

## CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

**To**  
Law Council of Australia

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# CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

This submission is in response to the Law Council of Australia's Discussion paper, "Constitutional Recognition of Indigenous Australians" released on 29 March 2011.

In drafting this submission, the Law Society of Western Australia has conferred with the members of its Aboriginal Lawyers Committee<sup>1</sup> and the President and a Committee representative attended the Law Council of Australia Discussion Forum, "Constitutional Change: Recognition or Substantive Rights" on 22 July 2011. The Society has also considered the discussions of the inaugural meeting of the delegates of the National Congress of Australia's First Peoples which occurred in Sydney between 6 – 9 June 2011 and the surveys conducted by the Congress in relation to this topic.<sup>2</sup>

## 1. Introduction

The Constitution was drafted at a time when Australia was living in the grips of overt discrimination in many areas, but particularly in the areas of race and gender. There were no women or Aboriginal or Torres Strait Islander people involved in its drafting.

Under section 128 of the Constitution, in order to change the Constitution, there must be a majority of all votes and a majority of all states. Of the 44 attempted amendments to the Constitution, only eight have been successful.

There is a perception that many Australians have a lack of knowledge about the civil and political systems that make up our Government, including our Constitution.<sup>3</sup> It is arguable that many Australians are more in tune with American rights and its Constitution, that they have heard over and over again on the television, than the document which creates the system of Government in Australia. This is not to say that Australians don't take constitutional reform seriously. Australians are very cautious about changing something they see as working well. Due to this caution, history has shown over and over that Australians vote with caution at referendum and generally vote no.<sup>4</sup>

## 2. Clearing the Pillars

Because of the historical caution to constitutional reform and excessive costs involved in holding a referendum, there is a clear need for any campaign for constitutional reform to be strategic by considering factors for a successful reform.<sup>5</sup> This is sometimes referred to as 'clearing the pillars'. There is some variance as to what the pillars are and they may vary depending on the issue. They include:

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<sup>1</sup> See <http://www.lawsocietywa.asn.au/aboriginal-lawyers-committee/> for more information about the Committee.

<sup>2</sup> National Congress of Australia's First Peoples, "Constitutional Reform and Indigenous Peoples" Final Report for the National Congress of Australia's First Peoples, Prepared by the Indigenous Law Centre and the Gilbert + Tobin Centre of Public Law, University of New South Wales, 6 July 2011.

<sup>3</sup> Gooda, Mick, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2011 National Indigenous Legal Conference, "Session 1: Indigenous Rights and the Constitution", 13 August 2011.

<sup>4</sup> See generally George Williams and David Hume, "People Power: The History and Future of the Referendum in Australia" Sept 2010, UNSW Press.

<sup>5</sup> Ibid and see the extract "Convincing a nation of naysayers" 11 September 2010, available online at: <http://www.smh.com.au/opinion/politics/convincing-a-nation-of-naysayers-20100910-154ux.html>. See also the You, Me, Unity discussion paper "A National Conversation about Aboriginal and Torres Strait Islander constitutional recognition" May 2011, available at <http://www.youmeunity.org.au/be-informed>.



- obtaining bipartisan support – so that the legislation required can successfully make its way through both houses of Parliament;
- providing good community education – so that people understand what they are voting on and why;
- ensuring that there is popular ownership of the proposed amendments – so that people see a benefit for themselves and Australia generally in making the amendments;
- ensuring that the proposed amendments are legally sound – in terms of their impact on the Constitution and State and Commonwealth legislation, policies and procedures; and
- for this referendum, ensuring that the amendments are seen to be of benefit to and according to the wishes of Aboriginal and Torres Strait Islander peoples.

In order to ensure these factors are strategically met (and especially for good community education), there is a need for a good lead up time to a referendum. Many learned commentators fear that the timeline given for this referendum is too short. We agree that there is a tight timeframe for reform, but consider, given that the notion of recognising Aboriginal and Torres Strait Islander people in the Constitution has bipartisan support and political will; that the referendum should proceed.

### 3. Stand Alone vs Package Questions

A further point to consider is whether the questions put to the public are posed as individual and separate questions or a 'package deal'. We also need to consider whether the questions posed have legally sound consequences based on their individual application as well as if they occur together. The Society recommends that package deal questions be avoided to ensure that the questions are as simple as possible and that each proposed amendment be thoroughly considered in terms of consequences based on whether or not they are successful individually or in combination with other proposed amendments.

