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Submission on Discussion Paper about Aboriginal and Torres Strait Islander Constitutional Recognition

26 September 2011

Contents

Summary

1 In summary, Australian Lawyers for Human Rights:

(a) welcomes the opportunity to make a submission on the Panel's Discussion Paper about Constitutional Recognition of Aboriginal and Torres Strait Islanders: see para [2] below;

(b) commends the Principles which the Panel identified to guide its assessment: para [4];

(c) affirms the centrality of Indigenous participation and involvement in forming any proposal about Constitutional Recognition of Aboriginal and Torres Strait Islanders : [8]-[14];

(d) urges the Panel to guide Government on the manner and extent of any additional consultation with Indigenous communities necessary before any proposed referendum: [14]-[15] & [19]-[28];

(e) supports the repeal of the discriminatory provision in section 25 of the Constitution (which enables the exclusion of people on racial grounds): [29]-[30];

(f) supports the concept of statement of recognition/values in the Constitution: [31]-[32];

(g) supports the inclusion of a power for the Commonwealth to make agreements with Aboriginal and Torres Strait Islanders communities: [33]-[36];

(h) proposes the Panel consider the inclusion of a broader control on Constitutional powers, that they must be used on a non-discriminatory basis: [37]-[41].

Introduction

2 Australian Lawyers for Human Rights (***ALHR***) welcomes the opportunity to make a submission on the Discussion Paper released by the Expert Panel.

3 The following submission is based on the various international standards relevant to Aboriginal and Torres Strait Islander people, including those standards with immediate and continuous obligations on the Australian State. The key standards among these are:

(a) *International Covenant on Civil and Political Rights* (***ICCPR***);[1]

(b) *International Convention on the Elimination of All Forms of Racial Discrimination* (***ICERD***);[2]

(c) *International Covenant on Economic, Social and Cultural Rights* (***ICESCR***);[3] and

(d) *Universal Declaration of Human Rights* (***UDHR***).[4]

The submission also references other international standards and materials of international human rights law which influence and inform the laws and reforms affecting Aboriginal and Torres Strait Islander people, including:

(e) *United Nations Declaration on the Rights of Indigenous Peoples* (***UNDRIP***);[5] and

(f) *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (***ILO 169***).[6]

4 ALHR commends the Government of Australia for its establishment of the Expert Panel, and the Panel's preparation and circulation of the Discussion Paper. These make an important contribution to raising awareness and enabling greater Aboriginal and Torres Strait Islander involvement and ALHR particularly endorses the Principles which the Panel identified as guiding is assessment.[7]

1 [1980] ATS 23 (treaty entered into force 1976; Australia ratified 1980). UN General Assembly, *International Covenant on Civil and Political Rights*, resolution 2200A(XXI) (16 Dec 1966). Available < www.un-documents.net/iccpr.htm> 26 Aug 2011.

2 [1975] ATS 40 (treaty entered into force 1969; Australia ratified 1975). UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, Resolution 2106 (XX) (21 Dec 1965). Available <www.un-documents.net/icerd.htm> 27 Jul 2009.

3 [1976] ATS 5 (Australia ratified 1975; treaty entered into force 1976). UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Resolution 2200A(XXI) (16 Dec 1966). Available <http://www2.ohchr.org/english/law/cescr.htm> 23 Apr 2009.

4 UN General Assembly, *Universal Declaration of Human Rights*, A/RES/3/217 (10 Dec 1948). Available <www.un-documents.net/a3r217a.htm> 13 May 2009.

5 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN doc A/RES/61/295 (13 Sep 2007). Available <www.un-documents.net/a61r295.htm> 27 Jul 2009. Australia originally voted against this, but changed its position and supported the declaration in 2009 (see n8 below).

6 (Treaty entered into force 1991; Australia has not ratified). International Labour Organisation, *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, Convention: C169 (27 Jun 1989). Available <www.ilo.org/ilolex/cgi-lex/convde.pl?C169> 16 Sep 2009. Even though Australia is not currently a party to this treaty, the Government supported its text in ILO meetings, and it has relevance for legal developments in Australia, eg. *Police v Abdulla* [1999] SASC 239, [37] per Perry J.

