Ready 4 Recognition
Contents

Introduction .........................................................................................3

Historical Background ...................................................................4

What does the Constitution Say Now? .......................................7

How do we change the Constitution? ........................................11

What is the Expert Panel? .........................................................12

What are the Expert Panel recommendations? .......................13

What we will be voting on? .......................................................18

When will we be voting? ............................................................19

Future Possibilities .....................................................................19

How can you contribute? ...........................................................21
How do we change the constitution?
Will changing a piece of paper do anything?
How can we contribute?

Introduction

In 2010, the government made a commitment to hold a national referendum to recognise Aboriginal and Torres Strait Islander peoples in our Constitution. The referendum is a historic opportunity for Australians to come together and recognise Aboriginal and Torres Strait Islanders as the first peoples of Australia, to affirm their full and equal citizenship and to remove the last vestiges of racial discrimination from the Constitution.

However, there is currently not enough public awareness about the issue of Constitutional recognition to hold a successful referendum. For this reason, in early 2013, the Australian Parliament unanimously passed an ‘Act of Recognition’ which strengthens political support for the referendum on both sides of politics and sets out a process for working towards constitutional recognition within the next two years.

The purpose of the Act of Recognition is to build community awareness and support for recognising Indigenous Australians in our Constitution so that all Australians are able to make an informed vote at a referendum.

In line with this aim, this information booklet has been prepared by students and staff at the Australian National University College of Law in order to help Australians understand and make sense of the proposals for the Referendum. We have provided a short and easy to understand summary of the historical background to the referendum, what our Constitution currently says about Aboriginal and Torres Strait Islander peoples and what the proposals for the referendum are.

It is our hope that this booklet will provide answers to some of the most confusing questions on the referendum and also spark people’s interest to find out more and share information with friends and family.
Aboriginal and Torres Strait Islander peoples have lived in what is now known as Australia for over 40,000 years and possibly as long as 70,000 years, making them one of the oldest continuing populations in the world. At the time of British arrival in 1788, there were approximately 250 distinct Indigenous nations, each consisting of different tribes or clans and speaking one or more of hundreds of languages and dialects. Indigenous nations had diverse and complex social systems, religion, art and culture. Many aspects of life were governed according to sophisticated laws and customs including land ownership, kinship and marriage.

Historical Background

Why is history important?

The particular way Australia was colonised and the early treatment of Aboriginal and Torres Strait Islanders by European settlers is the reason why it is considered necessary to change the Constitution today. It is helpful to first understand this history so we can make an informed decision about the referendum proposals.
Colonisation and Terra Nullius

When British colonisers arrived in 1788, international law meant that they could only gain control of the land now called Australia in one of three ways: by conquest (if the British had defeated Indigenous occupants to take control of the land), by cessation (if Indigenous peoples had voluntarily given up the land) or by settlement (if the land had been unoccupied by other peoples).

Initially, Captain Cook was sent to Australia with instructions to take possession of the land with the consent of the Aboriginal people living there, in other words the British hoped to claim Australia through the second option of cessation. However, no consent was ever given, indeed Indigenous peoples fought to resist colonisation, often suffering brutal counterattacks and massacres by European settlers as a result.

Instead of claiming the land by ‘cessation’ or consent, British occupation was justified by claiming that Australia had been ‘settled’ and that the land was terra nullius, meaning that it belonged to no-one. This idea that Australia was uninhabited because Indigenous peoples were considered ‘so low in the social scale that they could not be recognised’ was rejected in 1992 by the High Court in the Mabo decision.

Up until Mabo, however, terra nullius was the accepted basis of the British acquiring control over Australia. The idea that Australia was terra nullius was used to justify the forcible removal of Indigenous peoples from their land without consent or compensation, as well as policies which treated Indigenous peoples as less human than other Australians or as enemy foreigners in the country where they had lived for generations.
Race was one of central issues discussed during the creation of the Constitution, as many colonies were concerned about immigration from Asia and wanted the new national government to control and restrict entry and citizenship to create a ‘white Australia’. However, there was almost no attention paid to the plight of Indigenous peoples because it was believed at the time that they would eventually become extinct and die out. As a result, Aboriginal peoples as well as people from the Torres Strait Islands (which had become part of Queensland in 1879) were excluded from discussion or voting on the Constitution, and the new document largely ignored their existence within the new nation.

