Law Council
OF AUSTRALIA

@the LCA

August 2011

mail@lawcouncil.asn.au | www.lawcouncil.asn.au

In This Issue

Contact Details

Phone: +61 2 6246 3788
Fax: +61 2 6248 0639
www.lawcouncil.asn.au

Edited by Michael Anderson
Phone (02) 6246 3725
Email michael.anderson@lawcouncil.asn.au

President's message


Alexander Ward

In 1967 the Australian people voted to change their Constitution to remove divisive and discriminatory language relating to Indigenous Australians. 44 years on from that historic vote, there still today remains provisions in our Constitution that give rise to the potential discrimination on the basis of race.

On the July 22, the Law Council hosted its Constitutional Reform Discussion Forum at Old Parliament House in Canberra (as written about in last month's edition of *@theLCA*). The event was the first of its kind and brought together some of the leading experts in the field of Indigenous affairs and Constitutional reform from within Australia and overseas. It was these experts who discussed the importance of symbolic and substantive change to Australia's Constitution to recognise Aboriginal and Torres Straight Islanders.

At the centre of the Forum's debate was whether Australia should develop a preamble to the Constitution that recognises Indigenous people as the first Australians, and also if the Constitution should be amended to remove discriminatory provisions such as Section 25 which states:

> *For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted.*

I believe it is time to bring our foundation document into line with contemporary values; and time that we acknowledged our Constitution was not created for its Indigenous peoples, or for the rich array of cultures now residing here.

It is time for change. As in the referendum of 1967, it is time we made another important step in the direction of equality for *all* Australians. But like any topic of this significance and sensitivity, this change will not be easy. Only 8 of 44 referendums have passed during our nation's short history and there is never a cut and dry solution to complex issues.

The Law Council's Forum represented a positive step in the right direction to Constitutional change. We will continue to pursue this important issue and update the profession on further outcomes as they emerge from the Forum. I would also encourage readers to go to the Law Council's website where the speeches and transcripts from the Forum are available.

The Discussion Forum provided some strong opinions about how Australia should proceed on this sensitive issue. I would encourage you to read the article regarding the Discussion Forum on Constitutional recognition in this month's edition of *@theLCA*.

The Law Council also represents the profession on a national and international stage across a range of other key policy areas. This month *@theLCA* will look at some of these issues including the establishment of international chapters for Australian practitioners overseas, the recruitment and retention of lawyers and the recently announced National Disability Insurance Scheme.

@TheLCA August 2011

Wrap-up—Constitutional Change: recognition or substantive rights?

Alexander Ward opens the Discussion Forum

On 22 July the Law Council of Australia held its Constitutional Reform Discussion Forum to look at the issue of symbolic and substantive change to Australia's Constitution to recognise Aboriginal and Torres Straight Islanders. This month, *@theLCA* looks at some of the key discussion points from the Forum and if Australia is ready for any form of Constitutional reform.

Welcome to Country

The Forum began with a Welcome to Country from Ngunnawal Elder, Matilda House; as well as a traditional Indigenous performance.

Official Opening

The Forum was officially opened by Law Council of Australia President Alexander Ward, who set the agenda for the day.

"So why has the Law Council prepared a discussion paper and asked you to participate in this forum? Quite simply, it is time to bring our foundation document into line with contemporary values. It is time that we acknowledged our Constitution was not created for Aboriginal people, or for the rich array of cultures now residing here.

"The question of constitutional recognition brings with it a number of possibilities for the reform and part of the feedback that we got from indigenous bodies showed this very wide spectrum of possibilities. They ranged from the recognition of the Aboriginal and Torres Strait Islander Peoples in a new preamble to the constitution and that's it—as one we've been asked to look it—to the recognition at the other end of the spectrum of substantive rights giving rise to practical effect to that recognition. The Law Council hopes that today's forum will be one of many thought-provoking discussions which will help to inform more Australians about the importance of updating our constitution to reflect who we are today."

Opening remarks

Following his opening address, Mr Ward invited Professor Patrick Dodson to speak on the issues surrounding any potential Constitutional reform. Professor Dodson spoke passionately about the unique challenges faced in any attempt to change the Constitution and how it was important to demonstrate patience and persistence to ensure the best outcome for Indigenous Australians.

"In Australia, we have this appalling knowledge base of where indigenous peoples are in the social demographic and yet, there's not sufficient leverage out of that to say, something is not right with the relationship. We think something is not right with the public sector policy and the public sector policy of course gets crafted by people who are disengaged from indigenous peoples in the main and very little input and opportunity by the indigenous peoples in the formulation of those public policies and how they're certainly carried forward. But that's at a micro level in one sense. The macro level, how do we actually re-orientate this nation around a respectful relationship with the indigenous peoples? Is that just a preamble? Is it in the body of the constitution? What are the set of words? What intended consequences would it have for the law? What are the consequences for the indigenous peoples if there was a preamble recognising them? What are the consequences for them? The Canadians and other people complain about what happened when they repatriated their constitution to Canada and the treaty rights were supposedly acknowledged in the constitution and people were still being prosecuted for exercising those rights under those previous treaties.

