

Ms Angela Jurjevic
Executive Director
Aboriginal Affairs Victoria
GPO Box 2392V
Melbourne VIC 3000

29 July 2004,

Dear Ms Jurjevic,

Re: Constitution (Recognition of Aboriginal People) Bill Exposure Draft

VALS welcomes the Constitution (Recognition of Aboriginal People) Bill Exposure Draft (Bill) and this opportunity to comment on it. VALS acknowledges positive attributes of the Bill, such as the State of Victoria taking the lead in formally providing Constitutional recognition of Aboriginal people. VALS agrees with the comment of Troy Austin (Victorian ATSIC Commissioner) that the recognition provided in the proposal is “overdue recognition”.¹

However, VALS has some concerns about the Bill and some suggestions about how to improve the Bill. VALS argues that the proposed Bill does not go far enough in providing for Reconciliation between Indigenous and Non-Indigenous Australians, but is positive in that it *at least* provides some Constitutional recognition of Indigenous Australians. VALS suggestions of improvement reflect an attempt to provide realistic enhancement to the proposed Bill and ‘meet the Government where it is at’ in light of the current political climate in Victoria.

Climate in Victoria

VALS recognizes that the level of formal rights protection mechanisms in Australia, with the exception of the ACT, does not provide for a Bill of Rights. Recently the Attorney General’s Justice Statement recognized a need to better protect rights and the needs of disadvantaged groups and we hope this statement is supported by a significant funding commitment by the Government.

Characteristics of the Bill

VALS argues that the Bill is reflective of the current political climate in Victoria, where there is a willingness to recognise past injustices, but a fear of exactly what such recognition will mean for the future. As a result, the Constitutional recognition stops short of promising any future obligation to attempt to systematically reflect that Constitutional recognition in the development of new policy and legislation. VALS considers the Bill to have the following characteristics:

¹ Austin Troy Media Release, ‘Aboriginal people must be consulted on Constitutional Recognition’ 3/6/2004

Willingness to Recognise Indigenous Australians

The proposal is reflective of the willingness and courage of the Victorian Government to recognise Indigenous Australians within the Constitution. The Bill states at follows:

Clause 3(1): “the purpose of the proposed Act is to recognize Victoria's Aboriginal people and their contribution to the State of Victoria, within the Constitution Act 1975”.

VALS notes that no other Australian State Constitution, nor the Commonwealth Constitution, gives recognition to Indigenous Australians. VALS argues that the exclusion of Indigenous Australians in the Constitution is discriminatory and motivated by assimilation policies. VALS supports the Bill in so far as it changes the Victorian Constitution by literally including Indigenous Australians in it.

Fear of Opening the Flood Gates

The Bill is reflective of and motivated by the fear of the Government and the Australian public about opening the floodgates of civil causes of action against the Government for past injustices perpetuated against Indigenous Australians. The Bill states as follows:

Clause 3(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”.

The inclusion of Clause 3(3) leads VALS to argue that the Bill is giving with one hand and taking with the other. The Bill fails to create civil law rights specifically arising from Constitutional recognition of Indigenous Australians (ie: not confer any additional right to sue the Government). The Bill contains a Constitutional recognition of Indigenous Australians, however, such recognition is qualified or conditional, as it is not taken to mean an admission of liability giving rise to an entitlement to compensation. The Bill specifically excludes any suggestion that Constitutional recognition will have any present or future benefit to Indigenous people or communities.

Limited Effect of Bill

VALS is concerned that Clause 3(3) cancels out the Constitutional recognition of Indigenous Australians, as the consequences of such Constitutional recognition are limited. The Bill does not provide for what Constitutional Recognition will result in, but what it will not result in. Clause 3 means that Indigenous Australians cannot expect to exercise their legal rights to any civil cause of action in a similar manner as other Australians.

VALS does not argue that the Bill will have no effect on the lives of Australians, but that the Bill does not go far enough in improving the situation of Indigenous Australians, hence the Bill is limited in its effect. VALS acknowledges that the Bill does *at least* provide Constitutional Recognition of Indigenous Australians.

VALS acknowledges that the proposal to include Indigenous Australians within the Victorian Constitution will make Indigenous Australians visible to Australians in general.

The Bill will enhance public awareness of Indigenous Australians (ie: issues affecting Indigenous Australians) and the Reconciliation process. According to Troy Austin, “Constitutional recognition will go a long way towards bringing our people in from the margins and to finally recognise us in the fabric of society”.²

The Bill can be described as symbolic or tokenistic. Such a description can be taken to be a criticism of the Bill, but VALS acknowledges that there can be value in a symbolic gesture. Arguably, symbolism does matter because it is a reference point for all Australians, embodies ideals, speaks of identity, is a sign of change, a beacon of hope and reflects aspirations. The practical effect of symbolic gestures is limited in scope.

