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Constitutional Recognition of Aboriginal People

The *Constitution Act 1889* (WA) has a preamble in the following terms:

Preamble

Whereas by the 32nd section of the Imperial Act passed in the session holden in the 13th and 14th years of the Reign of Her present Majesty ², intituled "*An Act for the better Government of Her Majesty's Australian Colonies*", it was among other things enacted that, notwithstanding anything thereinbefore contained, it should be lawful for the Governor and Legislative Council of Western Australia, from time to time, by any Act or Acts, to alter the provisions or laws for the time being in force under the said Act or otherwise concerning the election of the elective members of such Legislative Council, and the qualification of electors and elective members, or to establish in the said Colony, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses, to consist of such members to be appointed or elected by such persons and in such manner as by such Act or Acts should be determined, and to vest in such Council and House of Representatives, or other separate Legislative Houses, the powers and functions of the Legislative Council for which the same might be substituted; and whereas it is expedient that the powers vested by the said Act in the said Governor and Legislative Council should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council, with the powers and functions hereinafter contained:

Be it therefore enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows: —

In 2006, the Western Australian Law Reform Commission report into Aboriginal Customary Law recommended "constitutional recognition of the unique status and contribution of Aboriginal people to WA" (Recommendation 6).

In February 2009, the Aboriginal and Torres Strait Islander Social Justice Commissioner released his *Social Justice Report 2008* (the Report). The Report included a section on Constitutional Reform, which summarised the then current position on constitutional recognition of Indigenous peoples.

The *Constitution Amendment (Recognition of Aboriginal People) Bill 2014* (WA) proposed the addition of the following words as a second sentence following the first in that preamble:

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;
And whereas the Houses of the Parliament resolve to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia:

The Explanatory Memorandum (E77) to the *Constitution Amendment (Recognition of Aboriginal People) Bill 2014* (WA), in its Overview, summarised the current position in relation to the progress of the States and Commonwealth in providing statutory recognition. Various forms of Constitutional recognition have been enacted in Victoria, New South Wales, Queensland and South Australia and the Commonwealth Parliament has before it the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, which was passed by the House of Representatives and was read into the Senate on 25 February 2013.

The Explanatory Memorandum notes that advice from the Solicitor General in 2004 was that:

"I do not believe that an amendment to the preamble in these terms would have any significant legal consequences. I would see it as principally a statement of historical fact."

"In terms of its constitutional significance, it could only be relevant to the extent that it might be the foundation for some implied limitation on the legislative power of the Parliament. However, I find it difficult to see how any limitation of substance could be constructed from such a provision."

I agree that statements of recognition of the that kind, and those enacted in other jurisdictions which will be discussed below, are all of that limited legal effect.

The Bill also proposes the repeal of s 42 of the *Constitution Act 1889*. That section provides as follows:

When 6 years shall have elapsed from the date of the first summoning, under section 6, of persons to the Legislative Council, or when the Registrar General of the Colony shall have

certified, by writing under his hand to be published in the *Government Gazette*, that the population of the Colony has, to the best of his knowledge and belief, exclusive of aboriginal natives, attained to 60 000 souls, whichever event shall first happen, this Part shall come into operation, provided that the Governor in Council shall have power, by proclamation in the *Government Gazette*, to further postpone the operation of this Part for any period not exceeding 6 months

As the Explanatory Memorandum notes this section has no continuing application; so its repeal is uncontroversial.

My submission to the Committee is that the amendment proposed by the 1014 Bill is adequate as a statement consistent with the Western Australian peoples obligations towards the Aboriginal people of the State, but it would be desirable to consider more expansive words than those proposed, and the adoption of a model similar to other States may provide the basis of doing so. This submission discusses the Constitutions of other States in that context.

New South Wales

The Constitution of NSW (*Constitution Act 1902*) is an Act of Parliament which may be readily amended by an amending Act and this has been done over 80 times since 1902. The exception is for amendment to part of the "entrenched provisions" (concerning the Legislative Council and Legislative Assembly) which require a referendum.¹

Existing legislation in New South Wales such as the Preamble to the *Aboriginal Land Rights Act 1983* (NSW) provides some recognition of Aboriginal peoples by providing:

- (1) Land in the State of New South Wales was traditionally owned and occupied by Aborigines:
- (2) Land is of spiritual, social, cultural and economic importance to Aborigines:
- (3) It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land:
- (4) It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation:

Similar recognition of Aboriginal people is found in the *Water Management Act 2000* (NSW)² and *Fisheries Management Act 1994* (NSW).³

¹ New South Wales Legislative Council Standing Committee on Social Issues *Enhancing Parliament Aboriginal Political Representation: Inquiry into Dedicated Seats in the New South Wales* (Chapter 9).

