



Victorian Equal Opportunity
& Human Rights Commission

30 September 2011

Expert Panel on Constitutional Recognition of Indigenous Australians
PO Box 7576
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Distinguished members of the Expert Panel,

Constitutional Recognition of Indigenous Australians

The Commission welcomes the opportunity to contribute to the Expert Panel consultation on how to recognise Indigenous Australians in the Australian Constitution. We recognise that the opportunity to contribute to this national discussion is a distinctive opportunity, a critical juncture of Australian history whereby for the first time there is comprehensive political commitment to pursuing recognition of Aboriginal and Torres Strait Islander People in the Australian Constitution.

The *Charter of Human Rights & Responsibilities 2006* (Vic) ('the Charter') has been in operation for nearly five years, and has provided Victorians with some experience of formal and specific recognition of Victorian Aboriginal people. The Commission has recently provided a submission to the four-year review of the Charter entitled 'Putting Principle to Practice'¹. Our submissions with respect to how constitutional recognition of Indigenous Australians might be achieved are informed by our statutory role under the Charter.

The Commission's annual reporting and educative functions have enabled the Commission to consider the impact that formal recognition of rights has had on all Victorians, including Victoria's Aboriginal population. We have engaged with the Charter on a day-to-day basis with the state government, the community and the courts in the past four years. We believe that these experiences will be valuable in assisting the Expert Panel and Australian public consideration of how Indigenous people should be recognised in the Australian Constitution. We acknowledge that constitutional recognition is significantly different to the legislative recognition of rights that is provided for in the Charter. Nevertheless, we believe the experience in Victoria of how the Charter's recognition of Aboriginal Victorians impacts on Aboriginal Victorians, and the Victorian people as a whole, can offer a valuable contribution to the national debate on constitutional recognition.

¹ Victorian Equal Opportunity and Human Rights Commission, 'Putting Principle into Practice: Submission to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006', 2011. A copy of the submission is available at <http://www.humanrightscommission.vic.gov.au/>

For this reason our submission does not address all of the questions raised in the discussion paper. Rather, it concentrates on the issues that are most directly informed by the Commission's work.

Recognition of Aboriginal Victorians in the Charter

The Victorian Charter currently recognises Aboriginal Victorians in two ways:

1. In a preamble

The preamble of the Charter recognises that human rights have a particular significance for Aboriginal Victorians, 'as descendants of Australia's first people, with their diverse, spiritual, special, cultural and economic relationship with their land and waters'.

The preamble of the Charter provides an overarching statement of the values which underpin the Charter and is also intended to inform policy development as it relates to Indigenous people in Victoria. Importantly, the preamble is also an interpretative aid that will assist to inform the application of the rights and obligations contained within the body of the Charter.

2. By providing Aboriginal Victorians with a right to maintain their culture

Section 19(2) of the Charter specifically applies the protection of cultural rights to Aboriginal people, recognising that Aboriginal Victorians have a right to maintain their language, kinship ties and spiritual and material relationship with the land, waters and other resources under their traditional law and custom (Section 19(2) of the Charter). The protection of cultural rights of Aboriginal Victorians in the Charter is based on article 27 of the ICCPR, which specifically protects the cultural rights of indigenous peoples.²

Paragraph (d) of section 19(2) is based on article 25 of the United Nations Declaration on the Rights of Indigenous Peoples.³

The Commission's work on Indigenous rights

The Commission has argued that recognition of Indigenous Victorians in the Charter should be strengthened.

Section 44 of the Charter mandates that the Victorian Attorney-General arrange a review of the Charter after four years of operation, and again after eight years of operation.⁴

Section 44(3) of the Charter states that four-year review must specifically consider whether the right to Indigenous self-determination should be included in the Charter.⁵

In our submission to the 2011 review of the Charter, the Commission recommended that there be "stronger and clearer recognition of the rights of Victorian Aboriginal people in the Charter" and said that "acknowledgement of a right to self-determination is the appropriate way to achieve that recognition".⁶

² Explanatory Memorandum, Charter of Human Rights and Responsibilities 2006, pg. 15.

