



**Submission to the Expert Panel on Constitutional  
Recognition of Aboriginal and Torres Strait Islander  
Peoples**

**September 2011**

## Table of Contents

Table of Contents.....	2
Executive Summary .....	4
1. Introduction.....	8
2. Why is Constitutional recognition important? .....	9
3. Constitutional Reform: The Historical Landscape.....	14
4. Options for reform.....	17
4.1 Formal acknowledgement and recognition.....	18
4.2 Creating a Constitution free from racial discrimination .....	21
4.3 A new agreement making power.....	25
5. 'Yes, we can': Winning the referendum .....	30
Reference List.....	35

**Contact:**

Jacqueline Phillips  
National Director

Email: [Jacqui@antar.org.au](mailto:Jacqui@antar.org.au)  
Phone: (02) 9564 0594  
Fax: (02) 9564 0195  
[www.antar.org.au](http://www.antar.org.au)  
PO Box 568  
Dulwich Hill NSW 2203

**About ANTaR**

ANTaR is a national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander peoples. We do this primarily through lobbying, public campaigns and advocacy.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society.

ANTaR seeks to persuade governments, through advocacy and lobbying, to show genuine leadership and build cross-party commitment to policies which will improve the lives of Aboriginal and Torres Strait Islander peoples.

ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Aboriginal and Torres Strait Islander peoples as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR has been working with Aboriginal and Torres Strait Islander organisations and leaders on rights and reconciliation issues since 1997.

## Executive Summary

ANTaR welcomes the Federal Government's commitment to hold a referendum on Constitutional recognition of Aboriginal and Torres Strait Islander peoples.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society. We also work to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Aboriginal and Torres Strait Islander peoples as First Peoples.

As such, Constitutional recognition of Aboriginal and Torres Strait Islander peoples is one of our key areas of focus. ANTaR has been campaigning for over a decade on this issue, in support of the aspirations of many Aboriginal and Torres Strait Islander organisations, communities and individuals as reflected in the Council for Aboriginal Reconciliation's final report (2000).

### **An historic opportunity for change**

Current multi-party support for Constitutional recognition offers an historic opportunity for change. It is vital that this is maintained on the road to a referendum. Broad political support can be translated into community support by engaging, inspiring and energising the Australian public behind a referendum proposal. We believe that with a well-conceived and well-managed process, we can achieve support for Constitutional recognition that is lasting, meaningful and substantive.

### **The shape of recognition**

We congratulate the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples (The Expert Panel) on its work to date in engendering an open National conversation about the importance of Constitutional recognition and the form it could take.

Through its discussion paper, *A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition*, and in online and public fora, the Expert Panel has stimulated wide-ranging and thought-provoking discussion on Constitutional recognition. These discussions mark the beginnings of the concerted, well articulated and wide ranging education campaign – and the robust and mature debate – that must precede a referendum.

However, the precise shape of Constitutional recognition is largely yet to be defined. The *conversation* has only just begun.

At its heart, Constitutional recognition goes to our values as a nation – how should we reflect the history of dispossession, prior ownership and continuing contribution of Aboriginal and Torres Strait Islander peoples, as well as their rights to self-determination, in our defining document? How do we articulate the standards of equality, non-discrimination and inclusiveness to which we aspire?

These are challenging issues which require us to look into our past, and to think carefully about the type of society we want in the future.

## **A thorough and appropriate consultation process**

The process that we institute to develop the reform proposals is as important as the content of the reform proposals themselves. This process will test our maturity as a nation, as well as our resolve to deal with our past – and to be willing to make meaningful changes to address it.

We must ensure an open and transparent process, one that is, and can be seen to be, by and for the Australian people. And fundamentally, we must ensure that throughout the process, the many voices of Aboriginal and Torres Strait Islander peoples are heard and heeded. The proposals put to the Australian people must be borne out of a thorough and transparent consultation processes that allows Aboriginal and Torres Strait Islander peoples to fully and freely express their views.

We urge the Government to make the Expert Panel's final report public at the time it is received, to adopt the recommendations of the Panel and act to implement them.

## **Recommendations for reform**

In this submission, we engage principally with the major options outlined by the Expert Panel. However, we recognise that these are by no means an exhaustive set of the recommendations that could form part of a Constitutional recognition proposal. In discussing the major options for reform, we recommend the following:

- **Statement of Recognition.**

A positive statement of recognition should be inserted into the Constitution, either in a new preamble or in the body of the Constitution. The language of the statement of recognition should be negotiated with and approved by Aboriginal and Torres Strait Islander peak organisations and national and community leaders.

- **Removing Racial-Discrimination.**

- Section 25 of the Constitution should be deleted.
- With respect to the *Race Power*:
  1. Section 51(xxvi) should be deleted from the Constitution.
  2. New provisions should be inserted in the Constitution that:
    - (i) Grant the Commonwealth Parliament power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'; and
    - (ii) Prohibit the enactment of laws by any Australian Parliament or the exercise of power by any Australian government that discriminates on the basis of race (while also providing that this does not prevent laws and powers that redress disadvantage, or recognise or protect the culture, identity and language of any group).

These changes would maintain the power of the Commonwealth to make beneficial laws with respect to Aboriginal and Torres Strait Islander peoples, while eliminating its ability to pass laws that discriminate on the basis of race. The protection from racial discrimination should extend to all people in Australia.

- **Agreement Making Power.** A new power should be introduced to enable the Commonwealth Government to enter into specific agreements with Aboriginal and Torres Strait Islander peoples, and to make laws for the implementation of such agreements.

The Expert Panel should consult with Aboriginal and Torres Strait Islander peoples and Constitutional law experts to define the scope and language of such a power, having regard to the mechanics of Section 105A of the Constitution.

In addition, the Expert Panel should recommend to the Commonwealth Government that it commit itself to act on such a power, if it is passed, by establishing and resourcing a formal process for framing, negotiating, concluding and giving legal effect to agreements with Aboriginal and Torres Strait Islander peoples.

### **A recipe for success**

To give a referendum every possible chance of success – and to win the hearts and minds of Australian people - we must adhere to certain core principles, many of which reflect lessons learnt from past referenda:

- **Multi-party support** – The proposals ultimately put to the Australian people must have the support of all major parties at the Federal Level, as well as broad support at the State level. To achieve this, formal commitments should be elicited from the major parties (and ideally the States as well).
- **A process for and by the Australian People** – The Australian people are unlikely to support proposals that are perceived to be elitist or self-serving towards vested interests. To avoid this, the referendum process needs to be one that allows for full and fair participation by Australians from all walks of life. This requires open and transparent debate and consultation, across cities, regional and remote areas, and utilising the full range of communications media.
- **Meaningful consultation with Aboriginal and Torres Strait Islander peoples** – In addition to fostering broad community ownership, discussions of the referendum proposals must be open, transparent and accessible to Aboriginal and Torres Strait Islander representative bodies, organisations, communities and individuals.
- **An effective, wide-ranging and well-resourced education campaign** – Broad public support for Constitutional Recognition requires a concerted, wide-ranging and effective education campaign, utilising all available forms of media. We must *energise and inspire* the Australian people to get behind the proposals.
- **Meaningful change** – the referendum proposals must be meaningful. They must not be limited by disclaimers or other language that seeks to water down their effect, or which prevents newly introduced language from having legal effect.

- **Simplicity** – The referendum proposals must be clear, concise and simple. Although they must be technically and legally sound, they must not be laden with legal complexity or rely upon complex legal mechanisms for their implementation.

### **Timing of the Referendum**

ANTaR recognises the current Government's commitment to hold the referendum before or at the same time as the next election.

We believe that any decision on timing of the referendum must be made in line with three key principles.

First, we must not allow the referendum to be held hostage to partisan politics. We believe that community discussion and consideration of an issue as foundational and fundamental for our nation should not be diluted by having an election being contested simultaneously. We also believe that the chances of success will be enhanced by holding the referendum at a time separate from a general Federal election.

Second, a dual referendum should be avoided, if possible. That is, referendum proposals on Constitutional recognition should not be put forward in tandem with other unrelated proposals.

Third, we must ensure that we allow sufficient time for obtaining multi-party commitments of support, a concerted popular education campaign, adequate consultation with Aboriginal and Torres Strait Islander peoples, and perhaps even changes to referendum machinery.

Winning the hearts and minds of Australians will be no mean feat. However, with time, and a meaningful commitment, it can be achieved.

## 1. Introduction

In this Submission, we set out ANTaR's vision for change: a set of Constitutional reform proposals which we believe could provide a path to meaningful, lasting change.

Our vision has been shaped by conversations with Aboriginal and Torres Strait Islander leaders, organisations and communities over many years about the 'unfinished business' of reconciliation, including Constitutional Recognition. The position expressed in this submission seeks to reflect those conversations, but ANTaR does not claim to speak for, or on behalf of, Aboriginal or Torres Strait Islander peoples.

