Aboriginal and Torres Strait Islander Peoples Recognition
Bill 2012

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Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012

Date introduced: 28 November 2012

House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs / Attorney-General

Commencement: The day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (the Bill) is to articulate the Parliament’s recognition of Aboriginal and Torres Strait Islanders as the original inhabitants of Australia, and also their ongoing connection with their traditional land and waters, cultures, languages and heritage.

The Bill also provides for the establishment of a review of the readiness of the Australian public to support a referendum giving constitutional recognition to Aboriginal and Torres Strait Islander people, and the preferred form of these proposed constitutional changes.

Background

There is a lengthy history of calls for constitutional recognition of indigenous peoples. The background material included here starts with the two most recent election campaigns, however the pertinent historical material in Appendix A goes back to the founding constitutional debates and further. It details the persistent efforts made in this field for constitutional amendments by indigenous and non-indigenous people, including several bipartisan initiatives. Appendix A also includes information regarding the constitutional recognitions made by various states.

The Australian Human Rights Commission has also documented some of this history in the Aboriginal and Torres Strait Islander Social Justice Commissioner’s 2011 submission ‘Constitutional reform: creating a nation for all of us’, and an excerpt from that submission is also included as Appendix B.

Previous election campaigns and Federal commitments to recognition

During the 2007 election both the Coalition and Labor promised to support a new preamble to the Constitution which recognises Indigenous Australians. Prime Minister John Howard announced at the Sydney Institute on October 2007 that:

if re-elected, I will put to the Australian people within 18 months a referendum to formally recognise Indigenous Australians in our Constitution — their history as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled,
Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012

[...] My goal is to see a new Statement of Reconciliation incorporated into the Preamble of the Australian Constitution. If elected, I would commit immediately to working in consultation with Indigenous leaders and others on this task. It would reflect my profound sentiment that Indigenous Australians should enjoy the full bounty that this country has to offer; that their economic, social and cultural well-being should be comparable to that of other Australians. I would aim to introduce a bill that would include the Preamble Statement into Parliament within the first 100 days of a new government. A future referendum question would stand alone. It would not be blurred or cluttered by other constitutional considerations. I would seek to enlist wide community support for a 'Yes' vote. I would hope and aim to secure the sort of overwhelming vote achieved 40 years ago at the 1967 referendum.

[...] There is a window to convert this moment of opportunity into something real and lasting in a way that gets the balance right. But I suspect it is small. Noel Pearson has made the point to me that Australia seems to go through 30 to 40 year cycles on indigenous affairs: periods of reorientation and attempts to find new solutions (assimilation in the 1930s; equality and self-determination in the 1960s and '70s) followed by decades of denial of the lack of progress in between. Some will no doubt want to portray my remarks tonight as a form of Damascus Road conversion. In reality, they are little more than an affirmation of well-worn liberal conservative ideas.

[...] In the end, my appeal to the broader Australian community on this is simpler, and far less eloquent. It goes to love of country and a fair go. It’s about understanding the destiny we share as Australians — that we are all in this together. It’s about recognising that while ever our Indigenous citizens are left out or marginalised or feel their identity is challenged we are all diminished. It’s about appreciating that their long struggle for a fair place in the country is our struggle too.

Constitutional recognition had been part of the Labor party platform as adopted at its 2007 46th National Conference National Platform—objective 3 (q) being:

recognition of the prior ownership of Australian land by Aborigines and Islanders; recognition of their special and essential relationship with the land as the basis of their culture; and a commitment to the return of established traditional lands to the ownership of Aboriginal and Islander communities.

Labor Party leader Kevin Rudd responded positively to Mr Howard’s commitment, offering bipartisan support regardless of the outcome of the election. The 2007 election did not return a Coalition Government, and carriage of the issue was left to the new Labor Government. The new Prime Minister, Kevin Rudd, referred to the need to work on constitutional recognition in the National Apology on the 13 February 2008 and restated his commitment to this recognition at the

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The Coalition reaffirmed its support in its 2010 election policy entitled The Coalition’s plan for real action for Indigenous Australians. The third item in this policy was a statement that the Coalition will ‘Support a referendum to recognise Indigenous Australians in the Constitution’, stating:

Before the last election, the Coalition made a commitment to hold a referendum to recognise Indigenous Australians in the preamble of the Constitution. Labor refused to match this commitment until recently.

The recognition of Indigenous Australians in the Constitution makes sense, and is overdue. The Coalition will encourage public discussion and debate about the proposed change and seek bipartisan support for a referendum to be put to the Australian people at the 2013 election.

The Coalition also said it did not want to put investigation of the proposal and development of the wording to an Expert Panel, but wanted to have the words formulated by the middle of the next parliamentary term in preparation for a referendum at the following election.

Following the election, both the Australian Greens and Andrew Wilkie included in their agreements with the ALP (to support their formation of government in September 2010) the requirement that the ALP Government would support a referendum to recognise Aboriginal people.

The Greens agreement established it as a Goal (3(f)):

Hold referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution.