³ Ibid.

⁴ Section 44 of the Charter of Human Rights & Responsibilities 2006 (Vic)

⁵ The right to self-determination was not included in the Charter in 2006. The Human Rights Consultation Committee said in 2006 that its decision not to recommend inclusion of the right to self-determination was based on the absence of an established precedent on the content of the right and concern that its recognition may lead to unintended consequences. The Committee considered that self-determination could not be expressed as a general undefined right, and that any provision must contain detail about its intended scope and reflect Indigenous communities' understanding of the term.

⁶ Victorian Equal Opportunity and Human Rights Commission, 'Putting Principle into Practice: Submission to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006', 2011, pg. 88

The observations and conclusions made by the Commission in our submission to the four-year review of the Charter are drawn from the evidence-base of our own experience working with the Charter, our interaction with government, and our consultations with people in the community. Our observations are also informed by the results of two collaboratively produced reports which specifically focused upon whether the right to self-determination should be included in the Charter:

1. 'Occasional Paper: Indigenous Self-determination and the Charter of Human Rights and Responsibilities- A Framework for Discussion', 2010 ('Occasional Paper'): The paper, prepared by Professor Larissa Behrendt and Alison Vivian, explores the concept of self-determination, examining both the international law definition and consulting with Aboriginal Victorians as to how they define of the concept. The paper was designed to be a starting point for discussion of whether the right to self-determination should be included in the Charter⁷.
2. 'Talking Rights: Consulting with Victoria's Indigenous Community about the Right to Self-Determination and the Charter', 2011 ('Talking Rights'). The report, prepared by Ingenuity – SED Consulting, documents the views of Aboriginal Victorians on three broad topics: What does self-determination mean to you and is it important?, should the right to self-determination be included in the Charter and, if so, how might this be achieved?⁸

Understanding and recognition of the right of Indigenous Australians to self-determination provides a framework through which recognition of Indigenous Australians in the Australian Constitution can be achieved. Similarly, legal recognition of the unique status of Indigenous people in Australia is a fundamental step towards full recognition of the right to self-determination held by Indigenous Australians.⁹

Self-determination as a framework for greater recognition

The right to self-determination "is central to the protection of all human rights"¹⁰ and encompasses a broad range of rights. The right is contained in the ICCPR and the ICESCR, and more recently in the United Nations Declaration of the Rights of Indigenous People ('the Declaration'), which Australia has formally supported. The Commission believes that legal recognition of the unique status of Indigenous people in Australia is a fundamental step towards full recognition of the right to self-determination held by Indigenous Australians.

Articles 3, 4 and 5 of the Declaration set out what self-determination means and what rights they bestow on Indigenous people. They include:

⁷ Ibid.

⁸ Victorian Equal Opportunity and Human Rights Commission, Talking Rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities, 2011, pg. 6. A copy of the report is available at <http://www.humanrightscommission.vic.gov.au>

⁹ Victorian Equal Opportunity and Human Rights Commission, Occasional Paper: Indigenous self determination and the Charter of Human Rights and Responsibilities – A framework for discussion, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, pg. 18. A copy of the report is available at <http://www.humanrightscommission.vic.gov.au>

¹⁰ Victorian Equal Opportunity and Human Rights Commission, Occasional Paper: Indigenous self determination and the Charter of Human Rights and Responsibilities – A framework for discussion, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, pg. 8

- a right to freely determine their political status and freely pursue their economic, social and cultural development (Article 3)
- a right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (Article 4), and
- a right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they choose, in the political, economic, social and cultural life of the State (Article 5).

Importantly, Article 46 of the Declaration makes it clear that self-determination should not be equated with the right for indigenous people to form an independent State, and that nothing in the Declaration may be construed as encouraging any action which would 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.

