



New South Wales
Aboriginal Land Council
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NSWALC Submission to the Referendum Council on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples in the Australian Constitution

The NSW Aboriginal Land Council (**NSWALC**) is the peak Aboriginal representative body in New South Wales and, with over 23,000 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)*, with a legislative objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC is a peak stakeholder on this matter and appreciates the opportunity to provide this submission containing our feedback on this important issue.

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 First Nations Aboriginal and Torres Strait Islander peoples. Given the discriminatory views that were prevalent at the time it is perhaps not surprising that little consideration was given to First Nations Aboriginal and Torres Strait Islander peoples in the drafting of the Australian Constitution and no recognition of Aboriginal rights are embedded within it.

Over the past seven years, successive Federal Governments of both persuasions have professed their commitment and support for recognition of First Nations Aboriginal and Torres Strait Islander peoples in the Australian Constitution. However, the form of recognition, the process towards a referendum and the question to be put before the Australian public in a referendum remains undecided.

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. In 2009, the Australian Government belatedly made a statement in support of the Declaration.

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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.¹ 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.

NSWALC supports practical measures taken by Governments 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 First Nations Aboriginal and Torres Strait Islander peoples which are particularly relevant to the commitment by the Federal Government to amend the Australian Constitution.

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.*

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.*

Article 3 *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Discriminatory provisions of the Australian Constitution:

There are a number of discriminatory aspects currently within the Australian Constitution including Section 25, Section 51 (xxvi) as well as the fact that there is no statement that recognises First Nations Aboriginal and Torres Strait Islander peoples as First Peoples of the land mass now known as Australia.

Section 25 anticipates the disqualification of persons of a particular race from voting in State elections and discriminates on the basis of race. 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, 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.

¹ Law Council of Australia, *Constitutional Recognition of Indigenous Australians, Discussion Paper, 2011*
<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/ConstitutionalRecognitionofIndigenousAustralians.pdf>

This section is inherently racist and should be deleted from the Constitution. NSWALC notes that in practice this section is highly unlikely to be used today and does not have 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. However, the fact that such a section remains part of the Constitution is surely an ongoing international embarrassment for a contemporary democracy like Australia which champions its status as an open and tolerant society.

Section 51 (xxvi), otherwise known as the 'race power' provides the source of power for the enactment of racially discriminatory laws. 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.² 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 (as was done in with the suspension of the RDA by the Howard Government in 2007 to implement the Northern Territory Emergency Response (NTER)).

Overall there is no statement that recognises First Nation Aboriginal and Torres Strait Islander peoples as First Nations Peoples with distinct identities and histories, with prior occupation and ownership of the land and with continued dispossession.³ There is now persuasive evidence, mentioned further in this submission below, that instances of racism and discrimination (which include the continued lack of any proper acknowledgment of Aboriginal peoples' existence in Australia prior to 1788 in the Constitution) has a profound effect on Aboriginal people's mental, and physical, health and wellbeing.

NSWALC's position

Reform to the Australian Constitution should be meaningful and not result merely in symbolic recognition of First Nations Aboriginal and Torres Strait Islander peoples in the Australian Constitution. NSWALC's position is therefore for amendments to the Constitution which:

- I. **Provide full Constitutional recognition** of First Nations 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 First Nations 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.

² See *Kartinyeri v Commonwealth* (1998) 195 CLR 337

³ Law Council of Australia, *Constitutional Recognition of Indigenous Australians, Discussion Paper, 2011*
<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/ConstitutionalRecognitionofIndigenousAustralians.pdf>

- III. **Remove in its entirety section 25** of the Constitution, which anticipates the disqualification of person of 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 First Nations Aboriginal and Torres Strait Islander peoples of Australia, the Australian Government must move beyond the reform of the Australian Constitution. In addition to ensuring opportunities are created for First Nations Aboriginal and Torres Strait Islander peoples of Australia to remedy the disproportionate disadvantage experienced by so many Aboriginal peoples, NSWALC 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**.

How the Five Key Proposals in the Referendum Council's Discussion Paper Align with NSWALC's Position:

The five key proposals for reform highlighted in the Referendum Council's Discussion Paper which was used during the recent dialogues across Australia are listed below as well as NSWALC's position in relation to each of the five key proposals.

Key Proposal 1 - Drafting a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, and inserting it either in the Constitution or outside the Constitution, either as a preamble in a new head of power or in a statutory Declaration of Recognition.

