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Expert Panel on Constitutional Recognition of Indigenous Australians
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BY ELECTRONIC SUBMISSION

Dear Members of the Expert Panel

Submission on Content of a Referendum Package

As Director for the Indigenous Legal Issues Project at the Gilbert + Tobin Centre of Public Law, I appreciate the opportunity to make submissions to the Expert Panel on Constitutional Recognition of Indigenous Australians (the Panel). This constitutes the primary submission of the Centre on the substantive content of a referendum package.

In brief, my submissions are:

- we face a rare opportunity because substantive constitutional change is politically achievable in the near term;
- some symbolic change is important, because a Constitution for Australia that is silent about its first peoples has a hole at its centre that must be filled;
- but the opportunity for practical reforms cannot be missed: Aboriginal and Torres Strait Islander people have waited too long for substantive change and Australian voters will be looking to the Panel for practical measures that can make a material difference to people's lives;

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- the Panel should recommend a set of related proposals as a package, being the maximum positive changes achievable in the current political cycle and reflecting two or three unifying ideas, such as fairness, inclusion and the acceptance of shared responsibility;
- the issue of racial discrimination must be addressed in a thorough and coherent way, as half-measures will leave an unwanted legacy of further unfinished business;
- in my view this means the following elements:
 1. replacing the **racess power** in s 51(xxvi) with a power to make laws with respect to Aboriginal and Torres Strait Islander peoples;
 2. a **non discrimination clause** on the issue of race which applies not just to s 51(xxvi) but *all* exercises of legislative and executive power;
 3. a provision to support **agreement-making** between governments and Aboriginal and Torres Strait Islander people modeled on the current s 105A;
 4. deleting **section 25** of the Constitution which contemplates State electoral laws that discriminate on the basis of race; and
 5. a **Statement of Recognition** in the body of the Constitution, acknowledging important aspects of Aboriginal and Torres Strait Islander history, culture, identity and languages.

THE NECESSITY FOR PRACTICAL AS WELL AS SYMBOLIC CHANGE

I am aware that one key issue for the Expert Panel, the Government and the Parliament is determining how ambitious a referendum package should be. I share the strong view that has been expressed at Panel consultations and elsewhere. That is, a package which includes substantive practical reforms, and not just important symbolic change, has a much better chance of satisfying two crucial audiences: Aboriginal and Torres Strait Islander communities and the wider voting public.

A proposal which settles only for symbolic change risks failing to win a strong level of Aboriginal and Torres Strait Islander support. Without that support, it is difficult to see how a Yes vote could be won, or indeed the purpose of proceeding to a referendum. Additionally, the wider electorate will be keen to know what difference a Yes vote will make. Practical changes make the package easier to sell.

These are not just pragmatic observations about achieving the necessary numbers for success. They reflect a deeper appreciation of the moment which appears to have arrived in Australia's legal and political history: as the need and desire for better approaches in Indigenous affairs coalesces with a solid platform of multi-party political support for constitutional change and the definitive commitment to hold a referendum in the near term.

The Australian Constitution was drafted in an era when racial discrimination was regarded as an acceptable basis for law and policy. The assumption now known as 'terra nullius' was so deeply embedded in our legal system it did not even need to be mentioned in 1901. For decades thereafter Aboriginal and Torres Strait Islander people were subjected to discrimination by governments, sanctioned by law – in their right to vote, in their freedom of movement, in the work they did and in their attempt to keep families together.

Social change in the latter part of the 20th Century saw legal reform and much of that formal discrimination dismantled. It was hoped that the enormous effort poured into the successful 1967 referendum would seal this process. But the High Court's findings in the case of *Kartinyeri v Commonwealth* (1998) show that those hopes have been disappointed and we know from recent experience in the Northern Territory that beyond the races power other Commonwealth powers can be used to over-ride non-discrimination principles in relation to Aboriginal people.