² Section 3 provides the following as one of the objects of the Act: [to provide] *benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water*"

³ Section 3 includes the following object of the Act: *"to recognise the spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect, and promote the continuation of, Aboriginal cultural fishing."* (*Fisheries Management Amendment Act 2009*)

The Constitution Act 1902 (NSW) has no preamble. It was amended to add, after section 1 which provides the title to the Act, to add:

2 Recognition of Aboriginal people

- (1) Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State's first people and nations.
- (2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
 - (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
 - (b) have made and continue to make a unique and lasting contribution to the identity of the State.
- (3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.

Victoria

The *Constitution Act 1975* (Vic) has the following Preamble:

And whereas the said Bill was presented to the then Lieutenant-Governor of Victoria for Her Majesty's assent and the said Lieutenant-Governor did thereupon declare that he reserved the said Bill for the signification of Her Majesty's pleasure thereon:

And whereas the Imperial [Parliament](#) deemed it expedient to authorize Her Majesty to assent to the said reserved Bill amended by the omission of certain provisions thereof:

And whereas the said Bill as amended was set forth in a Schedule to an Act of the Imperial [Parliament](#) passed in the 18th and 19th years of the reign of Her Majesty Queen Victoria intituled "An Act to enable Her Majesty to Assent to a Bill, as amended, of the Legislature of Victoria to establish a Constitution in and for the Colony of Victoria" by which Act Her Majesty in Council was authorized to assent to the said reserved Bill amended by the omission of certain provisions thereof, and the Bill was assented to accordingly:

And whereas by the said Bill as so amended the Colony of Victoria was established as a self-governing colony with responsible government:

And whereas the said Bill as so amended is the Constitution of Victoria and is known as The Constitution Act:

And whereas it is provided by section LX of the said The Constitution Act that the Legislature of Victoria has full power and authority from time to time by any Act or Acts to repeal alter or vary all or any of the provisions of The Constitution Act and to substitute others in lieu thereof:

Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

The *Constitution (Recognition of Aboriginal People) Act 2004* (Vic) added the following section to the Victorian Constitution:

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.

Queensland

The *Constitution (Preamble) Amendment Act 2010* (Qld) added the following preamble to the *Constitution of Queensland 2001* after the long title:

Preamble

The people of Queensland, free and equal citizens of Australia—

- (a) intend through this Constitution to foster the peace, welfare and good government of Queensland; and
- (b) 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; and
- (c) 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; and
- (d) determine to protect our unique environment; and
- (e) acknowledge the achievements of our forebears, coming from many backgrounds, who together faced and overcame adversity and injustice, and whose efforts bequeathed to us, and future generations, a realistic opportunity to strive for social harmony; and
- (f) resolve, in this the 150th anniversary year of the establishment of Queensland, to nurture our inheritance, and build a society based on democracy, freedom and peace.

Section 3A exempts the use of the preamble as an aid for interpreting the Constitution or any other Queensland law:

The Parliament does not in the preamble -

- (a) create in any person any legal right or give rise to any civil cause of action; or
- (b) affect in any way the interpretation of this Act or of any other law in force in Queensland.

South Australia

The *Constitution Act 1934 (SA)* provides as follows:

2—Recognition of Aboriginal peoples

(1) The Parliament on behalf of the people of South Australia acknowledges that—

(a) the Parliament of the United Kingdom in 1834 passed a Bill called *An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonisation and Government thereof* and that by Letters Patent dated 19 February 1836 His Majesty established the Province of South Australia; and

(b) the making of the above instruments and subsequent constitutional instruments providing for the governance of South Australia and for the making of laws for peace, order and good government occurred without proper and effective recognition, consultation or authorisation of Aboriginal peoples of South Australia.

(2) Following the Apology given on 28 May 1997, the Parliament, on behalf of the people of South Australia—

(a) acknowledges and respects Aboriginal peoples as the State's first peoples and nations; and

(b) recognises Aboriginal peoples as traditional owners and occupants of land and waters in South Australia and that—

(i) their spiritual, social, cultural and economic practices come from their traditional lands and waters; and

(ii) they maintain their cultural and heritage beliefs, languages and laws which are of ongoing importance; and

(iii) they have made and continue to make a unique and irreplaceable contribution to the State; and

(c) acknowledges that the Aboriginal peoples have endured past injustice and dispossession of their traditional lands and waters.

(3) The Parliament does not intend this section to have any legal force or effect.

