EXPERT PANELS, PUBLIC ENGAGEMENT AND CONSTITUTIONAL REFORM

PAUL KILDEA

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UNSW Law
UNSW Sydney NSW 2052 Australia

Expert panels, public engagement and constitutional reform

Paul Kildea*

Following the 2010 federal election the Gillard government established expert panels to inquire into and report on the constitutional recognition of Aboriginal and Torres Strait Islander peoples, and the constitutional recognition of local government. This article assesses whether the expert panels were effective vehicles for fostering community engagement in connection with their respective constitutional issues, and asks how their experience might inform the design of future constitutional review processes. It does this through an analysis of a range of sources, including the final reports of both panels, survey data, consultation notes, media coverage and ministerial speeches. The article argues that both panels demonstrated the potential of expert bodies to run effective consultation programs on constitutional reform, but that future bodies may look to be more interactive in their approach to public meetings and online engagement. It also contends that both panels suffered from an important external constraint in the form of poor political management by the Gillard government, which manifest itself in the form of inadequate resourcing, poor promotion and lack of responsiveness.

PART I: INTRODUCTION

As part of power-sharing agreements made after the 2010 federal election, the Gillard government pledged to hold two referendums at or before the next election: one on the constitutional recognition of Aboriginal and Torres Strait Islander peoples,[1] and the other on the constitutional recognition of local government. Several months later the government established two "expert panels" for the purpose of advancing constitutional review in these areas. The panels were required under their terms of reference to report on possible options for change and to advise on the level of support for constitutional recognition among stakeholders and the general community. The local government panel reported to the government in December 2011, and the following month the Indigenous recognition panel did the same.[2]

The establishment of expert bodies to advance constitutional review is not without precedent in Australia, with the Constitutional Commission (1985-1988) and the Republic Advisory Committee (1993) performing similar roles under previous Labor governments. The experience of such bodies is that they are able to draw on the expertise of their members to work efficiently and inexpensively through the issues and develop recommendations.[3] The downside is that they can be viewed as elitist and out of touch with the public, and biased towards central power and/or one or other of the main

* Lecturer, Faculty of Law, and Director, Referendums Project, Gilbert + Tobin Centre of Public Law, University of New South Wales. The author thanks Grace McDonald for her excellent research assistance, and You Me Unity (now "Recognise") for giving permission to publish the results of an Auspoll survey conducted for Reconciliation Australia in March 2012.

[1] The terms "Aboriginal and Torres Strait Islander" and "Indigenous" are used interchangeably in this article, although the former is the preferred term.

[2] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012); Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011). The expert panels' terms of reference are reproduced on p 3 and p 24 of their respective reports.

[3] Twomey A, "Constitutional Conventions, Commissions and Other Constitutional Reform Mechanisms" (2008) 19 PLR 308 at 323; Williams G and Hume D, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) p 32.

political parties. They are also liable to being ignored by government where there is no prior commitment to respond to their recommendations.[4]

The two expert panels differed from these antecedent bodies in important ways. Notably, they had large and diverse memberships, permitting the representation of a broad cross-section of community interests, and their terms of reference placed an especially strong emphasis on undertaking public consultation (in the case of both panels) and achieving broad community engagement and awareness (in the case of the Indigenous recognition panel). That the panels should have such a strong focus on community input and engagement is not surprising, for recent decades have seen an increasing emphasis on public involvement in the process of constitutional change. This is evident both in Australia, where the 1998 Constitutional Convention stands as one clear example, and globally, where small-group citizen deliberation and other participatory mechanisms are increasingly being used to inform constitutional review.[5] These developing practices in turn reflect the growing influence in constitutional contexts of deliberative democracy, whose adherents argue that the legitimacy of constitutional review is enhanced where it emerges from a process that has fostered input from diverse voices and encouraged broad public interest, understanding and participation.[6] The expert panels' obligations regarding public engagement might also be viewed as a means of accommodating recent commentary on Australian referendums which asserts that public education and popular ownership are essential to achieving successful change.[7] Alternatively, the obligations to actively seek community input could be seen as pre-emptive protection against the accusations of elitism and partisanship that have been directed at previous expert bodies.

This article assesses whether the expert panels were effective vehicles for fostering community engagement in connection with their respective constitutional issues, and asks how their experience might inform the design of future constitutional review processes. Parts II and III draw on a range of sources – including the panels' final reports, survey data, consultation notes, and analysis of media coverage and ministerial speeches – to argue that the panels were reasonably successful in attracting community input, but failed at generating wider engagement. Part IV reflects on the achievements and limitations of the two expert panels, and what they tell us about how expert bodies might be used in future constitutional review. Part IV argues that they demonstrated the potential of expert bodies to run effective consultation programs on constitutional reform, but that future bodies may look to be more interactive in their approach to public meetings and online engagement. It also argues that both panels suffered from an important external constraint in the form of poor political management by the Gillard government, which manifest itself in the form of inadequate resourcing, poor promotion and lack of responsiveness. These served to undermine the work of the panels and prevented them from reaching their full potential as vehicles for community engagement.

While this article focuses solely on issues of process, there is obviously much to be said about the substance of the reforms recommended by the two expert panels in their reports. The article leaves such commentary to others,[8] although both panels should be considered successful in fulfilling their obligations (under their terms of reference) to report to the government on possible options for change. This achievement was especially valuable with respect to Indigenous recognition, where prior public debate was minimal and there were a large number of reform possibilities under consideration. The

[4] Twomey, n 3 at 324.

[5] For example, British Columbia, Ontario and the Netherlands have each held citizens' assemblies on electoral reform. Most recently, Iceland and Ireland have employed deliberative forums as part of a wider program of constitutional review. On this trend, see Tierney S, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) pp 111, 208-210.

[6] See, for example, Chambers S, "Democracy, Popular Sovereignty, and Constitutional Legitimacy" (2004) 11(2) *Constellations* 153.

[7] Williams and Hume, n 3, pp 246-254.

