30 September 2011
The Expert Panel
Constitutional Recognition
submitted online

Dear Panel,

Please find Kingsford Legal Centre's submission to the National Conversation on the recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution.

We look forward to your recommendations.

Yours Sincerely,
KINGSFORD LEGAL CENTRE

[Signature]

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Submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians
September 2011

About Kingsford Legal Centre
Since 1981, Kingsford Legal Centre (KLC) has provided legal advice and advocacy to people in need of legal assistance who live, study or work in the municipalities of Randwick and Botany. KLC provides general advice on a wide range of legal issues and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer. Specialist legal advice is also provided in areas such as employment law, victims' compensation and a state wide service on discrimination matters. In 2010, KLC provided 1580 advices to the community and 161 new cases were opened.

KLC runs an Aboriginal and Torres Strait Islander Access Project where we offer an outreach service for Aboriginal and Torres Strait Islander clients. KLC recognises the barriers that exist between Aboriginal and Torres Strait Islander peoples and the law. In 2010, 5% of our clients identified as being Aboriginal or Torres Strait Islander.¹

A note on terminology
KLC recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait peoples. Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia. KLC acknowledges there are differing views on the use of terms such as Aboriginal and Torres Strait Islander and, "original inhabitants" and Indigenous peoples. In this document, KLC has used the term "Aboriginal and Torres Strait Islander peoples".

¹ Kingsford Legal Centre (KLC), Annual Report 2010.
Executive Summary

KLC welcomes the public consultation by the Expert Panel as an important opportunity to discuss Australia’s current commitment to reconciliation and “closing the gap” between Aboriginal and Torres Strait Islander peoples and the non-Indigenous community. KLC sees this commitment as acknowledgement by the Federal Government that Australia currently does not sufficiently recognise its first Australians, nor sufficiently protect their rights.

From consultation with our local community it was clear that our community undoubtedly supports Constitutional change, yet concerns were expressed about the need for wider public consultation, and the need to prioritise other important social and legal injustices facing Aboriginal and Torres Strait Islander Australians. This submission seeks to outline some of the views of our community, and KLC’s own recommendations for Constitutional reform.

Recommendations to the Expert Panel

1. We support the recognition of Aboriginal and Torres Strait Islander Australians in the Constitution.
2. We support this recognition in the body of the Constitution or alternatively, in the Preamble.
3. We support a Constitutional protection from race discrimination.
4. This Constitutional guarantee should not prevent ‘special measures’ or positive discrimination designed to promote equality for disadvantaged groups.
5. We support the repeal of section 25.
6. We support the inclusion of an agreement making power between the Federal Government and Aboriginal and Torres Strait Islander communities.
7. We support the designation in Parliament of seats for Aboriginal and Torres Strait Islander people.

Process of consultation

In response to the national consultation, KLC conducted a workshop within our local community at La Perouse to raise awareness of the consultation on Constitutional recognition and to encourage as many people as possible to contribute to the consultation. Staff from KLC spent time with our local Aboriginal and Torres Strait Islander communities to discuss the issue. We endeavoured to seek views from both older and younger generations of both Aboriginal and Torres Strait Islander people and non-Indigenous Australians.

Overall, strong opinions were raised suggesting that the Constitutional recognition of Aboriginal and Torres Strait Islander Australians is an issue about which many people feel strongly. The theme of the feedback from our community was that recognition of Aboriginal and Torres Strait Islander culture, rights and past injustices were important and something they believed Australia should protect and acknowledge.
During KLC’s consultations concerns were also raised about the rushed nature of the national consultation undertaken by the Expert Panel.

Many members of our community felt that the consultation process has been too short and felt that it was not organic, but imposed on people without much ‘consultation’ or publicity to engage more of the public. The La Perouse community expressed the sentiment that as Aboriginal and Torres Strait Islander Australians constitute less than 3% of the population, for a referendum to be successful they needed the support of non-Indigenous Australians, yet despite this reality there appeared to be little publicity, consultation or political dialogue with the wider public. Participants acknowledged that such Constitutional change is important and something which should not be rushed if “we are to do this right.”

Constitutional reform was clearly welcome from those who participated in our consultations, but concerns were raised that it had to go hand-in-hand with addressing other key human rights issues facing Aboriginal and Torres Strait Islander Australians. Participants felt that the ongoing Northern Territory Intervention and failure to adequately deal with the ongoing issues affecting communities due to the Stolen Generations were important issues which should be prioritised. One elder from the La Perouse community felt that nothing should be done until the Northern Territory intervention had ceased, and others noted that the ‘Bringing Them Home Report’ recommendations have still not been fully implemented, despite numerous recommendations from UN treaty bodies that they should be implemented.\(^2\) Participants also raised issues about the endemic social disadvantage and human rights abuses which continue to be faced by Aboriginal and Torres Strait Islander people.

