

Aboriginal Peak Organisations Northern Territory

An alliance of the CLC, NLC, CAALAS, NAAJA and AMSANT

Aboriginal Peak Organisations (NT)

Submission to the Expert Panel on
Constitutional Recognition of Indigenous
Australians

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SUBMISSION FROM APO NT TO THE EXPERT PANEL ON CONSTITUTIONAL RECOGNITION OF INDIGENOUS AUSTRALIANS

SEPTEMBER 2011

Aboriginal Peak Organisations Northern Territory (APO NT) welcomes the opportunity to make a submission to the Expert Panel on Constitutional Recognition of Indigenous Australians.

APO NT is broadly representative of all Aboriginal peoples in the Northern Territory. Formed in October 2010, APO NT is an alliance between the Northern Land Council (NLC), Central Land Council (CLC), Aboriginal Medical Services Alliance Northern Territory (AMSANT), North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS).

APO NT is working to develop constructive policies on critical issues facing Aboriginal people in the Northern Territory and to influence the work of the Australian and Northern Territory governments. As representatives from peak organisations in the Northern Territory, we share the aim of protecting and advancing the wellbeing and rights of Aboriginal and Torres Strait Islander people and communities. We also aim to provide a representative voice for Aboriginal people in the Northern Territory and to enable effective communication and information distribution between and within communities and Aboriginal organisations.

NAAJA:

NAAJA delivers quality and culturally appropriate Aboriginal legal services to the Top End of the Northern Territory in criminal law, family law, civil law as well as advocacy and community legal education.

Central Land Council:

The Central Land Council is a Commonwealth statutory authority established under the *Aboriginal Land Rights (Northern Territory) Act 1976* and a Native Title Representative Body under the *Native Title Act 1993*.

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The CLC is one of four Northern Territory Land Councils. The CLC region covers the entire southern half of the Northern Territory, an area of some 780,000 square kilometres of land. The council is made up of 90 Aboriginal people from more than 15 language groups elected from communities across the region.

The CLC is first and foremost a representative organisation for the Aboriginal people in its region particularly on land related matters, including land claims and economic use of land.

CAALAS:

Central Australian Aboriginal Legal Aid Service strives for justice, dignity and equal rights and treatment before the law for Aboriginal people in Central Australia. CAALAS provides high quality, culturally appropriate and readily accessible legal services (in the areas of criminal, civil, family and welfare rights law), legal education, social justice advocacy and preventative and early intervention services to Aboriginal people and communities in Central Australia.

Northern Land Council:

The Northern Land Council processes outstanding land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976*, as well as undertaking responsibilities under other legislation, such as native title claims. In addition, assisting landowners with land management and economic development is now a priority. Many Aboriginal people use the Northern Land Council to assist them in ‘caring for country’ and to develop economic opportunities. The Northern Land Council region covers the northern part of the mainland Northern Territory.

AMSANT:

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AMSANT is the peak body for Aboriginal Community Controlled Health Services in the Northern Territory. It aims to improve the health of Aboriginal people in the Northern Territory through promoting and extending the principle of local Aboriginal community control over primary health care services to Aboriginal people. AMSANT aims to alleviate the sickness, suffering and disadvantage, and to promote the health and well-being of Aboriginal people of the Northern Territory through the delivery of health services and the promotion of research into causes and remedies for illness and ailments found within the Aboriginal population of the Northern Territory.

EXECUTIVE SUMMARY

The Expert Panel should recommend that Australians vote on changes to the Australian Constitution which eliminate racial discrimination, support agreement-making and recognise and protect the culture, languages and identity of Aboriginal and Torres Strait Islander people. Practical, substantive changes must be made to the body of the Constitution in addition to achieving symbolic recognition.

In this submission we do not use the term ‘Indigenous’, except where it is part of a formal name such as the Expert Panel on Constitutional Recognition of Indigenous Australians. We instead use the more appropriate term ‘Aboriginal and Torres Strait Islander people’.

