



The NSW Aboriginal Land Council's

Submission: Australian Constitutional reform to recognise Aboriginal and Torres Strait Islander peoples

September 2011

Overview:

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and with over 20,000 members, is the largest Aboriginal member based organisation in Australia.

NSWALC is a self-funded statutory corporation under the *Aboriginal Land Rights Act 1983 (NSW)*, and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC also provides support to the network of 119 autonomous Local Aboriginal Land Councils (**LALCs**) across the state. LALCs have similar statutory objectives to NSWALC in regards to their own local communities.

The Australian Constitution was drafted in the last decade of the 19th century and establishes the Commonwealth Parliament and its powers. It provides the foundation of Australia's political and legal relationship with Aboriginal and Torres Strait Islander peoples.

The tone and the content of the Australian Constitution can be largely attributed to the attitudes of the political elite at the time of drafting and the popular ideologies at the time. These ideologies were exclusionary and in the spirit of *terra nullius*. The Australian Constitution was framed so as to ensure that decision making about rights protections were matters for the Parliament with only the most limited rights within it for Australian citizens.¹ As a result little consideration was given to Aboriginal and Torres Strait Islander peoples in the drafting of the Australian Constitution and no recognition of Aboriginal rights are embedded within it.

In 2010 the commitment by all major federal political parties to hold a referendum to seek to amend the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples gives Australia an opportunity to remove the discriminatory provisions of the Australian Constitution and to recognise Aboriginal and Torres Strait Islander peoples distinct cultures, prior ownership and unique place in Australia formally within the Australian Constitution. This opportunity should not be taken lightly, as it is unlikely that such a proposal for a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution will be presented again to Australian voters.

Affirmative constitutional recognition is core to the success of national strategies; including the Australian Government's 'holistic' approach closing the gap. It is also essential if Australia is to meet its international human rights obligations. In this context, NSWALC urges the Australian Government to move beyond mere symbolic recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution and seek to, at the minimum:

- I. Provide full constitutional recognition of Aboriginal and Torres Strait Islander peoples as the sovereign First Peoples of Australia.
- II. Remove section 51(xxvi) of the Australian Constitution, also known as the 'race power', and replace this with a power for the Australian Government to make laws with respect to *'matters beneficial to Aboriginal and Torres Strait Islander peoples in that such laws are only enacted for the sole purpose of securing the adequate advancement and the equal*

¹ Behrendt, L. 2007, 'The 1967 Referendum: 40 Years on...', *Australian Indigenous Law Review* 12, Vol 11(Special Edition).

enjoyment or exercise of human rights and fundamental freedoms for Aboriginal and Torres Strait Islander peoples'. This conforms to the accepted international standard for 'special measures' as allowed under the Convention on the Elimination of All Forms of Racial Discrimination.

- III. Remove in its entirety, section 25 of the Australian Constitution, which anticipates the disqualification of persons of a particular race from voting in state elections.
- IV. Insert a general guarantee of racial equality and a prohibition on racial discrimination into the Constitution.

International obligations:

The United Nations Declaration on the Rights of Indigenous People (the **Declaration**) was adopted by the UN General Assembly on 13 September 2007. At the 3 April, the Australian Government belatedly made a statement in support of the Declaration. The Declaration outlines the rights of an estimated 370 million Indigenous people throughout the world and is an important yardstick by which a state's human rights behaviour can be measured.

The International Covenant on Civil and Political Rights 1966 (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) similarly provide a framework for Indigenous peoples rights to self-determination and the recognition and protection of distinct cultural identities.² In addition, a fundamental right under the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**) is the right of Indigenous peoples to live free from discrimination.

The NSWALC supports practical measures taken by Government that seek to implement the Declaration, the CERD and other human rights mechanisms such as the ICCPR and the ICESCR.

The following excerpts of the Declaration identify the inherent rights of Aboriginal peoples which are particularly relevant to the recent commitment by Government to amend the Australian Constitution.