*In Section 2*, we discuss the importance of Constitutional recognition – what it might mean for Aboriginal and Torres Strait Islander peoples, and for the wider-community.

*In Section 3*, we discuss the history of Constitutional reform in Australia. We consider whether our Constitution has kept pace with changes in our society. We also look to learn lessons from past referenda and attempts at reform, in order to understand how better to achieve Constitutional recognition today.

*In Section 4*, we consider various key options for Constitutional reform. We engage principally with the major options outlined by the Expert Panel. However, we recognise that these are by no means an exhaustive set of the recommendations that could form part of a Constitutional recognition proposal.

Our discussion of the major options outlined by the Expert Panel does not imply that we would not support other proposals that come to light during the consultation process. We identify some wider views expressed to date on the significance of Constitutional recognition, as well as the ways to achieve an outcome that is meaningful, just and of lasting benefit to Aboriginal and Torres Strait Islander peoples.

*In Section 5*, we outline a “recipe for success” for a referendum. We present some principles that we believe could underpin a successful “Yes” campaign for Constitutional Reform. We also present some points for consideration in relation to the current mechanics for referenda. We also discuss potential strategies regarding the timing of a referendum.



## 2. Why is Constitutional recognition important?

The Constitution sets out the extent of Australia's 'legal universe'.<sup>1</sup> It establishes the framework within which all other domestic laws operate. It is our defining document.

Yet Aboriginal and Torres Strait Islander peoples were actively excluded from the drafting of the Constitution and from the lengthy process in which it was conceived. And from the outset, they were discriminated against within the Constitution, in the form of provisions precluding them from being counted within Australia's population.

Although progress has been made in eliminating some of its entrenched discriminatory provisions, the Constitution remains silent on the history, rights and contribution of Aboriginal and Torres Strait Islander peoples. The proposed Constitutional referendum offers us the opportunity to redress this glaring *omission*.<sup>2</sup>

In this way, Constitutional recognition of Aboriginal and Torres Strait Islander peoples would have tremendous symbolic value.

But its potential extends well-beyond symbolism. We believe that reform in the shape that we propose in this Submission will also have practical significance.

In particular, Constitutional recognition offers an opportunity to re-set the relationships between Aboriginal and Torres Strait Islander peoples and the wider Australian nation, by redefining 'the framework within which Aboriginal and Torres Strait Islander and non-Indigenous people understand and recognise one another, debate issues, and think about the type of society they would like to build.'<sup>3</sup>

We discuss some of the key imperatives for Constitutional Reform below.

### Constitutional recognition as a symbol of change

*'Those who argue against symbolic actions miss the fundamental linkage between the symbolic and the practical. Actions that have real and lasting effect on a community are both symbolic and practical.'*<sup>4</sup>

ANTaR recognises that some members of the wider Australian public have questioned proposals that they see as symbolic, rather than practical. But symbolism is important.

Symbolic acts can acknowledge the experience and struggles of Aboriginal and Torres Strait Islander people as well as their identities, cultures, languages and connection to country. They can also recognise the contribution of Aboriginal and Torres Strait Islander peoples to Australia's past and their central place in our future. Symbolic acts also play a role in redressing a history of exclusion and injustice by offering respect.

<sup>1</sup> Chief Justice Robert French in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 5.

<sup>2</sup> Sir Anthony Mason, "The Australian Constitution in retrospect and prospect" in G Lindell, *The Sir Anthony Mason Papers* (2007) 144, at p 148.

<sup>3</sup> Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future*, 2003 at 144-145.

<sup>4</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 7.

We believe that the Australian people understand and accept this.

The National Apology offers one of the most profound examples of the value of symbolic action to Australian people. In its *Reconciliation Barometer*, Reconciliation Australia found that:

- around 4 in 5 Australians (79%) believe that the apology was important for Aboriginal and Torres Strait Islander people;
- almost two thirds of Australians (65%) believe it was important for the relationship between Aboriginal and Torres Strait Islander people and other Australians; and
- around 3 in 5 Aboriginal and Torres Strait Islander respondents (58%) and 2 in 5 general population respondents (42%) believe that the apology has made the relationship between Aboriginal and Torres Strait Islander people and non-Indigenous people better. Less than 1 in 10 believe it has made the relationship worse.<sup>5</sup>

Of course, the Government's failure to complement its symbolic apology with practical action through compensation to the Stolen Generations has also been met with disappointment by many Aboriginal people. It is therefore vital that necessary symbolic changes to the constitution are coupled with more substantive reforms which deliver practical benefits to Aboriginal and Torres Strait Islander peoples.

### **An inclusive national identity**

*'We have reached a critical juncture. Australians have a rare opportunity to stand together as one people, united in recognition of the contribution of Aboriginal and Torres Strait Islander peoples to this land and this nation, in the past, the present and into the future. What is at stake is an inclusive national identity and a path towards a truly reconciled nation'*<sup>6</sup>

The Australian continent has a deep history extending far beyond Federation.

Aboriginal and Torres Strait Islander peoples have occupied this land, as its custodians, for over 70,000 years. Throughout that time they have maintained rich cultures, identities and connections to this land. They continue to make a unique and important contribution to the life and future of our nation.

While the nature of our multicultural society means that there are many diverse racial, religious and cultural groups in Australia, ANTaR believes that there is a strong argument for particular recognition of Aboriginal and Torres Strait Islander peoples in our Constitution, as the First Peoples of this land.

We believe that the Constitution cannot properly reflect who we are or who we wish to be as a nation until it acknowledges the unique and important position of Aboriginal and Torres Strait Islanders peoples.

<sup>5</sup> Reconciliation Australia, *Australian Reconciliation Barometer 2010*, <http://www.reconciliation.org.au/home/reconciliation-resources/facts---figures/australian-reconciliation-barometer>

<sup>6</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 4.

Importantly, the premise of the recognition we advocate is not the status of Aboriginal and Torres Strait Islander peoples as a race, a minority or a disadvantaged group, but their descent from the original owners and occupiers of the land now known as Australia. To ignore this status would be a failure to comprehend properly this distinct position and the unique experiences of Aboriginal and Torres Strait Islander peoples. In particular, it would disregard their history of exclusion, discrimination and denial of rights and humanity at the hands of Australian governments.

Constitutional recognition is an integral step forward in redressing these injustices and collectively moving forward. As Patrick Dodson has put it, 'this is a matter of justice, not special benefit'.<sup>7</sup>

More broadly, Constitutional recognition could serve all Australians by strengthening their sense of belonging through an affirmation of our common values, such as equality, democracy and fairness. Constitutional recognition is our chance, as Australian people, to showcase the type of nation we are, and which we aspire to be in the future: a mature nation that accepts all aspects of its past, and which acknowledges and expresses the importance of the rich, ancient living cultures and continuing contributions of Aboriginal and Torres Strait Islander peoples.

### Increased rights protection

*'So long as racist provisions exist in the Australian Constitution, they stand at risk of being used. This would be a powerful reason for deleting them.'*<sup>8</sup>

The proposed referendum offers us the opportunity to entrench within the Constitution fundamental rights which benefit all Australians. As such, it offers us the chance to bring to life the values expressed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>9</sup> and affirm our belief in the principles of equality, non-discrimination and the right to be different.<sup>10</sup>

In this Submission, we outline proposals to:

- amend the *Race Power* in Section 51(xxvi) of the Constitution to entrench a principle of non-discrimination;
- delete the anachronistic language of Section 25 of the Constitution, which makes reference to racially biased voting laws in the States.

In approving Constitutional reform which encompasses such changes, the Australian people would send a clear and enduring message that racial discrimination is unacceptable – in our daily lives, our workplaces, our communities, in our laws and in our founding document.

<sup>7</sup> Patrick Dodson, *Can Australia Afford Not to be Reconciled?* Speech delivered at the National Indigenous Policy and Dialogue Conference, UNSW, 19 November, 2010 at 3.

<sup>8</sup> Kirby AG CMG, Michael, The Hon., 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent', Speech delivered at Law Council of Australia Forum, *Constitutional Change: Recognition or Substantive Rights? Exploring the Constitutional change process and its application to create meaningful change in Australia*, 2011 at 16.

<sup>9</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295, 2007, preambular paragraph 2.

<sup>10</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 5.

Moreover, rights enshrined in legislative mechanisms such as the *Racial Discrimination Act*, and Native Title laws, which were originally developed to empower and protect Aboriginal and Torres Strait Islander rights, would be safeguarded from discriminatory modification.

In doing so, we would also dispel some of the uncertainty surrounding High Court decisions on the extent of the *Race Power*, which arguably give that power an interpretation which was not intended at the 1967 referendum.

In particular, the High Court's decision in the *Hindmarsh Island Bridge* case<sup>11</sup> suggests that the *Race Power* can be exercised to the detriment of a particular group of people. We believe that this is at odds with the spirit of the 1967 Referendum, but also the expectations of the Australian people. Further, the recent suspension of the *Racial Discrimination Act* to enable the Northern Territory Emergency Response legislation highlights the weaknesses in our current protection.

