



THE LAW SOCIETY
OF NEW SOUTH WALES

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Expert Panel on Constitutional Recognition of Indigenous Australians
PO Box 7576
Canberra Business Centre ACT 2610

Dear Expert Panel,

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

The Law Society's Human Rights Committee (the "Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society on any proposed changes. The Committee is a long-established committee of the Society, comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in all areas of human rights law in this State.

The Committee thanks you for the opportunity to make comments on your task, which provides a unique opportunity to redress a continuing injustice. As you are undoubtedly aware, the Australian Constitution as it currently stands contains two provisions that allow our Parliaments to detrimentally discriminate on the basis of race. These provisions are a clear and fundamental breach of Australia's international human rights obligations.

Australia ratified the *International Convention on the Elimination of all Forms of Racial Discrimination* in 1975. It is one of 174 nations that have now adopted that treaty, which was intended to help rid the world of the Nazi legacy of racial hatred. In the Committee's view, it is quite extraordinary that this country has yet to amend its Constitution to remove the powers within it that allow our Parliaments to pass such discriminatory laws. The Committee acknowledges that the Expert Panel's task allows an opportunity to address this Constitutional flaw.

The Committee's view is that at minimum, constitutional reform in this respect should encompass the following:

- Insert a preamble drafted by the Expert Panel;
- Repeal section 25 and reword section 51(xxvi) to allow laws to be made with respect to "the Aboriginal and Torres Strait Islander peoples"; and
- Insert a new section to guarantee the principles of racial equality and racial non-discrimination, which might read as follows:

" In the laws of the Commonwealth, States and Territories racial equality and racial non-discrimination are guaranteed principles. However no law made and which remains necessary for the benefit of the people of any race, to reduce or eliminate the impact of past racial inequality or discrimination, shall infringe those principles."

The Committee explores this view in more detail below.

1. Recognition

The Committee's view is that recognising Indigenous Australians in a Preamble is necessary, but not sufficient in itself. Given the expertise represented within the Expert Panel, and the comprehensive consultations the Expert Panel is carrying out particularly with the indigenous communities, the Committee will support inserting the preamble recommended by the Expert Panel.

2. Existing provisions allowing racial inequality in the Constitution

The Committee notes that the first racially discriminatory section of the Constitution is section 25. The Committee's view is that section 25 is outdated and should be removed.

That section, together with section 24, effectively provides that if a State excludes a race from voting in lower-house State elections, then the excluded race is not counted when determining the numbers of House of Representatives seats in the particular State concerned. (The number of seats that each State gets depends on its relative population). In today's context it would be highly contentious and unlikely for a State Parliament to exclude a race from voting; however, a State Parliament is still empowered to do so.

The second and more important provision in the Constitution is the race (or races) power, under which the Federal Parliament is able to pass legislation detrimental to a particular race. Section 51(xxvi) allows Parliament to make laws with respect to "the people of any race, for whom it is deemed necessary to make special laws". This section was originally inserted in the Constitution to give Federal Parliament the power to pass legislation to restrict the rights of non-Indigenous racial groups resident in Australia, particularly the Chinese, and Pacific Islanders.¹ The Committee notes the Australian Human Rights Commission's view that: "Unfortunately, Australia holds the dubious distinction of being perhaps the only country in the world whose Constitution still contains a 'races power' [section 51(xxvi)] that allows the Parliament to enact racially discriminatory laws."²

The Committee notes that so far as it is aware, the last time the High Court substantially considered the races power was in 1998 in what is often referred to as the Hindmarsh Island Bridge case (*Kartinyeri v The Commonwealth [1998] HCA 22*). A group of Indigenous women exercised certain legal rights to persuade the Federal Court to prevent the building of a bridge to Hindmarsh Island, because it would impede the practice of attending to secret women's business there.

¹ See Arthur Glass, "Interpretation/Application in Constitutional Law" 25 *Australian Journal of Legal Philosophy* (2000) 97-109

² Australian Human Rights Commission, "Constitutional Reform Fact Sheet – The Need for Reform", available online: <http://www.humanrights.gov.au/constitution/factsheet/index.html> (accessed 30 June 2011) citing G Williams, 'The Races Power and the 1967 Reference', unpublished article developed from 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643

The Parliament then passed an Act that overturned that decision and a challenge to the amending Act on Constitutional grounds was made.

