



THE LAW SOCIETY
OF NEW SOUTH WALES

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Committee Secretariat
Joint Select Committee on Constitutional
Recognition of Aboriginal and Torres Strait Islander Peoples
PO Box 6100
Parliament House
Canberra ACT 2600

By email: jscatsi@aph.gov.au

Dear Committee Secretariat,

The Joint Select Committee's Interim and Progress Reports on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

The Law Society's Human Rights Committee ("HRC") 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 membership of the HRC includes 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 HRC thanks you for the opportunity to make comments on your task, which provides a unique opportunity to redress a continuing injustice.

The HRC has had the opportunity to consider the Joint Select Committee's Interim and Progress Reports. The HRC notes that the Interim Report states that:

To be successful at a referendum, the committee considers that a successful proposal must:

- recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia;
- preserve the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and
- in making laws under such a power, prevent the Commonwealth from discriminating against Aboriginal and Torres Strait Islander peoples.¹

The HRC acknowledges that the issue of Constitutional reform in this respect is complex and encompasses many issues. However, the HRC's principal concerns revolve around the key

¹ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, at [2.96] available online: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Interim_Report/c02 (accessed on 23 October 2014)

human rights issues of equality and discrimination, and the comments provided below are therefore confined to matters relevant to these issues.

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. In the HRC's view, 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* ("ICERD") in 1975. Australia is one of 177 nations that have now ratified the ICERD, intended to help rid the world of racial hatred in the wake of atrocities carried out before and during World War II. In the HRC's view, it is extraordinary that the Australian Constitution provides a head of power based on race without prohibiting laws that discriminate adversely on the basis of race. The HRC acknowledges that the Joint Select Committee's task allows an opportunity to address this Constitutional flaw.

The HRC's view is that, Constitutional reform in this respect should encompass the following:

- Insertion of a new passage to recognise Aboriginal and Torres Strait Islander peoples;
- The repeal of s 25;
- The amendment of s 51(xxvi) to allow laws to be made with respect to "Aboriginal and Torres Strait Islander peoples"; and
- Insertion of a provision to provide Constitutional force to the non-discrimination provisions of the *Racial Discrimination Act 1975* (Cth).

The HRC explores these views in more detail below.

1. Recognition

The HRC's view is that recognising Indigenous Australians in a passage in our federal Constitution is necessary, but not sufficient in itself. The HRC submits that such a passage, and all of the other proposed constitutional reforms mentioned in this letter, should be developed and put to a referendum only with the free prior and informed consent of Indigenous communities. The HRC notes that consultations at community level would be required in this respect.

The HRC supports the approach recommended by the Expert Panel to include the recognition statement in the body of the Constitution, and be linked directly to the legislative powers of Parliament in section 51.² In the HRC's view this approach would also provide context for the Commonwealth's power to make laws for the benefit of Aboriginal and Torres Strait Islander peoples.

2. Existing provisions in the Constitution allowing racial discrimination

The HRC notes that the first objectionable section of the Constitution is s 25. That section, together with s 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 Federal Parliament allocated to the particular State concerned (which depends on its relative population). The HRC submits that this section is objectionable as it admits the legitimacy of any State excluding people from voting on the basis of race. In the HRC's view, the section is

² *Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp 117 and 130.

anachronistic and, given the *Racial Discrimination Act 1975* (Cth), has no place in a modern Constitution.

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 with respect to "the people of any race, for whom it is deemed necessary to make special laws". The HRC notes that this section was originally inserted in the Constitution to give Federal Parliament the power to pass legislation to restrict the rights of non-Indigenous groups of people resident in Australia, particularly Chinese, and Pacific Islander peoples³, and until the 1967 referendum specifically prevented the Commonwealth Parliament passing laws with respect to Aboriginal and Torres Strait Islander peoples. The HRC 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.⁴

As the Joint Select Committee is aware, the High Court held that the races power does allow Parliament to pass laws that discriminate on the grounds of race. The HRC also acknowledges that the ICERD does not prohibit discrimination on the grounds of race entirely and allows discriminatory measures if they are "special measures" that have the effect of redressing past discriminatory policies.

The High Court considered this issue in 1998 in what is often referred to as the Hindmarsh Island Bridge case (*Kartinyeri v The Commonwealth*⁵). That case concerned a group of Indigenous women who 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.

The Parliament then passed the *Hindmarsh Island Bridge Act 1996* (Cth) to overturn that decision, and a challenge to this legislation was made on Constitutional grounds.

