DAVIS, Professor Megan, University of New South Wales

Evidence was taken via teleconference—

CHAIR: I apologise on behalf of my co-chair, Mr Leeser, who is unavailable today but is keen to be with this committee on every future occasion, and on behalf of other absent members of the committee. Thank you for meeting with the committee today. The committee has been asked by the Commonwealth parliament to look into constitutional recognition relating to Aboriginal and Torres Strait Islander peoples. The resolution of appointment outlines in more detail the aspects for the committee's consideration. As co-chairs of the committee we have made statements expressing our wish to hear more from First Nations peoples as we start our work. We've also explained that we will continue to receive submissions and hear more views around Australia in coming months.

We need to ensure everyone present is aware of procedural considerations. Today the committee is taking a *Hansard* record of the proceedings, but they are not being broadcast. The committee may wish to make the *Hansard* record public at a later date, but we will seek your views on this before doing so. If you feel very strongly that you don't want your views recorded in any way, we'll give consideration to that. When you provide information to a committee, you are covered by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage you on account of evidence given, and such action may be treated by the parliament as a contempt. It is also a contempt to give false or misleading information. If you make an adverse comment about an individual or organisation, that individual or organisation will be made aware of the comment and be given a reasonable opportunity to respond to the committee. Would you like to make a brief opening statement?

Prof. Davis: Sorry Patrick, I didn't prepare one.

CHAIR: That's fine. If you don't wish to say something, we'll go straight to questions.

Prof. Davis: I'm happy to go straight to questions.

CHAIR: Thank you for being available. I know you've just had an epic journey around the world, especially to Ireland, and are back in the country only recently. I'm not sure if you're familiar with our terms of reference.

Prof. Davis: I have them here.

CHAIR: There are basically four components, maybe five. There is the question of constitutional matters; the question of legislation; the question of the ways in which people are consulted and whether that leads to self-determination or greater economic capacity; the question of the makarrata, truth-telling and agreement-making issues; and the broader question of where we're trying to go to in the context of our history and Australia's future.

Ms McGOWAN: Professor, I'm interested that you were on the expert panel. Could you give us some of your wisdom about how the expert panel worked, if there is anything we can learn from how it went about its task, and some of the findings from that which would be relevant to us as we move along in our task.

Prof. Davis: I was on the expert panel with Patrick, Noel and many others. Having been on the Referendum Council as well, I've been reflecting on the differences between the two and the shift in community appetite for reform. The first point I would make in relation to the expert panel is it was an expert panel. We as experts—I don't know whether we want to call ourselves experts; we didn't like to at the time—determined the reforms. That's very different to what the Referendum Council did. The Referendum Council took those key reforms of the expert panel, in addition to two more. I think those reforms reflected the time of that panel. In particular I reflect a lot, Patrick, on our emphasis on 51(xxvi) and 116A, particularly given it was relatively contemporaneous to the decision in Kartinyeri as well as actions by the federal parliament that led to the suspension of the RDA or the use of the race power to single out specific Aboriginal rights for detrimental treatment. That was first and foremost in our minds then.

The Referendum Council took those options to Aboriginal communities, and I found a significant difference in sentiment. The Indigenous Advancement Strategy and a number of policies over a period of five to seven years had had a dramatic impact on communities and—it's a very dramatic word to use—decimated them, which meant the Aboriginal domain looked very different to when we did our work back in 2011. In talking about constitutional recognition last year we had to build in an extra day of dialogue to allow people to ventilate pronounced concerns about the dissonance of Commonwealth policy settings that want to recognise us at the same time as chipping away at the distinctiveness of communities as Aboriginal and Torres Strait Islander entities. That point should be made in relation to the emphasis on which reforms were important and which may not have been.

I suspect—and Patrick might differ on this—that to some degree, although the four criteria we developed in the expert panel were important at the time, when you develop criteria like those, they can become a little bit rigid and fence you in. People can adopt them in a very absolute fashion. In any event, studying those four criteria post

Referendum Council, I think the expert panel definitely emphasised four and three but the Referendum Council focused primarily on one of the criteria:

- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples

We as a council were very upfront about that. We felt that's where we had to focus our attentions—what a sample of Aboriginal and Torres Strait Islander people want. As with any law reform process, we decided what the reforms might be, then were led by the public submissions. From then on it followed a pretty predictable route of society making submissions with respect to the reforms we put on the table. The recommendations very much followed what we set out. I don't know if that's very helpful. The reach of our consultation around the country was very comprehensive. The turnout in Aboriginal and Torres Strait Islander communities wasn't huge, and so-so in non-Indigenous communities, but this is a continuum. That was the beginning of the process; a lot has happened since with the Anderson review, the other joint select parliamentary committee, the Referendum Council and then this new committee. Sorry, that's all I can think of at this point.