7 Discussion Paper, p16.

Involvement and participation of Indigenous people

5 ALHR believe that the broad and open nature of the Panel's consultation process is significant in that it will it will provide the Panel with an indication of the general mood of specific sectors of the Australian public regarding possible constitutional reform. The submissions received should provide some clear ideas about how to best proceed towards the next phase in this constitutional reform process. Therefore, ALHR views this process as a fundamental first step in soliciting views on the process, and understands it as a positive sign from the Government of Australia that they are genuinely committed to a good faith and meaningful process of Constitutional Reform.

6 ALHR understands that this initial process will include the Panel receiving submissions by and from Aboriginal and Torres Strait Islander peoples and organisations. Of course, ALHR urges the Panel to take those proposals most seriously into account at this initial phase, as those proposals will reflect the views of some of the peoples most affected by any proposed constitutional reform.

7 At the same time, ALHR observes that the broad nature of the present process, whilst open to Aboriginal and Torres Strait Islander peoples' contributions, may not enable significant numbers of Aboriginal and Torres Strait Islander peoples to engage in this process. It is highly likely that certain Aboriginal and Torres Strait Islander groups and individuals would not even be aware of this current process and will, for that reason, fail to participate in it. This is because of the particular situation of disadvantage experienced by many Aboriginal and Torres Strait Islander people. This disadvantage comprises, variously, remote living environments; low levels of employment, education and little or no participation in formal structures including the full range of decision making structures in society.

8 For this reason, ALHR therefore emphasizes that any proposal received at this preparatory phase, whether from Aboriginal and Torres Strait Islander groups or others, be treated as a preliminary submission. Whatever recommendation the Panel then makes to the Government, Government will then need to ensure there are comprehensive consultations with all Aboriginal and Torres Strait Islander peoples around Australia in order to attain their free, prior and informed consent to the Constitutional reform processes proposed, in line with the international standards of human rights law.

Free, prior, informed consent

9 Free prior and informed consent (***FPIC***) of Aboriginal and Torres Strait Islander peoples is in accordance with the internationally recognized standard, as set out in UNDRIP, which Australia endorsed in the UN General Assembly in 2010.[8] FPIC, essentially, requires that activities (including law reforms) which would affect an Indigenous group should not occur without the group's consent. Given the fundamental and direct consequences of a constitutional reform process that specifically addresses Indigenous Australians, it is therefore essential that Aboriginal and Torres Strait Islander peoples are involved in all facets and at all stages of the process of Constitutional amendment.

10 The duty to consult with Indigenous peoples on decisions affecting them finds prominent expression in the UNDRIP, and is firmly rooted in international human rights law. This duty is

8 Minister for Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, 3 Apr 2009. Canberra: Australian Government. Available <www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf> 6 Aug 2011.

referenced throughout UNDRIP in relation to particular concerns[9] and it is affirmed as an overarching principle in article 19, which provides:

> States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[10]

11 The duty of States to effectively consult with Indigenous peoples is also grounded in the core human rights treaties of the United Nations, including ICERD and ICCPR.[11] Most recently, the Committee on the Elimination of Racial Discrimination, which oversees compliance with the ICERD, has called upon numerous Governments to carry out consultations with Indigenous peoples on matters affecting their rights and interests.[12]

12 In addition to these international standards, FPIC is informing legislation and judicial decisions in Australia,[13] as well as the jurisprudence of courts and tribunals at the international level and in other countries.[14] FPIC has existed for some time in various international structures like the international guidelines on impact assessment;[15] various

9 UNDRIP (n5 above), arts. 10, 11, 15, 17, 28, 29, 30, 32, 36 & 38.

10 UNDRIP (n5 above), art 19.

11 eg. see comments by the monitoring committees explaining the necessity of Indigenous participation, involvement, and agreement in relation to proposals affecting them: Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, UN doc CCPR/C/21/Rev.1/Add.5 (8 Apr 1994), para [7], available <www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> 24 Apr 2009; and Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples*, UN doc A/52/18, annex V (18 Aug 1997), para [4(d)], available <www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> 20 Sep 2010.

