

Aboriginal Peak Organisations Northern Territory

An alliance of the CLC, NLC, CAALAS, NAAJA and AMSANT

Aboriginal Peak Organisations of the Northern Territory

Submission to the Joint Select Committee on

Constitutional Recognition of Aboriginal and Torres Strait

Islander Peoples

24 February 2015

1. About APO NT

Formed in October 2010, APO NT is an alliance between the Northern Land Council (NLC), Central Land Council (CLC), Aboriginal Medical Services Alliance Northern Territory (AMSANT), North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS).

APO NT is working to develop constructive policies on critical issues facing Aboriginal people in the NT and to influence the work of the Australian and Northern Territory governments. As representatives from peak organisations in the NT, we share the aim of protecting and advancing the wellbeing and rights of Aboriginal and Torres Strait Islander people and communities. We also aim to provide a representative voice for Aboriginal people in the NT and to enable effective communication and information distribution between and within communities and Aboriginal organisations.

2. Terms of Reference

The Committee is seeking submissions on steps that may be taken to progress towards a successful referendum for Constitutional recognition of Aboriginal and Torres Strait Islander peoples.

3. Introduction

APO NT welcomes the interim report and the October 2014 progress report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. APO NT acknowledges the attention and thought that has gone into the drafting of the recommendations in the interim report and recent progress report and commends the Committee for adopting a number of the suggested recommendations made by APO NT and other organisations. Although we acknowledge this effort, APO NT considers that some of the recommendations do not go far enough to recognise Aboriginal and Torres Strait islander peoples and would not sufficiently protect them from racially discriminatory laws. APO NT recommends further and ongoing consultation with Aboriginal communities, and with the broader community.

This submission will address some of those issues as well as the steps and processes that should be undertaken to achieve a successful result at referendum.

4. Summary of APO NT's Recommendations

These recommendations are made with direct reference to the recommendations made by the Committee in the October 2014 progress report, and reflect APO NT's initial recommendations for Constitutional reform and recognition.

Committee October 2014 Progress Report Recommendations (in brief)	APO NT Response and Recommendations
<p>Rec 1. That each House of parliament set aside a full day to debate these recommendations</p>	<p>APO NT agrees with this recommendation.</p>
<p>Rec 2. The committee recommends repealing section 25 of the Constitution.</p>	<p>APO NT agrees with this recommendation.</p>
<p>Rec 3. The committee recommends not inserting the Expert Panel's proposed new section 127A.</p>	<p>APO NT recommends a provision be included in the Constitution recognising and protecting the right of Aboriginal and Torres Strait Islander people to maintain and practise their culture, language and identity and to protect those cultures, languages and identities.</p> <p>The Expert Panel's proposed section 127A relates to the recognition of Aboriginal and Torres Strait Islander languages, but still falls well short of APO NT's proposal.</p>

<p>Rec 4.</p> <p>The committee recommends the repeal or amendment of section 51(xxvi) to remove the reference to race.</p>	<p>APO NT agrees with this recommendation.</p> <p>As stated above, APO NT also recommends the repeal of section 25, which provides for adjustment of representation in the event that a State disqualifies persons from voting on the basis of their race. There is no place for such provision in a modern constitution.</p>
<p>Rec 5.</p> <p>The Committee presented three structural options for the recognition of ATSI peoples and preservation of both existing Commonwealth laws relying on section 51(xxvi) and the Commonwealth's power to make laws with respect to ATSI peoples. The options also include options for the prohibition of racial discrimination.</p>	<p>APONT has not been able to form a view about the three specific options but agrees that the Constitution should be amended as follows (subject to Rec 6 recommendations):</p> <ol style="list-style-type: none"> 1. A new provision should be inserted specifically directed at prohibiting racial discrimination. The provision should explicitly provide that any special measure must be reasonable and proportionate, and require prior consultation with the group that is the subject of the special measure. 2. There should be inclusion of a new provision providing a power for the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander people. 3. Incorporating a Statement of Recognition of Aboriginal and Torres Strait Islander people as the first people of this Country in the body of the Constitution. 4. Introducing an agreement-making power modelled on the existing and successful agreement-making provision in section 105A of the Constitution.
<p>Rec 6.</p> <p>The committee recommends that a referendum to recognise ATSI peoples in the Constitution</p>	<p>APO NT agrees with this recommendation but considers bipartisan support is critical and Prime Minister Abbott's suggestion of 27May 2017, to coincide with the 1967 Referendum has merit.</p>

take place at or shortly after the next federal election in 2016.

