



Law Council  
OF AUSTRALIA

# **Constitutional Recognition of Indigenous Australians**

## **Discussion Paper**



## Introduction

The Law Council of Australia is the peak body for the Australian legal profession, representing around 56,000 Australian lawyers through the law societies and bar associations of the states and territories. A detailed overview of the Law Council is set out at **Attachment A**.

This Discussion Paper has been prepared by the Law Council of Australia, in response to the announcement by the Federal Government, with bi-partisan support, that it will hold a referendum in the current term of government, or at the next election, to amend the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples as the First Australians.

The Discussion Paper sets out suggestions for substantive reform of the Constitution to give effect to the Government's commitment.

In preparing this paper, the Law Council consulted widely with Indigenous and non-Indigenous people and organisations. The paper was first distributed for comment in October 2010 and received in several submissions and responses over the ensuing months, resulting in a number of amendments. The Discussion Paper was adopted by the Law Council's Board of Directors on 19 March 2011.

The views and suggestions outlined in this Discussion Paper are intended to invite discussion and debate around the topic of Constitutional recognition of Indigenous Australians, including the scope and extent of reform that might be necessary to give substantive effect to that recognition. The views expressed do not represent a final and settled view of the Law Council. It is anticipated that the ongoing discourse around Constitutional reform will further shape the Law Council's views toward a settled position in the coming months.

The Law Council invites further comments and submissions in response to the matters outlined in this Discussion Paper by 31 August 2011.

Submissions or comments can be made by emailing:

- ▶ [ConstitutionalRecognition@lawcouncil.asn.au](mailto:ConstitutionalRecognition@lawcouncil.asn.au)

or writing to:

- ▶ Director, General Policy  
Law Council of Australia  
GPO Box 1989  
Canberra ACT 2600

*Throughout this Discussion Paper, reference is made variously to Aboriginal and Torres Strait Islander people, Indigenous peoples and Indigenous Australians. The Law Council understands that Aboriginal peoples and Torres Strait Islanders constitute many nations, language groups and cultures, each with separate and distinct identities. The Law Council recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples.*



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# **Part One:**

## Options for Constitutional Reform



## Part 1: Options for Constitutional Reform

### 1.1 Background

On the eve of the 2010 Federal election, all major political parties committed to holding a referendum during the present term of Federal Parliament to recognise the First Australians in the Australian Constitution. The Law Council of Australia welcomes such bipartisan political commitment to Constitutional reform. This Discussion Paper contains a number of proposals for Constitutional amendments to give practical and substantive effect to that commitment.

In many countries, Indigenous peoples have (re)established new Constitutional relationships within the limits of existing nation-States. These developments suggest that there are many ways to recognise distinct Indigenous identities in Constitutional documents, and to renew relationships between Indigenous and non-Indigenous peoples on a basis of equality and consent.

The Law Council welcomes the opportunity presented by recent political developments in Australia to renew relations between Aboriginal and Torres Strait Islander peoples, and Australia's non-Indigenous peoples, and to create a basis for future relationships founded upon principles of equality and consent.

In 1988, the Constitutional Commission recommended substantive Constitutional reform to the race power in section 51(xxvi) of the Constitution to retain the spirit, and make explicit the meaning, of the alteration made by the 1967 referendum which Justice Brennan has described as “*an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial*”. The proposal to replace section 51(xxvi) with a provision empowering the Commonwealth Parliament to make laws with respect to Aborigines and Torres Strait Islanders has been supported by the Hon Robert French who, writing extracurricularly, has commented that: “*Such laws are based not on race but on the special place of those peoples in the history of the nation*”.<sup>1</sup>

In March 1995, following the 1992 decision of the High Court in *Mabo v The Commonwealth (No 2)*,<sup>2</sup> comprehensive “social justice package” reports were provided to the Prime Minister by, amongst others, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner. Each of these reports raised the need for substantive Constitutional reform.

In an address to a conference on *The Position of Indigenous Peoples in National Constitutions* in Canberra on 4 June 1993, Professor Erica-Irene Daes, Chairperson of the UN Working Group on Indigenous Populations, noted that with few exceptions Indigenous peoples were never a part of State-building. With reference to Australia, Professor Daes suggested that the best way to mark the 100<sup>th</sup> anniversary of the Australian Constitution might be “*to build a new modern Constitution, in which the original people of this land can play a distinct, creative role*.” The opportunity for Constitutional renewal on the occasion of the Centenary of Federation was not realised.

The adoption by the United Nations General Assembly on 13 September 2007 of the Declaration on the Rights of Indigenous Peoples, and Australia's expression of formal support for the Declaration on 3 April 2009, represented further important steps forward in the recognition, promotion and protection of the rights and freedoms of Indigenous peoples. The Declaration provides belated recognition of the distinct rights of Indigenous peoples arising from their prior and unique relationships with their lands, territories and resources, as well their right to substantive equality with other groups in the States in which they now find themselves. Many of the articles in the Declaration bear directly upon the issues raised by processes of Indigenous recognition in national constitutions.

In early 2010, in a report to the UN Human Rights Council, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Professor James Anaya, commended the Australian Government on its stated intention “*to ‘reset’ the relationship with Australia's Indigenous peoples*”, and its commitment to work together “*in close collaboration and partnership within a context of mutual respect and understanding*”.<sup>3</sup> The Special Rapporteur noted relevantly:

1 The Hon Justice Robert French, “The Race Power: A Constitutional Chimera”, chapter 8 in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, Cambridge University Press) 180 at 208.

2 (1992) 175 CLR 1.

3 UN Doc A/HRC/15/37 Add 4, paras 15 and 61.

“14. Indigenous peoples have called for reforms to deliver constitutional recognition of Aboriginal and Torres Strait Islander peoples, provide guarantees of non-discrimination and protect their rights in a charter of rights to be included in the Constitution or other legislation.”

and recommended inter alia:

“75. The Government should pursue constitutional or other effective legal recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples in a manner providing long-term security for these rights.”

In late 2010, Australia’s “National Report” to the UN Human Rights Council for the purpose of Universal Periodic Review confirmed that:

“14. The Australian Government is committed to the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. It recently announced an intention to establish an Expert Panel comprising Indigenous leaders, constitutional lawyers, representatives of the federal Parliament and community representatives. The Expert Panel will consider how best to make progress on constitutional recognition of Indigenous peoples, and provide options on the form of the amendment which could be put to the Australian people at a referendum to amend the Constitution.”

Between October 2010 and January 2011, the Law Council of Australia consulted with its various constituent bodies, as well as other groups and individuals with particular interest and expertise in matters of the rights of Aboriginal and Torres Strait Islander peoples, and Constitutional reform. As a result of those consultations, the Law Council has elaborated this Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples.

Consistent with the views expressed by an overwhelming majority of the bodies and individuals with whom it consulted, the Law Council considers that the Australian Constitution should formally recognise the distinct identities of Aboriginal and Torres Strait Islander peoples, and secure to them equality before the law. In particular, the Law Council considers that any Preamble recognition should be accompanied by substantive recognition of the rights of Aboriginal and Torres Strait Islander peoples in the body of the Constitution.

