

EXPERT PANELS AS A MECHANISM OF CONSTITUTIONAL REFORM

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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’ to report on possible options for change, and to advise on the level of support for these forms of constitutional recognition. The establishment of expert bodies to inquire into issues of constitutional reform is familiar in Australia – previous examples include the Constitutional Commission (1985-88) and the Republic Advisory Committee (1993). One of their perceived advantages is that they are able to draw on the expertise of their members to work efficiently and inexpensively through the issues and develop recommendations.² On the other hand, expert bodies have been criticised in the past for being elitist and out of touch with the public, and for displaying partisan, centralist or other biases. It has also been observed that they are often set up without there being any commitment from the government to respond to, let alone implement, their recommendations.³ Outside the area of constitutional review, the use of expert bodies has been seen as a means for governments to ‘depoliticise’ complex policy issues by transferring responsibility for them away from elected politicians to an ‘enlightened elite’.⁴

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¹ I use the terms ‘Aboriginal and Torres Strait Islander’ and ‘Indigenous’ interchangeably in this paper, although the former is my preferred term.

² Anne Twomey, ‘Constitutional Conventions, Commissions and Other Constitutional Reform Mechanisms’ (2008) 19 *Public Law Review* 308, 323; George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 32.

³ Twomey, above n 2, 324.

⁴ Matthew Flinders, ‘In Defence of Politics’ (2010) 81 *The Political Quarterly* 318. See also Peter Burnham, ‘New Labour and the Politics of Depoliticisation’ (2001) 3 *British Journal of Politics and International Relations* 127, 128; Matthew Flinders and Jim Buller, ‘Depoliticisation: Principles, Tactics and Tools’ (2006) *British Politics* 293, 295.

The expert panels on Indigenous and local government recognition reported to the federal government in January 2012 and December 2011 respectively.⁵ There is much to recommend a comprehensive review of the two panels – their membership, processes and impact – but this is beyond the scope of this paper. Instead, this paper will focus on the effectiveness of the panels in attracting community input and generating wide public engagement. These issues should be considered central to any evaluation of the work of the panels for four reasons. First, they formed part of the panels’ terms of reference: the panel on Indigenous recognition was required to achieve both, while the local government panel was asked to do the former. Second, it has been remarked by some scholars that a failure to consult and engage the community places expert bodies at risk of being labelled elitist or partisan.⁶ Third, achieving community input and public engagement might be considered strategic, at least to the extent that popular ownership and public education are thought essential to a successful referendum.⁷ Finally, it is arguable that the democratic legitimacy of any constitutional review process is enhanced where it fosters input from a diverse range of voices and encourages broad public interest, understanding and participation.⁸

Alongside these issues of process, there is obviously much to be said about the substance of the reform proposals recommended made by the two expert panels in their reports. I will leave such commentary to others, 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 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

⁵ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) <<http://www.youmeunity.org.au/finalreport>>; Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011) <<http://localgovrecognition.gov.au/content/final-report.html>>.

⁶ Williams and Hume, above n 2, 32; Twomey, above n 2, 323.

⁷ Williams and Hume, above n 2, 246-54.

⁸ See, eg, Simone Chambers, ‘Democracy, Popular Sovereignty, and Constitutional Legitimacy’ (2004) 11(2) *Constellations* 153.

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 ongoing disagreement concerning the merits and language of these proposals, the reforms outlined by the panels have served as the focus of debate and negotiation over the past several months. The panel recommendations on Indigenous recognition appear set to become the focus of parliamentary debate over an 'Act of Recognition', following the federal government's decision to postpone a referendum on the issue for at least two years due to lack of community awareness and support for change.¹¹ At the time of writing there was still no government response to the recommendations of the local government panel.

This paper proceeds as follows. In Parts II and III I examine the extent to which each expert panel was successful in attracting community input and generating wider public engagement. In doing so I draw on the final reports of both panels, survey data, consultation notes, and analysis of media coverage and ministerial speeches. I argue that the panels were reasonably successful in attracting community input, but failed at generating wider public engagement. In Part IV I reflect on the experience of the two panels and how it might inform the design of future constitutional review process. I argue that expert bodies should continue to play a role in reform processes, but that a wider array of engagement methods and improved political management are needed if the shortcomings of the current process are to be overcome.

