

9 February 2015

Joint Select Committee on Constitutional
Recognition of Aboriginal and Torres
Strait Islander Peoples
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Dear Committee Secretariat

Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

The Queensland Law Society (**the Society**) welcomes the opportunity provided by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (**the Committee**) to provide its submissions concerning the steps to be taken to progress towards a successful referendum on Indigenous Constitutional Recognition.

The Society adopts a position in overall support of Indigenous Constitutional Recognition, and with the input of its Equalising Opportunities in the Law Committee, provides the following comments concerning how the Committee might best progress towards achieving this outcome. Its submissions fall under two broad categories: firstly, the substantial aspects of any amendments to the constitution; and secondly, the process by which constitutional change is to be effected.

1. Formulation of constitutional amendment

The Committee's Progress Report of June 2013 (**Progress Report**) sets out the observation, (at paragraph 1.14) that a specific proposed constitutional amendment would petition support more effectively than proposing a general idea of constitutional recognition to the public. The Society is in agreement with this.

The Progress Report also sets out that the Expert Panel on Constitutional Recognition of Indigenous Australians (**the Expert Panel**) formulated its recommendations for constitutional change through extensive consultation with Aboriginal and Torres Strait Islander peoples and communities. Emerging from this are the proposals that:

- a) The Expert Panel's recommendations form the framework for constitutional recognition of Aboriginal and Torres Strait Islander peoples (paragraph 2.13 of the Progress Report); and
- b) Any changes to this framework ought to arise from further negotiation with Aboriginal and Torres Strait Islander peoples (paragraph 2.14 of the Progress Report).

This latter point aligns with the UN Declaration on the Rights of Indigenous People (as paragraph 2.22 of the Progress Report states), which requires Indigenous peoples' free, prior and informed consent to legislation proposed for their benefit.

The mechanism for drafting and proposing constitutional amendment is suggested by the Expert Panel to be determined against the backdrop of four guiding principles (set out at paragraph 2.19 of the Progress Report), which state that a proposal should:

1. Contribute to a more unified and reconciled nation;
2. Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
3. Be capable of being supported by an overwhelming majority of Australians from across political and social spectrums; and
4. Be technically and legally sound.

The Society supports the notion that any changes to the basic framework within which constitutional recognition of Aboriginal and Torres Strait Islander peoples is to be achieved, can only be effected after full, preliminary consultation with Aboriginal and Torres Strait Islander communities.

Accordingly, the Society considers that the tension likely to arise between principles 2 and 3 above ought to be resolved by formulating a proposal that accords fully with the Indigenous peoples for whose benefit constitutional recognition is to be drafted.

The Society would also reiterate the Committee's comments at paragraph 2.33 of the Progress Report, which underscore the importance of Aboriginal and Torres Strait Islander peoples' voices on this issue.

2. Electoral process and the *Electoral Act* (Qld)

The Society considers that equal attention should be paid, both to the substantive change contemplated by the Constitutional Recognition of Aboriginal and Torres Strait Islander peoples, and to the practical measures required to support the implementation of any proposed constitutional change.

Accordingly, the Society would draw the Committee's attention to the Society's comments regarding the proposed changes to the *Electoral Act*.

2.1 Electoral enrolment

The Society refers to the Queensland Law Reform Commission (QLRC) 2011 Report on Jury Participation (which can be accessed [here](#)) which refers (for example at page 363) to Aboriginal and Torres Strait Islander peoples' reduced likelihood to enrol to vote due to remoteness and cultural and linguistic differences.

The Society considers it crucial to take practical steps to ensure that Aboriginal and Torres Strait Islander peoples are enrolled (if they wish to vote in the upcoming referendum). This process should include a clear mechanism to ensure that Aboriginal and Torres Strait Islander peoples who enrol, understand that they will be subject to an ongoing obligation to participate in all future elections, and take on the full obligations (including jury duty) which this entails.