James Anaya, the United Nations Special Rapporteur on the Fundamental Freedoms of Indigenous People, identifies five elements that constitute the right to self-determination: non-discrimination, cultural integrity, lands and natural resources, social welfare and development, and self-government.¹¹ These elements of self-determination raise important issues that need to be considered when determining the substance and form of constitutional recognition.

We recognise that there are a broad range of views within the Aboriginal and Torres Strait Islander community and the wider community about the specific importance of self-determination for Aboriginal and Torres Strait Islander People. However the clarity provided by the Declaration about what self-determination means in international law, and its acceptance after almost a decade of negotiations by states like Australia, Canada and New Zealand, means that there should no longer be a barrier to implementing principles of self-determination in Australia, or in the Australian Constitution.

The Commission believes that the widespread adoption of the Declaration provides clear support for a common understanding of self-determination that is able to reflect the different meanings that self-determination has to indigenous people world-wide, as well as the differing views amongst the international indigenous community on the importance of the right to self-determination. The clarity of the definition of self-determination at international law, as accepted by the Australian government, provides a basis for how the right of Aboriginal and Torres Strait Islander people to self-determination could be recognised in the Constitution, and clarifies the content of this right.

The value of rights recognition for all Australians

We believe that broader consideration of, and action in accordance with, the right of Indigenous people to self-determination can have a positive impact on the Victorian population, and assist to ameliorate the socio-economic gap between Indigenous and non-Indigenous Victorians.¹²

¹¹ S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004).

¹² Examples extracted from Victorian Equal Opportunity and Human Rights Commission 'Putting Principle into Practice: Submission to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006'.

- *In 2008, the World Health Organisation reported that any serious effort to reduce health inequalities will involve political empowerment, because people that are already disenfranchised are further disadvantaged with respect to their health.*¹³
- *The Harvard Project on American Indian Economic Development has found that self-determination and fostering the ability of Indigenous people to make their own decisions about what development approaches to take (on matters as diverse as governance, natural resources management, economic development, health care and social service provision) has a significant impact on improving chances for Indigenous economic development.*¹⁴
- *Recent research in Australia suggests that more than one quarter of Australians express anti-Aboriginal sentiments, and that one in five Aboriginal people polled said they were often treated with disrespect and mistrust. The research shows that racism can affect mental and physical health and reduce people's ability to take advantage of opportunity*¹⁵. *Recognition of the right to self-determination in the Charter can help to boost public perception and engagement with the Indigenous community.*

Additionally, as noted by the Victorian Aboriginal Child Care Agency in their submission to the four-year review of the Charter, the International Academy for Suicide Research in Canada has found that “as measures for self-determination and culturally-based services increase, youth suicide dramatically decreases”.¹⁶

A framework that allows for the recognition of Indigenous rights will assist in “closing the gap between us as peoples”.¹⁷ The Victorian Aboriginal Child Care Agency’s submission to the Charter Review asserts that “the story of human rights” can create “a platform for how we relate to each other as individuals and as peoples. Human rights is a basis for respectful relationships and a protection against inhumanity”.¹⁸

Behrendt and Vivian have analysed how and to what extent principles of Indigenous self-determination have been implemented within former British colonies, and in Norway and Sweden, where protection of the rights of Indigenous people has included government policy, treaties, legislation, and constitutional protection . Behrendt and Vivian note that:

*Experiences in other countries highlight that the establishment of a framework for self-determination is not divisive and has been achieved to a greater extent than in Australia*¹⁹ .

In the course of a limited consultation conducted across Victoria on the issue of self-determination, Behrendt and Vivian found that the common view expressed by Aboriginal Victorians themselves was that Aboriginal people have distinct rights and responsibilities,

¹³ The Harvard Project on American Indian Development can be located at <http://hpaied.org>. See specifically Cornell, S and Kalt, JP, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, American Indian Studies Centre.