[8] See, for example, Twomey A, "The Race Power: Its Replacement and Interpretation" (2012) 40 FL Rev 413; Saunders C, "Indigenous Recognition: We Can't Afford to Water Down Constitutional Reform", *The Conversation* (8 February 2012), http://theconversation.edu.au/indigenous-recognition-we-cant-afford-to-water-down-constitutional-reform-4705; Twomey A, "Always the Bridesmaid: Constitutional Recognition of Local Government" (2012) 38(2) Mon LR 142.

panel on Indigenous recognition made five recommendations for constitutional amendment, including the removal of provisions regarded as racially discriminatory, the insertion of a statement of recognition and the inclusion of a prohibition on racial discrimination.[9] The local government panel outlined four possible reforms but, of these, only recommended that the government proceed with a constitutional amendment to recognise the Commonwealth's capacity to have a direct financial relationship with local government.[10]

Notwithstanding disagreement about the merits and language of these proposals, the reforms outlined by the panels served as the focus of debate and negotiation in the months following their publication. The panel recommendations on Indigenous recognition were widely discussed by community leaders and academics, although the debate lost its urgency after the Gillard government announced in September 2012 that any referendum would be postponed, for at least two years, due to lack of community awareness and support.[11] Even then, the panel's reform proposals informed the drafting of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth), an interim measure that granted a form of statutory recognition to Indigenous peoples. The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples is expected to hold further public consultations this year, and Prime Minister Tony Abbott has committed to releasing a draft proposal for constitutional amendment by September 2014.[12] The recommendations of the local government panel featured in the deliberations of the Joint Select Committee on Constitutional Recognition of Local Government, which recommended that a referendum on the issue be held at the 2013 federal election.[13] In June 2013, the federal Parliament passed legislation that enabled the holding of a referendum on local government funding, endorsing a proposal for constitutional amendment that closely resembled the panel's recommendation.[14] However, Prime Minister Kevin Rudd's decision to hold a federal election on 7 September 2013 effectively prevented this referendum from going ahead.[15] A referendum on the issue now seems unlikely anytime soon, with the Abbott government saying that it has no intention to revisit it.[16]

PART II: EXPERT PANEL ON INDIGENOUS RECOGNITION

Background

The question of whether the Constitution should be amended to give recognition to Aboriginal and Torres Strait Islander peoples has been debated on and off for decades.[17] The most recent process began in September 2010 when the Australian Labor Party pledged to hold a referendum on the

[9] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p xviii.

[10] Expert Panel on Constitutional Recognition of Local Government, n 2, pp 1-3. The panel was supportive of a referendum on this issue going ahead in 2013 provided that the Commonwealth obtained support from the States, and allocated substantial resources for a major public awareness campaign.

[11] Macklin J, "Progressing Indigenous Constitutional Recognition" (Media Release, 20 September 2012), http://www.jennymacklin.fahcsia.gov.au/node/2098. The Bill was passed by the House of Representatives on 13 February 2013 and the Senate on 12 March 2013. Subsequently, the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) commenced on 28 March 2013 and ceases to have effect at the end of two years after its commencement.

[12] Karvelas P, "A-G Goes Steady on Aboriginal Referendum", *The Australian* (9 November 2013).

[13] Joint Select Committee on Constitutional Recognition of Local Government, *Preliminary Report on the Majority Finding of the Expert Panel on Constitutional Recognition of Local Government: The Proposal, Timing and Likely Success of a Referendum to Amend Section 96 of the Australian Constitution to Effect Financial Recognition of Local Government* (2013).

[14] *Constitution Alteration (Local Government) Bill 2013* (Cth).

[15] Coghill K, "Local Government Fights for Light Despite a Scrapped Referendum", *The Conversation* (19 August 2013), https://theconversation.com/local-government-fights-for-light-despite-a-scrapped-referendum-17106.

[16] Hudson P, "Abbott Government Kills Off Local Government Referendum", *Herald Sun* (31 October 2013), http://www.heraldsun.com.au/news/abbott-government-kills-off-local-government-referendum/story-fni0fiyv-1226750784515.

[17] A proposal to insert into the Constitution a preamble that gave recognition to Aboriginal and Torres Strait Islander peoples was defeated at referendum in 1999. The proposed preamble read: "We the Australian people commit ourselves to this Constitution: … honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country."

subject at or prior to the next federal election – this pledge was made as part of agreements with the Greens and two independent MPs, in return for their support of Labor's minority government. On 8 November 2010, Prime Minister Julia Gillard announced the establishment of an expert panel on the subject. Its membership was announced the following month, with Professor Patrick Dodson and Mark Leibler named as co-Chairs.

Under its terms of reference, the expert panel was to report to the federal government on "possible options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for each option by December 2011".[18] The government established the panel "in order to ensure appropriate public discussion and debate about the proposed changes and to provide an opportunity for people to express their views".[19] In performing its role, the panel was to lead a broad national consultation and community engagement program, work closely with key organisations, and raise awareness about the importance of Indigenous constitutional recognition.[20] One of the matters to be taken into account by the panel was "the form of constitutional change and approach to a referendum likely to obtain widespread support".[21] At its second meeting in March 2011, the panel supplemented its terms of reference by agreeing to four guiding principles. Under these principles, it was agreed that each of its reform proposals should contribute to a more unified and reconciled nation; be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples; be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and be technically and legally sound.[22] The panel handed down its report on 19 January 2012.

Attracting community input

The panel sought to incorporate diverse community views into its deliberations in a variety of ways. One factor that fostered this was the panel membership. For an expert body, the panel's membership of 22 was unusually large, but its size enabled it to accommodate a diversity of perspectives and interests. In terms of party political interests, it had four parliamentary members representing the Labor, Coalition and Greens parties, with Rob Oakeshott serving as an Independent. There were 13 members who identified as either Aboriginal or Torres Strait Islander, representing a wide range of geographical locations. The business and community sectors, and academics, were also represented. One of the advantages of this arrangement was that it allowed a wide range of perspectives to be represented and advocated on the panel itself, meaning that the panel did not have to rely solely on community consultations to bring in alternative perspectives. The panel's diversity may also have helped to protect it from allegations of partisan or other bias of the kind which had dogged the Hawke-appointed Constitutional Commission.[23]

In terms of attracting a diversity of views outside of its membership, the panel adopted a range of approaches. These included releasing a discussion paper, inviting submissions, conducting public consultations over a six-month period, and holding targeted stakeholder meetings. To help it obtain a broad community view, the panel also conducted quantitative and qualitative research, including a series of nationally representative telephone surveys and four online focus group sessions.[24] An

[18] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 3.