### 4. Possible Amendments

#### 4.1. Preamble

The Society supports the inclusion of a question suggesting a new preamble which recognises Aboriginal and Torres Strait Islander peoples. We note that this has received strong support from the National Congress of Australia's First Peoples whose survey showed 68% of members indicating that a new preamble was "very important".<sup>6</sup>

The National Congress has also consulted on the preferred wording of Aboriginal and Torres Strait Islander recognition. The most preferred wording was a recognition of "a spiritual, social, cultural and economic relationship with traditional lands and waters".<sup>7</sup> This is similar to the wording used in preliminary sections of the New South Wales (NSW) and Victorian Constitutions, which provide:

#### Constitution Act 1902 (NSW)

- (1) Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State's first people and nations.
- (2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
  - (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and

<sup>6</sup> Supra n 2.

<sup>7</sup> Ibid.



(b) have made and continue to make a unique and lasting contribution to the identity of the State.

Constitution Act 1975 (Vic)

1A. Recognition of Aboriginal people

(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established-

(a) have a unique status as the descendants of Australia's first people; and

(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

Of similar interest is the recognition in the preamble to the Queensland Constitution, which provides:

Constitution Act 2001 (Qld):

Preamble-- The people of Queensland, free and equal citizens of Australia--

(c) honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community.

These amendments to State constitutions have been complemented with a provision limiting the effects of the recognition. In NSW, section 2(3) provides that "[n]othing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales." Similarly, section 1A(3) of the Victorian Constitution provides that "[t]he Parliament does not intend by this section (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria." And the preamble in the Queensland Constitution is limited by section 3A (effect of preamble) which provides that "[t]he Parliament does not in the preamble (a) create in any person any legal right or give rise to any civil cause of action; or (b) affect in any way the interpretation of this Act or of any other law in force in Queensland."

At the Law Council's Forum on Constitutional Reform, international guest speaker Professor Bradford Morse noted that each incidence of recognition of Aboriginal and Torres Strait Islander peoples in Australia was expressly limited. Professor Morse urged those present to be brave in asking for reform and not take a minimalist approach.<sup>8</sup>

The naming of Aboriginal and Torres Strait Islander peoples is important. The term 'Indigenous' is not viewed favourably by many Aboriginal and Torres Strait Islander peoples and should be avoided. At the Law Council Forum, Mick Dodson and Lowitja O'Donoghue were strong on the naming as being 'Aboriginal and Torres Strait Islander peoples'. The term 'First Nations Peoples' also has appeal.

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<sup>8</sup> Professor Bradford Morse, Dean Of Law, University Of Waikato, NZ and Professor of Law, University Of Ottawa, "Race And The Australian Constitution: A Historical And International Perspective" Law Council of Australia Forum, "Constitutional Change: Recognition or Substantive Rights", Canberra, 22 July 2011.



We recommend that the Law Council consult with the National Congress about the wording of the preamble in relation to recognition of Aboriginal and Torres Strait Islander peoples.

In addition to recognition of Australia's first peoples in the preamble, we need to consider whether it should also discuss other components of Australia, such as British colonisation, the many migrants who have claimed Australia as home, mateship, the ANZAC spirit, God (Christianity) and important values such as democracy and possibly racial or cultural equality.

A preamble should set out the purpose of the document and in regards to a sovereign nation's constitution, it often describes the history, contemporary position and values of the nation today and into the future. In terms of the wording and content of the preamble, we concur with comments of the Hon Michael Kirby at the Constitutional Reform Forum on 22 July 2011, that it should be "something simple, noble, brief and true".

The Society has mixed views on whether the proposed preamble should be broader than just about recognition of Aboriginal and Torres Strait Islander peoples. On one side, a preamble that is broader may be more likely to clear the pillar of popular ownership. However, including more within the preamble may complicate the matter and at this stage does not have bipartisan support.

We consider that concepts of God, Christianity, mateship and the ANZAC spirit are unlikely to obtain popular ownership or be in keeping with the wishes of Aboriginal and Torres Strait Islander peoples and should be excluded. However, there may be some support for the inclusion of recognition of the diverse cultures and peoples within Australia and its migrant history. We recommend that further consultations be undertaken to harness views of these concepts.

Finally, there has been some discussion about whether a new preamble should be included in the body of the constitution rather than the preamble such as has occurred in the NSW and Victorian Constitutions.

