



# **Constitutional recognition of Aboriginal and Torres Strait Islander Peoples**

Submission to the Expert Panel  
on the Constitutional Recognition  
of Indigenous Australians

30 September 2011

## 1. Introduction

1. Oxfam Australia (Oxfam) welcomes the opportunity to make a submission to the Expert Panel on Constitutional Recognition of Indigenous Australians (Panel).
2. Oxfam notes and welcomes the ongoing cross party support for constitutional recognition of Aboriginal and Torres Strait Islander people maintained since 1999, and the Australian Government commitment to hold a referendum during the 43<sup>rd</sup> Parliament or at the next Federal Election.<sup>i</sup>
3. As part of this commitment, the Australian Government has established the Panel to ensure appropriate public discussion and debate about the proposed changes and to provide an opportunity for people to express their views.<sup>ii</sup>
4. The Panel will report to the Government on 'options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for each option by December 2011'.<sup>iii</sup>
5. Oxfam believes that while the Australian Constitution has served most Australians well, it has not served Aboriginal and Torres Strait Islander peoples well.
6. Oxfam is firmly of the view that the nations' founding document and pre-eminent source of law should recognise Aboriginal and Torres Strait Islander peoples – the first Australians.
7. Oxfam has for many years called for constitutional recognition of Aboriginal and Torres Strait Islander people, including addressing the discriminatory provisions in the Constitution.
8. The Australian Constitution should recognise the distinct place of Aboriginal and Torres Strait Islander peoples in our history and their unique and ongoing contribution to our nation and its future. In addition, provisions in the Constitution that permit discrimination based on race must be amended or removed as a matter of priority. Amending these two integrally linked aspects of the Constitution would ensure consistency between the preamble and body of the Constitution.
9. Oxfam agrees with the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, when he says:<sup>iv</sup>

*Relationships cannot be established where there is mistrust, misunderstanding, intolerance and a lack of acceptance, dialogue and respect. Therefore relationships must be rebuilt on a strong foundation of understanding, tolerance, acceptance, dialogue, respect, trust and reciprocated affection.*

*Building stronger, deeper relationships with these foundations offers the Australian nation an opportunity for healing. By respecting and celebrating differences and truly reconciling with the past Australians can advance together, as one unified nation.*

10. Recognising Aboriginal and Torres Strait Islander peoples in the Constitution has the potential to play a central role in truly resetting the relationship between Aboriginal and Torres Strait Islander peoples, government and the wider community, and as the Commissioner states, unify the nation.

11. This submission addresses why Aboriginal and Torres Strait Islander people should be recognised in the Australian Constitution; the changes that should be made to the Australian Constitution to achieve this; and what process should follow the completion of the work of the Panel in order to move towards a referendum

## 2. Summary of Recommendations

- Recommendation 1:** That Aboriginal and Torres Strait Islander people be recognised in a new preamble to the Australian Constitution. As part of such recognition, serious consideration should be given to the inclusion of issues such as Aboriginal and Torres Strait Islander peoples' stewardship, custodianship and ownership of land, and the unique, significant and ongoing contribution of Aboriginal and Torres Strait Islander peoples to our nation and its future.
- Recommendation 2:** That the preamble should include a statement of fundamental values such as our democratic system of government, a commitment to upholding the rule of law, human rights, gender equality and our nations' cultural diversity as a shared legacy owned by all Australians.
- Recommendation 3:** That the discriminatory provisions within the Constitution be removed so that the Constitution no longer permits or anticipates discrimination based on race. Specifically,
- a) That Section 25 be deleted from the Australian Constitution.
  - b) That Section 51 (xxvi) in its current form be deleted from the Australian Constitution and that new provisions be inserted to ensure that:
    - i) The Federal Parliament is empowered to make laws relating to Aboriginal and Torres Strait Islander peoples.
    - ii) Discrimination based on race is prohibited. However, the Parliament would be empowered to make laws aimed at addressing historical disadvantage or preserving language, identity or culture.
- Recommendation 4:** That the Australian Constitution be amended to enable the Commonwealth to enter into constitutionally supported agreements with Aboriginal and Torres Strait Islander communities or organisations.

- Recommendation 5:** That the report of the Panel be immediately released to the public following its submission to Government.
- Recommendation 6:** That a fully resourced popular education strategy to take forward the recommendations of the Panel, explain the nature and rationale for constitutional change and seek views on options, be developed and rolled out with cross party support early in 2012.