[19] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 3.

[20] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 3.

[21] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 3.

[22] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 3.

[23] Williams and Hume, n 3, p 30.

[24] On the panel's approach to consultation and community engagement, see Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, pp 4-9.

October 2011 Newspoll survey for the panel found that 81% of respondents supported amending the Constitution to recognise Aboriginal and Torres Strait Islander peoples and their cultures, languages and heritage.[25]

The panel accepted public submissions over a five-month period from May 2011. It received close to 3500 submissions from "members of the public, members of Parliament, community organisations, legal professionals and academics, and Aboriginal and Torres Strait Islander leaders and individuals".[26] As the Table below shows, the volume of submissions received compares well with other, similar processes. The panel received far more submissions than did the Republic Advisory Committee and the expert panel on local government recognition, and it attracted a comparable number to that reported by the Constitutional Commission over a much longer period.[27] The National Human Rights Consultation in 2009, though, was more successful on this front: it received more than twice as many submissions as the panel, not including the significant number of campaign submissions that it registered.[28] The panel was also effective in attracting input from a wide range of community groups. The panel's report records that 143 organisations made submissions, with significant proportions of these coming from community organisations (36%) and Indigenous bodies (28%).[29] Among the organisations that contributed were Reconciliation Australia, the Cape York Institute for Policy and Leadership, Australians for Native Title and Reconciliation, numerous community legal centres and the Business Council of Australia.[30]

TABLE Submissions and public meetings

Inquiry	Submissions received	Public meetings
Constitutional Commission (1985-1988)	4000+	–
Republic Advisory Committee (1993)	400+	22
National Human Rights Consultation (2009)	7902	66
Expert Panel on Indigenous Recognition (2010-2012)	3489	84+
Expert Panel on Local Government Recognition (2011)	634	6

The second major component of the panel's consultation process was an extensive program of public meetings. Over a six-month period from May 2011, the panel conducted public consultations in 84 urban, rural and remote locations.[31] These included targeted consultations in Aboriginal and Torres Strait Islander communities. Taking into account private consultations with stakeholders, the panel held more than 250 consultations and attracted more than 4600 participants.[32] The public meetings varied in their popularity – for example, a meeting in Canberra attracted 114 attendees, while the

[25] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 76.

[26] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 7.

[27] Of the submissions received by the Constitutional Commission, 670 were oral submissions made at public meetings.

[28] The figure in the Table for submissions received by the National Human Rights Consultation excludes campaign submissions, which would inflate the figure considerably: 27,112 such submissions were received.

[29] Urbis, *Analysis of Public Submissions to the Expert Panel on Constitutional Recognition of Indigenous Australians* (Report prepared for the Department of Families, Housing, Community Services and Indigenous Affairs, December 2011) pp 9, 13.

[30] A full list of submissions by organisations is published in the panel's final report: Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, pp 242-243.

[31] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, pp 5-6. The panel report does not record how many public meetings were held, so the assumption has been made (as demonstrated in the Table) that at least one was held in each of the 84 locations referred to in the report.

[32] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 7.

Broome consultation attracted just five attendees.[33] The forums themselves followed a fairly standard format. They would begin with a panel member providing an overview of the role and membership of the panel, and of the discussion paper. The meeting would then be opened up for comments from attendees; the main points made by participants were noted down (sometimes verbatim, usually paraphrased). The forums did not involve any small group discussion, and no communiqué was developed, although consultation notes were taken and a selection has been made publicly available.[34]

Again, the scope of this component of the national consultation program compares favourably with similar processes. The panel's 84 (or more) public meetings exceeds substantially the number held by the Republic Advisory Committee (which held 22) and the expert panel on local government recognition (6). It is also more than that held by the National Human Rights Consultation in 2009 (66).

What about the quality of the consultations? It is noteworthy that they provided a space for interested citizens to come together and share stories and perspectives about Indigenous constitutional recognition. In its report, the panel notes that personal stories "featured heavily" at consultations, and that "[e]xperiences of past systematic racial discrimination and exclusion from the broader Australian community were frequently recounted".[35] Similarly, panel member Lauren Ganley recalled that the highlight of being involved in the consultation process was "listening to the many heartfelt personal stories".[36] One of the advantages of holding public meetings on important policy issues is the opportunity it provides for citizens to express their views and to listen to those of others, and to revise their initial perspectives. The value of this aspect of the consultations is difficult to measure, but should not be overlooked.

However, feedback on the panel's consultations points to various shortcomings.[37] Some Aboriginal and Torre Strait Islander participants complained that they were not given sufficient advance notice of the consultations, and that the meetings did not allow enough time for in-depth discussion of the issues. Others were unhappy with the one-off nature of the consultations, and thought that ideally there would have been follow-up meetings in each community. One participant said that:

> In my very short time, my experience is that rushing the consultation is a recipe for disaster. Consulting Aboriginal and Torres Strait Islander peoples so that they do feel consulted, and not just a tick box approach, takes more than months.[38]

Some expressed a view that the panel had not visited a broad enough range of communities. For example, one participant thought that "[c]onstitutional recognition consultations should be done in an individual nation-by-nation basis".[39] This view of the panel's consultations was reported more generally in a survey conducted in March 2012. The survey found that 70% of Indigenous respondents thought that there had not been enough consultation with them in relation to the proposed reforms on constitutional recognition.[40] The fact that this attitude could be so widely held, despite the months-long consultation program undertaken by the Panel, underscores the great difficulty of implementing a consultation process that adequately captures the views of Australia's diverse, and geographically dispersed, Aboriginal and Torres Strait Islander peoples.