Aboriginal and Torres Strait Islander peoples did not participate in the Constitutional Conventions and they were not able to vote for the delegates they wanted to attend the Conventions, with the exception of South Australia. Further, the Constitution made only two references to Indigenous peoples, the most important of which was to exclude them from the scope of the national government’s powers, leaving it up to the states to formulate policies affecting them.

As the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples has pointed out, ‘this exclusion from the framing of the nation’s Constitution continued a pattern of marginalisation and systematic discrimination, the consequences of which endure today’.

Federation and the Creation of the Constitution

For more than 100 years after colonisation and the adoption of terra nullius, Australia did not exist as a single nation and instead was a collection of six British colonies under the authority of the British Parliament. These colonies were New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania.

In the 1890s the colonies began to discuss joining together to create a ‘federation’ or single nation which would be set out in a new Constitution. Representatives of each colony met at meetings called Constitutional Conventions to agree on a draft constitution. After five conventions, the terms of the constitution were decided on and voted on in a series of referenda. The federation and the new constitution came into force in 1901.
The Constitution is Australia’s founding legal document. It defines the basic relationships between the people and government as well as the way our society is to function. In particular, the Australian Constitution sets out the relationships between the national government (called the ‘Federal’ or ‘Commonwealth’ government) and the governments of the Australian States and territories. The Constitution gives a number of specific ‘powers’ to the Federal government and leaves other powers to the State. Legislation or laws which are passed by the Federal government must fall within one of these ‘powers’ if it is to be considered ‘valid’. Laws or parts of laws which do not conform to one of these powers can be challenged in the High Court and declared invalid.

What is the Constitution and what does it do?

The Constitution is Australia’s founding legal document. It defines the basic relationships between the people and government as well as the way our society is to function. In particular, the Australian Constitution sets out the relationships between the national government (called the ‘Federal’ or ‘Commonwealth’ government) and the governments of the Australian States and territories. The Constitution gives a number of specific ‘powers’ to the Federal government and leaves other powers to the State. Legislation or laws which are passed by the Federal government must fall within one of these ‘powers’ if it is to be considered ‘valid’. Laws or parts of laws which do not conform to one of these powers can be challenged in the High Court and declared invalid.

How is this history different from other Colonised Countries?

All Indigenous populations have experienced hardship and deprivation as the result of colonisation. However, in countries where the doctrine of terra nullius was not used as the basis of colonisation, Indigenous peoples have generally been given stronger rights and deeper recognition of Indigenous peoples’ prior ownership, including in treaties and national Constitutions.

In New Zealand, for example, the Treaty of Waitangi was signed in 1840 as an agreement between Maori chiefs and the British Crown to found a new nation and government in New Zealand. Under the Treaty, Maori peoples were guaranteed full ownership of their lands as well as the rights and privileges of British subjects. Today, the treaty is considered the founding document of New Zealand and a crucial part of New Zealand’s Constitutional structure.

Similarly, the national Constitutions of the USA and Canada expressly recognised their Indigenous populations, including rights established by early treaties signed between colonisers and Indigenous leaders.
What did the Constitution originally say about Indigenous Australians?

When the Australian Constitution first came into force in 1901 at Federation, there were three sections which were relevant to Aboriginal people (although only two which made explicit reference to Aboriginal people):

1. **Section 51(xxvi) or the ‘Races Power’**: this section gave the Federal Parliament the power to make laws about ‘the people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.’ At the time of federation it was thought that the States should have exclusive power to make laws for Indigenous peoples and so for many years the national government was prevented from making laws in relation to Aboriginal and Torres Strait Islanders.

2. **Section 127**: this section said that ‘in reckoning the numbers of people of the Commonwealth or of a State or other part of the Commonwealth, aboriginal natives shall not be counted’. The practical effect of s 127 was that Indigenous people were not to be counted for the purpose of determining the size and distribution of electorates for the federal Parliament. This was meant to prevent Queensland and Western Australia using their large Aboriginal populations to gain extra seats in the Federal Parliament.

3. **Section 25**: this section said that if people of any race were disqualified from voting in State elections, they would not be counted ‘in the reckoning the number of people of the State or of the Commonwealth’. At the time, Queensland and Western Australia did not allow Aboriginal men to vote in State elections. This provision of the Constitution was designed to allow the continuance of such racially discriminatory laws. However, this provision also penalized States for these laws by ensuring that if they had prevented Aboriginal people from voting this reduced the State’s federal representation.

