

HEARING INDIGENOUS VOICES

Options for Discussion

Providing the detail and
upholding the big ideas

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EXECUTIVE SUMMARY

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The Constitution is a charter of government. It is concerned with rules and divisions of power. The Indigenous leaders who met at Uluru in May 2017 called for one additional rule to establish legal machinery that guarantees the Australian Parliament will hear the voices of Indigenous people.

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Constitution Alteration (Receiving Indigenous Advice) Bill enshrines in the Constitution a new Advisory Council, which is responsible for providing advice on Indigenous affairs.

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HEARING INDIGENOUS VOICES

Legal machinery for hearing Indigenous voices

In the 19th century, the Founding Fathers understood the Constitution that they drafted as a practical charter of government concerned with rules and divisions of power. It remains so today.

When the Indigenous leaders met at Uluru in May 2017 and called for “the establishment of a First Nations Voice enshrined in the Constitution”, they were essentially thinking about the Constitution in the same way as the Founding Fathers.

The Referendum Council endorsed their proposal and recommended “that a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51(xxvi) and section 122.”

In *The Forgotten People*, Julian Leeser describes the kind of clause that the Referendum Council subsequently recommended as a “machinery clause”. It is a “machinery” clause, in the sense that it concerns the use of Parliament’s current powers, and does not alter or create new powers. It would guarantee that Indigenous people can have their voices heard in Indigenous affairs.

Such a clause is in keeping with the practical nature of the Constitution. As Leeser writes, “It is the kind of machinery clause that Griffith, Barton and their colleagues might have drafted, had they turned their minds to it.”

This proposal for recognition is fundamentally different from previous calls to insert uncertain symbolic language into a preamble or into a new section 51A head of power, or to insert a broad and ambiguous “one-clause bill of rights” into the Constitution via a racial non-discrimination clause. These proposals would introduce legal uncertainty and are not in keeping with the nature of the Constitution. Constitutional conservatives have resisted these changes because they would empower the High Court.

Constitutional conservatives have, however, seen the merits of the current proposal. It is legally modest because it does not frustrate the parliamentary process and upholds the powers of the Australian Parliament.

It does not provide a veto over bills tabled in Parliament. Instead, it provides machinery for greater input from Indigenous people into the Indigenous policymaking process. This input will help ensure greater “buy in” from the people for whom those laws are made and, therefore, improve policy outcomes. In doing so, it genuinely realises the aspirations of Australia’s Indigenous peoples as reflected at Uluru. It is a practical amendment to a practical document.

This pamphlet contains two proposals for how the new machinery provision might work. Each seeks to provide an option for realising Indigenous aspirations, while also upholding the Constitution. For each proposal, an amendment to the Constitution is suggested. These are set out in the appendices to this pamphlet, together with two Bills that provide alternative options for Acts of Parliament that implement each constitutional amendment.

Although either of the two options suggested below could be enacted using the Parliament’s existing powers, this would not provide the necessary constitutional guarantee that Indigenous leaders asked for at Uluru. In order to provide that guarantee, the Constitution would have to be amended to *require* Parliament to make the necessary arrangements.

How do we ensure Indigenous voices are heard in a practical way?

The options put forward in this pamphlet, and others in the monograph series, are intended to advance public discussion. Further discussion between Indigenous leaders and parliamentarians is required to determine whether either of these options is desirable, how they might be developed or changed, and how the Constitution might be amended to enshrine the preferred option.

If Indigenous voices are to be heard by the Parliament in a practical way, there are certain characteristics that any new machinery would need to have in order to ensure Indigenous voices speak with authority and in a way that facilitates a respectful dialogue with the Parliament.

These attributes of authenticity include:

- Independence;
- Autonomy;
- Accountability to grassroots Indigenous communities;
- Consultation with local Indigenous communities;
- Responsiveness to local Indigenous communities; and
- Reflection of the diversity of Indigenous experiences in modern Australia.

When and how should Indigenous voices be heard by Parliament?

A key challenge for ensuring that Parliament hears Indigenous voices lies in determining when it is appropriate for advice to be provided, how it is to be provided, and on what matters. This is a balancing act: on the one hand, Indigenous voices should not be unduly stifled; on the other, the processes of Parliament must function effectively. This is a delicate balance because it is one thing to create an opportunity for Indigenous voices to be heard by Parliament. It is another thing to impose an obligation on Parliament to consider what they say.

When Parliament is under an obligation to consider advice, there is a risk that this might frustrate Parliament's processes. For example, advice may be vexatious in terms of its volume or frequency, or it might be provided in a way that otherwise inhibits the efficiency of the legislative process.

If Parliament is to be placed under a constitutional obligation to consider advice, then the Constitution has to be very clear about the circumstances in which the obligation arises. It cannot be the case that Parliament must consider the advice of Indigenous voices with respect to any proposed law. Given the current scope of Indigenous disadvantage in almost every aspect of public policy—most notably in health and education—almost any Bill would conceivably impact on Indigenous people's lives. The obligation must, therefore, be appropriated limited to proposed laws specifically concerning Indigenous affairs. The obligation must not include *any* proposed law that might affect Indigenous people.

There is also scope for a broader advisory role, where Parliament is not under any obligation to consider the advice. In this case, there is no risk that Parliament's processes will be frustrated. Instead, the risk is that the advice might simply be ignored. These concerns must be balanced.

Formal advice to Parliament would need to be in writing so that it can be tabled in both Houses of Parliament. This advice would be tabled in the same way that reports of the Parliamentary Joint Committee on Human Rights, the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances are tabled and considered.

The mechanism for providing advice cannot constitute a veto on proposed laws. Thus, the failure to provide advice, or the failure to consider advice that is tabled, cannot invalidate an otherwise valid law.

The advice that is tabled would, however, have a special authority. In part, this comes from the attributes of authenticity that ensure Indigenous voices are heard in a constructive way. In part, it comes from the constitutional mandate provided by an amendment to the Constitution approved by an overall majority of electors, as well as a majority of electors in

a majority of States. In this way, it would carry with it the will of the Australian people that authentic Indigenous voices be heard by Parliament.

Such an approach would require the Parliament and the government to establish a meaningful dialogue with the constitutionally mandated—and authentic—Indigenous voices. This dialogue would see the advice accepted in some circumstances, in part or in full, but rejected in others. There would also be scope for Parliament to respond to the advice. The idea would be to foster practical partnership and collaboration between Indigenous peoples and the government in Indigenous affairs, enabling the government to “do things with, rather than to, Indigenous peoples”, as the Prime Minister, Malcolm Turnbull, has put it.

Any option for ensuring that Parliament hears Indigenous voices will have to resolve the competing concerns described above. The two options proposed below provide two different ways in which an appropriately balanced resolution might be achieved.

The States

Many aspects of Indigenous affairs are regulated by the governments and parliaments of the States and Territories, through which significant Commonwealth funding is channeled. It would be desirable, therefore, for the States and Territories to be able to benefit from any new arrangements for ensuring Indigenous voices are heard.

Neither of the options put forward in this pamphlet compels the States and Territories to participate in a new scheme. Nor do these options limit their existing powers in any way. Rather, each option provides for “opt-in” clauses, so that the States and Territories may confer jurisdiction on any new machinery for hearing Indigenous voices that might be established by the Commonwealth, enabling it to operate at the State and Territory level too.

Two options

Any machinery for ensuring that the *national* Parliament hears the voices of *local* Indigenous peoples is going to have to serve two functions. First, it will have to be sensitive enough to diverse local and regional voices to ensure that they are heard. Secondly, it will have to be structured such that the Parliament is able to receive advice from these voices in an efficient and timely way.

Two options for a machinery provision that serves these two functions are developed below. The first option involves the Constitution and legislation making provision for local entities,

and then letting them affiliate of their own accord, so that their voices are heard effectively at the national level. The second option involves entrenching a national entity that draws on local voices.

The machinery for the first option works as follows:

- *Constitution Alteration (Recognising Indigenous Peoples) Bill* requires the Parliament to establish or recognise local entities for the various Indigenous peoples;
- *Speaking for Country Bill* then provides the detail concerning how these entities will be established and provides for these local entities to affiliate voluntarily at the national and regional levels, so that there is a conduit for providing advice from local Indigenous voices to the national Parliament;
- According to this option, the attributes of authenticity are incorporated at the local level, and then the local entities may voluntarily affiliate in order to speak effectively at the national level.

The machinery for the second option works as follows:

- *Constitution Alteration (Receiving Indigenous Advice) Bill* enshrines a new national entity charged with responsibility for providing advice on Indigenous affairs;
- *Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill* then stipulates the roles, functions and composition of the new entity, and provides for local Indigenous entities to send delegates to a conference that selects members of the new national entity;
- According to this option, the attributes of authenticity are incorporated at the national level, and then the new national entity is linked into local entities.

