



Briefing on the Joint Select Committee Interim Report – August 2014

Background

A Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples¹ (JSC) was appointed during the previous government to inquire into and report on steps that can be taken to progress towards a successful referendum on constitutional recognition of Australia's First Peoples. This Committee has been working to secure strong, multi-partisan support around the timing, specific content and wording of referendum proposals. The reformed JSC under the Coalition government, with Mr Ken Wyatt AM MP as the Chair of the committee and Senator Nova Peris OAM as the Deputy Chair released an interim report on July 15 with a final report due by June 30, 2015. They are holding [community consultations](#) in Victoria from the 13-15th August and invite community feedback on this report. RecVic has been invited to present to the JSC along with the Victorian Constitutional Recognition Coalition in Melbourne on the 14th August. [The Interim Report](#) details its findings against the recommendations of the Expert Panel which were presented to government in 2012.

The Expert Panel recommend:

- Deleting Section 25, permitting States to disqualify people from voting on the basis of race, and Section 51 (xxvi), which allows the Commonwealth to make laws on the basis of race;
- Adding a new Section 51A Recognition of Aboriginal and Torres Strait Islander peoples, that recognises Aboriginal and Torres Strait Islander peoples as the first occupants of Australia; acknowledges the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples and acknowledges the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;
- Adding a new Section 116A Prohibition of racial discrimination that says Governments shall not discriminate on the grounds of race, colour or ethnic or national origin; and
- Adding a new Section 127A Recognition of languages that recognises English as the national language of Australia and Aboriginal and Torres Strait Islander languages as the original Australian languages, a part of our national heritage.

Interim Report

RecVic commends the JSC for putting forward options for constitutional reform that has unanimous support from the Committee members. As George Williams, an expert in constitutional law, identified, "This is the first time they have agreed on specific wording for the referendum. This is vital, because the main reason why 36 of Australia's 44 referendums have failed is a lack of cross-party support."² The committee agrees with the Expert Panel's recommendations that sections 25 & 51 xxvi should be removed from the constitution. These removals are with the allowance that a new legislative power be inserted to allow government to make laws for Aboriginal and Torres Strait Islander peoples, to 'ensure continuity' with current legislative powers including; Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and the Native Title Act 1993.

The report details five alternative options for constitutional reform. The first three offer alternative wording for the recognition of the First Peoples status of Aboriginal and Torres Strait Islander peoples, and each, bar one, include a protection against adverse discrimination. The first, a revised s51A, providing the Commonwealth with power to legislate with respect to Aboriginal and Torres Strait Islander peoples as long as it doesn't adversely discriminate; the second proposed a new chapter of the constitution be inserted with the power to make laws with respect to Aboriginal and Torres Strait Islander peoples titled, 'Chapter IIIA Aboriginal and Torres Strait Islander Peoples'; the third recognising Aboriginal and Torres Strait Islander peoples and

¹ Joint Select Committee on 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

² Professor George Williams, "Time to fix a silence at the heart of Australia's constitution", The Age, Editorial, July 18, 2014.

<http://www.theage.com.au/comment/time-to-fix-a-silence-at-the-heart-of-australias-constitution-20140717-ztwge.html>

providing the Commonwealth with legislative power defined by subject matter (ie. Culture, language, heritage, land and water); the fourth was a rewording of s51(xxvi); and the fifth, another alternative rewording of s51(xxvi) including an Act of Recognition. The committee also discussed the merit of having a statement of recognition in a preamble.

Of primary interest is that the JSC have proposed to include a protection from adverse discrimination and recognition of Aboriginal and Torres Strait Islander languages within the proposed new section 51A, rather than having two separate sections (116A & 127A respectively) as was proposed by the Expert Panel. The JSC received legal advice that recommended that s116A would be “likely to have wide-reading application and be heavily litigated.”³ So now rather than a general protection from racial discrimination, there is a specific protection against racial discrimination for Aboriginal and Torres Strait Islander Peoples.

Discussion & Responses

RecVic welcomes the ongoing discussions around the development of a meaningful model of reform. It is paramount that along with the recognition of Aboriginal and Torres Strait Islander Peoples as the First Peoples in the constitution that there is also a protection from racial discrimination. Of the five options put forward the first two are closer to the intent of the Expert Panel’s recommendations. In light of concerns around possible litigation for the proposed s116A, RecVic sees the JSC’s proposals as a compromise that is worth further consideration. We know that laws have been used to the detriment of the First Peoples, so the protections afforded in this proposal would also give provision for a challenge and appeal process if there were concerns about future legislations. We are mindful that racial discrimination is an ongoing issue that will need to be addressed so all Australians are afforded the same protection. We know that the strong community reactions to the proposed changes to section 18 of the Racial Discrimination Act, including the allegiances between diverse groups, sent a very clear message to government that racial discrimination was not acceptable in Australia today. We are also aware that we must maintain and grow general populist support for constitutional reform to be successful in a referendum. We hope that by identifying a specific group to be protected from racial discrimination, rather than including all Australians, support is not fractured and Aboriginal and Torres Strait Islander peoples are not further marginalised. We are also concerned that it could build a ‘no case’ in the lead up to a referendum.

