3 December 2014

Submission to the Joint Select Committee

Constitutional recognition of Aboriginal and Torres Strait Islander people
1. Introduction

Reconciliation Australia is the national organisation promoting reconciliation between the broader Australian community and Aboriginal and Torres Strait Islander peoples. Our vision is to build an Australia that is reconciled, just, and equitable for all. To do so, we are dedicated to building relationships, respect and trust between Aboriginal and Torres Strait Islander peoples and other Australians. We believe a reconciled Australia is one where:

- There are strong two-way relationships between Aboriginal and Torres Strait Islander and non-Indigenous Australians;
- Aboriginal and Torres Strait Islander history, culture and rights are a proud part of our everyday life;
- Our national wellbeing is enhanced by Aboriginal and Torres Strait Islander strength and prosperity;
- The collective rights of Aboriginal and Torres Strait Islander peoples are recognised and respected.

We believe that stronger relationships, built on shared knowledge and respect, are central to Aboriginal and Torres Strait Islander people controlling their life choices and fully participating in the economic and social opportunities enjoyed by the wider community. We aspire to enable all Australians to contribute to reconciliation and recognise the special place of Aboriginal and Torres Strait Islander peoples in Australia.

Reconciliation Australia makes this submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander people, outlining steps that we believe need to be taken to ensure progress towards a successful referendum on Indigenous constitutional recognition. Our submission is guided by the work done thus far by the Expert Panel on Constitutional Recognition of Indigenous Australians (the Expert Panel), the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel (the Review Panel), and the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander people (the Joint Select Committee). We believe the work done by these bodies has followed thorough processes, ensuring that multiple voices are heard from Aboriginal and Torres Strait Islander communities.

This is a unique opportunity to advance reconciliation through achieving a landmark change in the Australian Constitution. If the Constitution is the ‘rulebook’ of Australia, then the First Australians have been done a great disservice. As it stands, the Constitution fails to acknowledge the unique place Aboriginal and Torres Strait Islander peoples have in Australia, and by doing so we are failing to acknowledge the first chapter in our long and shared history. The silence is deafening, but a referendum on constitutional recognition would allow us to rectify this omission. Aboriginal and Torres Strait Islander cultures enrich the Australian nation and our everyday lives, they are crucial to our national identity and should be a source of pride for all Australians. Recognising Australia’s First Peoples in our Constitution exemplifies the next step in Australia’s maturity, and will allow all Australians to come together in the strong spirit of reconciliation.

Reconciliation Australia believes there are four crucial elements that need to occur if we are to see a successful referendum to recognise Aboriginal and Torres Strait Islander people in the Australian Constitution. First, all Australian Governments and Parliaments need to make
a clear and public commitment that a referendum on this issue will take place. Such a commitment will put to rest any fears that a referendum will not occur. Secondly, the Federal Government must set a date for the referendum, with a corresponding timeline of key milestones. Thirdly, it is imperative the question that is to be put to the Australian voters is finalised as soon as possible. Finally, in order to ensure public awareness on the issue is high, and to ultimately ensure a successful ‘Yes’ campaign, it will be crucial the Federal Government adequately funds the Recognise campaign until the completion of the referendum.

In addition to the recommendations made in this submission, Reconciliation Australia strongly urges the Joint Select Committee to give much weight to the position taken by the National Congress of Australia’s First Peoples (National Congress), as the national representative body for Aboriginal and Torres Strait Islander Australians. If changes in Aboriginal and Torres Strait Islander affairs are to deliver positive outcomes, it is critical that they are based on genuine partnerships and collaboration with Aboriginal and Torres Strait Islander leaders, communities, and representative bodies. There has never been a more important space in which to include and respect a diverse range of Aboriginal and Torres Strait Islander voices. National Congress has urged the Government to seize this ‘unprecedented opportunity’ to ensure due recognition and achieve change, and argues that amongst other key elements, a successful referendum process must have renewed commitment, must include due consideration of all recommendations of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, and must swiftly finalise the wording of the referendum proposal.¹

We must not let this opportunity slide. The promise of constitutional recognition has been actively discussed in Australian politics for eight years and has been a much sought after milestone on Australia’s reconciliation journey for many years. In order to create a reconciled nation, we must seize this opportunity for both symbolic and practical change, and create a landmark moment for our nation.

2. Summary of Recommendations

To ensure a successful referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples, Reconciliation Australia believes the following recommendations should be implemented:

**Recommendation 1)** All Australian Governments and Parliaments make clear commitments to support a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. As part of this, both Houses of the Federal Parliament should set aside a full sitting day to comprehensively debate the recommendations of the Joint Select Committee.