Mr Wilkie’s agreement was similarly worded:

3.2 The Parties acknowledge specifically that reform proposals are being developed on:

...
f) Holding referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government

3.3 The Parties agree to work collaboratively with each other and other parliamentarians on the reform proposals detailed in Clause 3.2.¹⁰

### The Expert Panel: recommendations for constitutional reform

In December 2010 Prime Minister Gillard’s Government appointed an Expert Panel to investigate potential options for constitutional recognition of Aboriginal and Torres Strait Islander peoples, and advise on the level of support for these options. On the panel were Indigenous and community leaders, legal experts and representatives from the Australian Labor Party, the Australian Greens, the Coalition and an Independent Parliamentarian. The panel undertook wide public consultations and made its report to the Government in January 2012. The panel’s report, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution¹¹*, looks at what forms of recognition have taken place in other contexts, and looks closely at the ‘race’ provisions in the present Australian Constitution. The report also examines the early calls for a prohibition against racial discrimination (also discussed in Appendix A of this Digest).

The panelists unanimously recommended putting at a special referendum a single question to seek approval to amend the *Constitution* by removing racist sections (both section 25¹², on excluding people from voting on the basis of race, and the race power in section 51(xxvi)¹³), and creating a section to legislate for the ‘advancement’ of Aborigines and Torres Strait Islanders and the protection of their language and culture. Their exact recommendations were as follows:

3. The Panel recommends that section 51(xxvi) be repealed, and that a new ‘section 51A’ be inserted after section 51 consisting of preambular or introductory language...and operative language along the following lines:

#### Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

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¹⁰ J Gillard and A Wilkie, [Agreement to form Government], (‘the Parties’) Agreement, signed 2 September 2010, accessed 14 January 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2FJrnart%2F218796%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2FJrnart%2F218796%22)


¹² Section 25 of the Constitution provides: ‘For the purposes of [section 24, which relates to the Constitution of the House of Representatives], if by the law of any state all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the state, then, in reckoning the number of the people of the state or of the Commonwealth, persons of that race resident in that state shall not be counted’. The *Constitution* is accessible at: [http://www.comlaw.gov.au/Details/C2004C00469](http://www.comlaw.gov.au/Details/C2004C00469)

¹³ Section 51(xxvi) of the *Constitution* provides that the Parliament has power to make laws for the peace, order and good government of the Commonwealth with respect to ‘the people of any race for whom it is deemed necessary to make special laws’.

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Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

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

4. That a new ‘section 116A’ be inserted, along the following lines:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

5. That a new ‘section 127A’ be inserted, along the following lines:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

Proposals for constitutional reform by other bodies

Where the 1998 Constitutional Convention and 1999 Constitutional referendum had proposed putting acknowledgement of Indigenous prior occupation in a preamble to the Constitution, and the states have mostly added their recognition in a preamble, the Expert Panel recommend the recognition be put in the body of the Constitution.

To help inform debate over the issue of Constitutional recognition, and while the Expert Panel was developing their proposals, the Aboriginal and Torres Strait Islander Social Justice Commissioner released a report 2011 Constitutional reform: creating a nation for all of us.14

Council for Aboriginal Reconciliation

In its final report to the Prime Minister and the Commonwealth Parliament in December 2000, the Council for Aboriginal Reconciliation had made various recommendations to give effect to its reconciliation documents (see further details of the Council’s work in Appendix A). In particular the Council recommended:

- The Commonwealth Parliament prepare legislation for a referendum which seeks to:
  - recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
  - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.\(^\text{15}\)

The Council recommended that section 51(xxvi) be amended to provide for making special laws only for the benefit of any particular race, the Expert Panel recommended that the section should be deleted, another added prohibiting legislative discrimination and another introduced to permit what some might once have called ‘positive discrimination’ but they call ‘overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.’\(^\text{16}\)

Reconciliation Australia

Reconciliation Australia (the national organisation promoting reconciliation between Aboriginal and Torres Strait Islander peoples and the broader Australian community) is identified by the Bill as an important element in the move to a referendum and the Bill specifies that its proposals should be considered. Reconciliation Australia has suggested that the removal of section 25, with its explicitly discriminatory provisions, and some modification of the potentially discriminatory effects of section 51(xxvi), are the most popularly supported changes:

Sections 25 and 51 (xxvi) have the potential to be used to discriminate against Aboriginal and Torres Strait Islander peoples. Section 25 should be removed because a provision to disallow a race from being counted in elections is out-dated in a modern democracy.

In amending or removing section 51 (xxvi), Reconciliation Australia notes there are several legal complexities involved because key pieces of legislation that enshrine Aboriginal and Torres Strait Islander peoples’ rights rely on this provision. Great care needs to be taken in drafting the changes to ensure that existing legislative rights are protected and that there are no or limited unintended consequences due to any change.

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16. The Expert Panel’s recommendations were all in the direction suggested by Liberal backbencher Billy Wentworth in the mid-1960s. See Appendix A for more information.