- 1. **Article** **1**
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
- 2. **Article** **2**
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
- 3. **Article** **3**
Indigenous peoples have the right to self-determination. By virtue of that right they freely

² Law Council of Australia, *Constitutional Recognition of Indigenous Australians, Discussion Paper*, Available: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2D64AD56-CCF1-979E-72D9-9D0714E6855B&siteName=lca. Accessed at 14 June 2011.

determine their political status and freely pursue their economic, social and cultural development.

NSWALC is particularly concerned with the Australian Government's efforts in regards to one fundamental right of the Declaration, that which can also be seen as central to the CERD – the right of Indigenous peoples to live free from discrimination. NSWALC notes that the Australian Government has continued to show passivity in its implementation of the Declaration and the CERD into law and policy. It is essential for the Australian Government to move forward from its 'commitment to formally support' the Declaration, to fully implementing these principles into laws, policies and practical measures.

At the end of 2009 the UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, investigated the situation of human rights and fundamental freedoms of Indigenous peoples in Australia. The Special Rapporteur noted that any partnership between the Australian Government and Aboriginal peoples should be one that is;

*based on respect, mutual resolve and mutual responsibility, and that is also fully respectful of the rights of Aboriginal and Torres Strait Islander peoples to maintain their distinct cultural identities, languages and connections with traditional lands, and to be in control of their own destinies under conditions of equality.*³

In Early 2010, the Special Rapporteur recommended in his report to the United Nations General Assembly that,

*The Government should pursue constitutional...recognition and protection of the rights of Aboriginal and Torres Strait Islander people in a manner providing long term security for these rights.*⁴

Similarly at the United Nations Periodic Review a series of recommendations were given relating to constitutional reform, including recommendation 107 - that the Australian Government:

*Launch a constitutional reform process to better recognize and protect the rights of the Aboriginals and Torres Strait Islanders which would include a framework covering the principles and objectives of the UN Declaration on the Rights of Indigenous Peoples and would take into account the opinions and contributions of indigenous peoples.*⁵

The Australian Government accepted this recommendation noting that it

³ Anaya, J. 27 August 2009, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, as he concludes his visit to Australia*, Canberra/Geneva. Available: www.un.org.au/files. Accessed: 25 July 2011.

⁴ Human Rights Council, 4 March 2010, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, The situation of indigenous peoples in Australia*, Un Doc A/HRC/15/ 4 March 2010. Available: <http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>. Accessed: 25 July 2011

⁵ Kingsford Legal Centre, *Thematic grouping of recommendations for Australia made during the Universal Periodic Review*. Available: <http://www.hrlrc.org.au/files/UPR-Recommendations-Thematic-Grouping.pdf>. Accessed: 18 August 2011.

*is committed to pursuing recognition of Indigenous peoples in the Australian Constitution and has appointed an Expert Panel to develop options and lead a wide-ranging national public consultation and engagement program.*⁶

With the increasing call for constitutional recognition for Australia's First Peoples and the Government's commitment to constitutional reform, NSWALC calls for Australia's foundational document to include protections for Aboriginal and Torres Strait Islander peoples', and all peoples', fundamental human right to live free from discrimination.

Discriminatory provisions of the Australian Constitution:

There are a number of discriminatory aspects currently within the Australian Constitution including;

- Section 25 which outlines provisions as to races disqualified from voting. This section anticipates the disqualification of persons of a particular race from voting in state elections and discriminates on the basis of race.
- Section 51 (xxvi), otherwise known as the 'race power' which provides the source of power for the enactment of racially discriminatory laws.
- Overall there is no statement that recognises Aboriginal peoples as First Peoples with distinct identities and histories, with prior occupation and ownership of the land and with continued dispossession.⁷

Section 25 states;

For the purpose 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, them, 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.

This section is inherently racist and no longer has any significant legal effect as the *Racial Discrimination Act 1975* (Cth) (**RDA**) now prevents any State from disqualifying anybody from voting on the basis of race.

Section 51 (xxvi) allows the Australian Government to make 'special laws' for 'the people of any race it deems necessary'. The key concern relating to this section is that it does not specify that these 'special laws' need to benefit the people they affect as opposed to discriminating against them.⁸ Although the RDA does this by prohibiting the Parliament from passing laws that discriminate on the basis of race, the RDA is legislation that can be repealed, suspended or amended at any time.

