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Committee Secretary

Joint Select Committee on Constitutional Recognition of Aboriginal & Torres Strait Islander Peoples  
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### **AIATSIS position on proposal for constitutional recognition**

The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has invited the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to express its views at a roundtable in Sydney on 30 April 2013 on the recommendations of the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples and the extent to which they should form the basis for any constitutional amendment; and the terms of a constitutional amendment that is most likely to be successful at a future referendum.

The Committee asked AIATSIS to provide a brief written submission by 17 April 2013 outlining AIATSIS' views on the matter, to be published on the Committee's website.

The simplest way to capture AIATSIS' views in relation to the Expert Panel's recommendations is to reproduce each recommendation and include relevant comments underneath. References to AIATSIS' previous submission and recommendations are references to AIATSIS' submission to the Expert Panel in October 2011 (Appendix 1 of this submission).

Before proceeding to the specific recommendations, two initial points should be made:

- Firstly, it is important to regard the recommendations of the Expert Panel as the result of a process of consultation, balance and compromise. In its previous submission to the Expert Panel, AIATSIS drew attention to a number of more extensive proposals made by other advocates. The purpose of this was to put the 'mainstream' proposals (such as those recommended by the Expert Panel) into context and perspective. By highlighting these more 'radical' proposals, one may better view the 'mainstream' proposals as the result of a compromise that already makes allowances for the need to gain broad public support in a referendum. This usefully avoids the perception that the mainstream proposals represent the ideal 'wishlist' from which compromises downwards should be made in the name of pragmatism.
- Secondly, in settling on a referendum proposal it is important to identify the best proposal that is capable of gaining sufficient popular support to satisfy the requirements for constitutional amendment. Such an approach is preferable to merely attempting to identify the proposal that is 'most likely to be successful at a future referendum'. Constitutional recognition of Aboriginal and

Torres Strait Islander peoples has specific objectives: it is intended to address unfinished business left over from Australia's history of colonisation and dispossession; it aims establish a definition of Australian nationhood that is substantively inclusive; it seeks to acknowledge the prior and continuing existence of Indigenous political and legal entities in this country. Some proposals are better suited to achieving these objectives than others. Accordingly, AIATSIS would recommend that the Joint Select Committee should aim to identify the best proposal that can succeed, rather than merely the most popular.

## **Substantive recommendations**

The Expert Panel's substantive recommendations were as follows:

### 1. That section 25 be repealed.

- AIATSIS made this recommendation in its previous submission (AIATSIS' recommendation #2, discussed at p10 of the AIATSIS submission).
- Section 25 contemplates, and accommodates, racism within the federal structure. Even though the section acts as a disincentive to discriminatory exclusion from voting, it nevertheless has no place within the Constitution of a nation which holds equality as a core value. **AIATSIS supports its removal.**

### 2. That section 51(xxvi) be repealed.

- AIATSIS made this recommendation with some qualifications (AIATSIS recommendation #3, pp10-12).
- There are two primary considerations:
  - Firstly, the need to change the Constitution so that it no would longer expressly empower the Commonwealth to make laws against the interests of a particular 'racial' group.
  - Secondly, the need to retain a constitutional head of power to support legislation that benefits Aboriginal and Torres Strait Islander peoples, such as the *Native Title Act 1993*.
- **AIATSIS supports the removal of s 51(xxvi)** (thus addressing the first consideration) **provided that a replacement head of power is inserted** (to address the second consideration). This could involve either a specifically 'beneficial' power, or a neutral power constrained by a non-discrimination clause (as proposed by the Expert Panel). AIATSIS' preference is for the latter.