### **3. About Oxfam Australia**

12. Oxfam Australia is an independent, not-for-profit, secular international development agency. We are a member of Oxfam International, a global confederation of 15 Oxfam affiliates that work together to fight poverty and injustice in almost 100 countries around the world.
13. Oxfam Australia has worked with local communities around the world to combat poverty and injustice for over 50 years. Our organisation undertakes long-term development projects, provides emergency response during disaster and conflict, and conducts campaigning and advocacy for policy and practice changes which promote human rights and justice. We support over 400 long-term development projects in 30 countries across Africa, Asia, the Pacific and Indigenous Australia.
14. Oxfam adopts a rights-based approach to community development. This approach focuses on the full achievement of the rights of human beings and looks at the drivers of inequality, poverty and conflict, rather than focusing on an immediate needs analysis alone. Oxfam's experience is that a rights-based approach has the potential to have a far greater impact within various levels of society because it uncovers and proposes solutions to multi-levelled barriers.
15. Significantly, rights-based approaches are no less 'practical' than other approaches and they look holistically at both rights and responsibilities.
16. Oxfam Australia has supported opportunities for Aboriginal and Torres Strait Islander peoples to exercise their rights to basic social services, sustainable livelihoods, a strong voice and cultural diversity, for more than 30 years.

### **4. Why Aboriginal and Torres Strait Islander people should be recognised in the Australian Constitution**

17. The Australian Constitution is the founding political and legal document of our nation. It underpins our federal laws and system of government. Written over a century ago, it was shaped by the values and beliefs of the time, without input from Aboriginal or Torres Strait Islander people.
18. Aboriginal and Torres Strait Islander peoples were explicitly discriminated against in the Constitution through provisions that prevented them being counted as among the numbers of the nation, and prevented the Australian Government from making laws specifically directed towards Aboriginal and Torres Strait Islander peoples.<sup>v</sup>

19. While the successful 1967 referendum amended the Constitution so that negative references to Aboriginal and Torres Strait Islander peoples were removed and enabling the Parliament to make laws for the benefit of Aboriginal and Torres Strait Islander peoples, it did not fully achieve the intended purpose. In fact, racially discriminatory laws against Aboriginal and Torres Strait Islander peoples can still be made.
20. It is unacceptable and out of step with the modern liberal democracy that Australia is today, for the founding document of our nation to allow discriminatory laws to still be made against Aboriginal and Torres Strait Islander peoples and others.
21. Moreover, it is an extraordinary omission that prior occupation, ownership and custodianship of the land and the contribution of Aboriginal and Torres Strait Islander peoples as the First Australians is not currently recognised in the Constitution.
22. In failing to recognise and protect their rights as the first peoples of Australia, the Constitution entrenches discrimination against Aboriginal and Torres Strait Islander peoples. Instead, the Constitution should reflect the true history of our nation, including the unique contribution of Aboriginal and Torres Strait Islander peoples and cease to allow discrimination.
23. Recognition of Aboriginal and Torres Strait Islander peoples will have both symbolic and practical effect. These effects should not be seen as separate or disconnected. For example, the Royal Australian College of Psychiatrists has argued that recognition will lead to improvements in the social and emotional well-being of Aboriginal and Torres Strait Islander peoples:<sup>vi</sup>

*Recognition of Indigenous Australians as the first people of Australia is as a critical step to support the improvement of Indigenous mental health.*

*The lack of acknowledgement of a people's existence in a country's constitution has a major impact on their sense of identity, value within the community and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people.*

24. In sum, by addressing a history of exclusion of Aboriginal and Torres Strait Islander peoples in the life of the nation, constitutional recognition has the potential to improve the wellbeing of Aboriginal and Torres Strait Islander people<sup>vii</sup>, reset the relationship between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians, build respect for Aboriginal and Torres Strait Islander culture and identity, and change the context in which debates about the challenges faced by Aboriginal and Torres Strait Islander communities take place.<sup>viii</sup>

## **5. What changes should be made to the Australian Constitution to recognise Aboriginal and Torres Strait Islander people?**

### **A preamble to the Australian Constitution**

25. A preamble can recite or explain certain facts.<sup>ix</sup> It can chart in a concise, quotable form the history and aspirations of a nation and provide guidance in interpreting the constitution.<sup>x</sup>

26. The Australian Constitution does not currently contain a preamble. There is only preamble to the Imperial Commonwealth of Australia Constitution Act 1900 (the British Act of parliament).<sup>xi</sup>
27. Oxfam believes that the Australian Constitution should include a preamble that recites certain facts and concisely tells the story of Australia, outlining fundamental principles that underpin our democracy. It should be positive and serve to unite the nation.
28. Recognition of the place of Aboriginal and Torres Strait Islander peoples must be included in a new preamble. But a broader focus will also be required to recognise factual information and fundamental values about our nation, including, for example, our system of government, migration to Australia, a commitment to upholding the rule of law, human rights, and gender equality. This can serve to unite us as a nation and has the potential to result in a higher level of support for constitutional change than recognising Aboriginal and Torres Strait Islander people alone may have.