The Constitution itself does not have a preamble. However, there is a short preamble to the British Imperial Act, which contains the Australian Constitution, the Commonwealth of Australia Constitution Act 1900. This preamble does not make reference to Aboriginal or Torres Strait Islander peoples but reads:

“Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.”
What was the 1967 Referendum and what did it achieve?

The 1967 Referendum is one of the best known and most successful referendum in Australia’s history. At the referendum over 90% of Australians voted in favour of the ‘YES’ case to remove section 127 from the Constitution and to amend section 51(xxvi).

This meant that the entire section 127 and the part of section 51(xxvi) which excluded Aboriginal peoples were deleted. Section 51(xxvi) now states that the Federal Parliament shall have the power to make laws about: ‘the people of any race for whom it is necessary to make special laws’. These changes allowed the Commonwealth Government to:

1. Make laws regarding Aboriginal and Torres Strait Islander peoples: for example, after 1967 the Commonwealth was able to pass laws such as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, to protect sites of cultural importance to Aboriginal peoples, and the Native Title Act 1993.

2. Take account of Aboriginal people in determining the population of Australia:
Up until this point Indigenous peoples had only been haphazardly included in the census. After 1967 Aboriginal and Torres Strait Islanders were counted in the same way as other Australians for the purposes of Commonwealth funding grants to the states and territories.

At the time many people thought that the referendum also gave Aboriginal and Torres Strait Islander Peoples citizenship rights, including the right to vote. However, neither of these things is actually true. The 1967 referendum did not give Aboriginal and Torres Strait Islander peoples the right to vote because they already had the right to vote at both a national level and in all States. The Menzies liberal government introduced laws giving all Aboriginal and Torres Strait Islander peoples the right to vote in Commonwealth elections in 1962. The last State to give Indigenous people the right to vote was Queensland in 1965.

Furthermore, the 1967 referendum did not give Indigenous peoples citizenship. The word ‘citizenship’ is not actually used in the Constitution, and although successive governments through legislation and administrative practices, excluded Indigenous peoples from what we would today refer to as basic ‘citizenship rights’ (such as the right to vote above), this was not the result of an explicit exclusion in the Constitution.
What does the Constitution currently say about Indigenous Australians?

Since 1988 there have been efforts to change the Constitution a second time to address issues of race and the position of Aboriginal and Torres Strait Islander peoples. There are three parts of the current Constitution which relate to Indigenous Australians and which have been the focus of calls for change:

1. A preamble: many people have been concerned about the absence of a preamble in the Constitution and have suggested that a preamble which states the unique position of Aboriginal and Torres Strait Islanders as the first peoples of Australia would better reflect who we are as a nation.

2. Section 51(xxvi) or the ‘Races Power’: there have been some unforeseen consequences of the 1967 changes to this section leading many constitutional experts to believe that the current section 51(xxvi) can be used to pass laws discriminating against Indigenous peoples as well as peoples of other races. Interpretation of this section by the High Court has indicated that the section allows the Federal Government to make laws not only for the benefit of Indigenous peoples but also laws which are detrimental or discriminate on the basis of race.

3. Section 25: while this section provides disincentives for States which prevent certain peoples from voting on the basis of race, it still allows for these kind of discriminatory laws to occur which has been concerning for many people. Similarly many consider this section as outdated with modern Australian values of non-discrimination and equality.

There is no form of direct protection against racial discrimination or right to equality in the Australian Constitution. These protections and rights are found in statutes enacted by the federal government. In this sense the Racial Discrimination Act 1975 (Cth) is our best legal protection against racial discrimination in Australia. However without constitutional entrenchment the Australian government also has the ability to suspend existing statutory protections, like the Racial Discrimination Act.
How do we change the Constitution?

Section 128 states that the Constitution can only be changed by a referendum. A referendum is a direct vote in which all Australians who are eligible to vote are asked to either accept or reject a proposal. Before a referendum can be held, the proposed changes must be approved by a majority in both houses of Parliament. The proposals are then voted on by the Australian people.

For a referendum to be successful it must be passed by a ‘double majority’, this means that a majority of voters in a majority of states must vote ‘yes’ (i.e. it must be passed in at least 4 out of the 6 states) and a majority of voters across Australia as a whole must also vote ‘yes’ (including people voting in the territories).

