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Hon Michael Mischin, MLC  
Committee Chair  
Joint Select Committee on Aboriginal Constitutional Recognition  
Parliament House  
Perth WA 6000

Dear Mr Mischin

**Inquiry into the appropriate wording to recognise Aboriginal people in the  
Constitution of Western Australia**

Thank you for the invitation to make a submission to this inquiry.

The idea of recognising Aboriginal and Torres Strait Islander peoples in Australia's constitutions has been championed by both sides of politics for more than a decade. Prime Minister John Howard sought, unsuccessfully, to have the Australian people support a new preamble to the Australian Constitution. This was a question on the ballot paper for the 1999 republic referendum. The new preamble would have stated:

We the Australian people commit ourselves to this Constitution ... honouring  
Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship  
with their lands and for their ancient and continuing cultures which enrich the life of  
our country.<sup>1</sup>

Even though this attempt failed, it spurred like change at the State level. Victoria was the first to move, adding the following text in 2004 to its *Constitution Act 1975* (Vic):

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<sup>1</sup> Constitution Alteration (Preamble) 1999 (Cth).

### **1A Recognition of Aboriginal people**

(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—

- (a) have a unique status as the descendants of Australia's first people; and
- (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
- (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

(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.

This section comes after the existing preamble to that Constitution, with recites things such as the creation of the self-governing colony of Victoria in 1854. Similar statements of recognition have since been added to the constitutions of Queensland,<sup>2</sup> New South Wales<sup>3</sup> and South Australia.<sup>4</sup>

The addition of such text to these four State constitutions has provided an important opportunity to recognise Aboriginal peoples in the foundational document of those States. The passage of these changes has been accompanied by public events that have attracted significant media and other interest.

My view is that the Parliament of Western Australia should make a like change. In addition to providing the basic rules of government, constitutions typically contain symbolic and aspirational text that sets out not only where a State is headed, but how its community is constituted, and where it has come from. The absence of appropriate mention of Aboriginal people in the West Australian Constitution is an unfortunate reminder of discredited past policies in voting and other areas.

It is important that the wording of any change be developed in consultation with Aboriginal people. It would be tokenistic and inappropriate to recognise them without ensuring that they are satisfied with the words of recognition. A starting point for such discussions would no doubt be the wordings agreed to by the other States.

One aspect of the recognition achieved in the four states is that each has been accompanied by what is known as a non-justiciability clause. This is set out in subsection (3) of the Victorian words set out above. Similarly, words recognising Aboriginal people in the South Australian Constitution are accompanied by a clause providing that 'the Parliament does not intend this section to have any legal force or effect'. The effect of these words has been to undermine Indigenous support, in part because of a perception that this constrained form of recognition is insincere.

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<sup>2</sup> *Constitution of Queensland 2001* (Qld), preamble and s 3A.

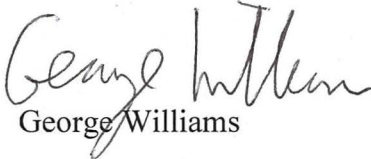
<sup>3</sup> *Constitution Act 1902* (NSW), s 2.

<sup>4</sup> *Constitution Act 1934* (SA), s 2.

In any event, such a clause is not needed, and misunderstands the role of a preamble or other forms of recognition in a constitution. Words of recognition are not expressed to have a substantive effect. They do not contain operative causes, and so do not confer new rights or obligations. This is reflected in the use made of such clauses by Australian courts. Judges have referred to preambular statements, but only on rare occasions, and even then not in a way that has given rise to new legal obligations. Hence, it has been stated that the High Court has historically treated the existing preamble in the Australian Constitution 'with a mix of indifference and reticence'.<sup>5</sup>

Words of recognition may be safely inserted into the Constitution of Western Australia without the need to add a non-justiciability clause. If nothing else, this avoids the odd, contradictory, situation of inserting words into a law, only to simultaneously indicate that they are not to have any legal effect.

Yours sincerely

  
George Williams

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<sup>5</sup> Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24 *University of New South Wales Law Journal* 382 at 386.