

A FULLER
DECLARATION
of AUSTRALIA'S
NATIONHOOD

Options for Discussion

Providing the detail and
upholding the big ideas

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EXECUTIVE SUMMARY

| | |
|--|-----------|
| A fuller declaration of Australia’s nationhood..... | 05 |
| The Referendum Council called for the adoption of a symbolic statement of recognition that does not form part of the Constitution but which unifies all Australians. | |
| Upholding the Constitution..... | 05 |
| The need for a symbolic statement does not justify creating uncertainty in relation to the interpretation of the Constitution. | |
| The place of symbolism..... | 07 |
| A symbolic statement about modern Australia’s Indigenous heritage, British institutions and multicultural achievement would help unify all Australians as part of the process of Indigenous recognition. | |
| What would a declaration say?..... | 07 |
| There are at least eight themes which a declaration of recognition might be expected to address. | |
| Who would draft a declaration?..... | 08 |
| When drafting the declaration, there should be a process, such as a drafting competition, that encourages a high level of participation from all sections of Australian society, so that the declaration embodies the will of the Australian people. | |
| How would a declaration be adopted?..... | 09 |
| The declaration of recognition should not be adopted through ordinary legislation, but through a process that evinces participation of the Australian people and/or all the Australian legislatures. | |

Timing.....09

The adoption of a declaration of recognition should be the capstone that provides symbolic recognition of modern Australia after implementing substantive reforms to recognise Indigenous peoples.

Two options.....10

A declaration could be adopted either by amending the *Australia Acts* or by proclamation in response to a petition to Parliament.

Amending the *Australia Acts*.....10

Commonwealth and State parliaments may legislate in concert to amend the *Australia Acts* by inserting a new section 18 which recites the declaration of recognition.

Petitioning for a *Declaration of Recognition Act*.....11

The Commonwealth Parliament may legislate to authorise the Governor-General to issue a Proclamation adopting the declaration of recognition in response to a petition by the Australian people.

APPENDICES

Australia Acts (Request) Bill 2018.....12

Declaration of Recognition Bill 2018.....14

Two sample declarations of recognition.....15

Tim Wilson’s draft in *The Forgotten People*

Stan Grant’s draft in *A Rightful Place*

A FULLER DECLARATION OF AUSTRALIA'S NATIONHOOD

To complement the practical reforms contained in other pamphlets in this series, *Hearing Indigenous Voices* and *Makarrata*, a declaration of recognition should be adopted to unite all Australians. This is an opportunity for Australians to give expression to their pride in the things that make our country unique: our Aboriginal and Torres Strait Islander heritage and culture, our British institutions and our multicultural accomplishment.

In May 2017, the Indigenous leaders assembled at Uluru proclaimed that “substantive constitutional change and structural reform” could result in “a fuller expression of Australia’s nationhood.” No doubt this influenced the Referendum Council, when it recommended in its final report, in June 2017, that an extra-constitutional declaration of recognition be adopted as “a symbolic statement of recognition to unify Australians.” The report envisaged a statement of “inspiring and unifying words articulating Australia’s shared history, heritage and aspirations” which would “bring together the three parts of our Australian story: our ancient First Peoples’ heritage and culture, our British institutions, and our multicultural unity.”

This trinity: our First Peoples’ heritage and culture, our British institutions, and our multicultural accomplishment forms the basis of what it means to be Australian today. A declaration of this kind would serve to change the cultural position of Aboriginal and Torres Strait Islander peoples in the national narrative.

Upholding the Constitution

Until recently, many people thought that the only way that the only way to achieve recognition of Indigenous peoples was by inserting a statement in the Constitution. This assumes that the Constitution is the place for symbolic or poetic language. It is not.

Justice Antonin Scalia, late of the Supreme Court of the United States, wrote, “If you want aspirations, you can read the Declaration of Independence, with its pronouncements that ‘all men are created equal’ with ‘unalienable Rights’ that include ‘Life, Liberty, and the Pursuit of Happiness.’ Or you can read the French Declaration of the Rights of Man... There is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government.”

Scalia's point applies equally to the Australian Constitution: it contains no symbolic language. For this reason, it is important that a declaration of recognition sits outside the Constitution. The Constitution is a practical charter of government, a rulebook that apportions power. Its elegance lies in its structure, neatly dividing the powers of the three branches of government. Its elegance does not lie in poetic language. The insertion of poetic language, such as might characterise a declaration of recognition, in a preamble or elsewhere *within* the Constitution, would create legal uncertainty. Such a proposal would be fiercely opposed by constitutional conservatives.