**Recommendation 2)** A clear and definitive timeline is set for the referendum, including a date for when it will be held. We believe a referendum should be held at the 2016 Federal election. Our next preference is that the referendum is held no later than the 50th anniversary of the 1967 referendum in 2017. The referendum timeline must also confirm that the final referendum wording will be decided upon by the end of 2015.

**Recommendation 3)** The wording of the referendum proposal is decided upon as soon as possible and by the end of 2015. It must:

- Contain a statement of recognition;
- Remove out-dated references to race, in particular section 25;
- Include racial non-discrimination;
- Be based on the recommendations of the Expert Panel;
- Be supported by Aboriginal and Torres Strait Islander peoples.

**Recommendation 4)** Adequate resources are provided to the Recognise campaign, to build public awareness and community support, and ensure a successful referendum. This includes funding for Recognise that is aligned with any proposed timetable for the referendum.
3. Political leadership

Political leadership from all Australian Governments will be critical for a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. There are two crucial aspects to the political leadership required to ensure a successful referendum. The first is that the Federal Government clearly commits to holding a referendum to recognise Aboriginal and Torres Strait Islander people in the Constitution. The second is that all governments—Federal, state and territory—must openly and resoundingly state their support for constitutional change. These actions will require strong political leadership and mean individuals will have to stand up and speak for what is right, even in the face of opposition, or support for a ‘No’ vote.

Constitutional recognition has been actively debated in Australian politics for the past eight years and has been an important milestone on the long road to reconciliation well before that, but public awareness of the issue has begun to wane. We must recognise and address this, as we cannot afford to let a referendum on constitutional recognition fail. Despite many recent conversations and headway towards a referendum, public awareness of the issue and progress to date is low. The establishment of the Expert Panel on Constitutional Recognition of Indigenous Australians and the more recent Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples as well as the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel, have all been invaluable in building multi-party support and facilitating discussion at a political level. However, politically focussed bodies such as these, while incredibly important, are not necessarily visible to the general public. As such, over the past twelve months public awareness levels of a referendum have declined to now sit at less than 40% across Australia.²

The lack of a clear path forward contributes to the low general awareness levels. It is difficult for the public to maintain enthusiasm and interest if an issue seems removed from their day to day life, or if there is little direction for involvement in the ‘next steps’. In order to combat and reverse low awareness levels, the Federal Government must immediately remove any ambiguity around the intention to hold a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples. By removing any sense of doubt that such a referendum will be held, we will be able to clearly focus on the best way forward to achieve a ‘Yes’ vote.

Secondly, it is crucial that multi-party support is assured before the referendum. It is important that voters from all sides of the political spectrum understand the importance of, and the political will behind, the changes to the Constitution. History has demonstrated time and again that referendums in Australia do not succeed without strong bipartisan support, and Australian voters in the past have been reticent to make changes to the constitution. Therefore, political parties and individuals must openly state their support for constitutional change to recognise Aboriginal and Torres Strait Islander peoples, thereby placing constitutional recognition above politics. This is a moment that calls for strong political leadership in Australia.

Leaders from all parties must actively campaign and show support for changing the Constitution to recognise Aboriginal and Torres Strait Islander peoples. It will be crucial to have multi-party support and leadership if we are to overcome the difficulty of getting Australian voters to support constitutional change. Recognition of our First Peoples must to be above politics. As noted in the Review Panel’s report, this referendum ‘presents a unique opportunity for an impressive show of parliamentary unity, responding to the will of the people and building confidence in our system of government’.\(^3\)

Reconciliation Australia supports the Joint Select Committee’s recommendation that each House of the Federal Parliament set aside a full sitting day to debate the Joint Select Committee’s recommendations.\(^4\) This will allow both Houses of Parliament to show full and near-unanimous (if not unanimous) support for constitutional recognition of Aboriginal and Torres Strait Islander people, and it will be a visible sign to the Australian public that we are quickly building momentum, and that a referendum is broadly supported and inevitable.

Strong political leadership will become increasingly important as the referendum draws closer. It is inevitable that Australian commentators speaking out against constitutional recognition will become more vocal, and it is crucial that all political leaders in Australia stand up in a show of unity. We must not let this moment pass, and without consistent and visible political support, it is unlikely that we will be able to achieve a successful referendum.

**Recommendation 1)** All Australian Governments and Parliaments make clear commitments to support a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. As part of this, both Houses of the Federal Parliament set aside a full sitting day to comprehensively debate the recommendations of the Joint Select Committee.