Ms McGOWAN: Have you learned anything from the process that you could share with us?

Prof. Davis: No, but I will reflect on that question, if that's okay, and maybe say something a bit later. I can't think of anything profound right now. I will say one thing, though. I have studied many constitutional recognition processes around the world. Our Constitution is so rigid because of the emphasis on the historical fact of bipartisanship. In these kinds of recognition projects it is absolutely vital to have the support of the to-be-recognised, and I think up until the Referendum Council process we hadn't yet—not so much privileged—set about determining that. To a certain extent the expert panel have done it, but I want to emphasise the relationship between the recogniser and the to-be-recognised. If the to be recognised aren't on board with that reform, you can do the reform; you just can't call it recognition. That's an important point to keep in mind in a recognition exercise.

Ms LEY: Professor Davis, what models of recognition around the world have attracted you and what lessons might we learn? I thought it was interesting that you just mentioned those examples.

Prof. Davis: With my UN hat on, there are approximately 194 member states and probably about 70 with significant indigenous populations. All of them do recognition in a number of ways. The first point to make is that recognition sits on a spectrum so that one end of the recognition spectrum might be something like acknowledgment and a preamble. That would be what we call weak recognition. At the other end of the spectrum might be something like an autonomous region like the Russian Federation, Nunavut Canada or the full-blown treaties in Canada. Calling it weak isn't to diminish that full recognition; it's simply to say that it doesn't require or invite the force of law as much down the weak end of the spectrum as it does at the strong end of the spectrum.

A key factor—and this was discussed in the dialogues—was this notion of how whitefellas do law and what are the important ways that they do law through the force of law. That is to say: you pass laws to compel governments to do something or not do something—not really compel but to stop governments from doing something. As a junior scholar, I was always very attracted to section 116A which we did in the expert panel on racial nondiscrimination course for many reasons—historical and the key decisions of the federal parliament or the High Court in relation to discrimination against Aboriginal people on the basis of race. As I've got older—10 years on from that process—I've become more interested in the models that I've seen around the world, which are models that enhance the participation of indigenous peoples in the democratic life of a state.

The bulk of recognition mechanisms, I'd argue, around the world are ones that compel governments to listen to indigenous people in relation to laws and policies. Some of those are just laws in constitutions or amendments to constitutions. Others are institutions. The most commonly cited institutions will be things like the Sami parliament in Finland, Norway and Sweden, for example. They have very different kinds of legislation. Sweden, for example, is a lot more autonomous then, say, the Finnish Sami parliament. What they do is allow indigenous input into laws and policies that are passed by the state. So there are those kinds of models.

The institutional models are probably the primary ways in which liberal democracies recognise indigenous populations. They do it in that way. In addition to things like treaties, agreements and other constructive arrangements, which is how they're referred to, there might be other ways in which the state decides to recognise indigenous peoples as an entity, and associated with that formal recognition other rights and entitlements arise as a consequence of that. That might be something relating to land justice, reparations and compensation and other things related to history such as treaty commissions or, in some instances, an agreement to disagree on historical facts and determine a pathway forward in terms of engagement.

In some jurisdictions—so in South Africa, New Caledonia—you've got customary senates and seats where you've got traditional elders or owners contributing to law and policy. In some countries—and I think this is a

really fascinating example—you've got indigenous ombudsmen who deal with the administrative law aspects of indigenous people's lives and rights. I think the Russian Federation's got a really interesting example of that. In addition to that, some member states have designated parliamentary seats reserved for Indigenous people. There are multiple ways in which the states do it, but I do think the primary way has been through public institutions.

Ms BURNEY: Thank you for that. I think that was really helpful not only to give an understanding of the breadth of what we might mean in relation to recognition but also to be very much reminded of the expert panel, your journey—which I think is important—and the different historical contexts we're working in now in relation to the Referendum Council's outcomes. I suppose my question is on timing. Obviously the Referendum Council's recommendation about constitutional reform went to an entrenched voice within the Constitution. You've given us a whole range of examples of ways that that could happen outside of constitutional reform. I'm not making any comment; I'm just saying it was great to hear that.

