Mr Ken Wyatt AM, MP, Chair and Senator Nova Peris OAM, Deputy Chair

Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Mr Wyatt and Senator Peris

In making this submission, we should first comment on the historical significance of your appointments to this important Parliamentary Joint Select Committee, and congratulate you both and wish you well in this work which has such potential symbolic and real benefit for the future of Aboriginal and Torres Strait Islander Peoples and the unity of the Australian nation.

It is only necessary to compare the composition of this Joint Select Committee with that of the Constitutional Conferences of the 19th century to see the extent of change in Australia. Those Conferences were attended by delegates who were exclusively white and exclusively male. The great majority of them accepted without question the now thoroughly discredited Social Darwinism which identified Aboriginal and Torres Strait Islander Peoples as members of an inferior race, doomed to extinction. The vision for the future of the Conferences' delegates was a White Australia. All but a few hundred Aboriginal and Torres Strait Islander Peoples who were already on the electoral rolls of mainly South Australia and the Northern Territory at the date of Federation, were deprived by them (Section 41 of the Constitution and the Commonwealth Franchising Act 1902) of the right to vote at Federal elections. [1]

The persistence of racial prejudice is demonstrated by the fact that it has taken us over one hundred and twenty years since the Constitution was first debated at those Conferences to get around to proposing the removal from it of the last vestiges of racial prejudice.

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[1] Australian Electoral Commission n.d., *History of the Indigenous Vote*, p. 5, viewed 15 February 2014, http://www.aec.gov.au/Education/files/history_indigenous_vote.pdf.

Chapter 1. Introduction

We strongly support the measures recommended by the Expert Panel which we believe would:

- remove those traces of racial prejudice that remain embedded in the Constitution;
- help to move Aboriginal and Torres Strait Islander Peoples away from their colonial legacy of imposed social and economic disadvantage; and
- contribute to national unity by breaking down the attitudes of mutual distrust that the Reconciliation Barometer shows with alarming clarity. [2]

The Expert Panel analysed [3] the deficiencies and the misplaced paternalism of present governance structures and procedures that continue to dictate the relationships between governments and Aboriginal and Torres Strait Islander Peoples. We believe that institutional racism, more insidious than racial prejudice, more persistent and often unrecognized, is still found here. While the Expert Panel discussed possible Constitutional remedies they made no recommendations for change in this area of governance. Unlike the Expert Panel, we believe that this rare opportunity to dispose of institutional racism should not be missed and that the two further Constitutional changes, discussed further below would:-

- help to re-establish the relationships between Governments and Aboriginal and Torres Strait Islander Peoples on the basis of equality and consent;
- give impetus to the establishment of governance structures and procedures that would enable Aboriginal and Torres Strait Islander Peoples to give their free, prior and informed consent to matters affecting them; [4] and
- contribute directly to the advancement of Aboriginal and Torres Strait Islander People towards equality, self-determination and autonomy in the management of their own affairs. [5]

Accordingly, we propose two additional items for inclusion in the Referendum, as indicated in paragraph 3 of the following summary.

This submission:-

- supports the proposals set out in the Draft Bill at pages 230-232 of the Expert Panel's Report;

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[2] Reconciliation Australia 2013, "Key Findings", Australian Reconciliation Barometer 2012, p. 1, viewed 4 February 2014, < http://reconciliation.org.au/wp-content/uploads/2013/12/2012-Australian-Reconciliation-Barometer-Overview.pdf >.
[3] Expert Panel 2012, *Report on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, Canberra, Sydney, Section 3.10 p. 99, Section 7.4 p. 183, Section 7.10 p. 187, viewed 6 February 2014, http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf >.
[4] United Nations 2002, Declaration of the Rights of Indigenous Peoples, Article 18 and 19, viewed 6 February 2014 <<**http://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1**>**.**

[5] Ibid, Articles 3 and 4.

- refutes three lines of argument against the Expert Panel's recommendations that have been advanced by some;
- adds two proposals for constitutional change that were considered but not recommended by the Expert Panel, with our recommendation for further consideration by you:
    - - a Constitutionally-backed Treaty-making power that would allow binding Treaties with Aboriginal and Torres Strait Islander Peoples and that, once ratified by Parliament, would have the full force of law; and
    - - two seats in the Senate dedicated to democratically elected representatives of the Aboriginal and Torres Strait Islander Peoples, with elected Senators having the same rights, duties and privileges as all other Senators;
- suggests that, in addition to the normal Constitutional provisions for changing the Constitution, an important need for this Referendum would be the free, prior and informed consent to the proposed changes by Aboriginal and Torres Strait Islander Peoples;
- proposes possible options for obtaining the views of Aboriginal and Torres Strait Islander Peoples not only as a prerequisite to this Referendum but on a continuing basis for other purposes, discussed in Chapters 5 and 6 below;

seeks the Committee's support for:-

- further discussions between Government and the National Congress that would equip the National Congress to make changes considered necessary to speak on behalf of the Aboriginal and Torres Strait Islander Peoples for advocacy and other purposes discussed in Chapters 5 and 6 below, and
- the necessary funding to achieve and implement any such agreed changes.

