

## Submission

for the

## Inquiry into Indigenous Constitutional Recognition

to the

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

PO Box 6100

Parliament House

Canberra ACT 2600

**Phone:** 02 6277 3544

**Facsimile:** 02 6277 5719

**Email:** [jscatsi@aph.gov.au](mailto:jscatsi@aph.gov.au)

**Website:**

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples)

by

**FamilyVoice Australia**

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## 1. Introduction

The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Committee) was established by Parliament in 2012 to inquire into and report on steps considered necessary to undertake a “successful referendum on Indigenous constitutional recognition”.<sup>1</sup> The Committee is due to make its final report to Parliament no later than 30 June 2015.

The Committee's current inquiry has called for submissions to advance this purpose. Due to the broad scope this could potentially cover, this submission takes the Committee's *Progress Report* of October 2014 as its framework.<sup>2</sup>

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed. To this end, we have a longstanding interest in the Australian Constitution.

We work with people from all major Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. We have full-time FamilyVoice representatives in all states.

Submissions to this inquiry are due by 31 January 2015.

## 2. Background

### 2.1. *Recognition of indigenous Australians*

Recognition of indigenous Australians and their full civic participation is a process which began long before this present inquiry. Indeed, compared with other developing democracies at the time, both pre- and post-Federation Australia was relatively advanced in extension of rights to its native peoples.

In the United States, for example, treaties between the government and native American tribes frequently saw the latter groups' land and hunting rights surrendered for resources, payments, and a promised end to further land claims.<sup>3</sup> Only by means of a court trial in 1879 were native Americans recognised under United States law as people, though still not widely accepted as citizens.<sup>4</sup>

Only after a convoluted process whereby some native Americans received citizens' rights (such as by marrying a white or through military service) were full citizens' and electoral rights granted under the *Indian Citizenship Act* of 1924.<sup>5</sup>

By comparison, when British sovereignty was extended to cover the whole Australian continent in 1829, everyone born in Australia automatically became a British Subject at birth – including Aborigines and Torres Strait Islanders – roughly a century before the United States treated its native peoples likewise.<sup>6</sup>

Furthermore, when the various Australian colonies became self-governing (South Australia in 1856, Victoria in 1857, New South Wales in 1858, and Tasmania in 1896), all adult male British Subjects –

including indigenous people – were entitled to vote. Only in Queensland (self-governing from 1859) and Western Australia (1890) were indigenous people initially disenfranchised.<sup>7</sup>

When South Australia extended franchise to all adult women in 1895, this included indigenous women.<sup>8</sup>

By means of section 25 of the Australian Constitution and provisions of the *Commonwealth Franchise Act 1902*, incentives were placed before the states to repeal any remaining race-based voting laws, an outcome which was ultimately achieved.<sup>9</sup>

When the modern legal concept of Australian citizenship was introduced in 1948 by the *Nationality and Citizenship Act*, it replaced the previous concept of being British subjects. All Australian-born people - including indigenous people – continued to be included.<sup>10</sup>

By 1962, all indigenous people were entitled to vote at federal level, regardless of state laws, and in 1965 Queensland extended the vote to indigenous people, completing the process of enfranchisement across Australia.<sup>11</sup>

The overwhelming result of the 1967 referendum (discussed further in section 2.3 of this submission) and the appointment of Neville Bonner AO as Australia's first indigenous federal parliamentarian marked further advances in indigenous recognition and civic participation.

Since that time, Aboriginal participation at federal, state and territory levels has grown substantially. Indigenous people have been elected to all levels of government, symbolising the Australian people's regard for, and solidarity with, our indigenous people.

## **2.2. “One people. One destiny.”**

In 1901, six colonies federated to form a new nation: Australia. It was then, and remains today, a nation comprised of diverse background – not only in terms of ethnicity, but also by means of arrival (Aboriginal inhabitants, convicts, free settlers, etc.).