Some practical difficulties to address will include identifying Aboriginal and Torres Strait Islander peoples who are not enrolled and assisting them with this process. This may present logistical issues particularly where Aboriginal and Torres Strait Islander peoples are in remote areas. Perhaps those who do not own land under the Torrens title system or who do not have a drivers' licences may encounter difficulties showing identification for the purposes of voting. For example, the *Sydney Morning Herald* reported that in 2007, the Australian Electoral Commission announced that people who do not have a driver's licence or other identification such as a birth certificate constituted almost 1.5 per cent of new enrolments.¹

2.2 Electoral Act

The following are aspects of the *Electoral Act* and the amendments which have recently been proposed to this legislation (largely concerning a new electronically assisted voting (EAV) process). In the Society's view, these provisions require review in order to facilitate Aboriginal and Torres Strait Islander peoples' enrolment and participation in any future referendum to be held, as well as voting on an ongoing basis.

(a) Registration process

Proposed s 32B(2)(a) to the *Electoral Act* does not provide guidance regarding the electoral registration process. The Society considers it necessary that the same level of assistance will need to be provided with respect to the registration process to ensure that all people intended to benefit from the EAV process are appropriately registered.

The Society also cautions against a process which may involve the allocation of digital 'authentication' or 'access' key for the subsequent vote. Given the high level of Aboriginal and Torres Strait Islander peoples' homelessness in remote areas, these kinds of access keys could be easily lost, jeopardising their ability to participate in the election.

¹Emily Howie, 'Voter ID laws politically motivated', *The Sydney Morning Herald*, 21 October 2013, <<http://www.smh.com.au/comment/voter-id-laws-politically-motivated-20131021-2vw6v.html>> at 6 February 2015.

(b) *'insufficient level of literacy'*

As the legislation is currently drafted, there is neither a test for 'insufficient level of literacy', nor any guidance as to what level of literacy may be 'insufficient' (with the concept of literacy encompassing abilities from reading *per se* through to reading with full comprehension). This may lead to the **EAV** process being applied inconsistently.

(c) *No mechanism to ensure the process is culturally appropriate*

The legislation does not require the EAV process (or, in fact, the more traditional voting process) to be culturally appropriate and avoid confusion.

The example given at clause 124 (proposed section 32A notes) states that a 'class of elector' may be an elector whose address is more than 20km from the nearest polling booth. Aboriginal and Torres Strait Islander peoples will be captured by this process, so there is a great need to ensure that the process prescribed by legislation is culturally appropriate and not apt to cause confusion.

This is particularly so because:

- a. No detail is provided in the Act about how the EAV process will work (e.g. will it simply be an audio version of the ballot paper? This may not be sufficient to overcome cross-cultural or language difficulties.)
- b. There is no equivalent provision enabling an EAV voter to obtain assistance (i.e. similar to s 108 and 113 of the current *Electoral Act*) where they need help with language interpretation or explanation of the ballot paper.

The Society suggests establishing designated EAV stations, and having appointed indigenous liaison officers available at those locations to assist. In fact, the Society suggests that indigenous liaison officers be available at all voting locations for the proposed referendum, particularly in more remote regional centres with high concentrations of Aboriginal and Torres Strait Islander peoples.

(d) *Assistance provisions*

Unlike sections 108 and 113 of the *Electoral Act*, there is no provision entitling EAV voters to assistance.

This is a broader issue than Aboriginal and Torres Strait Islander peoples, and may also affect people in remote areas or out of the jurisdiction with language or learning difficulties, or physical disabilities.

The Society recommends that at least a similar provision should be included with respect to EAV voters.

- (e) Even though electronically assisted voting already exists under the *Electoral Act*, no procedure has been implemented or notified as yet by the Electoral Commission of Queensland. Accordingly, the Society cannot comment on whether those procedures will adequately address the issues canvassed.

Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

We would be pleased to liaise with you further. Please contact Julia Connelly, Policy Solicitor, at J.Connelly@qls.com.au, or on (07) 3842 5884 for further inquiries.

Yours faithfully


Michael Fitzgerald
President