THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission to the Referendum Council

12 May 2017

Inquiry into the Constitutional Recognition of Indigenous Australians

Referendum Council

constitutionalrecognition@pmc.gov.au

Contact: **Emily Ryan**
President, NSW Young Lawyers

Suzanne Martinez
Chair, NSW Young Lawyers Public Law and Government Committee

Contributors: Angus Abadee, Richard Karaba, Damir Karamehmedovic and Shannon Peters

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

The NSW Young Lawyers Public Law and Government Committee makes the following submission in response to the Referendum Council's Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (**Constitutional Recognition Paper**).

It is acknowledged that there are many Aboriginal and Torres Strait Islander peoples who do not support constitutional recognition. This submission is not intended to ignore or disrespect those views, nor does it assume importance over those views. However, on the basis that a referendum on constitutional recognition may proceed, the Committee makes the following submission.

This submission does not consider the path to treaty. While the Committee considers this a separate issue to constitutional recognition, it supports treaty discussions as a next step after any referendum on constitutional recognition.

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Public Law and Government Committee (the **Committee**) is comprised of a group of over 850 members, which includes a diverse range of practising lawyers from the public and private sectors, barristers and students. The Committee aims to foster a social and educational environment for those who wish to keep abreast of developments, develop their skills, and gain awareness of potential career paths in these areas. The Committee's areas of focus include, but are not limited to, administrative law,

constitutional law and the work of government lawyers.

Summary of Recommendations

The Committee makes this submission to contribute to the process of consultation around the country. The Committee notes that the Referendum Council will hold its final dialogue on 24-26 May 2017, and welcomes the opportunity to comment further on the proposals that have been endorsed by Aboriginal and Torres Strait Islander peoples.

Any proposal must be endorsed and supported by Aboriginal and Torres Strait Islander peoples.

The Committee:

1. supports a combined Statement of Acknowledgement and head of power for Aboriginal and Torres Strait Islander peoples provision in the Constitution;
2. does not support the Statement being placed outside of the body of the Constitution, or as a preamble;
3. supports the contents of the Statement of Acknowledgement being determined by Aboriginal and Torres Strait Islander peoples;
4. supports the inclusion of a constitutional prohibition against racial discrimination in the form proposed by the Expert Panel on Constitutional Recognition of Indigenous Australians;
5. in the alternative, supports the limitation of the legislature's head of power for Aboriginal and Torres Strait Islander peoples in the Constitution to laws that do not adversely discriminate against Aboriginal and Torres Strait Islander peoples;
6. does not support the introduction of a new provision in the Constitution providing for the creation of a standalone Aboriginal and Torres Strait Islander advisory body; and
7. supports the repeal of section 25 of the Constitution.

A federal power to make laws for Aboriginal and Torres Strait Islander peoples (Questions 7- 9)

The Constitution should ensure that the Commonwealth Parliament retains the power to make laws with respect to Aboriginal and Torres Strait Islander peoples. The Committee proposes that section 51(xxvi) is repealed and that a new section 51A is inserted, which contains a Statement of Acknowledgement and the head of power.

Replacing the current placitum with a standalone provision will remove references to 'race' from the Constitution; thereby removing the power of Parliament to make laws with respect to a person's race. The Committee proposes that the wording of the head of power is:

> 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 Aboriginal and Torres Strait Islander peoples but not so as to adversely discriminate against them.

This head of power will ensure that the Commonwealth retains existing powers to make laws with respect to Aboriginal and Torres Strait Islander peoples, but ensures that the exercise of this power is limited to where the law does not adversely discriminate against them.

The Committee considers that the words 'but not so as to adversely discriminate against them' are not necessary if a standalone prohibition against racial discrimination is included in the referendum proposal.

The Committee considers that a separate standalone head of power for Aboriginal and Torres Strait Islander peoples is necessary. No other group in Australia has been subjected to the level of discrimination as the Australia's First Peoples. No other group has had actively discriminatory laws passed against it in the way Indigenous Australians have. Moreover, no other peoples have had general anti-discrimination laws suspended to allow active discrimination, except for Aboriginal and Torres Strait Islander peoples.

The proposed model ensures that the Parliament retains its current legislative power to make laws with respect to native title, community safety in remote and regional communities, and grant funding for Aboriginal and Torres Strait Islander community organisations, tempered only by a requirement that the law does not adversely discriminate against Aboriginal and Torres Strait Islander peoples.