### **A positive impact on health and self-esteem**

*'This truly is health system business, because recognition matters for the health of Aboriginal Australians, and for their health care.'*<sup>12</sup>

Positive Constitutional recognition is important for our nation's social and emotional well being, as individuals, communities and as part of our national identity.

Professor Judith Dwyer argues that 'good policy logic' tells us that the shorter life expectancy and worse health outcomes of Aboriginal and Torres Strait Islander peoples is intimately entwined with the absence of any formal recognition of their original custodianship of this land, and the injustices they have suffered.<sup>13</sup> Professor Ian Ring, Head of the school of Public Health and Tropical Medicine at James Cook University, and David Firman, a Statistician at the Queensland Health Information Centre, cite evidence that a sense of control over one's life contributes to longevity. In the context of Aboriginal and Torres Strait Islander peoples, they conclude that 'a greater sense of control may only come from a wider acceptance and recognition of [their] valued role... in Australian society'.<sup>14</sup>

Constitutional recognition has the potential to have a practical and beneficial impact on the way we see ourselves; and to increase the confidence, pride and sense of identity of Aboriginal and Torres Strait Islander peoples, helping to overcome the symbolic exclusion and denials of the past.

<sup>11</sup> *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337; 152 ALR 540; 72 ALJR 722 (1 April 1998).

<sup>12</sup> Professor Judith Dwyer, 'Why Constitution recognition for Indigenous Australians is a health issue', *Crikey*, 22 November 2010, <http://www.crikey.com.au/2010/11/22/why-constitutional-recognition-for-indigenous-australians-is-a-health-issue/>

<sup>13</sup> Professor Judith Dwyer, 'Why Constitution recognition for Indigenous Australians is a health issue', *Crikey*, 22 November 2010, <http://www.crikey.com.au/2010/11/22/why-constitutional-recognition-for-indigenous-australians-is-a-health-issue/>

<sup>14</sup> Ian Ring and David Firman cited in Professor Judith Dwyer, 'Why Constitution recognition for Indigenous Australians is a health issue', *Crikey*, 22 November 2010, <http://www.crikey.com.au/2010/11/22/why-constitutional-recognition-for-indigenous-australians-is-a-health-issue/>

### ***What our Supporters are Saying***

---

ANTaR has a network of over 12,000 supporters across Australia and overseas.

We contacted our supporters to see what they thought about Constitutional recognition of Aboriginal and Torres Strait Islander peoples. We asked what recognition would mean to them; what their views are on its symbolic and practical benefits; and how they feel about changes to our Constitution to prevent the Federal government from making laws which could discriminate against Australians on the basis of their race.

Below are some of their contributions, which indicate there are voices calling for change across Australia:

*'I think it will take a mature, committed and compassionate government to progress these complex issues, but Constitutional recognition will be a positive step... Healing cannot progress until there is recognition of First Peoples'*

Gabrielle, ANTaR Supporter (VIC)

*'As a non-Indigenous Australian, it's very important to me that the First Nations People of this country are duly respected in our constitution. It's an embarrassment to me that it has taken so long to get to this point... Reform should be meaningful and able to be tested in courts of law if violations occur'*

Jo, ANTaR Supporter (WA)

*'Aboriginal and Torres Strait Islander Peoples have been living, working, and trading on their territories for a great deal longer than the Federal government. It's past time to give them recognition ... Discrimination is destructive and manipulative... I believe it is the responsibility of governing institutions to lead Australia away from discrimination. It must be acknowledged as a past and present reality and discouraged as a future reality'*

Natalia, ANTaR Supporter

*'Constitutional recognition of Aboriginal and Torres Strait Islander Peoples would be a step towards finally coming of age as a nation and casting off the last remnants of our discriminatory past'*

Vicki, ANTaR Supporter

*'I believe that Indigenous Australians have been disrespected, abused and deliberately overlooked since white settlement... it is about time that we set the record straight and formally recognise the First Peoples in the Australian Constitution... The refusal to recognise the First Peoples for nearly 250 years has caused generations of pain, indignity and suffering. Each generation of white Australians that fails to act must be held to account for this injustice'*

Lisa, ANTaR Supporter (NSW)

*'We strongly support this long overdue initiative to formally recognise Aboriginal and Torres Strait Islander peoples, their place in our history and the need for a symbolic and practical recognition of the prior custodianship of the land... The constitution should play a vital role in formalising protection of traditional culture and heritage, as determined by Aboriginal and Torres Strait Islander people themselves, and in ensuring that they have control over the protection and maintenance of their culture and practices...The symbolic importance of Constitutional recognition cannot be underestimated as a further step towards reconciliation and reparation'*

Geoff and Robin, ANTaR Supporters

### 3. Constitutional Reform: The Historical Landscape

*'We cannot imagine that the descendants of people whose genius and resilience maintained a culture here through fifty thousand years or more, through cataclysmic changes to the climate and environment, and who then survived two centuries of dispossession and abuse, will be denied their place in the modern Australian nation.'*<sup>15</sup>

The Australian Constitution is a product of the nineteenth century society in which it was created. It was informed by the dominant historical, economic, social and political beliefs of the day. These included theories of white racial superiority which were reflected in the White Australia Policy and other discriminatory laws and practices that modern Australia has since condemned.<sup>16</sup>

In 1901, the only two Constitutional provisions that made reference to Aboriginal people did so to expressly deny them their rights and their voice. Moreover, Torres Strait Islander people were entirely excluded. Section 51 (xxvi) denied the Federal Parliament power to make laws with respect to people of 'the aboriginal race in any State' and Section 127 provided that, 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.<sup>17</sup>

The Expert Panel's discussion paper notes that, of all peoples in Australia, 'arguably, Aboriginal and Torres Strait Islander Australians have been the most exposed to discriminatory treatment by parliaments and governments—State and Commonwealth—throughout the past 200 years'.<sup>18</sup> Indeed, all the way through our nation's history and up until today, the law has variously subjected them to dispossession, the removal of their children, assimilation, the inability to access mainstream services or earn proper wages, regulation of their right to marry, infringement of their freedom of movement,<sup>19</sup> exclusion from the democratic process, disproportionate police interference, and compulsory income quarantining. Of course, this is not an exhaustive list.

In light of this reality, there have been a number of attempts over the past four decades to improve the position of Aboriginal and Torres Strait Islander peoples by amending State and Federal Constitutions.

---

<sup>15</sup> The Hon P Keating MP, Prime Minister, *Redfern Speech: Year of the world's Indigenous people*, Speech delivered at Redfern, 10 December 1992.

<sup>16</sup> See Behrendt, Larissa, *Breaking the Silences in the Constitution*, 2011, <http://constitutionday.wordpress.com/essay-2/> (viewed 2 September 2011); George Williams, 'How should the Australian Constitution be changed to recognise Indigenous Peoples?', Forthcoming in *Civil Liberty* (Journal of the New South Wales Council for Civil Liberties), Issue 225, 2011 at 3-4; and You Me Unity Discussion Paper at 10.

<sup>17</sup> *Australian Constitution 1901* cited in Law Council of Australia, *Constitutional Recognition of Indigenous Australians*, Discussion Paper, 2011 at 19.

<sup>18</sup> You Me Unity Discussion Paper at 11.

<sup>19</sup> Behrendt, Larissa, *Breaking the Silences in the Constitution*, 2011, <http://constitutionday.wordpress.com/essay-2/> (viewed 2 September 2011).

## Past Reform

### The 1967 Referendum

At the 1967 Referendum, 92% of the nation voted in favour of two amendments to remove the negative references to Aboriginal Australians from the Constitution. Firstly, the phrase 'other than the aboriginal race' was removed from section 51(xxvi) to enable the Federal Parliament to legislate with respect to the people of any race including Aboriginal and Torres Strait Islander peoples.<sup>20</sup> Secondly, section 127 was wholly repealed so that Aboriginal people would no longer be excluded when counting the number of people in the Commonwealth or a particular State'.<sup>21</sup>

### The 1999 Referendum

The 1999 referendum included a proposal to insert a preamble in the Constitution, which would recognise Aboriginal and Torres Strait Islander peoples. It contained the words:

'We the Australian people commit ourselves to this constitution... honoring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'.<sup>22</sup>

This proposal failed to acknowledge the prior ownership and custodianship of Aboriginal and Torres Strait Islander peoples. Further, it included a disclaimer to prevent it from granting any new legal protection. Ultimately, the proposal was rejected by the Australian people. According to the Hon Michael Kirby, the preamble 'gave no substance to the Aboriginal people. [It was] simply another instance of words, which come cheap'.<sup>23</sup>

## State Constitutions

Since 1999, three States have recognised Aboriginal and Torres Strait Islander Peoples in their constitutions in some form. Victoria (2004), Queensland (2010) and New South Wales (2010) have reformed their State Constitutions through acts of parliament.<sup>24</sup> However, like the 1999 proposal, each statement of recognition is accompanied by a disclaimer, which undermines the possibility of increased rights protection for First Peoples.