Whilst we see the merit in including the recognition in the body of the Constitution, given that it may add a layer of complication to the question, we recommend that the recognition be restricted to the preamble only.

#### **4.2. Section 25**

The Society is of the opinion that section 25 of the Constitution is discriminatory and should be repealed even though the section is already redundant and its removal will confer no additional rights or benefits to Aboriginal and Torres Strait Islander peoples. The section provides a penalty for States that discriminate in their elections by excluding people of a particular race, so that the votes from their State are then not counted in reckoning the number of seats of the Commonwealth, which would mean that the State that engaged in discrimination would have less seats in the House of Representatives. At the same time, by including the section within the Constitution, States are arguably granted the power to discriminate in their elections on the basis of race and because it is constitutionally entrenched, this arguably would override the protections conferred by the *Racial Discrimination Act 1976* (Cth).



#### 4.3. Section 51(xxvi)

There has been much debate about section 51(xxvi) and whether it should be amended or deleted and replaced with another section. Some of the possible suggestions are:

- (a) Delete the subsection altogether. This would remove the Commonwealth's power to legislate with regards to all races including Aboriginal and Torres Strait Islander peoples, undo the work of the 1967 referendum and create major upheaval in the way that policy for Aboriginal and Torres Strait Islander peoples in Australia is currently developed. It would mean that policy for Aboriginal and Torres Strait Islander peoples would revert to the peace, order and good government powers contained within each State constitution.
- (b) Keep s.51(xxvi) but add the words "for the benefit of" (or some similar variation) so that non-beneficial legislation for Aboriginal or Torres Strait Islander peoples could be challenged. This suggestion has been around for sometime, following the *Hindmarsh Island Bridge Case*.<sup>9</sup> Although this would confer additional protections, the suggestion has not been viewed favourably by some academics, because it is still open to judicial interpretation.<sup>10</sup>
- (c) Delete s.51(xxvi) and replace it with a new power in s.51 which allows the Commonwealth Parliament to make laws "with respect to Aboriginal and Torres Strait Islander peoples". This would mean that the Commonwealth Government could continue to make laws specifically for Aboriginal and Torres Strait Islander people, but not for any other particular race. It has been argued that this approach should be taken to remove race from the constitution and bring it in line with the modern world, but still recognise the special need for legislation for Aboriginal and Torres Strait Islander peoples.
- (d) Delete s.51(xxvi) and replace it with a new power in s.51 which allows the Commonwealth Parliament to make laws "with respect to the provision of benefits to Aboriginal and Torres Strait Islander peoples". This would add an extra protection to ensure that laws enacted specifically for Aboriginal and Torres Strait Islander peoples (but not for any other particular race) are only beneficial, though this will be subject to judicial interpretation.
- (e) The final option is to keep s.51(xxvi) as is and not include any changes to it in the upcoming referendum.

The Society sees the benefits and logic in removing the race power, but note that there remains a need for the Commonwealth Government to continue to legislate with regards to Aboriginal and Torres Strait Islander peoples.

With regards to the options which do not require legislation to be beneficial, they would need to rest on the hope that a general guarantee of racial equality is successful at referendum, and give rights to challenge discriminatory or non-beneficial legislation enacted under the power in s.51(xxvi).

As we are suggesting that all questions posed be standalone questions, we recommend variations to s.51(xxvi) be based on the suggestions above at (b) or (d).

<sup>9</sup> *Kartinyeri v The Commonwealth* [1998] HCA 22.

<sup>10</sup> Dr Sarah Pritchard, Law Council of Australia Forum, "Constitutional Change: Recognition or Substantive Rights", Canberra, 22 July 2011.



This will provide greater security regarding the provision of substantive rights and recourse to Aboriginal and Torres Strait Islander peoples where legislation enacted is discriminatory or non-beneficial. The advantage of the suggestion in (b) is that is a more simple amendment than deleting a subsection and replacing it.

#### **4.4. New Provision – General Guarantee of Equality**

At the inaugural delegates meeting of National Congress of Australia's First Peoples the question of a general guarantee of equality was raised. This would involve a general prohibition on all forms of discrimination (i.e. not just race, but on gender, age, religion, sexual orientation etc.). At that meeting, most were of the opinion that although a general guarantee of equality could gain popular support, it could also bring strong lobby groups against equal rights for some minorities, and in particular in regards to sexual orientation. A general guarantee of equality would also be open to judicial discretion as to what 'grounds' could be considered discriminatory and could open the floodgates of challenges to legislation.