Speaking for country option

In *Practical Recognition from the Mobs' Perspective*, Warren Mundine writes that “the only people who speak for country are traditional owners. Each of our mobs needs to get governance in place. It’s got to be transparent, and it has to be very clearly directed. Then the Government should start negotiating with the mob to reach an agreement which could be the basis for the Parliament establishing a local body for each mob according to the agreement it has reached with the Government. The Constitution should require the Parliament to do this. This would provide true recognition for each of our mobs.”

The proposed *Constitution Alteration (Recognising Indigenous Peoples) Bill* provides for a new section 70A of the Constitution. This would require the Commonwealth to establish or recognise local Indigenous entities for Indigenous people who speak for Country, and to provide the machinery for them to provide advice to the Parliament.

The proposed *Speaking for Country Bill* sets out how these entities would be recognised. Local Indigenous peoples would organise themselves and decide how they wish to be represented. A Recognition Commission will then be responsible for certifying which group of people speaks for which Country, and for the process leading to the formal recognition of a local Indigenous entity for that group's Country.

If we think about how this might work, we might imagine that the Recognition Commission determines that the whole of the Kimberley region should form one District. The local Indigenous peoples then have to decide how to set up a Country Group Organisation for the Kimberley District. They might identify the different language groups in the region, such as the Balanggara, Bardi and Jawi, Bindunbur, Bunuba, Dambimangari and so on. Each of these groups has authority to speak for Country in a different part of the Kimberley region. So they would set up a new entity with a constitution that ensured that the new entity was accountable to all of these language groups, as well as other Indigenous people resident in the region; that all of them had oversight of its management, and that its CEO had an obligation under its constitution to ensure that where a particular language group felt strongly about a certain issue, that the CEO would ensure that this advice was conveyed in discussions with the government. This new entity would then apply to the Recognition Commission for recognition as the Country Group Organisation for the Kimberley District. The Recognition Commission would be responsible for satisfying itself that, in this District, most Indigenous people identified with a language group authorised to speak for Country, and that these language groups had been able to agree on a constitution for their new entity which ensured their fair representation. The Commission could then recognise this new entity as the Country Group for the Kimberley District.

The new Country Group Organisations will be able to affiliate voluntarily at the regional and national levels. The *Speaking for Country Bill* makes provision for how their national affiliation can provide a conduit for transmitting advice from the different Country Groups to the Parliament.

One scenario in which this might work in practice would be if the federal government proposed amending the existing Indigenous heritage protection laws in order to enhance environmental protection. The government would be required to notify the national Country Group Affiliation of the proposed amendments to the legislation before these can be introduced into Parliament. The Country Group Affiliation would then notify the Kimberley Country Group Organisation, along with those in all the other Districts. The Indigenous people in the Kimberley might largely be happy with the proposed changes because they have been calling for changes along these lines for quite some time. The Indigenous people in Cape York might take a different view, however, seeking an approach that would allow them to pursue economic development of their natural resources in a way that would not be possible under the proposed amendments. So the Country Group Affiliation would receive the advice of the Kimberley Country Group Organisation and

the advice of the Cape York Country Group Organisation. It would then arrange to send its Advice to the Speaker of the House of Representatives and the President of the Senate. This Advice would explain both the position of the people who speak for Country in the Kimberley and the position of the people who speak for Country in Cape York. It would then be up to Parliament to consider whether to treat these two regions differently, or to work with the national Country Group Affiliation and find a compromise position that addressed both sets of concerns.

Advisory Council option

The proposed *Constitution Alteration (Receiving Indigenous Advice) Bill* provides for a new section 60A of the Constitution. This would establish an Advisory Council for Aboriginal and Torres Strait Islander affairs. The Advisory Council would be entitled to provide advice to the Parliament, and, in certain limited circumstances, the Parliament would be under an obligation to consider the Advisory Council's advice before passing a proposed law.

This amendment, proposed by Anne Twomey in *The Forgotten People*, establishes procedural rules that are enforceable by the Houses of Parliament, and which are out of the realm of judicial enforcement. Her drafting demonstrates that it is possible to draft a provision that does not undermine the role of the Parliament and that does not trigger the intervention of the courts.

The Constitution would leave it to Parliament to decide (in consultation with Indigenous peoples) how the Advisory Council should be composed, and what its roles, powers and procedures should be. This might be achieved through legislation such as the suggested *Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill*.

Members of the Advisory Council will be chosen by delegates of grassroots organisations that are actively engaged in their local Indigenous affairs.

A National Conference of grassroots Indigenous organisations could be established, to which each organisation sends two delegates, who then choose the Members of the Advisory Council.

Local Indigenous people will organise themselves and recommend local organisations that should send delegates to the Conference. Initially, the Minister will consider these recommendations. Once the Advisory Council is established, it will consider recommendations as to which organisations should send delegates to the Conference that selects future Members of the Advisory Council.

If we think about how this might work, the local Indigenous peoples in Arnhem Land, for example, might send delegates to the National Conference. As there may be a number of

Prescribed Bodies Corporate that represent the First Nations in Arnhem Land under native title legislation, Indigenous people might decide that each of these should be recognised as Local Organisations. Each of these Prescribed Bodies Corporate would then get to pick two delegates to send to the National Conference. Other organisations might also become involved. Because the Yothu Yindi Foundation is actively involved with cultural aspects of Indigenous affairs in the area, it might be recognised as an Other Organisation, which could then send one delegate to the National Conference. Each of these delegates would then get one vote when the National Conference meets to elect the members of the Advisory Council.

The Advisory Council will be entitled to have advice tabled in both Houses of Parliament. The Senate and the House of Representatives will only be required to consider such advice, however, if it relates to a Designated Bill.

Designated Bills are bills that seek to amend or enact Designated Acts. Designated Acts are those Acts listed in the schedule to the *Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill*, or any Act made under section 51(xxvi) or section 122 of the Constitution, if the Act is directed to Aboriginal or Torres Strait Islander peoples.

If we think about how this might work in practice, we can imagine that the federal government and the Indigenous peoples might want to work together to strengthen Indigenous property rights under the *Native Title Act*. As the government begins the process of developing a new policy approach, it would commence discussions with the Members of the Advisory Council, who would liaise with the Constituent Organisations that together constitute the National Conference. Early engagement in the policy development process may mean that by the time a Bill is introduced into Parliament, the proposal will be more in line with Indigenous expectations, needs and concerns.

Throughout this process, much of the Advisory Council's discussions with the government would occur in private. The Advisory Council would be entitled, however, to have Advice tabled in both Houses of Parliament at any time during this process. It could use this power at strategic moments to improve policymaking, by bringing to public attention the views of Indigenous people, if it judged that the government was not taking adequate notice of them in confidential discussions.

When a Bill is finally introduced, it will be accompanied by a certificate stating that it has been referred to the Advisory Council as it is a Bill to amend the *Native Title Act*, which is a Designated Act. If the Advisory Council tables formal Advice on the Bill, Parliament might accept the Advice, partly incorporate or reject the Advice, but the intention would be that engagement throughout the policymaking and lawmaking process will improve the quality and fairness of the outcome.

Local Indigenous organisations will also be free to send delegates to regional conferences, which can engage in partnership decision-making with government agencies in their regional affairs.

APPENDICES

Constitution Alteration (Recognising Indigenous Peoples) Bill 2018

A Bill for an Act to alter the Constitution to establish local Aboriginal and Torres Strait Islander bodies that can advise the Parliament on matters relating to Aboriginal and Torres Strait Islander affairs.

Explanatory Memorandum

Clause 3 provides for the Constitution to be altered by inserting a new section 70A.

Section 70A provides that there shall be local Indigenous bodies.

It leaves the Parliament to determine the composition, roles, powers and functions of each of these bodies.

The new section does specify, however, that the new bodies shall have the function of *collectively* advising the Parliament on proposed laws relating to Indigenous affairs.

The intention of this section is to leave the Parliament with complete discretion as to how it sets up the local Indigenous bodies, but to require the Parliament to make provision for them to have their voices heard on proposed laws relating to Indigenous affairs.

There is no constitutional obligation imposed upon the Parliament beyond making provision for local Indigenous bodies and for it to receive advice from them collectively.

The new section is drafted in a way that takes it out of the realm of judicial enforcement.

The Parliament of Australia, with the approval of the electors, as required by the Constitution, enacts:

1 Short Title

This Act may be cited as the *Constitution Alteration (Recognising Indigenous Peoples) 2018*.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule

This Act commences on the day on which it receives the Royal Assent.