Further, the Law Council considers that debate in Australia leading to a referendum on recognition of Aboriginal and Torres Strait Islander peoples in the

Constitution must be based on a recognition of their distinct rights as Indigenous peoples, and proceed on a basis of consultation through their own representative institutions in order to obtain their free, prior and informed consent to any proposal for Constitutional reform.<sup>4</sup> The Law Council emphasises, in particular, the critical importance of adequately resourced processes of consultation with Aboriginal and Torres Strait Islander communities and organisations in relation to options for Constitutional reform.

Also, any debate leading to a referendum must have regard to the comprehensive consultations previously undertaken by the ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner in relation to options for Constitutional recognition, as well as the detailed consideration and recommendations by each of those bodies in relation to options for and processes leading to Constitutional reform.

The Law Council calls on the Commonwealth Government — and all major political parties — to commit to a major public awareness program to create an environment for change and understanding of the Constitutional perspectives of Aboriginal and Torres Strait Islander peoples.

The Law Council also supports the recent calls of a number of Aboriginal experts for a process of Constitutional reform which is not rushed, and for a referendum to be held at a time which does not coincide with the next federal election.

## 1.2 Recent Political Developments

The Australian Labor Party’s 2010 Election Policy, *Closing the Gap*, provides as follows in relation to Constitutional recognition of Aboriginal and Torres Strait Islander peoples:

<sup>4</sup> In this regard, articles 18 and 19 of the UN Declaration on the Rights of Indigenous Peoples provide that:

“18. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.”

“19. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

Several bodies and individuals with whom the Law Council consulted also emphasised the centrality of article 3 in relation to self-determination.

### “Indigenous constitutional recognition

We will pursue bipartisan support for taking the steps needed to progress the recognition of Indigenous Australians in the Constitution.

Indigenous people generously share their culture and traditions with those who have come here after them.

Constitutional recognition of Aboriginal and Torres Strait Islander peoples would be an important step in strengthening the relationship between Indigenous and non-Indigenous Australians, and building trust.

A Gillard Labor Government will establish an Expert Panel on Indigenous Constitutional Recognition comprising Indigenous leaders, representatives from across the Federal Parliament, constitutional law experts and members of the broader Australian community.

The expert panel would be charged with broad consultation on recognition of Indigenous people in the constitution, providing options on the form of the amendment and guidance on the information needed for public discussion.”

Launched as part of the Coalition’s 2010 Election Policy, The Coalition’s *Plan for Real Action for Indigenous Australians* provides as follows in relation to Constitutional recognition:

#### “3. Support a referendum to recognise Indigenous Australians in the Constitution

Before the last election, the Coalition made a commitment to hold a referendum to recognise Indigenous Australians in the preamble of the Constitution. Labor refused to match this commitment until recently.

The recognition of Indigenous Australians in the Constitution makes sense, and is overdue. The Coalition will encourage public discussion and debate about the proposed change and seek bipartisan support for a referendum to be put to the Australian people at the 2013 election.”

The agreement between the Australian Greens and the Australian Labor Party, signed 1 September 2010, provides as follows in relation to Constitutional recognition of Aboriginal and Torres Strait Islander peoples (at paragraph 3(f)):

“Hold referenda during the 43<sup>rd</sup> Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution.”

In her letter of 7 September 2010 to the Hon Rob Oakeshott, Member for Lyne, Prime Minister Julia Gillard confirmed that in addition to the Australian Labor Party’s 2010 election commitments and the matters outlined in agreements with the Australian Greens and other independent MPs, a new Government would pursue inter alia the following policy programs during the term of the 43<sup>rd</sup> Parliament:

“A referendum during the 43<sup>rd</sup> Parliament or at the next election on recognition of Indigenous Australians in the Constitution.”

As reported in *The Australian* on 24 September 2010, the Minister for Indigenous Affairs, the Hon Jenny Macklin MP, has called for those from “*across the political divide*” to unite and form a consensus position on Constitutional recognition for Indigenous people as Labor works towards a referendum on the issue.

On 8 November 2010, Prime Minister Gillard said in connection with the announcement of an expert panel to consult on the best possible option for a Constitutional amendment to be put to a referendum as follows: “*The first peoples of our nation have a unique and special place in our nation. We have a once-in-50-year opportunity for our country*”.

In December 2010, the Prime Minister announced the membership of an Expert Panel on Constitutional Recognition for Indigenous Australians (**the Expert Panel**). The terms of reference of the Expert Panel are:

- a) to lead a broad national consultation and community engagement program to seek the views of a wide spectrum of the community, including from those who live in rural and regional areas;
- b) to work closely with organisations, such as the Australian Human Rights Commission, the National Congress of Australia’s First Peoples and Reconciliation Australia who have existing expertise and engagement in relation to the issue; and
- c) to raise awareness about the importance of Indigenous constitutional recognition including by identifying and supporting ambassadors who will generate broad public awareness and discussion.

Further and significantly, as reported in *The Australian* on 28 January 2011, the Coalition has indicated that it is open to more substantive acknowledgment in the Constitution than Preambular recognition. This represents a welcome shift from the Coalition’s previous position that it would not consider or support Constitutional reform beyond the Preamble.

### 1.3 Processes

Given the Federal Government's apparent commitment to hold a referendum during the present term of Parliament or at the next election, how should processes of consultation with Aboriginal and Torres Strait Islander peoples and the broader Australian community be approached?

The March 1995 "social justice package" reports of ATSIC and the Aboriginal and Torres Strait Islander Social Justice Commissioner emphasise the critical importance of adequately resourced processes of consultation with Aboriginal and Torres Strait Islander communities and organisations in relation to options for Constitutional reform, the preparation of appropriate information and consultation materials, and a major public awareness program to create an environment for change and understanding of Indigenous Constitutional perspectives.

The Law Council considers that in the endeavour of forging new relationships, and consistent with international standards, processes in Australia leading to a referendum on recognition in the Constitution must proceed on a basis of consultation with Aboriginal and Torres Strait Islander peoples through their own representative institutions in order to obtain their free, prior and informed consent to any proposal for Constitutional reform.<sup>5</sup> As noted above, such processes of consultation must be adequately resourced and must not be rushed.

The Law Council is also mindful of the need to be realistic about the feasibility of preparing and having put at referendum a complex series of amendments to the Constitution, particularly within the life of a single Parliament. The challenges of getting an affirmative vote from the Australian people on a referendum proposal are notorious. In order to pass a referendum, a bill must ordinarily achieve a double majority: that is, a majority of those voting throughout the country, as well as separate majorities in each of a majority of States. Australians have in most instances voted No to referendum questions: only 8 out of 44 referendums since 1906 have been carried.<sup>6</sup>

<sup>5</sup> Consistent with articles 18 and 19 of the UN Declaration on the Rights of Indigenous Peoples.

<sup>6</sup> The Law Council appreciates that it cannot represent the views of every member of its constituent bodies, and is hopeful that the work of the Expert Panel will enable a wide range of positions to be considered. The Law Council considers that the perspectives expressed in this Discussion Paper are consistent with the overwhelming majority of those consulted, and in particular with the February 2010 *Policy Statement on Indigenous Australians and the Legal Profession*, authorised by its Directors on 28 November 2009.