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[33] Expert Panel on Constitutional Recognition of Indigenous Australians, "Consultation Notes: Canberra, ACT, 25 May 2011" and "Consultation Notes: Broome, WA, 11 June 2011": see http://www.recognise.org.au/public-consultation-notes.

[34] Expert Panel on Constitutional Recognition of Indigenous Australians, "Notes from Public Consultations": see http://www.recognise.org.au/public-consultation-notes.

[35] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 104.

[36] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 65.

[37] See Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, pp 99-100.

[38] Quoted in Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 100.

[39] Quoted in Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 100.

[40] Auspoll, *Quantifying Community Attitudes to the Constitutional Recognition of Indigenous Australians* (Report prepared for Reconciliation Australia, April 2012) p 28.

Wider public engagement

The expert panel used various means to engage the wider public.[41] It adopted a digital communications strategy that included a website (youmeunity.org.au, now called recognise.org.au) and a social media presence on Twitter, Facebook, YouTube, Flickr and Tumblr. Interested citizens were able to use the website to download the discussion paper, read submissions and access communiqués from public meetings. A community information kit was made available on the website with an eye to enabling community organisations to run their own consultations, thus expanding the reach of the panel's work. The panel employed a media adviser to help publicise its work and opportunities for participation, and to arrange print and electronic media contributions. It also placed advertisements in national print media inviting citizens to make a submission or attend public meetings.

Despite these efforts, the panel was unable to engage the wider Australian public on Indigenous recognition in any significant way. A national survey conducted by Auspoll in March 2012, two months after the panel reported to government, found that just 39% of Australians were aware of the proposed referendum to recognise Indigenous peoples in the Constitution.[42] Of those who had heard about the referendum, 73% said they knew only a little or nothing at all about the reform proposals.[43] Further, just 33% of this same group agreed that they had a good understanding of what the campaign to recognise Indigenous peoples in the Constitution is about, and a similarly small proportion (34%) thought that the campaign was relevant to them.[44] The survey's findings were a factor in the federal government's decision to postpone the proposed referendum.[45] (A follow-up survey in September 2012 found that levels of public awareness had dropped by eight points, to 31%, in the intervening six months.)[46]

What might account for these low levels of public engagement? The poor awareness and understanding of Indigenous constitutional recognition among the general community are not entirely surprising when we consider that the issue did not enjoy a strong public profile during the life of the panel. This is apparent when we analyse media coverage in the 14-month period from December 2010 (when the membership of the panel was announced) to the end of January 2012 (the month that the panel delivered its report). During that period, just 226 articles mentioning Indigenous constitutional recognition or the panel's process were published in major metropolitan daily newspapers.[47] However, 99 of these articles (or 44%) appeared in the final two weeks of January 2012, where coverage focused on the release of the panel's report, and a protest at the Aboriginal Tent Embassy which some saw as jeopardising the cause of constitutional recognition.[48] As the Figure below shows, press coverage of the issue was sparse outside of the peaks brought about by these two events. In other words, there was no sustained media coverage of Indigenous constitutional recognition over the course of the panel's existence.

[41] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 5.

[42] Auspoll, n 40, p 9.

[43] Seven per cent said they knew a lot about it, and 21% said they knew a fair amount: Auspoll, n 40, p 15.

[44] Auspoll, n 40, p 25.

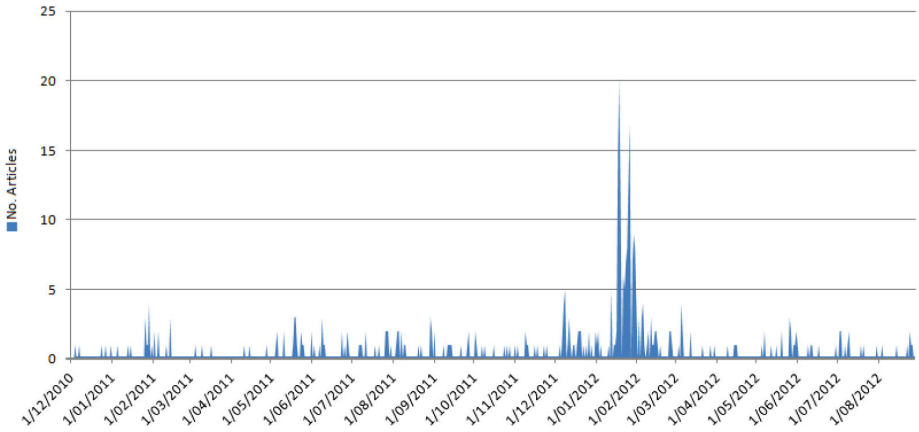
[45] Macklin, n 11.

[46] Karvelas P, "Mixed Awareness of Push in Preamble", *The Australian* (10 November 2012), http://www.theaustralian.com.au/national-affairs/mixed-awareness-of-push-in-preamble/story-fn59niix-1226514017778.

[47] In the author's calculations, they include: *The Australian*; *Australian Financial Review*; *Sydney Morning Herald*; *The Daily Telegraph*; *The Age*; *Herald-Sun*; *Courier-Mail*; *NT News*; *The West Australian*; *WA Today*; *Adelaide Advertiser*; *Hobart Mercury*; *Brisbane Times*; and *The Canberra Times*.

[48] Packham B and Vasek L, "Gillard, Abbott Escorted Under Guard Amid Aboriginal Tent Embassy Protest", *The Australian* (27 January 2012).

FIGURE Press coverage, Indigenous constitutional recognition (December 2010-August 2012)



The absence of any strong advocacy from the federal government is also likely to have contributed to poor community awareness and understanding. In the same 14-month period, the Prime Minister gave only four speeches (two of which were addresses to Parliament) that mentioned Indigenous constitutional recognition, while the Minister for Indigenous Affairs, Jenny Macklin, gave five speeches. The Attorney-General gave none. The government's relative silence on the issue can be explained in part by a desire to let the expert panel process take its course and avoid a perception that it was seeking to influence that process. But there can be little doubt that the government's reluctance to say much about the issue in public – which continued in the eight-month period between the release of the report and the government's postponement of the referendum – affected the ability of Australians to come to know about it.