VALS is disappointed by the limited effect of the Bill, but sadly not surprised that the Government is not prepared to go further in recognising Indigenous rights in the Constitution. Patrick Dodson’s criticism of “politeness and niceness of whiteness” is that it “often keeps it all safe and on the surface”. Such a criticism is arguably applicable to the Bill which is motivated by a fear of opening the floodgates of civil litigation.³

Lack of provision for the future

The proposal has a strong historical feel as it reflects a willing to recognise Victoria’s past, but lacks vision about the future. VALS acknowledges Premier Brack’s comment that the Bill contains “commonsense recognition of historical fact”, but notes that the Bill fails to go any further than this.⁴ VALS is critical of the Bill because it:

- only recognises the historical status of Indigenous Australians (ie: ‘original custodians’, Clause 3(2))
- only recognises the past mistakes of the Victorian Government, such as failing to consult with Indigenous Australians on the original Victorian Constitution [Clause 3(1A)].
- only recognises the past contributions of Indigenous Australians to the State of Victoria. Clause 3(2)(d) states that Indigenous Australians “have made a unique and irreplaceable contribution to the identity and wellbeing of Victoria” but does not address the future.
- does not provide for what Constitutional Recognition will result in, but what it will not result in (ie: not create a civil cause of action arising from Constitutional recognition).

VALS does not wish to disregard the importance of recognising Victoria’s past, as this is important in being able to move forward towards Reconciliation. However, the Bill fails to provide insight as to how the State of Victoria will address issues stemming from Victoria’s past (ie: disadvantageous impact of colonisation on Indigenous Australians). Also, the Bill does not envisage a future contribution to the State of Victoria by Indigenous Australians.

² ibid

³ Holt Lillian, ‘Reconciliation – Rhetoric, Reality and Racism’ Newsletter of the Rural Women’s Network (Department for Victorian Communities) Number 2 2004, p.44

⁴ Premier Of Victoria Media Release, ‘Constitutional Recognition for Victoria’s Aboriginal people’ 29 May 2004

The Bill does not even mention the word ‘Reconciliation’ and VALS would have thought that this is an important word to include in the Victorian Constitution.

VALS suggested improvements to the Bill

A commitment by Government to consider the impact of any new legislation or policy on Indigenous Victorians at the beginning of the policy or legislation devising process.

VALS has a suggestion about how the Victorian Government can address calls to provide for a stronger and more meaningful statement within the Constitution in relation to Indigenous Australians. The VALS suggestion will not give the Government reason to fear that the floodgates to civil litigation will be opened.

VALS proposes that the Victorian Government express a commitment to systematically take into account the likely impact of Government policy directions, program reviews and decisions to modify policy or legislation on Indigenous Australians. The proposal will indicate a commitment by the Victorian Government to develop pro active and systematic inclusion of Indigenous impact procedures across Government and in Government Departments. The operation of this commitment would have to be worked out by Government. There would need to be some resource commitment to this measure if it is to be effective. Clearly there would need to be guidelines to be developed to operationalise such a commitment and prevent it becoming too onerous. This proposal takes the objective of the Constitutional amendment a step further than what is proposed and is likely to improve the quality of policy development, but will not create a right for Indigenous Australians to sue for past damages, nor overburden the Victorian Government. The proposal will go further in providing for Reconciliation than the Bill does.

The proposed procedural obligation to consider the impact of potential legislation/policy on Indigenous Australians stems from an awareness of the high level of disadvantage Indigenous Australians face. Legislation often has a detrimental impact on them, such as resulting in further marginalisation.

VALS in its submission to the Department of Justice Review of the Implementation of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) raised concern about broader policy directions which run counter to attempts to implement the RCIADIC Recommendations. VALS raised concerns about punitive sentencing policies, difficulty in getting intra and inter departmental cooperation and action and concerns about how communities are consulted and resourced to contribute to policy development. VALS believes that a concern about the impact of policy and legislation on Indigenous people needs to be ‘wired in’ to the work of Government at the beginning of any new work. It should not be something that is only considered at the end of the process when people are asked to comment on a proposal. Often by the time a policy or piece of legislation is released there is not much room for the Government to move.

At a practical level the obligation to consider the impact of potential legislation/policy on Indigenous Australians could result in:

- An increase in the level, structure and effectiveness of consultation between the Victorian Government and the Indigenous Australian community.

- Establishment of an Inter-Departmental Committee to discuss the impact of proposed legislation/policy/program initiatives on Indigenous Victorians before projects are given the green light, rather than at the end of the process.
- Establishment of specific key indicators geared towards Indigenous Australians that aid in the assessment of the impact of the proposed program, policy or legislation on Indigenous Victorians.
- More effective consideration and representation of Indigenous Victorian's needs and views as the concerns of Indigenous Australians are taken into account at the beginning of the Government decision process, rather than at the end.

