

The Representative Organisation of Australian Jewry

Level 2, 80 William Street
Sydney NSW 2000

Address all correspondence to:
PO Box 1114, Edgecliff NSW 2027

Tel (+61 2) 8353 8500
Fax (+61 2) 9361 5888
Web: www.ecaj.org.au
E-mail info@ecaj.org.au

PRESIDENT

Dr Danny Lamm

DEPUTY PRESIDENT

Nina Bassat AM

HON. TREASURER

Robert Lissauer

HON. SECRETARY

Jillian Segal AM

EXECUTIVE DIRECTOR

Peter Wertheim AM

VICE PRESIDENTS

Yair Miller (NSW)
John Searle (VIC)
Tony Tate (WA)
Jason Steinberg (QLD)
Norman Schueler (SA)
Daniel Albert (TAS)
Manny Waks (ACT)

IMM. PAST PRESIDENT

Robert M Goot AM, SC

CONSTITUENTS

NSW Jewish Board of Deputies
Jewish Community Council
of Victoria Inc
Jewish Community Council of
Western Australia Inc
Queensland Jewish Board of
Deputies
Jewish Community Council
of South Australia
Hobart Hebrew Congregation
ACT Jewish Community Inc

AFFILIATES

Australasian Union of Jewish
Students
Australian Federation of WIZO
Union for Progressive Judaism
Federation of Jewish Aged
Care Services
Maccabi Australia Inc
National Council of Jewish Women

OBSERVERS

B'nai B'rith of Australia/ NZ
Council of Progressive Rabbis
Federation of Australian Jewish
Ex-Service Associations
Jewish National Fund
New Zealand Jewish Council
Zionist Federation of Australia



26 September 2011

The Expert Panel on the Constitutional Recognition of Indigenous Australians

The Indigenous Constitutional Recognition Secretariat,
C/- Department of Families Housing Community Services and
Indigenous Affairs,
PO Box 7576,
Canberra Business Centre, ACT 2610

Dear Panel Members

Re: Recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution

The Executive Council of Australian Jewry (ECAJ), the elected representative organisation of the Australian Jewish community, presents the following submission for consideration by the Panel concerning the proposal to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

Overall, the ECAJ favours amendments to the Constitution which will:

- (i) articulate the fundamental values of Australian society;
- (ii) recognise the distinct identities and rights of Indigenous Australians arising from their prior and unique relationships with their lands, territories and resources;
- (iii) repeal current provisions in the Constitution which are based on racial discrimination (sections 25 and 51(xxvi));
- (iv) provide for the insertion of an enforceable guarantee of racial equality that would apply generally to the Parliament's power to legislate (the racial equality guarantee);
- (v) empower the Australian Government, notwithstanding the racial equality guarantee, to pass laws with respect to Aboriginal and Torres Strait Islander peoples for their benefit and advancement;
- (vi) empower the Commonwealth to negotiate and conclude agreements with Aboriginal and Torres Strait Islander peoples on matters that affect their communities, and for the terms of such agreements to apply notwithstanding any inconsistency with existing State or Federal laws.

1. The rationale for constitutional change with respect to Indigenous Australians

Australia's current Constitution is a product of the constitutional conventions of the 1890's. At that time, Australia was a collection of six British colonies which were partly self-governing, but under the law-making power of the British Parliament. When the colonies finally agreed upon a draft of a Constitution that would end their colonial status and bring them together as States in a Federation with a new national government, the approved draft was enacted as a section of the *Commonwealth of Australia Constitution Act 1900 (Imp)*, an Act of the Parliament of the United Kingdom.

In many respects the Constitution is very much a document of its times. Sections 25 and 51 (xxvi) reflect a pre-occupation with 'race' and imply that it is appropriate in some circumstances for the law to treat people differently on the basis of their race, however that term might be defined.

From the stand-point of contemporary Australian values these ideas are antiquated and repugnant. Australia is a party to a raft of international human rights treaties, including the *Convention on the Elimination of All Forms of Racial Discrimination* and *Convention on the Elimination of All Forms of Discrimination against Women*, which are based on the principles of the inherent dignity and equality of rights of all human beings and commit Australia to respect and observe the human rights and fundamental freedoms of all people, without distinction as to race, sex or religion.