⁶ Australia's formal response to the UPR recommendations. Available: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(689F2CCBD6DC263C912FB74B15BE8285\)~OIL+-+UPR+-+Australia+s+response+-+FINAL+RESPONSE+-+27+May+2011+\(2\).pdf/\\$file/OIL+-+UPR+-+Australia+s+response+-+FINAL+RESPONSE+-+27+May+2011+\(2\).pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~OIL+-+UPR+-+Australia+s+response+-+FINAL+RESPONSE+-+27+May+2011+(2).pdf/$file/OIL+-+UPR+-+Australia+s+response+-+FINAL+RESPONSE+-+27+May+2011+(2).pdf).

Accessed: 25 July 2011.

⁷ Law Council of Australia, *Constitutional Recognition of Indigenous Australians, Discussion Paper*, Available http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=2D64AD56-CCF1-979E-72D9-9D0714E6855B&siteName=lca. Accessed at 14 June 2011.

⁸ See *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

Unfortunately when it comes to the 'race power' it is evident that it can and will be used to the detriment of Aboriginal peoples. This is particularly apparent in the Hindmarsh Island Bridge case (*Kartinyeri v Commonwealth* (1998)) and the Northern Territory Emergency Response (**NTER**).

In the matter of *Kartinyeri v Commonwealth* (1998) the Australian Government was successful in arguing that it had authority by virtue of the constitutional 'race power' to enact legislation expressly removing the Hindmarsh Island area from the purview of the RDA and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

In 2007 the Australian Government began the NTER. Law and order changes announced under the NTER included blanket compulsory income management in 73 prescribed Aboriginal communities in the Northern Territory (**NT**), their associated outstations and the 10 town camp regions in the NT, the removal of the permit system in the affected communities, Commonwealth take-over of Aboriginal land on five-year leases and a range of other law and order measures.

In order for these changes to be made the RDA, Australia's primary piece of legislation that upholds human rights and anti-discrimination principles, was suspended.

The UN Special Rapporteur noted in February 2010 that the NTER

limits the capacity of indigenous individuals to control or participate in decision affecting their own lives, property and cultural development, and it does so in a way that in effect discriminates on the base of race, thereby raising serious human rights concerns.

The Special Rapporteur stated that the provisions of the NTER are incompatible with Australia's human rights obligation, saying

The NTER...has an overtly interventionist architecture, with measures that undermine indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy.

In August 2010 the UN Committee on the Elimination of Racial Discrimination issued its final report to Australia over its treatment of Aboriginal and Torres Strait Islander peoples. The report noted that it was the first time the Committee had witnessed the suspension of discrimination on a very fundamental issue. The report recommended ensuring the RDA prevails over all other legislation which may be discriminatory and adopting comprehensive legislation providing entrenched protection against racial discrimination.

It is important to note that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is intended to provide protections for Aboriginal cultural heritage. The RDA is supposed to give effect to Australia's obligations under the CERD. Australia's obligations in this respect include taking all steps to eliminate racial discrimination and to review, rescind or amend laws that perpetuate discrimination wherever it exists. Both the Hindmarsh Island Bridge case and the NTER clearly demonstrate that the 'race power' can and will be used by the Australian Government to enact laws that detrimentally discriminate against Aboriginal peoples.⁹

Australia holds the dubious distinction of being the only developed country in the world to have a 'race power' that allows for the Parliament to enact racially discriminatory laws. Section 25 of the Constitution also allows for the exclusion of voters based on race. Proposed reform may give

⁹ Legg, M. 2002, 'The Australian Constitution and Indigenous Australians', Excerpt from *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 *Berkley Journal of International Law*. Available: <http://www.theage.com.au/opinion/politics/oldstyle-racism-still-in-constitution-20100913-1589c.html>. Accessed: July 2011.

Australia an opportunity to address these fundamental flaws that are not compatible with social democracy and Australia's international human rights obligations.