12 eg. the following all from CERD: *Concluding Observations on Canada* (UN doc CERD/C/CAN/CO/18), at [15] & [25]; *Concluding Observations on Indonesia* (UN doc CERD/C/IDN/CO/3), [17]; *Concluding Observations on New Zealand* (UN doc CERD/C/NZL/CO/17), [20]; *Concluding Observations on Democratic Republic of the Congo* (UN doc CERD/C/COD/CO/15), [18]; *Concluding Observations on United States of America* (UN doc CERD/C/USA/CO/6), [29]; *Concluding Observations on Ecuador* (UN doc CERD/C/ECU/CO/19) [16]; *Concluding Observations on Sweden* (UN doc CERD/C/SWE/CO/18), [19]. All available through <http://tb.ohchr.org/default.aspx>.

13 eg. *Bropho (Swan Valley Nyungah Community) v Western Australia* [2007] FCA 519, [254]-[262] (judge ruling that, given a group expressly consented to a document and had not alleged “duress or fraud or non est factum”, then the consent was effective to bind the group); *Kowanyama People v Queensland* [2009] FCA 1192, [21] per Greenwood J ('[T]he Court will be concerned to understand and place emphasis upon whether the agreement is freely made on an informed basis by all parties to the determination and whether the parties are represented by experienced independent lawyers') see also *Ampetyane -v- Northern Territory* [2009] FCA 834, [15] & [16]; *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), r8 (a body representing traditional owners, before it can do any act 'that would affect the native title rights or interests of the common law holders,.. must consult with, and obtain the consent of, the' native title holders).

14 eg. *Case of the Saramaka People -v- Suriname* (Inter-American Court of Human Rights, Series C No. 172, 12 Aug 2008; available <www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf> 22 Sep 2009) at [17]; *Cal & Coy (Maya Villages of Santa Cruz and Conejo) -v- Attorney General of Belize and the Minister of Natural Resources and Environment* (Supreme Court of Belize, Claim No 171 & 172 of 2007 (18 Oct 2007); available <www.belizelaw.org/supreme_court/judgements/2007/Claims%20Nos.%20171%20and%20172%20of%202007%20%28Consolidated%29%20re%20Maya%20land%20rights.pdf> 16 Jun 2010) at [123] & [131]; *Centre for Minority Rights Development (Kenya) on behalf of Endorois Welfare Council -v- Kenya* (African Commission on Human and People's Rights, 276 / 2003, 4 Feb 2010, available <www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf> 18 Mar 2010) at [232], [291]-[297].

15 Conference of Parties of Convention on Biological Diversity, *Akwé: Kon Guidelines - Voluntary guidelines for the conduct of cultural, environmental and social impact assessments* (May 2000, available <www.cbd.int/doc/publications/akwe-brochure-en.pdf> 29 Jan 2009). Although these guidelines are voluntary they indicate that governments and companies should establish 'a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community': Lehr, A & Smith, G, 2010. Foley Hoag LLP, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, report to Talisman Energy Inc, 4 May 2010. Calgary (CAN): Talisman Energy. Available <www.talisman-energy.com/responsibility/foley-hoag_report_on_fpic.html?disclaimer=1> 14 May 2010, 14.

governments and nations are implementing FPIC and consent as a legal standard,[16] and this has also been promoted by the European Union.[17]

13 While Australia is not under a duty to consult Aboriginal and Torres Strait Islander Australians regarding every decision it makes, the duty clearly arises in the present case. Constitutional reform that specifically addresses the situation of Aboriginal and Torres Strait Islander people in the Constitution is clearly one of the most fundamental legislative changes that could affect Aboriginal and Torres Strait Islander peoples, both substantively and symbolically.

14 ALHR therefore considers that it is fundamentally important that this Panel recommend that Government ensure there has been comprehensive consultation with Aboriginal and Torres Strait Islander Individuals and communities to obtain their FPIC regarding the content of the proposed referendum. Specifically, that consultation must address the aspect of the process that most affects Aboriginal and Torres Strait Islander peoples' rights, namely, what aspect of the Constitution they want changed, ie. the formulation for any proposed referendum.

15 ALHR recognize that the process of attaining FPIC of all Aboriginal and Torres Strait Islanders peoples regarding constitutional reform Australia will not be an easy one. The Government of course should not ignore the work and consultations undertaken through the Panel's processes. The Discussion Paper, and the Panel's meetings and materials on the internet and around Australia, will constitute one component of the necessary consultation processes. At this stage, however, it is not possible to determine the extent to which the Government may be required to undertake additional consultation. That will depend on the final proposals which the Panel recommends to Government, and the extent of Aboriginal and Torres Strait Islanders' consultation and consent supporting those recommendations at that stage. We expand on these aspects below.