We've had other people saying how frustrated they are at the time things are taking and the fact that things don't seem to change in the Aboriginal space no matter what we do. Whether we're lawmakers, journalists or professors, there are the incarceration rates, kids being removed et cetera. Can you comment on how you're feeling, as someone that has been part of the Aboriginal movement for 20-plus years now, probably more, on that level of frustration and why you think that the Referendum Council's recommendations would make a difference?

Prof. Davis: I suppose I'm not dissimilar to a lot of people in that there's a level of exhaustion that kicks in after a while when you're continually participating in reform processes and you continue to get a no from the state. That can be really demoralising not just for me but for a lot of people. One of the difficulties we had as the Referendum Council was that when we went out to communities it took a while to build trust simply because people kept saying, 'You've been here before'—well, not us, although I had because I had been on the expert panel—'you're asking again.' There was no good faith that anything was going to happen. We would have to ask people to suspend their disbelief that the Australian state and our democratic institutions can reform and can change. We wanted them to suspend that cynicism because the system is made to change. British constitutionalism is about changeability; it's about tradition and change, and our democratic structures are built to change.

We asked them to go on this journey with us—that law reform was about imagining that the world could be better. That is what law reform is: imagining that we can do things better and that Australia can get it right. But to get there you have to think about what that future looks like—'What do you think reform looks like for your community?' That's why we built in that full extra day, to get people to ventilate and take their anger out. Then they would calm down and participate in this exercise of law reform. To get there, you have to imagine the kind of institution you think will get us there. With the dialogues—and you guys would have seen the Referendum Council report—we had a supervised dialogue process with constitutional lawyers. We'd work with land councils in every region who would have people who would facilitate the conversations with Aboriginal and Torres Strait Islander people based on the expert panel recommendations and the voice and treaty making which we had permission to take out to the communities, and they settled on a framework. Uluru was just endorsing the work that had already been done in the dialogue. It was the dialogue that had designed the Uluru outcome. Uluru was merely showing the work and people endorsing the reform.

In the dialogue—and you guys will probably have access to all of the papers and working and peoples' thinking—we did have them prioritise reform: what will make a difference in your region now? The biggest issue was urgency. The saddest experience was listening to elders and old people talk about what they felt was their culture slipping away—they were very hard meetings—and the urgency of some reforms to give hope to people. We didn't take truth telling out, I have to say. That was not an option agreed to by the Prime Minister or the opposition leader. That came purely from the dialogues on that first day. Australian history, Aboriginal history—that was really quite profound and we didn't expect it. It started in Broome and it went right across the country. Because it was so highly ranked, we added it to the top two priorities. The non-discrimination clause ranked really highly too. This idea of a voice to the parliament and agreement making, treaty, which has been a long-time aspiration of our people, ranked higher, and so that framework of 'Voice. Treaty. Truce' was what the dialogues ended up with and what was endorsed at Uluru.

When I look back at the hundred-odd people who participated in the dialogues—and we were very clear with the land councils about the invite list, and I'm sure you've heard this. We wanted it to be 60 per cent traditional owners because we really wanted those who care for country, who are our traditional owners, to have a privileged say in the space. We wanted people who don't normally get to participate to participate. We pissed a lot of people off by not having the usual suspects, and we banned all lawyers too. I didn't realise until the dialogue process just

how irritating lawyers can be in this space! And then we had 20 per cent of our Aboriginal organisations of interested individuals.

I thought structural reform was really clever. It is true to say there has always been an aspiration for some form of mechanism to facilitate agreement making, but I think the voice ranked higher for this key reason: when you look at the working through of the dialogues and the thinking around treaty, what we heard was that a lot of communities felt they were not in a place to participate in agreement making. Treaties and agreement making are sophisticated legal frameworks. You require leverage. You can't just enter into these agreements with nothing. You might be able to, but it might end up looking a lot like a service-delivery agreement and not a treaty. In having the conversations in the regions, it was apparent to me that there needs to be more conversations in the community about what a treaty actually is—are we talking about First Nations agreements? Are we talking about an overarching Australia settlement? And what comes along with those agreements? It's interesting that Victoria took the same route. After some time, they realised that it had to be a sequenced reform—you need to have some sort of institutional mechanism first to enable you to identify who the nations are and what access to resources they have, because not every area of Australia is at the threshold of being able to even contemplate something like treaty agreements or other constructed arrangements.