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

⁹ Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, xviii.

¹⁰ Expert Panel on Constitutional Recognition of Local Government, above n 5, 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 Jenny Macklin, 'Progressing Indigenous Constitutional Recognition' (Media Release, 20 September 2012) <<http://www.jennymacklin.fahcsia.gov.au/node/2098>>.

decades.¹² The most recent process began in September 2010 when the Australian Labor Party pledged to hold a referendum on the 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 Liebler being 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’.¹³ 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’.¹⁴ 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.¹⁵ 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’.¹⁶ 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.¹⁷ The Panel handed down its report on 19 January 2012.

¹² 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.’

¹³ Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, 3.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

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 is that it allows 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.¹⁸

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.¹⁹ An October Newspoll survey for the Panel found that 81 per cent of respondents supported amending the Constitution to recognise Aboriginal and Torres Strait Islander peoples and their cultures, languages and heritage.²⁰

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'.²¹ As the Table below shows, the volume of submissions received compares well with other, similar

¹⁸ Williams and Hume, above n 2, 30.

¹⁹ On the Panel's approach to consultation and community engagement, see Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, 4-9.

²⁰ Ibid 76.

²¹ Ibid 7.

processes. The Panel received far more submissions than did the Republic Advisory Committee and the Expert Panel on Local Government, and it attracted a comparable number to that reported by the Constitutional Commission over a much longer period. 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. 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%).²² 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.²³

Table: Submissions and public meetings

Inquiry	Submissions received	Public meetings
Constitutional Commission (1985-88)	4000+ ²⁴	–
Republic Advisory Committee (1993)	400+	22
National Human Rights Consultation (2009)	7902 ²⁵	66
Expert Panel on Indigenous Recognition (2010-12)	3489	84+ ²⁶
Expert Panel on Local Government Recognition (2011)	634	6

²² *Analysis of Public Submissions to the Expert Panel on Constitutional Recognition of Indigenous Australians* (Report prepared by Urbis for the Department of Families, Housing, Community Services and Indigenous Affairs, December 2011) 9, 13.

²³ A full list of submissions by organisations is published in the panel's final report: Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, 242-3.

²⁴ Of these, 670 were oral submissions made at public meetings.

²⁵ This figure excludes campaign submissions, which inflates it considerably: 27,112 such submissions were received.

²⁶ The Panel report does not record how many public meetings were held, so I have assumed that at least one was held in each of the 84 locations referred to in the report: Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, 5.

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.²⁷ 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.²⁸ The public meetings varied in their popularity – for example, a meeting in Canberra attracted 114 attendees, while the Broome consultation attracted just 5 attendees.²⁹ 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.³⁰

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 (6). It 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’.³¹ Similarly, Panel member Lauren Ganley recalled that the highlight of being involved in the consultation process was ‘listening to the many

²⁷ Ibid 5-6.

²⁸ Ibid 7.

²⁹ Expert Panel on Constitutional Recognition of Indigenous Australians, ‘Consultation Notes: Canberra, ACT, 25 May 2011’ and ‘Consultation Notes: Broome, WA, 11 June 2011’ [online] YouMeUnity, <<http://www.youmeunity.org.au/public-consultation-notes>>.

³⁰ Expert Panel on Constitutional Recognition of Indigenous Australians, ‘Notes from Public Consultations’ [online] YouMeUnity <<http://www.youmeunity.org.au/public-consultation-notes>>.

³¹ Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, 104.

heartfelt personal stories'.³² 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.³³ Some Aboriginal and Torres 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.³⁴

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'.³⁵ This view of the Panel's consultations was reported more generally in a survey conducted in March 2012. The survey found that 70 per cent of Indigenous respondents thought that there had not been enough consultation with them in relation to the proposed reforms on constitutional recognition.³⁶ 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.

Wider public engagement

The Gillard government's decision to postpone the proposed referendum on Indigenous recognition was based on a perceived lack of community awareness about

³² Ibid 65.

³³ See *ibid* 99-100.