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\(^4\) Progress Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2014).
4. A clear and definitive timeline

Once a clear and public commitment to holding a referendum is made, it will be necessary for the Federal Government to outline the timing of a referendum. Setting a referendum date will reassure all stakeholders that we are progressing towards a vote.

Based on information from the hearings of the Expert Panel on Constitutional Recognition of Indigenous Australians, there are mixed views on the best timing for the referendum. Differing views on timing primarily centre on whether to hold the referendum as a stand-alone vote, or whether to hold it concurrently with an election. These views are valuable, and all viewpoints should be discussed as it is crucial to get the timing for a vote right. As acknowledged by the Expert Panel, a ‘No’ vote would be damaging for the future of reconciliation in Australia.

The latest report from the Review Panel notes that holding the referendum at the next Federal election in 2016 would be logistically possible, and would also reduce costs associated with any additional vote. A referendum at the Federal election also removes the impetus on Australian voters to attend voting booths on an additional occasion, possibly lowering the occurrence of ‘voter fatigue’. Given the requirement for a successful referendum in Australia (the support of a majority of voters in a majority of states, as well as an overall majority), it is crucial that as many voters as possible are encouraged to vote in the referendum, and barriers to them doing so are reduced.

The Review Panel notes that Aboriginal and Torres Strait Islander people are ‘increasingly concerned about the ability to deliver constitutional change if the timeframe lingers’. The longer the referendum process is drawn out, the more likely it is that both Aboriginal and Torres Strait Islander people and non-Indigenous Australians will become disenchanted with the process. If this occurs, a ‘No’ vote becomes increasingly likely. Additionally, we cannot drag out the process of recognising Aboriginal and Torres Strait Islander Australians any longer: due recognition has been denied long enough.

Holding the referendum as a stand-alone event in 2017 also has possible benefits. The additional time provided by the later date allows an opportunity to ensure both awareness for the referendum and the messaging and campaign for the ‘Yes’ vote are fully developed. Holding the referendum separately to a Federal election could also help ensure that constitutional recognition issues are removed from partisan politics. There is also a certain symbolism to holding a successful referendum on constitutional recognition for Aboriginal and Torres Strait Islander peoples on the 50 year anniversary of the overwhelmingly successful 1967 referendum.

Taking these implications into account, Reconciliation Australia believes that a successful referendum should be held in 2016. Our next preference is that the referendum is held no later than the 50th anniversary of the 1967 referendum in 2017. If we

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delay the date too long, we may miss our moment in history. **It is imperative that a date is set for the referendum soon.** It will remove any remaining concern that a referendum will not be held, and focus the efforts of all stakeholders. However, as is noted in the Review Panel’s report, achieving a successful referendum is the overarching imperative. To not achieve a successful ‘Yes’ vote would be damaging to all future work for reconciliation in Australia.

A second key milestone that requires confirmation if we are to properly coordinate efforts to achieve a successful referendum is that **a date must be set for delivery of the final wording that will be used in the referendum.** The Joint Select Committee is expected to deliver their final report by mid-2015, and have held many public hearings concerning the changes and wording that should be included. Reconciliation Australia believes the final report of the Joint Select Committee can and should include suggested wording to use in the referendum. This timing supports a 2016 referendum, held as part of the 2016 Federal election.

Recommendation 2) A clear and definitive timeline is set for the referendum, including a date for when it will be held. We believe a referendum should be held at the 2016 Federal election. Our next preference is that the referendum is held no later than the 50th anniversary of the 1967 referendum in 2017. The referendum timeline must also confirm that the final referendum wording will be decided upon by the end of 2015.
5. Creating the referendum core

The question to be put to the Australian voters will be the core of the referendum. The proposed changes must be at once both symbolic and substantial to deliver meaningful change and to progress reconciliation in Australia. They must also be constitutionally strong to allay any fears in the public that a change in the Constitution to recognise Aboriginal and Torres Strait Islander peoples will result in years of court challenges. Finally, the proposed changes must have the support of Aboriginal and Torres Strait Islander individuals and communities.

The Federal Government has identified two areas of the Constitution requiring amendments:

1) Aboriginal and Torres Strait Islander peoples must be recognised in the Constitution;
2) Clauses which contemplate racial discrimination must be removed or amended.

Such identified changes are very broad, and leave room for debate around the exact wording that will be put to the Australian voters at the referendum. Because the wording has not yet been settled, it is both difficult to gauge public support for a final proposal, and to campaign for a ‘Yes’ vote. To ensure meaningful change Reconciliation Australia believes the following key elements need to be included in the proposed constitutional changes:

- Statement of recognition: A non-negotiable change to the Constitution would be to include a statement to recognise Aboriginal and Torres Strait Islander Australians as our First Peoples. This is essential to override past historical injustices, such as the myth of terra nullius. Drawing on the work of the Expert Panel, Reconciliation Australia believes that such a statement needs to be included in the body of the Constitution in order to be supported by Aboriginal and Torres Strait Islander Australians.

