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30 January 2015

Joint Select Committee on Constitutional  
Recognition of Aboriginal and Torres Strait  
Islander Peoples  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [jscatsi@aph.gov.au](mailto:jscatsi@aph.gov.au)

Dear Sir or Madam

**LIBERTY VICTORIA'S SUBMISSION TO THE JOINT SELECT COMMITTEE ON  
CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT  
ISLANDER PEOPLES**

Liberty Victoria is grateful for the opportunity to make this submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development of Australia's laws and systems of government. Further information may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au).

Liberty Victoria acknowledges the work of Nicholas Moodie, Claire McMahon Jacquelyn Thompson and Asher Hirsch, members of Young Liberty for Law Reform, who prepared this submission under the supervision of Dr Adam McBeth. Young Liberty for Law Reform is a program that gives young professional and student volunteers the opportunity to engage in law reform and advocacy projects under the mentorship of Liberty Victoria members.

## **I LIST OF RECOMMENDATIONS**

**Recommendation 1:** Liberty Victoria recommends that section 25 and section 51(xxvi) of the *Constitution* be repealed.

**Recommendation 2:** Liberty Victoria recommends that section 51A of the Expert Panel Draft Bill be inserted, with changes in section 51A to read:

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 the benefit of Aboriginal and Torres Strait Islander peoples.

In addition, subsection 51A(a) should be inserted to read:

51A(a): Whether a law is for the benefit of Aboriginal and Torres Strait Islander peoples within the meaning of section 51A is to be determined by the standards of an ordinary reasonable member of the community for whom the benefit is intended.

**Recommendation 3:** Liberty Victoria recommends that section 116A of the Expert Panel Draft Bill be inserted, with the addition of subsection (2)(a) inserted to read:

116A(2)(a): In interpreting subsection (2), reference shall be made to an ordinary reasonable member of the community for whom the benefit is intended.

**Recommendation 4:** Liberty Victoria recommends that section 127A of the Expert Panel Draft Bill not be inserted.

**Recommendation 5:** Liberty Victoria recommends that a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution take place at or shortly after the next federal election in 2016, provided sufficient consultation and awareness-raising occurs in the meantime.

**Recommendation 6:** Liberty Victoria recommends that the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* should be extended to align with the proposed timing of a referendum.

## II INTRODUCTION

1. Liberty Victoria welcomes the Joint Select Committee's decision to review steps that can be taken to progress towards a successful referendum on Indigenous Constitutional Recognition. It is a matter of great significance for both indigenous and non-indigenous Australians. Constitutional recognition of Aboriginal and Torres Strait Islanders is necessary to acknowledge the harm caused by colonisation, the mistakes of the past and to assist with sustaining Aboriginal and Torres Strait Islander culture, heritage and languages into the future. Recognition, done correctly, provides an opportunity to establish a fair and just framework for the governance of Australia. Such a system would respect Aboriginal and Torres Strait Islanders as a fundamental and core component of Australian society.
2. This submission will first consider how constitutional recognition of Aboriginal and Torres Strait Islander Peoples may be understood in the context of international law. It will explore relevant cornerstones of international law, including equality, non-discrimination and self-determination. Indigenous constitutional recognition is consistent with the rights and obligations owed to indigenous societies within the international human rights system.

3. The submission will then review the Expert Panel Report on Constitutional Recognition of Indigenous Australians. Liberty Victoria broadly endorses this Report, and this submission will make recommendations for constitutional amendment based on the conclusions in the Report, including that:
  - a) section 25 and section 51(xxvi) of the Constitution be repealed; and
  - b) sections 51A and 116A of the Expert Panel Draft Bill be inserted, with certain amendments.
4. Finally, the submission will set out steps required to execute a successful constitutional referendum, including appropriate timing for a proposed referendum and other legislative amendments that may be required.

### **III ABORIGINAL RECOGNITION – INTERNATIONAL LAW**

5. Recognition of Aboriginal and Torres Strait Islanders within the Australian Constitution needs to be understood within the context of international law and the rights and obligations owed to indigenous societies within the international human rights system.<sup>1</sup> This means that both cultural integrity and autonomy must be affirmed alongside participatory engagement.<sup>2</sup> “This dual thrust reflects the view that indigenous peoples are entitled to be different but are not to be considered unconnected from larger society and political structures.”<sup>3</sup> The current section 25 of the Australian Constitution is in direct violation of this principle. At a minimum section 25 must be removed to eliminate the legal capacity to disregard Aboriginal and Torres Strait Islander voting rights on the basis of race.
6. Constitutional recognition of Aboriginal and Torres Strait Islander peoples is about acknowledging and preventing the recurrence of historical and modern