Given views and legislation at the time regarding issues such as race and limited franchise, it was remarkable that the lead up to Federation evoked strong visions of unity and egalitarianism. Such a vision is perhaps best summarised in the words of Sir Henry Parkes, addressing the 1891 Federal Convention in Sydney: “We seek to break down the barriers which have hitherto divided us... One people. One destiny.”<sup>12</sup>

The concept of “one people” resonates with – and finds its basis in – a Christian understanding of race. Being made in the “image and likeness” of God,<sup>13</sup> the false barrier of race is based on man's limited view of his fellow men. St Paul reaffirmed this understanding when he stated that “[God] made from one man every nation of mankind to live on all the face of the earth... His offspring”.<sup>14</sup>

The concept that we are all ultimately one human race finds much support throughout the Bible.

The Old Testament figure of Job provides one such example. In speaking of his servants, Job rhetorically asks: “Did not he who made me in the womb make him [my servant]? And did not one fashion is us in the womb?”<sup>15</sup>

Addressing the racially divided people of Galatia (some Greek, some Jewish) St Paul reminds them that: “There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus”.<sup>16</sup>

Maintaining a similar spirit of unity and equality is vital to this inquiry and its outcomes, avoiding any division or discord.

### **2.3. The 1967 referendum**

In light of a possible referendum concerning Aboriginal and Torres Strait Islander affairs, no consideration could ignore the constitutional changes of 1967 – or the events which preceded it.

The inaugural “Day of Mourning”, held to coincide with the sesquicentenary celebrations on Australia Day, 26 January 1938, was something of a watershed for Aboriginal civil rights. Held in Australia Hall, Sydney, and organised by noted Aboriginal activists William Cooper, Jack Patten and William Ferguson among others, the gathering heard a clear call for indigenous people to be treated equally with other Australians.

Addressing the meeting, Aborigines Progressive Association (APA) president Jack Patten said:

*Our purpose in meeting today is to bring home to the white people of Australia the frightful conditions in which the native Aborigines of this continent live... We do not wish to be left behind in Australia's march to progress. We ask for full citizen rights... We do not wish to be herded like cattle and treated as a special class... This is not a matter of race it is a matter of education and opportunity. That is why we ask for a better education and better opportunity for our people... The reason why this conference is called today is so that Aborigines themselves may discuss their problems and try to bring before the notice of the public and of parliament what our grievance is, and how it may be remedied. We ask for ordinary citizen rights and full equality with other Australians.<sup>17</sup>*

Within the week, Jack Patten also led a delegation which met with Prime Minister Joseph Lyons, at which the Prime Minister was presented the APA's *10-point Plan for Citizens Rights*. Anticipating what was to come at the 1967 referendum, the plan called for Aboriginal affairs to become the domain of the Federal Government and put forward a number of long-term proposals calling for better opportunity for Aborigines, always framed within the goal of equality with fellow Australians.<sup>18</sup>

These recommendations covered areas as diverse as education, wages, welfare, land (for which the APA offered soldier and immigrant land settlement schemes as a model for indigenous agriculture), housing, and contact by Aboriginal public servants to provide “contact with civilisation” for those still living on the land.<sup>19</sup>

Further action followed, but the outbreak of World War II saw these issues left unresolved.

Post-war, full Aboriginal franchise was legislated federally in 1962 – and then, in 1967, a constitutional referendum was conducted. This referendum is noteworthy of itself due to it being one of few successful referenda in Australian history – and also due to the record margin in the vote: 90.77 per cent voting for change.<sup>20</sup>

It is important to note what exactly this referendum did – not only because of frequent misunderstanding – but also because proposals of the Expert Panel and the Committee directly affect these changes.

The 1967 referendum extended the Commonwealth's power to legislate over Aboriginal affairs by striking out the words “other than the aboriginal people in any State” from section 51(xxvi):

*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, ~~other than the aboriginal people in any State~~, for whom it is necessary to make special laws.<sup>21</sup>*

and stipulated that Aborigines should be included in census data by repealing the Constitution's penultimate section, which read:

*127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.<sup>22</sup>*

The referendum was not concerned with voting rights, which had been extended by legislation to Aborigines at Commonwealth level in 1962.<sup>23</sup>

## **2.4. The current inquiry**

In December 2010, the Gillard Government appointed an “Expert Panel on Constitutional Recognition of indigenous Australians” (Expert Panel), co-chaired by Professor Patrick Dodson and Mr Mark Leibler AC. Professor Dodson explained his view of the Panel's rationale thus:

*Recognition of the first peoples in the Constitution sends a message that Australians value Aborigines, that they are important, that they are respected, and we want to deal with the things that have caused us division and discord in the past.<sup>24</sup>*

Professor Dodson's suggestion that indigenous Australians will somehow receive greater value and respect by constitutional change is far from a universal view – including among the indigenous people directly affected.