---

<sup>20</sup> Law Council of Australia, *Constitutional Recognition of Indigenous Australians*, Discussion Paper, 2011 at 19.

<sup>21</sup> Law Council of Australia, cited above, at 20.

<sup>22</sup> Cited in George Williams, 'How should the Australian Constitution be changed to recognise Indigenous Peoples?', Forthcoming in *Civil Liberty* (Journal of the New South Wales Council for Civil Liberties), Issue 225, 2011 at 3-4.

<sup>23</sup> Kirby AG CMG, Michael, The Hon., 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent', Speech delivered at Law Council of Australia Forum, *Constitutional Change: Recognition or Substantive Rights? Exploring the Constitutional change process and its application to create meaningful change in Australia*, 2011 at 10.

<sup>24</sup> George Williams, 'How should the Australian Constitution be changed to recognise Indigenous Peoples?', Forthcoming in *Civil Liberty* (Journal of the New South Wales Council for Civil Liberties), Issue 225, 2011 at 3-4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 3-4.

## **The challenge of achieving referendum success in Australia**

Achieving a successful referendum in Australia has been described as a ‘labour of Hercules’.<sup>25</sup> Only 8 of 44 referenda in Australia’s history have attracted popular support. This is attributed to the requirement that any referendum proposal receive support from a national majority of voters in a majority of states (the double majority principle).

While we must heed the lessons of this history and ensure that any proposal put to the people is well-conceived, well-managed and well-articulated, we must also remember that Constitutional change is a ‘realisable goal’. After all, more than 90% of voters supported change intended to benefit Aboriginal and Torres Strait Islander people in the 1967 referendum.

The last section of the paper draws on the experience of past referenda to suggest a recipe for referendum success.

## **The United Nations Declaration on the Rights of Indigenous Peoples**

The Australian Government formally expressed its support for the United Nations Declaration on the Rights of Indigenous Peoples on 3 April 2009. The Declaration is a comprehensive statement of Australia’s existing human rights obligations to Aboriginal and Torres Strait Islander peoples. Although it does not create new rights, it provides a comprehensive framework for action. Constitutional recognition of Aboriginal and Torres Strait Islander peoples could be a vehicle for the practical implementation of key provisions of the Declaration and the principles underpinning it, including:

### **Article 2 – Equality**

Indigenous peoples are equal to all other peoples and must be free from discrimination.

### **Article 3 – Self-determination**

Indigenous peoples have the right to self-determination. This means they can choose their political status and develop as they want.

### **Article 21 – Special measures**

Indigenous peoples have the right to improved economic and social conditions. This includes in the areas of education, employment, housing, health and social security. Governments shall adopt special measures to ensure the improvement of economic and social conditions.

### **Article 37 – Treaties and Agreements**

Governments shall respect treaties and agreements entered into with Indigenous peoples.

---

<sup>25</sup> Former Prime Minister Robert Menzies, quoted in L.F. Crisp, Australian National Government, Longman Cheshire, 4th ed., 1978, at p 40.



## 4. Options for reform

The Expert Panel's Discussion Paper outlines a number of options for reform though clearly states that these options are not intended to be exhaustive or to limit other possibilities.

The options in the paper are drawn from proposals suggested by Aboriginal and Torres Strait Islander peoples, Constitutional experts and parliamentary committees over the last 30 years. The three broad options which are the focus of the Expert Panel's paper are:

1. The addition of a statement of recognition/values (in a preamble or the body of the Constitution).
2. Reform to enshrine equality and non-discrimination in the Constitution (this could include the repeal of racially discriminatory provisions and the addition of a guarantee against racial discrimination).
3. The addition of an agreement-making power.

ANTaR is aware of a number of other reform proposals which have been advanced by Aboriginal and Torres Strait Islander leaders and organisations, including a Constitutional provision establishing reserved seats in parliament, inclusion of a broader range of human rights in the text of the Constitution, recognition of the rights of Aboriginal and Torres Strait Islander people to maintain and practise their cultures, languages and identity, and changes to the way that federalism impacts on Aboriginal peoples. While ANTaR would certainly support all of these reform proposals in principle, we have not analysed any of these options in detail in this submission due to time constraints, mindful of the significant challenge involved in achieving a successful referendum in Australia and concerned to ensure that any proposal has reasonable prospects of success. This does not detract from the importance of such reform, particularly to strengthen protection of Aboriginal and Torres Strait Islander peoples' rights to maintain and practise their culture, language and identity.

The Expert Panel should assess the likely success of these various options informed by the feedback it has received through the community consultation process and make recommendations about whether such changes are likely to be achievable.

At a minimum, ANTaR believes that the primary focus of any referendum in the next few years should be to secure recognition of Aboriginal and Torres Strait Islander peoples and to remove all racially discriminatory aspects from the Constitution. This of course would not preclude future reforms to achieve increased parliamentary representation, strengthen rights protection, or change federal arrangements impacting on Aboriginal and Torres Strait Islander peoples.

In this section, we analyse each of three main reform options outlined by the Expert Panel before moving on to consider issues of strategy and process to ensure the best prospects for referendum success.

#### **4.1 Formal acknowledgement and recognition**

In its discussion paper, the Expert Panel presents four options for Constitutional recognition of Aboriginal and Torres Strait Islander people.

ANTaR supports the addition of a statement of recognition, which could be inserted either in a new preamble or within the body of the Constitution. A final decision would need to be made in light of the views expressed during community consultation, as well as the views of legal experts.

##### **A statement of recognition – what could it cover?**

This Submission does not seek to draft a statement of recognition. Any statement put forward for consideration at referendum must be a product of thorough and appropriate consultation with Aboriginal and Torres Strait Islander peoples themselves.

In the meantime however, there are certain fundamental principles that should be considered for inclusion within a statement of recognition. These are that:

- Aboriginal and Torres Strait Islander peoples are the first people of the land and waters that now constitute the nation of Australia;
- Aboriginal and Torres Strait Islander peoples are the traditional owners and custodians of those lands and waters;
- Aboriginal and Torres Strait Islander peoples are historically sovereign, and through colonisation, were dispossessed of their lands and waters, noting that Australia was colonised without consent or treaty;
- Aboriginal and Torres Strait Islander peoples continue to maintain their identities, cultures, languages and connection to their lands and waters;
- Aboriginal and Torres Strait Islander people continue to make a unique and special contribution to the life and future of Australia, as they have in the past;
- As a nation, Australia is committed to preserving and revitalising the history, cultures and languages of Aboriginal and Torres Strait Islander peoples.

The consultation process must be open, transparent and accessible to Aboriginal and Torres Strait Islander representative bodies, organisations, communities and individuals alike. To achieve this, the Expert Panel and other engaged organisations should:

- actively engage with communities and individuals, in addition to national, state and regional organisations;
- continue to hold public seminars and “town hall” discussions around Australia in locations accessible to Aboriginal and Torres Strait Islander peoples, including in regional and remote areas; and
- offer Aboriginal and Torres Strait Islander peoples the opportunity to discuss the form and content of the statement in their own languages and in culturally appropriate forums.

## Form of recognition

ANTaR believes that a formal statement of recognition could be introduced either in a new preamble to the Constitution, or within the body of the document. In either case, the language should be placed in an appropriate section such that it can frame interpretations of the balance of the document. It may not be appropriate to place the text within an existing section of the document, such as within an amended *Race Power*, if the effect would be to limit its function.

A statement of recognition offers an ideal means to set the tone for the Constitution by articulating the values and principles on which our nation – and the document as a whole – is based. Well drafted language would allow any reader, whether a judge, politician or a member of the wider public, to be better equipped to navigate the existing provisions of the Constitution.

We must ensure that the statement of recognition is not a tokenistic gesture. In particular, we must not allow it to be hollowed out by a disclaimer stating that it has no legal effect or interpretative value.<sup>26</sup>

Any such limitation clause would undermine the spirit and symbolic value of Constitutional recognition. It risks alienating Aboriginal and Torres Strait Islander peoples, as well as the wider community. Additionally, it may jeopardise a referendum's potential for success by leading the Australian public to look upon the proposals as superfluous, empty gestures which do not merit support.

Let us not diminish the integrity of the Constitutional recognition process. To be meaningful, symbolically and in practice, Constitutional recognition must be unequivocal, lasting and capable of influencing how we interpret and apply our laws.

