NSW Council for Civil Liberties Inc.

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The New South Wales Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples (the panel).

CCL is grateful for the opportunity to make this submission to the panel. We would be happy to make further comment, should the Panel request it.

'There is no biological or genetic foundation for the grouping of individual humans into a racial group. Instead, humans themselves choose (consciously or unconsciously) which physical characteristics constitute a racial group. Consequently, racial groups are presently thought to be social constructions, or a category created not by biological nature but by human invention.' James, Michael, "Race", The Stanford Encyclopedia of Philosophy (Fall 2011 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2011/entries/race/>.

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race….'Article 26, International Covenant on Civil and Political Rights (ICCPR).

'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives'. Article 21, ICCPR

Introduction—the pragmatics

It is notoriously difficult to change the Australian Constitution. If a proposal can be attacked, it will be—by persons with an interest in creating publicity for themselves, by shock jocks, columnists and maverick politicians—indeed, by anyone who relishes an opportunity to attack the Government. Thus unless the proposal is clear and nonthreatening it will be defeated—even if all the major parties support it. Further, if several referendum questions are put at the same time and one of them is considered objectionable, the whole group is likely to be defeated.

CCL is of the opinion that it might be possible to insert a preamble into the Constitution recognising the significance of Aboriginal and Torres Strait Islander people. It should be possible to have section 25 deleted. It might also be possible to have placitum xxvi of Section 51 deleted—though opposition may be expected from some indigenous groups, who would prefer a new head of power enabling the

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Parliament to make laws favouring indigenous Australians. It might be possible to replace 51(xxvi) with a statement that no laws may discriminate against any person on the basis of race. It might just be possible to achieve all of these at once.

However it is our judgement that it will prove impossible to get recognition of indigenous Australians included in the body of the Constitution, because of the fears that will be spread of the likely or unpredictable legal consequences. It will be utterly impossible at the present time to insert a statement of "basic" values into either the preamble or the body of the Constitution. Indeed, CCL itself might oppose such a statement. Any proposed change which appeared to give a permanent ground for discrimination in favour of Aboriginal and Torres Strait Islander persons—or indeed any other group of disadvantaged Australians—would be overwhelmingly defeated.

Importantly, including any of the proposals in the preceding paragraph in a set of referendum questions would guarantee that the entire set would be rejected, irrespective of the merits of the other proposals. One must hasten slowly.

The remarks below have to do with the merits of each proposal, independently of their chances of success in a referendum.

1. Deleting Section 25

Section 25 is contrary to Australia's international obligations, and in particular is contrary to Sections 2, 7, 21 and 26 of the ICCPR. The concept of race, moreover, has no foundation in biology. Social constructs of race are thus arbitrary; discrimination on the grounds of race is arbitrary and hence immoral. It should go.

2. Placitum 51(xxvi)

The suggestion is made on page 18 of the Panel's Discussion Paper that the power could be altered so that legislation could only allow for the advancement of Aboriginal or Torres Strait Islander people or other groups.

The literature on reverse or positive discrimination is immense. One thing however is clear: such discrimination, even if justified, must be temporary. There is a case (though a contested one) that can be made for legislation that discriminates to reverse historical discrimination that has unfair contemporary consequences. But once the unfairness has been removed, that legislation should be repealed. For if this not done, there will be unfair discrimination against other groups. There is a classic example in Malaysia, where reverse discrimination was applied after independence to bring Malay Malaysians up to the standard of education and participation that had been largely the privilege of those of Indian and Chinese background. But the legislation continues to be in place decades later, with unjust consequences.

Accordingly, the Constitution is not the appropriate place for reverse discrimination to be legislated.

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CCL accordingly recommends that the Panel find that 51(xxvi) should be repealed. There is no place for a power dependent upon the spurious concept of race.

We would however support the inclusion of a section prohibiting discrimination on the grounds of race.

3. National identity and recognising indigenous Australians

The idea that Australia has or should have a national identity is deeply divisive. It is readily seen as an attempt to insist that we should stay as we are; or as an attempt to lay down how we should be. There are properly different views on these matters, and a human right to disagree and to attempt to make changes. Appealing to the idea therefore will not help the attempt to have indigenous Australians recognised in the Constitution.

Recognising prior ownership of by Australia's indigenous nations is recognising a fact, and CCL has no problem with it. Recognising ongoing custodianship will raise problems about who it is that has custodianship. CCL notes that definitions of indigeneity vary between Australian laws with the purposes the laws serve. We do not purport to solve the problems raised by accounts in terms of descent from those who held the land before the European invasion, immersion in a culture, upbringing, self-identification or acceptance by others. We not though that as time goes on, those problems will change.

4. Statements of values

Democratic beliefs, the rule of law and freedom are not fundamental values but derived ones. Fundamental values are those that are found in moral theories such as utilitarianism (some concept of happiness or human good), deontology (respect for persons) or neoAristotelianism (human flourishing). Effectively, people have to choose between these, and have a right to do so.

It will be easier to include the derived values proposed; but it will not be easy, if only because their interpretation is disputed.[1] Further, since the legal significance of including them is not certain, there is major room for scare campaigns. There will be far more fuss about including equality—even equality before the law—than there will about democracy.

5. Agreement-making power

It is one thing to allow the states and the Commonwealth to make agreements which are binding and cannot be overruled by legislation but only be further agreement. But it would be quite another for the Government or the Parliament to have the power to make such agreements with Aboriginal or Torres Strait Islander nations. State Governments are elected, and can be replaced.

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[1] See for instance the account of the rule of law by the former Lord Chief Justice in the United Kingdom, Lord Bingham of Cornwall: accessed from http://www.cpl.law.cam.ac.uk/past_activities/the_rt_lord_bingham_the_rule_of_law.php .

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CCL accepts that there is a case for making a treaty which would be binding. That would be a once only exercise. That is not what is being proposed.

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