Chapter 2: Refuting Arguments against the Recommended Changes

A one-clause Bill of Rights?

Some would avoid any change to the Constitution that might be regarded, in their words, as "a one clause bill of rights", suggesting that the Expert Panel's recommendations might do that through the proposed new Section 51A Recognition of Aboriginal and Torres Strait Islander Peoples, "acknowledging the need to secure the advancement of the Aboriginal and Torres Strait Islander People". It is our view that acknowledging this need is an essential move towards meeting Australia's international obligations under the UN Declaration of the Rights of the Indigenous Peoples (the UN Declaration). [6] While it is possible that laws made under this proposed Section 51A might confer rights, the wording of the proposed Section itself does not and could not be understood as doing so. This is clearly a view shared with the Expert Panel. [7] This Section would prevent the passage of legislation that would adversely affect existing rights and was designed to do so, in our opinion justifiably.

In this category also are the views of those who consider recognition would "undermine national ideals such as unity, equality and democracy". [8] We do not understand or accept this viewpoint and as the Expert Panel Report shows it does not represent the opinion of most Australians.

Legal uncertainty about "advancement"

Associated with (a) above is the claim that the power to make laws for the "advancement" of Aboriginal and Torres Strait Islander Peoples would lead to unending legal disputation about the application of this term to particular laws. The solution to this point is simple, although applying it might be rather more complex. To make the right to self-determination and autonomy, as set out in Articles 3, 4, 18 and 19 of the UN Declaration, [9] more than a mere statement of good intentions, any laws proposed to be made under this constitutional power should first be accepted by the Aboriginal community as advancement.

This could be achieved by submitting draft legislation made under this constitutional head of power to an Aboriginal representative body, a role that the National Congress of Australia's First Peoples has been designed to fill. It could be argued that further development of Congress' representational capacity might be necessary but we are firmly of the belief that such a development would place consultation with Aboriginal and Torres Strait Islanders right where it belongs: in the hands of a democratically elected, Aboriginal and Torres Strait Islander representative body. This proposal is discussed further below in Chapters 5 and 6.

The extent of changes

There are those who would prefer to confine any change to the Constitution to a preamble and to the mere acknowledgment of the historical fact that Aboriginal and Torres Strait Islanders were Australia's First

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[6] United Nations, *Declaration of the Rights of Indigenous Peoples*, articles3, 4, 18 and 19.
[7] Expert Panel 2012, *Report on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, p. xiv, viewed 6 February 2014, <http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf >.
[8] Ibid, p. 71.
[9] United Nations, Declaration of the Rights of Indigenous Peoples, articles3, 4. 18 and 19

Peoples, avoiding any other changes including those recommended by the Expert Panel or even the significance of Aboriginal culture and languages (e.g. Gary Johns' address to the Samuel Griffith Society). [10]

Dr Johns' main argument was that recognition of Aboriginal cultures in the Constitution would provide a legal basis for mitigating some criminal offences by Aboriginal and Torres Strait Islander Peoples, leading to sentences that would be less than those imposed on non-Indigenous offenders found guilty of similar crimes. In our opinion, this does not give sufficient weight to the fact that sentencing Judges already pay attention to a person's background. The Indigenous Clearing House [11] gives an extended discussion on sentencing guidelines, citing Justice Brennan of the High Court of Australia in Neal v R (1982:326) :-

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account ..., all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.

Given existing sentencing guidelines as described in that article, recognition in the Constitution of Aboriginal cultures would, it is suggested, be unlikely to give any more weight to mitigating circumstances arising from an Aboriginal offender's background than would the facts of that background. Even if this argument were not accepted, it seems to us to fall somewhere between flimsy and demeaning to suggest, as Dr Johns appears to, that there should be no recognition in the Constitution of Aboriginal cultures, the longest surviving cultures in the world, because he perceives (and we do not) a possible risk that sentences for some criminal offences might thereby be mitigated.

Others have argued strongly, with significant support from both Aboriginal and mainstream communities, that recognition of culture and languages as recommended by the Expert Panel is an essential element of any Constitutional recognition. Three leading sources are shown below.

The National Congress of Australia's First peoples said, in their submission to the Expert Panel:- [12]

So far much of the political and public debate appears to have been focussed upon the insertion of a preamble to the Constitution that will give appropriate recognition to Aboriginal and Torres Strait Islander Peoples as Australia's 'First Peoples'. Perhaps unsurprisingly, there was a very high level of support (almost 92%) for such a move when Delegates were asked to indicate support or opposition to the various options for reform. However, an even higher number of Delegates supported an amendment which would prohibit racial discrimination or provide a guarantee of equality (97%) and a clause which would protect the unique rights that First Peoples possess, such as rights to culture, heritage and land (95%).