## The existing preamble

We believe it would be better to introduce either a new provision or a new preamble, rather than to try to amend the existing preamble. This is because:

- The existing preamble is contained within the *Commonwealth of Australia Constitution Act 1900 (UK)*, a British Act. It expresses some principles that led to the formation of the Commonwealth of Australia over 110 years ago. It is not the forum in which to set out the values and aspirations which we hold today.
- Section 128 of the Constitution does not, on its face, permit the amendment of that Act, as has been affirmed in many academic discussions on the subject.<sup>27</sup> Any attempt to amend the Act would be complex, difficult to articulate to the Australian people and unlikely to be free from legal uncertainty. As the Expert Panel has

---

<sup>26</sup> Each of the New South Wales, Queensland and Victorian Constitutions contains a provision to the effect that its preamble does not create in any person any legal right or give rise to any civil cause of action, or affect in any way the interpretation of the Constitution Act or other laws of that State. Limiting language was also proposed to accompany the preamble put to the 1999 Referendum.

<sup>27</sup> See A Twomey, 'Constitutional Recognition of Indigenous Australians in a Preamble', Constitutional Reform Unit, Sydney Law School, Report No. 2, 2011 at 48-49.

made clear, together with Constitutional Law experts, any proposal put to the Australian people must be simple, and technically and legally sound.<sup>28</sup>

As we have seen in the past, unnecessary complexity can be fatal to referendum proposals. We should avoid it wherever we can.

### **A broader statement of recognition and values?**

ANTaR believes that recognition of Aboriginal and Torres Strait Islander peoples must be the primary focus of any referendum.

We understand that some organisations and commentators have suggested that a statement of recognition is better placed within a broader statement of values and aspirations. We are concerned that this may detract from the focus on the referendum. It could lead to a drawn-out process involving many groups with differing interests and diverse views as to the content of the statement, making it very difficult to put the referendum to the Australian people within the current timeframes contemplated.

If the Expert Panel's consultation shows clearly that a broader statement of values is likely to attract stronger support from the Australian public and make for a more successful referendum, ANTaR would not oppose a broader statement. However, we must approach this issue with caution to ensure that the current objectives of Constitutional reform are not compromised.

### **Recommendations**

ANTaR recommends that a positive statement of recognition should be inserted into the Constitution, either in a new preamble or in the body of the Constitution.

The language of the statement of recognition should be negotiated with Aboriginal and Torres Strait Islander peak organisations and national and community leaders.

---

<sup>28</sup> Some scholars have suggested that it would be necessary to repeal the existing preamble to the Act in order to facilitate the introduction of a new one, within the Constitution itself, citing possible confusion between the old and new preambles. Ultimately, we would defer to the view of Constitutional legal experts on this point. It is important to note, however, that the repeal of the existing preamble appears to require a cumbersome legal process in which the Commonwealth would need to pass legislation at the request of, or concurrently with, all of the States. This would introduce more complexity and delay in that it would require the co-operation of State legislatures. It would also be difficult to explain to the public, either within the proposals or more broadly in the media.

## 4.2 Creating a Constitution free from racial discrimination

### 4.2.1 Removing Section 25

#### **PART III — 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 the race resident in that State shall not be counted.

Under section 25 of the Constitution, if a State disqualifies the people of a particular race from voting in its elections, those people cannot be included when counting the State's population to determine its level of representation in the Federal Parliament. As Professor George Williams notes, although this means that section 25 acts as a penalty, it does so by acknowledging that States may legally remove people's voting rights based on their race.<sup>29</sup>

This is an odious and racially discriminatory provision. It reflects the denial of Aboriginal and Torres Strait Islander voting rights, at the hands of Australian States, in 1901 and for decades afterwards.<sup>30</sup> Moreover, section 25 does not just apply to Aboriginal and Torres Strait Islander peoples, but extends to all races.

Australia's social, cultural, and political landscape has changed considerably since 1901. Many of the programs and policies that appealed to our nation's early colonial self have long since been abandoned and condemned, including the White Australia Policy, and Protection and Assimilation Programs. Yet, this historical backdrop continues to inform the relationship between our central legal document and Aboriginal and Torres Strait Islander peoples. The proposed referendum provides us with the chance to remove this racist provision, which stands in stark contrast to the democratic and pluralistic society we pride ourselves on being.

#### **Recommendation:**

ANTaR recommends that section 25 be deleted from the Australian Constitution.

---

<sup>29</sup> George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won', *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1) at 4.

<sup>30</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 11 and George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won', *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1) at 4.

#### 4.2.2 Changing the Race Power

##### **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

The concept of race was ingrained in the Australian Constitution in 1901 with the adoption of the '*Race Power*'. This power is granted by section 51 (xxvi) of the Constitution, which permits Parliament to make special laws with respect to 'the people of any race for whom it is deemed necessary'.<sup>31</sup>

In 1898 Sir Edmund Barton, who later became Australia's first Prime Minister, asserted that such a provision would be necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.<sup>32</sup> Barton's words highlight the original intent of the *Race Power*, which was to allow discriminatory and controlling legislation to be enacted<sup>33</sup> that would function to segregate and limit the choices and movements of certain minority groups then seen as a threat to White Australia.<sup>34</sup> The ideas underpinning this provision are grounded in outdated notions of racial superiority that are no longer acceptable in modern Australia.

*'It is a shocking thing, in this day and age, to empower our national parliament to enact laws depriving one segment of our population and citizenry of basic rights enjoyed by others, specifically by reference to their race.'*<sup>35</sup>

The *Race Power* did not originally apply to Aboriginal and Torres Strait Islander peoples, who were considered a 'dying race' and therefore irrelevant to a constitution that was being built to span the life of the nation. Instead, their regulation was left to State Parliaments. However, the 1967 referendum extended s 51(xxvi) to apply to Aboriginal and Torres Strait Islander peoples in the hope that Government would use this power to

<sup>31</sup> *The Australian Constitution 1901*, s 51 (xxvi).

<sup>32</sup> Edmund Barton cited in George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won', *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1) at 4.

<sup>33</sup> Robert French, 'Dolores Umbridge and the Concept of Policy as Legal Magic', Speech delivered at the Australian Law Teachers' Association National Conference, Perth, 24 September 2007 at paragraph 19.

<sup>34</sup> Kirby AG CMG, Michael, The Hon., 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent', Speech delivered at Law Council of Australia Forum, *Constitutional Change: Recognition or Substantive Rights? Exploring the Constitutional change process and its application to create meaningful change in Australia*, 2011 at 17. Also see George Williams, 'How should the Australian Constitution be changed to recognise Indigenous Peoples?', Forthcoming in *Civil Liberty* (Journal of the New South Wales Council for Civil Liberties), Issue 225, 2011 at 3-4.

<sup>35</sup> Kirby AG CMG, Michael, The Hon., 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent', Speech delivered at Law Council of Australia Forum, *Constitutional Change: Recognition or Substantive Rights? Exploring the Constitutional change process and its application to create meaningful change in Australia*, 2011 at 19.

close the gap and advance Aboriginal and Torres Strait Islander interests.<sup>36</sup> Regrettably however, nowhere was it explicated that the power could only be used to *benefit* a particular race.

This is the central reason s 51 (xxvi) must be withdrawn from the Constitution. In its current construction, it enables adverse and discriminatory legislation to be made, not just in regard to Aboriginal and Torres Strait Islander peoples, but for all racial groups within Australian.

This has been suggested in a number of High Court decisions since 1967.<sup>37</sup> It is now generally accepted among the courts that the words ‘laws for’ in s 51 (xxvi), imply ‘with reference to’ rather than ‘for the benefit of’.<sup>38</sup> Such an interpretation lends s 51 to both beneficial laws and adverse, discriminatory laws.

### **Options for reform of the Race Power**

Changing the *Race Power* is tricky. Reform must eliminate the possibility of racial discrimination but preserve the legislative power of the Commonwealth to make laws that benefit disadvantaged groups. Given this aim, a number of options lie before us:

- Reword s 51(xxvi)
- Repeal s 51(xxvi)
- Insert a new anti-discrimination provision

### **Rewording s 51 (xxvi)**

Rewording s 51(xxvi) so that it can only be used for beneficial purposes is a risky reform option because the word ‘beneficial’, and other similar words, are complicated, subjective and susceptible to misinterpretation. Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda and his predecessor Tom Calma warn that such reform holds the potential for government to pass legislation they claim to benefit Aboriginal and Torres Strait Islander people, but which in reality is to their detriment or is against their wishes.<sup>39</sup>

### **Repeal of s 51 (xxvi)**

A simple repeal of the *Race Power*, without replacement, may compromise beneficial laws that have been enacted under the power, such as federal laws that protect rights relating to land, health, or the preservation of sacred sites.<sup>40</sup>

---

<sup>36</sup> George Williams, ‘How should the Australian Constitution be changed to recognise Indigenous Peoples?’, Forthcoming in *Civil Liberty* (Journal of the New South Wales Council for Civil Liberties), Issue 225, 2011 at 3-4.

<sup>37</sup> See the *Hindmarsh Island Bridge Case*, the *Tasmanian Dam Case*, *Kartinyeri v The Commonwealth* (1988) 195 CLR 337 at 414-419 and *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 394-5.