More generally, the Constitution contains no affirmative statement of the fundamental values upon which Australian society and our political and legal institutions are based. Although the Constitution is primarily a legal document and is the supreme law governing the functions of the Commonwealth Government, it does not operate in a philosophical and ideological vacuum. Like the American constitution which informed debate on and expressions in many of its provisions, Australia's constitution owes much to the ideas of the Enlightenment of the 17th and 18th centuries:

- Governments derive their legitimacy from the consent of the governed and must therefore be representative of, and regularly accountable to, the people.
- All citizens, and the government, are bound equally by the rule of law administered by an independent and impartial judiciary.
- The law must secure the life and liberty of the individual and protect private property from arbitrary seizure.

As fundamental as these principles continue to be, they do not by themselves reflect what is distinctive about Australian society and democracy. More than a century has passed since the Constitution came into effect. During that time Australia has grown and matured as a nation. We have abandoned the idea of preserving a 'White Australia', developed a more profound understanding of, and commitment to, human rights and begun at last the painful process of coming to terms with the dispossession and injustices committed against Aboriginal and Torres Strait Islander peoples in the

course of establishing Australia, first as a collection of colonies and then as a nation.¹ It is appropriate that these and other contemporary values by which we aspire to live as a nation should now be reflected in our Constitution, and the existence and rights of its original inhabitants acknowledged.

2. **Statement of Values**

Logically, a broad statement of national values should precede, and provide the underlying rationale for, specific recognition of Indigenous peoples in our Constitution. The ECAJ believes it would be important to include in any such statement a commitment to the following values (in no particular order of priority):

- democracy
- personal freedom
- the rule of law
- human rights
- racial and gender equality
- social egalitarianism
- mateship and mutual responsibility
- the ‘fair go’ ethic.

Australians share some of these values with other nations. In combination, however, they are uniquely Australian. For example, the United Kingdom now incorporates principles of racial and gender equality in many of its laws but still retains a class system that stands in stark contrast to Australia’s robust social egalitarianism and culture of mateship. The United States too is a highly rights-conscious society in which democracy and personal freedom are almost a secular religion. Yet the meritocratic culture that features so strongly in American society would be out of place in Australia with its egalitarianism and ‘fair go’ ethic.

In reflecting how we as a nation aspire to live, any statement of values that is included in the Constitution should give expression to the distinctive virtues of Australian society at its best.

¹ The legal doctrines on which those injustices were founded, and the national need to redress them, have seldom been more succinctly and eloquently articulated than in the joint judgment of Deane and Gaudron JJ in *Mabo v Queensland (No 2)* (“*Mabo case*”) [1992] HCA 23 at [55]-[56]:

Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, terra nullius in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. Those propositions provided a legal basis for and justification of the dispossession...The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.

3. **Recognition of the place of Aboriginal and Torres Strait Islander peoples in our nation**

Our belief in human equality, justice and a ‘fair go’ for all requires an honest acknowledgement by the nation of the Aboriginal and Torres Strait Islander peoples as descendants of the first peoples of Australia with distinct identities and histories, as well as their prior occupation of, and spiritual, social, cultural and economic connection to, their traditional lands and waters from which they were dispossessed, and the adverse effects of past and continuing injustices and disadvantage.

The national acknowledgement should be followed by a commitment to redress those injustices. Whilst there is inherent value in acknowledging past wrongs, this can only be truly meaningful if it is accompanied by an express commitment to make amends and to act justly towards Indigenous Australians now and in the future.

The precise form of the acknowledgement and of the commitment should be determined following a process of consultation between the Commonwealth Government and Indigenous Australians directly and through their own representative institutions² in order to obtain their free and informed consent before the matter is put to a referendum. Without such consent, any statement of recognition will ring hollow. The consultation process must be properly resourced. It should also consider values specific to Indigenous culture, such as the relationship with, and responsibility to care for, Country and whether these should be included in the Statement of Values.