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[10] Gary Johns 2013, "History Yes, Culture No", *The Australian*, October 08 2013, (an edited version of the Address to the Samuel Griffith Society), viewed 10 February 2014 <www.theaustralian.com.au/opinion/columnists/history-yes-culture-no/story-fn8v83qk-1226734337831 >.

[11] Indigenous Clearing House n.d., *Sentencing Guidelines*, viewed 7 February 2014, <.http://www.indigenousjustice.gov.au/briefs/brief007.pdf>.

[12] National Congress of Australia's First Peoples, 2011, *Statement by the National Congress of Australia's First Peoples to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, viewed 2 February 2014, <http://nationalcongress.com.au/wpcontent/uploads/2011/09/CongressStatementtoExpertPanel.pdf >.

The Expert Panel at page 77 shows a high level of support among the national community for amending the Constitution to recognise Aboriginal and Torres Strait Islander Peoples and their cultures in the Constitution. [13]

When asked about what should be recognised, the results showed the highest levels of support for recognising Aboriginal and Torres Strait Islander peoples as 'Australia's first peoples' (88 per cent), and for a statement recognising the 'distinct cultural identities' of Aboriginal and Torres Strait Islander peoples (90 per cent).

The Reconciliation Barometer [14] indicates the task ahead to achieve mutual trust between communities of Aboriginal and Torres Strait Islander Peoples and non-Indigenous people but also indicates a high awareness of the importance of the relationship (98% and 87%), and of knowing more about culture (96% and 82%) and of the importance of Aboriginal and Torres Strait Islander cultures to Australia's identity as a nation (94% and 71%). While this survey does not speak directly to the issue of inclusion of cultural recognition in the Constitution it shows a level of regard for the cultures of Aboriginal and Torres Strait Islanders that strongly indicates a favourable vote for a Referendum proposal on this issue.

Given the high level of public support for recognising Aboriginal and Torres Strait Islander cultures and heritage, we argue strongly that the restrictive approach to change argued for by Dr Johns and others should be disregarded. Aboriginal identity without culture is inconceivable. Every generation of Aboriginal and Torres Strait Islander Peoples is responsible for renewing culture and cultural practices, whether living on their own country in traditional lifestyle or engaged in economic activity in the mainstream community, away from country but still attached to it.

In short, any watering-down of the Expert Panel's recommended changes would be intolerable.

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[13] Expert Panel 2012, *Report on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, p.77, viewed 6 February 2014 http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf

[14] Reconciliation Australia 2013, "Key Findings", Australian Reconciliation Barometer 2012, p. 1, viewed 4 February 2014 < http://reconciliation.org.au/wp-content/uploads/2013/12/2012-Australian-Reconciliation-Barometer-Overview.pdf >.

Chapter 3: Two Further Proposals for Constitutional Change

We contend that the structures and processes of governance and the often negative effects of perhaps unconscious official profiling of Aboriginal and Torres Strait Islander Peoples is where institutional racism is now located. Among other things, the way laws are made and the manner and form of consultations between Governments, officials and Aboriginal and Torres Strait Islander Peoples, contribute to the insidious and persistent remnant belief of colonial days that "we know what is best for you". Action is needed to make more Aboriginal and Torres Strait Islander Peoples participants in governance processes, sharing power in determining their own futures, rather than filling more passive roles as mere "stakeholders" or "consultees". The Expert Panel Report commented on this: [15]

> …the concerns raised at consultations and by Ken Wyatt point to structural barriers to the involvement of Aboriginal and Torres Strait Islander peoples in the development and implementation of legislation, policies and services that affect them. The demands for nationally uniform policy approaches, election cycles, departmental silos, centralisation of government decision-making, overlapping jurisdictions and a multiplicity of programs stifle innovation and flexibility. There appears to be a gulf between government intentions and the delivery of acceptable outcomes for Aboriginal and Torres Strait Islander Peoples.

Despite these findings the Expert Panel failed to make any recommendations that would change the governance structures and processes that have given rise to the deficiencies they identified. The effects of the additional Constitutional changes we propose would, we believe, lead to necessary changes in governance structures, procedures and power-sharing between Governments, officials and Aboriginal and Torres Strait Islander Peoples that would help to solve the sort of problems outlined in the Expert Panel's Report.