Accordingly, the Law Council considers that it will be important to keep processes for the renewal of relations between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians and of Constitutional reform alive beyond the life of the 43<sup>rd</sup> Parliament.

In Canada, mechanisms were adopted to ensure that processes of discussion and settlement were ongoing. Section 37.1 of the Canadian *Constitution Act 1982* contains the following provisions:

**37.1** (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.<sup>7</sup>

The Kalkaringi Statement, adopted on 20 August 1998 by the Combined Aboriginal Nations of Central Australia, provided: "19b) That a Northern Territory Constitution must contain a commitment to negotiate with Aboriginal peoples a framework agreement, setting out processes for the mutual recognition of our governance structures, the sharing of power and the development of fiscal autonomies."<sup>8</sup>

Accordingly, the Law Council supports an approach to Constitutional reform which:

- a) seeks immediate Constitutional recognition of the distinct identities and rights of Aboriginal and Torres Strait Islander peoples, including substantive protection through the insertion of a general guarantee of racial equality; and
- b) ensures that there is ongoing discussion of the rights of Aboriginal and Torres Strait Islander peoples, provision for the negotiation of agreements, and a mechanism to confer Constitutional protection on such agreements.

<sup>7</sup> The original section 37 was repealed, having served its purpose, after the first Constitutional Conference was convened in March 1983. Section 37.1 was subsequently added by the *Constitutional Amendment Proclamation 1983*.

<sup>8</sup> S Pritchard, "Recent Constitutional Developments in the Northern Territory: The Kalkaringi Convention" 4 (15) *Indigenous Law Bulletin* 12.

If, as a number of Aboriginal experts apprehend, it may be impossible to arrive at a model for Indigenous Constitutional reform to be put to referendum within the life of the 43<sup>rd</sup> Parliament, it may be that the mandate of the Expert Panel will need to be extended beyond the life of the 43<sup>rd</sup> Parliament, and given some form of statutory foundation.

## 1.4 Substance of Constitutional Reform

In terms of the substance of Constitutional reform, the Law Council notes that much of the political discussion to date has focussed on recognition in the Preamble; that is, in the Preamble to the *Imperial Commonwealth of Australia Constitution Act 1900*, the Australian Constitution itself not containing a preamble.

However, the Law Council is encouraged that none of the Australian Labor Party's 2010 election commitments, the agreements with the Australian Greens and other independent MPs, or the Prime Minister's letter of 7 September 2010 to the Member for Lyne, the Hon Rob Oakeshott, suggests that the agenda for Constitutional reform is confined to the Preamble (i.e. to the Imperial Act). The Law Council is particularly encouraged by the Coalition's openness to more substantial recognition, as reported in *The Australian* on 28 January 2011.

As stated at the outset, the Law Council supports an approach to Constitutional recognition which goes beyond the Preamble to the Imperial Act and secures enforceable rights. The Law Council considers a referendum confined to Preambular recognition would be of little if any practical effect.<sup>9</sup> An approach which extends beyond the Preamble was strongly supported by an overwhelming majority of those with whom the Law Council consulted in the preparation of this Discussion Paper.

In the course of the Law Council's consultations, a significant number of those consulted urged that Constitutional recognition should address issues such as sovereignty, self-determination, political representation including through guaranteed seats in Parliament, recognition of customary law, and outstanding issues in relation to land and resources. There were numerous calls for Constitutional

entrenchment of the UN Declaration on the Rights of Indigenous Peoples. The Law Council respectfully suggests that all such proposals merit the most serious consideration by the Expert Panel and, in turn, all major political parties. In this regard, the Law Council refers to the February 2010 *Policy Statement on Indigenous Australians and the Legal Profession*, authorised by its directors on 28 November 2009, which recognises *inter alia*:

“9. that Indigenous Australians have the right to self-determination and to recognition and protection of their distinct culture and identities, as provided under *inter alia* the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Declaration on the Rights of Indigenous Peoples.”

Moreover, the Law Council is mindful of the number of Indigenous organisations and individuals consulted who expressed scepticism in relation to the utility of a process of Constitutional reform which does not engage with the underlying issue of the lack of consent sought from or provided by Aboriginal and Torres Strait Islander peoples to the acquisition of sovereignty by the Crown. There are many voices within Aboriginal and Torres Strait Islander communities who continue to call for the negotiation of a treaty or treaties, and who regard the current exercise of Constitutional reform with some doubt if not downright hostility. Again, in this regard the Law Council refers to the February 2010 *Policy Statement on Indigenous Australians and the Legal Profession* in which the Law Council, working in partnership with Indigenous Australians, commits to:

“21. promoting the development of lasting and equitable settlements between Indigenous Australians and Australian Governments.”

The Law Council supports the development of lasting and equitable settlements between Indigenous Australians and Australian Governments. Such settlements may be affected in a number of ways, including through treaties. In this respect, Australia stands at odds with New Zealand, the United States and Canada, all of which have long since concluded treaties with Indigenous peoples. In December 2000, the Council for Aboriginal Reconciliation recommended:

“That the Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.”

<sup>9</sup> In any event, a number of those consulted by the Law Council questioned whether section 128 of the Constitution applies to the Preamble (i.e. to the Imperial Act) as opposed to the Constitution itself (i.e. the Schedule to that Act), such as to render altogether uncertain whether a referendum is required — or even constitutionally permissible — to amend the Preamble.

Accordingly, whilst the Law Council can envisage challenges in securing sufficient support in the short to medium term for the inclusion of an extensive catalogue of Indigenous rights in the Constitution, it considers it imperative that the agenda for reform must:

- a) extend beyond the confines of the Preamble to the Imperial Act;
- b) provide for the enforceability of a guarantee of substantive equality; and
- c) keep 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.

The Law Council is aware that the Expert Panel is likely to receive many proposals for Constitutional recognition of Indigenous Australians. The Law Council does not intend to suggest that the options for Constitutional recognition are closed, or to foreclose its own consideration of appropriate options. There is no closed case in this regard. As presently advised, however, the Law Council raises for discussion the following options for Constitutional reform.<sup>10</sup>

#### 1.4.1 Section 25

The Law Council strongly supports the removal of those remaining sections of the Constitution which discriminate on the ground of race. These include, relevantly, section 25 which anticipates the disqualification of persons of a particular race from voting. During the course of the Law Council's consultations, there was overwhelming if not unanimous support for the repeal of section 25.<sup>11</sup>

<sup>10</sup> Professor Jeremy Webber has proposed as options for Constitutional reform the removal of provisions which bear traces of discriminatory policies, including s 25 and perhaps even s 51(xxvi), a Bill of Rights, constitutional measures designed to promote autonomy for Indigenous peoples, and a preamble or some other some symbolic constitutional declaration: Jeremy Webber, "Multiculturalism and the Australian Constitution" (2001) 24 *University of New South Wales Law Journal* 882, 889-890.

<sup>11</sup> See, also 1988 Final Report of the Constitutional Commission at [4.518]; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians A Submission to the Commonwealth Government 1995*; November 1996 Bathurst People's Convention; the December 2000 Final Report of the Council for Aboriginal Reconciliation.