In relation to the process for ensuring a successful referendum, APONT recommends:

1. That widespread Aboriginal community engagement and education regarding the importance of constitutional reform, and the detail of specific proposed amendments, particularly in remote areas. This will ensure that Aboriginal people understand what they are voting for and can make an informed decision. This should include the use of interpreters and local community members. Culturally appropriate community legal education should be resourced to assist the Government in delivering this education to Aboriginal communities.
2. A targeted national awareness campaign should also be undertaken to better inform the broader Australian community on the history of Aboriginal and Torres Strait Islander peoples and why Constitutional recognition and reform is necessary.
3. That the Australian Government invest in public relations initiatives, including social media, mainstream media and the engagement of high profile personalities, e.g. sports, television and music celebrities to foster Constitutional discussion nationally and specifically in the Northern Territory.
4. That the Australian Government continues to support the 'Recognise' campaign.
5. That public education campaigns should highlight:
 - a. What has been successful in other nations, including Canada and New Zealand in relation to Constitutional recognition of Indigenous people; and
 - b. That sovereignty and political representation models inform the discussions; and
 - c. That recognition does not threaten the structure or processes of Australian federalism or the

	<p style="text-align: center;">unity of the nation-state.</p> <p>These recommendations are also consistent with the advice that APO NT received from Professor George Williams and Sean Brennan in 2011. They advised that for a referendum to succeed there must be bipartisanship, popular ownership and popular education. The approach proposed by the Expert Panel is aimed at achieving this. APO NT strongly recommends that the Australian Government continue to consult with Aboriginal and Torres Strait Islanders and their representative organisations through the referendum process.</p>
<p>Rec 7.</p> <p>The committee recommends that the <i>Aboriginal and Torres Strait Islander Peoples Recognition Act 2013</i> should be extended to align with the proposed timing of a referendum.</p>	<p>APO NT agrees with this recommendation.</p>

5. Why Constitutional Change is Important

Aboriginal people in the Northern Territory understand that the Australian Constitution matters. We have experienced law-making power being used for and against our interests. We have seen that legal recognition can make a difference to our lives.

Aboriginal people in the Northern Territory need the right legal balance in the Constitution between the rights of people and the powers of government. As our experience with Commonwealth Ordinances in the protectionist and assimilation eras, and through the *Aboriginal Land Rights (NT) Act (1976)*, the *Native Title Act (1993)* and the *Northern Territory (National) Emergency Response Act (2007)* (“NTNER”) shows, Australia has not yet achieved that proper balance. Because of the lack of Constitutional protection, gains that Aboriginal people have made in the recognition of our rights and culture are often vulnerable to being reversed or diminished through discriminatory laws.

A referendum in the near future offers an important opportunity for Australia to modernise its Constitution. Australia has committed itself internationally to respecting basic human rights. This commitment includes being a signatory to the International Convention on the Elimination of all forms of Racial Discrimination (1966) and, more recently, the UN Declaration on the Rights of Indigenous Peoples. Australian courts and Parliaments have taken some steps to reverse Aboriginal people’s dispossession and recognise Aboriginal property rights. Unfortunately, the Constitution has not kept pace with these developments.

Constitutional change is needed to carry forward the work commenced by the 1967 referendum, but left unfinished. There should be strong constitutional protections against racial discrimination to help build a future based on acknowledgment and respect for Aboriginal and Torres Strait Islander peoples.