This requirement for a ‘double majority’ has meant that the Australian Constitution is very difficult to change. Australia has had 19 referenda with 44 separate questions but only 8 have been successful. It has been 34 years since the last successful change to the Constitution. However, this does not mean it is impossible to change the Constitution. Two academics and lawyers, David Hume and George Williams, who recently wrote a book analysing Australia’s history of referendums have stressed that they can be successful where there is popular ownership and education about the proposals.
What is the Expert Panel?

The Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander peoples (the Expert Panel) was appointed by the Prime Minister in December 2010 to lead a wide-ranging national public consultation and engagement program throughout 2011. The aim of this program was to advise the government on how Aboriginal and Torres Strait Islander peoples could be recognised in the Constitution.

The Expert Panel consists of 20 representatives from Australian society including Indigenous and community leaders, constitutional experts and parliamentary members. These members had been chosen after the public made nominations for the positions. Professor Patrick Dodson and Mr Mark Leibler AC co-chaired the Panel. The Australian Human Rights Commission and the National Congress of Australia’s First Peoples were also represented on the Panel.

The Expert Panel adopted four principles to guide its assessment of proposals for constitutional recognition. The principles stated that each proposal must:

- Contribute to a more unified and reconciled nation;
- Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- Be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- Be technically and legally sound.

The Expert Panel spoke with thousands of people from across the country, hosting over 200 public consultations across 84 communities in remote, regional and metropolitan Australia. At these consultations, over 4000 individuals and representatives of business, media, government and non-government organisations discussed their ideas and concerns about constitutional recognition with the Expert Panel. In addition, more than 3600 submissions were sent to the Panel as part of a written public submission process.

After this period of consultation with Australians, the Expert Panel developed options for recognising Aboriginal and Torres Strait Islander peoples in the Constitution. These recommendations were compiled into a report that was presented to the Australian government in January 2012.
What are the Expert Panel Recommendations?

Recommendation to Remove the ‘Race Provisions’: s25 and s51(xxvi)

Section 25 states:
‘Provision as to races disqualified from voting 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 that race resident in that State shall not be counted.’

Section 51(xxvi) states:
‘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 the people of any race for whom it is deemed necessary to make special laws.’

The Expert Panel has recommended the removal of section 25 and 51(xxvi) of the Constitution. This is because the Expert Panel decided that in order to properly recognise Aboriginal and Torres Strait Islanders in the Constitution, the two provisions, section 25 and 51 (xxvi), that allow discrimination against them, as well as against any other group on the basis of race, need to be removed. The main reasons for the removal of section 25 and 51(xxvi) are:

1. Race is an out-dated category:
Section 25 and 51(xxvi) allow for laws to be passed on the basis of race. Race is no longer considered an acceptable basis for laws. The Expert Panel notes that race is not an accurate, scientific concept because scientific research has shown that ‘visible variation among people from different places is due to adaptation to local conditions’ and has nothing to do with characteristics, ability or personality. This is consistent with understandings of race in international law. The Expert Panel states that the concept of race has impacted negatively upon Aboriginal and Torres Strait Islander peoples. As a first step, we need to remove the concept of race from our Constitution that allows adverse discrimination against groups on the basis of race, including Aboriginal and Torres Strait Islander peoples. Many countries have removed references to race from their Constitutions for similar reasons.

2. Section 25 and s51(xxvi) are racially discriminatory provisions:
Section 25 allows for state laws to exclude Aboriginal and Torres Strait Islander peoples from voting in State elections, as well as other groups, on the basis of race. Furthermore, section 25 is now a ‘dead letter’ provision because any attempt by a State to disqualify Aboriginal and Torres Strait Islander peoples from voting would be invalidated under the Racial Discrimination Act 1975 (Cth).

Section 51(xxvi) gives the federal Parliament the power to make laws about ‘the people of any race for whom it is deemed necessary to make special laws.’ It has been accepted in Australian law that s51(xxvi) can be used to discriminate against or for the benefit of the people of any race. This means it can be used to pass laws that will impact adversely on Aboriginal and Torres Strait Islander peoples.
Recommendation to Insert s51A: A New Head of Power

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;

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 Expert Panel recommended that a new section, section 51A, should be inserted into the Constitution. The proposed s51A is divided into two parts; the statement of recognition and the head of power to pass laws. The text of the statement recognises the status of Aboriginal and Torres Strait Islander peoples as Australia’s first peoples, their continuing relationship with land and waters, their continuing cultures, languages and heritage and the need to secure the advancement of Aboriginal and Torres Strait Islander peoples. The head of power states that the federal Parliament has power to pass laws ‘with respect to Aboriginal and Torres Strait Islanders.’ There are a number of reasons why the Expert Panel has made this recommendation:

1. The need for a new head of power:
   The federal Parliament needs, consistent with the aspirations of the Australian people in 1967, to be able to pass laws about Aboriginal and Torres Strait Islander peoples. The federal Parliament has used s51(xxvi) to pass laws specifically applicable to Aboriginal and Torres Strait Islanders, such as the Native Title Act 1993 (Cth) and the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). If s51(xxvi) was removed without replacement, there is a risk that there would be no other constitutional head of power that could support these important and beneficial federal laws or support such laws in the future.