Statement of Acknowledgement (Questions 1 - 6)

Australia stands alone amongst settler nations in not recognising its rich Indigenous history and culture in its founding document. A Statement of Acknowledgement celebrating Australia's Aboriginal and Torres Strait Islander origins and cultures and the role that Aboriginal and Torres Strait Islander peoples play in the nation is a critical step to ensure that the Constitution reflects Australia's history. The Committee supports the inclusion of a Statement of Acknowledgement of Australia's Aboriginal and Torres Strait Islander history and culture in the Constitution. The form of words should be settled in consultation with Aboriginal and Torres Strait Islander peoples.

Position of the statement of acknowledgement

The Committee supports the Statement of Acknowledgement in the body of the Constitution. The Committee does not support the Statement of Acknowledgement being placed in either the *Commonwealth of Australia Constitution Act 1900* (Cth), nor as a standalone Preamble before the substantive provisions of the Constitution.

Recognition should be in a new section 51A

The Committee supports combining the Statement of Acknowledgement with the head of power (discussed below). Inserting preambular language into a new section 51A, as proposed by the Expert Panel on Constitutional Recognition of Indigenous Australians, will create a lasting statement of Australia's recognition of Aboriginal and Torres Strait Islander peoples' connection with country, with each other, and

our nation's history. This would provide a textual guide to the purpose of the substantive provision. Moreover, depending on its terms, it could state that Aboriginal and Torres Strait Islander cultures will play a significant role in Australia's future.

Including a Statement of Acknowledgement in a new section 51A will assist Australians to understand the legal consequences of the proposed amendment.

Recognition should go beyond a Preamble

Inserting a Statement of Acknowledgement in the Act, or as a standalone Preamble before the substantive provisions of the Constitution, may create legal uncertainty due to the anomalous position at the start of the Constitution, rather than as a specifically designed substantive provision.

Proponents of a preambular Statement of Acknowledgement have proposed that a 'no legal effect' clause may overcome the legal uncertainty of inserting the Statement in either the Act or a standalone Preamble. The Committee does not support this approach as it gives the impression that the recognition is only tokenistic.

While preambles are often considered to have no positive force independent of the legislative instrument itself, they can be used in the interpretation of the Act where ambiguity exists. Given the nature of constitutional drafting, it is likely that a preambular Statement of Acknowledgement would be called upon to cast light on any ambiguity. In *Wacando,* Mason J argued that 'the particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object.'[1] The consequence of inserting a preambular Statement of Acknowledgment is that it could be used by a Court to introduce new statutory purpose or objects to substantive provisions in the Constitution – potentially causing provisions to be construed by the court more narrowly than intended.

Further, it is likely that there will be further confusion as to its interpretative value, as any Preamble inserted into the Constitution, rather than the Act, would occur after the preambular language in the Act, making it more likely that the provision will be interpreted as a substantive provision. A Court is likely to use the Preamble to interpret old and new language in the Constitution, even though the old language remains unchanged as the new change will reflect the will of the people.

Any amendments to the Act would need to be comprehensive and remedy all errors in its provisions, including Australia's original states, and would not amount to constitutional recognition.

Changing the Imperial Act would require wholesale change but would lack public involvement and a sense of public ownership over the change, as amendments to the Act do not require a referendum, but are part of the legislative power of the Parliament under the *Australia Acts*. The Committee considers that this form

[1] *Wacando v the Commonwealth* (1981) 148 CLR 1, 23 (Mason J).

of recognition would not add to the existing statutory recognition under the *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth).

The Committee does not support a Statement of Acknowledgement outside of the Constitution, such as a Declaration of Recognition, as this falls short of the aspirations of many Aboriginal and Torres Strait Islander peoples who have been engaged in the constitutional recognition process, and the broader Australian community. Those who have argued that it is inappropriate for the Constitution to contain anything other than the rules governing the powers of the arms of Government underestimate the position that the Constitution *could* have in our nation.

A constitutional prohibition against racial discrimination (Questions 10 - 13)

The Committee supports the inclusion of a standalone prohibition against racial discrimination.

A prohibition is necessary

The Committee considers that a standalone prohibition is in line with existing restrictions on the legislative power of the Constitution, including on the free exercise of religion (section 116) and freedom from discrimination based on which State a person resides in (section 51(ii)). It embraces the idea of the Constitution as a rulebook by prescribing what the Parliament can and cannot do.

Moreover, it is necessary, as part of the removal of provisions in the Constitution that embody racial discrimination, that they are replaced with a provision that denounces this history, and puts a stop on any future Parliaments passing laws that discriminate on the basis of race.

While this proposal has been pushed as part of the broader discussion of constitutional recognition of Aboriginal and Torres Strait Islander peoples, including the *Council of Aboriginal Reconciliation Final Report* (2000)[2] and *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012),[3] the proposal transcends the idea of constitutional recognition, and has broad appeal to all Australians. It will protect all Australians from parliamentary overreach, and ensures that inadvertent discrimination is protected against as much as overt discrimination.