Key proposals for constitutional change have circulated for decades amongst Aboriginal and Torres Strait Islander communities and the broader Australian public. We have talked long enough about the unfinished business from the 1967 referendum and the reconciliation process. The opportunity for making substantive change has arrived and with strong recommendations for practical as well as symbolic change, the Panel can drive the Australian nation forward toward that goal.

THE RACES POWER

The power in section 51(xxvi) is already de facto a power to make laws in relation to Aboriginal and Torres Strait Islander people. When the High Court heard the case of *Kartinyeri v Commonwealth* in 1998 it established that no laws to that point had solely relied for their validity on s 51(xxvi) other than ones specifically addressed to Aboriginal and Torres Strait Islander people. I am likewise not aware of any s 51(xxvi) law since 1998 that concerns a group other than Aboriginal and/or Torres Strait Islander people.

Because of its outdated and now unseemly origins, it is inappropriate to use 'race' as the basis for exercising a law-making power.

It is nevertheless appropriate that the Constitution authorise Indigenous-specific legislation. The stand-alone justification for that is the unique status of Aboriginal and Torres Strait Islander people as the first peoples for this place. Further, it is appropriate that there be such a power to make laws at a national level, across the federation. An important step forward in 1967 was the recognition that the Commonwealth had national responsibilities in the area of Indigenous affairs and the matter could not be left solely to the States. That view was vindicated in 1993, when Western Australia enacted laws to weaken native title in the aftermath of the *Mabo* decision and a national law was needed to hold the line. So, while the wording of section 51(xxvi) needs to be revisited and improved, the Commonwealth Parliament must retain an unambiguous power to make national laws.

Some have suggested a power which in its wording is tilted in a positive direction, such as ‘benefit’ or ‘advancement’. While supporting the intent, for reasons explained below, I prefer broad and neutral wording for a revised s 51(xxvi), as a power ‘to make laws with respect to...Aboriginal and Torres Strait Islander people’. A key remaining challenge is the wording of an exception to a non-discrimination clause, so as to permit appropriate use of the power to make Indigenous-specific laws under s 51(xxvi), now and in future decades.

A NON-DISCRIMINATION CLAUSE

The Australian Constitution permits governments across the federation to engage in racial discrimination and openly contemplates State electoral laws which disenfranchise people on the basis of race. Racist laws and policies might have survived public scrutiny in the late 19th Century. The potential for such laws and policies surely cannot survive a 21st Century referendum which is specifically directed to positive change for the benefit of Aboriginal and Torres Strait Islander people.

The referendum package recommended by the Panel should include a non-discrimination clause which says that no law or government action shall discriminate on the basis of race.

There are differing views in Australia about legally enforceable protection of rights and freedoms and that is a relevant consideration when considering proposals which must pass Parliament and secure a ‘double majority’ in the electorate. But non-discrimination is qualitatively different from the much broader question of the desirability of bills or charters of rights. Non-discrimination on the basis of race has a decades-deep history in Australian statutory law. Every jurisdiction in Australia has legislated for this principle. There is nothing radical in Australia about giving legal force to the non-discrimination principle.

But putting the principle *into the Constitution* is not just an additional symbolic step up from existing legislation. It can make a material improvement in the lives of Aboriginal

and Torres Strait Islander people. It is important, on the other hand, not to over-promise what such a clause will do. The High Court may well decide that, like most other rights and freedoms in a constitutional setting, a non-discrimination clause is not an absolute freedom and is subject to reasonable limitations. The proportionality principle may play a role (see below). But even if that is right, there are still significant advances on the present state of the law.

The key pay-off from constitutionalising non-discrimination when it comes to races is that it will require better quality and more careful use of governmental and law-making power in Indigenous affairs.

Indigenous-specific legislation is more likely to satisfy the non-discrimination principle if it demonstrates the qualities of good decision-making: the clear identification of legitimate purposes and the adoption of reasonable and proportionate means to achieve them. Arriving at reasonable and proportionate measures that are necessary to achieve policy objectives in Indigenous affairs means being both more careful and respectful of the people affected.

