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The Secretary
Standing Committee on Community Development
Parliament of Tasmania
Parliament House
Hobart TAS 7000

Dear Secretary

Inquiry into Constitutional Recognition of Aboriginal people as Tasmania's First People

The issues addressed in this inquiry are dealt with in a recent book by Megan Davis and myself entitled *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015). The idea of recognising Aboriginal and Torres Strait Islander peoples in Australia's constitutions has been championed by both sides of politics for more than a decade. Prime Minister John Howard sought, unsuccessfully, to have the Australian people support a new preamble to the Australian Constitution. This was a question on the ballot paper for the 1999 republic referendum. The new preamble would have stated:

> We the Australian people commit ourselves to this Constitution ... honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.[1]

Even though this attempt failed, it spurred change at the State level. Victoria was the first to move, adding the following text in 2004 to its *Constitution Act 1975* (Vic):

[1] Constitution Alteration (Preamble) 1999 (Cth).

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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.

This section comes after the existing preamble to that Constitution, with recites things such as the creation of the self-governing colony of Victoria in 1854. Similar statements of recognition have since been added to the constitutions of Queensland,[2] New South Wales[3] and South Australia.[4] The Select Committee on Aboriginal Constitutional Recognition of the Western Australian Parliament released a report in March 2015 recommending a like addition to that state's constitution. A Bill to achieve this has been introduced into the Western Australian Parliament.

The addition of such text to these State constitutions has provided an important opportunity to recognise Aboriginal peoples in the foundational document of those States. The passage of these changes has been accompanied by public events that have attracted significant media and other interest.

My view is that the Parliament of Tasmania should make a like change. In addition to providing the basic rules of government, constitutions typically contain symbolic and aspirational text that sets out not only where a State is headed, but how its community is constituted, and where it has come from. The absence of appropriate mention of Aboriginal people in the Tasmanian

It is important that the wording of any change be developed in consultation with Aboriginal people. It would be tokenistic and inappropriate to recognise them without ensuring that they are satisfied with the words of recognition. A starting point for such discussions would no doubt be the wordings agreed to by the other States.

One aspect of the recognition achieved in the four States is that each has been accompanied by what is known as a non-justiciability clause. This is set out in subsection (3) of the Victorian words set out above. Similarly, words recognising Aboriginal people in the South Australian Constitution are accompanied by a clause providing that 'the Parliament does not intend this section to have any legal force or effect'. The effect of these words has been to undermine Indigenous support, in part because of a perception that this constrained form of recognition is insincere.

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[2] *Constitution of Queensland 2001* (Qld), preamble and s 3A.

[3] *Constitution Act 1902* (NSW), s 2.

[4] *Constitution Act 1934* (SA), s 2.

In any event, such a clause is not needed, and misunderstands the role of a preamble or other forms of recognition in a constitution. Words of recognition are not expressed to have a substantive effect. They do not contain operative causes, and so do not confer new rights or obligations. This is recognised in the recent report of the Select Committee on Aboriginal Constitutional Recognition of the Western Australian Parliament. It makes clear, even in the absence of non-justiciability clause, Indigenous recognition can be included in a State constitution without giving rise to fears about the interpretation and application of such words.

The conclusion of the Western Australian committee is reflected in the use made of such clauses by Australian courts. Judges have referred to preambular statements, but only on rare occasions, and even then not in a way that has given rise to new legal obligations. Hence, it has been stated that the High Court has historically treated the existing preamble in the Australian Constitution 'with a mix of indifference and reticence'.[5]

Words of recognition may be safely inserted into the Constitution of Tasmania without the need to add a non-justiciability clause. If nothing else, this avoids the odd, contradictory, situation of inserting words into a law, only to simultaneously indicate that they are not to have any legal effect.

Yours sincerely

George Williams

[5] Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24 *University of New South Wales Law Journal* 382 at 386.