

UPHOLD & RECOGNISE
SUBMISSION TO THE REFERENDUM COUNCIL

1. Uphold & Recognise welcomes the opportunity to present our view on constitutional recognition and participate in an open and constructive national conversation about this important issue.
2. Executive summary
 - 2.1. Uphold & Recognise are an organisation of constitutional conservatives who believe Indigenous people deserve better outcomes.
 - 2.1.1. In extensive consultation with eminent Australians on the right and centre-right, we have developed a policy position that addresses both the aspirations of Indigenous advocates for practical change and the reasonable concerns of conservatives regarding constitutional reform.
 - 2.1.2. Our 4-point proposal would both recognise Indigenous Australians and produce practical outcomes, while upholding the Australian Constitution and avoiding legal uncertainty.
3. The purpose of this submission
 - 3.1. This submission outlines Uphold & Recognise's history, activities and purpose. It advocates for the 4-point proposal which addresses the concerns of our constituents and charter signatories.
 - 3.2. Uphold & Recognise is concerned that a proposal which does not gain bipartisan support will fail both in Parliament and at referendum. **A proposal must, therefore, accommodate any well-founded and constructive concerns of those on the right.** Uphold & Recognise has worked with constitutional conservatives such as Professor Anne Twomey and Professor Greg Craven to develop a proposal which addresses conservative concerns, detailed below.

4. History

- 4.1. Uphold & Recognise was established in 2015 by Damien Freeman and Julian Leaser MP to prosecute the case for how Australia can recognise Indigenous peoples while upholding the Constitution.
- 4.2. Uphold & Recognise arose out of an identified need to incorporate the concerns of constitutional conservatives, liberals and conservatives, and those on the right and the centre-right in the national discussion surrounding constitutional recognition. At the time of writing, Uphold & Recognise is the only dedicated organisation which addresses that need.
- 4.3. In 2017 Uphold & Recognise engaged a full-time Executive Officer and a part-time Executive Assistant. Uphold & Recognise receives generous in-kind support from the Australian Catholic University, in particular the PM Glynn Institute.
- 4.4. Recently, Sean Gordon, CEO of Darkinjung Local Aboriginal Land Council succeeded the Hon. Lloyd Waddy AM RFD QC as Chairman of Uphold & Recognise.

5. Activities

- 5.1. Uphold & Recognise has hosted events in NSW, WA, the ACT, and Victoria that have built support for the constitutional recognition of Indigenous Australians within our core constituencies: the religious, political and social right, the military, conservative organisations, eminent conservative businessmen and women, and organisations and individuals with an interest in upholding the integrity of the Australian Constitution.
- 5.2. Uphold & Recognise engages those on the right and centre-right of Australian politics and society. We do this with the aim of developing a compromise position between conservative concerns regarding constitutional recognition and Indigenous aspirations for substantive reform. Conservative concerns include:
 - 5.2.1. Inserting symbolic language into the Constitution may produce legal uncertainty when interpreted by the High Court. This should be avoided.

5.2.1.1. We propose the place for symbolic language is outside the Constitution in a declaration of recognition (see our 4-point proposal, below).

5.2.1.2. The structure and nature of the Australian Constitution make it a rule book, and not the place for symbolic statements about history, values and aspirations. The best place for these important statements is outside the Constitution.

5.2.2. Constitutional recognition must be practical, as well as symbolic.

5.2.2.1. Uphold & Recognise notes that conservatives are not interested in pursuing a political reconciliation project and going to the expense of a referendum if it will not produce positive practical outcomes.

5.2.3. The potential diminution of the sovereignty of parliament.

5.2.3.1. Conservatives oppose constitutional reforms that may diminish parliamentary sovereignty.

5.2.3.2. The 4-point proposal, and specifically the notion of an Indigenous advisory body, has been designed to uphold parliamentary sovereignty. The design of that body is at Parliament's discretion. It is designed to be non-justiciable, so would transfer no power to the High Court. There is no risk of Parliament's laws being struck down, and no risk Parliament could be delayed.

5.2.3.3. The Declaration of Recognition, detailed below, could be adopted as an act of Parliament, but would not form part of the Constitution itself. It would therefore avoid constitutional uncertainty.