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<sup>1</sup> Greg Marks, “Sovereign States vs Peoples: Indigenous Rights and the Origins of International Law”, *Australian Indigenous Law Reporter*

<sup>2</sup> S James Anaya, “International human rights and indigenous peoples: The move toward the multicultural state”, *Arizona Journal of International and Comparative Law*

<sup>3</sup> S James Anaya, “International human rights and indigenous peoples: The move toward the multicultural state”, *Arizona Journal of International and Comparative Law*

practices and attitudes that have treated indigenous cultures as inferior to other cultures. It is also about the right to equality and its mirror norm of non-discrimination, principles that are at the core of the contemporary international human rights regime.<sup>4</sup>

7. The promotion of equality through the elimination of racism is an important cornerstone of international law. Article 2 of the Universal Declaration of Human Rights (**UDHR**) states that each person is entitled to rights set out in the UDHR, including economic, social, cultural and political rights, civil liberty and the right to be treated with dignity, without distinction of any kind, including on a racial basis.<sup>5</sup> Upholding this principle has been key for the protection and self-determination of minority racial groups throughout the world.<sup>6</sup>
8. There are, of course, various international and domestic instruments which protect racial minorities through positive discrimination.<sup>7</sup> Consider, for instance, 'special measures' or programs which are used to promote access to education and employment for members of particular racial groups, which in Australia includes those of Aboriginal or Torres Strait Islander origins. However, this form of discrimination is justified as a means of nullifying any disadvantage that may be suffered by individuals as a result of their minority background, or actively promoting the social and economic benefit of the minority group.<sup>8</sup> Similar

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<sup>4</sup> S James Anaya, "International human rights and indigenous peoples: The move toward the multicultural state", *Arizona Journal of International and Comparative Law*

<sup>5</sup> Article 2, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 12 January 2015].

<sup>6</sup> See Megan Davis, "Community control and the work of the national aboriginal community controlled health organisation: Putting meat on the bone s of the 'UNDRIP'", *Indigenous Law Bulletin*, 8(7) July/August 2013: 11-1, available at <http://search.informit.com.au/documentSummary;dn=615561394500771;res=IELAPA> ISSN: 1328-5475> [accessed 12 January 2015].

<sup>7</sup> See, eg, Articles 1(4) and 2(2), UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 12 January 2015]; *Racial Discrimination Act 1975* (Cth) , section 8.

<sup>8</sup> See Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws (ALRC Report 31)*, published 12 June 1986, available at <http://www.alrc.gov.au/publications/report-31> [accessed 12 January 2015], section 9; Daniel Ghezlbash and George Newhouse, "Calling the Northern Territory Intervention laws to account: complaint to the UN Committee on the Elimination of All Forms of Racial Discrimination", *Law Society Journal: The official journal of the Law Society of New South Wales*, 47(9), October 2009: 56-59, available at

principles also apply to the active protection of minority customary heritage and culture, and in some cases the recognition of traditional laws.<sup>9</sup>

9. Any form of discrimination or differential treatment that is not aimed at promoting the rights and welfare of minority racial groups is, on the other hand, prohibited by international law. Although international law is somewhat indeterminate and strictly non-binding, Australia has ratified the major treaties and conventions that form the basis of international racial discrimination protection, including:

- **International Covenant on Civil and Political Rights (ICCPR)**<sup>10</sup>: As with the UDHR, Article 2(1) of the ICCPR states that all rights contained in this Covenant apply to all individuals, without distinction of any kind, including race.
- **International Covenant on Economic, Social and Cultural Rights (ICESCR)**<sup>11</sup>: Article 2(2) of the ICESCR also ensures that the rights of this Covenant are to be exercised without discrimination as to race.
- **International Convention on the Elimination of All Forms of Racial Discrimination**<sup>12</sup>: This Convention obliges signatories to eliminate racial discrimination domestically and to use education or information to combat the prejudices that lead to racial discrimination.<sup>13</sup>

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<http://search.informit.com.au/documentSummary;dn=200911628;res=IELAPA> ISSN: 1839-5287> [accessed 12 January 2015], 58.

<sup>9</sup> Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws (ALRC Report 31)*, published 12 June 1986, available at <http://www.alrc.gov.au/publications/report-31> [accessed 12 January 2015], section 9.

<sup>10</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 12 January 2015].

<sup>11</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 12 January 2015].

<sup>12</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 12 January 2015].

<sup>13</sup> Australian Human Rights Commission, "Guide to the Law - The International Convention on the Elimination of All Forms of Racial Discrimination", available at <https://www.humanrights.gov.au/guide-law-international-convention-elimination-all-forms-racial-discrimination> [accessed 12 January 2015].