Unlike the United States, Australia lacks a declaration that gives an inspiring statement of its nationhood. A declaration of recognition *outside* the Constitution might yet fill that void. A declaration within the Constitution would inevitably use legal (or legally constrained) language, which is not the best language to articulate Australia's nationhood. Australia can achieve a less constrained, more generous and loftier statement in an Australian declaration of recognition, rather than in the Constitution.

The question of legal risk is important. No one who advocates reform to the Constitution can guarantee the future interpretation of that reform by the High Court. The importance of the approach taken by a declaration of recognition, therefore, is that it avoids any unintended transfer of power from the Parliament to the High Court.

One of the reasons that previous approaches have failed to gain support is partly due to their inability to eliminate legal uncertainty. For example, the proposed insertion of a preamble to the Constitution that recognised Indigenous Australians did not withstand the challenge that a preamble could be used as a tool of interpretation by the High Court. It is at least possible, in the view of the late Chief Justice of Australia, Sir Harry Gibbs, that preambles could be used to provide evidence of established facts.

Sir Harry wrote in a paper for the Samuel Griffith Society, "A reference in a preamble to a matter will make evidence of that matter admissible. Recitals in a preamble are *prima facie* evidence of the facts recited. It would be arguable that these rules were not excluded by a provision that the Preamble has no legal force."

A declaration *outside* the Constitution is a legally modest proposal. Adopting a declaration avoids creating any legal uncertainty around the Constitution, which is essentially a practical and pragmatic charter of government. It therefore addresses the concerns of those who see the value in a grand unifying declaration, but who also understand the need not to disturb the way in which the Constitution operates.

The place of symbolism

A criticism is anticipated: that the declaration of recognition would provide merely symbolic reform. This is not correct. The declaration *must* be adopted at the same time as the practical recognition provided by the reforms contained in the other pamphlets in this series, *Hearing Indigenous Voices* and *Makarrata*. The declaration would be the capstone in this package of reforms, marking the significance of recognition for the nation as *a whole*. No form of symbolic recognition alone, however, can be a substitute for substantive recognition.

Formal declarations by institutions of government have been adopted overseas to recognise the place of indigenous peoples in the lives of the modern countries of which they form a unique part. For example, the Ainu were recognised as an indigenous people of Japan by the National Diet in 2008, as were the Travellers recognised as a distinctive ethnic group within the State in a statement made by the Taoiseach to the Dáil Éireann of the Irish Republic in 2017.

Together with other substantive reforms for constitutional recognition of Australia's Indigenous peoples, the adoption of a declaration of recognition will complete the process of recognition by creating a symbolic moment that unifies all Australians. The symbolic status of the declaration complements the practical reforms but cannot be a substitute for them.

What would a declaration say?

No conclusive or final draft of a declaration exists, and this pamphlet does not promote one draft over another. It aims to set out how a declaration might work, not identify what it ought to say. Various people have drafted possible declarations, and two of these suggestions—by Tim Wilson and Stan Grant—are reproduced at the end of this pamphlet as examples of contrasting approaches that might be taken to drafting a declaration.

Even in the absence of definitive drafting, there are recurring themes that are found in attempts at drafting statements of this kind, such as the 1998 Australian Declaration towards Reconciliation and attempts at drafting a new preamble to the Australian Constitution ahead of the republic referendum held in 1999. Similarly, the national apology to Australia's Indigenous peoples (delivered by the Prime Minister in 2008), the Australian Parliament's *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*, and recitations in each of the six State constitutions all use similar language to recognise Australia's Indigenous peoples.

Although the specific content and the tone of each of these documents differ, they suggest that there are eight recurring themes that can reasonably be expected to be included—in one form or another—in an Australian declaration of recognition:

- 1 Recognition of the traditional owners of the land that comprises modern Australia;
- 2 Acknowledgment of their ongoing connection to their traditional lands and waters;
- 3 Affirmation of the heritage, culture and languages of Australia's Indigenous peoples;
- 4 Reverence for the oldest continuing civilisation in the world;
- 5 Reflection about the past mistreatment of Indigenous peoples;
- 6 Recitation of the values shared by Australian citizens;
- 7 Recognition of the institutions central to Australian government; and
- 8 Recognition of the contribution of waves of immigration to a multicultural society.