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Changes being considered include amending Section 51 (xxvi) by adding the words ‘beneficial’, repealing section 51 (xxvi) and inserting a new head of power to make laws affecting Aboriginal and Torres Strait Islander peoples and inserting a guarantee of nondiscrimination and racial equality.17

An earlier publication by Reconciliation Australia had posed the question:

9. What could be added to the body of the Constitution?

Adding a protection against discrimination to the Constitution would help prevent legal and political discrimination against Indigenous Australians and would be a greater protection than the Racial Discrimination Act. Tom Calma from the Australian Human Rights Commission has suggested a new provision in the Constitution that provides for equality before the law and non-discrimination similar to this one from the International Covenant on Civil and Political Rights:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

More recently Reconciliation Australia has commented:

Reconciliation Australia believes that the focus of this current process should be on recognition of Aboriginal and Torres Strait Islander peoples and removing the potential for racial discrimination from the Constitution. These are the next stepping stones on our journey of reconciliation and there is a great opportunity for these changes to be successful.18

After the Expert Panel

Some submissions to the Joint Select Committee inquiry into the current Bill indicated an interest in using the Expert Panel’s recommendations as an initial basis for further consultation, leaving open the prospect that the wording could be modified or worked on, however many other submissions indicated they were content to go forward with the Panel’s precise proposals.

The need to come to an agreed approach, and even achieve more detailed agreement, such as the precise wording, will be vital to the success of any referendum. The Bill’s provisions recognise the work of the Expert Panel, but certainly make no suggestion that the Panel’s concrete proposal for the words to be put to a referendum are the best final text.

Upon the release of the Expert Panel’s report, the leader of the Opposition stated that:

18. Ibid.
The Coalition will now carefully study the report and then release a formal response [...] In examining the report we will be looking closely at the potential legal ramifications of any specific anti-discrimination power.  

Though Coalition comments over the following months never amounted to a complete rejection of the Expert Panel’s proposals or the Prime Minister’s push to frame a question to be put at a referendum in 2013, its reservations, together with a sense in the Government and community that the originally proposed timeframe was too tight for a successful yes campaign, led to a change of course.

In September 2012 the Federal Government announced that it would push back its plans for a referendum by two or three years, with commentators spreading the responsibility for the postponement around—the Government for not fighting hard enough for it, the Coalition for being reluctant to agree on a referendum question and timeframe, community groups for not taking it up as a cause and the community in general for not being sufficiently aware/interested in the proposal.

**Proposals for recognition by Federal Parliament.**

Prime Minister Gillard suggested that in lieu of pressing on immediately with the constitutional referendum, an Act of Recognition might be passed through Parliament. The Leader of the Opposition was not initially attracted to the idea, suggesting its details might lock a future government into a certain referendum wording and timetable and proposed instead both leaders read in Parliament statements declaring their support for a referendum on Indigenous recognition in the Constitution sometime in the next term. By early November the Coalition dropped its opposition to the idea of a Bill and on 28 November 2012, this Bill was introduced.

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Committee consideration

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

The Bill was referred to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (‘the Joint Select Committee’) for inquiry and report by 30 January 2013. Details of the inquiry can be found on the Committee’s website.  

The Report was tabled on 5 February 2013. Mr Oakeshott presented the Report to the House, commenting on his disappointment that a referendum was not yet feasible and saying that, while he was not ‘opposed to this bipartisan act of Parliament,’ the Parliament needs to show leadership in promoting the referendum. After considering various suggestions for changes to the Bill (see below) the Committee rejected them and recommended simply that the Bill be passed.

Senate Standing Committee for the Scrutiny of Bills

The Committee considered, but had no comment on, this Bill.

Parliamentary Joint Committee on Human Rights

The Bill has been listed by the Parliamentary Joint Committee on Human Rights as one of the ‘Bills requiring further information to determine human rights compatibility.’ In particular the Committee summarises its view:

The committee considers that the bill appears to be consistent with the promotion of the rights of Aboriginal and Torres Strait Islander peoples, but seeks further information as to why the issue of a constitutional prohibition of racial discrimination has not been included in the scope of the review proposed by the bill.


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As we see below, this absence of a reference to the principles of non-discrimination was a common concern amongst contributors to the Joint Select Committee.

**Policy Position of non-government parties/independents**

The position of Mr Wilkie and the Australian Greens has been commented on above. Mr Oakeshott supports the Bill, as he said when he tabled the Joint Select Committee Report. ²⁶

**Position of major interest groups**

The submissions to the Joint Select Committee evidenced a wide array of attitudes to the Bill. Almost all contributors acknowledged both the desirability or imperative of a referendum on constitutional reform to recognise Aboriginal and Torres Strait Islander Peoples, and to remove section 25. There was, similarly, a widespread understanding of the difficulties with holding a referendum at this time. This was largely identified as being due to lack of awareness of the current Constitutional situation and the difficulties of formulating the agreed final wording for any referendum proposal, although the work of the Expert Panel was regarded by many as a sound foundation which could be built from.

The Bill was seen by most contributors as a useful step in the process towards this future referendum, although there were many suggestions for improvement (discussed below) and there was a general sense of sorrow or frustration that progress towards the referendum was so slow.

