Hobart
Community
Legal Service Inc.
Providing legal direction
ABN 76 369 538 971

Hobart Office
166 Macquarie Street
Hobart Tasmania 7000
Ph 03 6223 2500
Fax 03 6223 2510

24 November 2014

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

Dear Committee Secretariat

Thank you for the opportunity to appear before the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples on Thursday 13 November in Hobart.

At this hearing we took on record the question as to which of the options given in Recommendation 5 of the Progress Report printed in October 2014 was our preferred option.

Option 1 of Recommendation 5 of the Progress Report is Hobart Community Legal Service Inc. preferred option and in the attached paper we give our reasons for option 1 being our preferred option.

Yours faithfully

Jane Hutchison
Director

Why Hobart Community Legal Service Inc. considers OPTION 1 of Recommendation 5 of the Progress Report produced by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples to be the most appropriate option for the Australian Parliament to adopt

— Option 1, unlike Option 3, directly provides 'substantive recognition' of Aboriginal and Torres Strait Islanders (ATSIL peoples) in the Australian Constitution
    - Option 1 directly delivers meaningful constitutional recognition of Aboriginal and Torres Strait islander peoples. Option 3 seems largely to defer the task to the legislature, and does little to progress reconciliation in Australia by itself. Option 3 would not, in itself, merit the referendum that would be required to inset it in to the Constitution.

— Option 1, unlike Option 2 and Option 3, expressly prohibits racial discrimination by both the Commonwealth, the States and Territories. Option 2 only includes the Commonwealth in its express prohibition. Option 3, as previously discussed, contains no prohibition of racial discrimination at all.

— Option 1 provides, through the proposed new section 116A, express prohibition against discrimination, "on the grounds of race, colour or ethnic or national origin". It does not make specific reference to ATSIL peoples. This is a positive attribute for two reasons:
    - Section 116A(1) would provide constitutional protection against racial discrimination to all Australians, which in itself would be a significant step towards eradicating racial discrimination in Australia. Option 2 and Option 3 do not provide this feature. The possibility of laws being passed that propound to be for the 'benefit' of ATSIL peoples, but are not endorsed by ATSIL peoples and do not include their input, is also mitigated by a general provision like the proposed 116A.
    - Unlike the limited prohibition of discrimination provided in Option 2, the proposed Section 116A does not make express reference to ATSIL peoples and at the expense of other groups, and so the potential for a perception of a policy of unfairly favoring one group over the rest of the Australian public is mitigated.

For the above reasons, Option 1 is the superior option for delivering constitutional recognition to ATSIL peoples. It not only delivers in terms of giving recognition to ATSIL peoples through the proposed Section 51A, but it provides express prohibition against racial discrimination through the proposed Section 116A. As was noted in the committee's Progress Report, substantive constitutional recognition could not be provided to ATSIL peoples if it did not include the preclusion of racial discrimination.[1] This objective is most effectively delivered through the two separate

[1] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, (Commonwealth of Australia, October 2014), 5 - 7

sections. Because Option 1 does not attempt to place both the express recognition of ATSIL peoples and the preclusion of racial discrimination in the same section, it is able to achieve both objectives in a straightforward and clear manner, and with minimal controversy.

Option 2, which attempts to deliver both objectives in the one section, is less effective in at least two respects. The first is that the protection against racial discrimination it provides only applies to ATSIL peoples, and it is only enforceable against the Commonwealth, not the States or Territories. The second is that not only is Option 2 less effective, it is more vulnerable to controversy because it applies only to ATSIL peoples, and may be viewed by some Australians as unfair. It may also lead to 'special' laws that apply only to ATSIL peoples, but are, "contrary to the consent of the peoples", as has been previously discussed.[2]

In general, Option 2 is scantily defined and less comprehensive than Option 1 in its preclusion of racial discrimination. Option 3 is wholly inadequate in all respects for the reasons outlined above.

In summary, Option 1 delivers on the objectives the set out by the committee, and it delivers on the outcomes sought by ATSIL peoples, them being 'substantive' constitutional recognition, and a unequivocal preclusion of racial discrimination, both for ATSIL peoples and all other Australians, at Commonwealth, State and Territory levels. Option 1 is the superior option of the three proposed options, and it is a fit, proper and extremely necessary amendment to the Australian Constitution.

---

[2] T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2008, Australian Human Rights Commission (2009), p 72. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html quoted in Chapter 2: Constitutional reform: Creating a nation for all of us, Social Justice Report 2010, Australian Human Rights Commission (2011) at https://www.humanrights.gov.au/publications/chapter-2-constitutional-reform-creating-nation-all-us-social-justice-report-2010