Commonwealth

The preambles to the *Aboriginal and Torres Strait Islander Act 2005* and the *Native Title Act 1993* make significant statements on the rights and aspirations of Indigenous people.

On 13 February 2008, the Prime Minister of Australia, in his Apology to members of the Stolen Generation, said.

It will be consistent with the government's policy framework, a new partnership for closing the gap. If this [bi-partisan] commission [on housing in remote Indigenous communities] operates well, I then propose that it work on the further task of constitutional recognition of the first Australians, consistent with the longstanding platform commitments of my party and the pre-election position of the opposition.

This would probably be desirable in any event because, unless such a proposition were absolutely bipartisan, it would fail at a referendum. As I have said before, the time has come for new approaches to enduring problems.

United Nations Declaration on the Rights of Indigenous People

The Declaration contains provisions of significance to the form of the constitutional recognition, such as Article 6 (every Indigenous person has a right to a nationality) and Article 9 (Indigenous People have a right to belong to an Indigenous community or nation). Article 46 also imposes limitations on the interpretation and application of the Declaration.

The Australian Government is a signatory to the Declaration, which sets out important international principles for nations to aspire to.

Exclusionary provisions

The purpose of exclusionary provisions is to avoid any uncertainty around future legal actions, the interpretation or operation of the Constitution or other Acts. This means the statement does not create any legal liability

Exclusionary provisions appear in the New South Wales, Queensland and Victorian Constitutions. They also occur in other Acts of Parliament.⁴ However, in my submission the opinion of the Solicitor-General is sufficient assurance and my opinion correctly sets out the limits of any declaration of recognition as to its limits. There is no need to include an exclusionary provision in the Western Australian Constitution of the kind set out in the Constitutions of other States.

Recommendation

Assuming that the Western Australian Parliament is not inclined to adopt a preamble of the kind in the Queensland Constitution, which expresses a broad range of aspirations on various topics, and intends to limit itself to recognition of Aboriginal peoples, it is recommended that the Western Australian Parliament, rather than adding to or altering the preamble, add a section to the Constitution in similar terms to section 1A(2)(a), (b) and (c) of the *Constitution Act 1975* (Vic), without the necessity to include sub-section (1) or (3) of that section.

Greg McIntyre SC
President
ICJ (WA)
16 January 2015

⁴ New South Wales examples are: *Health Records and Information Privacy Act 2002*, *Privacy and Personal Information Protection Act 1998*, *Victims Rights Act 1996*, *Health Services Act 1997*, and the *Fiscal Responsibility Act 2005*.



The International Commission of Jurists, or *ICJ* was founded in Berlin in 1952. The ICJ has long been hailed as the pre-eminent legal non-governmental organisation in the world, and is amongst the world's leading human rights NGOs generally. ICJ distinguishes itself through an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.

The ICJ holds consultative status with the United Nations Economic and Social Council; the United Nations Educational, Scientific and Cultural Organisation; the Council of Europe; and the African Union. ICJ also maintains co-operative relations with various bodies of the Organisation of American States.

The ICJ's central Commission is composed of sixty eminent jurists who are representatives of the different legal systems of the world. Based in Geneva, the International Secretariat is responsible for realising the aims and objectives of the Commission. The International Secretariat today benefits from a network of 82 autonomous national sections and affiliated legal organisations in 62 countries across Africa, Asia/Pacific, Europe, the Middle East, Latin and North America, and the Caribbean.

National Section of ICJ Australia

ICJ Australia is centrally co-ordinated by the Executive Committee and by the Council of the National Section, elected under the organisation's [Constitution](#)

Objectives

The Constitutional objectives of ICJ Australia are:

- to promote adherence to and observance of the Universal Declaration of Human Rights and other similar international instruments;
- to promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia and the nations of Southeast Asia and the Pacific;
- to provide an organisation through which the legal profession and others interested in human rights can protect and sustain the Rule of Law and promote the observance of human rights and fundamental freedoms;
- to help, advise and encourage all who seek to achieve, by means of the Rule of Law universal respect for and promote the observance of human rights and fundamental freedoms;
- to continue recognition by and affiliation with ICJ Geneva;
- to co-operate with ICJ Geneva on the basis of mutuality of purpose and interests;
- to co-operate with similar organisation in other countries through the channels provided by ICJ Geneva and other available means; and
- to sponsor lectures, seminars, books and pamphlets related to these objectives.

State and Territory branches

There are currently active branches in seven of the eight States and Territories of Australia. Traditionally, State and Territory branches focus on issues specific to their respective jurisdictions.