Schedule 1 – Amendment of the Constitution

Insert:

70A. Aboriginal and Torres Strait Islander bodies

There shall be local Aboriginal and Torres Strait Islander bodies, with such composition, roles, powers and functions as shall be determined by the Parliament, including the function of collectively advising the Parliament on proposed laws relating to Aboriginal and Torres Strait Islander affairs.

Speaking for Country Bill 2018

A Bill for an Act to recognise people who can speak for country and to enable them to provide advice to the Parliament.

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Explanatory Memorandum

PART 1 —PRELIMINARY

This Part deals with the short title, commencement, objects, simplified outline and interpretation of the proposed Act.

Clause 7—Concurrent operation of State and Territory laws

Clause 8—State constitutional powers

These clauses ensure that the laws and constitutional powers of the States are not affected by the proposed law.

PART 2—DETERMINATION OF DISTRICTS AND RECOGNITION OF COUNTRY GROUP ORGANISATIONS

This Part deals with the determination of Districts throughout Australia, and the recognition of Country Group Organisations whose members are able to speak for Country in each District.

Clause 9—Determination of Districts

Clause 10—Number of Districts

The Recognition Commission (which is established by clause 27) must determine the appropriate number of Districts, and the names and boundaries of each of those Districts.

Clause 11—What the Commission must have regard to

When determining the Districts, the Commission must have regard to the preferences and views expressed by Aboriginal and Torres Strait Islander peoples, their contemporary circumstances, areas in which different languages are and were spoken, areas subject to native title applications, land handbacks or grants, areas represented by Aboriginal Land Councils, anthropological evidence and other relevant considerations.

The intention of clauses 9-11 is to enable the Commission to exercise its discretion when setting boundaries, so that it can have regard to historical and contemporary circumstances, as may be required in different parts of Australia, given the different historical and contemporary experiences of Indigenous people in different places.

Clause 12—Timing

The intention is that the Commission should determine the Districts within its first twelve months.

Clause 13—Application for recognition

Once a District has been determined, a corporation may apply to be recognised as the Country Group Organisation for that District.

The Commission must determine applications for recognition as soon as practicable.

A “Country Group” is defined by clause 5 as “a group of Aboriginal or Torres Strait Islander people able to speak for country”.

A “Country Group Organisation” is defined by clause 5 as “a body recognised in accordance with Division 2.2 of this Act in respect of a specific District”.

The Act does not define what it means to “speak for country”. It is intended that the Commission might adopt a flexible approach that acknowledges that historical and contemporary circumstances of Indigenous people in different parts of Australia might require a different approach to speaking for country within different Districts. The Commission needs to remain responsive to how Indigenous people with a connection to Country in a particular district understand what it means to speak for Country in that District, and, indeed, how Indigenous people within the District choose to resolve competing understandings of what it means to speak for Country within that District.

Clause 14—Recognition of Country Group Organisations

The Commission may only recognise one corporation as the Country Group Organisation for each District.

A corporation can only be recognised as the Country Group Organisation for one District.

The intention of clauses 13 and 14 is to enable local Indigenous peoples to resolve amongst themselves the terms on which they can incorporate an entity to represent the various peoples within the District who claim to speak for different parts of Country within that District. The corporate structure that they adopt should be customised to reflect the historical and contemporary circumstances of people who are traditional owners of country within the District (whether or not they live on Country) and Indigenous people who reside on Country within the District, wherever their traditional Country may be.

The incorporation of these entities is an act of civil society. It is only once the Indigenous peoples within the District have worked out terms on which they can reconcile competing considerations, that they apply for official recognition as the people who can speak for Country in that District. In this way, the local people are empowered to decide the terms on which they shall work together to speak for Country. The Commission’s role is limited to being satisfied that the corporation making the application for recognition does include the different peoples who claim to speak for Country, and that these peoples have confidence in the corporation’s capacity to speak for Country within the District.

Clause 15—Revocation of recognition

Recognition of a Country Group Organisation can be revoked if the organisation applies to have its recognition revoked, or if the Recognition Commission is satisfied that the organisation has committed misconduct or is not able to fulfil its function as a Country Group Organisation.

If recognition is revoked, a new application may be considered for recognition as the Country Group Organisation for that District.

The intention of this clause is to enable local people to form a new corporation that is better able to perform the function of the Country Group Organisation if they lose confidence in the one that has previously been recognised.

PART 3—COUNTRY GROUP ORGANISATIONS

This Part deals with the functions and powers of Country Group Organisations.

Clause 17—Functions of Country Group Organisations

Clause 19—Ability to affiliate

Each Country Group Organisation’s functions shall be set out in its own constitution. This is a matter for the local people to decide for themselves.

Each Country Group Organisation’s functions are to include the formation of the national Country Group Affiliation, and to provide advice to the Parliament through the Country Group Affiliation.

Country Group Organisations may also affiliate to provide advice at regional, State or Territory levels and to engage in regional partnership decision-making with governmental agencies.

PART 4—COUNTRY GROUP AFFILIATION

This Part deals with the establishment and recognition of the national Country Group Affiliation.

Clause 20—Establishment and recognition of Country Group Affiliation

Country Group Organisations may voluntarily choose to affiliate with one another on such terms as might be acceptable to them.

The Commission may recognise a national affiliation as the Country Group Affiliation if it has been formed and is supported by a majority of the Country Group Organisations.

The intention of this clause is to allow the Country Group Organisations to affiliate as an act of civil society that does not involve the Commonwealth. The Commonwealth, through the Recognition Commission, simply recognises what the Country Group Organisations have voluntarily chosen to do.

PART 5—ADVICE TO PARLIAMENT

This Part deals with the power of Country Group Organisations to advise the Parliament through the Country Group Affiliation.

Clause 22—Application

The right to advise Parliament in this Part only applies if the national Country Group Affiliation has been formed and recognised under Part 4 of the Act.

Clause 23—Reference of Bills to national Country Group Affiliation

When a Bill relating to Indigenous affairs is introduced into either House, it must be accompanied by a certificate stating that it has been referred to the national Country Group Affiliation for consideration.

If the national Country Group Affiliation receives such a reference, it may provide Advice on the Bill, or decline to provide Advice.

Clause 23(5) explicitly states that failure to comply with this section does not affect the validity or enforceability of any Act.

The intention of this clause is to ensure that the national Country Group Affiliation is given an opportunity to provide advice in relation to a Bill relating to Indigenous affairs.

Clause 24—Power to advise

The national Country Group Affiliation may provide Advice to both Houses in respect of Bills, irrespective of whether the Bill has been referred to the Country Group Affiliation.

The national Country Group Affiliation may consult with Country Group Organisations before providing Advice.

The national Country Group Affiliation must seek to ensure that its Advice accurately reflects or summarises the advice or views of local Country Group Organisations communicated to the Country Group Affiliation, including any differing advice or views received from different Country Group Organisations.

The intention of this clause is to ensure that the Country Group Affiliation serves as a conduit between the local Country Group Organisations and the Parliament. Each Country Group Organisation represents the people who speak for Country within that District. People who speak for Country in different parts of Australia can thus have their advice conveyed efficiently to the Parliament, but, at the same time, the Parliament need only deal with a single conduit when receiving advice from local people who speak for Country across the continent.

This clause should be compared with clause 13 of the *Advisory Council Bill*, which provides a wider power to advise in relation to the development of public policy, as well as Bills and legislative instruments relating to Indigenous affairs.

Clause 25—Provision of Advice to Parliament

The presiding officers shall table Advice in each House.

Clause 26 Consideration of Advice on Bills

Advice from the national Country Group Affiliation that has been tabled shall be considered by both Houses in debate upon any Bill identified in the Advice.

Clause 26(2) explicitly states that failure to comply with this section does not affect the validity or enforceability of any Act.

This clause should be compared with clause 16 of the *Advisory Council Bill*, which imposes a narrower obligation on the Senate and the House of Representatives: the obligation to consider Advice in that Bill applies only when the Advice relates to a Designated Act.

PART 6—RECOGNITION COMMISSION

This Part deals with the establishment, constitution, functions and powers of the Commission, and appointment of its members.

Clause 27—Establishment of Recognition Commission

Clause 28—Constitution of the Commission

These clauses provide for the establishment of a Commission comprising a President and up to six additional members.

Clause 29—Functions of the Commission

The functions of the Commission are to determine Districts and recognise Country Group Organisations and the national Country Group Affiliation.

PART 7—MISCELLANEOUS

This Part provides that the Minister may make rules and must cause a review of the Act.

The Parliament of Australia enacts:

PART 1 PRELIMINARY

1 Short Title

This Act is the *Speaking for Country Act 2018*.

2 Commencement

- (1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
- (2) If this Act does not commence under subsection (1) within the period of 6 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

3 Objects of this Act

The objects of this Act are:

- (a) to recognise Country Group Organisations with authority to speak for Country in each District of Australia; and
- (b) to provide for such Country Group Organisations, through the national Country Group Affiliation, to provide advice to Parliament on proposed laws relating to Aboriginal and Torres Strait Islander affairs.