¹⁴ The Harvard Project on American Indian Development can be located at <http://hpaied.org>. See specifically Cornell, S and Kalt, JP, *Reloading the Dice: Improving the Chances of Economic Development on American Indian Reservations*, American Indian Studies Centre

¹⁵ University of Western Sydney, *Challenging Racism: The Anti-Racism Research Project*, 2010. Findings from the project are available at www.uws.edu.au/social_sciences/soss/research/challenging_racism.

¹⁶ Victorian Aboriginal Child Care Agency, ‘VACCA Submission to Victorian Human rights and Responsibilities Charter Review’, pg. 18.

¹⁷ Victorian Aboriginal Child Care Agency, ‘VACCA Submission to Victorian Human rights and Responsibilities Charter Review’, pg. 16-18.

¹⁸ *Ibid*, 17.

¹⁹ Victorian Equal Opportunity and Human Rights Commission, Occasional Paper: Indigenous self determination and the Charter of Human Rights and Responsibilities – A framework for discussion, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, pg. 11.

but that this did not detract from rights held by non-Aboriginal people²⁰. One person told the Commission:

It is not a question of there being two rules; different rules for different people. It doesn't mean a lessening of other rights but recognition that Aboriginal people have pre-existing rights that continue. Rights need to be enshrined and the argument that Aboriginal people are receiving special treatment needs to be rejected²¹.

This is mirrored in international law. Although the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights acknowledge the right of all peoples to self-determination, the United Nations Declaration of Rights for Indigenous Peoples specifically refers to self-determination as a concept of particular significance to Indigenous people, by acknowledging that there may be unique barriers to, enablers of, or aspects of self-determination that are only relevant to Indigenous persons.

What Form Should Recognition of Aboriginal and Torres Strait Islanders Take?

The consultation process conducted by the Expert Panel has indicated that it will consider, among other things, 'whether constitutional recognition should address issues such as sovereignty, self-determination, political representation, recognition of customary law and issues relating to land and resources.'

The Expert Panel has also said that it believes that recognition of Aboriginal and Torres Strait Islander People in the Australian Constitution must be able to benefit all Australians, and must be legally and technically sound.

Below we address some of the key proposals for how recognition of Aboriginal and Torres Strait Islander Australian's may be achieved in the Australian Constitution. Our comments and observations are based upon the experiences and expertise of the Commission in regulating both human rights and equal opportunity legislation in Victorian.

a) Extend beyond the Preamble

Recognition should include substantive rights in the body of the Australian Constitution. Australia currently does not have a mechanism for recognising the rights of Indigenous people or ensuring equality. This sets us apart from countries such as the UK, Canada, US, Norway and Sweden, which all have some mechanism, whether by virtue of a treaty or a Charter of rights, for recognising the unique rights of Indigenous people. Constitutional entrenchment takes such vital protections out of the political arena.

Many Aboriginal Victorians who took part in the Commission's consultations within the last four years have asserted that an important aspect of self-determination is recognising the history of Indigenous Australians and the impact of past events.²² Constitutional change that recognises the unique place that Aboriginal and Torres Strait Islander peoples occupy in Australia's history would go towards the realisation of Indigenous Australians' right to self-determination.

²⁰ Victorian Equal Opportunity and Human Rights Commission, Occasional Paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, pg. 18.

²¹ *Ibid.*

²² Victorian Equal Opportunity and Human Rights Commission, Talking Rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities, 2011, pg. 23.

Another vital aspect of self-determination is the right to cultural integrity.²³ Culture in the context of the right self-determination “encompasses language, traditional practices, religion, spiritual values, preservation of group identity and self-definition”.²⁴ Indigenous cultural rights are recognised in the preamble and section 19 of the Charter. These provisions draw on Article 27 of the ICCPR. To date, section 19 has not been used extensively to protect the rights of Aboriginal Victorians but where it has been used, it has added an important cultural dimension to the decision.