Three of the six High Court Justices sitting upheld that Act, and found that section 51(xxvi) does permit discrimination based on race which disadvantages particular groups. Two others did not offer a view on the issue and only one, Justice Michael Kirby, interpreted the section to exclude detrimental racial discrimination.

Since *Kartinyeri*, the *Racial Discrimination Act 1975* has been suspended a number of times to allow the Government to enact certain discriminatory measures.⁶ This includes instances where the Government's assertions that these measures were "special measures" were not accepted by the CERD Committee,⁷ or the UN Special Rapporteur⁸,

³ See Arthur Glass, "Interpretation/Application in Constitutional Law" 25 *Australian Journal of Legal Philosophy* (2000) 97-109

⁴ 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

⁵ [1998] HCA 22

⁶ Such as the *Native Title Amendment Act 1998*, the Northern Territory Emergency Response ("NTER") legislation package and the Stronger Futures in the Northern Territory legislation package.

⁷ In its Concluding Observations in 2010, the CERD Committee expressed its concerns about the NTER package. In stating its concerns, the CERD Committee expressed its also in relation to "the use of so called "special measures" by the State party. The Committee regrets the discriminatory impact this intervention has had on affected communities including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies (arts. 1, 2, and 5)": UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination*:

or the Parliamentary Joint Committee on Human Rights.⁹ Given this, the HRC submits that the prohibition against racial discrimination to the disadvantage of particular groups should be constitutionally protected.

3. Reform Proposals

The HRC respectfully submits that s 25 of the Constitution should be repealed for the reasons set out above.

In respect of the races power, the HRC submits that it should not be repealed in its entirety, as in the HRC's view, it remains necessary to provide an ongoing Constitutional basis for beneficial and/or remedial legislation such as the *Native Title Act 1993* and Aboriginal land rights and heritage protection legislation. Rather, the HRC submits that the power in s 51 (xxvi) should be amended to allow laws to be made for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples. The HRC notes that this wording is consistent with the recommendation of the Expert Panel.

In addressing the legal position after *Kartinyeri*, the HRC further accepts the Expert Panel's recommendation to include a prohibition against racial discrimination, but which does "not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group."

The HRC's view is that given the *Racial Discrimination Act* has been suspended several times, each time to allow discrimination against Indigenous peoples,¹⁰ this reform is necessary to give the principles of equality and non-discrimination Constitutional force.

4. The Referendum

The HRC understands that a consensus view of the whole of the Australian community on these matters must be achieved before the necessary referendum can be expected to be carried. The principle of racial non-discrimination is non-derogable under international law and one of the most important human rights principles recognised by the United Nations and incorporated in the Universal Declaration of Human Rights. Australia, a founding UN member State had a substantial role in that recognition.

The HRC notes that any proposal for reform should be the subject of extensive consultation with Indigenous communities and be capable of attracting bipartisan community support. Most importantly, the HRC acknowledges that there are a diverse range of views and concerns held by Indigenous peoples, and any proposal for reform should be capable of attracting the popular support of Indigenous communities. The HRC

Concluding Observations, Australia, 27 August 2010, CERD/C/AUS/CO/15-17 at [16], available at: www2.ohchr.org/english/bodies/cerd/.../CERD-C-AUS-CO-15_17.doc [accessed 24 October 2014]

⁸ The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, did not accept that the NTER constituted a special measure:

Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *Preliminary note on the situation of indigenous peoples in Australia*, Human Rights Council, Twelfth Session, 28 October 2009, A/HRC/12/34/Add.10 at [8].

⁹ See for example Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, June 2013, available online:

http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2013/11_2013/report.pdf [accessed 14 October 2014]

¹⁰ 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)

notes that there is an opportunity before the Joint Select Committee to recommend the content of substantive reform and an appropriate Referendum.

In the HRC's view the proposed Referendum provides an important opportunity to reform the Australian Constitution, beyond the insertion of a "recognition" passage, to ensure that Australian Parliaments cannot in future pass laws which discriminate adversely against Aboriginal and Torres Strait Islander people, an objective which Australia should strive to achieve in, and by, its most fundamental document.

The HRC wishes to express its support of the Joint Select Committee's work, and the Committee's approach to its task. If the HRC can assist further by its representatives appearing before the Committee, it would be happy to do so.

Thank you for this opportunity to comment. If your office has any questions, please contact Vicky Kuek, the policy lawyer for the HRC, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

A handwritten signature in black ink that reads "Ros Everett". The signature is written in a cursive, flowing style.

Ros Everett
President