4 A simplified outline of this Act

Part 2 of this Act establishes a process whereby a Recognition Commission will:

- (a) determine names and boundaries of Districts into which the territory of Australia is to be divided; and
- (b) recognise, in relation to each District, a Country Group Organisation with authority to speak for Country, and represent Aboriginal and Torres Strait Islander people with connection to Country, in that District.

Part 3 deals with the functions and powers of Country Group Organisations.

Part 4 recognises that each Country Group Organisation may affiliate to establish the Country Group Affiliation to represent the Country Group Organisations.

Part 5 empowers Country Group Organisations, through the national Country Group Affiliation, to provide advice to Parliament on proposed laws relating to Aboriginal and Torres Strait Islander peoples.

Part 6 creates the Recognition Commission, the body that will be responsible for determining Districts and recognising Country Group Organisations.

5 Definitions

In this Act:

Advice means advice provided by the Country Group Affiliation in accordance with Part 5 of this Act.

Commission means the Recognition Commission.

Country Group means a group of Aboriginal or Torres Strait Islander people able to speak for country.

Country Group Affiliation means a national affiliation of Country Group Organisations established in accordance with Part 4 of this Act.

Country Group Organisation means a body recognised in accordance with Division 2.2 of this Act in respect of a specific District.

District means the geographic area determined by the Commission in accordance with section 9 of this Act.

Gazette means the *Commonwealth of Australia Gazette*.

legislative instrument has the same meaning as the *Legislation Act 2003*.

member means a member of the Commission, and includes the President.

Minister means the Minister for Indigenous Affairs.

misconduct means conduct at a systemic level that brings a Country Group Organisation into disrepute and that is not limited to the conduct of one person.

President means the President of the Commission, and includes any person for the time being acting in the office of the President.

Presiding Officers means the Speaker of the House of Representatives and the President of the Senate.

signed means signed by way of handwritten or electronic signature.

6 Act to bind Crown

This Act shall bind the Crown.

7 Concurrent operation of State and Territory laws

This Act is not intended to exclude or limit the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

8 State constitutional powers

This Act does not enable a power to be exercised to the extent that it would impair the capacity of a State to exercise its constitutional powers.

PART 2 DETERMINATION OF DISTRICTS AND RECOGNITION OF COUNTRY GROUP ORGANISATIONS

Division 2.1 Districts

9 Determination of Districts

The Commission must determine, by notice published in the Gazette, the names and boundaries of Districts into which the territory of Australia is to be divided for the purposes of this Act.

10 Number of Districts

The Commission shall determine the number of Districts.

11 What the Commission must have regard to

When determining the Districts, the Commission must have regard to the objects of this Act set out in section 3 of this Act and may have regard to the following matters:

- (a) preferences and views expressed by Aboriginal and Torres Strait Islander peoples and their organisations about the appropriate names and boundaries of Districts for the purposes of this Act; and
- (b) contemporary circumstances and communities of Aboriginal and Torres Strait Islander peoples; and
- (c) the areas in which different Aboriginal languages are and were spoken; and
- (d) the areas the subject of native title applications; and
- (e) the areas subject to Government handbacks or grants under the *Aboriginal Land Rights Act 1976* (NT); and
- (f) areas represented by Aboriginal Land Councils and by native title representative boards; and
- (g) anthropological and other evidence about the areas in which discrete Aboriginal nations and Country Groups lived and had a connection with Country; and
- (h) any other matter the Commission considers relevant.

12 Timing

The Commission must endeavour to determine Districts by no later than the first anniversary of the commencement date of this Act.

Division 2.2 Recognition of Country Group Organisations

13 Application for recognition

- (1) A body incorporated under the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* may apply to the Commission for recognition as the Country Group Organisation for a relevant District.

(2) The Commission must determine applications under sub-section (1) as soon as practicable.

14 Recognition of Country Group Organisations

(1) Subject to subsection (2), the Commission may, by notice published in the Gazette, recognise a body as a Country Group Organisation in respect of a specific District.

(2) The Commission may not recognise:

- (a) the same body to be the Country Group Organisation for more than one District; or
- (b) more than one body to be the Country Group Organisation for a District.

15 Revocation of recognition

(1) The Commission may revoke the recognition of a Country Group Organisation if:

- (a) the body recognised as the Country Group Organisation ceases to exist; or
- (b) the Country Group Organisation informs the Commission in writing that it no longer wishes to be a Country Group Organisation for the purposes of this Act or that it is unable to perform its functions under this Act; or
- (c) the Commission is satisfied on reasonable grounds that:
 - (i) the Country Group Organisation has committed misconduct; and
 - (ii) by reason of the misconduct, the Country Group Organisation is unable to effectively perform its function under this Act; and
 - (iii) the Country Group Organisation has failed to take reasonable steps to remedy the misconduct and to take all necessary steps to prevent further misconduct that are reasonably available.

(2) If the Commission revokes the recognition of a Country Group Organisation, the Commission must give reasons for the decision in writing.

16 Effect of revocation of recognition

(1) If the Commission revokes the recognition of a Country Group Organisation, the body to which the revocation applies ceases to be the Country Group Organisation for the purposes of this Act, without affecting the constitution or function of the body for any other purpose.

(2) The revocation of the recognition of a Country Group Organisation does not affect the following:

- (a) any agreements already in force between the Country Group Organisation and the Commonwealth;
- (b) any actions taken by the Country Group Organisation.

PART 3 COUNTRY GROUP ORGANISATIONS

Division 3.1 General functions and powers of Country Group Organisations

17 Functions of Country Group Organisations

- (1) The functions of each Country Group Organisation will be set out in the constitution or other constituent documents of that Country Group Organisation.
- (2) The functions may include:
 - (a) the formation, with other Country Group Organisations, of the Country Group Affiliation, as provided in section 20;
 - (b) the provision of advice to Parliament, through the Country Group Affiliation, in accordance with Part 5 of this Act; and
 - (c) speaking for the Country Group of the relevant District.

18 Powers of Country Group Organisations

- (1) In addition to the powers it has as a body incorporated under the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, a Country Group Organisation has:
 - (a) power to do all things necessary or convenient to be done for or in connection with the performance of its functions; and
 - (b) any powers conferred on it by this Act or any other law of the Commonwealth; and
 - (c) any powers conferred on it by any law of a State or Territory.

19 Ability to affiliate

- (1) Country Group Organisations may affiliate to form the Country Group Affiliation as set out in Part 4 in order to provide advice to Parliament.
- (2) Country Group Organisations may also affiliate to provide advice on regional, State or Territory issues.

PART 4 COUNTRY GROUP AFFILIATION

20 Establishment and Recognition of national Country Group Affiliation

- (1) Country Group Organisations may, from time to time, agree to establish a peak organisation to represent the Country Group Organisations, and the name and form that such peak organisation should take.
- (2) The Commission may, by notice published in the Gazette, recognise an organisation as the Country Group Affiliation for the purposes of this Act.
- (3) The Commission may not recognise an organisation to be the Country Group Affiliation unless it is satisfied the organisation:
 - (a) has been formed and is supported by the majority of Country Group Organisations; and

(b) satisfies the requirements set out in section 21.

21 Country Group Affiliation membership functions and powers

- (1) The Country Group Affiliation may, but need not, be a corporation.
- (2) An Affiliation must have constituent documents that establish:
 - (a) the criteria for membership of the Country Group Affiliation; and
 - (b) the functions and powers of the Country Group Affiliation, which must include the functions and powers in relation to Advice to Parliament conferred under Part 5 of this Act; and
 - (c) rules in relation to meetings of members of the Country Group Affiliation.

PART 5 ADVICE TO PARLIAMENT

22 Application

This Part 5 applies only if the Country Group Affiliation has been formed and recognised by the Commission under Part 4.

23 Reference of Bills to national Country Group Affiliation

- (1) Upon the introduction into either House of a Bill relating to Aboriginal and Torres Strait Islander affairs, the person introducing the Bill shall table a certificate stating:
 - (a) that the Bill has been referred to the Country Group Affiliation for consideration; and
 - (b) the date upon which it was referred.
- (2) A reference of a Bill to the Country Group Affiliation shall:
 - (a) be in writing addressed to the Country Group Affiliation;
 - (b) include a copy of the draft Bill and the draft explanatory memorandum; and
 - (c) include a proposed timetable for the introduction and passage of the draft Bill.
- (3) If the Country Group Affiliation receives a reference under sub-section (2), it may provide Advice on the Bill or may decline to provide Advice.
- (4) If the Country Group Affiliation declines to provide Advice, it shall notify the Presiding Officers as soon as practicable and the Presiding Officers shall cause the notification to be tabled within two sitting days.
- (5) The failure to refer a Bill or table a certificate or notification under this section does not affect the validity or enforceability of any Act or any other provision of a law of the Commonwealth.

