

## Department of Premier and Cabinet

Executive Building 15 Murray Street HOBART TAS 7000 Australia  
GPO Box 123 HOBART TAS 7001 Australia  
Ph: 1300 135 513 Fax: (03) 6233 5685  
Web: [www.dpac.tas.gov.au](http://www.dpac.tas.gov.au)



17 AUG 2015

Ms Stephanie Hesford  
Committee Secretary  
House of Assembly Standing Committee on Community Development  
House of Assembly  
Parliament House  
HOBART TAS 7000

Dear Ms Hesford

Thank you for letter of 5 June 2015 inviting submissions to the House of Assembly Standing Committee on Community Development inquiry into proposals for amending the Tasmanian Constitution to recognise Aboriginal people as Tasmania's first people.

Please find attached the Department of Premier and Cabinet (DPAC)'s submission.

The purpose of the submission is to provide the Committee with background information to assist it with its deliberations, rather than promote a particular position.

Should the Committee have any queries regarding the submission the contact officer is Ms Zoë Laskey, Senior Policy Analyst, DPAC. Ms Laskey can be contacted by telephone on 6232 7181 or by email at [zoe.laskey@dpac.tas.gov.au](mailto:zoe.laskey@dpac.tas.gov.au).

Thank you again for the opportunity to provide input on this important matter.

Yours sincerely



Greg Johannes  
**Secretary**  
Attachment

HOUSE OF ASSEMBLY STANDING COMMITTEE ON  
COMMUNITY DEVELOPMENT

INQUIRY INTO PROPOSALS FOR AMENDING  
THE TASMANIAN CONSTITUTION TO  
RECOGNISE ABORIGINAL PEOPLE AS  
TASMANIA'S FIRST PEOPLE

Department of Premier and Cabinet Submission

AUGUST 2015

## INTRODUCTION

The Department of Premier and Cabinet welcomes the opportunity to make a submission to the House of Assembly Standing Committee on Community Development's inquiry into proposals for amending the Tasmanian constitution to recognise Aboriginal people as Tasmania's first people (the Inquiry).

Resetting the relationship with the Tasmanian Aboriginal community is a priority for this Government, as outlined in the Premier's March 2015 State of the State address and the Government's 2015 *Our Plan for the Next 365 Days*.

The Government has indicated that it aims to achieve greater understanding and respect between Tasmanian Aboriginal people and non-Aboriginal Tasmanians in a way that acknowledges Aboriginal history and culture. It is currently consulting with all Tasmanian Aboriginal people about issues that are a priority for them, and is considering a broad range of short, medium and long term actions across three outcome areas: connection to country and culture, recognition of Aboriginal people and closing the gap on disadvantage.

This Inquiry is an important step in the recognition of Aboriginal people.

The purpose of this submission is to provide the Committee with background information to assist it in its deliberations, rather than promote a particular position.

## TERMS OF REFERENCE

The Inquiry's terms of reference require it to inquire into and report upon:

- a) proposals for amending the Tasmanian constitution to recognise Aboriginal people as Tasmania's first people; and
- b) any matters incidental thereto.

This submission focuses on providing background information regarding avenues for constitutional recognition of Aboriginal people, as well as parallels with the campaign for national constitutional recognition. It covers the following key areas:

- constitutional amendment – issues and practicalities;
- arrangements in other jurisdictions;
- community engagement; and
- national constitutional recognition.

## CONSTITUTIONAL AMENDMENT – ISSUES AND PRACTICALITIES

The *Constitution Act 1934* can be amended by Parliament as it sees fit, similar to any piece of State legislation. As indicated by the Premier, the Hon Will Hodgman MP, when he moved the motion to establish this Inquiry, there is no requirement to hold a referendum or plebiscite, and the Standing Committee through this Inquiry, can investigate all practical matters associated with amending the Constitution Act.

However, this does not preclude a referendum or plebiscite from being held on the matter, which, along with this Inquiry, is another method that could assist in further building community understanding and support of constitutional change.

## ARRANGEMENTS IN OTHER JURISDICTIONS

All Australian states other than Western Australia and Tasmania recognise Aboriginal people (and in Queensland, Torres Strait Islander people) in their state constitutions.

New South Wales, Queensland, South Australia and Victoria have all amended their constitutions to acknowledge and honour the Aboriginal people as the first people and traditional custodians of the land.