#### 1.4.2 Preamble

The Law Council also supports the insertion in the Constitution of a Preamble containing paragraphs recognising Aboriginal and Torres Strait Islander peoples as the first peoples of Australia with distinct identities and histories, as well as their prior occupation and ownership, continuing dispossession, and particular status in contemporary Australia.<sup>12</sup> The Law Council considers that any Preambular text will necessarily be the subject of careful consultation and negotiation with Aboriginal and Torres Strait communities and organisations.

#### 1.4.3 Section 51(xxvi)

The Law Council further supports the repeal of the anachronistic race power in section 51(xxvi) which, as interpreted by the High Court in *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 (*Kartinyeri*), provides a source of power for the enactment of racially discriminatory laws.<sup>13</sup>

There would arise, however, a need to provide a new power to legislate with respect to Aboriginal and Torres Strait Islander peoples. One option would be to replace section 51(xxvi) with a power of Federal Parliament to make laws "with respect to Aboriginal and Torres Strait Islander peoples" (such laws not being based on race rather, as the Chief Justice, the Hon Robert French, has commented, "on the special place of those peoples in the history of the nation"<sup>14</sup>).

On the other hand, a number of those consulted, whilst expressing strong support for the repeal of section 51(xxvi), raised concern that replacing section

<sup>12</sup> See, for example, Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians: A Submission to the Commonwealth Government 1995*; November 1996 Bathurst People's Convention; the December 2000 Final Report of the Council for Aboriginal Reconciliation.

<sup>13</sup> A number of those consulted raised a concern that the deletion of section 51(xxvi) as proposed by, among others, the Hon Robert French, would remove protection provided by that paragraph to other racial groups. The Law Council considers that the removal of the paragraph would enhance protection of other racial groups in that it would remove the basis for the enactment of racially discriminatory legislation. Its removal would leave available to the Federal Parliament the external affairs power — and though it the *International Convention on the Elimination of all Forms of Racial Discrimination* — as a source of power for the enactment of non-discriminatory laws in respect of other racial groups.

<sup>14</sup> See, for example, 1988 Report of the Constitutional Commission; and the The Hon Justice Robert French, "The Race Power: A Constitutional Chimera", chapter 8 in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, Cambridge University Press) 180, 208.

51(xxvi) with a new power to make laws “with respect to Aboriginal and Torres Strait Islander peoples” would leave open the possibility of a future High Court holding that such power permitted discrimination against, or the making of laws detrimental to, Indigenous Australians (as a majority of the Court effectively held in *Kartinyeri*). In order to displace doubt, it was proposed instead to insert a new head of power with respect to “matters beneficial to Aboriginal and Torres Strait Islander peoples” or with respect to “the benefit of Aboriginal and Torres Strait Islander peoples”, or the like, to make clear that the constitutional text is confined by an express limitation. The Law Council acknowledges the view that such an approach leaves later definitional argument in Parliament and the courts as to the scope of its legislative power. This would, however, be a necessary consequence of a decision by the Australian people in a Constitutional referendum that there be judicial protection of the rights and interests of Aboriginal and Torres Strait Islander peoples, and that the powers of Federal Parliament with respect to Indigenous Australians be limited in accordance with international standards.

At the same time, the Law Council notes the possibility that the insertion of a general guarantee of racial equality and non-discrimination in the Constitution could well achieve the same result; namely, that a power to legislate with respect to Aboriginal and Torres Strait Islander peoples would be subject to the equality and non-discrimination guarantee.

Further, as well as inserting a new head of power to confirm the existence of a Commonwealth head of power to make laws advantageous to Indigenous Australians (based on recognition of their special place in the history of the nation), the Law Council commends for consideration a general guarantee of racial equality and non-discrimination. This option is referred to below.

#### 1.4.4 Equality and non-discrimination

The Law Council particularly supports insertion of a general guarantee of racial equality and racial non-discrimination.

Such guarantee should be expressed so as to secure the protection of those Indigenous rights which have been recognised (such as land rights, native title rights, heritage protection rights), as well as rights which might be negotiated and recognised in the future

(through agreements, decisions of the High Court, etc).<sup>15</sup>

In this connection, it is one thing to prevent the singling out of Indigenous Australians for adverse treatment by a general guarantee of racial equality and racial non-discrimination. It is another thing to ensure that special or advantageous or beneficial treatment of Indigenous Australians is not susceptible to invalidation on the ground of infringing a general guarantee of racial equality and racial non-discrimination.

This possibility needs to be carefully considered, and can certainly be avoided by a number of textual expedients including:

- (a) confining the Constitutional conferral of power by an express limitation, as discussed above;
- (a) making the power to make laws with respect to Aboriginal and Torres Strait Islander peoples part and parcel of the equality and non-discrimination guarantee, so that it could not be argued that the power to make laws conferring special or advantageous or beneficial treatment on Aboriginal and Torres Strait Islander peoples was eliminated by the equality and non-discrimination guarantee; or
- (b) the adoption of a non-derogation clause similar to section 25 of the Canadian Constitution which creates an exemption to the *Canadian Charter of Rights and Freedoms* (which forms Part I of the *Constitution Act 1982*). The non-derogation clause in section 25 confirms that the Charter’s guarantee of certain rights and freedoms should not be construed so as to derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada.

During the course of the Law Council’s consultations, a number of those consulted raised the insertion of a general guarantee of equality in the Constitution. Whilst the Law Council considers such a proposal to have considerable merit, its consideration would be better left for another day. The Law Council is of the view that the current process of Indigenous Constitutional recognition should maintain focus on the fundamental objective of securing belated recognition of the special place of Aboriginal and Torres Strait peoples in the history of the nation, their distinct rights, and the magnitude of the historical injustices wrought upon them.

<sup>15</sup> For example, the December 2000 Final Report of the Council for Aboriginal Reconciliation.

### 1.4.5 Constitutional Conferences and agreements

In addition, having regard to continuing calls for a treaty or treaties, and for Constitutional recognition of a comprehensive catalogue of Indigenous rights, the Law Council supports the insertion of a new provision, similar to section 37 of the Canadian Constitution, providing a commitment to Constitutional conferences or other processes to discuss Indigenous rights.<sup>16</sup>

Further, a provision like section 105A of the Australian Constitution could vest in the Commonwealth power to make agreements with Aboriginal and Torres Strait Islander peoples on a range of subjects. Such provision might provide, like section 105(A), for the agreement/agreements to override other laws.

This approach would obviate the need to put to referendum an extensive catalogue of rights or detailed arrangements and provide, at the same time, a source of Constitutional authority for such agreement/agreements. It would also provide opportunities for properly resourced consultations with Aboriginal and Torres Strait Islander communities and organisations, and wider community education, in relation to appropriate arrangements for addressing much of the unfinished business, including in relation to sovereignty, self-determination, political representation (including through guaranteed seats in Parliament), recognition of customary law and land rights.

