

Information brief, July 2013

Constitutional reform:



The story so far...

The Australian Constitution was drafted by the six Australian colonies (known as States after Federation in 1901) at the end of the 19th Century and approved in referendums held from 1898-1900. At Federation, there were only two references to Aboriginal people in the body of the Australian Constitution:

- Section 51(xxvi): the so-called 'race power', conferred on Parliament the power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.
- Section 127 provided: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.'

The purpose of section 127⁶ was to prevent Queensland and Western Australia from using their large Aboriginal populations to gain extra seats in the Commonwealth Parliament and a larger share of taxation revenue.

At the time of Federation, legislation in Queensland and Western Australia disqualified, among others, Aboriginal men from voting. Against this background, Section 25 allowed for the continuation of such racially discriminatory laws. Section 25 countenances the exclusion of persons of particular races from voting in State elections but was designed to penalise, by a reduction of their federal representation, those States where Aboriginal people had not been given the right to vote.⁷

The 1967 Referendum, the most successful in history with a 'yes' vote of over 90%, resulted in two amendments to the Constitution.

First, the repeal of the overtly discriminatory provision in section 127 meant the removal of the prohibition on counting Aboriginal people in the population statistics.

Second, the specific exclusion in Section 51(xxvi) of power to make laws with respect to the 'people of the aboriginal race in any State' was removed.

Aboriginal and Torres Strait Islander peoples ceased to be mentioned at all in the Constitution.

The 1988 Constitutional Commission Report recommended the removal of the race powers, insertion of a new paragraph that would give the Commonwealth Parliament express power to make laws with respect to 'Aborigines and Torres Strait Islanders', intended to be beneficial, and the inclusion of a new section that would give everyone the right to freedom from discrimination on the ground of race.

In 1995 ATSIC proposed the Social Justice Package arguing for “the securing of constitutional recognition of special status and cultural identity of indigenous peoples”, which was rejected by then Prime Minister John Howard.

The report of the Council for Aboriginal Reconciliation presented to the Prime Minister and Parliament in 2000 recommended that the Australian Constitution acknowledge “the True Place of Indigenous peoples within the Nation”, and that such constitutional reform should also seek to remove the Section 25 race power and outlaw racial discrimination.

In 2008 Prime Minister Rudd named Constitutional Recognition as one of the next steps in reframing this nation’s history in his National Apology to the Stolen Generations. Also in 2008 the Yolgnu and Bininj clans presented the Prime Minister with a Statement of Intent calling on the government “to work towards constitutional recognition of [their] prior ownership and rights”, in response to which he announced his support for recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

In 2010 then Prime Minister Julia Gillard appointed an Expert Panel¹ to conduct extensive consultations with Aboriginal and Torres Strait Islander communities and non-Indigenous people and present a proposal for Constitutional Reform. The Expert Panel presented its Report to the Prime Minister and Parliament in January 2012, and its recommendations are clearly similar to those of the Council for Aboriginal Reconciliation more than a decade earlier. The Expert Panel recommended:

- Deleting Section 25, permitting States to disqualify people from voting on the basis of race, and Section 51 (26), 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.

¹ The Members of the Expert Panel: <http://www.recognise.org.au/about/expert-panel>