The issues related to sexual orientation equality and judicial discretion could be overcome by following the approach of Canada, whose constitution refers to specific grounds, but does not include sexual orientation. Their constitution under section 15(1) provides:

**15. (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

However, at this stage, an amendment proposing a general guarantee of equality does not have bipartisan support and may incur difficulties in obtaining popular support due to sentiments expressed by many Australians with regards to religion in particular. In our deliberations of this issue we consider that, for this referendum, it will be better to restrict the prohibition against discrimination to race only.

#### **4.5. New Provision – Guarantee of Racial Equality**

The Society supports the inclusion a guarantee of racial equality to prevent discriminatory and non-beneficial legislation being passed about people of all races as it is more likely to pass the pillars of popular ownership and bipartisan support. The section should allow for positive and beneficial legislation which only impacts Aboriginal and Torres Strait Islander people for example rights to land and culture and positive discrimination and substantive equality measures (e.g. section 50(d) *Equal Opportunity Act* 1986 (WA)). Based on section 15 of the Canadian Constitution, we recommend wording such as:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups because of race.

In regards to community education about this proposal, the Society notes the importance of explaining to voters that such clauses are standard in most modern constitutions and that voting 'yes' on a question of racial equality will bring Australia into line with other modern developed nations in the world.



#### 4.6. New Provision – Agreements and Conferences

There has also been discussion of the idea of a new provision which provides an ability for the Commonwealth to make agreements or hold conferences with Aboriginal and Torres Strait Islander peoples.<sup>11</sup> Although supported by the Law Council (and see sections 35,<sup>12</sup> 35.1<sup>13</sup> and 37.1<sup>14</sup> of the *Canadian Constitution Act* 1982), this option will arguably be divisive and confusing to mainstream Australia and is unlikely to make its way through the pillars. We recommend its inclusion in the referendum be avoided.

#### 4.7 New Provision(s) – Local Government

The Society does not support the inclusion of questions about local government at the referendum as it will complicate the issue and in our view reduce the prospect of the other amendments being passed. We recommend this issue be put to the public at another time.

### 5. Promoting the Referendum

Another consideration is whether the referendum should be marketed on the grounds of race or only on the grounds of recognition of Aboriginal and Torres Strait Islander peoples. It should be noted that at this stage there is only bi-partisan support for the latter.

At the Law Council's forum on constitutional recognition held on 22 July 2011, the main question participants were asked to consider, in relation to changing the constitution to better recognise and protect Aboriginal and Torres Strait Islander peoples was whether we should be asking for recognition only (i.e. only a preamble) or substantive rights (i.e. changes to the body of the constitution itself). It seemed clear from all speakers that we should be brave and ask for more than just preambular recognition. Mick Dodson was particularly strong on this point, saying if asking for preambular recognition only, then why bother? The Society concurs with this stance and recommends that the referendum ask for more than just preambular recognition.

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<sup>11</sup> See part 1.4.5. of the Law Council's discussion paper.

<sup>12</sup> Section 35 provides: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

<sup>13</sup> Section 35.1 provides: "The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this Act or to this Part, (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."

<sup>14</sup> Section 37.1 provides: "(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date. (2) Each conference convened under subsection (1) shall have included in its agenda matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters. (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participating the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories. (4) Nothing in this section shall be construed as to derogate from subsection 35(1)."

However, if we take the view that the referendum should ask for substantive rights and not just recognition and go with recommendations seeking a preamble which is wider than just recognition of Aboriginal and Torres Strait Islander peoples and includes notions of Australia's mixed cultures, a provision on racial equality and changes to sections 25 and 51(xxvi), then it brings race into it.

On this basis, we recommend the referendum be promoted around race including the recognition of Aboriginal and Torres Strait Islander peoples as people of special First Nations status.

## **6. Recommendations**

Based on the above discussion, the Society recommends the following questions be put to referendum as standalone questions.

1. A new preamble which recognises:
  - Aboriginal and Torres Strait Islander peoples as the original owners of this land and acknowledges their spiritual and social connection to the land;
  - the diverse cultures that have migrated to Australia and who now and into the future make up the nation of Australia; and
  - important values including racial equality and democracy.
2. Replacement of section 51(xxvi) with a power to legislate "with respect to the provision of benefits to Aboriginal and Torres Strait Islander peoples".
3. Inclusion of a new section which provides for racial equality, including through positive discrimination and substantive equality.
4. Section 25 be repealed.



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