16 The Discussion Paper highlights some key areas of potential constitutional reform, namely:

(a) inclusion of values/recognition of Aboriginal and Torres Strait Islander peoples in a Preamble;

(b) repeal of s. 25;

(c) including a new power to make agreements with Aboriginal and Torres Strait Islander peoples;

(d) new approach to dealing with race in the Constitution (which may include repealing the race power altogether, or changing its wording); and

(e) A prohibition on racial discrimination,

17 ALHR believe that these five key areas of potential reform highlighted by the Discussion Paper reflect the key proposals developed over the years in both academic and political debate regarding best methods available to adequately include Aboriginal and Torres Strait Islander peoples in the Constitution. Moreover, as further discussed below, the various proposals set out in the Discussion Paper, do generally meet internationally agreed upon human rights standards. These are therefore proposals that ALHR would support subject to the few clarifications identified below. In summary, apart from the repeal of section 25 which

16 eg. *Law on the Right to Prior Consultation for Indigenous or Native Peoples* (House of Congress, Peru, 19 May 2010); *Indigenous Peoples Rights Act* (Philippines, 1997).

17 Deputy Head of Delegation of the European Union, said '...the effective participation of indigenous peoples in projects relating to their development needs must be based on their free, prior and informed consent': Department of Public Information, *Speakers Highlight Devastating Impact of Logging, Mining, Other 'Mega' Development Projects on Indigenous Lands, as United Nations Permanent Forum Debate Continues*, UN doc HR/5014, 20 April 2010. New York: Permanent Forum on Indigenous Issues. Available <www.un.org/News/Press/docs//2010/hr5014.doc.htm> 17 Jun 2010.

ALHR supports, unconditionally, most remaining issues (below) are aspects of constitutional reform that ALHR could support but, consistent with human rights standards, ALHR would only support those proposals if they are accompanied or preceded by the effective participation of Aboriginal and Torres Strait Islander peoples and, for those proposals which impact these peoples, by their consent.

18 Accordingly, therefore, before turning to the detail of the reforms, it may be useful to reinforce the process requirements. This is because the FPIC of Aboriginal and Torres Strait Islander Australians is central to any constitutional reform in this area.

What should FPIC process look like?

19 As the United Nations Special Rapporteur on the Rights of Indigenous peoples, James Anaya, has noted, there is not one specific formula for carrying out consultations with Indigenous peoples that applies to all countries and in all circumstances.

20 Yet, although the specific form in which consultations are carried out may not be prescribed, international human rights law is clear regarding the overarching aims of such consultations. Consultations should be conducted as negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than the mere provision of information to Indigenous peoples about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.[18]

Who should be consulted?

21 Given the fundamental nature of Constitutional amendment regarding the inclusion of Aboriginal and Torres Strait Islander peoples in the Australian Constitution, appropriate consultations should be undertaken and these consultations must reach all Aboriginal and Torres Strait Islander communities in Australia.

22 While ALHR appreciate that this may indeed be a large and complex task, the fundamental importance of constitutional reform will require the commitment of government to such a process. ALHR emphasizes that it will be important not to overlook remote communities in this process.

23 Furthermore, the consultation procedure must respect Indigenous peoples' own institutions of representation and decision-making, as explicitly required by UNDRIP.[19] ALHR are aware that Aboriginal and Torres Strait Islander communities in Australia may need to consolidate and strengthen these structures in order that the groups involved may have the necessary capacity to participate in the consultation procedure in accordance with their own traditions and customs. The Panel should therefore recommend that the Government carefully consider this matter, which may require an opportunity for some Aboriginal and Torres Strait Islander groups to consolidate these institutions, prior to engaging with the consultations. This will not only facilitate the consultation process but contribute to a climate of good faith and have benefit for similar processes in the future.

What should the consultations look like?