It is also noteworthy that the panel's online ventures, which could potentially have reached a large audience, achieved only modest popularity. Through the course of the panel's existence, its website attracted about 47,000 unique visitors, and it accumulated 6,559 Facebook fans and 384 Twitter followers.[49] The sense that the panel had not effectively tapped into as wide an audience as it might have was confirmed in the months after it delivered its report. By the time the government announced the referendum postponement in September 2012, You Me Unity had more than 10 times the number of Facebook fans (76,715) and three times as many Twitter followers (1164). What accounts for this is unclear, but it appears that You Me Unity's digital communications strategy has been more effective in attracting an audience than the Panel was during its tenure.

The panel process proved more effective in achieving wider engagement among the Aboriginal and Torres Strait Islander community. This is demonstrated by the results of a separate survey, also conducted by Auspoll in March 2012, which was confined to Indigenous people. (In interpreting these results, it is important to note that Auspoll, due to the manner in which it recruited its Indigenous sample, is not able to be certain of the degree to which it is representative of the Indigenous population.)[50] Awareness of the referendum was higher (at 60%), as was perceived level of knowledge about the reform proposals (42% said they knew a lot or a fair amount), and a majority (56%) said they had a good understanding of what the campaign was about. Indigenous people were also far more likely to see the campaign as relevant to them, with 80% of respondents saying as much.[51] The degree to which constitutional recognition became a talking point in the Indigenous community is reflected in

[49] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p 11 (fn 2).

[50] Auspoll, n 40, p 7.

[51] Auspoll, n 40, p 25.

the fact that respondents were most likely to have heard about the issue by word of mouth: 74% identified it as an information source, compared to 40% of general community respondents.[52] These results indicate that the panel can claim some success at raising awareness about constitutional recognition among the Indigenous community. Given that the support of the Aboriginal and Torres Strait Islander peoples is crucial to any future referendum on constitutional recognition, this is a significant achievement.

It should also be recognised that the panel process helped to aid wider public engagement by serving as a catalyst for community group activities that might not otherwise have occurred. For example, the National Congress of Australia's First Peoples devoted a half-day of its inaugural meeting to education and discussion around constitutional recognition, and polled its membership on the issue.[53] Further, the panel's consultation process prompted the formation of a network of non-governmental organisations that shared information and ideas throughout 2011, and continues to be active today.

Nonetheless, the failure of the panel process to achieve broad public engagement raises questions both about its design and the level of political support it received. These issues will be taken up in Part IV.

PART III: EXPERT PANEL ON LOCAL GOVERNMENT RECOGNITION

Background

A key difference between the processes regarding Indigenous and local government recognition is that there was already significant grassroots mobilisation around the latter issue prior to the 2010 election and the commencement of the expert panel process. The push for local government recognition began in earnest in March 2008, when the Australian Local Government Association (ALGA) commenced a process among local government bodies aimed at developing a consensus position on constitutional recognition. ALGA sought input from local government bodies and consulted experts, and in December 2008 held a Constitutional Summit attended by around 600 local government delegates from every State and Territory. The Summit endorsed a Declaration that stated, among other things, that any constitutional amendment should reflect certain principles, including that "[t]he Australian people should be represented in the community by democratically elected and accountable local government representatives" and that "[t]he power of the Commonwealth to provide direct funding to local government should be explicitly recognised".[54] The Rudd government welcomed the Summit's Declaration, and also took steps to progress constitutional recognition of local government through the Australian Council of Local Government, and by contributing $250,000 for an education campaign to promote a referendum on the issue.[55]

Following the 2010 election, the ALP made agreements with the Greens and three Independent MPs committing to a referendum on local government recognition, in return for the support of Labor's minority government.[56] It was only several months later, in June 2011, that the Expert Panel on Constitutional Recognition of Local Government was established and appointed. The panel had 18 members and was chaired by former New South Wales Chief Justice, Jim Spigelman. In subsequent reflections, Spigelman has said that he was surprised by the size of the panel – he had envisaged "a small group of experts like the five-member Constitutional Commission … In the end the Government found 18 'experts'".[57]

[52] Auspoll, n 40, p 14.

[53] National Congress of Australia's First Peoples, *National Congress Report 2011* (2011) pp 20-33.

[54] McGarrity N and Williams G, "Recognition of Local Government in the Commonwealth Constitution" (2010) 21 PLR 164 at 170.

[55] McGarrity and Williams, n 54 at 164, 170-171.

[56] See Expert Panel on Constitutional Recognition of Local Government, n 2, p 2.

[57] Spigelman J, "A Tale of Two Panels" (Speech delivered at the Constitutional Law Dinner, Sydney, 17 February 2012) p 2, http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner_speech_j_spigelman.pdf.

Under its terms of reference, the panel was to report on, and make recommendations to, the federal government by December 2011 on the level of support for constitutional recognition among stakeholders and in the general community, and options for that recognition.[58] In doing so, it was required to consult with stakeholder groups and the community, including local governments and their representative bodies, State and Territory governments, federal parliamentarians and subject matter experts. In addition, the panel adopted three criteria to guide its decisions around reform options; under these, any proposal was to make a practical difference, have a reasonable chance at a referendum, and resonate with the public.[59] The panel reported to the government on 22 December 2011.

Attracting community input

Like the panel on Indigenous recognition, the local government panel's large membership permitted a diversity of community views to be directly represented. Its membership of 18 included six current or former local government representatives, four parliamentary members (one each from Labor, the Coalition and Greens parties, and one Independent), and representatives from academia, trade unions and the community sector, and each State.[60] Again, this diversity may help to explain why the panel managed to avoid criticisms of bias.