The Supreme Court has examined the cultural rights of Aboriginal Victorians in the matter of *Department of Human Services v Sanding*.²⁵ In this matter, the Charter assisted the Court to clarify what it meant to make decision in accordance with the ‘best interests’ of the child, a requirement under section 10 of the *Children’s, Youth and Families Act 2005*. Four Aboriginal children who had been living with their mother in their maternal grandmother’s home were subsequently removed from their mother’s care because of the mother’s drug addiction. No relatives were able to take the children, there were no Aboriginal families available, and the children were separated and placed in different homes. The mother moved out of the home and applied for the children to be placed in their grandmother’s care.

The Supreme Court said that in determining what protection was in the best interests of the children, the Children’s Court must consider protection of the family as the fundamental group unit in society (s17(1) of the Charter) and the way it intersects with consideration of the cultural rights of the children as Aboriginal children (section 19 of the Charter). The right to protection of the children in their best interest meant that the children should be returned to the care of the grandmother.

The Commission believes that for recognition of Indigenous people to be practical and meaningful, the agenda for reform of the Australian Constitution should extend beyond the confines of a preamble to the Constitution to include recognition of substantive rights that have particular significance to Indigenous people - such as cultural rights - in the body of the Constitution.

b) Guarantee of substantive equality

The Australian Constitution should provide a guarantee of substantive equality.

The guarantee of protection from discrimination is particularly important for Indigenous Australians because of their disproportionate experience of discrimination. The Commission’s research has found that “continuing racist attitudes and perceptions that Aboriginal people and culture are not valued were reported as continuing realities in Victoria”.²⁶

Provision of protection against the enactment of discriminatory legislation in the Australian Constitution will benefit all Australians, and not just Indigenous Australians. Whilst specific constitutional recognition of Indigenous Australians means more than eliminating discrimination, amending the Australian Constitution to provide protection from the

²³ Victorian Equal Opportunity and Human Rights Commission, Occasional Paper: Indigenous self determination and the Charter of Human Rights and Responsibilities – A framework for discussion, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, pg. 22.

²⁴ Castan and Yarrow, ‘Charter Rights: Self-Determination for Indigenous Victorians’ (2008) *Indigenous Law Bulletin* 7(9), pg. 4.

²⁵ VSC 42 (22 February 2011)

²⁶ Victorian Equal Opportunity and Human Rights Commission, Occasional Paper: Indigenous self determination and the Charter of Human Rights and Responsibilities – A framework for discussion, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010, pg. 21.

enactment of discriminatory laws will have significant meaning for Aboriginal and Torres Strait Islander People.

Articles one and two of the *International Convention on the Elimination of Racial Discrimination*, which provide for the elimination and protection of racial discrimination, are not fully protected under current Australian law. The *Racial Discrimination Act 1975* (Cth) and other state and territory legislation provide some protection against discrimination on the basis of race to varying degrees throughout Australia. As the Expert Panel will be aware, statutory protection of rights does not provide the same degree of rights protection as Constitutional entrenchment, and is subject to being overturned, even by discriminatory legislation.

The *Racial Discrimination Act 1975* (Cth) ('RDA') does not address religious discrimination, racial vilification, substantive equality or systemic discrimination. In addition, 'Special measures' under the RDA currently do not comply with the Convention of Elimination of Racial Discrimination Committee General Recommendation No 32, which specifies that 'State parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities'. Australian governments can and have enacted racially discriminatory laws in the absence of constitutional protection against racial discrimination.²⁷

In Victoria, Section 8 of the Charter provides a mechanism for ensuring recognition and equality before the law. Recognition of this right is in addition to the protection from discrimination that is provided in the *Equal Opportunity Act (2010)* ('EOA 2010'). The definition of 'discrimination' has the same meaning as in the EOA 2010 which includes discrimination on the grounds of a number of personal characteristics, including: age, impairment, political belief or a activity, race, religious belief or activity, sex and sexual orientation, in a number of areas of public life. Both the EOA 2010 and the Charter protect against direct and indirect discrimination where the act applies. The rights contained in the Charter, including the equality right, are not absolute and may be subject to limitations. The Charter sets out a test for assessing whether particular limitations on a human right are permissible.

