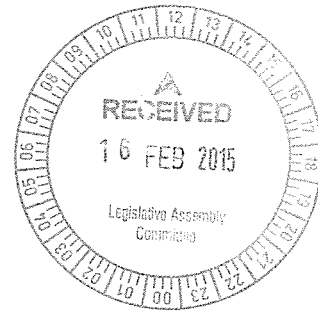




Government of Western Australia
Department of Aboriginal Affairs

ENQUIRIES: Madge Thomas

OUR REF: 2014/0933-01



Hon Michael Mischin, MLC
Attorney General; Minister for Commerce; Committee Chair
Joint Standing Committee on Aboriginal Constitutional Recognition
Parliament House
PERTH WA 6000

Dear Chair

**LETTER FROM THE JOINT SELECT COMMITTEE ON ABORIGINAL
CONSTITUTIONAL RECOGNITION - INQUIRY INTO THE APPROPRIATE
WORDING TO RECOGNISE ABORIGINAL PEOPLE IN THE CONSTITUTION OF
WESTERN AUSTRALIA - INVITATION TO MAKE A SUBMISSION**

Thank you for the opportunity to provide a submission to the inquiry into the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia (the Constitution).

As part of your inquiry you are seeking input on:

- The most appropriate form of wording to recognise Aboriginal people in the Act;
- The most appropriate manner in which recognition is to be incorporated into the Constitution;
- Any legal matters that need to be considered when incorporating certain words.

As a preliminary matter, DAA notes that a Federal Referendum is proposed on Constitutional recognition and is likely to take place in 2017. DAA considers that the outcome of this referendum and its impact on the Commonwealth Constitution will and should influence the approach taken in Western Australia.

DAA is the lead agency for the development of policy which advances the economic, social and cultural wellbeing of Aboriginal people in Western Australia. In making this submission, DAA is not expressing a legal opinion on the inclusion of particular wording, but rather providing policy advice and opinion, to inform the debate around appropriate wording for constitutional recognition of Aboriginal people.

DAA have identified a number of matters that DAA invites the Committee to consider as part of its inquiry.

Constitutional amendments and other Acts of Parliament

The Constitution, as the founding document of the government of this State, has been purpose built to define at the highest level, the structure of the relationships between the various arms of government. Constitutional documents are not readily adaptable to change. It is for this reason, that the rights and interests of individuals are better addressed in legislation which is specific to a particular field. This allows the legislation to more readily adapt to changes in society and movements in the common law.

DAA considers that any amendment to the Constitution should not attempt to address those matters which are already provided for in existing legislation, whether it is State or Commonwealth legislation.

DAA principally administers the *Aboriginal Affairs Planning Authority Act 1972* (AAPA Act) and the *Aboriginal Heritage Act 1972* (AHA). Both Acts have been specifically enacted to take in account the special interests of Aboriginal people, particularly with respect to land, heritage and the coordination of government services to Aboriginal people and the rights conferred in these acts should not be affected by Constitutional amendment.

Manner of recognition

It is a historical fact that Aboriginal people were living in Western Australia when the Constitution was enacted. For this reason, DAA supports recognising Aboriginal people in the preamble to the Constitution.

DAA notes that the Commonwealth's Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples (Commonwealth Committee) has proposed a more substantive course of recognition to include substantive provisions into the federal Constitution at s.51A (a 'Recognition' provision) and 116A (incorporating a prohibition against racial discrimination).

Queensland, Victoria and New South Wales have also adopted constitutional amendments to recognise Aboriginal and Torres Strait Islander peoples and all of these amendments contain provisions within the substantive content of the respective Constitutions, as opposed to in the preamble.

DAA understands that in 2004, the then Solicitor General of Western Australia advised that recognition of Aboriginal people in a Constitutional preamble would be a symbolic act of reconciliation, having no legal implications with regard to existing property or other rights. As constitutional recognition is proposed to have a symbolic effect and to avoid conferring or amending existing legal rights, recognition in the preamble only is supported.

DAA also supports removal of section 42 of the Act, as proposed in the *Constitutional Amendment (Recognition of Aboriginal People) Bill 2014* (the Bill), to give further effect to symbolic and actual reconciliation. Section 42 refers to the operation of the Act once the population of Western Australia 'exclusive of Aboriginal natives' has reached 60,000. Aboriginal people are clearly part of the population of Western Australia, which has, in any event, exceeded 60,000, therefore this provision is no longer appropriate or necessary to give effect to the Act.

Most appropriate wording for recognition

DAA notes that the Western Australian Premier has previously stated that it is preferred that Australia-wide recognition through the Australian Constitution occurs first, which can then be appropriately reflected in State Constitutions. Therefore, the draft provisions that the Commonwealth Committee has proposed may provide guidance as to the most appropriate wording for the WA Constitution.