5.2.4. The concern to avoid the insertion of a racial non-discrimination clause.

5.2.4.1. Uphold & Recognise's approach was developed in response to a racial non-discrimination clause being assessed as politically non-viable, due to resistance from the right.

5.3. The 4-point proposal, detailed below, is designed with the above concerns in mind.

6. The 4-point proposal

6.1. Uphold & Recognise currently supports the following 4-point proposal:

6.1.1. Repealing section 25 of the Constitution, widely understood to be a dead-letter clause;

6.1.2. Repealing and replacing section 51(xxvi) of the Constitution with an Aboriginal and Torres Strait Islander Peoples power.

6.1.3. Inserting a new section 60A, as drafted by Professor Anne Twomey, to read:

60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].

(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.

(4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

6.2. Adopting an extra-constitutional Declaration of Recognition;

6.3. We believe that this range of measures would fairly recognise Australia's indigenous peoples; help to enable better outcomes for them; and, at the same time, uphold the integrity of the Australian Constitution.

6.4. High among our concerns is the need to address the evinced desire of Indigenous peoples, expressed in the regional dialogues, for practical change. Any model for Constitutional recognition must be agreed to by Indigenous peoples. We also note that the desire for practical change coincides with that of conservatives.

6.4.1. An Indigenous advisory body with constitutional standing is Uphold & Recognise’s preferred method of delivering a practical outcome from the referendum process.

6.4.1.1. Indigenous peoples do not have a say in laws and policies that are made especially for them. The Indigenous advisory body proposal aims to redress this.

6.4.1.2. We note that the respectful dialogue which the body aims to establish behoves the dignity and honour of the Crown.

6.4.1.3. The advisory body should be constitutionally guaranteed.

6.4.1.3.1. Indigenous bodies of the past have not enjoyed longevity or stability. That is why a legislated body without the constitutional guarantee would be unacceptable.

6.4.1.3.2. Indigenous people deserve a guarantee that the future will be different from the past, and the Constitution is the place where an enduring promise to that effect must be made. Ordinary legislation does not address this issue.

6.4.1.3.3. We are of the view that an advisory body, accompanied by an extra-constitutional declaration of recognition, is the most sincere form of ‘constitutional promise’ that is politically achievable today (based on our experience and research).

6.5. Uphold & Recognise notes constitutional conservatives would not support a constitutional change that would produce *only* symbolic outcomes. Indeed they would oppose such a change because it would likely lead to legal uncertainty. A purely symbolic constitutional amendment is therefore not politically viable, whereas a modest amendment establishing an Indigenous voice to Parliament is a viable proposal.

7. Our Charter

7.1. Uphold & Recognise is committed to promoting its Charter, available on our website.

7.2. Uphold & Recognise enjoys support from its Charter signatories, including:

- 7.2.1. Major General the Hon. Michael Jeffery AC AO (Mil) CVO MC
- 7.2.2. Major General Peter Arnison AC CVO
- 7.2.3. Colin Carter AM
- 7.2.4. Professor Greg Craven AO, GCSG
- 7.2.5. The Hon. Nick Greiner AC
- 7.2.6. The Hon K. R. Handley AO QC
- 7.2.7. Malcolm Mackerras AO
- 7.2.8. The Hon. Brendan Nelson AO
- 7.2.9. The Hon. Andrew Robb AO
- 7.2.10. The Hon. L.D.S. Waddy AM RFD QC
- 7.2.11. Air Chief Marshal Sir Allan Grant “Angus” Houston AK, AFC (Ret’d)
- 7.2.12. Dame Marie Bashir AD, CVO

8. Our first annual report

8.1. Uphold & Recognise’s first annual report documents, in greater detail, the work that has been done to achieve our purpose. It is **attached** to this submission.

9. Contact regarding this submission:

9.1. David Allinson, Executive Officer

- 9.1.1. **Email:** david.allinson@upholdandrecognise.com
- 9.1.2. **Phone:** (+61) 412 202 554
- 9.1.3. **Web:** <http://www.upholdandrecognise.com/>
- 9.1.4. **Post:** Uphold & Recognise, PO Box 968, North Sydney, NSW 2059