In Victoria, there have been concerns about the way the Charter ties the right to equality in section 8 of the Charter to the list of protected attributes in the EOA 2010. The Commission believes that this may limit the ability of the equality right to keep up with developments in society in the same way as equivalent provisions under international law have in areas such as sexual orientation and homelessness. In this way, the right to equality in the Charter is restricted compared with the same right in International law.

How might substantive equality be guaranteed by the Australian Constitution?

Section 25

Section 25 of the Australian Constitution provides that the State or the Commonwealth may make laws to disqualify persons of any particular race from voting at elections.

Section 25 of the Australian Constitution is outdated and does not accord with Australia's obligations under International Law; accordingly, the Commission supports the proposal that a referendum should propose that section 25 be deleted from the Australian Constitution.

²⁷ For example parts of the *Northern Territory National Emergency Response Act 2007* (Cth)

Section 51(xxvi)

One of the options for amending the Australian Constitution to achieve substantive equality raised by the discussion paper would be to amend section 51(xxvi) to allow Parliament to make laws for the *benefit* of Aboriginal and Torres Strait Islander people only.

Australia is the only country with a constitution that allows for discrimination against its Indigenous peoples based on their race. A constitutional amendment that would eliminate the ability for Parliament to enact racially discriminatory legislation, unless a statute proposed to be a special measure required for a particular race to achieve substantive equality, would be an approach that is consistent with Australia's obligations under international law.

Any amendment to section 51(xxvi) that would allow for laws to be enacted for the benefit of Indigenous Australians must incorporate the principles of General Recommendation No 32 of Convention of Elimination of Racial Discrimination Committee, which clarifies the meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination, and sets out the rights of Indigenous People to participate in decisions that affect them.

Acknowledgement of the principles of General Recommendation No 32 will ensure that any amendment to section 51(xxvi) that allows for laws to be enacted for the *benefit* of Indigenous Australians complies with the principles of, and the rights that Aboriginal and Torres Strait Islander People have, to self-determination.

c) Agreement-making power

The Law Council suggests that the Australian Constitution could be amended to include a provision similar to section 105A of the Australian Constitution to provide the Commonwealth with the power to make agreements with Aboriginal and Torres Strait Islander People on a range of subjects. Like section 105A of the Australian Constitution, the agreements would override other laws. The Law Council says that:

'This approach would obviate the need to put to referendum an extensive catalogue of rights or detailed arrangements and provide, at the same time, a source of Constitutional authority for such agreement/ agreements.

It would also provide opportunities for properly resourced consultations with Aboriginal and Torres Strait Islander communities and organisations, and wider community education, in relation to appropriate arrangements for addressing much of the unfinished business, including in relation to sovereignty, self-determination, political representation (including through guaranteed seats in Parliament), recognition of customary law and land rights²⁸.

The Law Council also says that any constitutional amendment to provide the framework for agreement should not be made until agreement has been negotiated and constitutional alteration is thought necessary or desirable²⁹. This is to ensure that the electorate knows how such a provision would be intended to be used at the time of a referendum.

Amending the Australian Constitution to facilitate agreement making between the Commonwealth and Aboriginal and Torres Strait Islander People in the manner described by the Law Council is consistent with the following rights under International Law:

²⁸ Law Council of Australia, Discussion Paper, 'Constitutional Recognition of Indigenous Australians', March 2011, pg 16

²⁹ *Ibid.*

International Declaration of the Rights of Indigenous People

- Article 10: Requires that Indigenous People not be forcibly removed from their lands without their free, prior and informed consent.
- Article 11: Requires that states do not use the cultural, intellectual, religious and spiritual property of Indigenous People without their free, prior and informed consent or in violation of their laws, traditions and customs.
- Article 19: Requires that states shall consult and cooperate in good faith with Indigenous People through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- Article 32: States that Indigenous People have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. Requires states to consult and cooperate in good faith with the Indigenous People prior to implementing a project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Other International Law to which Australia is a party

