

Submission
by the Australian Monarchist League
To the Joint Select Committee on
Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

31 January, 2015

About us

The Australian Monarchist League, the nation's largest member-based monarchist organisation, defends the Constitution, with the Crown at its heart, as together they protect all Australians, including Aboriginal and Torres Strait Islander peoples.

The League is pleased to make the following submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. Officers of the League would be willing to appear before the Committee to assist it further.

Introduction

The Parliament has declared its commitment to a referendum on constitutional recognition.¹ As is widely recognised, this referendum will fail if the Australian people do not share the Parliament's view on the desirability of recognition, and of recognition in the particular form put to the people.

The Australian Monarchist League has always respected the interests of Australia's Aboriginal and Torres Strait Islander peoples and we raise the following concerns which may warn the Joint Select Committee that it might not make recommendations which may be unhelpful to Aboriginal and Torres Strait Islander people and which are likely to fail if presented in a referendum.

The nature of our Constitution

The Constitution is a legal, practical document, specifying the powers of the Commonwealth and establishing the framework for the relationship between the Commonwealth, the States and the people. It does not attempt to somehow articulate what it is to be an Australian or how any of the Australian people are to be recognised, other than as subjects of the Queen.

As such, constitutional recognition would involve changing the nature and purpose of the Constitution.

Equality under the Crown

Constitutional recognition also has the potential to undermine a key constitutional principle: the Crown's function of presiding over all its subjects in a unifying and equitable manner.

As the oldest institution in Australia, the Crown has always had a deep concern for Aboriginal and Torres Strait Islander peoples. For example, the following instruction was issued under the authority of King George III to the first NSW governor:

*You are to endeavour by every possible means to open an Intercourse with the Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence.*²

¹ *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*

² "Governor Phillip's Instructions 25 April 1787 (UK)" which can be found in 'Documenting a Democracy' (Museum of Australian Democracy & National Archives of Australia) <http://www.foundingdocs.gov.au>.

The Crown has always sought to give Aboriginal and Torres Strait Islander peoples the same legal rights, privileges and protections as apply to all the Crown's subjects. There should be no legal advantage or disadvantage accruing to Aboriginal and Torres Strait Islander peoples simply on the basis of their aboriginality. The League believes the Constitution, in particular, should not give, or risk giving, favour to any persons on the basis of their race.

The League would oppose any constitutional amendment that would give a different legal status to Aboriginal and Torres Strait Islander peoples. Such a proposal would be highly likely to be rejected at a referendum. Instead of helping Aboriginal and Torres Strait Islander people, it may cause difficulties in the community by diminishing efforts for unity and prosperity among all Australians.

Responses to specific recommendations

The League offers the following additional responses to certain problematic recommendations of the Joint Select Committee.

Repeal of section 25

The Joint Select Committee recommends the repeal of section 25 of the Constitution. While it is difficult to envisage any State legislating to ban particular races from voting today, section 25 protects democracy by penalising any State that legislates in such a way. There would be no harm in retaining section 25.

Emendation of section 51 (xxvi)

Currently section 51 (xxvi) empowers the Commonwealth to make laws "with respect to the people of any race for whom it is deemed necessary to make special laws".

The Joint Select Committee recommends modification of section 51 (xxvi) to remove the reference to race, while retaining some aspects of the Parliament's power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

We believe that most Australians would consider amending the Parliament's powers to go beyond "recognition". The people may well be suspicious to learn that "recognition" is intended to have significant legal consequences.

Any proposal to reduce the Parliament's power under this section must be considered very carefully. Parliament should only agree to this if it is absolutely certain that it would never need this power to respond to unforeseen circumstances pertaining to a particular race.

The League particularly opposes Option 1's proposed section 116A and Option 2. These options would constitutionalise concepts such as "discrimination" and "adversity". Public policy with respect to Aboriginal and Torres Strait Islander peoples is often highly controversial and divisive.

Australians of good will can have markedly different opinions on how best to advance the wellbeing of Aboriginal and Torres Strait Islander people. This was seen in, for example, debate around the Northern Territory Intervention. Under Australia's current anti-discrimination framework, centred on the *Racial Discrimination Act 1975*, these decisions are ultimately made by the nation's representatives in the Federal Parliament. The courts have a significant role, applying the anti-discrimination laws, but the Parliament has the final say as to what laws are to be invalid for being discriminatory.

The Committee's proposals would remove this advantageous democratic flexibility, by giving the courts, interpreting the new constitutional provisions, the responsibility of reversing Aboriginal and Torres Strait Islander public policy on the basis of the courts' understanding of "discrimination".

The League does not consider that this would be at all satisfactory for this contentious but highly significant area of our national life.

Timing of a possible referendum

The Joint Select Committee recommends that a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution occur at (or shortly after) the 2016 federal election.

The Australian Monarchist League upholds the role of the Australian people in determining the rules by which they are governed. The only proper time for a successful referendum is when the people are sufficiently persuaded of the merits of the proposal and it is very likely to achieve a majority of votes in a majority of states. As such, fixing a date for a referendum seems premature at this time.

As to the holding of a referendum in conjunction with any federal election, we make the following points: Since referendum proposals are successful only when they enjoy bipartisan support, there would be no electoral advantage to any major party if the referendum were held in conjunction with a federal election. The Australian people are quite capable of voting in general elections while also casting their verdict in a referendum. There are also considerable cost-savings when a referendum is held in conjunction with a federal election.

Funding and education

The Expert Panel recommended that funding and education occur to advance recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. We consider that this would be totally inappropriate. Given that constitutional recognition is a matter which is to be determined by the Australian people, the resources of government should not be expended in a biased manner. The only public expenditure in regard to education and funding for constitutional reform should be equal funding of a yes and no case, and for educational programs which favour neither case.

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