Examples of Commitment

There are examples of Australian agreements in place that reflect a commitment to Indigenous Australians that is stronger than the Bill and do not grant Indigenous Australians legal rights.

The Statement of Commitment by Darebin City Council (1998 -)

The Statement of Commitment by Darebin City Council (1998 -) states as follows: "The Darebin City Council recognises the past dispossession and the need to redress current disadvantages of Aborigines and Torres Strait Islanders. We acknowledge that present disadvantage stems from past injustice. The Darebin City Council is committed to building a future based on equity, respect, understanding and the elimination of the disadvantages Aboriginal and Torres Strait Islander people suffer".⁵

Victorian Aboriginal Justice Agreement (2000)

The Victorian Aboriginal Justice Agreement (2000) contains the following principles:

- Section 4: In taking a whole-of-government approach, the Government will:
 - have a genuine commitment to consultation, increased participation and negotiations with Indigenous Victorians.
 - Recognise that the needs and concerns of Indigenous Victorians must be accommodated across all areas of government.
- Achieving reconciliation within the Victorian community is a government priority, but true reconciliation will only be achieved when there is equality of opportunity and experience between Indigenous and non-Indigenous Victorians.

At a practical level the wording of the Constitution could be similar to agreements in existence within Australia.

Canadian Constitution

VALS notes that other countries provide a strong form of recognition of Indigenous people within their Constitutions, which highlight the lack of strength in the Bill. For instance, the Canadian Constitution makes provision for the entrenchment of existing specific rights (ie: section 35 & 37, treaty and common law rights), rather than a simple general recognition of

⁵ The Statement of Commitment by Darebin City Council (1998 - <http://www.atns.net.au/biogs/A000614b.htm>)

Indigenous people. VALS calls on the Government to make small steps towards Reconciliation, such as oblige the Government to consider Indigenous Australians when making decisions, if it is not prepared to take as big steps as other countries. VALS acknowledges that over time small steps contribute to the Reconciliation process.

Where to from here: The Need for consultation

VALS welcomes the proposed Clause 3(1A):

“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”.

VALS notes that there is a need for consultation with the Indigenous Community on the Bill. VALS agrees with Troy Austin that after recognising the failure to consult with Indigenous Australians in the past, “[f]ailure to engage in a proper consultative process would repeat the original injustice and may see reconciliation suffer a severe unintended blow”.⁶ VALS calls for the Government to provide Indigenous Australians with a consultation process that goes further than offering the opportunity to write a submission (ie: public hearing).

Wording of the Bill

It is important that the wording of the Bill receives Indigenous consent before it is introduced in Parliament. For instance, it is arguable that the proposed Clause 3(2)(a) should go further than recording Indigenous Australians as ‘custodians’ of the land. Instead, the word ‘owner’ should be used. According to Troy Austin, “[s]ome would argue that the word custodians is not an accurate enough description of the relationship between Aboriginal people and their land”.⁷

Arguably, the word “original custodians” is offensive to Indigenous Australians. This is because the word ‘original’ suggests that Indigenous Australians ceded the land to the British, or the British conquered the land and Indigenous Australians no longer have an association with the land. The issue of the wording of the Bill shows how important it is to consult with Indigenous Australians.

Conclusion - Summary of Proposals

VALS suggests that the following principles could be enshrined in the Constitution to provide for the protection of Indigenous Australians:

The Victorian Government is committed to providing access to and equity of services to Indigenous Australians by:

⁶ Austin Troy Media Release, ‘Aboriginal people must be consulted on Constitutional Recognition’ 3/6/2004

⁷ Troy Austin Media Release, ‘Aboriginal people must be consulted on Constitutional Recognition’ 3/6/2004

1. Considering the impact of any new legislation or policy on Indigenous Victorians at the beginning of the policy or legislation process (ie: before outcomes, strategies and models are adopted).
2. Introducing systematic and ‘early’ scanning of issues to highlight initiatives which may negatively impact on Indigenous Victorians.⁸
3. Recognizing the important role that Indigenous specific services have played in the past and the important role they can play in the future in serving the Indigenous and non-Indigenous community.
4. Recognising the principle of substantive equality, which caters for assertive action and special treatment.

VALS acknowledges that the Victorian Government is willing to recognise Indigenous Australians within the Constitution, but is concerned that the statement does not make any commitment to undertake any action what so ever as a result of this statement.

VALS has provided suggestions within this submission that represent some small steps towards Reconciliation and recognition of the systemic challenges faced by Indigenous Victorians.

Yours sincerely

Victorian Aboriginal Legal Service Co-operative Limited

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Chief Executive Officer

⁸ ATSIC Fact Sheet, ‘Constitutional Reform’ as at http://www.atsic.gov.au/issues/indigenous_rights/social_justice/recognition/27.asp

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