10. The role of international law in the lives of minority racial groups is not limited to racial discrimination protection. Indigenous peoples in particular are recognised as a special category within international law. For instance, the Declaration on the Rights of Indigenous Peoples<sup>14</sup> is a framework for applying existing human rights standards and obligations to the recognition and protection of indigenous rights.<sup>15</sup> It sets out both individual and collective rights of indigenous peoples. Other international law instruments, such as the International Labour Organisation's Convention concerning Indigenous and Tribal Peoples in Independent Countries,<sup>16</sup> are dedicated to ensuring that indigenous history is respected and that affirmative action is taken to compensate for disadvantages experienced by indigenous peoples as a result of colonialism.

#### **IV EXPERT PANEL REPORT AND THE COMMITTEE'S PROGRESS REPORT**

11. Liberty Victoria highlights the important need to recognise Aboriginal and Torres Strait Islanders in the *Australian Constitution*, while ensuring that the Federal Government cannot make laws that discriminate on the basis of race. It is a shame that Australia stands at odds with many nations in recognising its first peoples. As the nation's first and preeminent legal document, the *Constitution* is more than a set of laws; it is the guiding framework for our country's values, principles and ethics. As such, it is vital that this document highlights the significant role Aboriginal and Torres Strait Islanders play in our history, present and future.

12. Liberty Victoria submits that recognition should be more than simply a statement of affirmation, and that any amendment should also contain strong legal and political protections to prevent the horrors of the past from recurring,

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<sup>14</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html> [accessed 12 January 2015].

<sup>15</sup> Reconciliation Australia, "United Nations Declaration on the Rights of Indigenous Peoples", available at <https://www.reconciliation.org.au/wp-content/uploads/2013/12/United-Nations-Declaration-on-the-Rights-of-Indigenous-Peoples.pdf> [accessed 12 January 2015].

<sup>16</sup> International Labour Organization, Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169, available at: <http://www.refworld.org/docid/3ddb6d514.html> [accessed 21 January 2015].

and those of the present from continuing. To this end, Liberty Victoria endorses the Expert Panel Report on Constitutional Recognition of Indigenous Australians.

13. Importantly, Liberty Victoria highlights the need to:

- remove section 25 of the *Constitution* in order to prevent states from discriminating on the basis of race in terms of voting rights;
- remove section 51(xxvi) to prevent the Federal Government from passing laws that discriminate against people on the basis of their race;
- insert a provision to recognise Aboriginal and Torres Strait Islanders as the first peoples of the land, acknowledging their cultures, languages and heritage, respecting their ongoing relationship to the lands and waters and their continuing cultures and languages;
- ensure that any laws which are created work towards the benefit of all Aboriginal and Torres Strait Islanders; and
- insert a new clause that prevents racial discrimination by the Commonwealth, a State or a Territory (in accordance with international human rights).

#### Disqualification from voting and the race powers

14. As discussed above, Liberty Victoria believes that sections 25 and 51(xxvi) of the *Constitution* are discriminatory and at odds with international human rights law. Laws that allow a government to discriminate on the basis of race are archaic and unnecessary. Such provisions go against the multicultural nature of modern Australia. Section 51(xxvi) has provided for discriminatory and inhumane laws against Aboriginal and Torres Strait Islander people, enabling a multitude of discriminatory practices throughout the century. There is no place in modern day Australia for such powers. As such, Liberty Victoria agrees with the Expert Panel and the Committee's view that section 25 and 51(xxvi) should be repealed.

**Recommendation 1:** Liberty Victoria recommends that section 25 and section 51(xxvi) of the *Constitution* be repealed.



### Prohibition on racial discrimination

15. Liberty Victoria submits that section 116A of the Expert Panel Draft Bill, which seeks to ban racial discrimination by federal, state and territory governments, should be introduced. Such prohibition on racial discrimination is in line with international human rights law and will ensure Australia is meeting its international obligations. As Australia does not have a Charter of Rights, this constitutional protection is extremely important to ensure a multicultural, free and equal society. At the same time, Liberty Victoria acknowledges the need for limited federal powers in order to reverse the affects of past and current discrimination and to promote indigenous rights.

### Power to make laws with respect to Aboriginal and Torres Strait Islander peoples

16. Liberty Victoria also acknowledges that the Commonwealth needs to have legal power to address past discrimination and ensure the promotion of rights in connection to land, water, culture and heritage. This is in line with human rights provisions, discussed above, which allow for positive discrimination in order to address past wrongs. However, such powers need to be restricted and interpreted narrowly to ensure they are not misused. As such, Liberty Victoria submits that section 51A of the Expert Panel's Draft Report be introduced.

