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Constitutional Recognition of Aborigines – Tasmania

Proposals for amending the Tasmanian constitution to recognise Aboriginal people as Tasmania's first people:

Since 1825 with the establishment of the then unicameral parliament and the major amendments of 1856 with the establishment of the second chamber and further significant amendment in 1934, the Constitution of Tasmania is incomplete because it fails to recognise or acknowledge the first people inhabiting our State and yet the Constitution is often thought of as the Birth Certificate of the State and needs to recognise the original inhabitants of this land. The State Constitution is silent on our essential heritage and history and merely acknowledges the presence and influence of the European settlers.

When the Constitution was drafted, the founding Fathers maintained a benevolent attitude to the First People of Tasmania – then Van Diemens Land, although this benevolence was rarely reflected in the torrid history of European settlement of the lands of our First People that Tasmanian Aborigines.

As a country that is a signatory to the United Nations Declaration of Rights of Indigenous People, we must be mindful of Article 15 which outlines the rights of Indigenous peoples to have their dignity and diversity of culture respected as well as an obligation to combat prejudice and to promote tolerance, understanding and good relations.

These obligations for the Australian Government can become the essence of recognition of our First Peoples in Tasmania and be recognised in the Tasmanian Constitution.

The current preamble needs significant modernisation. The aspirational structure of Queensland's Constitutional preamble is quite inspiring, and regarding recognition of Aboriginal persons states (I have adapted this for Tasmania):

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

1. intend through this Constitution to foster the peace, welfare and good government of Tasmania; and
2. 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
3. **honour the Aboriginal people, the First People of Tasmania, 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**

Note: I have removed Torres Strait Islanders as they are more relevant to the Queensland Constitution although I would also support the exact wording of that section as it is in Queensland's Constitution preamble.

In New South Wales, the Constitution provides specific recognition of Aboriginal people as follows:

Section 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.

In Victoria they also have an effective recognition of Aboriginal people, acknowledging that they are the original custodians of the land, that there is a unique status as the descendants of the Victoria's first people and the spiritual, social cultural relationship with the traditional lands and waters, as follows:

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.

My intention in this submission is to support recognition of Tasmania's First People, the Tasmanian Aborigines and this is a recognition that is long overdue. One hundred and ninety years since the first Tasmanian Parliament, recognition by way of amendment to the Constitution will acknowledge the first communities, the first nations, of what is now our State. The recognition of Aboriginal People will also be a significant step to redress the injustice and neglect of Aboriginal needs.

These needs include the recognition of the spiritual, social, cultural and economic significance of land to the Aboriginal people of Tasmania. My definition of the

Aboriginal People of Tasmania is not a narrow interpretation as reflected by recent interpretations in this State, but along the lines of the nationally recognised definitions used throughout Australia.

We now understand that this recognition should extend further and that it should not be bound to a single issue or Act as the Tasmanian Parliament has done in the past where in some cases we have led Australia in terms of some aspects of recognition. Today we have the unique opportunity of enshrining fundamental truths: the truth that our Aboriginal people are the first inhabitants of Tasmania; the truth of the spiritual, cultural and economic ties that bind our Aboriginal people to their traditional lands and waters; and the truth in the diverse and unique contributions that our many Aboriginal nations, cultures and communities make to the life, the economy and the character of our State.

I know some Aboriginal groups have recently stated that any such proposed recognition is merely symbolic, but I disagree emphatically with that perspective and commend the Tasmanian Government for the consideration of real words in the most significant document governing our State that we are entrusted by the people to have as the binding glue for our State structure and government. To me and many other Aboriginal persons with our heritage lines to this States First People, realise the importance of symbols and their power to inspire and to shape our State attitudes and actions.

I commend the Tasmanian Parliament for consideration of the heritage and turbulent past of the Aboriginal peoples of the State. The symbol of constitutional recognition is to me a symbol that matters dearly and one that has genuine meaning. It is not just symbolic and represents an acknowledgement that in the past we as a State have not had a good record in relation to treatment of our State's First People and that there have been numerous examples of treatment of Aboriginal persons that need to be set right.

Recognition of the State's First People, the Tasmanian Aboriginals is both timely and significant and will have far-reaching consequences for Tasmania's Aboriginals both in this state and on a national scale. This will be a true milestone for Tasmania and for Tasmania's Aboriginals.[1]

Any matters incidental to amending the Tasmanian constitution to recognise Aboriginal people as Tasmania's first people:

Of great concern in Tasmania over recent years has been the definition of an 'Aboriginal' person. The definition implemented (as opposed to adopted) by the Tasmanian government, is at odds with the Federal definition adopted by the Federal Government and also by every other Australian State and Territory.

This is best evidenced by the recent changes in the provision of legal aid to Tasmania's Aborigines. The former group providing legal aid used the widely

[1] Part of the above is adapted from the speech by Kristina Keneally to the New South Wales Parliament on 8/09/2010

implemented restrictive and discriminatory definition of an Aboriginal person, one which some writers have claimed would exclude around 80% of the mainland Aboriginal persons – no matter how 'black' they look.

As a result, the Victorian Aboriginal Legal Aid now has the Federal funding to provide legal aid to ALL Tasmanian Aboriginals, using the usual mainland test of an Aboriginal person, under the guise of the Tasmanian Aboriginal Community Legal Aid (this was one of the three major factors that the original Tasmanian group was not successful on obtaining Federal government finding for the next 5 years) and I believe has widespread implications for all other services provided by government in Tasmania to Aboriginal persons.