2. Laws for a beneficial purpose:
   The reason for the statement of recognition preceding the head of power is that it would enable the provision to be interpreted so as to prevent the federal Parliament from enacting laws that would discriminate adversely against Aboriginal and Torres Strait Islanders, which it can currently do under s51(xxvi).

3. Recognising the unique status of Aboriginal and Torres Strait Islander peoples:
   The proposed s51A is based not on race, but on the special place of Aboriginal and Torres Strait Islander peoples in Australia, as the descendants of the original owners and occupiers of Australia.
Recommendation to Insert Section 116A: A Prohibition of Racial Discrimination

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.

The Expert Panel recommended that s116A be inserted into the Constitution to prohibit racial discrimination. The Expert Panel consultations and public submissions demonstrated overwhelming support for a racial non-discrimination provision in line with principles of racial equality. There are two parts to section 116A. Section 116A (1) states that State, Territory and Federal governments ‘shall not discriminate based on race, colour, ethnic or national origin.’ Section 116A (2) states that subsection (1) does not limit ‘the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination or measures protecting cultures, languages or heritage of any group.’ There are a number of reasons why the Expert Panel has made this recommendation:

1. The importance of an express prohibition of racial discrimination:
The Expert Panel concluded that ‘recognition of Aboriginal and Torres Strait Islander peoples will be incomplete without a constitutional prohibition of laws that discriminate on the basis of race.’ Section 116A(1) would prohibit the Commonwealth or State and Territory governments from using race, colour, ethnic or national origin as a basis for treating some people differently. This provision would protect not only Aboriginal and Torres Strait Islander peoples but also all Australians from discrimination and bring our Constitution in line with contemporary Australian values of equality.

2. Consolidating Australia’s commitment to racial non-discrimination:
Section 116A cements a commitment that Australia has made to the principle of racial non-discrimination. This principle is already captured in legislation and policies in all of the States and Territories in Australia, as well as at the federal level. For example, in the ACT there is the Discrimination Act 1991 (ACT) and at the federal level, there is the Racial Discrimination Act 1975 (Cth) (the ‘RDA’). However, despite such legislative safeguards against racial discrimination, the Commonwealth government can still pass racially discriminatory laws because the RDA is not constitutionally entrenched. This means that the Commonwealth can suspend the operation of the RDA, as it did to allow the Northern Territory Intervention, or even change the content of the RDA. The Constitution, as it currently stands, does not protect Australian citizens from discrimination of any kind, including racial discrimination.
3. Section 116A allows ‘special measures’ to be taken for certain groups:
Section 116A(2) allows for laws or measures ‘for the purpose of overcoming disadvantage’ and/or ‘ameliorating the effects of past discrimination.’ This acknowledges that differential discriminatory treatment in the past justifies special measures directed at a specific group in order to allow them the same standards of life and opportunities as everybody else. This will allow current and future laws designed to address issues such as socio-economic disadvantage to remain constitutionally valid. It will allow laws of this kind to be passed that are ‘needs-based’ that will yield some form of material benefit to Aboriginal and Torres Strait Islander peoples or other groups, rather than laws based on the groups identity. Section 116A (2) also allows for laws or measures for the purpose of ‘protecting the cultures, languages or heritage of any group.’ This does not impose any obligations on Parliament to adopt such laws or actions, but rather ensures that they would not be struck down as discriminatory should Parliament decide to do this.

Recommendation to Insert Section 127A: A New Language Provision

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.

The Expert Panel recommended that section 127A is inserted into the Constitution to recognise Australian languages. Section 127A recognises English as the national language of Australia and section 127A(2) recognises that the Aboriginal and Torres Strait Islander languages are ‘the original Australian languages’ and ‘part of our national heritage.’