24 Power to advise

- (1) The Country Group Affiliation may provide Advice to both Houses of Parliament in respect of Bills for Acts, whether or not the Bill has been referred to the Country Group Affiliation.

- (2) Prior to providing that Advice, the Country Group Affiliation may consult with Country Group Organisations.
- (3) The Country Group Affiliation must seek to ensure that any Advice it provides accurately reflects or summarises any advice or views of Country Group Organisations communicated to the Country Group Affiliation (including, if necessary, differing advice or views received from different Country Group Organisations).
- (4) The Advice provided by the Country Group Affiliation must be in writing and be delivered to the Presiding Officers.

25 Provision of Advice to Parliament

The Presiding Officers shall cause a copy of any Advice under section 24 to be tabled in each House of Parliament within 2 sitting days after its receipt.

26 Consideration of Advice on Bills

- (1) Advice provided by the Country Group Affiliation and tabled in Parliament shall be considered by the Houses of the Parliament in debate upon the passage of any Bill identified in that Advice.
- (2) The fact that the tabled Advice of the Country Group Affiliation is not considered by a House of the Parliament does not affect the validity or enforceability of any Act.

PART 6 RECOGNITION COMMISSION

Division 6.1 Establishment and constitution of the Commission

27 Establishment of the Commission

The Recognition Commission is established.

28 Constitution of the Commission

- (1) The Commission consists of:
 - (a) a President; and
 - (b) up to 6 other members.
- (2) The performance of the Commission's functions, and the exercise of its powers, are not affected merely because of 1 or more vacancies in its membership.

Division 6.2 The Commission's functions and powers

29 Functions of the Commission

- (1) The Commission has the following functions:
 - (a) to determine Districts in accordance with Division 2.1 of this Act; and
 - (b) to recognise Country Group Organisations in accordance with Division 2.2 of this Act; and

- (c) to recognise a Country Group Affiliation in accordance with Part 4 of this Act.

30 Powers of the Commission

The Commission has power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.

Division 6.3 Appointments to the Commission

31 Appointment of members

- (1) The members are to be appointed by written instrument by:
 - (a) for a full time member—the Governor General; and
 - (b) for a part time member—the Attorney General.
- (2) In considering whether to appoint a person as a member, the Governor General or Attorney General (as the case may be) must take into account the person's experience, leadership and knowledge of Aboriginal and Torres Strait Islander peoples and matters affecting them.

32 Full-time and part-time appointments

- (1) The President must be appointed as a full time member.
- (2) The other members may be appointed either as full time or part time members.
- (3) The term of a member's appointment must not exceed 5 years, but a member is eligible for reappointment.
- (4) A member's appointment is subject to the terms and conditions, if any, the member's appointment documentation.

33 Termination of appointments

- (1) The Governor General may terminate a member's appointment for misbehaviour, or physical or mental incapacity.
- (2) The Governor General must terminate a member's appointment if the member:
 - (a) becomes bankrupt; or
 - (b) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (c) compounds with his or her creditors; or
 - (d) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (e) is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (f) fails, without reasonable excuse, to comply with section 29 of the *Public Governance, Performance and Accountability Act 2013* or rules made for the purposes of that section; or

- (g) in the case of a full-time member only, engages, except with the Governor-General's approval, in paid employment outside the duties of his or her office.

34 Disclosure of interests

- (1) A disclosure by a member under section 29 of the *Public Governance, Performance and Accountability Act 2013* must be made to the Governor-General.
- (2) Subsection (1) applies in addition to any rules made for the purposes of that section.
- (3) For the purposes of this Act and the *Public Governance, Performance and Accountability Act 2013*, a member is taken not to have complied with section 29 of that Act if he or she does not comply with subsection (1) of this section.

PART 7 MISCELLANEOUS

35 Rules

The Minister may, by legislative instrument, make rules prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to this Act.

36 Review of operation of Act

- (1) The Minister must cause a review of the operation of this Act to be undertaken.
- (2) The review must:
 - (a) start 2 years after the commencement of this section; and
 - (b) be completed within 6 months.
- (3) The Minister must cause a written report about the review to be prepared.
- (4) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days after the Minister receives the report.

Constitution Alteration (Receiving Indigenous Advice) Bill 2018

A Bill for an Act to alter the Constitution to establish an advisory council for Aboriginal and Torres Strait Islander affairs.

Explanatory Memorandum

Clause 3 provides for the Constitution to be altered by inserting a new section 60A.

Section 60A(1) states that there shall be an Advisory Council which has the function of providing advice to the Parliament and the Executive Government on Indigenous affairs.

Section 60A(2) empowers the Parliament to determine the composition, roles, powers and procedures of the Advisory Council.

Section 60A(3) requires the presiding officers to table the Advisory Council's advice in each House of Parliament as soon as practicable.

Section 60A(4) requires each House to give consideration to tabled advice when debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

The intention of this section is to give a broad power to advise combined with a narrower obligation to consider advice. In this way, constitutional limits are not imposed upon the powers of the Parliament. In practice, most of the advice will occur outside of the constitutional obligation, so that the effectiveness of the section will depend upon the effectiveness of the section will depend upon the openness of governments the openness of governments to adjusting their policies when better informed about their likely impact.

As Anne Twomey writes in *The Forgotten People*, “There would be no third house of parliament, no power of veto and no power of delay—simply a capacity on behalf of the indigenous advisory body to have its advice tabled in the Parliament and internally considered by Parliament in relation to a limited category of bills. The effectiveness of this mechanism in giving rise to changes to bills and policies will then depend upon the value and persuasiveness of that advice.”

This section has deliberately been drafted to avoid concerns that a law could be struck down by the High Court for the Parliament's failure to give adequate consideration to the advice. The only obligations that arise from this section are ones that relate to the intramural proceedings of the Houses of Parliament. As Professor Twomey writes in *The Forgotten People*, “The High Court has long exercised deference in relation to the internal proceedings of Parliament, not interfering in matters that are for the houses to enforce... No court would have jurisdiction to compel a house to deliberate upon a bill in a particular way or instruct members upon what they must consider when voting. This would be a breach of the separation of powers and the constitutional principle of comity between the arms of government.”

The Parliament of Australia, with the approval of the electors, as required by the Constitution, enacts:

1 Short Title

This Act may be cited as the *Constitution Alteration (Receiving Indigenous Advice) 2018*.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule

The Constitution is altered as set out in the Schedule.

Schedule 1 – Amendment of the Constitution

Insert:

60A. Advisory Council

- (1) There shall be an Advisory Council, which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander affairs.
- (2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the Advisory Council.
- (3) The Speaker of the House of Representatives and President of the Senate shall cause a copy of the Advisory Council's advice to be tabled in each House of Parliament as soon as practicable after receiving it.
- (4) The House of Representatives and the Senate shall give consideration to the tabled advice of the Advisory Council in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill 2018

A Bill for an Act to establish an advisory council to provide advice to the Parliament and to the Executive on matters relating to Aboriginal and Torres Strait Islander affairs, and to provide for the constitution of the Advisory Council and how it will exercise its advice-giving and other functions.

PART 1 Preliminary

- 1 Short Title
- 2 Commencement
- 3 Objects of this Act
- 4 Simplified outline of this Act
- 5 Interpretation
- 6 Act to bind Crown
- 7 Concurrent operation of State and Territory laws
- 8 State constitutional powers

PART 2 Advisory Council

Division 2.1 Establishment and Functions of Advisory Council

- 9 Establishment of Advisory Council
- 10 Functions of the Advisory Council
- 11 Minister may approve performance of functions under State or Territory laws
- 12 Powers

Division 2.2 Advice giving powers

- 13 Power to advise

Division 2.3 Advice on Bills

- 14 Referral of Bills to enact or amend Designated Acts
- 15 Referral of Other Bills for Advice
- 16 Consideration of Advice on Bills

Division 2.4 Advice on legislative instruments

- 17 Consultation on Designated Legislative Instruments
- 18 Explanatory statements
- 19 Advice to be tabled

PART 3 Constitution of the Advisory Council

Division 3.1 Members of the Advisory Council

- 20 Constitution of the Advisory Council
- 21 Role of Members
- 22 Duties of the Members

Division 3.2 Appointment of Members

- 23 Appointment of Initial Members

- 24 National Conference
- 25 Selection of Members by National Conference
- 26 Term
- 27 Eligibility
- 28 Disclosure of interests
- 29 Resignation of Member
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Division 3.3 Chair and Deputy Chair

- 32 Advisory Council Chair and Deputy Chair
- 33 Resolution of no confidence in Advisory Council Chair or Advisory Council Deputy Chair
- 34 Voting

PART 4 Miscellaneous

- 35 Rules
 - 36 Review of operation of Act
- Schedule 1 – DESIGNATED ACTS
- Schedule 2 – CONSTITUENT ORGANISATIONS

Explanatory Memorandum

PART 1—PRELIMINARY

This Part deals with the short title, commencement, objects, simplified outline and interpretation of the Act.