Lecturer and researcher Dr Anthony Dillon, for example, does not believe the Constitution should be used as a vehicle for recognition of indigenous culture:

*The many thousands of happy, successful Aboriginal people, who are flourishing despite the lack of constitutional recognition of culture, are surely evidence that such recognition is not needed.<sup>25</sup>*

Former ALP national president, now government indigenous affairs adviser, Warren Mundine has said of proposals: “I feel strongly about this – it's a hundred steps too far. I'm opposing it and I'll campaign against it.”<sup>26</sup>

Speaking about this dissent, University of New South Wales law professor George Williams, a supporter of constitutional change, made the point that: “To proceed, the move will not only require strong backing from the community and politicians, but from Aboriginal people. No referendum to recognise them in the constitution should be put without their clear support.”<sup>27</sup>

Following public consultation, the Expert Panel compiled a report of options for constitutional change which it provided to the Federal Government in January 2012.

Subsequently, Parliament established this Committee in November 2012, tasked with further investigating the Expert Panel's recommendations. A temporary *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* was also passed by Parliament, anticipating a future referendum on Aboriginal recognition and related issues.

### 3. Proposals for constitutional change

As mentioned in the introduction, this submission responds to a number of recommendations contained within the Committee's October 2014 *Progress Report*. These, in turn, were based upon initial recommendations received from the Expert Panel.

Following these responses is some commentary on related issues.

#### 3.1. *Repeal of section 25: race-based state voting laws*

**Recommendation 2** of the Committee's October 2014 Progress Report states:

*The committee recommends repealing section 25 of the Constitution.*<sup>28</sup>

Section 25 reads as follows:

*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.*<sup>29</sup>

The "last section" referred to here, namely section 24, sets out how the total number of members of the House of Representatives is determined and the proportion to be elected from each state. The Constitution needed to accommodate the reality that, at the time of Federation, Aboriginal people were entitled to vote in some states but not others, despite all being British Subjects by law.

Queensland had legislated in 1885 to exclude Aboriginal people from voting and Western Australia did so in 1893 – in both cases confirming existing practice.<sup>30</sup>

The practicalities of daily life in these colonies at the time throw some light on this practice. Many indigenous people tended to live traditional lives in remote areas – far removed from towns and settlements. Few spoke English, and transportation and communications were quite rudimentary by modern standards. Given that voting was optional and very few indigenous people would have voted, what became a practice was ultimately formalised in legislation.

In 1959, the federal Joint Committee on Constitutional Review acknowledged the practical impediments at Federation to full participation of indigenous people in voting. Its report concluded that:

*[a]t Federation, the available means of communication made it almost impossible to obtain an accurate count of the aboriginal population of a State. Some difficulty will continue to be experienced in counting the number of aborigines who do not live in proximity to settlements but the means of communication and available sources of contact with aborigines of nomadic habit have improved so much since Federation that the Committee believes that there are no longer insuperable barriers to the carrying out of a satisfactory census of the aboriginal population of the States.*<sup>31</sup>

Gradually, the issues that gave rise to the situation at Federation were slowly overcome and the presence of section 25 in the Australian Constitution served as an incentive to repeal race-based voting laws at state level. Western Australia finally extended franchise in 1962 and Queensland, the last Australian jurisdiction, did so in 1965.<sup>32</sup>

Given that the historical circumstances that led to the inclusion of section 25 in the Constitution no longer apply, it could be repealed. However, if its presence causes no problems, its repeal hardly warrants a referendum (unless other changes are proposed in the same referendum).