**Recommendation 1:**           **That Aboriginal and Torres Strait Islander people be recognised in a new preamble to the Australian Constitution. As part of such recognition, serious consideration should be given to the inclusion of issues such as Aboriginal and Torres Strait Islander peoples’ stewardship, custodianship and ownership of land, and the unique, significant and ongoing contribution of Aboriginal and Torres Strait Islander peoples to our nation and its future.**

**Recommendation 2:**           **That the preamble should include a statement of fundamental values such as our democratic system of government, a commitment to upholding the rule of law, human rights, gender equality and our nations’ cultural diversity as a shared legacy owned by all Australians.**

## **Addressing discriminatory provisions within the Australian Constitution**

### *Delete Section 25*

29. Section 25 of the Australian Constitution allows states to exclude people from voting based on race. This is not limited to Aboriginal and Torres Strait Islander peoples but extends to all races.
30. This has rightly been described as an odious provision.<sup>xii</sup> It empowered the denial of Aboriginal and Torres Strait Islander voting rights by Australian States for many years after Federation.<sup>xiii</sup>
31. Australia’s social, cultural, and political views have long since moved on from those of 1901. The White Australia Policy, Protection and Assimilation Programs have long since abated from the social and political landscape. Oxfam believes that this historical backdrop must cease to inform the contemporary legal landscape in Australia and that this provision must be deleted from the Australian Constitution.

32. Moreover, section 25 is fundamentally inconsistent with Australia's commitment to universal human rights given its potential denial of basic rights to certain groups of people based on their race.

*Deletion of Section 51 (xxvi)*

33. Section 51 (xxvi) of the Australian Constitution allows legislation to assert 'race' as a category through which to make laws – whether beneficial or detrimental.
34. Australia's first Prime Minister Sir Edmond Barton described the intent of this provision as enabling the Parliament the power to 'regulate the affairs of the people of coloured or inferior races'.<sup>xiv</sup> Further, it was conceived in 1901 as enabling the Parliament to confine to certain locales, restrict the migration, confine to certain occupations, give protection, and return 'from whence they came' the people of any 'race'.<sup>xv</sup>
35. Most Australians would be shocked to hear that a provision based on such a premise is still contained in the Australian Constitution. A provision that classifies people based on race, underpinned by such thinking is out of step with a modern liberal democracy.
36. While the provision was amended as a result of the landmark 1967 referendum to address its discriminatory nature by removing the words 'other than the Aboriginal race in any State', it has been interpreted by the High Court in *Kartinyeri v The Commonwealth*<sup>xvi</sup> as still allowing racially discriminatory laws. This power has been used since then to make laws against Aboriginal and Torres Strait Islander peoples.<sup>xvii</sup>
37. Oxfam believes that the Parliament should have power to make laws relating to Aboriginal and Strait Islander peoples. However, Section 51 (xxvi) is not an appropriate provision for giving effect to this power. Section 51(xxvi) should be removed and replaced with a new clause to allow the Commonwealth to make laws relating to Aboriginal and Torres Strait Islander peoples.
38. Replacing Section 51 (xxvi) with such a power is necessary because legislation relating to Aboriginal and Torres Strait Islander peoples' cultural heritage, corporations and native title relies on this power could be put in risk if it were not to be replaced.<sup>xviii</sup>
39. In addressing the discriminatory provisions in the Constitution, laws made for the benefit of Aboriginal and Torres Strait Islander peoples must not be compromised, nor should future laws for the protection and recognition of Aboriginal and Torres Strait Islander rights be limited.
40. It is the strong view of Oxfam however that the deletion of Section 51 (xxvi) must be accompanied by the insertion of new clause that prohibits discrimination based on race. This must have the effect of an express limitation on the power so that the Parliament can only make laws relating to Aboriginal and Torres Strait Islander peoples that are beneficial.
41. Without this accompanying non-discrimination clause, Oxfam is of the view that a new provision to make laws in relation to Aboriginal and Torres Strait Islander people

would be unacceptable because it would continue to have the same effect as the current Section 51 (xxvi).