Who would draft a declaration?

For the declaration of recognition to capture the national imagination it must take its inspiration from the words and sentiments of the Australian People. It must not be, and must not be seen to be, an act of the political class alone. This necessitates public participation in the process of drafting the declaration.

It is, of course, critical that the declaration has the support of Indigenous Australians. For this reason, it is important that the process includes Indigenous people, and their views about how best to maximise their participation in the process. Any approach to public participation should include a process for involving Indigenous peoples in an appropriate way.

There are historical examples of similar processes working well. In 1901, a competition was held inviting suggestions for a national flag for the new Australian nation. Over 32,000 entries were received, and five entries were sufficiently similar to be declared joint winners. A similar process could be adopted, encouraging everyone to have their say about the declaration of recognition. Such a competition could result in a shortlist of five versions of a declaration from which the final text could be chosen or refined.

The Ode of Remembrance (from Laurence Binyon's poem, 'For the Fallen') enjoys a sacred status in Anzac Day ceremonies. If the declaration is to have a similar effect, it needs to be pithy and poetic and include some degree of metre. It would be appropriate to engage an accomplished poet to assist in refining the best entries in the national competition.

This process offers the opportunity to educate those who aspire to draft something of a high quality. If successful, it could produce something memorable for schoolchildren to learn off by heart, like Gettysburg Address in America, whose 272 words are etched into the walls of the Lincoln Memorial, and are read by all its visitors. This is an opportunity for every Australian to participate in the creation of a document that will contribute in an important way to our sense of national pride.

How would a declaration be adopted?

Although a declaration of recognition could be adopted through an ordinary act of the Australian Parliament, this would not confer upon the declaration the popular support it needs to be effective. Its adoption needs to involve the Australian people in some larger way, so that it is beyond any doubt that the declaration is more than just the mere will of the legislative or executive branch of government.

A plebiscite would be an unproductive means of pursuing a declaration. More often than not, national plebiscites are corrosive to our parliamentary democracy. A plebiscite would be a divisive endeavour. Contrariwise, the purpose of a declaration is to *unify*. As Edmund Burke put it in his Speech to the Electors of Bristol, “parliament is a *deliberative* assembly of one nation, with *one* interest, that of the whole.” Pursuing a plebiscite would be a failure of the parliamentary system. Rather, it must be clear that a declaration is the mandated will of the Parliament and of the people *both*.

Popular support could be gained by augmenting the ordinary processes of the Australian Parliament, so that the federation’s State and Territory parliaments and governments could participate in the process, and, indeed, to ensure that Australian people themselves are directly involved (as they are at an election or referendum, but without pursuing those costly and complicated processes).

An adoption process such as this would serve as a reminder that, like the American Declaration of Independence and the French Declaration of the Rights of Man and Citizen, the Australian Declaration of Recognition would be a statement for all time that could not be altered at the whim of the government of the day.

Timing

The declaration is to be the final moment in the process of reform. It would provide the symbolic dimension for the practical recognition provided by other reforms. Whilst the significance of symbolism should not be underestimated, no form of symbolic recognition alone can be a substitute for substantive recognition. It must, therefore, be enacted *after* the other reforms proposed in these pamphlets.

The declaration is, in that sense, the “capstone” of the reform agenda. It holds the rest together. And, like the capstone of a buttress, the other proposals must be in place before the capstone can be positioned.

Two options

The challenge then becomes one of identifying options for adopting a declaration of recognition that will:

- 1 maximise public participation in the drafting and adoption processes;
- 2 avoid the processes becoming unnecessarily cumbersome or costly;
- 3 maintain the support of Indigenous people;
- 4 avoid legal uncertainty.

Two options that satisfy these requirements are:

- Amendment of the *Australia Acts* to insert a new section 18 reciting the declaration;
- A *Declaration of Recognition Act* authorising the Governor-General to proclaim the declaration in response to a petition to Parliament calling for the declaration.

These options are sketched out below. Examples of legislation that might give effect to them are provided at the end of this pamphlet.