Dr John Falzon, the Chief Executive Officer of the St Vincent de Paul Society, for example, commented that ‘[i]t is axiomatic that justice delayed is justice denied’. ²⁷ Submissions from the Australian Psychological Society Limited,²⁸ the Australian Institute of Aboriginal and Torres Strait Islander Studies,²⁹ and the St Vincent de Paul Society,³⁰ amongst others, make the point that the continuing failure to remove racially discriminatory provisions and give recognition to Aboriginal and Torres Strait Islander peoples is doing damage to all Australians, both Indigenous and

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³⁰ St Vincent de Paul Society, op. cit.
non-Indigenous. Mr Oakeshott’s speech on the tabling of the Joint Select Committee Report echoed these submissions.31

Financial implications

The Explanatory Memorandum says there are no financial implications. It is unclear from the Bill’s language whether the ‘review’ of the relevant constitutional situation will be conducted from within government or will involve an external independent body. The manner in which the review will be funded, if at all, is therefore also left unaddressed.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the Human Rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.32 The Government points to the “range of international human rights obligations in relation to the recognition of Aboriginal and Torres Strait Islander peoples and their culture, language, heritage and rights to self-determination” and concludes that the Bill is compatible.

Key issues and provisions

The proposed preamble of the proposed Act outlines the rationale for approaching the matter as the Bill does. It identifies the reality of Aboriginal and Torres Strait Islander prior occupation and identifies the Parliament as wanting to have a referendum for the constitutional recognition of Aboriginal and Torres Strait Islander peoples. The proposed preamble identifies and acknowledges the important work of the Expert Panel and its proposals for constitutional change and goes on to ‘recognise’ that:

- further engagement with Aboriginal and Torres Strait Islander peoples and other Australians is required to refine proposals for a referendum and to build the support necessary for successful constitutional change.

The Bill identifies the Parliament as being committed to building the national consensus to make this constitutional recognition and believes the proposed Act is a ‘significant step’ in the process.

The Bill then goes on to make the Parliament’s own recognition in proposed section 3, (which mirrors the Expert Panel’s proposed wording), making a three part recognition of (1) Aboriginal and Torres Strait Islander peoples’ prior occupation; (2) their continuing relationship with their traditional lands and waters; and (3) their continuing cultures, languages and heritage.

32. The Statement of Compatibility with Human Rights can be found at page 8 of the Explanatory Memorandum to the Bill, accessed 20 January 2013, http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4943_ems_ff41ca02-ab71-4d5f-bfd9-097a62bb4edb%22

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The language used reflects the recommendations of the Expert Panel, but does not include the Panel’s proposed reference, in the same constitutional section\(^{33}\), to securing ‘the advancement of Aboriginal and Torres Strait Islander peoples’, nor does it refer to additional constitutional amendments regarding the elimination of racial discrimination\(^{34}\) and the recognition of aboriginal languages\(^{35}\).

The Explanatory Memorandum notes that the Bill does not engage with issues of race discrimination, commenting that the *Racial Discrimination Act 1975* is already in place:

> The Bill also does not reflect the Expert Panel’s recommendation for a constitutional prohibition of racial discrimination. The Government remains firmly committed to the elimination of racial discrimination. The *Racial Discrimination Act 1975* already prohibits racial discrimination, which means incorporating a legislative prohibition in this Bill is unnecessary.\(^{36}\)

Submissions to the Joint Select Committee have taken issue with the logic of this position. The Public Interest Advocacy Centre (PIAC) commented that since the Constitution already contains race discriminatory provisions (co-existing with the Racial Discrimination Act), the Bill should deal with this issue:

> PIAC submits that the current Bill should be amended so as explicitly to identify these discriminatory provisions and it should also set out Parliament’s commitment to eradicate such discrimination. In other words, and consistently with the recommendations of the Expert Panel, PIAC submits that the Bill should make clear that the elimination of racial discrimination is central to constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Many other submissions referred to the need to include the additional recommendations of the Expert Panel, particularly with respect to racial discrimination and/or the Panel’s reference to the ‘advancement’ of the Aboriginal and Torres Strait Islander people.\(^{37}\)

The Committee, however, said it expected further discussion would continue and it did not believe ‘the omission of this wording from the Bill proscribes further consideration of the issues in the process leading to a referendum’.\(^{38}\)

\(^{33}\) That is, new section 51A, as proposed by the Expert Panel.

\(^{34}\) See new section 116A, as proposed by the Expert Panel.

\(^{35}\) See new section 127A, as proposed by the Expert Panel.

\(^{36}\) Explanatory Memorandum, Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, p. 5, accessed 20 January 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4943_ems_ff41ca02-ab71-4d5f-bf09-097a62bb4ed%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4943_ems_ff41ca02-ab71-4d5f-bf09-097a62bb4ed%22)

The operational provisions of the Bill are quite simple, although unusually framed. Effectively the Bill, in proposed section 4, requires the Minister to cause a review to commence within 12 months of the Act’s commencement. Those undertaking the review are to examine the readiness and support for amending the Constitution by referendum amongst the ‘Australian public’, Aboriginal and Torres Strait Islander peoples and the governments of the states and territories. They are required to consider the changes proposed by the Expert Panel and Reconciliation Australia and identify which are the more supported proposals.