4. **Should recognition be included in a preamble to the Constitution or in the body of the Constitution?**

The Statement of Values and the Statement of Recognition should appear in a new preamble to the Constitution. While a *pro forma* preamble prefaces the Imperial *Commonwealth of Australia Constitution Act 1900*, the Australian Constitution itself does not contain a preamble. Yet there are good reasons to include a preamble. A preamble would be the appropriate place to include broad statements about values, history and general principles. The body of the Constitution should be reserved for specific prescriptive rules about the manner in which Australia’s government is to be ordered in accordance with the nation’s values.

This is not to say that a preamble would be without legal significance or consequence. As a statement of the supreme principles guiding our national life, the preamble would be a source for interpreting legislation, including the substantive provisions of the Constitution itself.

² The question of establishing a body or bodies that genuinely represent Indigenous Australians is outside the remit of the Expert Panel and hence of this submission. It is, however, of obvious importance if any process of consultation is to be legitimate and meaningful.

5. Repeal of section 25

Section 25 of the Constitution contemplates the disqualification of certain persons from voting because of their ‘race’. In the era when the Constitution was being drafted, this term was often used in its biological sense, reflecting an assumption that the human family can be categorised into different genetic groups, the members of each of which share distinct and characteristic physical or behavioural traits which are inherited – biological essentialism.

While biological scientists sometimes use the concept of race to make practical distinctions among traits that are in fact not unique to any one group, among humans ‘race’ has no taxonomic significance. All people belong to the same hominid subspecies, *homo sapiens sapiens*. Modern scientists consider biological essentialism to be obsolete, and generally discourage racial explanations for collective differentiation in both physical and behavioural traits.

In contemporary Australia, the term ‘race’ is more generally used in the sense in which it is defined in the *Racial Discrimination Act 1975* (Cth) and includes a person’s national or ethnic origin. On any such definition, for the reasons stated in section 1 of this submission, section 25 of the Constitution, which would give effect to any State laws that disqualify people from voting at elections on the basis of their race, and would exclude them from being counted as citizens, is repugnant to contemporary Australian values³ and should be repealed.

³ Opposition to racial discrimination is enshrined in Commonwealth and State legislation. It has also been articulated by all the political parties currently represented in the Australian and various State and Territory legislatures. In October 1996, the then Prime Minister, John Howard, moved a statement on racial tolerance in the Australian Parliament’s House of Representatives. The statement read:

That this House:

- *reaffirms its commitment to the right of all Australians to enjoy equal rights and be treated with equal respect regardless of race, colour, creed or origin*
- *reaffirms its commitment to maintaining an immigration policy wholly non-discriminatory on grounds of race, colour, creed or origin*
- *reaffirms its commitment to the process of reconciliation with Aboriginal and Torres Strait Islander people, in the context of redressing their profound social and economic disadvantage*
- *reaffirms its commitment to maintain Australia as a culturally diverse, tolerant and open society, united by an overriding commitment to our nation, and its democratic institutions and values and*
- *denounces racial intolerance in any form as incompatible with the kind of society we are and want to be.*

The statement was supported by the Opposition Leader and carried unanimously. See <http://www.immi.gov.au/media/fact-sheets/06australias-multicultural-policy.htm>

6. **Repeal of section 51(xxvi) and its replacement with a specific head of power to enact legislation for the benefit and advancement of Indigenous Australians**

We also support the repeal of the race power in section 51(xxvi) which, as interpreted by the High Court in *Kartinyeri v The Commonwealth* [1998] HCA 22; (1998) 195 CLR 337 (“*Hindmarsh Island Bridge Case*”), may provide a source of power for the enactment of racially discriminatory laws. In the *Hindmarsh Island Bridge Case*, the validity of a law which had been challenged by a group of Aboriginal Australians on the basis that it was detrimental to them and discriminated adversely against them solely by reference to their race, was upheld.

For the reasons stated in sections 1 and 5 of this submission, a power to legislate with respect to ‘*the people of any race for whom it is deemed necessary to make special laws*’ is out of keeping with contemporary Australian values of racial equality and equal justice, and with modern science, especially to the extent that it would validate legislation which is prejudicial to that race.