The Committee supports the 'section 116A' proposed by the Expert Panel on Constitutional Recognition of Indigenous Australians.

[2] Council for Aboriginal Reconciliation, *Final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000) < http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text10.htm>.
[3] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012), 173.

Parliamentary sovereignty

The Committee notes that much of the opposition to a prohibition of racial discrimination is focused on a concern of fettering parliamentary sovereignty by giving the courts a broad power to strike down laws deemed to be inconsistent with the prohibition.[4]

Those opposed to the standalone prohibition on racial discrimination argue that Parliament is competent to make legislation to protect people from being discriminated against on the grounds of their race, and have done so in an effective manner, and that the courts would have an unfettered power to interpret that provision when considering legislative instruments and executive action.

Moreover, there is concern that a prohibition on discrimination limited only to race would not protect against other forms of discrimination, and is reliant on the amorphous concept of 'race', the very thing that is sought to be removed from the Constitution.

The Committee, disagrees, and considers that there is significant value in including a standalone prohibition of racial discrimination, notwithstanding that it fetters the power of the Parliament.

When the Australian people voted to federate under the Constitution, they ensured that the courts were given the power to strike down laws found to be inconsistent with the Constitution. The people agreed that the court should have final say on whether a law is valid, not the Legislature. To argue that this new provision would create broad new powers for the courts is to ignore the over 100 years of constitutional jurisprudence that notes that this power has been around since the Constitution commenced.

The Australian people should be given the opportunity to vote on a proposal that ensures that they will not be discriminated against by the Commonwealth, or a State or Territory, based on their race. It will ensure that where the Government passes a law under a head of power that it is read subject to the prohibition. It will ensure that where a law is passed, including under section 122 ('the Territories power'), that the Parliament is not able to pass discriminatory laws with respect to Aboriginal and Torres Strait Islander peoples living in the territories under section 122.

An Indigenous voice (Questions 14 – 17)

The Committee supports increasing the involvement of Aboriginal and Torres Strait Islander peoples in decisions that affect them, including the laws and policies about Indigenous affairs. However, the Committee does not support inserting a new provision or Chapter into the Constitution to form an Indigenous advisory role or body.

[4] See, eg, Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' (2012) 3 *University of Illinois Law Review* 683, 687; Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004), 38–42.

The Parliament has broad powers to create parliamentary committees to advise on any issue it sees fit. One example of this is the Parliamentary Joint Committee on Human Rights, a creature of statute that examines Bills and legislative instruments to assess their compatibility with human rights. These bodies, however, are only composed of parliamentarians, and can be dissolved at any time.

The Parliament and Government have from time to time created advisory bodies that sit outside of the Parliament, which are created under one of the Commonwealth Parliament's existing constitutional legislative powers. With respect to Indigenous issues, this has included the Council for Aboriginal Affairs, the National Aboriginal Consultative Committee and its successor, the National Aboriginal Conference, and Aboriginal and Torres Strait Islander Commission.

Whilst it is clear that a power to create advisory bodies to review and provide advice on legislative and spending proposals already exists, the Pearson model proposes inserting a new Chapter into the Constitution to reiterate the power of the Parliament to create an Indigenous advisory body.[5]

While commentators have argued this would ensure that Parliament is compelled to establish and maintain such an advisory body, case law on constitutional bodies (for example, the section 101 Inter-State Commission) indicates there may be no compellable obligation on Parliament to create, or maintain, the advisory body, particularly as proponents suggest it would be non-justiciable (i.e. its recommendations would not compel Parliament to act on that advice).

Further, it is difficult to argue that creating such a body as a means for ensuring that Aboriginal and Torres Strait Islander peoples are not adversely discriminated against will be more effective than simply restricting the legislative power for Parliament to adversely discriminate against Indigenous Australians, either by an amendment to section 51, or by a standalone racial discrimination prohibition, couched in similar terms as existing constitutional limitations, including section 51(ii).

While the Committee supports Aboriginal and Torres Strait Islander peoples having more say, directly, on laws and policies that affect Indigenous Australians, the Committee's view is that this does not require a new Chapter in the Constitution.

Deleting section 25 (Questions 18 – 19)

The Committee supports the repeal of section 25.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

[5] Noel Pearson, *A Rightful Place: Race, Recognition and a more complete Commonwealth* (2014) *Quarterly Essay* 55.

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Contact:

Emily Ryan

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Suzanne Martinez

Chair

NSW Young Lawyers Public Law and Government Committee

Email: publiclaw.chair@younglawyers.com.au