- Removing out-dated references to race: Provisions such as section 25 and the ‘race power’ in section 51 (xxvi) currently allow for laws to be made by reference to the concept of race; section 25 refers to State laws, and section 51 (xxvi) refers to Commonwealth laws. It is crucial that we ensure there is no longer an avenue for race discrimination in Australia’s Constitution. The Expert Panel recommends the repeal of section 25, which Reconciliation Australia supports. Furthermore, the Expert Panel believes there would be no legal risks in repealing section 25, and that ‘an overwhelming majority of Australians’ would support its removal. The need to repeal section 25 of the Constitution is further strengthened by Recommendation 2 of the Joint Select Committee’s Progress Report, which argues section 25 is ‘no longer necessary… [and is] a vestige of racial concepts and practices that have no place in contemporary Australia’. It is a greater challenge to finalise proposed changes to section 51 (xxvi). As Australia has changed, it is no longer appropriate, as the Joint Select Committee also

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argues, that the ‘Commonwealth…make laws with respect to race’.\textsuperscript{11} However, the Expert Panel and the Review Panel both highlight the necessity of ensuring that this power is constrained so it cannot be used for ‘perverse’ outcomes.\textsuperscript{12} Reconciliation Australia believes that if a Commonwealth power allowing the ability to positively legislate based on race is to be maintained, it is critical that Aboriginal and Torres Strait Islander peoples and communities support the wording. As highlighted by the Review Panel, any proposed change that could undermine native title, heritage protections, or Aboriginal and Torres Strait Islander programs would be unlikely to gain support from the Aboriginal and Torres Strait Islander community. Reconciliation Australia supports the argument of the Joint Select Committee that the Commonwealth should also retain the ability to make laws with respect to Aboriginal and Torres Strait Islander people, in order to protect legislation including the \textit{Native Title Act 1993}, and the \textit{Aboriginal and Torres Strait Islander Heritage Protection Act 1984}.\textsuperscript{13}

- Reconciliation Australia, along with other leading non-government organisations, supports including racial non-discrimination in any proposal.
- The work of the Expert Panel should provide the basis for the final proposal. After conducting 250 consultations in a nation-wide process and receiving 3500 submissions, the Expert Panel’s recommendations were based on an extensive consultative process, and were unanimously supported by a diverse Panel. The recommendations, largely welcomed by members of the Aboriginal and Torres Strait Islander community, should therefore be given due consideration and should be central in finalising a model for the referendum;
- Reconciliation Australia believes that of the options from the Joint Select Committee’s Progress Report, Option 1 best meets these criteria.\textsuperscript{14} This option clearly recognises Aboriginal and Torres Strait Islander people are the original occupiers of the land, prohibits racial discrimination, while allowing for laws designed to overcome disadvantage and protect the language, cultures and heritages of any group.
- There must be support from Aboriginal and Torres Strait Islander people for the final proposal, including support from representative bodies, such as National Congress.

Taking such requirements into consideration, and balancing the views of all stakeholders, it is crucial to finalise the wording of the referendum as soon as possible. Without a final proposal, it is difficult to continue building public support. A confirmed referendum question will allow campaigners to build public awareness and support, and will reassure all stakeholders, particularly those in Aboriginal and Torres Strait Islander communities, that there is political will for a successful and imminent referendum.

\footnotesize{\textsuperscript{11} Progress Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2014). p 4.  
\textsuperscript{12} Final Report of the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel. (2014).  
\textsuperscript{13} Progress Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2014).  
\textsuperscript{14} Progress Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2014).}
The Joint Select Committee will, by June 2015, put forward proposals they believe will have the greatest chance of success at a referendum. Following on from this, Reconciliation Australia supports the suggestion made by the Review Panel that a ‘circuit breaker’ should be introduced to break through the continuous conversations and debates around the final wording. The Review Panel’s recommendation of a Referendum Council, comprised of both Indigenous and non-Indigenous leaders, would ensure the best referendum proposal is selected.\(^{15}\) To ensure this process is transparent and representative, the Referendum Council must:

- Have membership confirmed before the final report of the Joint Select Committee, so they are immediately able to begin evaluating support for the wording;
- Have legitimate members in the eyes of Aboriginal and Torres Strait Islander Australians, non-Indigenous Australians, and the Federal Parliament;
- Be apolitical; and
- Have direct involvement of a wide range of Aboriginal and Torres Strait Islander people, representing different communities and interests.