There is a long history in Australia of flawed policy, unilateralism and too little thought in advance about fair and effective implementation in Indigenous affairs. As Peter Yu, Marcia Ella Duncan and Bill Gray said of the Northern Territory Intervention in 2008:

Support for the positive potential of NTER measures has been dampened and delayed by the manner in which they were imposed. The Intervention diminished its own effectiveness through its failure to engage constructively with the Aboriginal people it was intended to help.¹

Take, for example, the lack of preparation in applying ‘income management’ to the social security payments of Aboriginal people across Northern Territory communities (whatever view one takes of the merits of compulsory income management). In the context of a measure that treated Aboriginal people in a sweeping and indiscriminate fashion, regardless of their personal and family circumstances, their achievements and their community contribution, it was extraordinary that so little attention was paid to implementation issues before launching the policy.

The BasicsCard, the debit card necessary to make the system work properly, became available from Centrelink in September 2008, more than 12 months after the commencement of the income management laws:

This is a basic technical component of the scheme that the government should have straightened out before it launched the system. Instead Aboriginal people were forced to make do with second-best solutions that were inflexible, inefficient

¹ Peter Yu, Marcia Ella Duncan and Bill Gray, *Report of the NTER Review Board* (2008), pp 9-10.

and disruptive. Stored value cards generated a whole set of new problems in the lives of many Aboriginal people suddenly subjected to income management. They could only be redeemed at a small number of stores. It was not clear that they could be augmented with cash, nor that an unused balance could be spent on later occasions. New cards had to be constantly obtained in order that basic necessities could be bought. Small business operators lost custom to large stores or in remote areas faced enormous record-keeping and other demands as they were compelled to make the government's policy work. Centrelink staff were diverted into unnecessary and repetitious tasks and community organisations were likewise saddled with a major new problem-solving workload... A government mindful of its responsibilities to the human beings affected by its policies would not take such a high-handed approach to the introduction of a major change to the social security system.²

Likewise, the Commonwealth never provided a satisfactory explanation as to why compulsorily acquiring exclusive possession for five years over Aboriginal land in community townships was a reasonable, proportionate and necessary incursion upon property rights in order to achieve non-discriminatory objectives under the Intervention.

Constitutionalising the non-discrimination principle reduces the risk that Aboriginal and Torres Strait Islander people will confront the kind of ill-prepared policy or poor implementation they experience more often than other Australians.

CO-ORDINATING THE POWER IN S 51(XXVI) AND THE NON DISCRIMINATION CLAUSE

This is probably the most important legal task in front of the Panel. Finding the right words to clarify the relationship between a national power to make Indigenous-specific laws on the one hand and the non-discrimination principle on the other is a challenging task. I am not aware of any approach which can wish away the problem and it is a problem of great substance not merely a technical issue of legal drafting. The crucial issue is what Indigenous-specific laws should be unambiguously possible in five, ten, thirty and possibly a hundred years. Australia's constitutional history suggests that Aboriginal and Torres Strait Islander people will be living with the wording adopted at the 2013 referendum, if a Yes vote is successful, for many decades to come.

I am reluctant to adopt a definitive position on the issue in this submission because my thinking and the thinking of others on constitutional change continues to develop as more intensive discussions have taken place on constitutional change in recent months. It is likely that further expert discussion amongst the Panel and a wider range of people

² Sean Brennan, Submission to the Northern Territory Emergency Response Review Board on NT Intervention Measures, 22 August 2008 <www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Submission_NTER_Review_Board.pdf>, p 17.

is needed to arrive at the preferred solution. However, I do have some submissions to put the Panel reflecting my current views on this most important issue.

A ‘benefit’ requirement in s 51(xxvi)?