The amendments in all jurisdictions are similar. The respective state constitutions acknowledge and respect Aboriginal people as the first people, recognise Aboriginal people as the traditional owners and acknowledge the spiritual, social and cultural connections with the land.

Details of the legislation and specific legislative provisions in other jurisdictions are provided below.

### VICTORIA

Victoria was the first State to give constitutional recognition to Aboriginal people. The *Constitution (Recognition of Aboriginal People) Act 2004* was passed in 2004.

The new section inserted into the *Victorian Constitution Act 1975* is as follows:

- 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 wellbeing 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.

### NEW SOUTH WALES

The New South Wales Parliament passed the *Constitution Amendment (Recognition of Aboriginal People) Act 2010* in 2010.

Before the introduction of the Bill into Parliament, the New South Wales Department of Aboriginal Affairs released a discussion paper and invited submissions.

The new section inserted into the New South Wales *Constitution Act 1902* is as follows:

- 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 affects the interpretation of this Act or law in force in New South Wales.

## QUEENSLAND

The Queensland Parliament also passed the *Constitution (Preamble) Amendment Act 2010* in 2010.

The purpose of the amendment was to provide an aspirational statement in commemoration of the 150th anniversary of Queensland and to provide due recognition to Queensland's Aboriginal and Torres Strait Islander people by inserting a preamble to the *Constitution of Queensland 2001*.

The Government received some criticism for not taking the constitutional change to a state plebiscite or referendum. Some Aboriginal groups were also critical of the Government stating it was purely symbolic and did not give any benefits or legal rights to Aboriginal Queenslanders.

The preamble of the Constitution of Queensland was amended to include the following paragraph:

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;

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

## SOUTH AUSTRALIA

South Australia is the most recent state to recognise Aboriginal people in its constitution when it passed the *Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013* in 2013.

Prior to the introduction of the Bill into Parliament, the Government established a five member Expert Advisory Panel to advise the Government on the preferred form and content of a statement of Aboriginal recognition, prepare options for the Government's consideration and seek the views of South Australians.

The Advisory Panel released a discussion paper, sought written submissions and held consultation meetings in city and regional centres.



The new section inserted into the South Australian *Constitution Act 1934* is as follows:

- 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.

## WESTERN AUSTRALIA

A Private Members Bill for constitutional recognition was defeated in the Western Australian Parliament in 2014. The Premier, the Hon Colin Barnett MP, has indicated that the Western Australian Government wants to wait until the question of Commonwealth constitutional recognition of Aboriginal people has been resolved before addressing the issue at a state level.

The Government is presently negotiating a settlement with the Noongar community. In return for surrendering native title, the Noongar people have entered into Indigenous Land Use Agreements (ILUA), which will settle current native title claims and provide \$1.3 billion for economic, social and cultural development of the community.

Following execution of the ILUAs, the Government is required to introduce and sponsor the Noongar Recognition Bill and Enabling Bill. A timeframe of June 2015 was proposed; however the Bill has not yet been introduced.

## AUSTRALIAN CAPITAL TERRITORY AND NORTHERN TERRITORY

Due to their territory status and the fact that they do not have a constitution, the Australian Capital Territory and the Northern Territory have not sought constitutional recognition at a local level. It is not known whether alternative mechanisms for formal recognition of Aboriginal people have been pursued in these jurisdictions. However, the Chief Minister of the Northern Territory, the Hon Adam Giles MLA, has publicly expressed support for the campaign for national constitutional recognition<sup>1</sup>.

## USE OF JURISDICTIONAL MODELS

The examples of constitutional recognition in other Australian jurisdictions may be useful to consider for application in Tasmania. However, careful consideration would need to be given to using one of these models to ensure it is appropriate for the Tasmanian context.

For example, to adopt the Queensland model in Tasmania, the preamble of the Constitution Act would have to be significantly reorganised. This is opposed to the model that has been adopted in New South Wales, Victoria and South Australia, which involve the insertion of a specific section in the Act.

The wording of the provisions used in other jurisdictions would also require consideration for their applicability in Tasmania. For example, the South Australian Constitution makes reference to maintaining 'languages and laws, which are of ongoing importance'. In the Tasmanian context the terminology of recognising and maintaining 'languages' may not have the same application, as the retrieval of the many known traditional languages into one language – *palawa kani* – is ongoing.

## COMMUNITY ENGAGEMENT

As might be expected, diverse views exist amongst the Tasmanian Aboriginal and non-Aboriginal community regarding recognition of Aboriginal people as Tasmania's first people in the Tasmanian Constitution Act. Some view constitutional recognition as an important symbolic step and acknowledgement of past injustices, whereas others do not see it as important given it has no direct practical or legal impact and confers no additional rights.