NSWALC supports the essence of the first key proposal as it aligns to NSWALC's existing position on providing full recognition of Aboriginal and Torres Strait Islander peoples as the sovereign First Nations Peoples of Australia. However, in relation to the exact positioning of the statement of acknowledgement/recognition, NSWALC advocates for the statement being inserted within the Constitution itself as it could then only be removed or amended via a referendum. Should the option of using a statutory Declaration of Recognition be chosen then an incoming Government in the future could repeal the legislation without the need to put the matter to a referendum.

Key Proposal 2 - Amending or deleting the 'race power', section 51 (xxvi) and replacing it with a new head of power (which might contain a statement of acknowledgement as a preamble to that power) to enable the continuation of necessary laws with respect to Indigenous issues.

NSWALC supports this proposal as it aligns to NSWALC's existing position but advocates for the removal rather than the amendment of section 51(xxvi). Specifically NSWALC advocates for the replacing of section 51 (xxvi) with a power for the Australian Government to make laws with respect to 'matters beneficial to First Nations 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 First Nations Aboriginal and Torres Strait Islander peoples'.

Key Proposal 3 - Inserting a constitutional prohibition against racial discrimination into the Constitution

This is another proposal which aligns with NSWALC's position in relation to the Australian Constitution reform. However, NSWALC seeks to have a general guarantee of racial equality included in the Constitution, which NSWALC asserts would both enhance and complement this proposal.

Key Proposal 4 - Providing for an Indigenous voice to be heard by Parliament, and the right to be consulted on legislation and policy that affect Aboriginal and Torres Strait Islander people

NSWALC supports this proposal in principle noting that there would need to be consultation with First Nations Aboriginal and Torres Strait Islander peoples in relation to what form this Indigenous voice in Parliament might take. NSWALC also notes that a type of formal mechanism for the Indigenous voice to be heard and consulted on legislation already exists overseas including in New Zealand.

Key Proposal 5 - Deleting section 25, which contemplates the possibility of a State government excluding some Australians from voting in State elections on the basis of their race.

NSWALC supports this proposal which aligns with NSWALC's position in relation to the Australian Constitution reform.

Why change is important

Powers and rights under the Australian Constitution are greater than those provided by statute or common law as powers and rights enshrined within the Constitution can only be amended through a referendum process. Powers and rights under statute or common law can be suspended (as was done in with the suspension of the *Racial Discrimination Act 1975* by the Howard Government in 2007 as mentioned above) or altered with 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.*⁴

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, full recognition of First Nations Aboriginal and Torres Strait Islander peoples coupled with 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 First Nations Aboriginal and Torres Strait Islander peoples currently experience and may also 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.⁵ Indeed, Dr. Maria Tomasic,

⁴ Davis, M. 2009. 'A Woman's Place...' *Griffith Review* 156, p157.

⁵ Yin Paradies, Ricci Harris and Ian Anderson, 2008, 'The Impact of Racism on Indigenous Health in Australia and

President of the Royal Australian and New Zealand College of Psychiatrists from 2010- 2013, has highlighted this issue:

*"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. 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. It would make a real difference to the lives of Indigenous Australians."*⁶

Reforming the Australian Constitution will begin to address the history of exclusion that First Nations 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 bedrocks of Australian society.

However, it is also important to be mindful that amendment to the Constitution, including full recognition of First Nations Aboriginal and Torres Strait Islander peoples, is not the end of the journey for proper rights and recognition for our people. Rather it is merely a first step on the path towards other ways that First Nations Aboriginal and Torres Strait Islanders peoples' rights and recognition can finally be properly asserted. To that end, in the coming years, as well as the need to implement the above mentioned reforms to the Constitution, there also needs to be a renewed focus on working towards the development of treaty/ies between Governments across this nation and First Nations Aboriginal and Torres Strait Islander peoples.

Should you require further information in regards to any issues that have been raised in this submission, please do not hesitate to contact James Christian, Chief Executive Officer on 02 9689 4444.

Yours sincerely,



Roy Ah-See

Chairman

NSW Aboriginal Land Council

Aotearoa: Towards a Research Agenda', Cooperative Research Centre for Aboriginal Health, Discussion Paper Series No. 4.

⁶ Australian Medical Association Website <https://ama.com.au/ausmed/overdue-indigenous-recognition>