The Bill proposes amendment to the preamble with statements recognising WA's government, legislature and colonial settlement history and the following phrase: *"And whereas the Houses of the Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect reconciliation with the Aboriginal peoples of Western Australia."*

It does not appear that the proposed wording is reflective of the Commonwealth Committee's proposal, which states at 51A:

51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage 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.

While DAA favours recognition only in the preamble, the wording contained in the Commonwealth Committee's s51A may be instructive and could be applied to Western Australia's preamble as follows:

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Houses of the Parliament resolve to acknowledge that the land and waters now known as Western Australia were first occupied by Aboriginal peoples; and acknowledge the continuing relationship of Aboriginal peoples of Western Australia with their traditional lands and waters; the Parliament affirms its respect for the continuing cultures, languages and heritage of Aboriginal peoples of Western Australia.

DAA notes the AAPA Act and AHA have preferred the terminology "original inhabitants".

The wording used by the Commonwealth Committee is preferred as it does not class Aboriginal people within a category used in current legislation, such as 'original inhabitants', nor does it create a new, potentially inconsistent, definition of Aboriginal people such as 'First Peoples'. This wording also acknowledges prior occupation and relationship to the traditional land and waters.

If, however, the intent is to provide a new terminology for Aboriginal peoples in Western Australia, the term 'First Peoples' or other similar wording is preferred as DAA considers this to be a plain English definition reflecting more modern terminology.

DAA's preferred wording also does not contain words such as 'custodians' or 'reconciliation' that could be subject to interpretation. While DAA supports the inclusion of wording that acknowledges constitutional recognition as a reconciliatory gesture, DAA believes the aims of reconciliation could be achieved by a less prescriptive phrase that allows Parliament to affirm its ongoing respect for Aboriginal culture, language and heritage.

DAA considers that constitutional recognition of this nature would be a powerful symbol of Western Australia's commitment to closing the gap between Aboriginal and non-Aboriginal Australians.

Legal matters for consideration

While DAA is not providing legal advice, the Committee may wish to consider the legal implications of the following matters further:

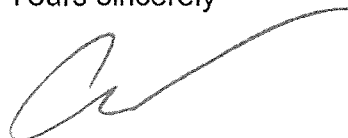
- Legal advice may be required on the effect of removing section 42 of the Act, notwithstanding that DAA does not consider this would have any adverse impact on the utility or effect of the Constitution.
- DAA understands that including wording in the preamble does not ordinarily confer legal rights or obligation, however, it may be appropriate to seek updated advice from the State Solicitor as to whether, and to what extent, contents of the preamble could be used by a Court to assist in the interpretation of the Constitution.
- If the wording in the Bill proposed by Ms Farrar is supported by the Committee, consideration may need to be given to the meaning and legal effect of '*Parliament seeks to effect reconciliation*'. This phrase has the capacity to imply obligations on Parliament and the term 'reconciliation' may be subjective and open to interpretation.
- If it is anticipated to include any wording regarding or resembling 'custodianship' in the substantive content of the Act, further consideration by the Committee and/or further legal advice from the State Solicitor's Office (SSO) or Department of the Attorney General (DOTAG) is appropriate.
 - The term 'custodian' or 'custodianship' is not defined in the *Native Title Act 1993 (Cwlth)*. While this term does not appear to hold a particular legal meaning for the purposes of native title, this should be confirmed to avoid unintended consequences on native title.
 - The *Northern Territory Sacred Sites Act*, s.3 states 'custodian', in relation to a sacred site, means 'an Aboriginal who, by Aboriginal tradition, has responsibility for that site' and, in Part II, includes a custodian of any sacred site. Therefore, 'custodianship' may also have a legal impact in a heritage or land management context.

- DAA notes that in other Australian jurisdictions, including Victoria, Queensland and New South Wales, where the word 'custodian' has been used, express wording has been included in the respective constitutions to allay concerns about creation of legal rights in respect to land. The wording is to the effect that these rights are not intended to be created.
- For example, clause 1A 'Recognition of Aboriginal people' in the *Constitutional (Recognition of Aboriginal People) Act 2004 (VIC)* recognises Victoria's Aboriginal people, as the '*original custodians of the land*', but also contains the following provision at sub-section three:
 (3) *The Parliament does not intend by this section—*
 - (a) *to create in any person any legal right or give rise to any civil cause of action; or*
 - (b) *to affect in any way the interpretation of this Act or of any other law in force in Victoria."*
- Consultations have revealed that such disclaimers may detract from the symbolic nature of recognition.
- The Committee may wish to consider whether a disclaimer would be appropriate and effective and whether it is likely to have a valid and binding effect.

DAA would welcome the opportunity to provide further submissions to the Committee as its proposals, findings and public hearings progress.

If you have any questions regarding this submission or require further information, please contact Ms Madge Thomas, Acting General Counsel, DAA, by email at

Yours sincerely



Cliff Weeks
DIRECTOR GENERAL

16 February 2015