<sup>38</sup> Chief Justice Gibbs cited in Australian Law Reform Commission, ‘Federal-State Issues: Scope and Limits of Constitutional Power’ in *Recognition of Aboriginal Customary Laws (ALRC Report 31)*, 1986.

<sup>39</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 15.

<sup>40</sup> George Williams, ‘Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won’, *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1) at 7.

In order to preserve such protections while preventing racial discrimination, the *Race Power* should instead be recast. The current provision should be deleted, to be replaced by a new provision that enables special laws to be made, not on the basis of race, but on the grounds that Aboriginal and Torres Strait Islander peoples 'represent a distinct group within the community identified not by their race but by their status as constituting the first peoples of the continent.'<sup>41</sup>

No current legislation relating to other minority groups would be affected by this reform since, as Professor George Williams highlights, 'there are no laws on the federal statute book, nor is it apparent that there have ever been, that apply the *Race Power* to groups other than Aboriginal and Torres Strait Islanders'.<sup>42</sup>

To eliminate the possibility of racial discrimination, s 51 (xxvi) should be accompanied by the insertion of a new provision that explicitly prohibits discrimination on the basis of race.

### **A new non-discrimination provision**

*'Justice denied one group within the nation is a diminishment of us all and the nation will remain diminished until the wrong is righted.'*<sup>43</sup>

The suspension of the *Racial Discrimination Act* at various points since 1975 illustrates the vulnerability of legislative rights protections to the shifting political agendas of Parliament.<sup>44</sup> A Constitutional guarantee of freedom from racial discrimination in all laws and programs would remove the power of Government to suspend such rights at its will. It would mean that 'a law or program could be challenged in the courts if it breached the guarantee.'<sup>45</sup>

Professor George Williams points out that 'there is a possibility that a freedom from racial discrimination might be interpreted by the High Court to strike down laws and programs that provide special benefits or recognition to Aboriginal people and Torres Strait Islanders' on the ground that they discriminate against non-Indigenous people.<sup>46</sup> To avoid this, he recommends that such a provision 'should be made subject to a clause stating that it does not affect laws and programs aimed at redressing disadvantage.'<sup>47</sup>

### **Recommendations**

With respect to the *Race Power*, ANTaR recommends:

1. Section 51(xxvi) be deleted from the Constitution.
2. New provisions should be inserted in the Constitution that:

---

<sup>41</sup> George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won', *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1) at 7.

<sup>42</sup> George Williams, cited above, at 7.

<sup>43</sup> Patrick Dodson, 'In Search of Change, Robed in Justice', Speech delivered upon acceptance of the Sydney Peace Prize, Sydney, 5 November, 2008.

<sup>44</sup> Larissa Behrendt, *Breaking the Silences in the Constitution*, 2011, <http://constitutionday.wordpress.com/essay-2/> (viewed 2 September 2011).

<sup>45</sup> George Williams, cited above, at 9.

<sup>46</sup> George Williams, cited above, at 9.

<sup>47</sup> George Williams, cited above, at 9.



- (i) Grant the Commonwealth Parliament power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'; and
- (ii) Prohibit the enactment of laws by any Australian Parliament or the exercise of power by any Australian government that discriminates on the basis of race (while also providing that this does not prevent laws and powers that redress disadvantage, or recognise or protect the culture, identity and language of any group).<sup>48</sup>

These changes would maintain the power of the Commonwealth to make beneficial laws with respect to Aboriginal and Torres Strait Islander peoples, while eliminating its ability to pass laws that discriminate on the basis of race. The protection from racial discrimination should extend to all people in Australia.

### 4.3 A new agreement making power

ANTaR supports a Constitutional amendment to introduce a power to enter into specific agreements with Aboriginal and Torres Strait Islander peoples, and to make laws for the implementation of such agreements.

#### Background

The United States, Canada and New Zealand each have formal treaties with the First Peoples of their respective territories. However, neither the British nor the Australian Parliament has ever formally recognised such an agreement with Aboriginal and Torres Strait Islander peoples.

As we have noted earlier, Aboriginal and Torres Strait Islander peoples were excluded from participating in the formation of the Australian Federation and from the drafting of the Constitution. This was premised on the doctrine of *terra nullius*, which has since been overturned, and the colonisers' failure to acknowledge the customs, laws and political and power structures that have long existed within Aboriginal and Torres Strait Islander societies.

The lack of a formal agreement is a marker of the way in which Aboriginal and Torres Strait Islander peoples have been dispossessed of their lands, and politically and economically disenfranchised within the Australian polity. If the Australian government had concluded and recognised a treaty or other form of agreement with Aboriginal and Torres Strait Islander peoples, it is far more likely that the structure of Federation, and the Constitution itself, would have recognised their position and rights.

Many Aboriginal and Torres Strait Islander groups have long called for a formal agreement with the Australian Government, such as the *Makarrata* considered by the Senate Standing Committee on Constitutional and Legal Affairs in 1983.

---

<sup>48</sup> George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won', *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1) at 7.

## Why do we need a new agreement-making power?

Constitutional recognition that extends beyond the introduction of a new preamble, the amendment of the *Race Power*, and the deletion of the anachronistic Section 25, would empower us to more fully address the unfinished business of Reconciliation.

ANTaR supports an *effective, clearly-articulated and legally enforceable* framework for Aboriginal and Torres Strait Islander peoples to exercise more control over their lives. Fundamentally, we must re-set the relationships between Aboriginal and Torres Strait Islander peoples and the wider Australian nation.

To achieve this, the Australian government must be empowered, and must be willing to negotiate agreements in good faith with Aboriginal and Torres Strait Islander peoples. Such agreements would act, to use the words of Professor Mick Dodson, 'to restore the lost and suppressed dignity' of Aboriginal and Torres Strait Islander peoples, reflecting at last that 'Australia has matured as a nation'.<sup>49</sup>

These agreements could contain the following:

- legal recognition of the inherent rights of Aboriginal and Torres Strait Islander peoples, having regard to the matters recognised within the newly amended Constitution, including:
  - Aboriginal and Torres Strait Islander peoples' prior ownership and occupation of the lands and waters that now comprise the nation known as Australia;
  - the recognition that Aboriginal and Torres Strait Islander peoples are historically sovereign and, through colonisation, were dispossessed of their lands and waters, without consent;
  - Aboriginal and Torres Strait Islander peoples' right to self-determination;
- legal recognition and protection of the distinct cultures, identities and languages of Aboriginal and Torres Strait Islander peoples, including protection of property and intellectual property rights;
- a legal framework for settling relationships between Aboriginal and Torres Strait Islander peoples and governments at all levels, including in relation to reparations for past injustices;
- commitments to allow equitable access to health, housing, education, employment and other services; and
- commitments to make improvements in health, housing, education, employment, rates of imprisonment and other social indicators.

We do not envisage a single agreement which purports to represent all Aboriginal and Torres Strait Islander peoples. Rather, the framework must allow for the entry into

---

<sup>49</sup> Professor Mick Dodson, 'What is a Treaty', in *What Good Condition: Reflections on an Australian Aboriginal Treaty 1986 to 2006*, ANU Press, Canberra, 2006 at p 107.

agreements with Aboriginal and Torres Strait Islander communities, recognising the many distinct nations that make up the Aboriginal and Torres Strait Islander population.

### **Existing powers are insufficient**

It has been argued that the Commonwealth Government may currently have the power to conclude agreements with Aboriginal and Torres Strait Islander peoples, and to give such an agreement the force of law under legislation passed pursuant to the *Race Power* in Section 51(xxvi), the *External Affairs* power in Section 51(xxix), or by way of a referral of matters from the States under Section 51(xxxvii).

However, any such legislation would inevitably be vulnerable to amendment or repeal by later Parliaments. Moreover, the Commonwealth may need to draw on various heads of power to act comprehensively, which would create legal uncertainty. Any requirement for the States to refer matters to the Commonwealth under Section 51(xxxvii) would be particularly cumbersome. On such a significant subject, it would be extremely unfortunate if collaboration with the States was to be held hostage to partisan politics, as can happen in Commonwealth-State relations.

As noted by the Senate Standing Committee on Constitutional and Legal Affairs in 1983, a separate agreement making power is desirable because it would:

- 'give Aboriginal people the sort of security in the terms of a Makarrata that the importance of such a document requires';<sup>50</sup>
- 'avoid the need to rely on [other] Commonwealth legislative powers which may prove insufficient to support the whole agreement';<sup>51</sup>
- 'avoid the need to rely on collaboration by State governments'.<sup>52</sup>

In this way, a new agreement making power would deliver 'the ultimate certainty to the relationship between Aboriginal and Torres Strait Islanders and the rest of the country's population'.<sup>53</sup>

More fundamentally, a new agreement making-power, passed at referendum, would send a strong message to governments at all levels as to how the Australian people wish to see the reconciliation process progress. It would signify a clear statement of the political support and expectation of the Australian people – a majority of Australians in a majority of States – that they wish to see formal agreements concluded with Aboriginal and Torres Strait Islander peoples recognising their position and rights.