Clause 7—Concurrent operation of State and Territory laws

Clause 8—State constitutional powers

These clauses ensure that the laws and constitutional powers of the States are not affected by the proposed law.

PART 2—ADVISORY COUNCIL

This Part establishes the Advisory Council and deals with referral of Bills and legislative instruments to the Advisory Council.

Clause 10—Functions of the Advisory Council

The Advisory Council is intended to function as a voice for Aboriginal and Torres Strait Islander peoples in legislative and executive processes, and to provide advice to the Parliament and the Executive on the development of policy, Bills and proposed legislative instruments concerning Indigenous affairs.

Clause 11—Minister may approve performance of functions under State or Territory laws

The Minister may permit the Advisory Council to perform a function expressly conferred upon it by a law of a State or Territory. This is intended to allow States and Territories to opt into the national scheme for obtaining advice in Indigenous affairs on their own terms and without requiring them to do so.

Clause 13—Power to advise

The Advisory Council is given a broad discretion to provide advice on matters relating to Indigenous affairs. This Advice must be in writing and provided to the presiding officers of both Houses of Parliament. They must ensure that it is tabled in Parliament. This includes providing advice on the development of public policy in relation to Indigenous affairs.

This clause should be compared with clause 24 of the Speaking for Country Bill, which provides a narrower power in relation to Bills relating to Indigenous affairs, but does not include advice in relation to the development of public policy.

Clause 14—Referral of Bills to enact or amend Designated Acts

“Designated Acts” are defined in Clause 5 as any Act listed in Schedule 1 or any Act made under sections 51(xxvi) or 122 of the Constitution to the extent that the Act is directed to Aboriginal and Torres Strait Islander peoples or their affairs.

This clause provides that if a Bill to amend or enact a Designated Act is introduced into either House, it must be accompanied by a certificate stating that the Bill has been referred to the Advisory Council.

The Advisory Council may then decide whether or not to provide Advice. If it decides not to provide Advice, it must notify the presiding officers of both Houses accordingly.

Clause 14(5) expressly states that failure to comply with this section does not affect the validity or enforcement of any Act.

Clause 15—Referral of Other Bills for Advice

Any Minister, House of Parliament or parliamentary committee may refer any other Bill to the Advisory Council for Advice, and the Advisory Council has a discretion as to whether it provides advice.

The Advisory Council may then decide whether or not to provide Advice. If it decides not to provide Advice, it must notify the presiding officers of both Houses accordingly.

Clause 16—Consideration of Advice on Bills

The Senate and the House of Representatives have an obligation to consider Advice that has been tabled in the House when debating a Bill to enact or amend a Designated Act.

This obligation does not apply if the Bill being debated does not relate to a Designated Act. The intention is that, although the Advisory Council might provide Advice on a wider range of Bills and legislative instruments, the Senate and the House of Representatives only have an obligation to consider the advice in limited circumstances relating to a Designated Act.

Clause 16(3) expressly states that failure to comply with this section does not affect the validity, operation or enforcement of the Act.

This clause should be compared with clause 26 of the *Speaking for Country Bill*, which imposes an obligation on the Senate and the House of Representatives to consider all Advice that is tabled.

PART 3—CONSTITUTION OF THE ADVISORY COUNCIL

This Part deals with the Members of the Advisory Council and the National Conference that appoints the Advisory Council's Members.

Clause 20—Constitution of the Advisory Council

The Advisory Council shall consist of between ten and fifteen part-time Members.

Clause 24—National Conference

This clause establishes a National Conference which is responsible for selecting the Members of the Advisory Council.

The National Conference is constituted by delegates of the Constituent Organisations.

Clause 5 defines Constituent Organisations as organisations listed in Schedule 2 or any

other organisation specified by the Minister following consultation with the Advisory Council. It is intended that the Advisory Council would consider recommendations from local Indigenous communities, which it would then forward on to the Minister if appropriate.

Constituent Organisations are divided into two categories: Local Organisations and Other Organisations.

Local Organisations are organisations that represent the local communities of Aboriginal or Torres Strait Islander peoples.

Other Organisations include organisations that have a more specialised interest in Indigenous affairs, such as learned societies, cultural organisations, heritage protection agencies, educational institutions, and philanthropic foundations whose objects are directed to some aspect of Indigenous affairs. These organisations have expertise in some aspect of Indigenous affairs, but do not necessarily claim to represent the interests of Indigenous people.

In this way, the National Conference brings together delegates who represent local Indigenous communities and delegates with expertise in different aspects of Indigenous affairs.

Each Local Organisation is represented at the National Conference by two delegates and each Other Organisation by one delegate.

Delegates may nominate prospective Members of the Advisory Council.

Clause 25—Selection of Members by National Conference

Clause 27—Eligibility

The National Conference may select any person to be a Member of the Advisory Council, providing that person is not on the staff of the Advisory Council, bankrupt, or has been convicted of a serious offence.

PART 4—MISCELLANEOUS

This Part provides that the Minister may make rules and must cause a review of the Act.

The Parliament of Australia enacts:

PART 1 PRELIMINARY

1 Short Title

This Act is the *Advisory Council for Aboriginal and Torres Strait Islander Affairs Act 2018*.

2 Commencement

- (1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
- (2) If this Act does not commence under subsection (1) within the period of 6 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

3 Objects of this Act

The objects of this Act are to:

- (a) provide for the establishment of an Advisory Council to provide advice to the Parliament or the Executive Government on matters relating to Aboriginal and Torres Strait Islander affairs, including matters respecting:
 - (i) Aboriginal and Torres Strait Islander peoples;
 - (ii) the relationship of Aboriginal and Torres Strait Islander peoples with their traditional land and waters; and
 - (iii) the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples; and
- (b) establish the procedure by which the Parliament and the Executive consider the advice of the Advisory Council; and
- (c) facilitate Aboriginal and Torres Strait Islander participation in the formulation of government policies that affect them; and
- (d) provide for how the Advisory Council shall be constituted.

4 Simplified outline of this Act

Part 2 of this Act establishes the Advisory Council and sets out its functions and powers including:

- (a) describing how the Advisory Council may give advice to the Parliament and to the Executive; and
- (b) identifying when the Parliament and the Executive must consider the advice of the Advisory Council.

Part 3 deals with the constitution of the Advisory Council, including the selection and appointment of its Members and the holding of meetings of the Members.

Part 4 deals with miscellaneous matters.

5 Interpretation

(1) In this Act, unless the contrary appears:

Aboriginal or Torres Strait Islander peoples means groups of people who

- (a) are descendants of Aboriginal people or Torres Strait Islander people;
- (b) identify as Aboriginal people or Torres Strait Islander people; and
- (c) are accepted as Aboriginal people or Torres Strait Islander people by an Aboriginal community or Torres Strait Islander community.

Advice means advice provided by the Advisory Council in the form prescribed in section 13 of this Act.

Advisory Council means the Advisory Council established under section 9 of this Act.

amend has the same meaning as in the *Legislation Act 2003*.

Chair means the person selected as the Chair of the Advisory Council in accordance with section 32 of this Act.

Constituent Organisation means a Local Organisation or an Other Organisation.

Deputy Chair means the person selected as the Deputy Chair of the Advisory Council in accordance with section 32 of this Act.

Designated Act means:

- (a) this Act;
- (b) an Act listed in Schedule 1 to this Act; or
- (c) an Act made under:
 - (i) section 51(xxvi) of the Constitution; or
 - (ii) section 122 of the Constitution;to the extent that the Act is directed to Aboriginal and Torres Strait Islander peoples or their affairs.

Designated Legislative Instrument means a legislative instrument made under a Designated Act.

eligible number, in relation to the Advisory Council, means:

- (a) 12; or
- (b) if a notice under section 20 of this Act is in force – the number fixed by the notice.

explanatory statement, when used in relation to a legislative instrument, has the same meaning as in the *Legislation Act 2003*.

Initial Members means the Members of the Advisory Council appointed by the Governor-General in accordance with section 23 of this Act.

Local Organisation means an organisation whose primary object is the representation of a local community of Aboriginal or Torres Strait Islander people:

- (a) which organisation is listed in Part 1 of Schedule 2 to this Act; and
- (b) any other organisation specified by the Minister by notification in the *Gazette*, following consultation with the Advisory Council.