³⁴ Quoted in *ibid*, 100.

³⁵ Quoted in *ibid*, 100.

³⁶ Auspoll, *Quantifying Community Attitudes to the Constitutional Recognition of Indigenous Australians* (Report prepared for Reconciliation Australia, April 2012) 28.

the issue. The results of a national survey conducted by Auspoll in March 2012, to which the government had access, support this judgment, and suggest that the Panel's broad national consultation program had very little impact on the wider public. The survey found that just 39 per cent of Australians were aware of the proposed referendum to recognise Indigenous peoples in the Constitution.³⁷ Of those who had heard about the referendum, 73 per cent said they knew only a little or nothing at all about the reform proposals.³⁸ Further, just 33 per cent 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 per cent) thought that the campaign was relevant to them.³⁹

What might account for this? The low awareness and understanding of Indigenous constitutional recognition among the general community are not entirely surprising when we consider that the issue has not enjoyed a strong public profile. 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 such articles mentioning Indigenous constitutional recognition or the Panel's process were published in major metropolitan daily newspapers.⁴⁰ However, 99 of these articles (or 44 per cent) appeared in the final two weeks of January 2012, where coverage focused on the release of the Panel's report, and the protest at the Aboriginal Tent Embassy which some saw as jeopardising the cause of constitutional recognition. 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. The Panel's media strategy included taking active steps to 'arrang[e] features and opinion pieces', but does not seem to have been effective in promoting the issue's profile above its consistently low level.⁴¹

³⁷ Ibid 9.

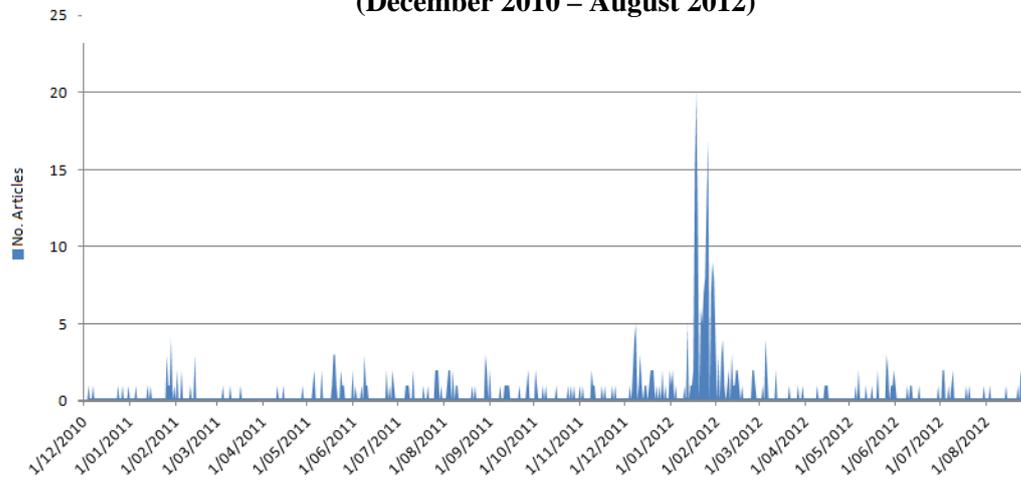
³⁸ Seven per cent said they knew a lot about it, and 21 per cent said they knew a fair amount: ibid 15.

³⁹ Ibid 25.

⁴⁰ In my calculations I have included *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*.

⁴¹ Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, 5.

**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 the 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. In any event, 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 – has no doubt 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 (youmeunity.org.au) attracted about 47,000 unique visitors, and it accumulated 6,559 Facebook fans and 384 Twitter followers.⁴² The sense that the Panel had not effectively tapped into as wide an audience as it might have has been confirmed in the months since it delivered its report. As of 14 September 2012, You Me Unity had more than ten times the number of Facebook fans

⁴² Ibid 11, n 2.