The Bill offers no specifications regarding the members or nature of the review, and there is no discussion of its likely size or arrangements to be made for its members. Questions such as whether there will be a secretariat? Where would that be located? How is the review panel (for want of a better word) to operate — consensus? Voting? Minority reports? Such questions are all left unanswered by the Bill.

Many of the submissions to the Joint Select Committee raised these and similar issues to do with the Bill’s failure to illuminate future process questions. Both the lack of detail on timeframe and mechanics in the Bill, and the Government’s failure to offer further details outside the Bill’s process was of concern in various submissions.

The Committee responded to these and similar concerns by pointing to the different elements contributing to progressing the referendum and said:

the committee is satisfied that the mechanisms currently in place, including the review outlined at clause 4, provide a good architecture for moving toward a referendum.

The Bill provides that a report of the review is to be given to the Minister ‘at least six months prior to the day the Act ceases’. Proposed section 5 defines the day the Act ceases as being two years after its commencement. This sunset provision means that if the Minister takes the allowable 12 months to establish the review, then the review would only have six months to complete its work. The Expert Panel took 14 months to complete its process of consultation. The sunset provision operates on all provisions of the Act, rather than identifying specific provisions which cease to have operation.

The Explanatory Memorandum says that the sunset provisions are included in order to ensure the Bill’s provision do ‘not become entrenched at the expense of progress towards’ constitutional recognition. The legislative note to proposed section 5 also makes this point, although in slightly more constrained language:

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39. As mentioned above, commencement is the day after Royal Assent is given to the Bill.
40. For example ANTaR, Public Interest Advocacy Centre, NTSCORP, Gilbert + Tobin Centre for Public Law.
41. Joint Select Committee Report, op. cit., p. 16.
42. Proposed paragraph 4(2)(e).

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The 2 year sunset period in this section will provide Parliament and the Australian people with a date by which to consider further the readiness of Australians to approve a referendum to amend the Constitution to recognise Aboriginal and Torres Strait Islander peoples.

There have, nevertheless, been various concerns expressed regarding the sunset provision. It has, for instance, been pointed out that while the operational provisions may require a deadline to progress the issue, the rationale for terminating Parliament’s recognition of the pre-existing ownership of Australia by Aboriginal and Torres Strait Islander is not so apparent.\(^{43}\) It is also argued that the timeframe is inappropriate and the Act should instead sunset when the referendum is more proximate.\(^{44}\) Finally the wording of the note, it is pointed out, is oddly agnostic about supporting the actual holding of the referendum, referring instead to ascertaining ‘further the readiness of Australians to approve a referendum’, which is not framed so as to actually promote the referendum.\(^{45}\)

**Concluding comments**

The Bill is brief and offers a way for Parliament, at a time when a promised referendum on recognition has been postponed, to show its support for some of the principles expressed in the Expert Panel’s recommendations, and to show its support for possibly putting a referendum at a later date. It leaves, however, many issues unaddressed (for example funding and future steps). These issues may be dealt with subsequent to the Bill’s passage.

The decision to give parliamentary endorsement to some principles contained in the Expert Panel’s recommendations has been almost universally welcomed. However, the proposal to sunset these endorsements and the decision to endorse only a selection of the Expert Panel’s recommendations (for example, not to give express support to removing racial discrimination from the Constitution) have not been so welcome.

The Bill has received widespread overall support (however qualified) as a step in a process towards overdue constitutional recognition of Australia’s indigenous people and the removal of racially discriminatory provision from the Constitution.

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\(^{43}\) E Arcioni (University of Sydney), Submission to the Joint Select Committee.

\(^{44}\) J Falzon (St Vincent de Paul Society), Submission to the Joint Select Committee.

\(^{45}\) Ibid.
Appendix: A

Historical Background and state Constitutional recognition

There is evidence of at least 60 000 years of Aboriginal occupation of the Australian mainland, at least 10 000 years of indigenous occupation of Australia’s Torres Strait Islands, and of indigenous society at the time of European settlement comprising hundreds of language groups, many divisible into sub-groups.\(^46\) The Australian Constitution provides Australia’s Indigenous people, however, with no formal recognition.

Indigenous people were not involved in or were barely mentioned during the convention debates of the 1890s. The resulting Constitution of 1901 ended up with only two references to ‘aboriginal’, and both were in a negative context. The original section 51 provided that:

> 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, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws.

The original 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.

It also ended up with a section 25 that provided:

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

Tasmanian Attorney-General Andrew Inglis Clark was particularly concerned with the need for safeguards against discrimination by states. During the Constitutional Convention in Melbourne in 1898, the original due protection clause of 1891 ran into complications, and attention was directed to the proposal for a new clause by Inglis Clark. Richard O’Connor proposed a similar clause in Melbourne in 1898. The proposal was narrowly defeated by a vote of 23 to 19.