The purpose of the Referendum Council would be to ensure that, out of the referendum proposals recommended by the Joint Select Committee, the final proposition is the one most likely to garner wide-spread support. Part of this process would be to ensure that Aboriginal and Torres Strait Islander communities support the final referendum proposal. Reconciliation Australia consistently advocates for working closely and collaboratively with a diverse range of stakeholders from Aboriginal and Torres Strait Islander communities, which must include peak representative bodies. There is not a more important time to do so than when considering the wording of the referendum. We do not believe it will be possible (or desirable) to achieve a successful referendum without the support of Aboriginal and Torres Strait Islander communities.

**Recommendation 3) The wording of the referendum proposal is decided upon as soon as possible and by the end of 2015. It must:**

- Contain a statement of recognition;
- Remove out-dated references to race, in particular section 25;
- Include racial non-discrimination;
- Be based on the recommendations of the Expert Panel;
- Be supported by Aboriginal and Torres Strait Islander peoples.

6. Building public awareness

As highlighted by the Review Panel, awareness of the need for constitutional recognition has dropped, and we are not yet in a position to be assured of a successful referendum. There are two stages to the process of achieving a successful referendum. The first is an educative process, to ensure as many Australians as possible are aware of the referendum and its topic. This process is designed to help people understand why the issue is being put to a vote, what the outcomes of the vote possibly are, and making clear the case for change. The second process is a yes/no campaign that would focus on a specific proposition.

No Australian referendum has been successful without a well-informed and engaged public. Past referendum results demonstrate that whilst cross-party political leadership is essential, grassroots, community campaigns with high levels of public awareness are also necessary. To continue to build on the current progress and awareness base, it is crucial to expand funding for a public awareness and education campaign.

There remains much work to be done throughout Australia in terms of building awareness, understanding and support for constitutional change. As noted by the Review Panel, even if the final referendum wording was currently available, we would not be able to proceed to a referendum because we could not be sure of a positive outcome. Amongst many groups in Australia, we need to continue to build awareness and support for the issue before proceeding to a referendum. Drawing on the Review Panel’s report, it is clear that more work needs to be done across Australia to raise awareness and support. This includes further work amongst groups such as:

- Aboriginal and Torres Strait Islander people who have, unsurprisingly, the highest awareness of constitutional recognition, at 57%. However, this is still not high enough for a successful referendum, and there needs to be a clear timeline and plan for the referendum process to build support in these communities.
- Non-Indigenous Australians, who have much lower awareness of constitutional recognition, at 34%. Support levels for constitutional recognition amongst those aware of the issue remain high at 61%, but again this is not high enough to ensure a successful referendum.
- Constitutional conservatives, amongst whom it will be crucial to build support for constitutional change if the referendum is to be successful. Constitutional recognition will not be passed without support from these groups, so support must be built by emphasising the recognition and equality arguments for changes, rather than individual rights. Constitutional conservatives are considered perhaps the most difficult to engage, given their preference for little constitutional change, and the

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18 Auspoll Survey, August 2014.
19 Ibid.
20 Ibid.
historic difficulty of successful referendums in Australia. There must be refocussed effort to ensure increased support amongst this group.

- Young voters under 40 years of age, who currently have the lowest levels of awareness of constitutional recognition. The diverse nature of this group means that there must be increased efforts, across multiple platforms, to engage young voters in the issue of constitutional change.

Without strong support across all of these groups, we will not be able to ensure a successful referendum to recognise Aboriginal and Torres Strait Islander peoples. Building a groundswell of public support, and ensuring that the diverse Australian public is well educated on the referendum is crucial, and will only be possible through a well-funded awareness raising campaign. Therefore, Reconciliation Australia believes it is necessary for the Federal Government to continue to fund and support Recognise and its partner organisations. This includes continued funding aligned with any proposed timetable. The Recognise campaign is crucial in raising public awareness of the referendum, and in educating Australians about why recognition is important, and the effect that recognition would have on the lives of every day Australians and all Australian communities. This funding commitment should be confirmed when the Federal Government confirms the referendum date. Only when their funding is assured, will Recognise be able to develop and finalise the sustained, long-term, nation-wide education strategy that will be crucial to a successful referendum.

Recommendation 4) Adequate resources are provided to the Recognise campaign, in order to build public awareness and community support, and ensure a successful referendum. This includes funding that should be aligned with any proposed timetable.

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22 Auspoll Survey, August 2014.