There is some academic dissent as to the true rationale of the *Hindmarsh Island Bridge Case*. Strictly it stands for the proposition that a head of power which supports a valid Act supports an Act repealing it or amending it, unless there be some constitutional limitation on the power to effect the repeal or the amendment.⁴ In the course of the discussion, Gaudron J expressed the view, as part of the majority, that the current constitutional provision permits the enactment of adversely discriminatory legislation, but only in circumstances where a special necessity could be objectively identified to justify legislation.⁵ Kirby J dissented and concluded that the race power does not extend to the enactment of laws which are detrimental to, or discriminate against, the people of any race (including the Aboriginal race) by reference to their race.⁶ According to his Honour, that conclusion was in part influenced by the history of the race power and especially by its amendment as a result of the 1967 Referendum.⁷ The joint judgment of Gummow and Hayne JJ, who were also part of the majority, was to the effect that the race power is not limited to the enactment of special laws which are for the ‘benefit’ of Indigenous people. Their

⁴ Per Brennan CJ and McHugh J at [15].

⁵ At [32]. ‘*Whatever the international standards and community values in 1967 and whatever the intention of those voting in the 1967 referendum, the bare deletion of an exception or limitation on power is not, in my view, capable of effecting a curtailment of power. On the contrary, the consequence of an amendment of that kind is to augment power. Accordingly, if, prior to 1967, s 51(xxvi) authorised special laws which were not for the benefit of the people of a particular race, the referendum did not, in my view, alter that position.*’ And at [39]: ‘*The criterion for the exercise of power under s 51(xxvi) is that it be deemed necessary - not expedient or appropriate - to make a law which provides differently for the people of a particular race or, if it is a law of general application, one which deals with something of ‘special significance or importance to the people of [that] particular race’. Clearly, it is for the Parliament to deem it necessary to make a law of that kind. To form a view as to that necessity, however, there must be some difference pertaining to the people of the race involved or their circumstances or, at least, some material upon which the Parliament might reasonably form a political judgment that there is a difference of that kind. Were it otherwise, the words ‘for whom it is deemed necessary to make special laws’ would have no operation and s 51(xxvi) would simply be a power to make laws for the people of any race.*’

⁶ At [152].

⁷ At [146]: ‘*There was not the slightest hint whatsoever in any of the substantial referendum materials placed before this Court that what was proposed to the Australian electors was an amendment to the Constitution to empower the Parliament to enact laws detrimental to, or discriminatory against, the people of any race, still less the people of the Aboriginal race.*’

Honours expressly rejected the proposition that such a limitation is implied by the amendment of the race power as a result of the 1967 Referendum.⁸

Such a fundamental question should not be left unresolved. The possibility that the race power permits the enactment of racially vilificatory or discriminatory laws ought not to be countenanced, and such a fundamental right as equal justice ought to be guaranteed to all persons.

To the extent that the race power authorises special laws with respect to people of a particular race that are not for their benefit or advancement, or may even be detrimental to them, it would be inconsistent with all notions of “equal justice”⁹ and would be at odds with Australia’s obligation under Article 2(c) of the *International Convention on the Elimination of All Forms of Racial Discrimination* to:

amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Whilst it is appropriate to delete any reference in the Constitution to ‘race’ as a basis for the exercise of legislative power, there remains a need for Parliament to be empowered to pass laws to prevent, reduce or remedy the disadvantages still suffered by Aboriginal and Torres Strait Islander peoples in connection with land ownership and in accessing housing, health, education and other government services. The basis of such laws would not be ‘race’, but rather the nation’s express commitment to redress historical injustices and their continuing impact. If, contrary to our submission, any ‘race’ power were to remain in the Constitution, it should be confined to redressing inequality or disadvantage and discrimination (see Section 7 below).