I am not convinced that the answer lies in conditioning the power in s 51(xxvi) by use of the word ‘benefit’ or ‘advancement’ and then carving out the laws enacted under this power as exceptions to the non-discrimination principle. There are two main reasons. The first is that such a change alone will not address the adverse use of other legislative and executive powers, such as the Territories power in section 122 of the Constitution, the corporations power, State legislative powers and so on. That, however, is more an argument which reinforces the need for a broad non-discrimination clause than a conclusive case against including ‘benefit’ or ‘advancement’ in a reworded s 51(xxvi).

The second and more specific reason is that I believe that moving beyond neutral wording in the power risks neutralising the impact of the non-discrimination clause in the ultimate judicial calculus. When confronted with a future challenge by Aboriginal or Torres Strait Islander people to an Indigenous-specific federal law, on the grounds that it breaches the non-discrimination clause, the High Court will ask first whether the law is supported by a power and then second whether it constitutes impermissible racial discrimination. If the Commonwealth satisfies the Court there is benefit in the law, it is hard to imagine the judges then backtracking from that conclusion to a finding of invalidity due to racial discrimination. As one lawyer put it, with some evidence of ‘benefit’ established, the legal challenge is ‘seven wickets down’. The risk is that a full and clear-sighted analysis of the non-discrimination principle will be impeded by the prior legal finding of benefit. A neutral worded power may better clear the way for the discrimination analysis.

I acknowledge, however, that in a different scenario where Aboriginal or Torres Strait Islander people seek to defend an Indigenous-specific law against challenge by a non-Indigenous party, the presence of the word ‘benefit’ may offer legal protection which appropriately informs the judicial application of the non-discrimination principle.

Leaving the entire co-ordination task to the High Court

Another response to the difficulty of this challenge could be to say nothing in the text as to how Indigenous-specific laws relate to the non-discrimination principle. The basis for this approach would be that drafting a legal formula in advance is a perilous exercise and that the High Court will develop doctrine on an evolving basis, employing the familiar legal principle that a Court must strive to give a coherent effect to provisions that co-exist in the same legal document.

Looking to the case law which has developed under statutory non-discrimination regimes in Australia such as the *Racial Discrimination Act 1975* and to what I understand to be international law principles regarding non-discrimination, the High

Court may develop a body of constitutional doctrine that permits Indigenous-specific laws in one or both of the following situations:

- a. where the law is found not to constitute discrimination, whether on grounds of substantive equality, special measures or for some other reason;
- b. where the law is deemed a reasonable limitation on the non-discrimination principle or alternatively a reasonable, proportionate and necessary pursuit of a legitimate purpose

Both these judicial developments may occur in any case. But as a strategy for addressing the intersection of the power and the limitation in the 2013 referendum this seems too risky and perhaps leaves too much to chance. It is not clear what assurance Aboriginal and Torres Strait Islander people could have for the survival of important laws well into the future. The power to make Indigenous-specific laws could be read down in unintended or perverse ways.

A sub-section (2) in the non-discrimination clause

At this stage, the following appears to me to be the preferable strategy: if a law is found *prima facie* to constitute racial discrimination then to survive it must satisfy an express category of permissible laws recognised by subsection (2) of the non-discrimination clause. The section as a whole would apply to all Commonwealth, State and Territory legislative and executive powers.

The difficulty here lies in phrasing the carve-out from the non-discrimination principle. A *characteristics* approach involves anticipating the kind of Indigenous-specific laws which should stand not just now but in fifty or even a hundred years from now. That involves difficult questions of social, political and economic foreseeability. Any carve-out must also address the fact that a non-discrimination principle is a general one applicable to all groups in Australia and must cater to situations beyond Aboriginal and Torres Strait Islander communities. A formula such as this may be appropriate:

- (1) No law or government action may discriminate on the basis of race.
- (2) Subsection (1) does not apply to laws or actions which support or promote the identity, culture or language of a particular group or which address disadvantage in a reasonable, proportionate and necessary way.

In the alternative, a standards-based approach would use a broad litmus test such as ‘benefit’ or ‘unfairness’ in subsection (2), leaving the High Court to interpret its application in a given case by reference to an evolving set of principles or constitutional doctrine. Under this approach, subsection (1) would not apply where law or action is for the benefit for a particular group or where the measure does not constitute unfair discrimination.