### 3.2. Constitutional recognition of languages

**Recommendation 3** of the Committee's October 2014 Progress Report states:

*The committee recommends not inserting the Expert Panel's proposed new section 127A.<sup>33</sup>*

The Expert Panel proposed a new section 127A to incorporate constitutional recognition of languages:

**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.*

There is currently no constitutional recognition of languages. English operates as Australia's de facto official language by default. Placing any language in the Constitution without a clear purpose would leave such a section open to judicial interpretation and potentially unintended consequences.

This is particularly problematic when the sheer number (hundreds) of indigenous languages is considered, not to mention their differing status (ranging from actively spoken to endangered to extinct).

While respecting indigenous heritage, there is great value in Australians being united by a common language. The Committee is right to recommend against adopting this proposal.

### 3.3. Repeal of section 51(xxvi): power to make race-based laws

**Recommendation 4** of the Committee's October 2014 Progress Report states:

*The committee recommends the repeal or amendment of section 51(xxvi) to remove the reference to race.<sup>34</sup>*

Section 51 lists the powers of the Commonwealth Parliament to make laws for the peace, order, and good government of the Commonwealth, with 51(xxvi) specifically authorising laws with respect to:

*The people of any race for whom it is deemed necessary to make special laws.<sup>35</sup>*

The repeal of section 51(xxvi) would be not only problematic if undertaken in isolation from other constitutional change, but also of extreme irony given that the successful 1967 referendum expanded its scope by removing the words: "other than the aboriginal people in any State."<sup>36</sup>

Undertaken alone, such repeal would remove the constitutional basis for race-based laws that have been considered desirable at several stages in Australia's history, including some laws enacted in recent years. Both the Expert Panel and the Committee acknowledge this problem through proposing (in recommendation 5) a means for maintaining the legal basis of laws concerning Aborigines and Torres Strait Islanders, namely a new section 51A or a revised 51(xxvi).

No consideration seems to have been given to the question of what other Commonwealth laws currently rely on this power for their validity. Before any proposal to repeal or alter this section is



progressed, a thorough review of current legislation should be undertaken to identify any laws that depend on section 51(xxvi). Consideration should also be given to possible exceptional situations in future that might warrant such laws, such as for defence or national security reasons.

The general “race power” of section 51(xxvi) is already constrained by the prohibition of racial discrimination in the *Racial Discrimination Act 1975*. Any exception to the provisions of this Act would require the support of both houses of the Commonwealth Parliament, after full parliamentary debate. This provides strong protection against abuse of the race power, while retaining the flexibility to respond, if necessary, to unforeseen future circumstances.

Section 51(xxvi) should consequently not be repealed or amended at this time.

### **3.4. New sections to recognise indigenous Australians**

**Recommendation 5** of the Committee’s October 2014 Progress Report states:

*The committee recommends that the Parliament consider three structural options for constitutional recognition of Aboriginal and Torres Strait Islander peoples that follow, noting the committee's view that any proposal must preserve both existing Commonwealth laws relying on section 51(xxvi) and the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples.<sup>37</sup>*

In seeking to preserve Parliament's power to legislate for Aboriginal and Torres Strait Islander peoples, three options have been put forward. The first two options propose a new section 51A, both of which maintain the powers mentioned, but also extend further to cover issues of recognition and racial discrimination. The third option is a reworded variation of the existing section 51(xxvi).

#### **OPTION 1 – New section 51A with a broad prohibition of racial discrimination incorporating the Expert Panel's section 116A amendment**

##### **51A Recognition of Aboriginal and Torres Strait Islander Peoples**

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

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

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

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

##### **116A Prohibition of racial discrimination**

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

*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;*

#### **OPTION 2 – New section 51A with a limited prohibition of discrimination by the Commonwealth against Aboriginal and Torres Strait Islander peoples**

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

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

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

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

(1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.

(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 Aboriginal and Torres Strait Islander peoples.