The other significant point that I think is overlooked in this whole conversation is the number of communities who said they needed dispute resolution services in their communities. Many communities felt that native title had had a really disruptive impact upon families. Families were fighting during the determination process, and after that you had families fighting through the PBC process. That's not to diminish the important gains of native title. The point I'm making is that I thought a very sophisticated response from the dialogue was that not everybody is at a place in their economic development or political development—though I don't want to use the word 'development'—to be able to enter into what are very complex legal agreements. And that's what treaties are. On the other side of a treaty is what you would call a 'lawyers picnic'. It produces treaty law firms and treaty litigation—it's a legal framework. So there was a very strong sense that not everybody would be able to do that, and we didn't want to leave communities behind.

I think the voice was so attractive because that form of recognition, to some extent, reflects the sense of powerless and voicelessness. In the absence of us being able to have that detailed conversation with community about what a treaty is, I think treaties can often be proxies for voicelessness and powerlessness. I suspect that's why the dialogue has designed the reform as 'voice, treaty, truth', the last element being a really powerful one. We consistently heard from people a concern that Australians didn't want to know about Aboriginal culture and about Aboriginal history, and in those conversations about truth telling we had the most powerful stories being told by elders, by people who had been children during massacres. They weren't just stories about massacres and frontier killings; they were also stories about coexistence—how white man and black man had built this country together. It wasn't all negative, and I found that element really powerful.

Once again, what was really novel and surprising to a lot of historians and lawyers was that clearly people wanted that truth telling to be done on a local level—not to have some South African style truth commission but to allow First Nations to map out that truth with local Australian historical societies and local councils. It would be a kind of joint endeavour in local areas. To some extent that is already done across the country at that local level.

In terms of the Referendum Council's final report, the council decided that we could only go forth with recommendations that required a constitutional amendment, and that's why the voice went forward and 'treaty' and 'truth' didn't. There was that kind of technical decision made. I would have preferred us to do a more fulsome recognition of what the dialogues had done, but in any event the voice went forth. But I do think that the structural reforms that the dialogues contemplated and came up with were really clever—a really powerful and earnest expression of what they thought would be meaningful recognition. And it wasn't quite what any of us expected.

I suppose the last thing I'd say is that it was very difficult last year—as Patrick would know—for someone who'd started out as a junior leader to be a leader on the other side of the phone, getting phone calls from younger Aboriginal kids crying after the decision to reject the voice to parliament, and to have to deal with the devastation that was wrought among young people around the country.

My greatest fear, as my constitutional colleagues here will say, is that the downside of what happened last year is that more of our kids lose faith in the rule of law, the Australian democratic system to reform itself, and the parliamentary system. That is something that we discussed with the New South Wales Bar Association and the New South Wales Law Society late last year: how to arrest the feeling that our young kids get—somehow reinforcing the powerlessness and that the system was always going to say no to us despite the reforms we come

up with, particularly with relation to the voice. Of course, when you went to the dialogues, some people wanted a veto. We have to have the conversation that it would have to be advisory, because constitutionally it has to be advisory. Then people would say, 'Why can't we veto?' and then we'd walk through chapters 1, 2 and 3 of the Constitution and the structures of the Constitution. It is the case that we can't veto the Australian parliament. Once you walked people through that, there was an understanding that there was not going to be a veto at this level, but there could be an advisory body that provides up-front political advice to the parliament—the polar opposite to having an entrenched right in the Constitution that you might have to litigate on later. Anyway, Linda, I've rambled for a long time.

Ms BURNEY: No, it's been fantastic. Thank you so much. I'll hand back to Patrick. It's been really excellent. Thank you.

CHAIR: Megan, we going to run out of time yet again on this, but you are welcome to put in a submission to us if you're inclined to, particularly on the pragmatism of going forward. We could continue this discussion for, no doubt, several days. The committee's faced with three or four critical matters: whether we can get consensus around a constitutional matter; whether a legislative response would be useful; whether the current way in which people are being consulted by parliament in the implementation and formation of policy and strategy is sufficient; and whether the makarrata type truth-telling and agreement-making process is a useful process and how that might be taken forward. It would be useful for us with your experience and knowledge of not only the places here but the international awareness you have of much of our First Nations peoples' interaction with other sovereign states. I'm not asking you to have a concluded view, by any means, but it would be useful for us to get some hard comment on how this nation would come to terms with the challenges that we know have been obfuscated for so long. The challenge for us as politicians and the parliament is to step up and do something that might help move the thing a little bit further, but it still leaves many other things to be done. That would be useful for us.

Prof. Davis: Absolutely. I could do that.

CHAIR: Thank you, Megan. We look forward to that submission.

Prof. Davis: Thank you, everybody.