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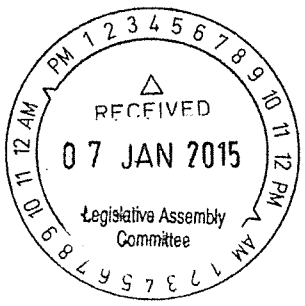

Dr Anne Twomey
Professor of Constitutional Law

7 January 2015

The Hon Michael Mischin MLC
Attorney-General and Minister for Commerce
Chair
Joint Select Committee on Aboriginal Constitutional Recognition
Parliament House
Perth, WA, 6000

Dear Attorney,

Submission to the Joint Select Committee on Aboriginal Constitutional Recognition

I refer to your letter of 12 December 2014 seeking a submission to the Joint Select Committee on Aboriginal Constitutional Recognition in relation to its inquiry into the 'most appropriate form of wording to recognise Aboriginal people in the Constitution of Western Australia'. I would like to make the following comments on the subject to aid the Committee in its deliberations.

1. Recognition in other State Constitutions

Indigenous Australians have in recent years been formally recognised in the Constitutions of Victoria, New South Wales, Queensland and South Australia. Four main issues have arisen in relation to each of these reforms. The first is whether recognition should take place in the text of the Constitution or whether it should instead be included in the preamble. The second is whether recognition should take the form of historical statements, explanations or aspirations on the one hand or whether substantive changes should be made in the Constitution. The third is whether there should be an express provision that denies any legal consequences that might otherwise arise from what were intended to be non-substantive provisions. The fourth is the method for enacting the law – whether it be by ordinary legislation or by a referendum – and the consequences for community involvement and understanding. Each State approached these issues as follows.

(a) Victoria

While the Victorian Constitution already had a preamble which included various historic statements about the formation of the Victorian Constitution, it was decided to leave them unchanged as they accurately presented the views taken at the time the Constitution was enacted. Instead, a new sub-section 1A(1) was inserted at the beginning of the Constitution in 2004 which acknowledges that the events set out in the preamble 'occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria'. Having recognised that failure, sub-section 1A(2) then sets out the recognition of 'Parliament' (rather than the people) of Victoria's Aboriginal people 'as the original custodians of the land' and then recognises their unique status as the descendants of Australia's first people, their spiritual, social, cultural and economic relationship with their traditional lands and waters and their unique and irreplaceable contribution to the identity and well-being of Victoria.

Sub-section 1A(3) then expressly states that the Parliament does not intend this section to create any legal rights or give rise to any civil cause of action. It also provides that it is not intended to affect in any way the interpretation of the State Constitution or any other law in force in Victoria.

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The amendment was made by the enactment of an ordinary law, the *Constitution (Recognition of Aboriginal People) Act* 2004 (Vic). No referendum was involved. The Act commenced on 10 November 2004.

Hence, while recognition was achieved in the substantive text of the *Constitution Act* 1975 (Vic), the provision does not make any substantive changes to the law and it is expressly provided that it is not intended to make any indirect changes through interpretation or by giving rise to legal rights or actions.

(b) New South Wales

The *Constitution Amendment (Recognition of Aboriginal People) Act* 2010 (NSW) amended the *Constitution Act* 1902 (NSW) by inserting a substantive provision in s 2. New South Wales did not have an existing preamble, so unless it decided to insert a new preamble into the Constitution (which would have opened up much broader issues about what should be included in such a preamble), its only other option was to insert a provision in the substantive text of the Constitution.

The recognition in s 2(1) was provided by 'Parliament, on behalf of the people of New South Wales'. Hence, the people are mentioned, but their consent and involvement is at most indirect, because they had no vote on the issue and this was not an election issue. It would be fair to say that very few citizens of New South Wales knew (and indeed, know now) that this occurred.

Sub-section 2(1) both 'acknowledges and honours the Aboriginal people as the State's first people and nations'. Sub-section 2(2) then recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales have a spiritual, social, cultural and economic relationship with their traditional lands and waters and have made and continue to make a unique and lasting contribution to the identity of the State.

Sub-section 2(3) then provides that the section does not create any legal right or liability, give rise to any civil cause of action or right to review administrative action, or affect the interpretation of any Act or law in force in New South Wales.

The constitutional amendment was made by the enactment of an ordinary law. No referendum was held.

As was the case in Victoria, the amendment was inserted in the substantive text of the Constitution, but no substantive change was made by it and it was expressed to have no legal or interpretative consequences.

(c) Queensland

Queensland revised and consolidated its Constitution in 2001. This new Constitution did not include a preamble. However, the Queensland Government decided later to insert a preamble in 2010 to celebrate the 150th anniversary of the establishment of Queensland. It did so by way of the *Constitution (Preamble) Amendment Act* 2010 (Qld).

The new preamble attributes a number of things to 'the people of Queensland'. It states, for example, that the people of Queensland 'intend through this Constitution to foster the peace, welfare and good government of Queensland' and that they adopt the 'principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution'. It also states that the people of Queensland 'honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community'.

Section 3A in the substantive text of the *Constitution of Queensland* 2001 declares that the Parliament 'does not in the preamble – create in any person any legal right or give rise to any civil cause of action; or affect in any way the interpretation of this Act or of any other law in force in Queensland.'