The key points of this submission are:

1. **Substantive, practical changes** to the Australian Constitution are necessary and important.
2. Australia’s Constitution should not permit **racial discrimination**.
3. The Constitution should ensure that the Commonwealth can exercise its **national responsibilities** and legislate effectively for Aboriginal and Torres Strait Islander people.
4. These points mean that:

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- the races power in **section 51(xxvi)** should be re-written as a power to make laws with respect to ‘Aboriginal and Torres Strait Islander peoples’;
and
 - a **non-discrimination clause specifically directed to race** should be inserted into the Constitution to protect all Australians against laws and executive action at the Commonwealth, State or Territory levels which discriminate adversely on the basis of race.
5. **Section 25**, in recognising that people may be disqualified from voting in state elections on the basis of their race, should also be deleted.
 6. **Agreement-making** between governments and Aboriginal and Torres Strait Islander peoples allows all sides to take their fair share of responsibility for improving the daily lives of Aboriginal and Torres Strait Island people.
 7. The Constitution should support agreement-making. This should be modelled on the existing and successful agreement-making provision in **section 105A** of the Constitution.
 8. The Constitution should recognise the **right** of Aboriginal and Torres Strait Islander people **to maintain and practise our culture, languages and identity**. It should also require action by the Commonwealth, States and Territories to recognise and protect the culture, languages and identity of Aboriginal and Torres Strait Islander people.
 9. A **Statement of Recognition** of Aboriginal and Torres Strait Islander people should be included in the body of the Australian Constitution and no legal disclaimer should attach to such a statement.

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WHY CONSTITUTIONAL CHANGE IS IMPORTANT

Aboriginal people in the Northern Territory understand that the Australian Constitution matters. We have experienced law-making power being used for and against our interests. We have seen that legal recognition can make a difference to our lives. We know first-hand that laws which discriminate against us on the basis of our race remain possible under Australia's existing constitutional arrangements.

From our experience with Commonwealth Ordinances in the protectionist and assimilation eras, through the *Aboriginal Land Rights Act*, the *Native Title Act* and the Northern Territory Intervention, Aboriginal people in the Northern Territory know that getting the right legal balance in the Constitution between the rights of people and the powers of government is essential. We also know that Australia has not yet achieved that proper balance. Laws have been made with insufficient respect for Aboriginal people, our rights and capabilities. The gains that we have made in the recognition of our rights and culture are often vulnerable to being reversed or diminished.

A referendum in 2013 offers an important opportunity for Australia to modernise its Constitution in this key area. It is also a way of ensuring that the Constitution reflects the broad respect in the community for the idea that people should not be discriminated against on the basis of their race.

The unfortunate truth is that racism was a feature of law and politics in the 1890s when the Australian Constitution was drafted. Things have moved on. Australia has committed itself internationally to respect basic human rights. Its courts and parliaments have taken some steps to reverse dispossession and recognise Aboriginal property rights. The government has agreed to the principles of the UN Declaration on the Rights of Indigenous Peoples. The Prime Minister led the Parliament in 2008 in a national apology to Aboriginal and Torres Strait Islander people.

Unfortunately the Constitution has not kept pace with these positive developments. In particular, it permits unilateral and discriminatory action which is not only flawed in principle but leads to bad policy and poor implementation. The most effective path to progress in

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Aboriginal and Torres Strait Islander affairs lies in a shared commitment to solving problems, based on mutual respect and all sides taking responsibility for what they can improve.

Constitutional change is needed to support this goal. This would carry forward the work commenced by the 1967 referendum but left unfinished – eliminating racial discrimination in the Constitution and helping to build a future based on acknowledgment, respect and negotiation. A renewed Constitution could engender national pride in Aboriginal and Torres Strait Islander heritage in a way that all Australians can share.

ELIMINATING RACIAL DISCRIMINATION

The need for a non-discrimination clause with respect to race

The Australian Constitution was drafted at a time when politicians thought racial discrimination was an acceptable policy. Aboriginal people in the Northern Territory repeatedly suffered injustice under racially discriminatory laws. Commonwealth Ordinances gave administrators extensive controls over people's daily lives and caused harm to many Aboriginal families and children. Many Aboriginal people were denied the right to vote at federal elections until 1962.

After 1975, the federal *Racial Discrimination Act* made a difference. But it was cancelled out by the Commonwealth Parliament when enacting native title laws and the Northern Territory Intervention. There is nothing in the Constitution to prevent this happening again.

Racial discrimination is wrong. The Constitution needs to make that clear.

A clause should be inserted in the Australian Constitution which says that no Commonwealth, State or Territory law or government action can discriminate on the basis of race.

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The need for a federal law-making power in Aboriginal and Torres Strait Islander Affairs

APO NT and its constituent organisations engage with both the Northern Territory and Commonwealth governments. When we deal with the Commonwealth, we need it to be able to act on its national responsibilities. There should be clear authority to do so spelt out in the Constitution. This is consistent with providing recognition of Aboriginal and Torres Strait Islander people in the Constitution.