6. Eliminating Racial Discrimination

a. The need for a non-discrimination clause with respect to race

The Australian Constitution was drafted at a time when the general public and politicians thought racial discrimination was acceptable. This has meant that Aboriginal people in the Northern Territory and across Australia have repeatedly suffered injustice under racially discriminatory

laws. Commonwealth Ordinances gave administrators extensive controls over people's daily lives and caused harm to many Aboriginal families and children. Aboriginal people were denied the right to vote at federal elections until 1962.

After 1975, the federal *Racial Discrimination Act* made a difference. However, because there is no constitutional protection against racial discrimination, the Commonwealth Parliament can choose to introduce legislation overriding or avoiding protections provided under the *Racial Discrimination Act*. The introduction of the NTNER is a blatant example of this.

To ensure sufficient protection against the introduction of racially discriminatory laws, the Constitution needs to explicitly preclude racial discrimination. A provision should be inserted in the Constitution which provides that no Commonwealth, State or Territory law or government action can discriminate on the basis of race.

The Expert Panel's recommendation that a non-discrimination provision be included in the Constitution is consistent with APO NT's proposal, but the wording of the proposed s. 116A non-discrimination provision is problematic. The proposed provision does not offer sufficient protection against racially discriminatory laws. Sub-section (2) of the proposed section, is broadly drafted and significantly waters down the prohibition on discrimination. It seeks to include a provision to allow special measures' to be taken to benefit people of a particular racial group; however, it is not limited to positive measures. Further, it does not explicitly require that a 'special measure' be reasonable and proportionate, or include a prior consultation and consent requirement. These are features which are generally argued to be characteristics of 'special measures'. The absence of these requirements means that the provision may be too wide and allow for paternalistic laws to be made in relation to Aboriginal and Torres Strait Islander people 'for their own good'.

Using the NTNER (which was explicitly and unashamedly discriminatory) as a litmus test, the NTNER would arguably be permissible under the Expert Panel's proposed s. 116A non-discrimination provision as the government has consistently maintained that the NTNER was 'for the purpose of overcoming disadvantage'. We therefore urge the Committee to consider a stronger non-discrimination provision than that recommended by the Expert Panel.

Once a proposed non-discrimination clause is settled, strong public awareness campaigns advocating for Constitutional reform should educate the Australian community about the racially

discriminatory nature of past and present Australian laws. This will increase public awareness of the treatment of Aboriginal people in Australian history.

b. The need for a federal law-making power in Aboriginal and Torres Strait Islander Affairs

The existing races power in section 51(xxvi) of the Constitution must be repealed. Since the 1967 referendum, this section has allowed for both beneficial and detrimental laws based on 'race'.¹

Whilst APO NT strongly recommends that a non-discrimination provision be included in the Constitution, as the Committee has recognised, it is also important that the Commonwealth has the clear power to make beneficial laws for Aboriginal and Torres Strait Islander peoples. Accordingly, a law-making power, which complements the recommended non-discrimination provision, must be included in the Constitution. It should expressly permit laws that maintain and promote Aboriginal and Torres Strait Islander culture, languages and identity, or address historical disadvantage. This will protect against any unintended interpretation of the non-discrimination clause which might affect laws of this kind.

c. The need to repeal section 25 from the Constitution

A provision which contemplates race-based electoral laws has no place in the Australian Constitution. Section 25 should be repealed as part of the package of changes necessary to finally eliminate racially discriminatory provisions from the Australian Constitution. This is consistent with the recommendation by the Expert Panel, and the Committee's recommendations in both the Interim Report and the October 2014 Progress Report.²

7. Supporting Agreement Making

APO NT considers that the Australian Constitution should provide a legal basis to support agreement-making between governments and Aboriginal and Torres Strait Islander peoples.

The Committee did not consider this issue in its Interim Report or recent Progress Report.