- Non-discrimination on the basis of race as required by article 2, International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), article 2 and article 26, International Covenant on Civil and Political Rights ('ICCPR'), and article 2, International Covenant on Economic Social and Cultural Rights ('ICESCR').
- Equal protection of property interests before the law as required by article 5, ICERD.
- Protection of the right to maintain and enjoy a distinct culture as required by: article 2, ICERD, and article 27, ICCPR
- Right of Indigenous people to effective participation in decisions affecting them, their lands and territories as required by: article 5(c) of ICERD, article 1 of the ICCPR, and article 1 of the International Covenant on Economic Social and Cultural Rights ('ICESCR').

Inserting a provision in the Australian Constitution that would facilitate agreement-making between the Australian Government and Indigenous People would not necessarily lead to unprecedented outcomes, as the rights of Indigenous People contained in international law would be able to inform the ambit of any agreement making provision in the Australian Constitution. In addition, elements of self-determination through agreement making are already reflected in an institutional and statutory manner at Commonwealth and State levels, through the *Native Title Act 1993 (Cth)* and other State and Territory legislation.

As we noted in our submission to the four-year review of the Charter:

'...the Aboriginal Land Act 1970 (Vic), the Native Title Act 1993 (Cth) and the Traditional Owner Settlement Bill 2010 (Vic) all acknowledge the rights that Victorian Aboriginal Traditional Owners have over their land. This legal framework helps Aboriginal groups in Victoria to make agreements with government based on what is important and specific to them. Elements of land rights agreements that promote self-determination include the transfer of freehold title to Aboriginal land corporations, cooperative management agreements over national parks and funding for Traditional Owners Corporations to manage their native title interest and other aspects of settlement under land agreements.

This example shows that recognition of self-determination in the Charter is a means to an end. The extent to which the rights of self-determination are pursued in Victoria will depend upon:

- the objectives of the Indigenous community, which themselves are diverse, and
- the agreements that the Indigenous community are able to reach with government³⁰.

The Australian Human Rights Commission's Community Guide to the United Nations Declaration on the rights of Indigenous People states that:

*'The Declaration has again opened the debate about true reconciliation between our peoples and the wider Australian public. The signing of treaties and other agreements between our peoples and governments could form part of a new relationship based on mutual respect and equality. Agreement-making is one way that the rights contained in the Declaration can be implemented.'*³¹

Facilitating and providing for the ability for the Commonwealth to enter into agreements with Indigenous Australians in the Australian Constitution would be beneficial to all Australians, and as such, the appropriateness of inclusion of an agreement-making provision in the Australian Constitution should be thoroughly considered by the Expert Panel.

Inclusion of an agreement-making provision in the Australian Constitution would create the basis from which a new relationship based on respect and equality between Indigenous and non-Indigenous Australians could be formed. To achieve this, any agreement-making provision must promote equitable and effective participation of Indigenous Australians in the agreement making process.

Formal recognition in the Australian Constitution is not enough

Our experience with specific recognition of Indigenous Victorians in the Charter is that formal recognition must be coupled with an ongoing commitment to work in partnership with Indigenous Australians.

Reports produced by the Commission have found that four years after enactment, the Charter is not well known or applied by Victorian Aboriginal people and further engagement with the community is required³². Whilst the Victorian Aboriginal people who were consulted for the purpose of collating these reports indicated a high level of interest in the rights conferred by the Charter, there was limited knowledge and experience on the existence of application of the Charter. The Victorian Aboriginal Legal Service's submission to the four-review of the Charter echoed this sentiment and asserted that it is "the people who need the knowledge of the Charter the most that do not know enough

³⁰ Victorian Equal Opportunity and Human Rights Commission, 'Putting Principle into Practice: Submission to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006', pg 90