The mistrust and racial prejudice that prevails in both communities, as disclosed by the Reconciliation Barometer, is alarming. [16] Action taken by the Prime Minister through the appointment of his Advisory Panel and the Empowering Communities Council is clearly intended to confront this issue, among others. We believe that the two further changes to the Constitution outlined below:-

- would be an effective way of bringing about necessary and desirable systemic change;
- would stimulate the development of mutual trust;
- would add greater effectiveness to Government programs and efforts to close the gap, with consequent national benefits; and
- would, in addition, give effect to Australia's international Treaty obligations. [17]

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[15] Expert Panel 2012, *Report*, p. 185.
[16] Reconciliation Australia 2012, *Australia's Reconciliation Barometer an Overview*, p. 1, viewed 6 February 2012, < http://www.reconciliation.org.au/wp-content/uploads/2013/12/2012-Australian-Reconciliation-Barometer-Overview.pdf >.
[17] United Nations, *Declaration of the Rights of Indigenous Peoples*, Articles 3 and 4, regarding self-determination and autonomy in their own affairs and, in matters affecting, them or their rights, article 18 the right to participate in decision-making and Article 19 the need to obtain their free, prior and informed consent, viewed 7 February 2014, <http://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>.

While the Expert Panel stated that their recommendations should be presented as a package, to stand or fall together, the following two proposals could be presented separately on their own merits and therefore without prejudicing the likelihood of acceptance of other proposals.

A Constitutionally-backed Treaty-making Power

We urge the Committee to consider including in the Referendum a constitutionally-backed treaty-making power. This matter was considered by the Expert Panel *Report*:- [18]

The Panel has concluded that agreements that are negotiated on the basis of consent and that give rise to mutually binding obligations have a critical role to play in improving relations between Aboriginal and Torres Strait Islander peoples and the broader Australian community, and in providing more constructive and equitable relationships between Aboriginal and Torres Strait Islander peoples and Australian governments, local government bodies, non-government bodies and corporations.

In addition, in the Introduction to its Report, [19] the Expert Panel said:-

Chapter 8 addresses another of the key things to emerge at consultations and in submissions to the Panel: the aspirations of many Aboriginal and Torres Strait Islander Peoples in relation to agreement-making. It was apparent that there is also strong support among the non-Indigenous community for forms of binding agreements between Aboriginal and Torres Strait Islander communities and governmental and non-governmental parties.

Elsewhere in their Report, at page 96, the Expert Panel recorded the strong support for Agreement- or Treaty-making power: favoured or strongly favoured by 88%% of the Indigenous and 71% of the non-Indigenous communities.

The Expert Panel did not, however, recommend inclusion of this power, for the reasons they outlined in their Report at pages 201-203 (which are discussed further below) and on the rather surprising grounds of uncertainty about whom treaties would be made with and their possible content. It is agreed that specifying in the Constitution either parties or topics to Treaties except in the broadest terns, would add undesirable complexity to a Referendum. Clearly, however, to be a party to a Treaty, Aboriginal and Torres Strait Islander People would need to be represented by a body with a right to perpetual succession and the legal power to bind the People they represent; and content of Treaties would be within the Constitutional powers of the Commonwealth (which would be extended only by this specific Treaty-making power).

In our view a Constitutionally-backed Agreement- or Treaty-making power would:-

- have an important symbolic, legal and practical significance;

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[18] Expert Panel 2012, *ReportRecognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 8.3 Conclusions, p. 202, viewed 14 February 2014, <http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf >.

[19] Ibid, p. xvi.

- enable agreements binding on both parties in perpetuity or for an appropriate specified term. Once ratified by Parliament on behalf of the Government, (that is to say, one of the parties to the Treaty) a Treaty made under a constitutionally-backed power would not necessarily rely on the ratifying legislation for continuing legal effect but would have the full force of the law and, desirably, could be amended, if at all, or nullified only by the means set out in the Treaty itself; [20]

- help, when the power is implemented, to move the Aboriginal and Torres Strait Islander Peoples further towards their internationally acknowledged right to self-determination and autonomy in the management of their own affairs. [21] As signatories to a binding Treaty they would rise above the status of mere stakeholders as they inevitably are when subject to laws passed by Parliament, to the status of participants sharing power in the making of the laws affecting them - clearly a most significant change;

- have the practical benefit of giving impetus to the creation of a body representative of Aboriginal and Torres Strait Islander Peoples at each of the national and regional levels, with perpetual succession and the power to make binding Treaties on behalf of the Peoples they represent. (The qualifications of the National Congress of Australia's First Peoples to act in this role at the National level are considered in Section 6 below).This would be an important administrative advance on present, highly fragmented bureaucratic arrangements; and

- have, as conceded by the Expert Panel and as discussed above, strong support from both communities.

It is noted that the Prime Minister declared his Government was open to considering this question. [22]

We note that the Expert Panel's Report (pp. 202-203) suggests that the Government would already have the power to make binding treaties with Aboriginal Peoples under sections 51 (xxvi) (or the new section 51A that is proposed to replace that section) and 61 of the Constitution and has made agreements under those powers. In this debate, we prefer to side with Professor George Williams and Allens Arthur Robinson whose arguments for a specific constitutionally-backed treaty-making power with Aboriginal and Torres Strait Islander Peoples are referred to in page 199-200 of the Report. Both the sections that the Expert Panel would rely on (i.e. sections 51 (xxvi) and 61) are general executive powers whereas we regard it as important that a specific power covering treaties or agreements with Aboriginal and Torres Strait Islander Peoples should be included in the Constitution as an acknowledgment of the unique identity and status of Australia's First Peoples within the Australian nation.