The Expert Panel did not recommend the inclusion of an agreement-making power in the Constitution. The Expert Panel decided that including an agreement-making power 'would be likely to confuse many Australians, and hence could jeopardise broad public support for the Panel's other recommendations' (p 201). The Panel Report does not elaborate on this concern,

¹ *Kartinyeri v Commonwealth*, (1998) 195 CLR 337 and Dr. A.J. Wood, 'Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples', 29 July 2014.

² The Report of the Expert Panel, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution', January 2012, xviii:http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf Retrieved 13 August 2014. (Hereinafter 'the Panel Report')

but presumably the concern is that the power could be seen (or presented by opponents) as related to the making of a treaty, which may polarise opinion.

The Expert Panel was also satisfied that the Commonwealth already had sufficient power under the Constitution to advance agreement-making with Aboriginal and Torres Strait Islander peoples (p 202).

Whilst acknowledging the issues raised by the Expert Panel, APO NT is of the view that the proposal for Constitutional Reform should include a proposed agreement making power. Agreement-making would give appropriate recognition to Aboriginal and Torres Strait Islander peoples as the nation's first people, and whose status and rights were ignored during colonisation and federation. Agreement-making also provides a mechanism for developing legitimate and long-lasting solutions to the disadvantage experienced by so many Aboriginal and Torres Strait Islander people (such agreements could be made to improve specific areas like education and health and could extend to more comprehensive arrangements over matters such as local governance).

Further, a Constitutional agreement making power could help ensure that governments better consult and engage with Aboriginal people prior to introducing laws and formulating policies to combat disadvantage and poverty and progress self-determination.³

Morris explains that:

The New Zealand example shows us that treaties and agreements can be effective in equalising the status of Indigenous people, though the Treaty of Waitangi is not formally incorporated into New Zealand's Constitution. Its legal status is ambiguous because it is only enforceable to the extent it has been incorporated into legislation. The Treaty of Waitangi has however been described as having quasi-constitutional force in its extensive impact on law and policy in New Zealand. A similar approach to agreement making in Australia may be helpful in shifting attitudes and affording Indigenous people more leverage in their affairs.⁴

³ Morris, S 'Agreement-Making: The need for democratic principles, individual rights and equal opportunities in Indigenous Australia', p.2 <http://www.cyi.org.au/wp-content/uploads/2011/11/AltLJ363Morris.pdf>

⁴ Ibid.

8. Constitutional recognition and protection of cultures, languages and identity

a. Protecting the rights to culture, language and identity

The Constitution should include a specific provision recognising and protecting the right of Aboriginal and Torres Strait Islander peoples to maintain and practise their culture, languages and identity. This should reflect the terms of the UN Declaration on the Rights of Indigenous Peoples.

The Expert Panel expressed limited support for a provision of this nature. However, APO NT considered that the Expert Panel's proposed s. 127A is far too narrow in scope. Furthermore, the inclusion of a statement recognising English as the national language in the Expert Panel's proposed s. 127A is inappropriate in a provision of this kind. While APO NT does not oppose a statement recognising English as the national language, such a statement would be more appropriately placed in a standalone provision elsewhere in the Constitution.

We ask the Committee to reconsider its opposition to a provision recognising and protecting the right of Aboriginal and Torres Strait Islander people to maintain and practise their culture, languages and identity. Should the Committee reconsider its position, we urge the Committee to consider a broader provision than that recommended by the Expert Panel.

b. A statement of recognition in the Constitution

A Statement of Recognition of Aboriginal and Torres Strait Islander people as Australia's original owners and occupiers should be included in the body of the Australian Constitution. The Statement should refer to matters such as:

- the history of continuous occupation by Aboriginal and Torres Strait Islander people;
- our unique status as the original owners and occupiers of Australia;
- colonisation by Britain and its impacts on Aboriginal and Torres Strait Islander societies;
- the maintenance of Aboriginal and Torres Strait Islander culture, languages and identity;
- the spiritual, social, cultural and economic relationship we have with our land and waters;
and
- the distinctive contribution we have made to Australian life and Australian identity.