(76,715) and three times as many Twitter followers (1,164). 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. Awareness of the referendum was higher (at 60 per cent), as was perceived level of knowledge about the reform proposals (42 per cent said they knew a lot or a fair amount), and a majority (56 per cent) 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 per cent of respondents saying as much.⁴³ The degree to which constitutional recognition became a talking point in the Indigenous community is reflected in the fact that respondents were most likely to have heard about the issue by word of mouth: 74 per cent identified it as an information source, compared to 40 per cent of general community respondents.⁴⁴ 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.⁴⁵ 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 about the methods it adopted, and the level of political support and commitment it received. Both of these issues will be taken up in Part IV.

⁴³ Auspoll, above n 36, 25.

⁴⁴ Ibid 14.

⁴⁵ National Congress of Australia's First Peoples, *National Congress Report 2011* (2011) 20-33.

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, 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'.⁴⁶ 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.⁴⁷

Following the 2010 election, the ALP made agreements with the Greens and Andrew Wilkie committing to a referendum on local government recognition, in return for the support of Labor's minority government.⁴⁸ It was only several months later, in June 2011, when 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 size of the Panel – he had envisaged 'a small group

⁴⁶ Nicola McGarrity and George Williams, 'Recognition of Local Government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164, 170.

⁴⁷ *Ibid* 170-1, 164.

⁴⁸ See Expert Panel on Constitutional Recognition of Local Government, above n 5, 2.

of experts like the five-member Constitutional Commission ... In the end the Government found 18 “experts”.⁴⁹

Under its terms of reference, the Panel was to report on, and make recommendations to, the federal government by December 2011 in relation to the level of support for constitutional recognition among stakeholders and in the general community, and options for that recognition.⁵⁰ 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 their 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.⁵¹ 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.⁵² Again, this diversity may help to explain why the Panel managed to avoid criticisms of bias.

The Panel’s strategy for consulting the wider community 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 group and an online survey.⁵³ The Newspoll survey found that 75 per cent of respondents supported financial recognition of local government, but this dipped to 64 per cent after a

⁴⁹ James Spigelman, ‘A Tale of Two Panels’ (Constitutional Law Dinner, Sydney, 17 February 2012) <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner_speech_j_spigelman.pdf> 2.

⁵⁰ Expert Panel on Constitutional Recognition of Local Government, above n 5, 24.

⁵¹ Ibid 1.

⁵² For a full list of members see ibid 25.

⁵³ See ibid 87, 39, 47.

challenge to the idea was introduced, and less than a third thought that a referendum on this issue was very important.⁵⁴ Democratic recognition had the most support among survey respondents (at 85 per cent) but these high levels also dipped (to 66 per cent) after challenge.⁵⁵

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'.⁵⁶ In total, the Panel held six consultations, each hosted in a regional centre in a different State.⁵⁷ The forums attracted just 127 participants, most of whom were local council representatives.⁵⁸ 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 per cent from local councils, and the remainder from advocacy groups, experts, State governments and politicians.⁵⁹ The small-scale nature of this consultation program raises questions about political management, which will be addressed in Part IV.

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 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.

⁵⁴ Ibid 20.

⁵⁵ Ibid.

⁵⁶ Spigelman, above n 49, 5.

⁵⁷ Expert Panel on Constitutional Recognition of Local Government, above n 5, 88.

⁵⁸ Ibid 88.

⁵⁹ Ibid 27. Of the submissions, 53 per cent supported constitutional change to recognise local government, while 45 per cent were against. Submissions from local councils expressed almost unanimous support for change: 29.

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.⁶⁰ 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.

IV EXPERT PANELS AND CONSTITUTIONAL REFORM PROCESS IN AUSTRALIA

The Expert Panels on Indigenous recognition, and local government recognition, were effective in doing a number of things. Both produced a suite of reform options which have since served as the focus of debate and negotiation. This has been especially useful with respect to Indigenous recognition, where public debate prior to the Panel was at a relatively nascent stage and involved consideration of a wide range of proposals. Both Panels managed to do their work without attracting strong allegations of partisan or other bias of the sort that had undermined previous expert constitutional bodies, such as the Constitutional Commission. Further, the Panels were reasonably successful in mobilising interest groups and academics around the issue and gathering their input. The panel on Indigenous recognition can also claim credit for running a broad national consultation program that, despite its shortcomings, was wider in scale than most previous expert bodies and managed to attract a diversity of views.