### 3. That a new 'section 51A' be inserted.

- **AIATSIS supports the insertion of a head of power as proposed in s 51A provided it is coupled with a prohibition on racial discrimination (as is proposed in s 116A).** A neutrally-worded power combined with an anti-discrimination provision is an appropriate means of supporting Commonwealth legislation relating to Aboriginal and Torres Strait Islander peoples.
- **AIATSIS supports the proposal for a statement of recognition, whether in a preamble or in the body of the Constitution. (Recommendation #1, pp6-10). AIATSIS has no objection to the combination of a statement of recognition and a head of power in a single section.**
- AIATSIS' previous submission strongly rejected any proposal to accompany such a statement with any legal disclaimer, and did not support the inclusion of a statement of values. **AIATSIS welcomes the absence of these aspects in the proposed s 51A.**

4. That a new 'section 116A' be inserted.

- AIATSIS made this recommendation (AIATSIS recommendation #4, p12).
- **AIATSIS supports the inclusion of a new section along the lines of s 116A. Some further attention to the precise wording, however, may be required.**
- AIATSIS recommends that the section should refer to 'special measures' as an explicit indication that overseas and international jurisprudence on 'special measures' should be considered in its interpretation.
- In presenting the proposal to the public, significant care and effort will be required to distinguish the entrenched non-discrimination clause from the more controversial aspects of *the Racial Discrimination Act 1975* and the recently proposed *Human Rights and Anti-Discrimination Bill 2012* relating to offensive or insulting conduct.<sup>1</sup>

5. That a new 'section 127A' be inserted.

- AIATSIS did not address the issue of languages in its previous submission, but considers that the proposed s 127A is appropriate, important, and capable of mustering sufficient public support.
- **AIATSIS supports the inclusion of s 127A in the referendum question.**

### Procedural recommendations

In addition to its substantial recommendations, the Expert Panel made the following procedural recommendations:

- In the interests of simplicity, there should be a single referendum question in relation to the package of proposals on constitutional recognition of Aboriginal and Torres Strait Islander peoples set out in the draft Bill (Chapter 11).*
  - **AIATSIS supports this proposal.** The provision of internal options would serve only to split the 'yes' vote, and also to complicate the task of communicating the meaning of the changes to the public.
- Before making a decision to proceed to a referendum, the Government should consult with the Opposition, the Greens and the independent members of Parliament, and with State and Territory governments and oppositions, in relation to the timing of the referendum and the content of the proposals.*
  - **AIATSIS supports this proposal.**
- The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.*
  - **AIATSIS supports this proposal,** in light of the importance of political leadership to the prospects of success.
  - In its previous submission, AIATSIS warned against imposing a higher threshold on assessing the referendum than is actually required by the Constitution (pp20-21). A single individual or party ought not be given an effective veto over the question to be put to referendum, and a referendum question that is capable of supporting sufficient support should not be set aside simply because there is a different proposal that would gain greater support but contribute less to the objectives of constitutional recognition. Nevertheless, if significant

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<sup>1</sup> Section 18C *Racial Discrimination Act 1975*; paragraph 19(2)(b) *Human Rights and Anti-Discrimination Bill 2012*.

political actors do not support the proposal, their lack of support may pose serious damage to the prospects of success, and so it is prudent to proceed only when all major actors have indicated their support.

- d. *The referendum should not be held at the same time as a referendum on constitutional recognition of local government.*
- **AIATSIS supports this recommendation**, having made it in the previous submission (AIATSIS recommendation #7, p19).
  - AIATSIS also recommends against holding the referendum in conjunction with a general election (p20). Both recommendations are founded in the risks of political controversy or confusion of key messages, that may arise if the referendum is not held by itself.
- e. *Before the referendum is held, there should be a properly resourced public education and awareness program. If necessary, legislative change should occur to allow adequate funding of such a program.*
- **AIATSIS supports this recommendation**, and gave arguments in support in its submission regarding the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (January 2013). (Appendix 2 to this submission)
- f. *The Government should take steps, including through commitment of adequate financial resources, to maintain the momentum for recognition, including the widespread public support established through the YouMeUnity website, and to educate Australians about the Constitution and the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Reconciliation Australia could be involved in this process.*
- **See previous comment.**
- g. *If the Government decides to put to referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples other than the proposals recommended by the Panel, it should consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.*
- **AIATSIS supports this recommendation.**

AIATSIS thanks the Joint Select Committee for its invitation to comment, and looks forward to participating in the roundtable discussion on 30 April 2013.

For further information or other inquiries, please contact AIATSIS legal researcher Nick Duff at [nick.duff@aiatsis.gov.au](mailto:nick.duff@aiatsis.gov.au) or (02) 6246 1160.

Yours sincerely,

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