



Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples: "Considering the issue of 'positive purpose', 'advancement', beneficial policy".

Reconciliation Victoria welcomes the reforming of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples. We refer in particular to the intentions in the Progress Report ¹Clause 3.14 (b) for the Committee to review wording of the proposed section 51(A) to 'ensure...positive purpose' and appropriateness of the term 'advancement'. We believe that the inclusion of 'informed consent' within the proposed model will help ensure the positive purpose of government policies and legislations.

We write to strongly encourage the Committee to have a focussed examination of this critical issue, through calling for submissions and holding further roundtables or forums in the lead up to the release of your interim report in September.

Reconciliation Victoria supports the scope and intent of the recommendations made by the Expert Panel and is working towards community review, understanding and, if necessary, improvement of the recommendations. We do so acknowledging that recognising Aboriginal and Torres Strait Islander peoples in the Constitution is part of the unfinished business of the recommendations made by the Council for Aboriginal Reconciliation in 2000. We see Constitutional Recognition as a positive step forward, but not an end to the reconciliation journey: it alone is not sufficient to achieve outcomes required of a fully reconciled and fair Australia.

We make these comments based on the work we have done, with funding from Recognise, through our grassroots networks of local government, local reconciliation groups, Aboriginal organisations, schools and others to coordinate a Victorian campaign to raise awareness about the proposed Constitutional Reform agenda.

From both the feedback from these community engagement activities as well as our own research we would like to see further examination on the wording, as it is proposed in section 51(A), which states:

"Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples, 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."

The word 'advancement' has been raised as a concern from almost every community consultation or public forum we have been involved with. The issue lies in the consideration of

¹Joint Select Committee Progress Report June 2013:

http://www.aph.gov.au/~media/Committees/Senate/committee/jscatsi_ctte/completed_inquiries/2010-13/progress_report/report.ashx



who determines what is beneficial, or to the advancement of, as well as the consideration that the word identifies a deficit to be ameliorated. The ‘problematism’/ or deficit model approach applied to the governance of Aboriginal and Torres Strait Islander people through government policies and legislations is well documented. We would not advise that this approach be imbedded in this nation’s founding legal document so that Aboriginal and Torres Strait Islander people are defined by disadvantage.

Reconciliation Victoria acknowledges that we are one among many organisations to have raised these concerns; ANTaR², the Indigenous Youth Employment Consulate³, the Cape York Institute⁴ and Anne Twomey⁵, to name a few, have already made submissions or comments to this effect. It is critical that Aboriginal and Torres Strait Islander peoples’ agency informs this process of reform, and is seen as integral to the roll out of these constitutional changes.

Reconciliation Victoria sees the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), to which Australia is a signatory, as a useful framework for considering these questions, in particular articles 18 & 19⁶. Consideration and implementation of the principle of free, prior and informed consent, recognising Aboriginal and Torres Strait Islander peoples “...right to participate in decision-making in matters which would affect their rights...”⁷ could help illuminate the desired processes and wording in the Constitution.

When there are representative bodies such as the National Congress of Australia’s First Peoples, and in light of the importance of consultation as stipulated in the recommendations of the Expert Panel and under the UNDRIP, Reconciliation Victoria would question the appropriateness of having the Parliament and or the Judicial system being the sole arbiters in deciding what is of benefit to Aboriginal and Torres Strait Islander peoples.

We have been considering wording such as:

“...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 with their informed consent through processes specified in an Act”

and obtaining initial legal advice about difficulties in such an approach.

² ANTaR National submission to You Me Unity: <http://www.antarvictoria.org.au/pages/antars-submission.php>

³ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Interim Report: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/~media/wopapub/senate/committee/jscatsi_ctte/report/report.ashx

⁴ Cape York Institute Constitutional Reform Proposal 2011: <http://cvi.org.au/wp-content/uploads/2012/03/Cape-York-Institute-Constitutional-Reform-Proposal-2011-LR.pdf>

⁵ Anne Twomey, “Indigenous Constitutional Recognition Explained – The Issues, Risks and Options”, Constitutional Reform Unit, University of Sydney Law School, p.6:

http://sydney.edu.au/law/cru/documents/2012/Indigenous_Recognition.pdf

⁶ United Nations Declaration on the Rights of Indigenous Peoples: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁷ Ibid Article 18



We therefore appreciate some of the complexities in resolving this issue. We nevertheless think that a rigorous consideration of possible approaches will be highly desirable in convincing many people that the final wording is appropriate. We are concerned that without this matter being satisfactorily resolved, some significant Aboriginal individuals and organisations may resist the reform, which would be fatal for its success. We would therefore welcome participating in an informed discussion and deep examination of this issue, along with Aboriginal and Torres Strait Islander organisations. We believe we have an important role in advocacy, in feeding back our experiences from the grass roots level to others involved in the campaign in Victoria and those working on the proposal and campaign at a national level.

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