Despite these successes, the experience of the last two years carries some lessons for how constitutional reform process should be undertaken in the future. These lessons can be divided into three categories: design, method and political management. In seeking to learn from the work of the two expert panels, it is important to

⁶⁰ Lauren Wilson, 'John Howard's Fears on Local Councils in Constitution Ignored', *The Australian*, 28 December 2011.

acknowledge that there were important differences between the two bodies – the local government panel, for example, was established following substantial prior mobilisation by stakeholders; it was also subject to significantly greater time and resource constraints than the Indigenous recognition panel.

The most distinctive design feature of the two expert panels, compared to previous expert bodies on constitutional review, was their large and diverse membership. In a sense, they might also have been called ‘community panels’. A firm judgment as to whether this design feature operated to the benefit or detriment of the review process could only be formed after interviews with panel members. However, some signs point to size and diversity being an asset. The inclusion of diverse community representation on the panels (across party, State and sector lines) seems to have been successful in warding off accusations of bias. It is also possible that the representation of different political parties on the panel enabled members to ‘test’ the political viability of their proposals internally, rather than having to wait for this to occur publicly. Further, 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.

While acknowledging these points, two reservations about large panels come to mind. First, there is no guarantee that large, diverse memberships will always have this result – after all, there are any number of community interests that such a body could include among its membership, and questions can always be asked as to why one interest was represented while another was excluded. Second, it is apparent that the effective accommodation of interests on an appointed body offers no 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 its representatives on the panel.

A second lesson concerns the methods chosen by the expert panels to achieve community consultation and public engagement. Neither panel generated wide public awareness and understanding of the issues. This is especially noteworthy in relation to

the Indigenous recognition panel, given the effort and resources that were devoted to its national consultation program and digital communications strategy. The Panel itself was aware that more needed to be done to achieve wider public engagement, as shown by its recommendation that the federal government implement ‘a properly resourced public education and awareness program’ in the lead up to the referendum.⁶¹ To its credit, the federal government subsequently assigned \$10 million to Reconciliation Australia to build public awareness and community support for a referendum about Indigenous constitutional recognition. In doing so, however, it effectively acknowledged that the expert panel process had been unsuccessful in delivering on that aspect of its terms of reference.

The panels’ experience underscores the inherent limitations of any constitutional review body – expert panel or otherwise – which relies on submissions and public meetings as its primary means of engaging the public. Such activities are not designed to achieve broad awareness and engagement, but instead are aimed at trying to capture a reasonable diversity of voices.⁶² The goal of mass public engagement – of the sort that would deliver levels of awareness above 40 per cent – was never seriously pursued.

Both panels, appropriately, ran targeted consultations with core constituencies (Indigenous peoples and local councils respectively) and subject matter experts,⁶³ and conducted opinion polls to gain a more representative assessment of community views. Beyond these priorities, though, there was room for more imaginative approaches to community consultation and engagement. 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 subsequent criticisms of the Indigenous recognition panel’s process, including that the meetings were too short and of a one-off nature. Further, the panels might have looked to other processes around the globe where innovative mechanisms have been used to help achieve breadth and/or depth of citizen engagement. These include deliberative

⁶¹ Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, xix.

⁶² On the limitations of consultation exercises in terms of attracting diverse opinion, see Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge University Press, 2009) 14-15.

⁶³ For example, both panels conducted roundtables with legal experts: Expert Panel on Constitutional Recognition of Indigenous Australians, above n 5, 9-10; Expert Panel on Constitutional Recognition of Local Government, above n 5, 88-9.

mechanisms such as citizens' juries and citizens' assemblies,⁶⁴ and new forms of citizen participation via the internet.⁶⁵ These have been employed successfully as part of constitutional reform processes – examples include British Columbia's citizens' assembly on electoral reform in 2004,⁶⁶ and the use by Iceland's constitutional council of an online dialogue with citizens to inform the drafting of a new national constitution. In future, governments should consider appointing experts in public consultation and deliberation to their constitutional review bodies to take full advantage of the vast array of mechanisms that are available.