24 As noted above, there is no prescriptive formula regarding consultations. However, an important requirement, at the early stages of any proposal, is that Indigenous people are adequately included in discussions leading to the design and implementation of the

18 Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Report to the UN Human Rights Council* (UN doc A/HRC/12/34, 15 July 2009). Available <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/145/82/PDF/G0914582.pdf?OpenElement> 29 Aug 2011.

19 UNDRIP (n5 above), art. 19.

consultation procedures. The National Congress of Australia's First Peoples, among other Aboriginal and Torres Strait Islander representative organisations including Aboriginal legal services and community based organisations, could play a key role in this regard. However, it is will not be sufficient to simply ask the Congress or other peak bodies to decide on behalf of all Indigenous peoples and communities in Australia. Consultations must be carried out with Aboriginal and Torres Strait Islander communities themselves, as noted above, to solicit their views. This may give rise to a need for flexibility in the form of consultation. Processes designed in good faith using best available procedures early in the process may need to be supplemented or altered as more Aboriginal and Torres Strait Islander groups have an opportunity to be involved or unanticipated access issues need to be overcome.

25 The consultations must be in good faith, with the objective of achieving agreement or consent.

26 In the first place, it will be essential that the Government ensures there has been clear and accessible information provided during the consultations about the impacts of and differences between the proposed constitutional reforms, in a way that is accessible and understandable for the Aboriginal and Torres Strait Islander groups involved. This information should be made available to the Aboriginal and Torres Strait Islander communities concerned along with all relevant information well in advance of any deadline imposed. This includes providing translators, where necessary.

27 Moreover, ALHR emphasizes that a key aspect of the consultation will be the development of a climate of openness and dialogue in which both the government and government agencies, on the one hand, and Aboriginal and Torres Strait Islander communities, on the other, can work together in good faith towards consensus.

28 ALHR believe that Aboriginal and Torres Strait Islander involvement in the design of the consultation process will contribute to a climate of confidence and mutual respect. This will be assisted by respecting Aboriginal and Torres Strait Islander peoples' own governance and decision making structures during the consultation process. As the process of working together in good faith proceeds, these factors will increase the effectiveness of the process and build mutual confidence that will make consensus among the parties easier to achieve. Confidence and trust in the process is particularly important for the Aboriginal and Torres Strait Islander peoples of Australia, given the situation of disadvantage many of them experience and the traumatic experience and follow-on effects of colonization that has persisted until this very day.

Repeal of section 25 (racial disqualification from voting)

29 ALHR supports the repeal of the discriminatory provision in section 25 of the Constitution (which enables the exclusion of people on racial grounds).[20]

30 The provision is out-dated and irrelevant which adds nothing to the Constitution. More significantly, it is clearly racial discrimination which, if it were in any law other than the Commonwealth Constitution, would breach the *Racial Discrimination Act*.[21] It is in breach of Australia's obligations under UDHR[22] and Australia's commitments under ICCPR and ICERD.[23]

20 Discussion Paper, idea 6, p19.
21 *Racial Discrimination Act 1975* (Cth).
22 eg. UDHR (n4 above), art 2.
23 eg. ICCPR (n1 above), arts 2(1), 3, & 25; and ICERD (n2 above), arts 2 & 5(c).

Statement of recognition/values in 'preamble'

31 Subject to the FPIC of Aboriginal and Torres Strait Islander peoples to the proposal,[24] ALHR supports the concept of a Constitutional statement of recognition/values in 'preamble' form.[25] This support cannot, however, be separated from the more substantive amendments to the body of Constitution such as the repeal of discriminatory provisions and the inclusion of powers in relation to Aboriginal and Torres Strait Islander persons.

32 ALHR considers it important, in addition to the substantive amendments, that a preamble indicates some basic recognition of the British imposition of sovereignty in Australian colonies, the traumatic experience of colonisation on indigenous peoples' cultures and ways of life, and the pre-existing (and continuing) connection to land that is an integral part of the identity and existence of Aboriginal and Torres Strait Islander people. The proposals in ideas 1 and 3 of the Discussion Paper do this.