Professor George Williams has said of the JSC’s interim report, “The committee has identified the right changes to the constitution. They would fix a major problem with the document.”⁴ There still remains the technical drafting issues of the final wording for the proposed constitutional reform. The JSC understands that to be successful at a referendum the proposal must; “...recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia; preserve the Commonwealth’s power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and in making laws under such a power, prevent the Commonwealth from discriminating against Aboriginal and Torres Strait Islander peoples.”⁵ [The National Congress of Australia’s First Peoples](#) has given qualified support for the interim report. They do however emphasise, “that reform of the Constitution must ultimately receive endorsement from Aboriginal and Torres Strait Islander Peoples before going to Referendum.”⁶ RecVic also sees this as critical to the reform agenda.

RecVic made a submission⁷ back in February to the JSC raising concerns about the using of the word ‘advancement’ in the Expert Panel’s report. It had been raised as a concern from almost every community consultation or public forum we have been involved with. The issue lies in the consideration of who determines what is beneficial, or to the advancement of, as well as the consideration that the word identifies a deficit to be ameliorated. What could the implications be of this legal interpretation on Aboriginal and Torres

³ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Interim Report, July 2014. [http://www.reconciliationvic.org.au/user-data/Constitutional Recognition/JSC Interim Report July 2014.pdf](http://www.reconciliationvic.org.au/user-data/Constitutional%20Recognition/JSC%20Interim%20Report%20July%202014.pdf) p18

⁴ Professor George Williams, “Time to fix a silence at the heart of Australia’s constitution”, The Age, Editorial, July 18, 2014. <http://www.theage.com.au/comment/time-to-fix-a-silence-at-the-heart-of-australias-constitution-20140717-ztwge.html>

⁵ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Interim Report, July 2014. [http://www.reconciliationvic.org.au/user-data/Constitutional Recognition/JSC Interim Report July 2014.pdf](http://www.reconciliationvic.org.au/user-data/Constitutional%20Recognition/JSC%20Interim%20Report%20July%202014.pdf) p29

⁶ National Congress of Australia’s First Peoples, ‘First Peoples must have final say on constitutional recognition’, published on 17 July, 2014: <http://nationalcongress.com.au/aboriginal-and-torres-strait-islander-people-must-have-the-final-say-on-constitutional-recognition/>

⁷ Reconciliation Victoria, “Considering the issue of ‘positive purpose’, ‘advancement’, beneficial policy”. Feb, 2014. [http://www.apf.gov.au/Parliamentary Business/Committees/Joint/Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples/Constitutional Recognition/Submissions](http://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Constitutional%20Recognition%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples/Constitutional%20Recognition/Submissions)

Strait Islander peoples if they have no clear line of authority in the decision making process? We strongly believe that using a model similar to the United Nation's Declaration on the Rights of Indigenous Peoples around informed consent would help address this issue. We strongly encourage the Committee to have a focussed examination of this critical issue.

The committee is seeking feedback from community members about the options put forward in the interim report. Minister for Indigenous Affairs the Hon Nigel Scullion stated on 28 March that the government would announce a draft amendment to the Constitution for public consultation later in the year. There is no timeline set for when a referendum will be called but in February next year the government must revisit the issue of constitutional recognition as the Act of Recognition, passed in February 2013, comes to the end of its sunset clause. Given that awareness levels are still around 50% of the population with 60% of the population supporting recognition of Aboriginal and Torres Strait Islander Peoples as Australia's First Peoples, it provides a good platform to work from but there is still significant work to do. We know that due to the complexity of this issue, a successful campaign will require wide ranging and effective resourcing. Due to the complexity of the reform agenda and the confusion that is evident there needs to be increased resourcing to help build capacity at a local level to educate and inform. RecVic is well placed to continue to build on the momentum across Victoria using our diverse networks, including our 23 reconciliation groups. This process must respectfully engage and collaborate with Aboriginal and Torres Strait Islander community members and leaders to ensure they play a part in the decision making process.

In terms of timing the RecVic believes that provided there is support from Aboriginal and Torres Strait Islander peoples that a referendum could be called in the near future. There needs to be an engagement on a local, regional and national level to ensure that all Australians can make an informed decision.

We feel it is important to rectify the silences in the Constitution; the fact Australia has the oldest continuing cultures in the world should be a source of national pride and inform our sense of identity. Our constitution should also protect all Australians from racial discrimination. These are two inextricably linked and integral steps in the journey towards reconciliation and justice for Aboriginal and Torres Strait Islander Peoples. We see this as a step towards addressing the 'unfinished business' of treaty and agreement making processes and sovereignty. We strongly encourage the committee to keep treaty and agreement making processes on the agenda.