The situation was reinforced in 1929 when a Royal Commission on the Constitution recommended against amending s 51(xxvi) to empower the Commonwealth to make special laws concerning Indigenous people in the states, because ‘on the whole the states are better equipped for controlling aborigines than the Commonwealth’, and again in 1944 when a referendum to insert new

Commonwealth powers for a five-year post-war reconstruction period, including a power to make laws concerning ‘the people of the aboriginal race’, was defeated.\footnote{University of New South Wales, \textit{Constitutional reform and Indigenous Peoples}, Research brief, no. 2, Indigenous Law Centre, 2010, accessed 21 January 2013, \url{http://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/Constitutional%20Reform%20No.2_1.pdf}}

In the 1950s greater Commonwealth involvement in indigenous affairs was supported by both sides of politics, but the focus of the Menzies Government (through Minister Paul Hasluck) was on raising the Department of Territories from its administrative torpor, not on recognition of rights or transferring state powers to the Commonwealth (Gordon Bryant of the Labor Party being one of the few campaigning for the latter). In the early 1960s with an increasing number of voices, both Aboriginal and non-Aboriginal, drawing attention to the meagre achievements of government assimilation policy and the denial of civil rights and poor international image it engendered, many state governments began to repeal their most discriminatory pieces of legislation and the Commonwealth Government began to lift its restrictions on Aboriginal rights—including in the area of electoral franchise.\footnote{For a fuller study of this period see: J Gardiner-Garden, \textit{From dispossession to reconciliation}, Research paper, no. 27, 1998-99, Parliamentary Library, Canberra, 29 June 1999, accessed 21 January 2013, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F11D06%22} and J Gardiner-Garden, \textit{The 1967 Referendum: history and myths}, Research brief, no. 11, 2006-07, Parliamentary Library, Canberra, 2 May 2007, accessed 8 February 2013, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2FTJZM6%22}} Still no-one was debating what positive constitutional recognition of the Aborigines might be appropriate.

The 1967 Constitutional Referendum

In 1965 the Menzies Government presented a Bill which provided for the repeal of section 127 (which dealt with excluding Aboriginal people when reckoning the population for certain purposes) but it was felt that the words of section 51(xxvi) should remain:

\begin{quote}
The words are a protection against discrimination by the Commonwealth parliament in respect of Aborigines. The power granted is one which enables the Parliament to make special laws, that is, discriminatory laws in relation to other races—special laws that would relate to them and not to other people. The people of the Aboriginal race are specifically excluded from this paper. There can be in relation to them no valid laws which would treat them as people outside the normal scope of the law, as people who do not enjoy benefits and sustain burdens in common with other citizens of Australia ...
\end{quote}

In March 1966, Liberal backbencher William (Billy) Wentworth introduced a Private Member’s Bill that proposed the deletion of section 51(xxvi) and the insertion of a new power to make laws ‘for the advancement of the aboriginal natives of the Commonwealth of Australia’. Wentworth also proposed new section 117A to prevent the Commonwealth and states from making or maintaining any law ‘which subjects any person who has been born or naturalised within the Commonwealth of

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Australia to any discrimination or disability within the Commonwealth by reason of his racial origin’. The proposed section 117A included a proviso to ensure that it would not operate ‘to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia’. Neither proposal was put to the Australian people at the 1967 Referendum. Wentworth’s proposal for protection against racial discrimination in the Constitution was supported by former Prime Minister Malcolm Fraser in a recent speech.

The Government Member WC Wentworth moved a Private Member’s Bill proposing that section 51(xxvi) be deleted and a new section added as follows:

Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin.’

There were those advocating the retention of the Commonwealth power to make laws with respect to people of different races and the extension of the law to Aboriginal people. It was thought that this approach was necessary if the Commonwealth was to be able to enact laws to benefit Aboriginal people and this view won through.

On 1 March 1967 the Constitution Alteration (Aboriginals) Bill was introduced. In addition to removing section 127, the Bill provided for the amendment of section 51(xxvi) by deleting the words ‘other than the Aboriginal race in any state’. The Bill passed unanimously and on 27 May 1967 a referendum question was put and received a 90.77 per cent ‘yes’ vote. The referendum opened the way for much greater Commonwealth Government involvement in the area of Aboriginal affairs but it broadened, rather than eliminated, the ‘race power’ and offered no positive recognition of Indigenous people.

1967–1999

Over the next 30 years as people’s confidence in the Commonwealth’s capacity or willingness to deliver in the area of Indigenous affairs waxed and waned, so debate over the need for greater constitutional recognition of indigenous people (and/or a treaty or compact) waxed and waned. In 1974 and again in 1988 referendums were put which included a proposal to delete section 25, but on both occasions the referendum proposals were rejected.

The amending of the Constitution to facilitate a treaty between Indigenous peoples and the Australian state was recommended by the Senate Standing Committee on Constitutional and Legal Affairs in 1983 and put to government in ‘Social Justice Package’ submissions in 1992–95. However,


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in the former case the Hawke Government favoured a different policy direction and in the latter the Keating Government lost office before the package was finalised.\(^{51}\)

In 1987 the report of the Individual and Democratic Rights Advisory Committee to the Constitutional Commission recommended the insertion of a new Preamble to the Commonwealth Constitution:

> It is appropriate to recognise in the Preamble that prior to the arrival of European settlers Australia was owned by the Aboriginal people. Such recognition in the Constitution would be an act of good faith and symbolic importance in furthering reconciliation between Aboriginal and non-Aboriginal Australians.