The third lesson is that the effectiveness of expert constitutional review bodies is dependent on strong political management. There are three elements to this: resources, commitment and process planning. As to resources, the federal government appears to have given the local government panel the impossible task of running a public consultation 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 raise awareness or run a broad national consultation program, let alone make use of innovative engagement strategies. A better managed process would have seen the local government panel be given a budget and timetable that allowed it to take community engagement 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.

On political commitment, neither panel received a clear indication in advance of when and how the government intended to deal with their recommendations. The Gillard government's silence on the recommendations of both expert panels – only recently broken with respect to Indigenous recognition – continues a pattern observed before with respect to the Constitutional Commission.⁶⁷ We might also point to the Rudd government's decision not to introduce a national charter of rights as another example

⁶⁴ Smith, above n 62, 72-110; Lyn Carson and Janette Hartz-Karp, 'Adapting and Combining Deliberative Designs: Juries, Polls, and Forums' in John Gastil and Peter Levine (eds), *The Deliberative Democracy Handbook: Strategies for Effective Civic Engagement in the Twenty-First Century* (Jossey-Bass, 2005) 120.

⁶⁵ Stephen Coleman and Jay G Blumer, *The Internet and Democratic Citizenship* (Cambridge University Press, 2009); Smith, above n 62, 142-61.

⁶⁶ Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008).

⁶⁷ Excepting the Hawke government's partial (and rushed) adoption of recommendations made in the Commission's interim report.

of a government choosing to disregard the recommendations of its appointed advisory body. Without a prior pledge from the government as to how it will deal with recommendations, expert panels run the risk of irrelevance – they are usually too low profile for there to be any substantial political cost to a government that wishes to ignore or disregard its recommendations. Another risk is that stakeholders and interest groups 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.⁶⁸

The downside of another government process that professes to want the input of Aboriginal and Torres Strait Islander people, only to ignore it, is obvious. In order to maintain the trust and confidence of those who set aside time and resources to contribute to such inquiries, governments must ensure that they respond to them in good faith and in a timely fashion.

The downside of a lack of process planning is also evident from the experience of the past two years. At no point did the Gillard government outline its vision of how the work of the expert panels related to any wider reform process. It never sought to clarify 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. The fact that both panels remarked on the need for further public education and engagement on the proposed reforms suggested that a future, post-panel stage was required prior to any referendum. As noted, the local government panel is yet to receive a formal response to its report. And while the government did eventually announce a \$10 million campaign to build public awareness and community support for the referendum on Indigenous recognition, this step again seemed disconnected from any wider view of how the reform process should go forward. Particularly confusing was the fact that the government pledged the funding for a two-year period from July 2012, while simultaneously holding to its post-election commitment that it would hold a referendum on the issue before the end

⁶⁸ Expert Panel on Constitutional Recognition of Indigenous Australians, 'Consultation Notes: Mt Isa, Qld, 27 June 2011', <<http://www.youmeunity.org.au/public-consultation-notes>> 2.

of 2013. These types of developments, even when welcome, give the impression of ad hoc decision-making around process, and can serve to confuse both stakeholders and the general public as to the role and relevance of the expert panels in the overall constitutional review process.

V CONCLUSION

The experience of the past two years demonstrates the strengths and limitations of constitutional review bodies like expert panels. While the differences between the two panels must be kept in mind, some general conclusions can be made. Both panels were able to quickly and efficiently report to government on complex issues. They also attracted and incorporated a variety of community views, both internally through their membership and externally via public consultations. On the other hand, the panels were less successful in generating wider public engagement, with awareness and understanding of both forms of constitutional recognition remaining at low levels.

The key lessons to be learned from the expert panel processes relate to design, methods of engagement and political management. Of these, the third is the most important, as both panels – and especially the local government panel – suffered for having inadequate government support. Ideally, any process involving expert panels should be mapped out from the beginning, ensuring that stakeholders and the public have clear expectations about the panel's role and the opportunities available for input and engagement. Governments should also signal clearly how and when they will respond to any recommendations. In this way, strong political management can help to build confidence and trust in the constitutional review process.