<sup>16</sup> In its 1988 Final Report, the Constitutional Commission noted that during the period in which it had been conducting its review of the Constitution, there has been a revival of interest in the possibility of some sort of formal agreement being entered into between the Commonwealth of Australia and representatives of Aborigines and Torres Strait Islanders. The Constitutional Commission commented:

“There is no doubt that the Commonwealth has sufficient constitutional powers to take appropriate action to assist in the promotion of reconciliation with Aboriginal and Torres Strait Islander citizens and to recognise their special place in the Commonwealth of Australia. Whether an agreement, or a number of agreements, is an appropriate way of working to that objective has yet to be determined.

A constitutional alteration to provide the framework for an agreement provides an imaginative and attractive approach to the immensely difficult situation which exists. But any alteration should not be made until an agreement has been negotiated and constitutional alteration is thought necessary or desirable. Section 105A, on which a possible alteration may be modelled, was approved at a referendum in 1928 after the Financial Agreement had been entered into between the Commonwealth and the States in 1927. The electors, therefore, were in a position to know precisely what was being approved.”

## 1.5 The Way Forward

The Law Council recognises that the fundamental objective of the consultation process is to reach a model of Constitutional reform that is supported by Aboriginal and Torres Strait Islander peoples and embraced by most Australians. It is intended that this discussion paper will evolve as the Expert Panel undertakes consultations and public discussion and awareness are generated.

The legal profession has a key role to play in informing the debate around recognition of Indigenous Australians in the Constitution, as well as proposals for more substantive and far-reaching reform to address the unfinished business in Indigenous/non-Indigenous relations in this country. To this end, the Law Council and its constituent bodies will endeavour to contribute constructively to debate and building public awareness around the importance of and options for Constitutional reform.

The Law Council recognises that the process cannot succeed unless it proceeds in accordance with the principle of free, prior and informed consent of Aboriginal and Torres Strait Islander peoples. The Law Council can see some merit in proposals to enable Aboriginal and Torres Strait Islander peoples to express their own views about proposals for Constitutional reform before any model is put to a referendum.

The Law Council welcomes further feedback and discussion around the matters contained (or not contained) in this discussion paper. The Law Council will continue to consult with both Indigenous and non-Indigenous individuals and organisations in relation to the opportunities which have been presented by the welcome bi-partisan commitment to recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

# **Part Two:**

# Background



## Part 2: Background

### 2.1 The Australian Constitution and the 1967 Referendum

The preamble to the *Commonwealth of Australia Constitution Act 1901*, an Act of the Parliament to the United Kingdom at Westminster, provides:

“**Whereas** the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established”.

The Australian Constitution itself contains no Preamble.

Further, the “people” referred to in the Preamble to the Imperial Act did not include Aborigines and Torres Strait Islanders.

In 1901, the only two references to Indigenous people in the body of the Australian Constitution were couched in language of exclusion:

- (a) Federal Parliament was denied power to make laws with respect to people of “*the aboriginal race in any State*”: section 51(xxvi)<sup>17</sup>; and
- (c) section 127 provided: “In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.”<sup>18</sup>

Both the Convention debates and Quick and Garran in their 1901 *Commentaries on the Constitution* make clear that the so-called race power in s 51(xxvi), in its original form, was a racist and discriminatory provision.<sup>19</sup>

Section 25 of the Constitution provided (and continues to provide):

“[I]f by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the

<sup>17</sup> Section 51(xxvi) provided Federal Parliament with power to make laws with respect to “*The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws*”.

<sup>18</sup> On the background to s 127, see G Sawyer, “The Australian Constitution and the Australian Aborigine” (1966) 2 *Federal Law Review* 17, especially at 25-30.

<sup>19</sup> For discussion, see George Williams, “Race and the Australian Constitution: From Federation to Reconciliation” (2000) 38 *Osgoode Hall Law Journal* 643 at 649-650.

State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.”

At the time of Federation, legislation in Western Australia and Queensland precluded Aboriginal men from voting. During the decade of the Constitutional Conventions, only in South Australia were Aborigines placed on electoral rolls and able to vote for delegates to the Conventions.<sup>20</sup> It was not until 1965 that Queensland allowed voting rights for adult Aborigines and Torres Strait Islanders.

Nor, in drawing up the Constitution, did the Founding Fathers see any reason to include women in their deliberations. Section 41 of the Constitution provided (and continues to provide) that no adult with the right to vote at State elections shall be prevented from voting at Commonwealth elections. Section 41 was adopted to ensure that women who had gained the vote in South Australia in 1897 could also vote in Commonwealth elections. As at Federation, only women in South Australia and Western Australia had the vote. The *Commonwealth Franchise Act 1902* (Cth) was titled “An Act to provide for an Uniform Federal Franchise”. It was intended to enfranchise all Australian women. It also contained a provision in section 4 which sought to disqualify persons of coloured races from voting. Section 4 provided that:

“No aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an electoral roll unless so entitled under section 41 of the Constitution.”

Section 4 was retained, as section 39(6), in the *Commonwealth Electoral Act 1918* (Cth). Section 39(6) was omitted by the *Commonwealth Electoral Act 1962* (Cth), thereby removing all qualifications upon indigenous people’s right to vote.

At the 1967 referendum, 92% of Australians voted in favour of Constitutional amendments to remove the negative references in the Constitution to Indigenous Australians:

- (a) the words “*other than the aboriginal race*” were deleted from section 51(xxvi), thereby enabling the Federal Parliament to legislate for people of any race, including Aborigines and Torres Strait Islanders; and

<sup>20</sup> See Fr F Brennan SJ, “Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia”, *Constitutional Centenary Foundation*, 1994, at 6.

(d) section 127 was also repealed, with the result that Aboriginal natives were no longer excluded from being counted in the numbers of people of the Commonwealth or a State. By 1967, all Aboriginal people had the right to vote in Federal and State elections. Accordingly, there was no basis for excluding them from the calculations of quotas for the constitution of the House of Representatives under section 24 of the Constitution, and no other relevant purpose for section 127.<sup>21</sup>

The removal of negative references to Indigenous Australians raised the question of how to move beyond non-recognition to achieve appropriate substantive recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

In April 1991, the Constitutional Centenary Conference held in Sydney presented to the Prime Minister, State and Territory Premiers and Chief Ministers, and Opposition Leaders a statement which recommended among other items for action that the reconciliation process should “*seek to identify what rights the Aboriginal and Torres Strait Islander peoples have, and should have, as the indigenous peoples of Australia, and how best to secure those rights including through constitutional changes*”.

## 2.2 The 1967 Amendment to Section 51(xxvi)

The 1967 amendment to the race power in s 51(xxvi) has produced a body of High Court jurisprudence which suggests that notwithstanding its amendment the power is capable of supporting laws which are both beneficial, as well as laws which discriminate on the ground of race.