Member means a member of the Advisory Council appointed by the Governor-General in accordance with sections 23 or 25 this Act, who shall collectively be the accountable authority of the Advisory Council for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

National Conference has the meaning given in section 24 of this Act.

Other Organisation means an organisation whose primary object is the promotion of some aspect of Aboriginal and Torres Strait Islander affairs:

- (a) which organisation listed in Part 2 of Schedule 2 to this Act; and
- (b) any other organisation specified by the Minister by notification in the *Gazette*, following consultation with the Advisory Council.

Presiding Officers means the Speaker of the House of Representatives and the President of the Senate.

rule-maker has the same meaning as in the *Legislation Act 2003*.

signed includes signed by way of electronic signature placed on a document under the authority of the relevant person or body.

6 Act to bind Crown

This Act shall bind the Crown.

7 Concurrent operation of State and Territory laws

This Act is not intended to exclude or limit the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

8 State constitutional powers

This Act does not enable a power to be exercised to the extent that it would impair the capacity of a State to exercise its constitutional powers.

PART 2 ADVISORY COUNCIL

Division 2.1 Establishment and Functions of Advisory Council

9 Establishment of Advisory Council

- (1) The Advisory Council is established.
- (2) The Advisory Council:

- (a) is a body corporate, with perpetual succession; and
 - (b) is to have a common seal; and
 - (c) may sue and be sued in its corporate name.
- (3) The common seal of the Advisory Council is to be kept in such custody as the Advisory Council directs and must not be used except as authorised by the Advisory Council.

10 Functions of the Advisory Council

The Advisory Council has the following functions:

- (a) to provide a voice for Aboriginal and Torres Strait Islander peoples in the legislative and executive processes of the Australian government; and
- (b) to consider and provide advice to the Parliament and to the Executive on Bills and legislative instruments concerning matters relating to Aboriginal and Torres Strait Islander affairs; and
- (c) such other functions as are conferred on the Advisory Council by this Act or any other Act or with the approval of the Minister under s 11.

11 Minister may approve performance of functions under State or Territory laws

The Minister may, in writing, approve the performance by the Advisory Council of a function expressly conferred on the Advisory Council by a law of a State or Territory.

12 Powers

The Advisory Council may do all things necessary or convenient to be done for or in connection with, or as incidental to, the performance of its functions.

Division 2.2 Advice giving powers

13 Power to advise

- (1) The Advisory Council may provide Advice to the Parliament or the Executive Government on matters relating to Aboriginal and Torres Strait Islander affairs, including matters respecting:
- (a) Aboriginal and Torres Strait Islander peoples;
 - (b) the relationship of Aboriginal and Torres Strait Islander peoples with their traditional land and waters; and
 - (c) the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.
- (2) Advice provided by the Advisory Council under subsection (1) under subsection (1):
- (a) must be in writing and signed by the Chair of the Advisory Council; and
 - (b) when the Advice is provided to the Parliament, it must be delivered to delivered to the Presiding Officers, who shall cause it to be laid before each House as soon as practicable after receiving it and no later than two sitting days from its receipt.

Division 2.3 Advice on Bills

14 Referral of Bills to enact or amend Designated Acts

- (1) Upon the introduction of a Bill to enact or amend a Designated Act in either House, the person introducing the Bill shall table a certificate stating that:
 - (a) the Bill has been referred to the Advisory Council for consideration; and
 - (b) the date upon which it was referred.
- (2) A reference to the Advisory Council of a Bill to enact or amend a Designated Act shall:
 - (a) be in writing addressed to the Chair of the Advisory Council;
 - (b) include a copy of the draft Bill and the draft explanatory memorandum; and
 - (c) include a proposed timetable for the introduction and passage of the draft Bill.
- (3) If the Advisory Council receives a reference under sub-section (2), it may provide Advice on the Bill or may decline to provide Advice.
- (4) If the Advisory Council declines to provide Advice, it shall notify the Presiding Officers as soon as practicable and the Presiding Officers shall cause the notification to be tabled within two sitting days.
- (5) The failure to refer a Bill or table a certificate or notification under this section does not affect the validity or enforceability of any Act or any other provision of a law of the Commonwealth.

15 Referral of Other Bills for Advice

- (1) Any Bill may be referred to the Advisory Council for Advice by:
 - (a) any Minister; or
 - (b) a resolution of either House of Parliament; or
 - (c) a parliamentary committee.
- (2) A reference under subsection (1) shall:
 - (a) be in writing addressed to the Chair of the Advisory Council; and
 - (b) include a copy of the Bill and the explanatory memorandum; and
 - (c) include a proposed timetable for the debate and passage of the Bill; and
 - (d) identify any particular parts of the Bill in relation to which the Advisory Council's Advice is sought.
- (3) If a reference is made under this section, the Advisory Council may provide Advice on the Bill or may decline to provide Advice.
- (4) If the Advisory Council declines to provide Advice on the Bill, it shall notify the Presiding Officers as soon as practicable and the Presiding Officers shall cause the notification to be tabled in their respective Houses within two sitting days.

16 Consideration of Advice on Bills

- (1) The House of Representatives and the Senate must, in debating a Bill to enact or amend a Designated Act, give consideration to any Advice by the Advisory Council that has been tabled with respect to that Bill.
- (2) Advice otherwise provided by the Advisory Council and tabled in Parliament may be considered by Parliament.
- (3) A failure to comply with this section in relation to a Bill that becomes or amends a Designated Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.

Division 2.4 Advice on legislative instruments

17 Consultation on Designated Legislative Instruments

- (1) Before a Designated Legislative Instrument is made or amended, the rule-maker must be satisfied that there has been consultation with the Advisory Council that is:
 - (a) considered by the rule-maker to be appropriate; and
 - (b) reasonably practicable to undertake.
- (2) Without limiting the form that consultation referred to in subsection (1) might take, such consultation must involve notification to the Advisory Council of the proposal to make or amend the Designated Legislative Instrument and such notification must invite Advice to be given by a specified date.
- (3) If a notification is given to the Advisory Council under this section, the Advisory Council may provide Advice or may decline to provide Advice.
- (4) If the Advisory Council provides Advice, the consultation will not be appropriate for the purposes of subsection (1) unless that Advice is considered by the rule-maker before the Designated Legislative Instrument is made or amended.
- (5) The fact that consultation does not occur does not affect the validity or enforceability of a Designated Legislative Instrument.

18 Explanatory statements

An explanatory statement for a Designated Legislative Instrument must:

- (a) note whether or not the Advisory Council provided Advice on the Designated Legislative Instrument;
- (b) if consultation was undertaken under section 17 of this Act, contain a description of the consultation that was undertaken; and
- (c) if no such consultation was undertaken, explain why no such explanation was undertaken.

19 Advice to be tabled

If the Advisory Council has given Advice in relation to a Designated Legislative Instrument, a copy of the Advice must be tabled in each House of Parliament together with the

explanatory statement for the Designated Legislative Instrument pursuant to section 39 of the *Legislation Act 2003*.

PART 3 CONSTITUTION OF THE ADVISORY COUNCIL

Division 3.1 Members of the Advisory Council

20 Constitution of the Advisory Council

- (1) The Advisory Council consists of the eligible number of part-time members appointed in accordance with this Act.
- (2) The Minister may fix the eligible number for the Advisory Council by notice in the *Gazette*.
- (3) The number fixed must be at least 10 and no more than 15.
- (4) The notice is a legislative instrument.
- (5) The performance of the functions or the exercise of the powers of the Advisory Council is not affected by reason only that there are fewer than the eligible number of members of the Advisory Council.

21 Role of Members

- (1) The role of Members is:
 - (a) to determine whether or not to give Advice on a proposal to enact or amend a Designated Act or a Designated Legislative Instrument or on any other matter within the Advisory Council's functions; and
 - (b) to facilitate the consultations necessary or desirable to inform the content of the Advice that may be given under this Act; and
 - (c) to determine and approve the Advice to be given on a proposal to enact or amend a Designated Act or a Designated Legislative Instrument or on any other matter within the Advisory Council's functions; and
 - (d) to decide the objectives, strategies and policies to be followed by the Advisory Council in performing its functions; and
 - (e) to ensure that the Advisory Council performs its functions in a proper, efficient and economical manner and with the maximum benefit to Aboriginal and Torres Strait Islander peoples.

22 Duties of the Members

- (1) It is the duty of the Members:
 - (a) to maintain the independence and integrity of the Advisory Council;
 - (b) to ensure that, in fulfilling its functions, the Advisory Council continues to represent the interests of Aboriginal and Torres Strait Islander peoples by undertaking appropriate consultation with Aboriginal and Torres Strait Islander peoples and with its Constituent Organisations.

- (2) Nothing in this section imposes on the Members a duty that is enforceable by proceedings in a Court.