The wording of the existing races power in section 51(xxvi) of the Constitution must be improved. Race is the wrong concept upon which to make federal laws.

The power should instead be to make positive laws for Aboriginal and Torres Strait Islander people. There should be a federal power to make laws with respect to ‘Aboriginal and Torres Strait Islander people’. Merely deleting the races power and replacing it with these words would not achieve the most important object of ensuring that laws cannot be made for Aboriginal and Torres Strait Islander people in a way that discriminates against them on the basis of their race. Hence, the power must be put into the Constitution in combination with the clause protecting against racial discrimination. A key requirement is that the wording of the federal power fits well with the non-discrimination clause.

The need to reconcile a revised section 51(xxvi) with a non-discrimination clause

The point of revising section 51(xxvi) and inserting the non-discrimination clause is to allow positive laws and prevent bad ones, now and into the future. That objective must govern the use of the power in section 51(xxvi) and also the way in which positive laws enacted under that power can stand with the non-discrimination clause.

The non-discrimination clause should be accompanied by words in the Constitution that expressly permit laws that maintain and promote Aboriginal and Torres Strait Islander culture, languages and identity, or address historical disadvantage. This will protect against an unintended interpretation of the non-discrimination clause which might affect laws of this kind.

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It is important the Constitution prohibit adverse racial discrimination. On the other hand, the Constitution must also enable Australia's parliaments and governments to act with confidence to redress disadvantage and support Aboriginal and Torres Strait Islander culture, languages and identity now and for the decades to come.

The need to delete section 25

A provision which contemplates race-based electoral laws has no place in the Australian Constitution. Section 25 should be removed as part of the package of changes necessary to finally eliminate racially discriminatory provisions from the Australian Constitution.

SUPPORTING AGREEMENT-MAKING

The Australian Constitution should give legal support to agreement-making between governments and Aboriginal and Torres Strait Islander peoples.

In a symbolic sense, this gives appropriate recognition to Aboriginal and Torres Strait Islander peoples, whose status and rights were ignored during colonisation and federation. In a practical sense, agreement-making offers a constructive path to solutions that have legitimacy and are therefore more likely to work. Such agreements could be made to improve specific areas like education and health and could extend to more comprehensive arrangements over matters such as local governance. Agreement-making gets away from governments telling Aboriginal people what to do and instead allows everyone to take on their share of responsibility for a better future.

The model presented by section 105A of the Constitution is an appropriate one, offering both security and flexibility.

A new section 105B of the Constitution could:

- authorise the Commonwealth, States and Territories to enter into agreements with Aboriginal and Torres Strait Islander peoples;

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- give constitutional force to an agreement negotiated by the parties, thereby binding the Commonwealth, States and Territories; and
- authorise the parties to revise their agreement to meet changed circumstances, and give any such changes likewise the force of law.

RECOGNISING CULTURE, LANGUAGES AND IDENTITY

Protecting the rights to culture, language and identity

The Constitution should include a provision recognising the right of Aboriginal and Torres Strait Islander people to maintain and practise their culture, languages and identity. This should reflect the terms of the UN Declaration on the Rights of Indigenous Peoples.

The clause should also require action by the Commonwealth, States and Territories to recognise and protect the culture, languages and identity of Aboriginal and Torres Strait Islander people. These should also be protected against being undermined by the laws and policies of any Australian government or parliament.

A Statement of Recognition in the Constitution

A Statement of Recognition of Aboriginal and Torres Strait Islander people as Australia's owners and occupiers should be included in the body of the Australian Constitution. The Statement should refer to matters such as:

- the history of continuous occupation by Aboriginal and Torres Strait Islander people;
- our unique status as the original owners and occupiers of Australia;
- colonisation by Britain and its impacts for Aboriginal and Torres Strait Islander societies;
- the maintenance of Aboriginal and Torres Strait Islander culture, languages and identity;

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- the spiritual, social, cultural and economic relationship we have to our land and waters; and
- the distinctive contributions we have made to Australian life and Australian identity.

APO NT is aware that certain States have recently included like acknowledgment in the preamble or body of their constitutions, but have attached a clause disclaiming any legal significance for the change. We oppose the inclusion of a legal disclaimer in the Australian Constitution. This would send the wrong message and undermine the significance and value of the Australian people voting at a national referendum to acknowledge and recognise Aboriginal and Torres Strait Islander people.

The inclusion of a Statement of Recognition in the body of the Australian Constitution would not preclude the insertion of a Preamble to the Constitution which addresses a wider range of matters.