The panel's strategy for community consultation included issuing a discussion paper, conducting public meetings and inviting submissions. The panel also maintained a website along with Facebook and Twitter accounts. To gauge the views of the wider public, the panel commissioned Newspoll to conduct a representative national telephone survey, and also ran six focus groups and an online survey.[61] The Newspoll survey found that 75% of respondents supported financial recognition of local government, but this dipped to 64% after a challenge to the idea was introduced, and less than a third thought that a referendum on this issue was very important.[62] Democratic recognition had the most support among survey respondents (at 85%) but these high levels also dipped (to 66%) after challenge.[63]

The panel's community consultation program was modest – or, in the words of Spigelman, "low key". As he acknowledged, the consultations "were not as extensive [as those of the Indigenous recognition panel] and did not attract much in the way of public response".[64] In total, the panel held six consultations, each hosted in a regional centre in a different State.[65] The forums attracted just 127 participants, most of whom were local council representatives.[66] The public submission process, which was open for six weeks, attracted more interest but with a similar concentration of participation by local council personnel. All up, the panel received 634 submissions – of these, half were from private individuals, 43% from local councils, and the remainder from advocacy groups, experts, State governments and politicians.[67]

Wider public engagement

Unlike the panel on Indigenous recognition, the terms of reference for the local government panel did not require it to raise awareness about the issue under consideration. In any event, there is no survey

[58] Expert Panel on Constitutional Recognition of Local Government, n 2, p 24.

[59] Expert Panel on Constitutional Recognition of Local Government, n 2, p 1.

[60] For a full list of members, see Expert Panel on Constitutional Recognition of Local Government, n 2, p 25.

[61] See Expert Panel on Constitutional Recognition of Local Government, n 2, pp 39, 47, 87.

[62] Expert Panel on Constitutional Recognition of Local Government, n 2, p 20.

[63] Expert Panel on Constitutional Recognition of Local Government, n 2, p 20.

[64] Spigelman, n 57, p 5.

[65] Expert Panel on Constitutional Recognition of Local Government, n 2, p 88.

[66] Expert Panel on Constitutional Recognition of Local Government, n 2, p 88.

[67] Expert Panel on Constitutional Recognition of Local Government, n 2, p 27. Of the submissions, 53% supported constitutional change to recognise local government, while 45% were against. Submissions from local councils expressed almost unanimous support for change: p 29.

data available, as there is with respect to Indigenous recognition, to help us measure the post-panel levels of public awareness and knowledge about local government recognition in the general community. Given the "low key" nature of the local government panel's work, there is little reason to think that awareness and knowledge are any better than that recorded for Indigenous recognition, and they are most likely lower.

Certainly, public awareness of the debate over local government recognition was not aided by press coverage. In the roughly seven months between the creation of the panel in June 2011 and the release of its report in December 2011, just 10 articles in major metropolitan newspapers mentioned the issue. Oddly, no major newspaper reported on the publication of the panel's report and recommendations until six days after its public release.[68] The Gillard government was similarly reticent during the panel's existence. The only public pronouncement of note, at least among those recorded on Ministers' websites, was a keynote address by the Minister for Local Government, Simon Crean, at the ALGA Conference in June 2011. In sum, the panel process was not designed to achieve wider public awareness and engagement in relation to local government recognition, so it is no surprise that the issue maintained such a low public profile through the panel's existence. As to whether this might have been different in a differently designed process, this is taken up in the next section.

PART IV: EXPERT PANELS AND CONSTITUTIONAL REFORM PROCESS IN AUSTRALIA

The experience of the two expert panels highlights both their potential and limitations as vehicles for engaging the community in constitutional reform. It also underscores how weak political management can act as a significant external constraint that prevents expert bodies from realising their potential.

In seeking to learn from the work of the two expert panels, it is important to acknowledge that there were important differences between the two bodies. In particular, the local government panel was established following more substantial prior mobilisation by stakeholders, and had a much shorter timeframe in which to operate. In drawing general conclusions about the work of the two bodies, the article endeavours to be sensitive to these differences.

Potential and limitations

The two panels demonstrated their potential as vehicles for attracting input from a diverse array of stakeholders, experts and community members. The panel on Indigenous recognition in particular ran a broad national consultation program which, despite its shortcomings, was wider in scale than most previous expert bodies. The local government panel received fewer submissions and conducted fewer meetings, but was subject to significantly greater time and resource constraints. The panels' most distinctive design feature – their large and diverse membership – enhanced their ability to incorporate diverse views into their deliberations. Moreover, the inclusion of diverse community representation on the panels (across party, State and sector lines) probably helped to protect them from accusations of bias of the sort that had undermined the Constitutional Commission. The representation of different political parties on the panel may also have enabled members to "test" the political viability of their proposals internally, rather than having to wait for this to occur publicly. While one might have expected the internal debates of these panels to be more fractured due to their size, this does not appear to have occurred: the Indigenous recognition panel delivered a unanimous report, while the local government panel made a majority recommendation in favour of constitutional change. The experience of the last few years therefore suggests that, given adequate time and resources, future expert bodies designed along similar lines will have the capacity to run effective consultation programs on constitutional reform.

Two reservations about large panels come to mind. First, their size will not necessarily protect them from accusations that their membership is selective – where a multiplicity of interests exists, questions can always be asked as to why one interest was represented while another was excluded. Secondly, it is apparent that the effective accommodation of interests on an appointed body offers no

[68] Wilson L, "John Howard's Fears on Local Councils in Constitution Ignored", *The Australian* (28 December 2011).

guarantee that those interests will achieve equal harmony in the wider political environment. This is shown by the fact that, following the release of the panel report on Indigenous recognition, neither the Labor nor Coalition parties were prepared to support the position taken by their representatives on the panel.