From our consultations, whilst there was undoubtedly support for Constitutional recognition of Aboriginal and Torres Strait Islander Australians, there was concern that these changes needed to be more than merely symbolic and that they should be implemented with the aim of improving the economic and social disadvantage of Aboriginal and Torres Strait Islander people.

**Recognition of Aboriginal and Torres Strait Islander peoples in the Constitution**

KLC supports the adoption of a Statement of Recognition and Values in the Constitution. We believe that this Statement is important and should be included in the body of the Constitution, however we recognise that there may not be bi-partisan political support for the insertion of this Statement into the body of the Constitution. The Constitution is a national document and is the central legal document of the nation, and we believe that recognition of Aboriginal and Torres Strait Islander peoples within the Constitution is important in ensuring

\(^2\) National Inquiry into the Separate of ATS Children from their Families, AHRC known as the “Bringing Them Home Report”

recognition and respect for Aboriginal and Torres Strait Islander values and heritage as Australian national values.

KLC also supports as an alternative, the proposal to change the Preamble of the Constitution to recognise the important place of Aboriginal and Torres Strait Islander peoples in Australia’s national identity and history. In particular, we believe it is important to acknowledge Aboriginal and Torres Strait Islander peoples as the traditional custodians and occupants of the land, recognise the special relationship between Aboriginal and Torres Strait Islander peoples and the land, and acknowledge the past injustices suffered as a consequence of colonisation. We note bipartisan support already exists for changing the Preamble and believe that this is an important issue that should go beyond politics.

We believe by recognising Aboriginal and Torres Strait Islander peoples in the Preamble, there is the potential to strengthen reconciliation and foster trust between Aboriginal and Torres Strait Islander people, the legal system and Government institutions. This would be one way for the Australian nation to deal with the ongoing injustices of our colonial past and a positive step towards redress for these injustices. Acknowledgement of Aboriginal and Torres Strait Islander Australians in the Preamble builds awareness among all Australians of the role, place and contribution of Aboriginal and Torres Strait Islander people to the history and culture of Australia. This encourages mutual respect and equality, central values in modern Australian society. Recognition has the capacity to build self-esteem and provide mental health benefits for Aboriginal and Torres Strait Islander people and to create greater understanding between non-Indigenous Australians and Aboriginal and Torres Strait Islander Australians.

Recognition of Aboriginal and Torres Strait Islander Australians has already occurred in various State Constitutions. For example in NSW and Victoria respectively:

Section 2 of the Constitution Act 1902 (NSW)

"...acknowledges and honours the Aboriginal and Torres Strait Islander people as the State’s first people and nations."

"...recognises that Aboriginal and Torres Strait Islander 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."

Section 1A of the Constitution Act 1975 (Vic)

"...acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal and Torres Strait Islander people of Victoria."
"...recognises that Victoria’s Aboriginal and Torres Strait Islander people, as the original custodians of the land on which the Colony of Victoria was established:
  o “have a unique status as the descendants of Australia’s first people; and
  o “have a spiritual, social, cultural and economic relationship with their traditional lands and waters; and
  o “have made a unique and irreplaceable contribution to the identity and well-being.”

Recommendations:
1. We support the recognition of Aboriginal and Torres Strait Islander Australians in the Constitution.
2. We support this recognition in the body of the Constitution or alternatively, in the Preamble.

Constitutional Guarantee against Discrimination
KLC supports the proposal to insert a guarantee against discrimination into the Constitution. KLC believes as a matter of principle that the right to equality and non-discrimination should be included in the Constitution and should reflect Australia’s international human rights obligations.

In the context of this consultation, KLC supports the view that there should be a prohibition against race discrimination in the Constitution and that this should be a proposed amendment that is put to the Australian people in a referendum.

The Constitution currently does not include a guarantee against the Federal Government passing racially discriminatory laws. We do not believe the Racial Discrimination Act 1975 (Cth) is sufficient protection from discrimination. The Act does not prevent the Federal Government from passing a law that is racially discriminatory. The operation of the Racial Discrimination Act can also be suspended from operating by statutory amendment or repeal. We also believe that anti-discrimination legislation alone is insufficient to deal with the significant and substantial disadvantage faced by Aboriginal and Torres Strait Islander people in Australia. KLC operates a specialist discrimination practice and is aware of the limitations of discrimination law in achieving equality for Aboriginal and Torres Strait Islander people. Recognition in the Constitution would provide greater weight to the principles of non-discrimination and would also ensure that laws made in Australia are consistent with our international human rights obligations to eliminate racial discrimination.

