

28 September 2011

Expert Panel on Constitutional Recognition
Of Indigenous Australians
C/- Department of Families, Housing,
Community Services and Indigenous Affairs
PO Box 7576
Canberra Business centre
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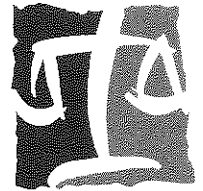
by email: submissions@youmeunity.org.au

To the Expert Panel on Constitutional Recognition of Indigenous
Australians,

**Constitutional Recognition of Aboriginal and Torres Strait Islander
People.**

The Women's Legal Centre (ACT & Region) (WLC) is pleased the Commonwealth Government is looking into amending the Australian Constitution with regards to the rights of Aboriginal and Torres Strait Islander peoples. The WLC believes changes to the Constitution are long overdue and that amendments need to include recognition in the form of both a Preamble and substantive amendments to specific provisions. The WLC calls on both the Federal Government and the Coalition to demonstrate a real commitment to upholding the rights of the first peoples of Australia, and leading change for Aboriginal and Torres Strait Islander peoples.

The Women's Legal Centre (ACT and Region) Inc (the WLC), is a Community Legal Centre accredited by the National Association of Community Legal Centres. The Centre has been operating in Canberra since 1996. The main areas in which we provide advice are family law, domestic violence, and employment and discrimination law. Our client group includes disadvantaged women, such as those from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander women, women with disabilities, and women living in poverty. Around half of the women seeking assistance from the Centre in family law matters have experienced family violence. In 2006, the WLC established an Indigenous Women's Law and Justice Support Program to improve access and outcomes for Indigenous women in relation to law and justice services.



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The Centre believes that Australia should be ashamed of its history and the past injustices inflicted on the Indigenous peoples of this land since colonial settlement. Current statistics in areas including health, education, employment and over-representation in the criminal justice system clearly demonstrate the disadvantage experienced by Aboriginal and Torres Strait Islander peoples. This disadvantage is also evident in the experiences of the Aboriginal and Torres Strait Islander women who approach our Centre for legal assistance. We work with women from the Stolen Generations and recognise the devastation attributable to past practices of Australian governments.

Whilst many referendums to amend the Constitution have historically been fraught with failure; the Centre believes that Australia cannot move forward in its stated aim to reduce the disadvantage experienced by Aboriginal and Torres Strait Islander peoples without amendments to our highest law.

Constitutional Amendments

The WLC believes there should be three amendments to the Constitution. These amendments are:

- A Preamble inserted in the Constitution
- Repeal Section 25
- Repeal Section 51(xxvi)

Preamble

A Preamble to the Australian Constitution is important. A Preamble reflects the principles on which a society is based. It gives a message to the world about the values, aspirations and principles of the people of Australia. This is an opportunity for the Australian people to demonstrate how seriously we take the rights of Aboriginal and Torres Strait Islander peoples.

Although a Preamble is largely a symbolic gesture, the WLC strongly believes there should be a preamble to the Australian Constitution which recognises Aboriginal and Torres Strait Islander people's unique position as the original owners of the land. The WLC believes that the Preamble should be written by members of the Aboriginal and Torres Strait Islander community through consultation with Aboriginal and Torres Strait Islander peoples.

Repeal Section 25

The WLC believes section 25 should be repealed on the basis that it is a racist provision. Section 25 addresses the situation where Australians may be excluded from voting based on their race. In our current era, this section is surely obsolete. Our domestic and international obligations relating to anti-discrimination laws and human rights compliance prohibit the Australian Government from ever excluding an individual or group from voting on the basis of their race. It is therefore unacceptable that the Constitution of Australia, in 2011, should contain a provision which suggests that people could be treated differently, indeed unfavourably, on the basis of their race. While it may be administratively difficult to amend the Constitution, the necessary steps must be taken to ensure that our highest law does not promote differential and unfavourable treatment of people based on race.

Repeal Section 51(xxvi)

This section allows the Government to make special laws with respect to the people of any race. This section allows the government to enact laws which may be beneficial *or* detrimental to Aboriginal and Torres Strait Islander peoples. The section was amended through the 1967 referendum. The Australian people believed at the time that they were amending the Constitution to improve the position of Aboriginal and Torres Strait Islander peoples. It was never envisaged that the section would be used to the detriment of Aboriginal and Torres Strait Islander peoples. The inadequacy of section 51(xxvi) as a tool to protect against racial discrimination was highlighted in the *Hindmarsh Island Bridge Case*. Although some legal uncertainties remain regarding the nature and extent of the 'race power', it seems this section empowers the Government to enact laws which discriminate against Aboriginal and Torres Strait Islander peoples.¹ Again, the Centre asserts that such distinction on the basis of race is inconsistent with Australia's Human Rights and anti-discrimination obligations. The simplest way to address this inconsistency is through repeal of section 51(xxvi).

Amending the Constitution

Past Referendums have demonstrated the general unwillingness of the Australian people to amend the Constitution. Research has shown that for a proposed amendment to be successful, certain factors have to be present. These factors include:

- Bipartisan support for the amendment
- Popular ownership of the proposal
- Effective education; and
- Sensible proposals.

It is clear that without support from both the Federal Government and the Coalition, support for change it is unlikely to take place. The majority of the Australian people need to believe in the proposed changes. This can only happen if the Australian people understand what the proposed changes mean. Accordingly, an effective education campaign is vital if the changes are to be successful.

Historically, Australians have support constitutional change when it comes to improving the situation of Australia's Indigenous peoples. In 1967, when the Australian population thought they were correcting an injustice in the Constitution regarding Aboriginal and Torres Strait Islander peoples, there was a massive vote in favour of amendment. Over 90 percent of the population voted to amend the Constitution that year.

Given our constitutional history, the WLC believes it is likely that the amendments to the Constitution we have outlined above would pass successfully via referendum. However, such success will require a commitment from both sides of Government and substantial investment in educative resources.

Assuming the Australian Government moves to amend the Constitution, the WLC also calls for proper, thorough and transparent consultation with Aboriginal and Torres Strait Islander peoples in all aspects of the amendment process.

¹ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337

If you would like to discuss any aspect of this submission, please contact Carol Benda, at the Women's Legal Centre in Canberra on (02) 6257 4377 or cbenda@womenslegalact.org.

Yours sincerely,
Women's Legal Centre (ACT & Region)



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Co-ordinator