Why change is important

Powers and rights under the Australian Constitution have greater force than statute law (as evidenced in the repealing of the RDA in relation to the NTER) and common law, which can be altered by subsequent legislation (for example in the Wik decision and amendments to the *Native Title Act 1993* (Cth)). Aboriginal lawyer and academic, Megan Davis states;

*In Australia, Indigenous interests have only been accommodated in the most temporary way, by statute. What the state gives, the state can take away, as has happened with the ATSIC, the Racial Discrimination Act and native title.*¹⁰

Powers and rights under the Australian Constitution are greater as rights granted within the Constitution can only be amended through a referendum process.

The possible benefits flowing on from a reform process is highly dependent on the type of reform that is posed at the referendum. However, broadly speaking, the removal of the racially discriminatory provisions of the Australian Constitution (that is, the deletion of section 25 and the amendment of section 51 (xxvi) in line with NSWALC's recommendations) will assist in addressing the systemic and institutionalised discrimination that Aboriginal and Torres Strait Islander peoples currently experience and may assist the Government in achieving its *Closing the Gap* targets. There is strong evidence that this systemic and institutionalised discrimination has resulted in reduced opportunities to access societal resources required for health, leading to increased exposure to ill health.¹¹

*The lack of acknowledgement of a people's existence in a country's constitution has a major impact on their sense of identity, value within the community and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people. There is an association with socioeconomic disadvantage and subsequent higher rates of mental illness, physical illness, and incarceration..... While recognition in the Constitution would have a positive effect on the self esteem of Indigenous Australians and reinforce their pride in the value of their culture and history.*¹²

Reforming the Australian Constitution will begin to address the history of exclusion that Aboriginal and Torres Strait Islander peoples have experienced and more holistically affirms principles of equality and non-discrimination. Discriminatory provisions within the Australian Constitution are not in line with principles of social justice, equality and a 'fair go' which are espoused as being fundamental to Australian society.

The current proposal for reform of the Australian Constitution

The 2010 commitment by the major political parties was a commitment to recognise Aboriginal and Torres Strait Islander peoples as well as local government in the Australian Constitution. The history

¹⁰ Davis, M. 2009. 'A woman's place...' *Griffith Review* 156, p 157. Available: <http://www.griffithreview.com/edition-24-participation-society/222-essay/643.html>. Accessed 19 August 2011.

¹¹ Paradies, Y. et al, 2008, 'The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda', *Cooperative Research Centre for Aboriginal Health*, Discussion Paper Series No. 4. Available: http://www.lowitja.org.au/files/crahd_docs/Racism-Report.pdf. Accessed: 18 August 2011.

¹² The Royal Australian and New Zealand College of Psychiatrists, "Constitutional changes would improve Indigenous mental health" (2010) <<http://www.ranzcp.org/media/constitution-changes-would-improve-indigenous-mental-health.html>> 27 June 2011.

of successful referendums in Australia is limited, with only eight out of 44 being successful. Past referendums have also shown that ones with multiple questions are more likely to lead to the proposed amendments being rejected.¹³

Of the 44 referendums held since federation, referendums were held on 18 separate occasions. Five of these occasions asked single questions, while 13 asked multiple questions. In a series of referendums (including the 1974 referendum where local government recognition was sought) the ballot grouped together a number of questions. This in effect meant that a voter who was opposed to a single question had a clear incentive to vote 'no' regardless of how they might have felt about any of the other questions.

It is essential that the ballot at the next referendum, which will aim to provide recognition of Aboriginal and Torres Strait Islander peoples and local government, includes two distinct questions which are not grouped together.

In 2010 Newspoll (for Griffith University) conducted nationally the *Australian Constitutional Values Survey*. Of this survey, 75 per cent of respondents indicated it was important to have a referendum to recognise the history and culture of Indigenous Australians (43.2 per cent said it was very important and 31.5 per cent said it was somewhat important).¹⁴ Further to this, support was highest in Victoria and South Australia (with 79 and 78 per cent (respectively) of respondents indicating the referendum was at least somewhat important) while in Tasmania support was lowest (with 57 per cent of respondents seeing any importance in the referendum).¹⁵

As a result, NSWALC urges the Government to invest in education campaigns specifically targeting areas that have lower rates of appreciation that constitutional reform to recognise Aboriginal and Torres Strait Islander peoples is important. This is essential in attempting to secure a 'yes' vote at the proposed referendum, particularly due to the nature of section 128 of the Australian Constitution that establishes the need for a double majority for a successful referendum.