It seems for no better reason than postponing a decision on this proposal, the Expert Panel expressed the view that it would be preferable to put the cart before the horse and to actually negotiate a national Treaty before seeking the Constitutional power to execute it. It seems to us it would be difficult to maintain a façade

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[20] Professor George Williams and Allens Arthur Robinson cited by the Expert Panel 2012, Report on *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, pp. 199, 200, viewed 14 February 2014, <http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf >.

[21] United Nations, Articles 3, 4, *Declaration of the Rights of Indigenous Peoples*, viewed 7 February 2014, <http://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>.

[22] Karvelas, Patricia and Ben Packham 2014, "Abbott open to treaties with Aboriginal nations", The *Australian* , January 28, 2014.

of good faith in the course of the Expert Panel's proposed "negotiations without power". If the model for treaty-making with individual Aboriginal Nations tailored to meet each Nation's needs and condition, as proposed by Mr Warren Mundine, [23] were to be adopted, this suggestion by the Expert Panel would be even more impractical.

For all the reasons advanced above, the Expert Panel should be overruled in this case. Given the high level of support from both communities, we recommend the proposal should be put to the Referendum.

Dedicated Seats in the Commonwealth Senate

Our proposal is that two additional seats in the Senate whose holders should have the same duties, obligations and privileges as all other Senators, should be reserved for Aboriginal and Torres Strait Islander persons.

The way in which these Senators might be elected poses a problem. We suggest two ways in which it might be addressed.

They could be elected by those Aboriginal and Torres Strait Islander voters on the Australian electoral roll who opt to transfer to a new section of that roll composed only of Aboriginal and Torres Strait Islander people, as legally and customarily defined. Aboriginal and Torres Strait Islander voters who choose to be on that roll, would have the same rights and obligations as those on the main roll except that their Senate vote would be for candidates only for the dedicated Senate seats and not also for candidates for other Senate positions in any State or Territory. That is to say, like any other voter, they would have one vote for candidates in both the House and the Senate.

A preferred alternative to a separate electoral roll, would be to provide that these seats should be filled by vote of a democratically elected body representing Aboriginal and Torres Strait Islander Peoples, (we suggest the National Congress of Australia's First Peoples) sitting as an electoral college. The qualifications of the National Congress to fill such a role are further considered in Section 6 below.

We have already commented on the presence of two Aboriginal and Torres Strait Islander Peoples in the current Parliament. Representation in both Chambers proportional to population would require a total of four or five presently rising to six or seven by 2030.

It is often suggested that lines of accountability between elected representatives and their electorates under the Australian system of responsible government are weakened by Party loyalties. To suggest that Aboriginal and Torres Strait Islander Parliamentarians representing specific open electorates or States should also be asked to add representative responsibilities to Aboriginal and Torres Strait Islander Peoples throughout Australia to this mix is, we think, to expect too much: it would subject those representatives to perhaps unresolvable conflicts of loyalties and interests.

To have in the Senate, originally conceived as the States' Chamber, Aboriginal and Torres Strait Islander People who represent only their own Peoples seems to us, in both historical and legal contexts, to be eminently democratic (particularly as that number would be roughly proportional to population) and a powerful sign of a society based on equality, as it has been in other democracies. This is not to suggest that

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[23] Rick Wallace 2014, "First Nations Need to sign treaties, says Warren Mundine", *The Australian* January 27, 2014, viewed 27 January 2014, < http://www.theaustralian.com.au/national-affairs/policy/first-nations-need-to-sign-treaties-says-warren-mundine/story-fn9hm1pm-1226810926014#mm-premium.

Party loyalties would not intrude into this chain of electoral responsibility to the same extent as it does for the great majority of other Parliamentarians: that is simply a fact of the Australian parliamentary system.

In proposing for your consideration this second matter which the Expert Panel recommended against, we suggest that the Expert Panel's Report on this topic:-

Expressed inconsistent views about the extent of support for this change in the following sections of their Report (our emphases): at Chapter 3.7, "The idea of establishing dedicated Parliamentary seats …was raised **at many consultations**"; later, under Submissions, "**Forty five** submissions raised the issue…"; at section 7.1: "**A number of submissions** …raised the possibility of dedicated or reserved seats.."; before, at 7.5 Conclusions, discarding the proposal, "having regard to **the infrequent references** to the idea (of dedicated seats)". Even if the last of these views was the best, it should perhaps be noted that "dedicated seats" was not one of the seven ideas [24] discussed in the Expert Panel's position paper so the "forty five submissions" and the "many consultations" at which it was raised were not prompted by the material that had been circulated in advance.