The purpose of section 127A is to provide symbolic recognition to Australia’s languages. The recognition of English as the national language ‘simply acknowledges the existing and undisputed position.’ The recognition of Aboriginal and Torres Strait Islander languages identifies the importance of these languages in Australian life and culture. Section 127A will not give rise to implied rights for Aboriginal and Torres Strait Islander peoples nor any obligations for the Australian government.
What Will We Be Voting On?

The recommendations of the Expert Panel were drafted with the intention that Parliament would design a question for the referendum based on them. However, it is ultimately for Parliament to draft the question to be put to the Australian public for the referendum, and this may differ from the recommendations of the Expert Panel.

The Constitution requires that a proposal to alter the Constitution be submitted to electors in the form of a proposed law. Federal politicians will be responsible for drafting this proposed law, and formulating it as a question to put to voters. However, it must for pass through a particular parliamentary process before this can occur.

A proposed law to alter the Constitution must first pass an absolute majority of each House of Parliament; that is, both the House of Representatives and the Senate. Alternatively, if one House of Parliament passes the proposed law with an absolute majority and the other house fails to pass it in an unaltered form, and if after three months a similar proposal is put forward again, which meets the same fate, the Governor-General may submit the proposed law to electors at a referendum.

There are several stages in the referendum process at which a decision might be made to depart from the Expert Panel’s recommendations. The Government may, following consultation within its own ranks and probable consultation with the Opposition, decide not to give effect to one or more of the Expert Panel’s recommendations. Alternatively, the Government may submit the initial proposed law to both Houses of Parliament only to have it rejected by either the Senate or House of Representatives. The Government may decide to amend the proposed law at this stage so as to depart from the Expert Panel’s recommendations, in order to gain bi-partisan support.

The government has not yet put forward a proposed law for the alteration of the Constitution to recognise Aboriginal and Torres Strait Islander peoples.
When Will We Be Voting?

There is no guarantee as to when Parliament will call a referendum on Constitutional recognition or even if they will. However, the Act of Recognition passed by Parliament in February 2013 is designed to encourage Government to reconsider the levels of community support for a referendum to amend the Constitution within the next 12 months.

The Act of Recognition acknowledges the prior occupation of Indigenous peoples, their continuing relationship with the land and waters and pays respect to the continuing cultures, languages and heritage of Indigenous peoples. However, this recognition is not a substitute for constitutional change and its purpose is to build momentum towards the ultimate goal of a successful referendum. The Act contains a two-year ‘sunset clause’, meaning that it will expire after two years. This helps set a deadline for Parliament to reconsider and act on the issue in the future.

It is now the responsibility of Australians to keep the referendum on our politician’s agendas and to demonstrate support and commitment for recognition of Aboriginal and Torres Strait Islander peoples.

Future Possibilities

The Expert Panel Recommendations

The Expert Panel’s recommendations are not the only ways that Aboriginal and Torres Strait Islander peoples can be recognized in our Constitution. They are the forms of constitutional recognition that the Expert Panel considered to be consistent with their guiding principles.

The Expert Panel Report also explored other options that were not put forward as recommendations. The Expert Panel made it clear that these other options were challenges that should be explored and addressed in the future.
Involving Aboriginal and Torres Strait Islander peoples in the Australian Government

The Expert Panel Report raised concerns about the lack of participation of Aboriginal and Torres Strait Islanders in Australia’s political processes as well as the failure of the Australian government to deliver better outcomes for Aboriginal and Torres Strait Islander communities.

Aboriginal and Torres Strait Islander peoples constitute 2.5% of Australia’s population. It was only in 2010 that Ken Wyatt became the first indigenous representative in the House of Representatives. Even though indigenous political representation in the State or Territory and Federal government has been limited, it is important to acknowledge that there are a range of Aboriginal and Torres Strait Islander bodies at all levels of Australian society that represent the views of indigenous peoples. The most recent is the National Congress of Australia’s First Peoples, which was established in 2010.

The way that the Australian government deals with Aboriginal and Torres Strait Islander communities has created many problems. The Expert Panel Report stated that, “at almost all consultations and in many submissions, Aboriginal and Torres Strait Islander Australians expressed anguish, hurt and anger at the extent of their economic and social disempowerment, and their current circumstances.” Indigenous communities have not experienced sweeping positive changes as a result of government attempts to remedy disadvantage.