Prior to 1967, Professor Geoffrey Sawer suggested that having regard to “*the dubious origins of [section 51(xxvi)] and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would be preferable to any amendments intended to extend its possible benefits to the Aborigines.*”<sup>22</sup>

In 1988, in its Final Report, the Constitutional Commission noted that until s 51(xxvi) was amended in 1967, Parliament could “*pass special and discriminating laws*” relating to the people of any race. As Professor Harrison Moore had pointed out in 1910, the provision was intended to enable the Commonwealth to pass the sort of laws which

before 1900 had been passed by many States concerning “*the Indian, Afghan, and Syrian hawkers; the Chinese miners, laundrymen, market gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia.*” The Constitutional Commission concluded:

“It is inappropriate to retain section 51 (xxvi.) because the purposes for which, historically, it was inserted no longer apply in this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based. The attitudes now officially adopted to discrimination on the basis of race are in striking contrast to those which motivated the Framers of the Constitution. It is appropriate that the change in attitude be reflected in the omission of section 51 (xxvi.)”.<sup>23</sup>

In conjunction with the recommendation for the omission of section 51(xxvi), the Constitutional Commission recommended the insertion of a new paragraph (xxvi) which would give the Federal Parliament express power to make laws with respect to those groups of people who are, or are descended from, the indigenous inhabitants of different parts of Australia. The recommendation was made because:

- a) the nation as a whole has a responsibility for Aborigines and Torres Strait Islanders; and
- b) the new power would avoid some of the uncertainty arising from, and concern about, the wording of the existing power.<sup>24</sup>

Further, the Constitutional Commission observed that approval of such alteration of section 51(xxvi) would retain the spirit, and make explicit the meaning, of the alteration made in 1967 which Justice Brennan has described as “*an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial*”.

Writing extracurricularly in 2003, the Hon Robert French provided a detailed overview of post 1967 High Court jurisprudence in relation to section 51(xxvi), culminating in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, the so-called *Hindmarsh Bridge decision*. The Chief Justice commented that as construed by a now substantial body of High Court

<sup>21</sup> Ibid at 36.

<sup>22</sup> G Sawer, “The Australian Constitution and the Australian Aborigine” (1966) 2 *Federal Law Review* 17 at 35.

<sup>23</sup> Final Report of the Constitutional Commission: Summary, at 55.

<sup>24</sup> Ibid.

jurisprudence<sup>25</sup>, there is nothing in section 51(xxvi), “other than the possibility of a limiting principle of uncertain scope, to prevent its adverse application to Australian citizens simply on the basis of their race”. It followed that there is “little likelihood of any reversal of the now reasonably established proposition that the power may be used to discriminate against or for the benefit of the people of any race”.<sup>26</sup>

The Chief Justice concluded by adopting the recommendation of the Constitutional Commission in 1988 that the race power be replaced by a provision empowering the Commonwealth Parliament to make laws with respect to Aborigines and Torres Strait Islanders: “Such laws are based not on race but on the special place of those peoples in the history of the nation”.<sup>27</sup>

The Law Council considers it essential that any discussion of Constitutional recognition of Indigenous Australians must involve consideration of the potentially unacceptable consequences of section 51(xxvi) in its current form, and of more appropriate approaches as suggested by, amongst others, the Constitutional Commission and the Chief Justice, the Hon Robert French.

## 2.3 *Mabo*, Social Justice and Reconciliation

With the 1992 decision of the High Court in *Mabo v The Commonwealth (No 2)*<sup>28</sup>, the myth that Australia was *terra nullius* at the time of acquisition of sovereignty was finally dispelled from Australian law.

The first stage of the Federal Government’s response to the decision in *Mabo* was the enactment of the *Native Title Act 1993* (Cth), which created an opportunity for at least some Indigenous people to receive formal recognition of their customary ownership of country. The second stage was the establishment of a land fund to help address the land needs of dispossessed Indigenous people who, because of their dispossession, would rarely be able to demonstrate continuous

connections to land required under the *Native Title Act*. This led to the establishment of the Indigenous Land Corporation to manage monies drawn down each year from the land fund.

The third stage was to be a “social justice package” consisting of further measures directed to structural reform, and to advance the cause of social justice for Aboriginal and Torres Strait Islander peoples. This package was promised by Prime Minister Keating in his second reading speech on the Native Title Bill. In 1994, the Minister for Aboriginal and Torres Strait Islander Affairs, Mr Tickner, told the 12th Session of the UN Working Group on Indigenous Populations:

“The social justice package presents Australia with what is likely to be the last chance this decade to put a policy framework in place to effectively address the human rights of Aboriginal and Torres Strait Islander people as a necessary commitment to the reconciliation process leading to the centenary of Federation in 2001.”

In June 1993, the Council for Aboriginal Reconciliation and the Constitutional Centenary Foundation convened a conference in Canberra on *The Position of Indigenous People in National Constitutions* to explore some of the Constitutional options with respect to Australia’s indigenous peoples.

In March 1995, comprehensive “social justice package” reports were provided to the Prime Minister by, amongst others, ATSIC<sup>29</sup>, the Council for Aboriginal Reconciliation<sup>30</sup> and the Aboriginal and Torres Strait Islander Social Justice Commissioner.<sup>31</sup> Each of these reports raised the need for Constitutional reform.

25 Pre-1967 decisions include *Robtelmes v Brennan* (1906) 4 CLR 395; and *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 507-81. See discussion in J Eastick, “The Australian Aborigine: Full Commonwealth Responsibility under the Constitution” (1980) 12 *Melbourne University Law Review* 516. Eastick also refers at 523-531 to various statutes apparently enacted in reliance on the power in s 51(xxvi).

26 The Hon Justice Robert French, “The Race Power: A Constitutional Chimera”, chapter 8 in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, Cambridge University Press) 180, 206.

27 *Id* at 208.

28 (1992) 175 CLR 1.

29 ATSIC was established in 1989 under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), with the following objectives (ss section 3): to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation; to promote Indigenous self-management and self-sufficiency; to further Indigenous economic, social and cultural development, and to ensure co-ordination of Commonwealth, state, territory and local government policy affecting Indigenous people.

30 The Council for Aboriginal Reconciliation was established in 1991 as a statutory authority under the *Council for Aboriginal Reconciliation Act 1991* (Cth) “to improve the relationships between Aboriginal and Torres Strait Islander peoples and the wider Australian community.”

31 The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was created by the Federal Parliament in December 1992 in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence.

ATSIC's "social justice package" report<sup>32</sup> noted at [4.6] that the Commission had adopted as one of the objectives in its corporate plan the securing of Constitutional recognition of special status and cultural identity of indigenous peoples. In its submission to the Council for Aboriginal Reconciliation, the Commission had pointed out that constitutional change is an issue which is "quite central to redefining ourselves as a nation in a way that would promote meaningful reconciliation..."

"4.7 "With the rejection of the doctrine of terra nullius and the emerging legal view that the powers of Government belong to and are derived from the governed that is to say the people of the Commonwealth we consider that constitutional change should not be minimalist. There needs to be recognition in the Constitution that the sovereign power accorded to Governments is derived from the people including the Aboriginal and Torres Strait Islander peoples whose native title rights predate British colonisation."

According to ATSIC's "social justice package" report at [4.8], the development of the details of an Indigenous constitutional reform agenda would inevitably take some time to emerge, however broad options raised to date had been brought together in a publication by the Constitutional Centenary Foundation entitled "Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia." The options raised in the discussion paper were to:

- maintain the present situation and do nothing;
- seek to recognise Aboriginal and Torres Strait Islander peoples, their history and their culture in the Constitution;
- enshrine the principle of non discrimination;
- grant the Commonwealth primacy over indigenous affairs;
- negotiate an instrument of reconciliation;
- recognise indigenous people's entitlement to self determination;
- grant self government to remote communities; and
- recognise the inherent sovereignty of indigenous peoples.