Misinterpreted the conclusions of the submission to the Expert Panel on this topic made by the National Congress of Australia's First Peoples which found only luke-warm support for the idea, did not discard it but concluded in effect it required further work. In (Chapter 7.5), the Expert Panel suggested this confusion about the proposal meant it should be discarded:

> …, the Congress statement concluded: 'It may be that this particular proposition requires much more development to be fully supported or understood within the context of political representation and/or status of Aboriginal and Torres Strait Islander peoples.' The proposal would not therefore satisfy the principle that any proposal for constitutional recognition **'be of benefit to** and accord with the wishes of Aboriginal and Torres Strait Islander peoples' (our emphasis).

We do not consider the conclusion justifiable on the stated facts. We think Congress was verballed.

Raised fears (Chapter 7.5) that were not specified (in a manner straight from Sir Humphrey Appleby's handbook) [25] "Given the uncertainties surrounding its implementation, it is also unlikely to satisfy the principle that it 'be technically and legally sound'". We surmise (although we cannot find where or if this is explicitly stated), that doubts about the technical and legal soundness might arise from either the need to establish an electoral roll of Aboriginal and Torres Strait Islander peoples or from the need for a ballot paper for use only by this segment of voters. If this is so, there are after all other international examples where these (and any other unstated legal and technical problems the Expert Panel may have had in mind) have already been solved. The Expert Panel did not attempt to explain why Australia would be so different that appropriate adaptations would not work here.

The Expert Panel stated other reasons they had been given (3.7 Research) opposed to "dedicated seats":

> "… the idea was seen as undemocratic and impractical in terms of representation". The suggestion that dedicated seats in the Senate approximately pro-rata to population would be undemocratic, given the representation of the vastly different number of voters in each State by the same number of Senators, seems ill-considered. As to the impracticality of representation, we assume this refers to

[24] Expert Panel 2012, *Report*…, p. xii.
[25] Sir Humphrey Appleby was the departmental head in the BBC's television program "Yes, Minister". His ability to dissuade the Minister from action was based on such forms of words as were used here in the Expert Panel's Report.

the diversity of cultures, politics and locations. We accept the problems arising from Aboriginal diversity but believe this is a problem of democracy where consensus is an ideal but representation of dominant views and, hopefully, respect for minorities is the norm.

"… it could lead to members of parliament who were ill-equipped for the job". This view is based on racial prejudice and does not deserve further response.

"… that it could lead to pressure from other minority groups for similar guarantees of representation". The many reasons that this Referendum is about recognising Aboriginal and Torres Strait Islander Peoples, not the many other minority ethnic groups, seems to us a sufficient rebuttal of this point.

In short, we find the Expert Panel's case against dedicated seats, at best, unconvincing. Before this worthwhile proposal is discarded we consider the findings of previous Inquiries and research that were available to the Expert Panel but which have not been referenced by them, should be re-examined, including particularly Australian Parliamentary Library Research Paper No. 23. The abstract of that Paper corresponds to our own views: [26]

Proposals for dedicated seats in Australia are subject to both compelling arguments and considerable obstacles. The experience in New Zealand shows that dedicated seats do more than equalise the amount of parliamentary representation. Rather, they are a concrete expression of a formal relationship between Indigenous and non-Indigenous constituencies. In Australia, where such a relationship is yet to be defined, dedicated seats could play a key role in the development of such a relationship.

Other arguments, not dealt with above, for and against the idea of dedicated seats, from Brian Lloyd's paper (which also drew on previous NSW and Queensland Parliamentary Inquiries) included:- [27]

For

Indigenous people as prior inhabitants, experiencing unique disadvantage and in recognition of their minority status, warrant special consideration to re-establish their right to self-determination and participative equality.

> The New Zealand experience shows that dedicated seats can equalise proportional parliamentary representation and, in doing so, help to create an appropriate formal relationship between Governments and Indigenous Peoples. [28]

Dedicated seats would be consistent with Australia's international Treaty obligations. [29]

An alternative to a separate roll for Aboriginal and Torres Strait Islander voters opting to vote for Senators in dedicated seats would be to use an acceptable democratically elected representative body (such as the National Congress of Australia's First Peoples) as an electoral College for the election of Senators to

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[26] Brian Lloyd 2009, *Dedicated Indigenous representation in the Australian Parliament, No. 23 2008/9*, Australian Parliamentary Library, Canberra, viewed 23 February 2014, < **http://www.aph.gov.au/binaries/library/pubs/rp/2008-09/09rp23.pdf** >.

[27] While the points for and against have been extracted from other work, the arguments and conclusions are ours.

[28] Ibid.

[29] United Nations, Declaration of the Rights of Indigenous Peoples, articles3, 4, 18, 19.

dedicated seats. Such a role in the Australian electoral processes for Congress would give impetus to the further development of this democratically elected representative body.