---

<sup>50</sup> Senate Standing Committee on Constitutional and Legal Affairs, 'Two Hundred Years Later: Report of the Senate Standing Committee on Constitutional and Legal Affairs into a compact or Makarrata between the Commonwealth and Aboriginal people', 1983 at p 69.

<sup>51</sup> Senate Standing Committee on Constitutional and Legal Affairs, cited above, at p 69.

<sup>52</sup> Senate Standing Committee on Constitutional and Legal Affairs, cited above, at p 70.

<sup>53</sup> Professor Mick Dodson, 'What is a Treaty', in *What Good Condition: Reflections on an Australian Aboriginal Treaty 1986 to 2006*, ANU Press, Canberra, 2006 at p 108.

## Form and scope of the new power

ANTaR notes the suggestion that an agreement-making power could be framed along the lines of the existing power in Section 105A of the Constitution for the Commonwealth to make certain agreements with respect to the public debts of the States.

This appears to provide a sound blueprint for a new power to make agreements with Aboriginal and Torres Strait Islander peoples. In particular, we note that Section 105A provides that:

- Any agreement made under that section ‘may be varied or rescinded by the parties thereto’.<sup>54</sup> We would suggest that this language be clarified within a new agreement making power to make it clear that agreements may be varied or rescinded *only* with the agreement of the contracting parties. Given the central place that such agreements would hold in relationships with Aboriginal and Torres Strait Islander peoples, their consent to amendments must be entrenched in the language of the power itself.
- Every such agreement and any variation to it is binding on the parties to it, notwithstanding anything contained in the Commonwealth Constitution ‘or the Constitutions of the several States, or in any law of the Parliament of the Commonwealth of any State’.<sup>55</sup>

ANTaR believes that both of these concepts should be carried through to a new power to make agreements with Aboriginal and Torres Strait Islander peoples.

## Commitment to action

If the referendum successfully introduces an agreement-making power with Aboriginal and Torres Strait Islander peoples, the Commonwealth Government must act on it. It must commit itself to establishing and resourcing a formal process for framing, negotiating, concluding and giving legal effect to agreements with Aboriginal and Torres Strait Islander peoples.

## Recommendations

ANTaR recommends the inclusion in the Constitution of a new power to enable the Commonwealth Government to enter into specific agreements with Aboriginal and Torres Strait Islander peoples, and to make laws for the implementation of such agreements.

The Expert Panel should consult with Aboriginal and Torres Strait Islander peoples and Constitutional law experts to define the scope and language of such a power, having regard to the mechanics of Section 105A of the Constitution.

In addition, the Expert Panel should recommend to the Commonwealth Government that it commit itself to act on such a power, if it is passed, by establishing and resourcing a

---

<sup>54</sup> Constitution, Section 105A(4).

<sup>55</sup> Constitution, Section 105A(5).

formal process for framing, negotiating, concluding and giving legal effect to agreements with Aboriginal and Torres Strait Islander peoples.

## 5. ‘Yes, we can’: Winning the referendum

*‘By its very nature, the Constitution is an instrument of the people. It is the people who have the power to change or amend it. Through this reform process, the nation will be able to decide how it wants its first peoples positioned in the nation and what sort of protections it wants to assure for all its citizens’.*<sup>56</sup>

Our Constitution was designed to allow the Australian people to amend it over time – it was designed with change in mind. As our defining document, it must mature and evolve in step with changes in our society, values and aspirations.<sup>57</sup>

We are, however, currently in the longest period of Constitutional inertia since Federation, with 34 years having passed since the last successful referendum. And we know from our history that it is difficult to win referenda proposals in Australia. However, we also know that the Australian people will support proposals that are well-conceived, well-managed and well understood.

With a well-conceived and well-managed Yes campaign, we can win a referendum for Constitutional recognition of Aboriginal and Torres Strait Islander peoples. We can win the *hearts and minds* of a majority of Australians in a majority of States.

### A recipe for success

*‘History shows that Constitutional reform is not easy. As with the 1967 referendum, it will require the open hearts and minds of the majority of Australians in order to succeed’.*<sup>58</sup>

In order to give the referendum every chance of success, we must learn from the experiences of past referenda.

ANTaR supports the guiding principles put forward by the Expert Panel, which are designed to give the referendum the best possible prospects of success, having regard to past experience. Additionally, we believe that in order to be capable of achieving a double majority at referendum, we must adhere to certain core principles:

- **Multi-party support** – The proposals ultimately put to the Australian people must have the support of all major parties at the Federal Level, as well as broad support at the State level. We agree with Professor George Williams that to achieve this formal commitments should be elicited from the major parties (and ideally the States as well).<sup>59</sup> Such support must be for the proposals themselves, as opposed

<sup>56</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 12.

<sup>57</sup> See George Williams and David Hume, ‘People Power: The History and Future of The Referendum in Australia’, University of New South Wales Press, Sydney, 2010 at p 238, where the authors note that ‘Constitutions are meant to change, slowly perhaps, but they are meant to change. They must adapt to meet new circumstances, new technologies, new ways of dealing with old problems and new societal standards’.

<sup>58</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 4.

<sup>59</sup> George Williams and David Hume, ‘People Power: The History and Future of The Referendum in Australia’, University of New South Wales Press, Sydney, 2010 at pp 244-245, where the authors note that

only to the holding of a referendum.

- **A process for and by the Australian People** – The Australian people are unlikely to support proposals that are perceived to be elitist or self-serving towards vested interests. Arguably, this was one of the key factors leading to the failure of the Republican referendum in 1999.

Politicians, government and non-government organisations and community leaders will inevitably have a role to play in bringing a referendum to fruition. However, the process needs to be one that allows for full and fair participation by Australians from all walks of life.

This requires open and transparent debate and consultation, across cities, regional and remote areas, and utilising the full range of communications media, including print, television, radio and online technologies.

- **Meaningful consultation with Aboriginal and Torres Strait Islander peoples** – In addition to fostering broad community ownership, discussions of the proposals must be open, transparent and accessible to Aboriginal and Torres Strait Islander representative bodies, organisations, communities and individuals. To achieve this, the Government should:

- actively engage with communities and individuals, in addition to national, state and regional organisations;
- hold public seminars and “town hall” discussions around Australia in locations accessible to Aboriginal and Torres Strait Islander peoples, including in regional and remote areas;
- offer Aboriginal and Torres Strait Islander peoples the opportunity to discuss the form and content of the statement in their own languages and in culturally appropriate forums.

- **An effective, wide-ranging and well-resourced education campaign** – Many Australians are not well-informed about the role and workings of the Constitution. Equally, many Australians are only aware peripherally of the history, struggle and rights of Aboriginal and Torres Strait Islander communities. We also know that an uninformed populace is far less likely to vote in favour of the proposals (the No campaign being notoriously easier to run at almost all of the referenda held to date).

Broad public support for Constitutional recognition therefore requires a concerted, wide-ranging and effective education campaign, utilising all available forms of media.

To put it simply, we must *energise and inspire* the Australian people to get behind the proposals. In doing so, we should learn from and build on the momentum from previous successes, including the 1967 Referendum, the *Mabo* decision (and the resulting passage of the *Native Title Act 1993*) and the National Apology to the Stolen Generations. Each of these successes resulted in meaningful symbolic and

---

the failures of referenda in 1920, 1929 and 1977 were due not to a “*failure of involvement, but a failure to achieve a binding political commitment*”.

practical benefits for Aboriginal and Torres Strait Islander peoples, without the adverse consequences predicted by their opponents.

This must be a central pillar of the Expert Panel's approach, carrying on from its wide-ranging awareness raising efforts to date. Governments at all levels must commit adequate funding and resources, in line with the recommendations of the Expert Panel, to facilitate such a campaign.

- **Meaningful change** – ANTaR supports the guiding principle adopted by the Expert Panel that the referendum proposals must be legally and technically sound. They must be well-drafted and unambiguous.

Additionally, the proposals must be meaningful. They must not be limited by disclaimers or other language that seeks to water down their effect, or which prevents newly introduced language from having legal effect.

As we stated earlier, a “toothless” set of proposals, or proposals that are perceived to be such, risks alienating Aboriginal and Torres Strait Islander peoples, as well as the wider community. This approach might also seriously jeopardise a referendum's potential for success if it leads the Australian public to look upon the proposals as superfluous, and wasteful of their time and national resources.

We believe that the package of amendments we propose would achieve meaningful change.

- **Simplicity** – The proposals must be clear, concise and simple. Although they must be technically and legally sound, they must not be laden with legal complexity or rely upon complex legal mechanisms for their implementation.

We believe strongly that unnecessary legal complexity, both within the language of the proposals and in the mechanics of their implementation, could be very difficult to articulate to the Australian people in a manner capable of being supported by a national majority.