<sup>32</sup> ATSIC, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, Commonwealth of Australia 1995.

ATSIC's "social justice package" report noted [4.14]-[4.15]:

"4.14 Processes will need to be set up to facilitate the negotiation of the indigenous constitutional reform agenda with the Government, to provide for effective educational and public awareness for both the indigenous and wider communities and to ensure ongoing indigenous involvement in broader processes which could lead to constitutional reform.

4.15 Consultations: There was overwhelming support from all meetings on the Social Justice package that Aboriginal and Torres Strait Islander peoples must be given proper recognition in Australia's Constitution."

ATSIC's "social justice package" report contained the following recommendations in relation to Constitutional reform:

#### **RECOMMENDATION 19.**

The Commonwealth Government should note that the national consultation process in relation to the Social Justice Package showed overwhelming support for the reform of the Constitution especially in relation to recognition of Indigenous peoples.

#### **RECOMMENDATION 20.**

The Commonwealth Government should adequately resource a process to manage the Indigenous constitutional reform agenda after consultation with ATSIC and the Council for Aboriginal Reconciliation.

#### **RECOMMENDATION 21.**

The Commonwealth Government should commit itself to regional, zone or State-based conventions to discuss options for Constitutional reform and to the principle of negotiating Constitutional reform and adequately resourcing these negotiations.

#### **RECOMMENDATION 22.**

Prior to any constitutional referendum, the opinion of the Indigenous community should itself be canvassed through appropriate means, including, perhaps, a survey of Aboriginal and Torres Strait Islander opinion conducted in conjunction with an ATSIC election.

The Commonwealth Government should commit itself to a major public awareness program to create an environment for change and understanding of indigenous Constitutional perspectives.

**RECOMMENDATION 23.**

The Commonwealth Government should commit itself to a major public awareness program to create an environment for change and understanding of indigenous Constitutional perspectives.

**RECOMMENDATION 24.**

The Commonwealth Government shall ensure that Aboriginal and Torres Strait Islander people are adequately represented in any national constitutional convention which is held as part of broader processes.

In its “*social justice package*” report, the Council for Aboriginal Reconciliation<sup>33</sup> made the following recommendations in relation to the Australian Constitution:

**“Acknowledging the True Place of Indigenous Peoples within the Nation**

7. The Council recommends that an appropriate new preamble to the Constitution be prepared for submission to referendum with such preamble to acknowledge the prior occupation and ownership, and continuing dispossession of Aboriginal and Torres Strait Islander peoples.

8. The Council recommends that ATSIC and the Council be funded to conduct a consultation program with Aboriginal and Torres Strait Islander communities and organisations and with the wider community on what would be appropriate forms of words to be written as a new preamble to the Constitution with this process concluding by the end of 1996.

9. The Council recommends that such a consultation process should be undertaken on a cross-party basis with the report being provided to the Parliament.

10. The Council recommends that any constitutional reforms dealing with the rights of Aboriginal and Torres Strait Islander peoples include a question to remove the power of any State to disenfranchise any citizens on the grounds of their race.

**Constitutional Prohibition of Discrimination on the Grounds of Race**

11. The Council recommends that, in conjunction with other referendum questions dealing with indigenous issues, the proposition also be put that the Commonwealth’s power to legislate to outlaw racial discrimination be entrenched in the Constitution.”

In relation to recommendation 11 concerning a Constitutional prohibition of discrimination on the grounds of race, the report of the Council for Aboriginal Reconciliation explained as follows:<sup>34</sup>

“At the same time as a referendum question is put to repeal the race-related provisions of Section 25 of the Constitution, an opportunity would arise to pose a positive question to entrench in the Constitution a new clause which would explicitly prohibit the making of laws which discriminate on the grounds of race (save where such a provision was for the specific benefit of the race involved) and providing that the Commonwealth has the power to legislate to outlaw all forms of discrimination on the grounds of race.”

The submission of the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, identified broad-ranging examples of possible Constitutional change to illustrate the potential range that could be considered:

- 1) educate the public and governments and improve race relations by stating that Indigenous peoples are unique, with unique status and history quite unlike more recent immigrants;
- 2) commit Federal, State and Territory governments to equalise public services and facilities within their borders to remove regional and racial disparities;
- 3) provide a legal and/or moral framework for public policy towards Indigenous peoples, perhaps through a preamble to an Indigenous peoples section of the Constitution, with Indigenous peoples and governments to negotiate the detailed contents of the section later;
- 4) guarantee legal protection for treaties, land claims settlements or other agreements between Indigenous peoples and governments;
- 5) specify certain rights of Indigenous peoples;
- 6) alter the system of political representation to better reflect the diversity of community and

<sup>33</sup> Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians*, Commonwealth of Australia 1995.

<sup>34</sup> *Ibid.*

the make up of the Australian population (for example, through multiple seats in one electorate);

7) create Indigenous Parliaments for Torres Strait Islanders and Aborigines through which we can decide matters, govern areas or advise the national parliament (as in Norway);

8) provide for customary law courts and dispute resolution;

9) establish responsibility of different levels of government, including Indigenous governing bodies for services or other matters pertaining to Indigenous peoples after a full review of the adequacy and relevance of current spending;

10) establish or recognise Indigenous self-government in principle or in specific geographic areas (like Torres Strait or the Tiwi islands or the Pitjantjatjara lands), or for certain categories of subjects (such as sacred sites);

11) establish Torres Strait Island and Aboriginal grants commissions to fund Indigenous self-government;

12) establish ecologically sustainable development planning commissions to develop integrated self-government, economic and environmental plans and structures for lands and seas under Indigenous management;

13) establish national Indigenous land rights and sea rights or processes to define such rights nationally;

14) commit governments to constitutional conferences or other processes with Indigenous people to discuss specified subjects like land and marine rights, self-government, funding and delivery of services (as did s 37 of Canada's *Constitution Act*, further formal political accords); or

15) add one or more Indigenous treaty or statement to the Constitution as an appendix or schedule, together with provisions for interpretation and application."<sup>35</sup>

In relation to Constitutional reform, the submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner contained the following recommendations:

"1. That recognition of the unique place of Indigenous peoples in contemporary Australia

be a fundamental principle in any national constitutional review and revision, that this include recognising the right of Indigenous peoples to represent ourselves in negotiation of constitutional change with governments.

2. That the Federal Government, in consultation with the Council for Aboriginal Reconciliation, ATSIC, the Constitutional Centenary Foundation and the Aboriginal and Torres Strait Islander Social Justice Commissioner establish structures and processes of constitutional reform and national renewal which are building towards the new millennium and the centenary of the Constitution in 2001.

3. That Indigenous constitutional structures and processes provide for access by all sections of the Indigenous community through consultations and public forums to the development of positions of negotiations with governments. This will require sufficient resources for the preparation of information and consultation materials, as well as the equitable funding of forums or groups for the expression of diverse views.

4. That structures and processes for Indigenous constitutional recognition and reform be directed not only to achieving specific rights but to continuing processes for the renewal of relations between Indigenous and non-Indigenous Australians."