As noted earlier, a future High Court may anyway find an Indigenous-specific law compatible with the non-discrimination clause for two reasons independent of a subsection (2) – reasonable limitation/proportionality and substantive equality/special measures. If it is right that in total three legal qualifications (in a non-technical sense of that word) may potentially apply to the non-discrimination clause in relation to Indigenous-specific legislation, it will be important in any referendum campaign to communicate that message, particularly to Aboriginal and Torres Strait Islander communities. The effects of a non-discrimination clause should not be oversold.

AN AGREEMENT-MAKING CLAUSE

I strongly support the inclusion of an agreement-making power of the kind referred to in the Panel's Discussion Paper. The suggestion offers appropriate if belated recognition of Aboriginal and Torres Strait Islander societies in our foundational document. In a practical sense it gives impetus to what is likely to be the most productive default approach to resolving challenges in Indigenous affairs. That is, engagement, partnership and the negotiation of a fair allocation of responsibility between governments, communities, families and individuals. Further, I believe there is strong community support for this strategy in Indigenous affairs. We hear from the Panel that popular opinion strongly supports an agreement-making power and this echoes earlier findings in Nielsen and Saulwick polls in 2000-2001, even at time of very polarised opinions in Indigenous affairs.

As a constitutional provision, a new section 105B modeled tightly on the existing section 105A, but referring instead to agreements between government and Aboriginal and Torres Strait Islander people, has three virtues. It copies a successful existing model in the Constitution. It is simple to understand and explain. And it is flexible enough to accommodate the range of possible agreements (local, regional, national, functional, topic-specific etc) which might foreseeably arise between Aboriginal and Torres Strait Islander people and governments for the next 50 to 100 years.

DELETING SECTION 25

Both sides of politics recognise that section 25 is an invidious provision because it contemplates racially discriminatory voting laws in the States. They have each attempted to eliminate section 25 as part of a disparate package of referendum proposals in the past. The referendum in 2013 offers the best and most coherent opportunity for doing so.

I note that any proposal to delete section 25 but omit a general non-discrimination clause is a half-measure which lacks political and intellectual coherence and risks creating another 40 year debate about unfinished business in the Constitution.

STATEMENT OF RECOGNITION IN THE BODY OF THE CONSTITUTION

The package of proposals put to the Australian people at a referendum in 2013 should include a Statement of Recognition. This should acknowledge key contemporary and historical aspects of Aboriginal and Torres Strait Islander societies. I have not suggested any specific wording because it is vital that the Panel's recommendations reflect the aspirations and opinions of Aboriginal and Torres Strait Islander people.

I press two related submissions. The first is that the Panel should reject a disclaimer clause which says that any statement of recognition or acknowledgment has no legal significance. I believe that such a clause would fatally undermine support for a Statement of Recognition.

The second is that the Statement be inserted in the body of the Constitution as a standalone provision.

The Australian Constitution does need a new preamble which includes appropriate acknowledgment of first peoples. But a preamble will necessarily involve wording that takes account of many other interests and aspirations beyond those held by Aboriginal and Torres Strait Islander people. The project of achieving a new preamble should in my view await a future occasion. The challenges of effectively engaging the community and carrying out the necessary multilateral negotiations should not be allowed to jeopardise the near-term achievement of a broader package of practical and symbolic changes directed specifically to Aboriginal and Torres Strait Islander people, including a standalone Statement of Recognition in the body of the Constitution.

CONCLUSION

Legal change is no panacea for all the problems and challenges confronting first peoples. But the Panel has a tremendous opportunity to help Australia take a forward step, at a time when positive developments are sorely needed to restore morale and hope. If a referendum package containing the above five items can pass the Parliament, Australian voters will have the chance to affirm some key values and principles as Australian values and principles and to make a material difference to the lives of the first peoples for this continent.

Yours sincerely

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