The parliamentary presence of a further two Aboriginal Senators could become an important factor in breaking down mutual mistrust and prejudice in the community. The Senators elected could provide a role model for aspirational Aboriginal and Torres Strait Islander Peoples.

Against

An alternative approach that would be preferred by some would be for an educational campaign supported by positive discrimination in Party pre-selections as a means of increasing representation in both Chambers. This suggests Australia is not yet ready for this next step. We disagree and point out that dedicated seats might well, through a demonstration effect, provide a very effective means of education leading to further advancement of Aboriginal and Torres Strait Islander Peoples on a variety of fronts, including parliamentary representation in unreserved seats.

This would be an inadequate recognition of Aboriginal sovereignty. Perhaps that is so, but we regard this proposal as a move in the right direction, as is the Treaty-making power (Chapter 3a) and the proposed role for the National Congress (Chapters 5, 6).

Party loyalties would affect the representational responsibilities of Senators in the dedicated seats to their constituents. As discussed above (pp. 14 and 15), this is regarded as a feature of responsible government under the Australian Constitution that, from time to time, affects most Australian parliamentarians.

This form of representation is tokenistic and/or undemocratic. In fact, dedicated seats in the Senate would, be roughly proportional to population, making it democratic; and the Senators in dedicated seats would have the same rights, duties and privileges as other Senators, so it would be by no means tokenistic.

The need for a separate electoral roll for Aboriginal and Torres Strait Islander Peoples who elect to vote for dedicated seats in the Senate might appear to some commentators as form of separatism that would be unacceptable. There is point to this and, in Chapter 5 we have suggested an alternative voting system (which we acknowledge, may well pose other problems for some).

Putting this proposal to the Referendum might well prejudice the chances of success of other proposals. We consider this issue and the Treaty-making power should be put as separate questions, in order to avoid that result.

On balance, we recognise that there are obstacles as well as advantages and benefits from this proposal. Experience in other similar countries, particularly New Zealand, similar to though different from Australia, shows the obstacles can be overcome if there is a political will. Two previous Parliamentary Inquiries (in New South Wales and Queensland, in the 1990s) concluded the idea was worth pursuing after further preparatory work was done ("in the fullness of time", as Sir Humphrey Appleby would say). We say more than enough time has passed. The rewards of action on this proposal would more than justify the further work necessary to identify and resolve the problems along the lines discussed above prior to the holding of the Referendum.

Chapter 4. The Need for Prior Agreement to the Referendum Questions by the Aboriginal and Torres Strait Islander Peoples.

Everything that makes it desirable to recognise Aboriginal Peoples in the Constitution also makes it essential that the views of Aboriginal Peoples should be sought after the terms of the Referendum have been passed by Parliament and before the Referendum is held. Only after the Aboriginal and Torres Strait Islander Peoples themselves have had an opportunity to arrive at an informed view of the proposed changes to the Constitution and to express those views collectively, will it be possible to say that the proposed changes are for the advancement of the Aboriginal Peoples. Otherwise, it is merely another case in a long history of perhaps on this occasion a well-meaning, but nevertheless patronising and paternalistic, White community deciding what is best for the Black community. We are of course well aware that this does not form part of the legal process by which the Australian Constitution may be changed but nevertheless strongly contend that is a necessary component in the present case.

The way in which the views of Aboriginal and Torres Strait Islander Peoples might be sought are dealt with in Chapter 5 below but the case for doing so seems clear-cut:-

Assuming that the process of consultation and opinion polling they had adopted represented informed consent to their proposals, the Expert Panel recommended that :-[30]

If the Government decides to put to Referendum a proposal …other than the proposals recommended by the Panel, it should consult further with Aboriginal and Torres Strait Islander Peoples and their representative organisations to ascertain their views…"

The United Nations Declaration of the Rights of Indigenous Peoples (Articles 18 and 19), to which Australia is a signatory, are explicit :- [31]

> ***Article 18***. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures…..
>
> ***Article 19***.States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The Law Council of Australia endorsed the need for free, prior and informed consent to the Referendum proposals. [32]

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[30] Expert Panel *Report*.., paragraph g, p. xix.

[31] United Nations, Articles 18 and 19, Declaration of the Rights of Indigenous Peoples, viewed 6 February 2014, < http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

[32] Law Council of Australia 2011, *Constitutional Recognition of Indigenous Australians*, page 9, viewed 16 February 2014, <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2626%20-%20Constitutional%20Recognition%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Australians.pdf>.

Further, the Law Council considers that debate in Australia leading to a referendum on recognition of Aboriginal and Torres Strait Islander peoples in the Constitution must be based on a recognition of their distinct rights as Indigenous peoples, and proceed on a basis of consultation through their own representative institutions in order to obtain their free, prior and informed consent to any proposal for Constitutional reform.