17. While Liberty Victoria supports the model proposed by the Expert Panel, we have some concern regarding the word 'advancement' in relation to the power to make laws with respect to Aboriginal and Torres Strait Islanders. Such a word leaves unanswered the question of who defines *advancement*, and to what goal. Such a word brings back memories of past horrors, in which many discriminatory and inhumane policies were implemented for the so called 'advancement' of Aboriginal peoples.

18. As such, Liberty Victoria recommends that the word 'benefit' be used, with the legal test not being based on a 'reasonable person' but rather a 'reasonable person of the group for whom the benefit is intended'. Such a test ensures that it is Aboriginal and Torres Strait Islander peoples who define the benefit of such laws, rather than the majority of white Australia. In recognition of the right to

self-determination, Aboriginal peoples should be the sole decision makers concerning what constitutes a benefit for their communities.

19. Furthermore, Liberty Victoria highlights the need for further and continued consultation with Aboriginal and Torres Strait Islanders regarding the wording of this clause.

**Recommendation 2:** Liberty Victoria recommends that section 51A of the Expert Panel Draft Bill be inserted, with changes in section 51A to read:

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 **the benefit of** Aboriginal and Torres Strait Islander peoples.

In addition, subsection 51A(a) should be inserted to read:

51A(a): Whether a law is for the benefit of Aboriginal and Torres Strait Islander peoples within the meaning of section 51A is to be determined by the standards of an ordinary reasonable member of the community for whom the benefit is intended.

**Recommendation 3:** Liberty Victoria recommends that section 116A of the Expert Panel Draft Bill be inserted, with the addition of subsection (2)(a) inserted to read:

116A(2)(a): In interpreting subsection (2), reference shall be made to an ordinary reasonable member of the community for whom the benefit is intended.

### Recognition of Languages

20. Liberty Victoria does not support the inclusion of section 127A of the Expert Panel Draft Bill. Liberty Victoria has concerns that the new section may have unintended consequences regarding constitutional recognition of English as the official language. Such recognition of English as the official language may entrench English as the official language, thereby creating unforeseen legal

issues in the future. There has never been a need to establish English as the official language within the constitution in the past, and Liberty Victoria believes such provision is unnecessary. While we acknowledge the importance of recognising Aboriginal languages as the original languages of Australia and part of our heritage, Liberty Victoria believes that such recognition is already found within the new section 51A. As such, Liberty Victoria agrees with the Committee that section 127A should not be implemented.

**Recommendation 4:** Liberty Victoria recommends that section 127A of the Expert Panel Draft Bill not be inserted.

## **V STEPS TO IMPLEMENT A SUCCESSFUL REFERENDUM**

21. Liberty Victoria supports the Committee's recommendations that a referendum be held at or shortly after the next federal election in 2016, and that the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* be extended to align with this timing. If a referendum were to be held any sooner, it is possible that public awareness on the issue would not have been sufficiently established. Liberty Victoria emphasises the importance of ensuring adequate time for Parliament to debate specific wording of a proposed draft, for consultation with Aboriginal and Torres Strait Islander communities to continue, and for awareness among the wider Australian population to increase through public awareness and education campaigns.

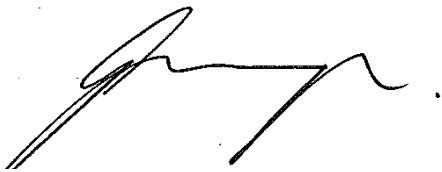
**Recommendation 5:** Liberty Victoria recommends that a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution take place at or shortly after the next federal election in 2016, provided sufficient consultation and awareness-raising occurs in the meantime.

**Recommendation 6:** Liberty Victoria recommends that the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* should be extended to align with the proposed timing of a referendum.

## VI CONCLUSION

22. While constitutional recognition in itself will not resolve the harm inflicted by the discriminatory laws and practices of the past, it will hopefully, in the spirit of equality, recognition and respect, contribute towards the future reconciliation of the peoples of Australia to the benefit of all involved.
23. Thank you for the opportunity to make this submission. If the panel has any questions with regard to this submission, or if we can provide any further information or assistance, please do not hesitate to contact George Georgiou SC, President of Liberty Victoria, Adam McBeth through the Liberty Victoria office by email: [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au). This is a public submission and is not confidential.

Yours sincerely

A handwritten signature in black ink, appearing to read 'George A Georgiou SC', with a stylized flourish at the end.

George A Georgiou SC  
President  
Liberty Victoria