After an extensive public consultation process, the Council for Aboriginal Reconciliation drew up two documents of reconciliation: the *"Australian Declaration Towards Reconciliation"* and the *"Roadmap for Reconciliation"*. On 27 May 2000, at Corroboree 2000, the Council presented these documents of reconciliation to the Prime Minister, other national leaders, and the nation as a whole. The *"Roadmap for Reconciliation"* consisted of various strategies, including *"The National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights"*. The strategy proposed a number of actions, including some constitutional and legislative processes, to assist the progressive resolution of outstanding issues for the recognition and enjoyment of Aboriginal and Torres Strait Islander rights. It aimed to ensure:

"that all Australians enjoy, in daily life, a fundamental equality of rights, opportunities and acceptance of responsibilities; and

the status and unique identities of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, achieve recognition, respect and understanding in the wider community."

<sup>35</sup> The submission noted that: "Of course, many proposals among those listed above could be enshrined in special legislation of the Australian Parliament, or achieved in a variety of other ways. No less important will be ensuring that well-intended amendments proposed by others do not have unforeseen negative effects."

Essential actions identified by the strategy included:

#### “Legislation

Governments establish legislative processes to deal with the ‘unfinished business’ of reconciliation, allowing for negotiated outcomes on matters such as Indigenous rights, self-determination within the life of the nation, and constitutional reform.

#### Australian Constitution

Within the broader context of future constitutional reform, the Commonwealth Parliament enacts legislation for a referendum which seeks to:

- prepare a new preamble to the Constitution which recognises the status of the first Australians; and
- remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.”

In Final Report to the Prime Minister and the Commonwealth Parliament in December 2000, the Council for Aboriginal Reconciliation made, amongst others, the following recommendation in relation to the “*manner of giving effect to*” the reconciliation documents:

“3. *The Commonwealth Parliament prepare legislation for a referendum which seeks to:*

- recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
- remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.”

The Law Council considers that any debate leading to a referendum must have regard to the comprehensive consultations undertaken by each of ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner in relation to options for Constitutional recognition, as well as the detailed consideration and recommendations by each of those bodies in relation to options for and processes leading to Constitutional reform.

## 2.4 Developments in the States and Territories

Further, in recent years the Constitutions of Victoria, Queensland and New South Wales have been amended to recognise Indigenous Australians to some degree.

In Victoria, in 2004 a new section 1A was incorporated into the Victorian Constitution, which provides:

### 1A. Recognition of Aboriginal people<sup>36</sup>

(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.

(3) The 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.

In 2006, Victoria became the first, and remains the only, Australian State (after the Australian Capital Territory in 2004) to enact a human rights Act. The Victorian *Charter of Human Rights and Responsibilities Act 2006* came into partial operation on 1 January 2007 and full operation on 1 January 2008, and contains a number of mechanisms designed to protect and promote human rights under law and in public administration in Victoria<sup>37</sup> as well as other mechanisms designed to ensure that human rights are taken into consideration in the development of government policy and in the making of new laws.

<sup>36</sup> Section 1A was inserted by No 73/2004 section 3.

<sup>37</sup> In particular sections 6, 7(2), 32 and 38.

In regard to Aboriginal and Torres Strait Islander peoples, the Victoria Charter recites in its Preamble that:

“This Charter is founded on the following principles —

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- **human rights have a special importance for the Aboriginal<sup>38</sup> people of Victoria, as descendants of Australia’s first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.**” (emphasis added)

The Victorian Charter also provides that Aboriginal persons’ cultural rights are human rights protected and promoted under the Charter. Part 2 provides as follows:

#### “PART 2—HUMAN RIGHTS

##### 7 Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

...

##### 19 Cultural rights

(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.”

In December 2008, the Premier of Queensland announced that her Government would investigate *“the insertion of a preamble into the Constitution of Queensland as an aspirational statement for all Queensland — and which gives due recognition to Aboriginal and Torres Strait Islander peoples as the first peoples of our state”*.

Section 3(c) of *Constitution (Preamble) Amendment Act 2010* (Qld) — introduced 24 November 2009 and assented 25 February 2010 — provides:

“(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”.

Section 3A prevents the use of the preamble as an aid for interpreting the Constitution or any other Queensland law. It provides:

“The 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.”

Likewise, in 2010, the *Constitution Act 1902* (NSW) was amended to provide:

#### “2 Recognition of Aboriginal people

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

<sup>38</sup> “Aboriginal” is defined in section 3(1) to mean: *“a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples.”*

(3) Nothing 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.”

## 2.5 Some Comparative Experiences

Constitutional reforms in Norway have resulted in recognition of the country as bi-cultural — Norwegian and Sami — and a guarantee to the Sami people of means to maintain their distinct culture. A 1988 constitutional amendment provides:

“It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”

In Canada, processes of constitutional reform were initiated in 1978. Section 35(1) of the *Constitution Act 1982* provides:

“The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”

Section 35(2) provides that the reference in s 35(1) to “*treaty rights*” includes rights that now exist by way of land claims agreements or may be so acquired.

Constitutional recognition has meant that Aboriginal and treaty rights can only be altered or terminated by consent or by constitutional amendment. Laws contravening s 35(1) can be set aside under s 52(1) of the *Constitution Act 1982*. The Canadian Supreme Court has confirmed that the words of s 35(1) should be given a generous, purposive interpretation.

Section 25 creates an exemption to the *Canadian Charter of Rights and Freedoms*, which forms Part I of the *Constitution Act 1982*:

“The guarantee of this Charter of certain rights and freedoms shall not be construed so as to derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including ... any rights or freedoms that may be acquired by the Aboriginal peoples of Canada by way of land claims settlement.”



# **Part Three:**

## Constitutional Provisions



## Part 3: Constitutional Provisions

### Commonwealth of Australia Constitution Act

#### Preamble

#### An Act to constitute the Commonwealth of Australia

(The *Commonwealth of Australia Constitution Act 1900* is an Act of the Parliament of the United Kingdom at Westminster)

**Whereas** the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:--

#### Section 25

**25** For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted.

#### Section 51(xxvi)

**51** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: - ...

(xxvi) The people of any race, for whom it is deemed necessary to make special laws:

#### Section 105A

**105A** (1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including--

(a) the taking over of such debts by the Commonwealth;

(b) the management of such debts;

(c) the payment of interest and the provision and management of sinking funds in respect of such debts;

(d) the consolidation, renewal, conversion, and redemption of such debts;

(e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and

(f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3) The Parliament may make laws for the carrying out by the parties of any such agreement.

(4) Any such agreement may be varied or rescinded by the parties thereto.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6) The powers conferred by this section shall not be construed as being limited in any way by the provision of section one hundred and five of this Constitution.

#### Underlined words repealed in 1967

**51** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: - ...

(xxvi) The people of any race, other than the aboriginal race in any State for whom it is deemed necessary to make special laws:

#### Section repealed in 1967

**127** In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.



# **Attachment A:**

## Profile of the Law Council of Australia



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## Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.



Law Council  
OF AUSTRALIA

19 Torrens Street  
Braddon ACT 2601

P. +61 2 6246 3788  
F. +61 2 6248 0639

[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)