Whether a power to pass specific laws in relation to Indigenous peoples is to remain characterised as a race power or should be characterised in some other way, it should be qualified by the requirement that any laws passed under it be for the benefit and advancement of Aboriginal and Torres Strait Islander peoples. Without such a qualification it would be possible for a future High Court to interpret the power as permitting discrimination against, or the making of laws detrimental to, Indigenous Australians (as some of the majority of the Court effectively interpreted the current race power in the *Hindmarsh Island Bridge Case*). That would be contrary to the principle of equal justice and to the values of human rights, racial equality and a fair go for all referred to in section 2 of this submission.

⁸ At [90]-[91]: ‘Moreover, it is as well to recall that it is the constitutional text which must always be controlling. The text is not limited by any [such] implication...The circumstances surrounding the enactment of the 1967 Act, assuming regard may properly be had to them, may indicate an aspiration of the legislature and the electors to provide federal legislative powers to advance the situation of persons of the Aboriginal race. But it does not follow that this was implemented by a change to the constitutional text which was hedged by limitations unexpressed therein.’

⁹ “Equal justice” is a term that incorporates racial equality but also allows for different treatment to the extent that there is a rational difference in or between persons or groups: see *Postiglione v R* [1997] HCA 26; (1997) 189 CLR 295 and *Jimmy v Regina* [2010] NSWCCA 60 at [254]-[257].

7. **Insertion of a general guarantee of racial equality and against racial discrimination**

We support the insertion into the Constitution of a provision guaranteeing racial equality. Such a provision would prohibit the singling out of Indigenous Australians or any other group for adverse treatment on the basis of race. It would thus enshrine in the Constitution the goal of eliminating discrimination on the basis of race in accordance with Commonwealth and State legislation.

In the case of Aboriginal and Torres Strait Islander peoples, the redressing of historical injustices will necessarily involve the differential treatment of that group, albeit for their benefit and advancement. If, as we have recommended, the Constitution were to make express provision for the passing of laws for the benefit and advancement of Indigenous Australians, there is a risk that such special (albeit beneficial) laws may be invalidated on the ground of infringing the general guarantee of equal justice and against racial discrimination.

To preclude that possibility, the Constitutional provisions conferring such power must state expressly that neither they nor the laws passed in the exercise of that power will be invalidated by the provisions guaranteeing equal justice and prohibiting racial discrimination, and will apply with full force and effect notwithstanding those provisions. Perhaps, there could be a provision generally allowing for measures to redress racial or other inequality.

There should be further provision to preclude the invalidation, by reason of the provisions guaranteeing racial equality and racial discrimination, of Indigenous rights which have been recognised to date (such as land rights, native title rights, heritage protection rights), as well as rights which might be negotiated and recognised in the future (through agreements or judicial decisions).

8. **Insertion of an Agreement-making power**

In the early years of European settlement in New Zealand, Canada and the USA treaties were entered into by their sovereign rulers or governments with the original inhabitants which recognised native title to land and provided the original inhabitants with certain protections and other benefits. The terms of the treaties were in many respects harsh and were frequently violated, but they were negotiated, as between peoples who respected each other, and they provided a legal basis upon which the first peoples of New Zealand, Canada and the USA have been able to continue to fight for their rights in the courts of those countries.

There has been no comparable process in Australia. Whilst there is a plethora of legislation, State and Federal, dealing with many matters of vital concern to

Indigenous Australians (including land rights and native title), and whilst such legislation has usually emerged following a process of consultation with Indigenous Australians (whether or not reflected in the legislation itself), such legislation is no substitute for a freely-negotiated agreement.

Many Indigenous Australians continue to call for the conclusion of a treaty with the Australian government which will establish an agreed framework for addressing basic ongoing issues: sovereignty, self-determination, land rights, political representation, and recognition of customary law.

We support the inclusion in the Constitution of a provision empowering the Commonwealth to negotiate and conclude agreements with Aboriginal and Torres Strait Islander peoples on a range of subjects, and for the terms of such agreements to apply notwithstanding any inconsistency with existing State or Commonwealth laws.

We wish the Expert Panel well in its deliberations.

Yours sincerely

A handwritten signature in cursive script that reads "P.S. Wertheim".

Peter Wertheim AM
Executive Director