Commonwealth agreement-making power

33 Subject to the FPIC of Aboriginal and Torres Strait Islander peoples to the proposal,[26] ALHR supports the inclusion of a power for the Commonwealth to make agreements with Indigenous communities.[27] There is broad contemporary recognition that many government actions affecting Aboriginal and Torres Strait Islander peoples should occur through negotiation and agreement rather than by the unilateral imposition of executive or legislative force.[28] Without some agreement-making power, it is difficult to see how the Commonwealth Government can progress matters consistently with this recognition. The ability for the Commonwealth to make agreements, either at a national level or in relation to specific groups for specific Commonwealth land, is a significant tool. Inclusion of such a power should be accompanied with a statement that it can only be used consistent with the principles of FPIC of the particular Aboriginal and Torres Strait Islander community with whom any agreement is being made.

34 ALHR's decision to support this provision is taken despite, and in full awareness of, the complexities such a provision would likely produce, including:

(a) modifying the division of responsibilities within the Federation as a by-product of particular agreements, particularly if the agreement-making power is unfettered as proposed, because it would enable the Commonwealth executive to make agreements about matters currently within State jurisdiction, eg. land use and management;[29]

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24 See discussion in [5]-[28] above, and particularly the explanation in [17].

25 eg. Discussion Paper, ideas 1 and 3, p17.

26 See discussion in [5]-[28] above, and particularly the explanation in [17].

27 Discussion Paper, idea 7, p19-20.

28 eg. Llewellyn, D & Tehan, M, 2005. 'Treaties', 'Agreements', 'Contracts', and 'Commitments' - What's in a name? The legal force and meaning of different forms of agreement making. *Balayi: Culture, Law and Colonialism*, 7, 6-40 (available <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=815324> 13 Aug 2009) p2; *Native Title Ministers' Meeting, Guidelines for Best Practice Flexible and Sustainable Agreement Making, endorsed by Commonwealth, State and Territory Native Title Ministers*, 28 August 2009. Canberra: Australian Government (available <www.ag.gov.au/www/agd/rwpattach.nsf/alldoc/C8D9FB54AC29A726CA257626001AEDF6/$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf> 17 Oct 2009). Some of these moves are reflected in, and influenced by, changes in international law which features support for indigenous rights (eg. UNDRIP and ILO see para [3] above) and in decisions by regional human rights bodies such as *The Social and Economic Rights Action Center -v- Nigeria* (1991) Communication 155/96 (African Commission on Human & Peoples' Rights), *Case of the Saramaka People -v- Suriname* (2007) Series C No. 172 (Inter-American Court of Human Rights) and *Communities of the Maya People (Sipakepense and Mam), Guatemala Precautionary Measures* (2010) PM 260-07 (Inter-American Commission on Human Rights).

29 The effects of this may not be so extreme as the Commonwealth Parliament would have power to legislate directly, in any event, in respect of matters affecting or involving Aboriginal and Torres Strait Islander peoples pursuant to placitum 51 (xxvi).

(b) on its own (ie. unless there are other Constitutional or legislative changes), this Constitutional change won't make any difference to the current situation because it does not address any existing discriminatory matters, either legal or systemic, but simply gives some power for them to be addressed in the future if the Commonwealth Executive is so minded to agree; and

(c) if it is unfettered (ie. simply 'any agreement can be made') would enable and validate any agreements, including those which may impact on the rights of other parties, including human rights (because the Constitution contains very little protection of human rights, more generally).

35 Nevertheless, despite all these potential difficulties, ALHR supports the inclusion of an agreement-making power. All the above concerns are equally applicable to the 'external affairs' power, by which the Commonwealth Executive is able to enter agreements with other nations which then empower the Commonwealth Executive and Parliament to address matters in a way different to the previous provision for division of responsibility between Commonwealth and State and Territory legislatures. The various Australian polities (Parliaments and executive governments at State, Territory and local levels) all accommodate that flexibility in Commonwealth power. There is no reason why a similar provision cannot exist in relation to Indigenous agreement-making.

36 There is little credibility in the argument against an agreement-making power, namely, that it would give unlimited discretion to the Commonwealth to agree any matter regardless of its benefit for the nation or level of democratic support. The Commonwealth Executive is accountable to the Parliament and the Parliament subject to election every three years. These constraints of responsible government operated as potent restrictions on proposals for Commonwealth agreement-making with Indigenous people throughout the 1980s. Additionally, the Courts have also indicated they will exercise control over Government agreement-making to ensure that the Government is acting in the broader public good.[30]

Constitutional prohibition on discrimination

37 ALHR has given careful consideration to the other proposals in the Discussion Paper on more extensive amendments of the Constitution regarding racial discrimination.[31] Firstly, ALHR has concerns about the proposed amendment of the race power by inserting an additional requirement that these powers be used only “for the benefit of” Indigenous peoples. Such an approach has a danger of allowing others, including the Judiciary and Parliament, to decide what measures are in fact 'beneficial' for Indigenous peoples, without asking Indigenous peoples first. This could certainly have negative effects for Indigenous peoples, inconsistent with the principle of FPIC as outlined above.