*Insertion of a new non-discrimination clause*

42. The Racial Discrimination Act 1975 has been overridden in relation to Aboriginal and Torres Strait Islander peoples on at least two occasions.<sup>xix</sup>
43. As a modern liberal democratic country that has committed internationally to protect and promote human rights, and one that values fairness, our Constitution should prohibit discrimination based on race. This would mean that racial discrimination could not be overridden by legislation.
44. A new clause prohibiting discrimination based on race should be inserted into the Australian Constitution in such a way as to have effect across all provisions in the Constitution. This clause should make clear that it would not prevent making laws or taking actions to address historical disadvantage or aimed at the preservation of language, culture or identity.
45. In addressing discrimination based on race this new provision would not be limited to Aboriginal and Torres Strait Islander people but would extend to all peoples living in Australia.

**Recommendation 3: That the discriminatory provisions within the Constitution be removed so that the Constitution no longer permits or anticipates discrimination based on race. Specifically,**

- a) **That Section 25 be deleted from the Australian Constitution.**
- b) **That Section 51 (xxvi) in its current form be deleted from the Australian Constitution and that new provisions be inserted to ensure that:**
  - i) **The Federal Parliament is empowered to make laws relating to Aboriginal and Torres Strait Islander peoples.**
  - ii) **Discrimination based on race is prohibited. However, the Parliament would be empowered to make laws aimed at addressing historical disadvantage or preserving language, identity or culture.**



## **Enabling the Commonwealth to enter into constitutionally supported agreements with Aboriginal and Torres Strait Islander communities or organisations**

46. The relationship between the Commonwealth and Aboriginal and Torres Strait Islander peoples has been damaged by many years of paternalistic imposition of laws and policies without any agreement.
47. Oxfam agrees with the Aboriginal and Torres Strait Islander Social Justice Commissioner that strengthening relationships between the Commonwealth and Aboriginal and Torres Strait Islander peoples is central to addressing disadvantage faced by Aboriginal and Torres Strait Islander peoples.<sup>xx</sup>
48. Changing our nation's Constitution to enable the Commonwealth to enter into constitutionally supported agreements with Aboriginal and Torres Strait Islander peoples offers the nation a circuit breaker to rebuild and truly reset this relationship.
49. It will involve reconsidering how the Commonwealth relates to Aboriginal and Torres Strait Islander peoples and re-structuring the relationship to one based on agreement and participation, not imposition.
50. Constitutionally supported agreements between the Commonwealth and Aboriginal and Torres Strait Islander peoples could be in relation to issues fundamental to the relationship, such as education, the protection of cultural heritage, and rights to land.<sup>xxi</sup> These agreements could only be changed by further agreement between the parties involved, rather than by legislation.<sup>xxii</sup>
51. Such agreements would have the potential to reframe the conversation and relationship between the Commonwealth and Aboriginal and Torres Strait Islander peoples. They could support a more appropriate framework for engaging Aboriginal and Torres Strait Islander people in decisions about their lives, ensure adequate resourcing of engagement processes, and allow genuine partnership approaches to emerge.

**Recommendation 4:**           **That the Australian Constitution be amended to enable the Commonwealth to enter into constitutionally supported agreements with Aboriginal and Torres Strait Islander communities or organisations.**

## **6. What processes should follow the completion of the work of the Expert Panel on Constitutional Recognition of Indigenous Australians?**

52. The Constitution is owned by the Australian people. Any process towards a referendum must be open and transparent and seek to involve the community at every step. Oxfam believes that the final Panel report must be made public immediately after its submission to government.
53. Only eight out of 44 referenda have succeeded in Australia.