Some other jurisdictions in Australia have included like acknowledgment [what does that mean] in the preamble or body of their constitutions, but have also included non-justiciability clauses.⁵ We oppose the inclusion of a non-justiciability clause in the Australian Constitution. This would send the wrong message and undermine the significance and value of the Australian people voting at a national referendum to acknowledge and recognise Aboriginal and Torres Strait Islander people.

The inclusion of a Statement of Recognition in the body of the Australian Constitution would not preclude the insertion of a Preamble to the Constitution addressing a wider range of matters.

11. Timing of the Referendum

This referendum should not be rushed; equally, it is critical that momentum not be lost. Further public education is required and there is a definite need for further consultation with Aboriginal communities and peak Aboriginal organisations to ensure that the content and process for the proposed reform is supported by Aboriginal communities.

APO NT is in agreement with the recommendation in the interim report that a referendum should be held after the 2016 Federal election. However it should not be rushed and Abbott's commitment to hold on the 50th anniversary of the 1967 Referendum, that is 27 May 2017 – would be more symbolic to Aboriginal people and mainstream who voted in 1967?

Governments must resource and support a strong education and awareness campaign to build momentum for change in the lead up to the referendum.

⁵ See for example; *Constitution Act 1902* (NSW) and *Constitution Act 1975* (Vic).

Appendix A:

APO NT Member Organisations

NAAJA:

The North Australian Aboriginal Justice Agency was formed in 2006. It brought together three existing Aboriginal Legal Services: North Australian Aboriginal Legal Aid Service, established in 1972; Katherine Regional Aboriginal Legal Aid Service, established in 1985; and Miwatj Aboriginal Legal Service, established in 1998.

NAAJA now has staff of over 100 across the Top End of the Northern Territory, with offices in Darwin, Katherine and Nhulunbuy. NAAJA provides services in a number of areas of the law including; criminal law, civil law (including family and child protection matters), Law and Justice Advocacy projects, and a prison Throughcare service.

Central Land Council:

The Central Land Council is a Commonwealth statutory authority established under the *Aboriginal Land Rights (Northern Territory) Act 1976* and a Native Title Representative Body under the *Native Title Act 1993*.

The CLC is one of four Northern Territory Land Councils. The CLC region covers the entire southern half of the Northern Territory, an area of some 780,000 square kilometres of land. The council is made up of 90 Aboriginal people from more than 15 language groups elected from communities across the region.

The CLC is first and foremost a representative organisation for the Aboriginal people in its region particularly on land related matters, including land claims and economic use of land.

CAALAS:

Central Australian Aboriginal Legal Aid Service strives for justice, dignity and equal rights and treatment before the law for Aboriginal people in Central Australia. CAALAS provides high quality, culturally appropriate and readily accessible legal services (in the areas of criminal, civil, family and welfare rights law), legal education, social justice advocacy and preventative and early intervention services to Aboriginal people and communities in Central Australia.

Northern Land Council:

The Northern Land Council (NLC) has legislative responsibilities under the *Aboriginal Land Rights (Northern Territory) Act 1976*, and the *Native Title Act 1993*. The NLC is the Native Title Representative Body responsible for native title matters within its jurisdiction as well as the Tiwi and Anindilyakwa Land Council areas. NLC's Corporate and Strategic Plans provide a vision and guides the work to be performed including assisting Aboriginal landowners to protect and manage and sustainably use their land, seas and resources through caring for country. NLC supports community development initiatives and developing a prospectus to enhance economic development opportunities is a priority. The Northern Land Council region includes islands and covers the northern part of the mainland Northern Territory.

AMSANT:

AMSANT is the peak body for Aboriginal Community Controlled Health Services in the Northern Territory. It aims to improve the health of Aboriginal people in the NT through promoting and extending the principle of local Aboriginal community control over primary health care services to Aboriginal people. AMSANT aims to alleviate the sickness, suffering and disadvantage, and to promote the health and well-being of Aboriginal people of the NT through the delivery of health services and the promotion of research into causes and remedies for illness and ailments found within the Aboriginal population of the NT.