We believe that, whether further changes are made to the Expert Panel's Report or not, the final form of the Referendum together with the Yes/No cases need to be submitted to the Aboriginal and Torres Strait Islander Peoples for two purposes:

- to gain their agreement that the Referendum proposals are for their advancement; and
- to gain their free, prior and informed consent to the Referendum proposals.

Chapter 5: Possible Means of Obtaining Prior Approval by Aboriginal and Torres Strait Islander Peoples.

We consider this prior approval could take three forms in descending order of preference:

- endorsement by a democratically elected body representing the Aboriginal and Torres Strait Islander Peoples; or
- a separate vote by all Aboriginal and Torres Strait Islander Peoples after the Referendum Bill has passed Parliament and before the actual Referendum; or
- a survey of a sufficient stratified sample of Aboriginal and Torres Strait Islander Peoples, supplemented by further consultations.

Of these options, we prefer the first, mainly because of the time, expense and technical difficulties involved in creation of an Aboriginal and Torres Strait Islander electoral roll. It does not seem good enough to take a survey of Aboriginal and Torres Strait Islander Peoples based on a sample. Given the stringent criticism of past consultations by Governments with Aboriginal and Torres Strait Islanders this too would seem an unsatisfactory process. [33]

We therefore believe prior approval to the terms of the Constitutional changes should be sought preferably by reference to a democratically elected body representing a wide spread of the Aboriginal and Torres Strait Islander Peoples. They should be asked to consider two questions: whether the proposals would represent advancement for Aboriginal and Torres Strait Islander Peoples and, if so, whether they would vote Yes or No on the Referendum proposals.

In Chapter 6, we argue that the National Congress of Australia's First Peoples, perhaps reconstituted to make it even more representative, would be the much-preferred means for obtaining this prior approval and consent.

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[33] Expert Panel 2012, *Report*…, Section 3.10 p. 99; Section 7.4 p. 183,184, viewed 6 February http://www.recognise.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf >.

Chapter 6: Recognition of National Congress of Australia's First Peoples

The importance of having a democratically elected body able to represent and to speak for Aboriginal and Torres Strait Islander Peoples on national issues has been widely debated. The role of the National Congress of Australia's First Peoples was discussed in the Expert Panel Report (page 182). We suggest that the changes to the Constitution proposed by the Expert Panel, particularly the power to make laws for the advancement of Aboriginal and Torres Strait Islander Peoples, add to the need for such a representative body.

In this submission, we have proposed that the National Congress of Australia's First Peoples could:-

- accept the Referendum as advancing the interests of Aboriginal and Torres Strait Islander peoples and vote yes/no to the proposals, on behalf of its constituents;
- advise with representative authority the Commonwealth Government in relation to the proposed Section 51A of the Constitution that future proposed legislation contributed to the advancement of Aboriginal and Torres Strait Islander Peoples; and
- act as an electoral college for the purpose of electing Aboriginal and Torres Strait Islander candidates to dedicated Senate seats.

The Government, having recently de-funded the operations of the National Congress of Australia's First Peoples, should return to the question of providing further funds, for the specific purpose of enlarging its representative capacity if that is seen by the Government as a problem, in order to fill the above representative and consultative roles necessitated both by the Expert Panel's proposed Constitutional changes and by international Treaty. [34]

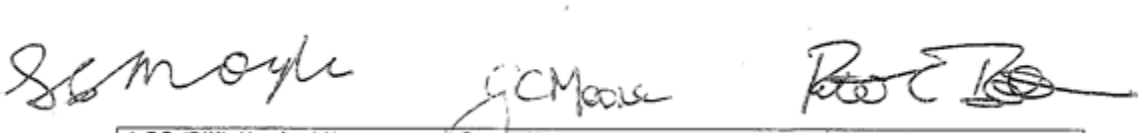
We trust that you will support further consideration of this proposal by Government.

[34] United Nations, *Declaration of the Rights of the Indigenous Peoples*, articles 3, 4, 18 and 19.

Chapter 7: Conclusion

This submission has been prepared by us, members of both the Aboriginal and non-Indigenous communities, as a collaborative effort. We hope it will make a contribution to your deliberations and to an outcome from the Referendum that will provide continuing national benefits based on reconciliation and the building of mutual trust and respect.

Yours sincerely



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Attached to this draft submission is the following background material (not intended for attachment to the submission itself):-

Attachment 1: Draft Bill Incorporating Recommendations by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

Attachment 2: Brief for the Parliamentary Joint Select Committee.

Attachment 3: 2011 Statement by the National Congress of Australia's First Peoples to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. The co-chairs of the National Congress at the time were made ex-officio members of the Expert Panel. Congress expressed its support for the Expert Panel's recommendations after it was released.

Attachment 4: A link to the UN Declaration on the Rights of the Indigenous Peoples (the Declaration).

The full submission can be found at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Submissions