54. The three critical factors for achieving successful referenda have been maintaining bipartisan support, engendering a sense of popular ownership, and ensuring public education.<sup>xxiii</sup>
55. It is therefore incumbent on the Panel to recommend to government a process towards a referendum following the submission of its final report that seeks to maintain and enhance each of these three pillars for achieving a successful referendum.
56. While the Panel process has started the national conversation on constitutional recognition and engendered a sense of interest in the issue, a significant further process to build popular ownership of options and educate the public is needed. This must be done in a way that maintains the multi party support enjoyed to date for this issue. It must also ensure that widespread engagement occurs with Aboriginal and Torres Strait Islander peoples, including in remote communities and in language.
57. The Government should fully fund a widespread public education and engagement campaign capable of reaching the majority of Australians. This would take forward the recommendations of the Panel, explain the nature and rationale for change, and seek views on those options. This should be independent of Government and have cross party agreement and could build public understanding and support for changes.
58. Innovative campaigning and engagement options should be utilised so that the process enthuses and encourages participation, discussion and debate. For example, town hall meetings, people's parliaments, school-based preamble writing competitions based on issues proposed by the panel, and social media should play a part in engaging the Australian public in this important national discussion. Civil society organisations should also be harnessed to engage with their constituents and build public support and understanding.
59. The Government has committed to holding a referendum at or before the next election. In considering the timing of a potential referendum, the Panel should consider the current opportunity that is presented to the Australian people to reform the Constitution, the potential for partisan politics at the next election, and public perception of the cost of de-coupling the referendum from the election.
60. The Panel should also consider whether the Australian public will be well enough informed by the time a referendum is held, as an unsuccessful referendum could set back relations between Aboriginal and Torres Strait Islander people, government and the wider community many years.

**Recommendation 5: That the report of the Panel be immediately released to the public following its submission to Government.**

**Recommendation 6: That a fully resourced popular education strategy to take forward the recommendations of the Panel, explain the nature and rationale for constitutional change and seek views on options, be developed and rolled out with cross party support early in 2012.**

<sup>i</sup> Law Council of Australia, *Constitutional Recognition of Indigenous Australians*, Discussion Paper, April 2011, At <http://www.lawcouncil.asn.au/library/speeches/forum-2011.cfm> (viewed 1 September 2011).

<sup>ii</sup> Australian Government, *Expert Panel Terms of Reference*, Expert Panel on Constitutional Recognition of Indigenous Australians, At <http://www.youmeunity.org.au/be-informed/expert-panel> (viewed 15/8/2011).

<sup>iii</sup> Australian Government, note 2.

<sup>iv</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2010), At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport10/chap2.html#s2\\_5](http://humanrights.gov.au/social_justice/sj_report/sjreport10/chap2.html#s2_5) (viewed 1/8/2011)

<sup>v</sup> P Dodson, *Welcoming speech* (Speech delivered at the Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993) quoted in B Attwood and A Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed, 2007), pp 146-147.

<sup>vi</sup> The Royal Australian and New Zealand College of Psychiatrists 2011, *Recognition of Indigenous people in the Australian Constitution*, Position Statement September 2011, Available at <http://www.ranzcp.org> (viewed 22 September 2011)

<sup>vii</sup> Royal Australian and New Zealand College of Psychiatrists, note vi.

<sup>viii</sup> Gooda, note 4.

<sup>ix</sup> Quick and Garran, *The Annotated Constitution* (1901).

<sup>x</sup> M McKenna, A Simpson, G Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24(2) *University of New South Wales Law Journal* 382.

<sup>xi</sup> Law Council of Australia, *Constitutional Recognition of Indigenous Australians*, Discussion Paper, April 2011, At <http://www.lawcouncil.asn.au/library/speeches/forum-2011.cfm> (viewed 1 September 2011).

<sup>xii</sup> Constitutional Commission, *Final Report of the Constitutional Commission* (1988), p 16.

<sup>xiii</sup> Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Constitutional reform: Creating a nation for us all*, 2011 at 11 and George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won', *Land, Rights, Laws: Issues of Native Title*, September 2011, 5(1) at 4

<sup>xiv</sup> Blackshield T & Williams G, 2002, *Australian Constitutional Law and Theory: commentary and materials*, 3<sup>rd</sup> Ed, The Federation Press, p 181

<sup>xvi</sup> (1998) 195 CLR 337.

<sup>xvii</sup> Law Council of Australia, note 11, p 14.

<sup>xviii</sup> Oxfam notes that many of these laws may be able to be made in accordance with the external affairs power (s 51(xxix)) but also notes that the use of this power is often contested and sole reliance on this may lead to legal uncertainty and lack of clarity.

<sup>xix</sup> T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 70. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport08/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html) (viewed 2 September 2011).

<sup>xx</sup> Gooda, note 4

<sup>xxi</sup> Indigenous Law Centre, *Constitutional reform and Indigenous peoples*, Research Brief No 3, 2011, University of NSW, At <http://www.lawcouncil.asn.au/library/speeches/forum-2011.cfm> (viewed 1 September 2011).

<sup>xxii</sup> Indigenous Law Centre, note 25.

<sup>xxiii</sup> Williams, G & Hume D, *People Power: the history and future of the referendum in Australia*, UNSW Press, 2011