Three of the six High Court Justices sitting found that Section 51(xxvi) does allow the Parliament to pass laws that discriminate against a race. Two others did not offer a view on the issue and only one, Justice Michael Kirby, interpreted the section to exclude detrimental racial discrimination.

Subsequently, the most recent example of a discriminatory legislative exercise was the 2007 Northern Territory Emergency Response (NTER) legislation, where the *Racial Discrimination Act 1975* was suspended to allow the Government to enact certain discriminatory measures.

It was Constitutionally permissible for the Federal Parliament, without consultation with the communities affected, to pass legislation that clearly discriminated against Territory Indigenous people in many respects. For example, the NTER legislation allowed the Commonwealth to compulsorily obtain 5-year leases of land in Northern Territory Indigenous communities without consent. A further example was that Indigenous social security recipients were "income managed". Under that regime, 50 per cent of an Indigenous person's welfare income was quarantined for food and necessities. While an unemployed Indigenous Territorian would be subject to that indignity, a non-Indigenous Territorian would not, whatever the circumstances.

While the Government has amended the NTER legislation with the intention of reinstating the *Racial Discrimination Act 1975*, discriminatory provisions in the NTER legislation remain.

The Committee's view is that the NTER legislation illustrates how the issue of legislative discrimination is not merely an abstract one, and that this situation is in fundamental disrespect of both the principle of racial equality, and international law. The Committee respectfully submits that section 51(xxvi) should be reworded to allow laws to be made with respect to "the Aboriginal and Torres Strait Islander peoples".

Further, the Committee submits that a new section should be inserted in the Constitution to guarantee the principles of racial equality and racial non-discrimination, which might read as follows:

" In the laws of the Commonwealth, States and Territories, racial equality and racial non-discrimination are guaranteed principles. However no law made and which remains necessary for the benefit of the people of any race, to reduce or eliminate the impact of past racial inequality or discrimination, shall infringe those principles."

There is no section 127 at present because the original section was removed in the 1967 Referendum. The repealed section excluded "aboriginal natives" from being counted as part of the "people of the Commonwealth". The proposed section guaranteeing equality could be inserted as a new section 127.

It may be appropriate that this removed provision be replaced with one that implements Australia's obligations under international law not to discriminate against any race, including its original inhabitants — but permits beneficial laws to be legislated by the Parliament, to apply for so long as necessary to redress the effect of past discrimination.

The general effect of this proposed new section has been part of the *Racial Discrimination Act 1975* since it was enacted and the Referendum would entrench it in the Constitution. The Committee's view is that it is necessary to give these principles Constitutional force as the *Racial Discrimination Act 1975* has been suspended three times, including in the 2007 NTER legislation discussed above, each time to allow discrimination against Indigenous peoples.³

3. Provision for Constitutional Conferences

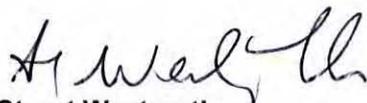
The Committee notes that the Law Council supports keeping "*processes for the renewal of relations between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians alive, including through the negotiation of agreements, and a mechanism to confer Constitutional protection on such agreements.*"⁴

While the Committee endorses this view, it is however, alive to the fact that it could be difficult for such a mechanism to gain bipartisan support and may in fact be fatal to achieving Constitutional change.

For the reasons set out above, the Committee's view is that the proposed Referendum provides an important opportunity to reform our Constitution, beyond the insertion of a Preamble by erasing its racially discriminatory provisions, a move which should not be politically controversial.

Thank you, once again, for this opportunity to comment.

Yours sincerely,



Stuart Westgarth
President

³ Australian Human Rights Commission, "Constitutional Reform Fact Sheet – The Need for Reform", available online: <http://www.humanrights.gov.au/constitution/factsheet/index.html> (accessed 30 June 2011)

⁴ Law Council Discussion Paper on Constitutional Recognition of Indigenous Australians, p10, available online: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2D64AD56-CCF1-979E-72D9-9D0714E6855B&siteName=Ica (accessed 1 September 2011)