

KNOW THE IMPACT – COUNT ME IN

Constitutional Recognition of Aboriginal people
Hon. Robyn Layton AO QC May 2012



BACKGROUND

- December 2010 all political parties agree to appoint an Expert Panel to advise on reform to recognise Aboriginal peoples in the Constitution
- Constitutional issues
 - no recognition of Aboriginal people and their prior occupation and custodianship of land, waters and sea
 - clauses which discriminate against Aboriginal people sections 25 and 51(xxvi)
- January 2012 You Me Unity Expert panel reported and made recommendations

EXPERT PANEL

- Composition
 - Indigenous and non-indigenous which included community leaders, academics, members of parliament and constitutional lawyers
- Process – broad based
 - Conducted research: received 3,500 submissions: conducted > 300 stakeholder, public, and community consultations around Australia and used social media networks
- Principles applied – each proposal must:
 - Contribute to more unified and reconciled nation
 - Benefit Aboriginal people and accord with their wishes
 - Capable of being supported by overwhelming majority of Australians
 - Technically and legally sound

3

PROPOSAL OVERVIEW

- Suggested amendments
 - Repealing discriminatory sections 25 and 51 (xxvi)
 - Adding three new sections 51A, 127A, 116A
- Recommendations
 - Single referendum question
 - Only proceed if supported by all major political parties and majority of state governments
 - Properly resourced public education and awareness programme
 - Further consultation with Aboriginal peoples if different amendments are proposed
- Current situation
 - Reconciliation Australia is tasked by Government to lead the public education campaign for Constitutional Recognition

4

REPEAL SECTION 25

- Present provision
 - Enables States to pass laws which disqualify people of any particular race from voting in either State or Federal elections as they ‘shall not be counted’
- Why repeal
 - Takes away fundamental human right and is discriminatory on the basis of race including Aboriginal peoples.

5

REPEAL SECTION 51(xxvi)

- Present provision
 - Gives power to Parliament to make ‘special laws’ in respect to ‘the people of any race’
- History
 - Original section excluded Aboriginal people, therefore no Commonwealth power to make special laws regarding Aboriginal people.
 - 1967 referendum
 - deleted S 127 which prevented ‘aboriginal natives’ from being counted and therefore voting.
 - deleted the Aboriginal people exclusion in S 51(xxvi) and therefore allowed special laws to be passed in respect to Aboriginal Peoples as included in race
 - Commonly thought ‘special laws’ could only “advantage” but the High Court decided in *Kartinyeri v Commonwealth* that it allowed special laws to ‘disadvantage’ Aboriginal peoples.

6

1967 REFERENDUM



7

WHY REPEAL SECTION 51(XXVI)

- Used to **disadvantage** Aboriginal peoples e.g. *Hindmarsh Island Bridge Act 1997*; *The Northern Territory Emergency Response Legislation 2007* and the suspension of the *Racial Discrimination Act*
- If not amended or deleted, it can be used in the future to **discriminate against** Aboriginal peoples.
- If deleted it needs a **replacement section** so as to preserve existing laws and allow future laws which **advantage** Aboriginal peoples e.g. *Aboriginal and Torres Strait Islander Heritage Protection act 1984*

8

INSERT SECTION 116A

○ **Section 116A Prohibition of racial discrimination**

- (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

9

WHY INSERT SECTION 116A

- Australia one of the only developed countries which does not have a section in its Constitution which prohibits racial discrimination
- The Expert Panel concluded that a Bill or Statement of general human rights going beyond racial non-discrimination "was well outside its remit" and would shift the focus away from Aboriginal peoples.
- Need to have a power to take "special measures" to protect native title, cultures languages and heritage.
- Special measures not limited to laws but also includes executive decisions designed overcome disadvantage

10

INSERT SECTION 51A

- **Section 51A Recognition of Aboriginal and Torres Strait Islander peoples**
 - **Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
 - **Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
 - **Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
 - **Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;
 - the Parliament shall, subject to this Constitution, have **power to make laws** for the peace, order and good government of the Commonwealth **with respect to Aboriginal and Torres Strait Islander peoples.**

11

WHY INSERT 51A

- Wording reflects views expressed by Aboriginal people
- Expert Panel did not recommend a preamble because there would be ‘two preambles’
- A preamble could result in uncertainty as to whether it could be used to interpret other sections in the Constitution.
- Inserting a recognition section into the body of the Constitution overcomes some problems of being ‘tokenistic’
- new section permits laws for the “**advancement**” of Aboriginal peoples and not simply limited to “overcoming disadvantage”
- Linked to insertion of new127A

12

INSERT 127A

○ Section 127A Recognition of languages

- (1) The national language of the Commonwealth of Australia is English.
- (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.



13

WHY INSERT SECTION 127A

- At the time of British settlement: 1million Aboriginal people, 250 nations with 700 languages.
- 200 years later Australian population almost 23 million, Aboriginal people only 2.5% of the population, only approx. 150 languages continue and some of them are endangered
- Declaratory only does not give rights



14

REFERENDUM PROCESS

- **A referendum** is the only way in which the Constitution can be changed. Other laws can easily be changed by a majority in both houses of parliament, but not the Constitution.
- **A referendum** which is a special form of voting in which every registered voter is asked a question(s) as to whether they accept or reject a particular change to the Constitution
- An Act which sets out the question(s) to be asked must first be passed by both Houses of Parliament.
- Only option for voters is vote “yes” or “no”.
- Change requires over half the voting population in over half the 6 states to voting YES to the question
- Need to keep changes SIMPLE

15

FAIRNESS AND JUSTICE

- Constitutional change is essential for **fairness, justice and respect** for Aboriginal peoples who are the First nations peoples of Australia and for **all** other Australians



16

COUNT ME IN



"Sea of Hands" Installation in Cairns, May 1998. Photo courtesy - Cairns Post.