The preamble was inserted in the Constitution by way of the enactment of an ordinary law without any referendum being held. Although the inclusion of a preamble was considered by parliamentary committees, 'the people' were not directly asked whether they agreed with any of the beliefs attributed to them in that preamble.

Even though the statements made in the preamble were not included in the substantive text of the Constitution, a provision was still included in the Constitution to exclude any legal or interpretative consequences.

(d) South Australia

The South Australian Constitution was amended in 2012 by the *Constitution (Recognition of Aboriginal Peoples) Amendment Act* 2012 (SA) which inserted a new s 2 into the *Constitution Act* 1934 (SA).

Section 2 attributes the recognition of Aboriginal peoples to the 'Parliament on behalf of the people of South Australia'. First, in s 2(1) there is acknowledgment that the establishment of the colony of South Australia and the making of laws for its governance occurred 'without proper and effective recognition, consultation or authorisation of Aboriginal peoples of South Australia'.

In sub-section 2(2), the Parliament on behalf of the people of South Australia 'acknowledges and respects Aboriginal peoples as the State's first peoples and nations' and recognises Aboriginal peoples as traditional owners and occupants of land and waters in South Australia. In doing so, it recognises that their 'spiritual, social, cultural and economic practices come from their traditional lands and waters', that 'they maintain their cultural and heritage beliefs, languages and laws which are of ongoing importance' and that 'they have made and continue to make a unique and irreplaceable contribution to the State'.

Sub-section 2(2) also contains an acknowledgement that Aboriginal people have endured past injustice and dispossession of their traditional lands and water.

Sub-section 2(3) adds that the Parliament does not intend this section to have any legal force or effect.

Again, this amendment was enacted by ordinary legislation. No referendum was held.

While the provision was inserted in the substance of the Act, it made no substantive legal changes and was asserted to have no legal effect.

2. Constitutional Recognition at the National Level

As the Committee would be very well aware, there is a current debate about constitutional recognition of Aboriginal and Torres Strait Islander peoples at the national level. I have written about the relevant issues in an article in the *Sydney Law Review,* a copy of which is attached.

3. Western Australia

I understand that a *Constitution Amendment (Recognition of Aboriginal People) Bill* has been introduced into the Western Australian Parliament and referred to this Committee. The Bill has two functions. First, it would amend the preamble to the *Constitution Act* 1889 (WA) by adding at the end a paragraph in which the 'Houses of the Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land'. In doing so, it acknowledges a historic fact and attributes this acknowledgement to the Houses of Parliament, rather than the people. It further adds that the 'Parliament' (which includes both Houses and the Crown) 'seeks to effect a reconciliation with the Aboriginal peoples of Western Australia'. This appears to provide a positive aspiration. It does not explain how this aspiration is to be achieved or what is meant by reconciliation.

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The second proposed amendment is the repeal of s 42 of the *Constitution Act* 1889 (WA), which would delete a transitional provision that is no longer relevant. The reason for its deletion is that s 42 excluded 'aboriginal natives' from the population for the purposes of identifying when an elective legislative council should be established in the nineteenth century.

As with the other States, it is proposed that this amendment be made by ordinary legislation and that no referendum be held.

As in Queensland, the amendments are proposed to be preambular in nature, rather than in the substantive text of the Constitution. (While the repeal of s 42 appears to be substantive in nature, the provision is already redundant, having ceased to apply well over a century ago.) Interestingly, no provision has been included that would expressly prevent the preambular statements from having any legal or interpretative consequences. The relevance of such clauses is discussed in an article I wrote on the interpretation of preambles in the *International and Comparative Law Quarterly,* a copy of which is also attached.

The proposed Western Australian provision is also unusual in that it contains an aspiration for future action, rather than simply historical statements or recognition of facts. How a court might interpret an aspiration remains uncertain and is also discussed in my attached article on the interpretation of preambles.

4. The effectiveness of 'recognition'

At the national level, the means of providing Indigenous constitutional recognition is an end in itself. The power of 'recognition' will lie in the fact that the Australian people are asked for their approval and positively vote in favour of it, as they did in overwhelming numbers in 1967. This is true recognition because it is derived directly from the people, rather than indirectly through elites at the political level.

The problem with constitutional recognition at the State level is that there has been no involvement of the people, no expression of their views through votes and there is, in fact, almost no knowledge amongst the general public that these acts of recognition have occurred in their name. While a referendum is not constitutionally necessary at the State level to achieve Aboriginal recognition, it is the only way that such a change would have any real social effect. Otherwise, it is only the elites in the Aboriginal community and the political community who are even aware of the constitutional amendment and who give it significance. For the rest of the population, it is likely to pass by either completely unknown or as one story in a newspaper that is forgotten the following day. This is not a reason for failing to go ahead with recognition at the State constitutional level. Constitutional recognition will still be an important educative tool. Rather, it is an observation that such a reform is likely to achieve little in terms of public recognition, in contrast with recognition at the national level pursuant to a referendum.

If the Committee has any particular wording that it would like comments on or wishes to raise any particularly constitutional issues, please let me know and I will do my best to help.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law