For example, the following definitions apply:

Abstudy	• is of Aboriginal or Torres Strait Islander descent; **and** • identifies as an Australian Aboriginal or Torres Strait Islander person; **and** • is accepted as such by the community in which s/he lives or has lived. • From Abstudy Policy Manual: Dept Social Services
Commonwealth v Tasmania (1983) 158 CLR 1, 274 (Deane J)	A person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as Aboriginal
Mabo v Queensland (No 2)(1992) 175 CLR 1, 70 (Brennan J)	Depends on biological descent from the Indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people
Gibbs v Capewell (1995) 128 ALR 577, 585 (Drummond J)	"Aboriginal communal recognition will always be important, when it exists, as indicating the appropriateness of describing the person in question as an 'Aboriginal person'. Proof of communal recognition as an Aboriginal may, given the difficulties of proof of Aboriginal descent flowing from, among other things, the lack of written family records, be the best evidence available of proof of Aboriginal descent. While it may not be necessary to enable a person to claim the status of an 'Aboriginal person' for the purposes of the Act in a particular case, such recognition may, if it exists, also provide evidence confirmatory of the genuineness of that person's identification as an Aboriginal
Shaw v Wolf (1998) 163 ALR 205, 213 (Merkel J)	"In these circumstances Aboriginal identification often became a matter, at best, of personal or family, rather than public, record. Given the history of the dispossession and disadvantage of the Aboriginal people of Australia, a concealed but nevertheless passed on family oral 'history' of descent may in some instances be the only evidence available to establish Aboriginal descent. Accordingly oral histories and evidence as to the process leading to self-identification may, in a particular case, be sufficient evidence not only of descent but also of Aboriginal identity
Patmore and Others v Independent Indigenous Advisory Committee [2002], AATA 962 para 32-33	33. "We accordingly approach the matters before us on the following two assumptions: 1. It is probable that there are in the wider Tasmanian community persons who have a degree of Aboriginal descent although there are no public records which support their claim. 2. Self-identification and community recognition of applicants as Aborigines, particularly where there is evidence of a family history or tradition of Aboriginal descent passed on orally, can provide evidence of Aboriginal descent. 33. We would even go so far as to say that there may be genuine cases of Aboriginal descent which conflict with public records. We think it would be wrong to approach these matters on the basis that public records are the only definitive way of determining Aboriginal descent. Even where public records

	tend to deny Aboriginal descent a sufficiently persuasive case may still be capable of being made out.

Proposed Test:

In Tasmania there needs to be a uniform adoption of the three fold test, that being:

a. is of Aboriginal or Torres Strait Islander descent,
b. identifies as an Aboriginal person, and
c. is accepted by the Aboriginal or Torres Strait Islander community in which they live, have lived or have a clear connection to.

The three components of the above need a policy guideline to interpret them. These are not exhaustive as several examples from Court reports indicate there can be different reasons from time to time for variations on the definitions.

Component One: Is of Aboriginal descent

This is usually evidenced in all mainland states and should also be the case where a person provides a letter or certificate from a recognised Aboriginal body evidencing that the person is of Aboriginal descent. For example, in Tasmania this may be the:

a. Tasmanian Aboriginal Centre,
b. Lia Pootah group, or
c. Aboriginal Land Council.

The usual ways to prove that a person is of Aboriginal descent includes a paperwork trail through government organisations (as is currently implemented in Tasmania) but as several of the Judges above indicate (in particular I note *Pattmore & Ors*), the "lack of family records" is problematic in many Australian cases and proof can flow from things such as oral history, circumstantial evidence (which one notes can in some cases result in convictions under criminal law).

This should NEVER involve politics or a Government Department as it always does in Tasmania. We are the only State that applies such restrictive and discriminatory definitions and application of definitions and policy.

Component Two: Identifies as an Aboriginal person

This component is usually not contentious and can involve several types of evidence, including an application for recognition of a certificate as outlined in component one above, notation on employment documents indicated by the person themselves and many others.

Component Three: Recognised by the Aboriginal Community In Which They Live, Have Lived or Have a Connection To

This is again controversial in Tasmania as the application of this principal has a very restrictive application by the TAC for example where they require a person to have an unbroken connection to the community group. This may not work for a person who has recently established that they are of Aboriginal heritage and this may have been for many reasons including some of those discussed by various Judges above which may have included parents who did not wish to be recognised as Aboriginal persons, persons who may have been taken from their group and raised as Europeans or at least in a non-Aboriginal group and many others.

The usual way this is proven in all mainland states and with all Commonwealth government departments I have encountered is usually evidenced by the Certificate of Recognition provided by a recognised Aboriginal group as I have discussed above.

Conclusion

Without far-reaching changes to the application of the definition of Aboriginal to one that reflects definitions and application of proof requirements as practised by Commonwealth Government Departments and all mainland states, the recent example of a Tasmanian group losing their right to provide services for Aboriginal persons (legal aid changes 2015), this will remain a hotly contested area and the attack on the current highly discriminatory and restrictive definition and application of policy will continually set Tasmania outside the common boundaries accepted throughout Australia and is highly embarrassing to our State which when entertaining steps towards Recognition, was to maintain a highly discriminatory policy on who is an Aboriginal person.

This needs to change and we need to take this current opportunity to make these important changes to end the discrimination currently being practised and endorsed by the Tasmanian Government.

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