In both options, sections which would maintain Parliament's ability to legislate for Aboriginal and Torres Strait Islander affairs are coupled with a preamble of recognition and provisions against racial discrimination. The latter provisions are problematic under both options, especially given that questions of discrimination, disadvantage, benefit, and so on, would almost certainly become the domain of the courts, rather than the Executive or Parliament of the day.

Professor Anne Twomey, Director of the Constitutional Reform Unit at the University of Sydney summarises this outcome, saying:

*controversy will hang on the fact that it would ultimately be a matter for a court to decide what was, or was not, for the advancement of Indigenous Australians (although, no doubt, it would give a degree of deference to the view of the Parliament). On the whole, Australians have proved most reluctant to shift such assessments from the Parliaments to the courts.*<sup>38</sup>

Professor Twomey also notes that insertion of constitutional anti-discrimination provisions would cover only race, but not other forms of discrimination:

*Some are also likely to argue that if an anti-discrimination provision is to be included in the Constitution, then it should not just be directed at race but also at discrimination against women and other groups. Back in the 1890s when s 25 of the Constitution was drafted, it penalised States that enacted racially discriminatory voting laws, but did not penalise States that excluded women from voting, despite the far greater disparity in voting numbers that this caused. To perpetuate the privileging of anti-racial discrimination measures over anti-sex discrimination measures in the twenty-first century would seem inappropriate to some.*<sup>39</sup>

It is important for consistency – let alone the clarity of any constitutional referendum proposals – that the issue of discrimination should continue to be the domain of legislation, not the Constitution.

Returning to the preamble of the proposed section 51A, both options include the words “recognising the continuing cultures”. A number of commentators have raised concerns about the possible misinterpretation and abuse of these words. Warren Mundine, for example, has stated his “massive concern” at opening a “Pandora's box” which could see protection for traditional customs such as child brides.<sup>40</sup>

Former MP and minister Gary Johns has covered similar concerns as contributor and editor of his recent book *Recognise What?*<sup>41</sup>

In the book's introduction, Mr Johns references the *Recognise* campaign and the constitutional creation of "separate and special rights for Aborigines ... on the basis that Aborigines are assumed to have a unique culture". He then adds: "This may be so, but the historical record reveals that while the Aboriginal culture may include admirable respects, it also includes a number of less than attractive beliefs and practices."<sup>42</sup>

Some of these beliefs and practices are raised by Mr Johns and other contributors and include: "demand sharing" or "humbugging" of resources,<sup>43</sup> ritual initiation involving genital mutilation,<sup>44</sup> and traditional systems of violent "payback".<sup>45</sup> The implication is that courts could well determine, in time, that traditional law survives as a system existing parallel with Australian common and statutory law – echoing somewhat the concerns of Professor Twomey as stated earlier.

Contributing to Mr Johns' book, Dr Anthony Dillon raises the prospect of a "lawyer's picnic" and an accentuation of "the us-vs-them divide" if Aboriginal law receives constitutional privilege.<sup>46</sup>

Options 1 and 2 of the proposed new section 51A are extremely problematic, would likely create unforeseen and unintended consequences, and should not be pursued.

***OPTION 3 – Redraft section 51(xxvi) to allow the Commonwealth Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples with the option of enacting an Act of Recognition***

***51 Legislative Powers of the Parliament***

*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) Aboriginal and Torres Strait Islander peoples.*

Option 3 maintains the Commonwealth's ability to legislate with respect to Aboriginal and Torres Strait Islander peoples, but removes the ability to legislate for any other race. As with the proposed repeal of section 51(xxvi) removing this more general constitutional race power should only be considered in light of all affected legislation – an issue which falls outside the scope of this inquiry.

This option would also represent an extraordinary reversal of the motivation for the 1967 referendum. On that occasion, over 90% of Australians voted for generality, equality and unity. This proposal would replace the generality of the current section 51(xxvi) with the particularity of applying only to Aboriginal and Torres Strait Islander people. It would abandon equality under the law for all Australians and instead entrench inequality, with indigenous people being governed differently from other Australians. Instead of cultivating unity, it would lead to disunity.