The guarantee would apply all heads of power, essentially ensuring that the Federal Government cannot pass any law under any head of power that has a discriminatory effect. This not only overcomes the ambiguities of the race power, but also deals with all other heads of power that might give effect to discrimination. We believe this is an important feature for a modern Constitution and is important to recognise the significant change in values around race discrimination since the original framing of the Australian Constitution.
KLC supports a position where positive discrimination or ‘special measures’ that take into consideration race in order to promote equality and benefit a disadvantaged group are not prohibited by the operation of the Constitutional guarantee. We believe a Constitutional protection against racial discrimination would not prevent such positive measures.

Recommendations:

3. We support Constitutional protection from racial discrimination.

4. This Constitutional guarantee should not prevent ‘special measures’ or positive discrimination designed to promote equality for disadvantaged groups.

Race Power – section 51(xxvi)

KLC supports the removal of the race power.

The current race power enables the Federal Government to make laws with respect to the people of any race, for whom it is deemed necessary to make special laws. We believe that the history of the race power is such that it remains too uncertain as to whether the power can only be used beneficially or can be used detrimentally. It is important to note that the race power has in effect been predominately directed to legislation affecting Aboriginal and Torres Strait Islander Australians, and not always beneficially.

We believe that the race power should be removed and a new power to make laws enacted in its place.

We recognise the need for the Federal Government to have the power to legislate with respect to Aboriginal and Torres Strait Islander people in order that the Government continue essential service delivery, protect culture and to overcome disadvantage. We support the creation of a new head of power that allows the Federal Government to legislate with respect to Aboriginal and Torres Strait Islander people. This power would permit necessary Federal Government law-making with respect to Aboriginal and Torres Strait Islander people. We support the introduction of this new head of power in conjunction with protection from race discrimination. We see these provisions as operating together to prevent racially discriminatory laws being enacted under this new head of power and to redress the current uncertainty under the race power.

Recommendations:

5. We support the repeal of the race power under section 51(xxvi)

6. We support the introduction of a power which allows the Federal Government to legislate with respect to Aboriginal and Torres Strait Islander peoples.

Repeal of Section 25

KLC supports the proposal to remove section 25 from the Constitution.
Section 25 anticipates a situation where persons of a particular race might be disqualified from voting by a State in State elections. Section 25 in fact works as a disincentive to States disqualifying voters on the basis of race. By disqualifying a particular race from voting, the State will thereby have a lower population count, and have fewer allocated federal seats and fewer federal representatives.

The expectation that a State would disenfranchise a group of people based on race is no longer in line with current world views and social attitudes. Although individual States retain the ability to amend their electoral laws to the detriment of a particular race, such an act would be repugnant to public opinion and international standards. In order for the Constitution to reflect modern values this provision needs to be repealed.

Recommendation:

7. We support the repeal of section 25.

Agreement Making Power

KLC supports the proposal to include an agreement-making provision in the Constitution to allow the Federal government to make agreements with Aboriginal and Torres Strait Islander communities on a range of significant issues. Significant issues might include health, education and the provision of community services.

Currently, section 105A of the Constitution allows agreement-making between State and Federal governments on the issue of state debt. Agreements made have the ability to override existing laws.

The creation of a provision for agreement-making between communities and the Federal Government would encourage greater government consultation with communities and would increase community self-determination placing key decisions directly in the hands of the community those decisions affect.

Recommendation:

8. We support the inclusion of an agreement making power between the Federal Government and Aboriginal and Torres Strait Islander communities.

Designated seats in Parliament

KLC supports the designation of seats in Parliament for Aboriginal and Torres Strait Islander people. Designated seats for Indigenous people have be adopted in by New Zealand for Maori peoples and in the US State of Maine for First Nations peoples.
9. We support the designation in Parliament of seats for Aboriginal and Torres Strait Islander people.

Conclusion
We believe that this national conversation around the extent to which our Constitution reflects the importance of Aboriginal and Torres Strait Islander culture within Australia is important to promoting values of respect, equality and non-discrimination. We also see the proposed changes as more than symbolic and important in recognising the history of Australia and recognising the deep impact of colonisation on Aboriginal and Torres Strait Islander people, and the ongoing disadvantage they face today.

We await the recommendations of the Expert Panel and look forward to building community support for changes that recognise Aboriginal and Torres Strait Islander people, their culture and history in the Australian Constitution.

Kingsford Legal Centre
September 2011