³¹ Australian Human Rights Commission, Community Guide to the United Nations Declaration on the rights of Indigenous People, 2010, available at:

http://www.hreoc.gov.au/declaration_indigenous/declaration_full.html

³² Victorian Equal Opportunity and Human Rights Commission, Talking Rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities, 2011 and Victorian Equal Opportunity and Human Rights Commission, Occasional Paper: Indigenous self determination and the Charter of Human Rights and Responsibilities – A framework for discussion, prepared by Larissa Behrendt and Alison Vivian, Jumbunna Indigenous House of Learning, University of Technology, Sydney, March 2010.

about it".³³ The Victorian Aboriginal Child Care Agency's submission asserted that in Aboriginal Victorian communities there is confusion over how the Charter works.³⁴

In the report documenting the Commission's consultations, it was recommended that engagement with Indigenous communities "be considered an important priority",³⁵ as this is essential to the promotion of awareness and understanding of the Charter and fostering a sense that the Charter is relevant to their lives. Similarly, for constitutional recognition to be meaningful and have a real impact on local Indigenous communities, engagement with Indigenous peoples must be central to the process. A commitment for engagement with the general population may be useful as well. In Victoria, with respect to human rights and the recognition of the human rights protected in the Charter, we have found that there is still a great need for ongoing and increased effort in providing human rights education about the Charter in the community at grassroots level and at organisation level³⁶.

The Commission believes there is merit in the Law Council's recommendation that a new provision be inserted into the Australian Constitution that commits the Federal Government to ongoing constitutional conferences to discuss Indigenous rights.³⁷ This approach would be similar to section 37.1 of the Canadian Constitution. We are aware however, that this might present with technical difficulties.

The Commission believes the Expert Panel should consider whether it would be appropriate to seek an amendment of the Australian Constitution that would commit the Federal Government to ongoing constitutional conferences to discuss Indigenous rights.

In the event that this cannot be achieved within the body of the Australian Constitution, some other mechanism that binds the Federal Government of the day to engaging in ongoing discussions about the realisation of the rights of Aboriginal and Torres Strait Islanders should be implemented. Formal involvement of the Aboriginal and Torres Strait Islander representative body, the National Congress of Australia's First Peoples, would be one way of ensuring participation of Indigenous people in such discussions. It would be appropriate that the finalisation of such binding agreement occur simultaneously with any referendum that seeks to amend the Australian Constitution to achieve formal recognition of Indigenous Australians.

The Commission recognises and supports the Expert Panel's efforts to consult with Aboriginal and Torres Strait Islander people. However, the consultation process should not end with the referendum.

Ongoing engagement is important given the time constraints on the consultation process which aims to put the reform to a referendum within the life of the 43rd Parliament³⁸. Formal, bipartisan commitment should be provided from the Federal Government to ensure that the process of moving towards a referendum on the question of constitutional recognition of Indigenous Australians will continue. This commitment should not be limited

³³ Victorian Aboriginal Legal Service, 'Review of the Victorian Charter of Human Rights and Responsibilities', July 2011, pg. 52.

³⁴ Victorian Aboriginal Child Care Agency Co-Op, 'VACCA Submission to Victorian Human rights and Responsibilities Charter Review', pg. 14.

³⁵ Victorian Equal Opportunity and Human Rights Commission, Talking Rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities, 2011, pg. 24.

³⁶ Victorian Equal Opportunity and Human Rights Commission, 'Putting Principle into Practice: Submission to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006', pg. 18

³⁷ Law Council of Australia, Discussion Paper, 'Constitutional Recognition of Indigenous Australians', March 2011, pg. 16.

³⁸ Law Council of Australia, Discussion Paper, 'Constitutional Recognition of Indigenous Australians', March 2011, pg. 12.

to the options put forward for constitutional recognition of Indigenous Australians by the Expert Panel.

Please contact me if the Commission can be of any further assistance to the Expert Panel in considering the options to achieve Constitutional Recognition of Indigenous Australians.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Karen Toohey', with a stylized, cursive script.

Karen Toohey

Acting Commissioner