The proposal also breaches the fundamental concept of the rule of law. As Macquarie University professor Cameron Stewart wrote:

*Primarily, the rule of law principle requires that the legal system comply with minimum standards of certainty, generality and equality.*<sup>47</sup>

Professor Stewart elaborated these concepts affirming:

*the value of **certainty**, which requires that all law should be prospective, open, clear and stable so as to maximise the autonomy of the individual... **generality**, which requires that in addressing the control of the conduct of people from different classes, law must be impersonal and non-particularised. **Equality** ... embodies the idea that all people should be equally subject to the law.*<sup>48</sup>

The rule of law is such a vitally important element in the protection of our freedoms that it should not be abandoned. Consequently, option 3 should not be pursued.

Option 3 would also “allow” the Parliament to pass an *Act of Recognition*. This is pointless given that Parliament already has such a power – demonstrated in part by its passing of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*. Furthermore, if such an Act was referenced within – or even ordered by – the Constitution, that Act would arguably take on a quasi-constitutional nature itself. Any legislative action by Parliament should be undertaken separately from Constitutional reform with due consideration and consultation.

In all three suggested options, it is important to note the clear contrast with the intent of the “Day of Mourning” pioneers and the 1967 referendum outcome. In both cases, the spirit echoed Sir Henry Parkes' vision of “one people, one destiny”, seeking to overcome any past divisions, and calling for equality for all Australians.

### 3.5. *Timing of a referendum*

**Recommendation 6** of the Committee’s October 2014 Progress Report states:

*The committee recommends that a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution take place at or shortly after the next federal election in 2016.*<sup>49</sup>

A referendum should only occur after a clear set of proposals has been decided upon by Parliament, after consultation with states and territories, with adequate time provided for balanced public consideration. It should also take place separately from the distractions of a federal election campaign.

### 3.6. *Equal campaign funding*

Among its other recommendations, the Expert Panel called for a “properly resourced public education and awareness program” with legislative change if necessary “to allow adequate funding of such a program” as well as calling for Commonwealth funding of websites and potentially bodies.<sup>50</sup>

It is difficult to gauge public support for constitutional change, especially in the absence of a firm set of proposals. Regardless of the anticipated or estimated public response to any proposal, it is in the best interest of informed public debate that both “yes” and potential “no” cases receive equal public funding.

## 4. Conclusion

Any Constitutional referendum must address a clear need, have regard to potential effects (both intended and unintended), and see a fair and balanced campaign for public consideration.

As the Committee prepares its final report, its attention is respectfully drawn to the following recommendations summarised from this submission:

#### **Recommendation 1: repeal of section 25 – race-based state voting laws**

Section 25 could be repealed, having served its purpose, but does not alone justify a referendum.

### **Recommendation 2: constitutional recognition of languages**

The proposed new section 127A should not be put to a referendum.

### **Recommendation 3: repeal of section 51(xxvi) – power to make race-based laws**

Repeal of this section, which undertaken alone would undo a power granted by the 1967 referendum, should not occur without a clear understanding of all related consequences.

### **Recommendation 4: new sections to recognise indigenous Australians**

Options 1 and 2 cannot be supported due to the risk of executive and parliamentary functions shifting to the courts, as well as the potential for a parallel legal system.

Option 3 should not be accepted because it would reverse the 1967 constitutional change and treat indigenous Australians differently from other Australians.

All options run the risk of invalidating any existing laws that rely on section 51(xxvi) and entrenching inequality.

### **Recommendation 5: referendum timing**

A referendum should only occur after all stakeholders – including all other Australian jurisdictions – have been consulted on firm proposals. A referendum should not be held at the same time as a federal election to avoid the distractions of other issues.

### **Recommendation 6: equal campaign funding**

In the event of a referendum, public interest is best served by a fair and balanced campaign in which both “yes” and “no” campaigns receive equal funding.

## **5. Endnotes**

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<sup>1</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Committee home page, accessed 15 January 2015: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples)

<sup>2</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, October 2014.