There was room for both panels to be more creative in their approach to community consultation, and it is here that designers of future expert bodies might see untapped potential. For instance, the expert panels might have involved members of the public in the very design of their consultation processes. This might have helped to pre-empt some of the criticisms of the Indigenous recognition panel's process, including that the meetings were too short and of a one-off nature. Both panels, appropriately, conducted opinion polls to gain a representative assessment of community views and to compensate for the fact that submissions and public meetings tend to capture the opinions of a narrow segment of the population that is already interested and engaged in the issues.[69] In a similar vein, the panels might also have made use of deliberative micro-forums, such as citizens' juries, which offer an indication of what reforms the wider population would favour if they had the opportunity to learn about and discuss the issues in an in-depth fashion.[70] In addition, both panels could have fostered more active forms of online participation beyond communication via Facebook and Twitter.[71] Iceland has recently demonstrated what is possible in this domain – in 2011 its Constitutional Council held an online dialogue with citizens that helped inform the drafting of a new national constitution.[72] Given the proliferation of innovative engagement techniques currently being used globally in connection with policy development of all kinds, there would be value in ensuring that at least one member of future expert bodies is a specialist in community engagement.

The most significant limitation of the panels was that they were unable to generate wide public awareness and understanding of the issues. This is especially noteworthy in relation to the Indigenous recognition panel, given its terms of reference and the effort and resources that were devoted to its national consultation program and digital communications strategy. Acknowledging that more needed to be done, both panels recommended that the federal government implement well-resourced public education and awareness programs prior to holding any referendum on their respective issues.[73]

This failure to generate wide public engagement should not be seen as a shortcoming of these particular panels. Instead, it illustrates the inherent limitations of expert bodies. Such entities are appointed for the purpose of reporting to the government on a given subject, often within a short period of time and on a limited budget. To the extent that such bodies engage with the public, it is to consult with a small segment of it through such methods as inviting submissions and attendance at public meetings. The focus is capturing a reasonable diversity of voices, rather than generating mass engagement.

While the Indigenous recognition panel was indeed appointed to lead a broad community engagement program and to raise awareness, it was not well-equipped to do so. In fact, this was too much to ask of a body that was already required to run a national consultation process and work closely with key organisations as part of fulfilling its brief to report on options for change and levels of community support. It is also the case that raising awareness and consulting the community are two very different aims, whose fulfilment requires different skills, strategies and resources. For these

[69] On the limitations of consultation exercises in terms of attracting diverse opinion, see Smith G, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge University Press, 2009) pp 14-15.

[70] Carson L and Hartz-Karp J, "Adapting and Combining Deliberative Designs: Juries, Polls, and Forums" in Gastil J and Levine P (eds), *The Deliberative Democracy Handbook: Strategies for Effective Civic Engagement in the Twenty-First Century* (Jossey-Bass, 2005) p 120; Smith, n 69, pp 72-110.

[71] Coleman S and Blumer JG, *The Internet and Democratic Citizenship* (Cambridge University Press, 2009); Smith, n 69, pp 142-161.

[72] Blokker P, "Grassroots Constitutional Politics in Iceland" (12 January 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990463.

[73] Expert Panel on Constitutional Recognition of Indigenous Australians, n 2, p xix; Expert Panel on Constitutional Recognition of Local Government, n 2, pp 2, 16.

reasons, the terms of reference assigned to the Indigenous recognition panel ultimately display a confusion of objectives, and in this particular respect the local government panel was the preferable model. The lesson for future expert panels is that the focus is best kept on community consultation, with the goal of wider engagement left either to the government or to some other body that is better equipped to deliver it.

Of course, mass engagement on any issue is unlikely to be achieved in the absence of public discussion and debate led by senior Ministers and other political representatives. As outlined below, both panels were poorly supported by the government in this respect.

Political management as an external constraint

The effectiveness of any expert body will be dependent on the degree of support it receives from its appointing government. It was no different for the expert panels. Ultimately, the effectiveness of both panels was undermined by poor political management by the Gillard government. This occurred in three areas: inadequate resourcing, poor promotion, and lack of responsiveness. These three factors not only undercut the panels' efforts at consulting and engaging the public, but also served to diminish the impact of their work and slow the momentum of the reform process.

The capacity of the local government panel to consult diverse community voices was severely limited by its resourcing. The federal government gave this panel the near-to-impossible task of running a public consultation program within a period of about three months. Without having a longer timeframe with which to work, the panel was never going to be able to consult widely and it had less scope to make use of innovative engagement strategies. A stronger process would have seen the local government panel be given a budget and timetable that allowed it to take community consultation seriously. The Indigenous recognition panel received more support in this respect, and the benefits can be seen in the extensive consultation program it was able to deliver.

The consultation and engagement activities of the two panels were also hamstrung by the federal government's failure to promote them. As noted, Ministers mentioned constitutional recognition only infrequently in their public statements during the life of the panels. It is a statement of the obvious, but people can only contribute to a consultation process if they are aware that it exists. And given the government's relative silence, it is no surprise that public awareness of both constitutional recognition proposals remained so low. This was a lost opportunity, as senior Ministers were in a unique position to raise the profile of the reform process and encourage people to have their say. A better managed process would have seen the government give more vocal public support to the work of the panels it had appointed.

The third external factor undermining the work of the panels was government inaction following the release of their reports. Both panels had urged the government to act quickly in response to their recommendations to ensure that any referendum held in 2013 would have a reasonable chance of success. Despite this, it took the Gillard government more than eight months to announce the next steps it would take to advance the respective forms of constitutional recognition. This delay was a cause of concern for some members of the Indigenous recognition panel, and if anything probably deepened the lack of community awareness and support that ultimately served as the reason for postponing the referendum.[74] In terms of local government recognition, the effect of the delay was to provide less time for the federal government to satisfy two conditions which the expert panel had considered essential to the success of a 2013 referendum – namely, securing the support of the States and conducting a major public awareness campaign. Coalition members of the Joint Select Committee on Constitutional Recognition of Local Government remarked upon this, expressing concern that the prospects of a successful referendum had been harmed.[75]

The delay undermined the consultation and engagement work of the panels in two ways. First, it slowed any momentum that the panel processes might have created as regards public engagement. In

[74] Cullen S, "Oakeshott Fears Time Running out on Aboriginal Recognition", *ABC News Online* (7 September 2012), http://www.abc.net.au/news/2012-09-07/oakeshott-warns-on-aboriginal-recognition-referendum/4247784.