Amending the *Australia Acts*

On 3 March 1986, the Queen spoke at Parliament House, Canberra. Her Majesty said, “I can see a growing sense of identity and a fierce pride in being Australian. So it is right that the *Australia Act* has finally severed the last of the constitutional links between Australia and Britain, and I was glad to play a dual role in this. My last official action as Queen of the United Kingdom before leaving London last month was to give my Assent to the *Australia Act* from the Westminster Parliament. My first official action on arriving in Australia yesterday was to proclaim an identical Act—but from the Australian Parliament—which I did as Queen of Australia. Surely no two independent countries could bring to an end their constitutional relationship in a more civilised way, and I hope you will agree with me that this has been symbolic of the depth and quality of the relationship between Australia and Britain. Anachronistic constitutional arrangements have disappeared—but the friendship between two nations has been strengthened and will endure.”

Just as the *Australia Acts* marked an end to Australia’s imperial past, it is appropriate for a declaration in the *Australia Acts* to recognise Australia’s Indigenous history. Doing so would be a civilised way to end anachronistic arrangements and replace them with a revitalised conception of Australian nationhood, one based on mutual respect between Indigenous Australians and those who have come since 1788.

This could be achieved by inserting a new section 18 into both versions of the *Australia Acts*. Section 15 of the *Australia Acts* requires the State and Commonwealth parliaments to act in concert in order to amend the Acts, with each of the six State parliaments passing Acts requesting the Commonwealth Parliament to make the amendment.

Each of the States has already amended its own Constitution to recognise the Indigenous peoples as the traditional owners of the land that now forms part of the State. Given their leadership on this issue, it is fitting that their legislatures should play a role in the process of formal recognition at the national level.

Because any subsequent amendment of the *Australia Acts* could only occur at the request of the State parliaments, no future Commonwealth Government would be able to amend the declaration enshrined in the *Australia Acts* without the higher mandate of the six State parliaments.

Petitioning for a *Declaration of Recognition Act*

Any Australian resident can petition Parliament to do something, so long as it is within the powers of Parliament, and a Member of Parliament is prepared to present the petition.

Aboriginal people have a proud history of petitioning Parliament, most famously through the Bark Petitions from the Yirrkala people, who petitioned Parliament in 1963 to recognise their land rights. Furthermore, over 500,000 people signed the Sorry Books in 1998, paving the way for the national apology to Australia's Indigenous peoples in the House of Representatives in 2008.

Once the drafting process has settled the text of the declaration of recognition, it could be reproduced in Recognition Books which would be circulated around Australia. In this way, Australian citizens could sign the books to signify their support for the declaration, and to petition the Australian Parliament to adopt it. Once a sufficient number of people have signed the Recognition Books, they would then be tabled in Parliament as a petition calling for the adoption of a declaration of recognition.

The Parliament could then respond to this petition by passing a *Declaration of Recognition Act*, which would authorise the Governor-General to issue a Proclamation Adopting the Declaration of Recognition.

Such a Proclamation would build on that issued by the Governor-General on 25 January 2008, which noted that the design of Harold Thomas is recognised as the flag of the Aboriginal peoples of Australia and a flag of significance to the Australian nation generally. The Governor-General appointed that flag, under section 5 of the *Flags Act 1953*, to be the flag of the Aboriginal peoples of Australia and to be known as the Australian Aboriginal Flag.

APPENDICES

Australia Acts (Request) Bill 2018

A Bill for an Act to request the amendment of the *Australia Acts 1986* to adopt a declaration recognising modern Australia’s First Peoples’ heritage and culture, British institutions, and multicultural unity.

WHEREAS the Prime Minister of the Commonwealth and the Premiers of the States at conferences held in Canberra on [Date] agreed on the adoption of a Declaration of Recognition through amendment of the *Australia Acts*;

AND WHEREAS it has been agreed that the Parliament of the Commonwealth at the request of the Parliaments of the States in pursuance of section 51 (xxxviii) of the Constitution of the Commonwealth of Australia and section 15 of the *Australia Acts 1986* should adopt a Declaration of Recognition in the terms of the First Schedule:

The Parliament of New South Wales enacts:

1 Name of Act and purpose

This Act may be cited as the *Australia Acts (Request) Act 2018*.

The purpose of this Act is to request the amendment of the *Australia Acts* in connection with the adoption of a Declaration of Recognition.

2 Commencement

This Act commences on a day to be proclaimed.