<sup>3</sup> “Native American Citizenship: 1924”, NebraskaStudies.org, p 1, accessed 18 January 2015: [http://www.nebraskastudies.org/0700/frameset\\_reset.html?http://www.nebraskastudies.org/0700/stories/0701\\_0140.html](http://www.nebraskastudies.org/0700/frameset_reset.html?http://www.nebraskastudies.org/0700/stories/0701_0140.html)

<sup>4</sup> Ibid.

<sup>5</sup> “Native American Citizenship: 1924 Indian Citizenship Act”, NebraskaStudies.org, op cit., p 7.

<sup>6</sup> Australian Electoral Commission, “Electoral milestones for Indigenous Australians”, updated 25 September 2014, accessed 15 January 2015: <http://www.aec.gov.au/indigenous/milestones.htm>

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> The Henry Parkes Foundation, "In his own words...", accessed 16 January 2015: <http://parkesfoundation.org.au/resources/sir-henry-parkes-2/in-his-own-words/>

<sup>13</sup> Genesis 1: 26-27.

<sup>14</sup> Acts of the Apostles 17:26 and 28.

<sup>15</sup> Job 31:15.

<sup>16</sup> Galatians 3:28.

<sup>17</sup> "Remembering Jack Patten, 1905-1957", accessed 19 January 2015: <http://www.pattenproject.com/jack/>

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> National Archives of Australia, "The 1967 referendum – Fact sheet 150", accessed 15 January: <http://www.naa.gov.au/collection/fact-sheets/fs150.aspx>

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Australian Electoral Commission, "Electoral milestones for Indigenous Australians", op cit.

<sup>24</sup> Wesley Aird, "Recognition is Blackfella Politics", in Gary Johns, *Recognise What?*, Connor Court Publishing, 2014, p. 48.

<sup>25</sup> Anthony Dillon, "A Lot Could, and Will, Go Wrong", in *Recognise What?*, op cit., p. 60.

<sup>26</sup> Patricia Karvelas, "Warren Mundine to fight new race power in Constitution", *The Australian*, 19 December 2011.

<sup>27</sup> George Williams, "Time to fix a silence at the heart of Australia's constitution", *The Age*, 18 July 2014.

<sup>28</sup> Joint Select Committee, *Progress Report*, October 2014, p. 3.

<sup>29</sup> *Australian Constitution*, Parliament of Australia, section 25.

<sup>30</sup> Australian Electoral Commission, "Electoral milestones for Indigenous Australians", op cit.

<sup>31</sup> *Joint Committee on Constitutional Review Report*, Senator O'Sullivan (Chairman), Australian Parliament, 1959, p 55.

<sup>32</sup> Australian Electoral Commission, "Electoral milestones for Indigenous Australians", op cit.

<sup>33</sup> Joint Select Committee, *Progress Report*, para. 1.13, p. 4.

<sup>34</sup> Ibid., para. 1.17.

<sup>35</sup> *Australian Constitution*, Parliament of Australia, section 51(xxvi).

<sup>36</sup> National Archives of Australia, "The 1967 referendum – Fact sheet 150".

<sup>37</sup> Joint Select Committee, *Progress Report*, October 2014, p. 5.

<sup>38</sup> Anne Twomey, "Indigenous Constitutional Recognition Explained – The Issues, Risks and Options", Constitutional Reform Unit, University of Sydney Law School, 26 January 2012, p.7.

<sup>39</sup> *Ibid.*, p.8.

<sup>40</sup> Stuart Rintoul, "Race power opens Pandora's box", *The Australian*, 22 December 2011.

<sup>41</sup> Gary Johns (ed.), *Recognise What?*, Connor Court Publishing, 2014.

<sup>42</sup> *Ibid.*, p. xv.

<sup>43</sup> *Ibid.*

<sup>44</sup> Alistair Crooks, "An Aboriginal constitution", in *Recognise What?*, op cit., pp 15-16.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, pp 60-61.

<sup>47</sup> Cameron Stewart, "The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law", *Macquarie Law Journal*, 2004, Vol 4, p 135.

<sup>48</sup> Stewart, p 137.

<sup>49</sup> Joint Select Committee, *Progress Report*, para. 1.41, p. 11.

<sup>50</sup> Joint Select Committee, *Progress Report*, appendix 2, p. 16.