NSWALC's position

Constitutional recognition of Aboriginal and Torres Strait Islander peoples is essential as it has the potential to enshrine principles of non-discrimination and begin to address the history of exclusion of Aboriginal and Torres Strait Islander peoples in the nation.

The proposal for constitutional reform that is considered by government must reflect Australia's international human rights obligations, which include Aboriginal and Torres Strait Islander peoples right to self determination, the right to protect their distinct cultures and identities and the right to be protected from racial discrimination. NSWALC considers that in the approach to Constitutional reform, and consistent with international standards in Australia, the process to towards a

¹³ Australian Electoral Commission, 2011. *Referendum Dates and Results 1906 – Present*. Available: http://www.aec.gov.au/Elections/referendums/Referendums_Dates_and_Results.htm. Accessed: 23 June 2011.

¹⁴ Griffith University, October 2010. *The Australia Constitutional Values Survey 2010 Results Release 2*. Available: http://www.griffith.edu.au/_data/assets/pdf_file/0006/248271/Griffith-University-Australian-Constitutional-Values-Survey-October-2010-Results-2.pdf. Accessed: 13 July 2011.

¹⁵ Brown AJ, 9 November 2010, *Where is constitutional reform in Australia going?*, The drum opinion ABC. Available: <http://www.abc.net.au/unleashed/40908.html#>. Accessed: 18 August 2011.

referendum must be on a basis of open-consultations with Aboriginal and Torres Strait Islander peak bodies and communities with adequate timeframes in order to obtain their free, prior and informed consent towards any proposal for Constitutional reform. Such processes of consultation must seek to be open and transparent, reaching all demographics to give the referendum every opportunity to succeed.

NSWALC is also mindful of the need to be realistic about the timing of the referendum and considerate of the challenges and complexities involved in amending the Constitution. In order to gain meaningful change, NSWALC notes that the timeframe towards Constitutional recognition, which should secure enforceable rights for Aboriginal and Torres Strait Islander peoples, should not be limited to holding a referendum at the next Federal election. Maintaining bi-partisan support may be enhanced by holding the referendum within a more adequate timeframe, and not in association with a general Federal election. Sufficient time must be given to proper consultation with Aboriginal peak bodies, organisations and communities as well as developing a concerted public education campaign.

NSWALC recommends that reform to the Australian Constitution should move beyond mere symbolic recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution and seeks to at the least:

- I. Provide full constitutional recognition of Aboriginal and Torres Strait Islander peoples as the sovereign First Peoples of Australia.
- II. Remove section 51(xxvi) of the Constitution, also known as the “race power”, and replace this with a power for the Australian Government to make laws with respect to *‘matters beneficial to Aboriginal and Torres Strait Islander peoples in that such laws are only enacted for the sole purpose of securing the adequate advancement and the equal enjoyment or exercise of human rights and fundamental freedoms for Aboriginal and Torres Strait Islander peoples’*. This conforms to the accepted international standard for ‘special measures’ as allowed under the Convention on the *Elimination of All Forms of Racial Discrimination*.
- III. Remove in its entirety, section 25 of the Constitution, which anticipates the disqualification of persons of a particular race from voting in state elections.
- IV. Insert a general guarantee of racial equality and a prohibition on racial discrimination into the Constitution.

To provide greater rights protections of Aboriginal peoples of Australia, the Australian Government must move beyond the reform of the Australian Constitution. To ensure opportunities are created for Aboriginal peoples of Australia to remedy the disproportionate disadvantage experienced by so many Aboriginal peoples, the New South Wales Aboriginal Land Council strongly advocates for:

- The Australian Government to move forward from its ‘commitment to formally support’ the Declaration on the Rights of Indigenous Peoples, to fully implement these principles into laws, policies and most importantly practical measures.

- The Australian Government must unreservedly ratify and fully implement the International Labour Organisation Convention 1969 and the Indigenous and Tribal Populations Convention, 1989.