[75] Joint Select Committee on Constitutional Recognition of Local Government, n 13, pp 19-20.

the absence of any high-profile announcements or activities following the reports' release, the process of public engagement stalled. One demonstration of this, in relation to Indigenous recognition, is the eight-point decline in public awareness that was recorded between March and September 2012. The government's decision to fund Reconciliation Australia from July 2012 to lead a campaign to build community awareness and support, while widely welcomed, was too small an initiative to regain lost momentum on a mass scale. Secondly, the delay devalued the contributions that stakeholders and citizens had made to the panels' consultation processes by signaling that they could be ignored or at least treated as a low priority. Again, this is particularly evident with respect to Indigenous recognition. More than two years have passed since the release of the expert panel report and there remains uncertainty among stakeholders as to the status of its recommendations. This was given expression in the parliamentary committee hearings on the *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* which, as several participants noted, excluded any reference to the substantive race discrimination proposals made by the expert panel.[76] Les Malezer, co-chair of the National Congress of Australia's First Peoples, remarked during the hearings on the manner in which the Bill differed from the views expressed during the expert panel process:

> [W]e feel that that is not consistent with the discussions we had out there in the community and the balance that people wanted between having recognition as well as some substantive protections provided in the Constitution for the first people … [A]ny departure would require justification as to why it is a departure from those recommendations.[77]

This statement encapsulates an apprehension that the passage of time has weakened the impact of community views given during the panel's consultation process and they are now more liable to being ignored.

Some of the uncertainty created by the government's lack of responsiveness could have been avoided had a clear timetable been set out from the beginning, including a commitment to respond in a timely manner. However, there has long been a lack of clarity around the constitutional recognition processes. Throughout 2011 and 2012 it was unclear whether the panels were the first stage of a planned multi-stage process of constitutional review or, alternatively, whether they should be considered the last word before the launch of a referendum campaign. Subsequent steps, such as the establishment of the two joint parliamentary committees and the introduction of the *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012*, were announced abruptly and deepened the impression that the process was unfolding in an ad hoc manner. The Northern Territory statehood initiative provides a point of contrast here in that the government provided far more clarity in advance as to how the process would unfold – namely, in multiple stages comprising consultation, an elected convention and a referendum.[78]

One of the wider dangers of poor planning and lack of responsiveness is that they may lead stakeholders and citizens to become cynical and defeatist about constitutional review processes. This possibility was given concrete expression at a public consultation on Indigenous recognition in Mount Isa, where a participant told the meeting:

> There is a view amongst the Indigenous people that this will be just another Government process and government will not really think about, listen or understand what is really best for our people – no real community engagement.[79]

A perception of government indifference is especially damaging on an issue such as Indigenous recognition, particularly where the voices feeling excluded belong to Aboriginal and Torres Strait Islander peoples. But the risk of cynicism is real irrespective of the issue. Both expert panels would

[76] See, for example, National Congress of Australia's First Peoples, Submission No 18 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People, *Inquiry into Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* (11 January 2013).

[77] Evidence to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People (Parliament of Australia, Sydney, 22 January 2013) p 3 (Les Malezer).

[78] This process was put on hold following the 2012 Northern Territory election: http://www.ntstate7.com.au.

[79] Expert Panel on Constitutional Recognition of Indigenous Australians, "Consultation Notes: Mt Isa, Qld, 27 June 2011", p 2: see http://www.recognise.org.au/public-consultation-notes.

have benefited from stronger political management of the sort that would have built greater trust and confidence in their community engagement work and in the reform process as a whole.

PART V: CONCLUSION

The experience of the two expert panels demonstrates their potential and limitations as vehicles for fostering community engagement in constitutional reform. The Indigenous recognition panel, in particular, showed the capacity of expert panels to run effective consultation programs that attract a variety of views. The local government panel collected a more narrow set of views within a tighter timeframe and with fewer resources. In terms of design, the large memberships of both panels proved an asset in incorporating a diversity of voices into their deliberations. There is room, however, for future panels to use more interactive means of engaging the community – these might include involving the public in process design, deliberative micro-forums and online dialogue. The panels were unsuccessful in generating wide public engagement, although expert bodies are arguably ill-suited to this task and future governments should confine their engagement responsibilities to consultation exercises.

The last few years has also demonstrated that the effectiveness of expert panels will depend in large part on how much support they receive from their appointing government. The panels suffered from poor management in the form of inadequate resourcing, poor promotion and lack of responsiveness. The first two weakened the panels' ability to foster public engagement during their lifetime, while the third slowed momentum and signalled to stakeholders and citizens that their contributions to the process were a low priority. All three served to diminish the status and impact of the expert panels' work.

Each constitutional review process is different and must be tailored to its specific needs. Nonetheless, some general lessons can be gleaned from the experience of the two expert panels. First, such bodies will be most effective as vehicles for community engagement where governments are clear about what objectives they will serve. Their role is best understood as delivering a set of recommendations to government that can claim a wider legitimacy for having emerged from an effective program of stakeholder and community engagement. The task of achieving mass engagement, however, should be left to government and Parliament. Expert panels should not be expected to drive the constitutional review process, nor are they capable of sustaining the type of widespread public debate that these issues demand. Secondly, in order to fulfil their role effectively, expert panels must be adequately resourced, have sufficient time to complete their work, and have access to the support they need to conduct an extensive and well-targeted engagement program. The more equipped that such panels are, the more confidence governments can have that any reform recommendations emerging from the process are based on a wide diversity of community views. Finally, the status and impact of any expert panel will depend on the support it receives from its appointing government. They will be most effective where governments commit to respond to any recommendations in a timely manner, and provide clarity and certainty in advance as to how its consultations and recommendations relate to the wider process of constitutional review.