The Expert Panel Report indicated that this failure to deliver outcomes acceptable to and supported by indigenous peoples comes down to barriers to indigenous involvement in the process, a lack of flexibility in the way that policy is implemented across different communities and a lack of understanding and respect for indigenous culture. The Expert Panel acknowledged proposals put forward by people in submissions to address these issues, such as reserved seats for Aboriginal and Torres Strait Islanders in the Commonwealth Parliament or Senate or the creation of an Equal Rights and Responsibilities Commission that is required to review all laws passed in relation to Aboriginal and Torres Strait Islander peoples.

The Expert Panel recognized that issues of indigenous political representation and governance must be addressed in the future. However, the Expert Panel did not think this was appropriate as the basis of a proposal for constitutional reform due to a lack of consensus among Indigenous peoples.
Agreement-Making with Aboriginal and Torres Strait Islander peoples

Another option raised in submissions to the Expert Panel was the idea of agreement making with Aboriginal and Torres Strait Islander peoples. Many Aboriginal and Torres Strait Islander peoples aspire to agreement making as a way of co-existing on equal terms in a respectful, co-operative way.

Australia is unique among former settler societies with indigenous populations because no significant historical treaties were entered into with Indigenous peoples. The US, Canada, Scandinavia and New Zealand all have historical treaties with indigenous peoples that have been drawn upon to inform the modern relationships that these states share with their indigenous peoples.

There has been significant activism and support in Australia over the years for agreement making with indigenous peoples. In fact, there are many examples where agreements have been successfully made with indigenous peoples such as with universities and local governments.

There are many different ways of entering into agreements with indigenous peoples and there are many different topics over which agreements could be made. The Expert Panel Report explores a range of agreement making models. The most widely supported was the insertion of an agreement-making power in the Constitution that would facilitate and require the making of agreements with indigenous peoples in relation to specific topics.

The Expert Panel concluded that agreement making with indigenous peoples will play an important role in improving the relationship between Aboriginal and Torres Strait Islander peoples and the wider Australian community. The Expert Panel highlighted that this was a project for the future that required further groundwork, consultation and public education for it to be embraced and understood by the Australian community.
How Can You Contribute?

History shows us that referenda can only happen and be successful with the support of ordinary Australians. You can make a difference to ensuring that constitutional recognition of Aboriginal and Torres Strait Islander peoples stays on the political agenda. There are a number of things you can do:

- **Pass it on:** Have a chat with your family and friends about constitutional recognition and the possibility of a referendum. While it is an easy thing to do, this is one of the most valuable steps you can take because it allows more people to join the conversation about constitutional recognition.

- **Sign Up:** Register your support for constitutional recognition on the Recognise website at www.recognise.org.au. Recognise is the part of Reconciliation Australia, which is leading the campaign on constitutional recognition.

- **Spread the word:** Reach out to your local community and raise awareness about constitutional recognition. You can share the Ready4Recognition information pack with groups in your community or organise your own community event focused on constitutional recognition. You can download a copy of this information pack or view it online on our website at www.ready4recognition.com.

- **Speak Up:** Write to your local member of Parliament and let them know you care about constitutional recognition.

- **Stay informed:** Keep up-to-date with the progress of constitutional recognition as it develops at the political level so that when the issue is put to referendum you can make an informed vote.

Generating Further Ideas: The Sky is our Limit!

There are many different ways that we can recognize Aboriginal and Torres Strait Islander peoples in Australia. Recognition can be symbolic. An example of this kind of recognition is the Apology to the Stolen Generations. However, recognition can extend beyond merely acknowledging a group and past historical injustices perpetrated against them. It can extend to offering substantive rights to Indigenous peoples in Australia to better facilitate the healing process.

The Expert Panel Report focuses on ways that Aboriginal and Torres Strait Islander peoples can be recognized in our Constitution. The Australian Constitution is Australia’s founding legal document. Australian people play an important role in updating its content through referenda. It is the responsibility of Australians to ensure that our Constitution reflects our contemporary values and outlines a vision for how Australians should interact and live side-by-side.

Constitutional recognition is just one step in a process of change to fully recognize and respect the rights of Aboriginal and Torres Strait Islander people. Constitutional recognition is not going to provide all of the answers to what is a very complex issue in Australia. Addressing the inequalities in the relationship between indigenous peoples and the wider Australian community requires us to change the way that we interact and think as much as change the words of a legal document. Australians need to be creative, innovative and take initiative to ensure that constitutional recognition can act as a positive framework for further change in the future.