Division 3.2 Appointment of Members

23 Appointment of Initial Members

- (1) As soon as practicable following the establishment of the Advisory Council, the Governor-General shall appoint the eligible number of Members of the Advisory Council by notification in the *Gazette* (the *Initial Members*).
- (2) The Governor-General shall make the appointments referred to in subsection (1) on the recommendation of the Minister.
- (3) Each person recommended by the Minister to be an Initial Member must:
- (a) be a person who the Minister is satisfied has significant experience in or expertise on the community life and civic affairs of Aboriginal and Torres Strait Islander communities; and
 - (b) be eligible under section 27 of this Act to be selected and appointed as a Member.

24 National Conference

- (1) There shall be a national conference constituted by delegates of the Constituent Organisations to select the Members of the Advisory Council (the *National Conference*).
- (2) The first National Conference must be held within 12 months of the establishment of the Advisory Council.
- (3) Subsequent National Conferences must be held at least every 3 years on a date to be determined by the Minister, in consultation with the Advisory Council.
- (4) At the National Conference:
- (a) Each Local Organisation:
 - (i) shall be represented by two delegates; and
 - (ii) may propose one nominee for the position of Member of the Advisory Council.
 - (b) Each Other Organisation:
 - (i) shall be represented by one delegate; and
 - (ii) may propose one nominee for the position of Member of the Advisory Council.
- (5) Subject to subsection (6), the delegates and nominees referred to in subsection (4) must be chosen in accordance with the internal rules and procedures of the Constituent Organisation.
- (6) A Constituent Organisation must not propose a nominee unless the person is eligible under section 27 of this Act to be appointed as a Member.
- (7) An Initial Member or sitting Member of the Advisory Council may, subject to eligibility under section 27, be:

- (a) a nominee of a Constituent Organisation at a National Conference; and
- (b) selected by the National Conference as a Member of the Advisory Council.

25 Selection of Members by National Conference

- (1) The National Conference must select the Members of the Advisory Council by secret ballot.
- (2) The candidates for selection under sub-section (1) will be the nominees proposed by Constituent Organisations in accordance with section 24 of this Act.
- (3) Selection processes under this section must be conducted in accordance with any regulations.
- (4) The Governor-General shall appoint the persons selected by the National Conference pursuant to this section as Members of the Advisory Council within 10 days of that selection.

26 Term

- (1) The term of office of the Initial Members ceases on the date on which the first Members who are appointed pursuant to section 25 of this Act take office.
- (2) Persons appointed as members of the Advisory Council in accordance with section 25:
 - (a) take office as Members 21 days following the appointment concerned; and
 - (b) hold office until the date 21 days following the next appointment of Members following a selection by the National Conference.

27 Eligibility

- (1) A person is not eligible to be appointed as a Member or to continue as a Member if the person:
 - (a) is a member of the staff of, or a consultant to, the Advisory Council;
 - (b) subject to subsection (2), is bankrupt;
 - (c) subject to subsection (2), has been convicted of an offence against a Commonwealth, State or Territory law and sentenced to imprisonment for one year or longer; or
 - (d) subject to subsection (2), has been convicted of an offence against a Commonwealth, State or Territory law involving dishonesty and sentenced to imprisonment for 3 months or longer.
- (2) Subsection (1) does not disqualify a person from being appointed or continuing as a Member if:
 - (a) where the person was not imprisoned for the offence – at least 2 years have elapsed since the person was convicted;
 - (b) where the person served a term of imprisonment for the offence – at least 2 years have elapsed since the person was released from prison; or

- (c) in any case – the Minister, on application by the person, declares that in spite of the person’s conviction or bankruptcy, extenuating circumstances mean the person is a fit and proper person to serve as a Member and ought not to be disqualified from being appointed as a Member.

28 Disclosure of interests

- (1) Each Member of the Advisory Council must make to the Minister a written disclosure equivalent to the disclosure of financial interests required to be made by senior executive service (SES) employees of:
 - (a) the Member’s financial interests; and
 - (b) the financial interests of the Member’s immediate family.
- (2) The Member must make a disclosure under subsection (1) within one month after being appointed as a Member.
- (3) The Member must from time to time make such further disclosures as are necessary to ensure that the information available to the Minister about the financial interests of the Member, and of the Member’s immediate family, is up-to-date.

29 Resignation of Member

- (1) A person may resign as a Member, Chair or Deputy Chair by writing signed and delivered to the Minister.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

30 Removal of Member

- (1) The Minister may, after consulting with the other Members of the Advisory Council, terminate the appointment of a Member because of incompetence, misbehaviour or physical or mental incapacity.
- (2) If a Member:
 - (a) becomes disqualified under section 27 of this Act; or
 - (b) fails, without reasonable excuse, to comply with section 28 of this Act; or
 - (c) fails, without reasonable excuse, to comply with section 29 of the *Public Governance, Performance and Accountability Act 2013* or rules made for the purposes of that section; the Minister must terminate the appointment of the Member.

31 Filling casual vacancies

If a Member of the Advisory Council resigns, dies or is removed from office, the Governor-General shall appoint to fill the vacancy the unelected nominee who received the highest number of votes at the previous National Conference and who is both eligible and willing to accept the office.

Division 3.3 Chair and Deputy Chair

32 Advisory Council Chair and Deputy Chair

- (1) The Advisory Council must, at its first meeting, select from among its members by secret ballot a Chair and Deputy Chair.
- (2) The first meeting of the Advisory Council must be held:
 - (a) in the case of the first meeting following the appointment the Initial Members pursuant to section 23 of this Act – as soon as practicable after that appointment; and
 - (b) in any other case – as soon as practicable following the commencement of the term of the Members appointed in accordance with section 25 of this Act.
- (3) All other meetings shall be convened by the Chair of the Advisory Council, at a place and time to be determined by the Chair.
- (4) At any other meeting of the Advisory Council, after the first meeting, the Advisory Council must select:
 - (a) a new Chair if there is a vacancy in the office of Chair of the Advisory Council; and
 - (b) a new Deputy Chair if there is a vacancy in the office of Deputy Chair of the Advisory Council.
- (5) Selections made under this section must be conducted in accordance with any regulations.

33 Resolution of no confidence in Advisory Council Chair or Advisory Council Deputy Chair

- (1) At any meeting of the Advisory Council, the Members of the Advisory Council may pass a resolution of no confidence in the Chair or Deputy Chair by majority of the Members present.
- (2) If a resolution of no confidence is passed, then the position of Chair or Deputy Chair is declared to be vacant and a new selection must be undertaken in accordance with section 32 of this Act.

PART 4 MISCELLANEOUS

35 Rules

The Minister may, by legislative instrument, make rules prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to this Act.

36 Review of operation of Act

- (1) The Minister must cause a review of the operation of this Act to be undertaken.

- (2) The review must:
- (a) start 2 years after the commencement of this section; and
 - (b) be completed within 6 months.
- (3) The Minister must cause a written report about the review to be prepared.
- (4) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

Schedule 1 – DESIGNATED ACTS

[Insert relevant Acts, including:

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Acts 2006

Native Title Act 1993]

Schedule 2 – CONSTITUENT ORGANISATIONS

Part 1 – Local Organisations

[Insert list of Local Organisations]

Part 2 – Other Organisations

[Insert list of Other Organisations]

Two new options for hearing Indigenous voices

The Referendum Council's final report recommended that the Australian Constitution should be amended to ensure that Indigenous voices are heard by Australia's legislators.

This pamphlet provides two options for how this recommendation might be realised in practice, and includes draft bills that could provide the basis for Constitution alterations and statutes to achieve this.

It is intended to provide options which could serve as the basis for further consultation with Australia's Indigenous peoples and for subsequent consideration by parliamentarians.

Uphold & Recognise has collaborated with the PM Glynn Institute, Australian Catholic University's public policy think-tank, under the strategic guidance of Professor Megan Davis, Sean Gordon, and Noel Pearson, to develop these proposals with in-kind support from Allens and seed funding from Westpac Banking Corporation and the Commonwealth Bank of Australia.

UPHOLD & RECOGNISE is a non-profit organisation committed to its charter for upholding the Australian Constitution and recognising Indigenous Australians.

This pamphlet forms part of the Uphold & Recognise Monograph Series:

- 1 *The Australian Declaration of Recognition*
- 2 *Practical Recognition from the Mobs' Perspective*
- 3 *Claiming the Common Ground for Recognition*
- 4 *This Whispering in Our Hearts*
- 5 *Journey from the Heart*
- 6 *Hearing Indigenous Voices*
- 7 *Makarrata*
- 8 *A Fuller Declaration of Australia's Nationhood*

For more information, or to download a copy of any of these, visit www.upholdandrecognise.com