## Re-examining the Referendum Mechanics

Although it is not appropriate to examine the issue in detail in this submission, we note the discussion by several Constitutional experts of the need to modernise Australia's referendum mechanics, as set out in the *Referendum (Machinery Provisions) Act 1984*.

Australia's voting system and population demographics have changed considerably since these mechanics were first devised, as has the range of technologies available for communication.

It is appropriate to consider whether such mechanics remain acceptable, and to examine how they could impact on the success (or otherwise) of the referendum. The Expert Panel should consider recommending to the Government that a suitable committee be appointed to explore possible changes. Some possible issues to consider include:

- the expansion of the scope of matters on which expenditure is permitted, such as advertising (perhaps with the introduction of monetary limits on the expanded scope of permitted matters);



- whether the official “Yes/No” pamphlet should be restructured to incorporate more neutral explanatory material, whether it should be delivered in forms other than print, and whether it should be delivered more than 14 days before the referendum;
- the establishment of publicly funded “Yes” and “No” committees for the referendum (as was done for the 1999 referendum), and the appropriate allocation of funds to these committees.

We acknowledge that such inquiries, and any consequential amendments, may be difficult to achieve in a short period time. However, if they can be conducted within the current timeframes contemplated for the referendum, they may go a long way towards securing a more open, transparent and effective process – one that can help us to ensure that a referendum is, and is seen to be, conducted by and for the Australian people.

### **Timing of the referendum**

The current Government’s commitment is to hold the referendum before or at the same time as the next election.

However, we recognise that a lot is at stake. Just as a successful referendum would be a tremendous step forward, failure could seriously harm national unity and our capacity to achieve lasting reconciliation while also causing deep hurt to many Aboriginal and Torres Strait Islander people. A politicised, polarised or adversarial campaign could result in the loss of considerable momentum generated from decades of campaigning and activism.

Accordingly, we believe that any decision on the timing of the referendum must be made in line with three key principles.

- First, in line with the core principles we outlined above, we must not allow the referendum to be held hostage to partisan politics.

If the referendum were to be held simultaneously with the next Federal election, it runs a serious risk of becoming caught up in the politicking and posturing of opposing interest groups. It could be swallowed into an adversarial process, whereas its success will lie in it being a collaborative effort.

We believe that community discussion and consideration of an issue as foundational and fundamental for our nation should not be diluted by having an election being contested simultaneously. We also believe that the chances of success will be enhanced by holding the referendum at a time separate from a general Federal election.

Patrick Dodson expresses this well when he notes:

*‘As ever, the devil will be in the details, and in this case, in whether the bipartisanship promised on the day of the Prime Minister’s announcement will be maintained up to polling day. I would strongly counsel that the referendum be held on a day not connected to a General Election, which*

*would destroy any bipartisan position that is clearly critical to a positive outcome for Indigenous and all Australians.*<sup>60</sup>

- Second, a dual referendum should be avoided if possible. ANTaR is concerned that any attempt to put forward a proposal on local government at the same time as Constitutional recognition could be both confusing and distracting, making it very difficult to articulate the purpose and effect of, and win support for, proposals on Constitutional recognition.
- Third, the referendum must not be rushed. Although we are keen to have a referendum question put and passed as soon as practicable, we must not do so at the expense of the core principles we outlined above.

In particular, we must ensure that we allow sufficient time for obtaining multi-party commitments of support, a concerted popular education campaign, adequate consultation with Aboriginal and Torres Strait Islander peoples, and perhaps even changes to referendum machinery.

Winning the hearts and minds of Australians will be no mean feat. However, with time, and a meaningful commitment, it can be achieved.

---

<sup>60</sup> Patrick Dodson, *Can Australia Afford Not to be Reconciled?* Speech delivered at the National Indigenous Policy and Dialogue Conference, UNSW, 19 November, 2010 at 2. We note that Patrick Dodson has canvassed the of holding the referendum on or near the anniversary of the 1967 Referendum, 26th May, 'so as to symbolically take the resounding demand of that earlier generation "for a just relationship between our peoples" to its next logical step – a proper recognition of the Indigenous people of Australia as the First Peoples, and acknowledgement of our culture, our languages and our economies within the Australian Constitution.' Ultimately, this would need to be considered in light of the timing of the next Federal election.

## Reference List

Attwood, Bain and Markus, Andrew, *The 1967 Referendum: Race, Power and the Australian Constitution* (2<sup>nd</sup> ed), 2007

Australian Human Rights Commission and the National Congress of Australia's First Peoples, Calls for Constitutional Recognition on National Aboriginal and Islanders Day, Joint Media Release, 9 July 2010

Australian Law Reform Commission, 'Federal-State Issues: Scope and Limits of Constitutional Power' in *Recognition of Aboriginal Customary Laws (ALRC Report 31)*, 1986

Behrendt, Larissa, Breaking the Silences in the Constitution, 2011, <http://constitutionday.wordpress.com/essay-2/> (viewed 2 September 2011)

Behrendt, Larissa, *Achieving Social Justice: Indigenous Rights and Australia's Future*, 2003

Calma, Tom, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2008, Australian Human Rights Commission, 2009

*Constitution Act 1902, Section 2, Recognition of Aboriginal People*

Davis, Megan and Lino, Dylan, 'Constitutional Reform and Indigenous Peoples', *Indigenous Law Bulletin*, 2010, 7(19)

Davis, Megan, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform', *Indigenous Law Bulletin*, June/July 2008, 7(6), 6-8

Dodson, Patrick, *Can Australia Afford Not to be Reconciled?* Speech delivered at the National Indigenous Policy and Dialogue Conference, UNSW, 19 November, 2010

Dodson, Patrick, *In Search of Change, Robed in Justice*, Speech delivered upon acceptance of the Sydney Peace Prize, Sydney, 5 November, 2008

Dodson, Mick, 'What is a Treaty', in *What Good Condition: Reflections on an Australian Aboriginal Treaty 1986 to 2006*, ANU Press, Canberra, 2006

Dwyer, Professor Judith, 'Why Constitution recognition for Indigenous Australians is a health issue', *Crikey*, 22 November 2010, <http://www.crikey.com.au/2010/11/22/why-constitutional-recognition-for-indigenous-australians-is-a-health-issue/>

Gooda, Mick, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011

Gooda, Mick, 'Constitutional Reform: Creating a Nation for all of us', An Eidos Institute Event with Mick Gooda, The State Library Brisbane, 23 February 2011

Griffith, Gareth, 'Constitutional Recognition of Aboriginal People', *NSW Parliamentary Library Research Service*, E-Brief, 11 / 2010

Kirby AG CMG, Michael, The Hon., 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent', Speech delivered at Law Council of Australia Forum, *Constitutional Change: Recognition or Substantive Rights? Exploring the Constitutional change process and its application to create meaningful change in Australia*, 2011

Keating, The Hon Paul, Prime Minister, *Redfern Speech: Year of the world's Indigenous people*, Speech delivered at Redfern, 10 December 1992

Langton, Professor Marcia, *Australian federalism and race: the special cases of Queensland and the Northern Territory*, July 2008, Available at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=50F8C197-9C71-CE6F-B412-6594FBCADEEC&siteName=ica](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=50F8C197-9C71-CE6F-B412-6594FBCADEEC&siteName=ica)

Law Council of Australia, *Constitutional Recognition of Indigenous Australians*, Discussion Paper, 2011

Law Council of Australia, *Constitutional Change: Recognition or Substantive Rights? Exploring the Constitutional change process and its application to create meaningful change in Australia*, Transcript of Proceedings, 2011

Mason, Sir Anthony, 'The Australian Constitution in retrospect and prospect' in G Lindell, *The Sir Anthony Mason Papers*, 2007, 144

McKenna, M, Simpson, A and Williams, G, 'First Words: The Preamble to the Australian Constitution', *University of New South Wales Law Journal*, 2001, 24(2) 382

Reconciliation Australia, *Australian Reconciliation Barometer 2010*, <http://www.reconciliation.org.au/home/reconciliation-resources/facts---figures/australian-reconciliation-barometer>

Ring, Ian and Firman, David, 'Reducing Indigenous Mortality in Australia: Lessons from Other Countries', *The Medical Journal of Australia*, 1998

Senate Standing Committee on Constitutional and Legal Affairs, 'Two Hundred Years Later: Report of the Senate Standing Committee on Constitutional and Legal Affairs into a compact or Makarrata between the Commonwealth and Aboriginal people', 1983

Twomey, A. 'Constitutional Recognition of Indigenous Australians in a Preamble', Constitutional Reform Unit, Sydney Law School, Report No. 2, 2011

United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295, 2007

You Me Unity, *A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011

Williams, George, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won', *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1), 1-15

Williams, George, 'How should the Australian Constitution be changed to recognise Indigenous Peoples?' *Civil Liberty* (Journal of the New South Wales Council for Civil Liberties), Issue 225, June 2011, 3-4

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

Winterton, G and McKenna, M, 'Two Preambles is Stretching the Mateship', *The Australian*, 22 April 1999