38 Regarding an outright prohibition on racial discrimination, ALHR do not oppose this proposal, although we are aware that thought would need to be given to the extent that allowance needs to be made for positive measures. ALHR recognise that the Commonwealth Parliament’s current ability to legislate on race does support some existing legislation which has potential beneficial aspects for Aboriginal and Torres Strait Islander Peoples, including heritage and native title laws.

30 eg. *Smith v Western Australia* [2000] FCA 1249, [38] per Madgwick J; *Button Jones v Northern Territory* [2011] FCA 573, [10] per Mansfield J; *Prior (Juru Cape Upstart People) v Queensland (No 2)* [2011] FCA 819, [5] per Rares J. All these cases involved the judiciary emphasising that they will not simply implement an agreement reached between the relevant native title group and State Government, but need to understand the State has properly considered broader community interests.

31 eg. Discussion Paper, ideas 2 & 4 on p17, and idea 5 on p18.

39 Yet, given that non-discrimination law in Australia has developed in such a way as not to preclude positive measures addressing disadvantage,[32] ALHR believe that the proposal is therefore not prohibitive. However, to remove any ambiguity concerning this question, ALHR recommend that any prohibition on racial discrimination should explicitly affirm this common law approach (based on the consideration of the relevant international treaties and international customary law) which allows for positive measures.

40 However, ALHR are aware that there are few provisions with express or implied protection of individual human people's rights in the Australian Constitution. Nowhere does the document explicitly provide common human rights guarantees. The guarantees that do exist in Australian law for human rights issues are found in statutes and common law. Accordingly, it may be considered anomalous to seek to have only one human right (freedom from racial discrimination) inserted into the Constitution.

41 Therefore, ALHR's submission is that, rather than inserting a provision solely addressing racial discrimination, there should be provision for broader protection against discriminatory action by government. This could be achieved by including a section that Constitutional powers (executive, legislative and judicial) cannot be used on a discriminatory basis. This would provide a broader limitation on Commonwealth powers being used on a discriminatory basis. There is sufficient law, both internationally and in Australia, to provide guidance as to how a general 'anti-discrimination' measure should be worded and ALHR would be happy to provide further submissions on this aspect if the Panel would be assisted by these.

About Australian Lawyers for Human Rights

42 ALHR was established in 1993 and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).

43 ALHR comprises a network of Australian lawyers active in the practice, promotion, and implementation of international human rights law standards in Australia. It raises awareness of international human rights laws and standards through training, information, submissions and networking.

44 ALHR has a national membership of over 2000 lawyers and engages its members through active National, State and Territory committees.

Stephen Keim
President, Australian Lawyers for Human Rights
26 September 2011

32 Positive measures to address disadvantage, or 'special measures', are permitted under international law (ICERD, n2 above, arts 1(4) & 2(2)) and Australian law (eg. *Racial Discrimination Act 1975* (Cth) s8). The measures form an exception to the general rule that all racial groups must be treated the same. The Commonwealth has enacted special measures, which have been approved by the Courts, eg. *Gerhardy v Brown* [1985] HCA 11, 159 CLR 70, p131-133; *Bruch v Commonwealth* [2002] FMCA 29, [20] & [49]-[51] (Case concerning government 'assistance to ensure that the rates of participation of indigenous Australians in education is raised to the same level as that for non indigenous Australians and is designed to promote equity and educational opportunity and improve educational outcomes for indigenous Australians'. In the context where 'The scale of education or inequality remains vast for Australia's aboriginal and Torres Strait Islander peoples and continues', the provision of Government assistance aimed only at Indigenous students has an 'objective [to produce] equality of educational opportunity ...[and] can properly be regarded as a special measure for the purposes of s 8 of the RDA').