This Inquiry is an important opportunity to consult and engage widely with both Tasmanian Aboriginals and non-Aboriginals to gauge whether constitutional recognition is supported, what form it should take, and any proposed wording.

Given the complexities associated with this issue and the difference of views in the community, it is noted that a broad discussion on possibilities for the recognition of Tasmanian Aboriginals as Tasmania's first people may be divisive both within the Aboriginal and non-Aboriginal community.

This Inquiry is also an important opportunity to build support for recognition of Aboriginal people in the Australian Constitution, and any recommendations need to consider the potential impacts on this national campaign.

<sup>1</sup> <http://www.recognise.org.au/wp-content/uploads/shared/uploads/custom/e67ed9e2eaf42e60b4fc.pdf>

## NATIONAL CONSTITUTIONAL RECOGNITION

The campaign for recognition of Aboriginal people in the Australian Constitution has been ongoing at a national level for a number of years. The Australian Government has proposed that a referendum be held in 2017, around the 50<sup>th</sup> anniversary of the national referendum giving Aboriginal people the vote. Tasmania is important to the success of a national referendum, which requires a majority of voters in favour in a majority of states.

Recognition of Aboriginal people in the Australian Constitution is a complex process, and significant work has been undertaken over a long period of time at the Australian Government level to support the move to national constitutional recognition, including establishment of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People (covered in more detail below).

On 6 July 2015, the Prime Minister, the Hon Tony Abbott MP, and the Leader of the Opposition, the Hon Bill Shorten MP, held a bi-partisan summit in Sydney with Aboriginal leaders to discuss the possible 2017 referendum for Aboriginal recognition. In their joint press release, both leaders emphasised the need for a broad based conversation about Aboriginal recognition involving all Australians in the lead up to the referendum, and the need for the referendum to be held when it has the best chance of success. Three key steps were proposed:

1. Establish a series of community conferences across the country to enable everyone to have their say, and significant points of view to be considered, with all members of Parliament having the opportunity to discuss Aboriginal recognition before they commence.
2. The Joint Select Committee to develop a discussion paper regarding constitutional change to help facilitate an informed community discussion.
3. Establish a Referendum Council that is broadly reflective of the Australian people to progress a range of issues related to constitutional change, with this process informing further steps to be taken, including any constitutional conventions. This Council will report regularly to the Prime Minister and the Leader of the Opposition, and together with their respective party rooms, they will consider its final recommendations in developing a proposal to put to Parliament, and if supported, the Australian people.

Along with work by government, national constitutional recognition is supported by RECOGNISE, the peoples movement in favour of recognition, which is a part of Reconciliation Australia.

Given that this Inquiry is progressing at the same time as the campaign for national constitutional recognition is gaining momentum, it is imperative that careful consideration is given to the impact any debate or outcome may have on the national campaign.

### JOINT SELECT COMMITTEE ON CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

The federal Joint Select Committee was established in December 2013 to 'inquire into and report on steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition'.



The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People tabled its Final Report on 25 June 2015. Specifically the Final Report includes recommendations about the model for recognition in the Australian Constitution and about the process going forward to a referendum. There is a range of areas touched on in the Final Report that would be useful to consider in the Tasmanian context. It may therefore be appropriate for the Inquiry to consider and take into account the findings of the federal Joint Select Committee.

The Final Report identifies the need for support by the Aboriginal community for any proposal as one of the motivating factors for constitutional recognition. This also features in the principles used by the Expert Panel on Constitutional Recognition of Indigenous Australians to guide development of recommendations to the Joint Select Committee:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander people;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound<sup>2</sup>.

The terms of reference for the Joint Select Committee included the intention that it 'work to build a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals'. It is suggested that building of multi-partisan support in both Houses of Parliament for any recommendations is also an important consideration for this Inquiry. Chapter 2 of the Final Report also makes reference to the need to focus public attention to stimulate interest and support for constitutional recognition of Aboriginal people.

Chapter 7 of the Final Report canvasses issues in relation to sovereignty and treaty, in particular concerns that constitutional change would extinguish any future aspirations for claims of sovereignty and making a treaty or treaties. Similar concerns are likely to be raised in the course of this Inquiry.

---

<sup>2</sup> Section 1.5 of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People – Final Report