3 Request for amendment of *Australia Acts*

The Parliament of New South Wales requests the enactment by the Parliament of the Commonwealth of an Act in, or substantially in, the terms set out in the Schedule.

First Schedule: *Australia Acts Amendment Act 2018* of the Commonwealth

An Act to insert section 18 of the *Australia Act 1986* of the Commonwealth and section 18 of the *Australia Act 1986* of the Parliament of the United Kingdom to adopt a declaration recognising modern Australia's First Peoples' heritage and culture, British institutions, and multicultural unity.

The Parliament of Australia enacts:

1 Name of Act

This Act may be cited as the *Australia Acts Amendment Act 2018*.

2 Commencement

This Act shall come into operation on a day and at a time to be fixed by Proclamation.

3 Declaration of Recognition

The Parliament of the Commonwealth of Australia adopts the Declaration of Recognition contained in the Schedule.

4 Schedule

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule

1 Insert a new section 18

[Insert the Declaration of Recognition]

2 Amendment of Imperial Act

The *Australia Act 1986* of the Parliament of the United Kingdom is amended as set out in this Schedule, insofar as that Act is part of the law of Australia or of an external Territory.

Declaration of Recognition Bill 2018

A Bill for an Act to authorise the adoption of a declaration recognising modern Australia's First Peoples' heritage and culture, British institutions, and multicultural unity.

Preamble

On [date] the Parliament was presented with a petition signed by over 300,000 Australian citizens calling for a declaration recognising modern Australia's First Peoples' heritage and culture, British institutions, and multicultural unity.

In response to that petition:

The Parliament of Australia enacts:

1 Name of Act

This Act may be cited as the *Declaration of Recognition Act 2018*.

2 Commencement

This Act shall come into operation on a day and at a time to be fixed by Proclamation.

3 Power to make Proclamation

- (1) The Governor-General may, by Proclamation, adopt the Declaration contained in the Schedule.
- (2) The Governor-General may act in concert with State Governors and Territory Administrators to proclaim the Declaration of Recognition jointly in all States and Territories as authorised by their respective legislatures.

4 Power to make rules concerning use of Declaration

The Governor-General may make rules to govern the use of the Declaration of Recognition and to preserve its dignity.

5 Power to make rules concerning use of Declaration

The Governor-General may make rules to preserve the petition tabled in Parliament, and this might include entrusting parts of the petition to any public institutions that undertake to make suitable arrangements for their preservation, rather than entrusting the entire petition to the parliamentary archives.

Schedule

[Insert the Declaration of Recognition]

Two declarations of recognition

An Australian Declaration of Unity

first published by Tim Wilson in *The Forgotten People*

With this pledge we recognise we are all Australians,
Aboriginal and Torres Strait Islander peoples,
Whose heritage, culture and language we cherish
and enduring connection to land and waters we respect,
The first European settlers that followed
Whose institutions and traditions we preserve,
The generations of migrants from across the seas
Who come to contribute to our shared future,
Built on a liberal democracy that binds us as equals,
With mutual respect and responsibility for each other
For a free, fair, just and united Australia for all.
We pledge our loyalty to Australia.

A Makarrata Declaration: A Declaration of our Country

first published by Stan Grant in *A Rightful Place*

The first people touched this land as our continent was being formed.
They came in boats when humanity had yet to cross an open sea.
Here they formed a civilisation that continues to this day.
Their birthright has never been ceded.
Those people live still in their descendants.
We enter into their heritage and respect their traditions.
We honour too those who have come from other lands and carry with them
their cultures and faiths.
Though our bonds may strain, we seek to live together in harmony.
Though we may disagree, we find no enemy among us.
We cherish the foundations of our nations, and our rule of law and democracy.
We abide by the will of the majority but defend the rights of the minority.
We are all equal in dignity.
Opportunity is for all.
Worth should be measured not in privilege.
By our efforts we prosper.
In a land of plenty, we care for those without.
From the first footsteps, we form a new people bound not by the chains
of history but committed to a future forged together.

Two new options for adopting a declaration of recognition

The Referendum Council's final report recommended the adoption of a symbolic statement of recognition that does not form part of the Australian Constitution.

A Fuller Declaration of Australia's Nationhood provides two options for how this recommendation might be implemented in practice. This pamphlet, and others in this series, aim to provide legislative options for discussion between Indigenous peoples and all Australians, 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