However, the recommendation was not adopted by the Constitutional Commission in its Final Report of 1988, the Commission observing:

> At this stage we note that there are real difficulties in preparing an appropriate recital and that words such as ‘owned’ and ‘ceded’ need to be carefully considered in this context.\(^{52}\)

In 1988 the Constitutional Commission recommended the insertion of a new paragraph 51(xxvi) to give the Commonwealth Parliament express power to make laws with respect to ‘Aborigines and Torres Strait Islanders’. Consistent with such an approach, the Commission recommended the insertion of a new section 124G that would give everyone the right to freedom from discrimination on the ground of race. In relation to equality rights, the Commission recommended that the Constitution be altered as follows:

124G (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

(2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

In 1997, as Australia debated the possibility of becoming a republic, there was debate over whether there should be a preamble to the Constitution which, among other things, acknowledged the original occupancy and custodianship of Australia by Aboriginal and Torres Strait Islanders. The Constitutional Convention held at Old Parliament House in February 1998 favoured such a preamble, and this minimalist approach to recognising Indigenous Australians received bi-partisan support. On 23 March 1998 the Prime Minister, John Howard, presented a draft preamble to the Constitution but it was not well received as it did not refer to prior Aboriginal ownership or custodianship of the country. Later that year the Prime Minister released a new draft preamble mentioning the deep kinship Aborigines and Torres Strait Islanders have with the land and a question of whether to add

\(^{51}\) University of New South Wales, Indigenous Law Centre, Constitutional reform and Indigenous Peoples, op. cit.

this new preamble to the Constitution went to referendum in November 1999, along with a proposal to make Australia a republic. The proposed preamble struggled to get attention in a divisive debate over the republic and form thereof, and to the extent that it was noticed, it was contentious because of some elements not related to recognition of Indigenous Australians and because it referred only to past occupation and continuing cultures, not to land ownership or custodianship prior to settlement. The referendum question failed.

Council for Aboriginal Reconciliation

Voices advocating greater recognition for Indigenous Australians in the Constitution continued to be raised. It was one item on the Council for Aboriginal Reconciliation ‘Roadmap to Reconciliation’ agenda presented at the Corroboree 2000.53 Chapter 4 of the Council’s Document of Reconciliation Briefing Paper noted:

Constitutional Changes

In 1967, the Australian people returned the most convincing vote in support of a referendum proposal in our history. The proposal was to remove discriminatory references to Aboriginal people in a number of sections of the Constitution. However, some anomalies remain. To further strengthen measures against discrimination, the Council proposes that of two provisions of the Commonwealth Constitution one be further amended and the other deleted.

Section 25 of the Constitution is intended to discourage discrimination but recognises the possibility that a State might exclude people from voting on the grounds of race. Such a provision is inappropriate for any democratic nation, particularly one whose people come from many different backgrounds. As it stands, the Australian Constitution arguably contemplates that Australian citizens may be disenfranchised on racially discriminatory grounds. The Council strongly supports removing section 25 from the Constitution to ensure that no Australian can be denied the vote on the grounds of their race.

There have also been proposals to replace section 25 with a provision that entrenches the prohibition against discrimination. This would ensure that the Commonwealth Parliament, like the States, cannot pass discriminatory laws or suspend the application of the Racial Discrimination Act in particular circumstances.

Section 51(26) empowers the Commonwealth to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’. It is possible however, that in its present form this section could be used to discriminate in a negative manner. The Council supports the amendment of section 51(26) to ensure that the Commonwealth can only make racially specific laws for the benefit of the people of a particular race.

Formal recognition of the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia remains an outstanding issue of Constitutional reform. The Council recommends the use of the Australian Declaration Towards Reconciliation as the basis for Constitutional recognition.

The Council also notes the importance of bi-partisan support and community education about proposed Constitutional changes to ensure their success.

Actions for implementation

A. The Commonwealth Parliament initiate and support a referendum to:

(i) provide a new preamble to the Constitution which, among other things, recognises Aboriginal and Torres Strait Islander peoples as the original owners and custodians, and acknowledges the history of dispossession that many have suffered since colonisation;

(ii) entrench the Australian Declaration Towards Reconciliation;

(iii) amend section 51(26) of the Constitution to authorise the Commonwealth to make special laws only for the benefit of any particular race; and

(iv) remove section 25 of the Constitution, and insert a new section making it unlawful to adversely discriminate on the grounds of race.

B. The Commonwealth government make every effort to obtain bi-partisan support and adequate and accurate community education programs to ensure that a referendum to change the Constitution takes place in a thoughtful and informed environment.54

State constitutional recognition

Paralleling the debate at Commonwealth level has been a debate at the state level. The Queensland Constitutional Convention, held in June 1999, resolved that the Constitutions of each state should include a preamble, which should be concise, inspirational and aspirational and should acknowledge ‘the past; the custodianship of indigenous peoples; and equality before the law.’55 The challenge has since risen in three states.

In 2004 the Constitution (Recognition of Aboriginal People) Act 2004 (Vic) inserted a new section 1A into the Constitution Act 1975 (Vic), of which sub section 1A(1) states:

The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

and subsection 1A(2):

The Parliament recognises that Victoria’s Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—

(a) have a unique status as the descendants of Australia’s first people; and


(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

(c) have made a unique and irreplaceable contribution to the identity and wellbeing of Victoria.\(^{56}\)

A **new subsection 1A(3)** adds the caveat that:

The Parliament does not intend by this section—

(a) to create in any person any legal right or give rise to any civil cause of action; or

(b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.\(^{57}\)

Similarly, in 2010 the *Constitution (Preamble) Amendment Act 2010* (Qld) inserted a new preamble into the *Constitution of Queensland 2001* (Qld):

The people of Queensland, free and equal citizens of Australia—

(a) intend through this Constitution to foster the peace, welfare and good government of Queensland; and

(b) adopt the principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution; and

(c) honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community; and

(d) determine to protect our unique environment; and

(e) acknowledge the achievements of our forebears, coming from many backgrounds, who together faced and overcame adversity and injustice, and whose efforts bequeathed to us, and future generations, a realistic opportunity to strive for social harmony; and

(f) resolve, in this the 150th anniversary year of the establishment of Queensland, to nurture our inheritance, and build a society based on democracy, freedom and peace.

followed by a **new section 3A** carrying the caveat that:

“The Parliament does not in the preamble—

(a) create in any person any legal right or give rise to any civil cause of action; or

(b) affect in any way the interpretation of this Act or of any other law in force in Queensland.”\(^{58}\)

Later in 2010 the *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW) inserted a **new section 2** into the *Constitution Act 1902* (NSW):

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57. Ibid.
58. Ibid.

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(a) The People and Parliament of New South Wales acknowledge and honour the Aboriginal people as the first people and nations of the State, and

(b) The People and Parliament of New South Wales recognise that Aboriginal people have a spiritual, social, and cultural relationship with their traditional lands and waters and have made a unique and lasting contribution to the identity of New South Wales.

(c) Nothing in this section creates in any person any legal right or gives rise to any civil cause of action, or affects the interpretation of this Act or any other law in force in New South Wales. 59

More recently the South Australian Government has moved towards recognising indigenous people in its Constitution when ‘[t]he Constitution (Recognition of Aboriginal Peoples) Amendment Bill 2012 was tabled in the House of Assembly on 29 November 2012.’ 60

The Bill will insert s. 2 into the Constitution Act 1934 (SA) which provides various forms of recognition of Aboriginal peoples and acknowledges some of the mistakes of the past in the treatment of South Australia’s Aboriginal peoples. In particular, it acknowledges that the settlement of South Australia ‘occurred without proper and effective recognition, consultation or authorisation’ from the State’s Aboriginal peoples, who ‘have endured past injustice and dispossession’. Moreover, the Bill ‘acknowledges and respects Aboriginal peoples as the State’s first peoples and nations’ and specifically ‘recognises Aboriginal peoples as traditional owners and occupants of land and waters in South Australia’, also recognising the continuing importance of their heritage. Finally, the Bill recognises that Aboriginal peoples ‘have made and continue to make a unique and irreplaceable contribution to the State’. 61

Subclause 2(3) of the Bill provides that ‘The Parliament does not intend this section to have any legal force or effect’. 62

The body of the Digest contains material bringing this account of the history of constitutional recognition of indigenous peoples up to the present date.

59. Ibid.
61. Ibid.
62. Ibid.
Appendix: B

[The] former Chief Justice of the High Court of Australia, Sir Anthony Mason, has referred to this lack of constitutional recognition as a ‘glaring omission’.  

In the face of this history of exclusion, Aboriginal and Torres Strait Islander peoples have consistently and vehemently fought to have our rights recognised and acknowledged by the Australian Government and the Australian people. In 1938, two great Aboriginal warriors stated that:

You are the New Australians, but we are Old Australians. We have in our arteries the blood of the Original Australians; we have lived in this land for many thousands of years. You came here only recently, and you took our land away from us by force.

There is a long history of Indigenous and non-Indigenous people calling for this recognition including:

- **1938** – Aborigines Conference
- **1967** – Referendum and preceding campaigns
- **1988** – Barunga Statement
- **1988** – Constitution Commission’s Report
- **1995** – Constitution Commission’s Report
- **1995** – Social Justice Package submissions
- **1999** – Referendum on the preamble of the Constitution
- **2000** – Council for Aboriginal Reconciliation Report
- **2008** – 2020 Summit
- **2008** – Social Justice Report and
- **2009** – Australian Human Rights Commission submission to the National Human Rights Consultation.

These examples illustrate years of advocacy for constitutional recognition:

Since the days of the Bark Petition, Aboriginal people have been aware that the protection offered by legislation – ranging from the Aboriginal protection ordinances to the Land Rights Act – is only as secure as

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64. J Patten and W Ferguson quoted in S Bennett, Aborigines and political power, Sydney, Allen & Unwin, 1989, p. 5.

the government of the day...We have long believed that the protection of our rights deserves a higher level of recognition and protection.\textsuperscript{66}

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.