"So, very little seems to have changed for indigenous peoples. I'm not suggesting we have to solve all of this at once, but we do have to put our minds to, I think, the topic that has been raised by the Law Council which I think is really a very useful topic. Recognition or substantive rights. And usually when we talk about rights, and we've had this awful public performance over the last few years of the symbolism versus rights agenda, practicality versus symbolism, all of those sorts of false binaries and people get sucked into them because that's the way newspapers are sold and other things. But this is not a time to be part of the public fodder. This is a time to be incisive and sharp and to be clear with where we need to be going and to ensure that the country is going to be pulled along. And I don't think we should just wait for our political leadership to actually do that. This is about the people of Australia saying, okay, we've got enough knowledge now. We've got all sorts of reports that have reflected our underbelly and some of the brilliant things we've done. We've got great knowledge. Where do we go now into the future? We're not rewriting the whole constitution. That's not my task. It's not the Panel's task. Wish it was, but it's not ours.

...

"It is a time for courage if we're going to be serious about reform and that courage may be about something that's quite small, or it may be a courage that's a bit more creative. And that's the challenge I think, but all the experts tell us it will be simple, it will be clear and make sure that the public understands it. There's no counter-arguments, otherwise it's dead in the water."

Keynote address

The Hon Michael Kirby AC CMG delivered the Forum's keynote address, which looked at the challenges of Constitutional reform in Australia and the recognition of Indigenous rights. The following is an extract from the Hon. Michael Kirby AC CMG's keynote address at the Law Council's Constitutional Reform Discussion Forum. A full copy of Justice Kirby's speech, *Constitutional Law and Indigenous Australians: Challenge for a Parched Continent,* is available online.

Getting to Yes in Australia

"It is a privilege for any Australian, especially of my generation, to gather in Old Parliament House. To sit and speak in one of the chambers in which the parliamentary business of our nation was discharged for more than half a century. We are surrounded by the portraits and watched by the spirits of the famous Australians who led this country in peace and war. We must be grateful to the Law Council of Australia for summoning us here to consider an issue of existential importance for our continental land: the provisions of our national Constitution as they concern the indigenous people: the Australian Aboriginals and Torres Strait Islanders.

"Let us, at the outset, pause to reflect on the respect we owe to them, both to their forebears and to their Posterity. Let us do so sincerely as the New Zealanders do; not mechanically or perfunctorily. Wrongs have been done to the indigenous people of this land. Including in this place. And including in the Constitution that binds us all.

"In 1951, speaking in this building, Prime Minister Robert Menzies lamented the failure of his misbegotten referendum to dissolve the Australian Communist Party and to impose civil burdens on communists. He said:

> *'The truth of the matter is that to get an affirmative vote from the Australian people on a referendum proposal is one of the labours of Hercules. [T]his last referendum showed us ... the amount of sheer hard lying that goes on in the course of a referendum campaign designed to alter the Constitution and the amount of muddled thinking and speaking that can proceed from minds that are supposed to be improved by university degrees is quite baffling to me.'*

"Lying and muddled thinking there may have been. But on that occasion, and many others besides, the Australian people showed wisdom and good judgment in rejecting the proposal to change their national Constitution.

"Geoffrey Sawer once said that, constitutionally speaking, Australia was a "frozen continent". It did not necessarily have to be so. The mechanism adopted to provide for formal amendment of the constitutional text was copied from Switzerland. It was innovative, in that in placed ultimate power in the hands of the Australian people. There were many ways in which in which this faith in the electors was signalled during the creation of the federal Constitution:

- The decision (unlike the United States of America and Canada) to hold the constitutional conventions in public, with a transcript for all to see and read ;
- The election of delegates and the provision (reflected in the Preamble to the Constitution Act) that the Constitution was adopted at the people's request by the United Kingdom Parliament ; and
- The detailed provisions for electoral democracy that permeate the constitutional text.

"Our Constitution is suffused with the sovereignty of the people. Not the sovereignty of the Crown. Nor the sovereignty of parliament (as in the United Kingdom). The sovereignty of the Constitution traceable to the will of the sovereign people. All the people. Including the Aboriginal people, though they had no real part in its design or adoption and received only minor, and then substantially negative, mention in its text.

"Most educated Australians, and all lawyers I hope, know the daunting record of referendums to alter the text of the Australian Constitution. In 110 years of the operation of our Constitution, there have been 44 referendum proposals. Eight only have been carried with the requisite double majority required by s128 of the Constitution.

"The process began well enough on12 December 1906 when a proposal to make amendments to the system of rotation of senators was carried nationally and in all States. Then the second referendum, on 13 April 1910, was carried nationally and in five States, empowering the Commonwealth to take over public debts owed by the States. Yet on that same day, another proposal, to amend s87 of the Constitution relating to the distribution of customs and excise revenue to the States

The Hon Michael Kirby AC CMG

failed nationally, although carried in three States. That is when the great freeze began. Thirteen referendums were held between 1910 and 1926 and none of them was carried. Occasionally, the defeated referendum went straight to the heart of the political agenda of the government of the day. This was so in the repeated efforts of governments formed by the Australian Labor Party to secure greater federal power over industrial employment. And then there was the Communism referendum of 22 September 1951 which failed to gain a national majority although succeeding in three States.

"The biggest majority ever secured in an Australian constitutional referendum was that won on 27 May 1967 concerning Aboriginals. It amended s51(xxvi) ('the races power') to delete the exclusion of Aboriginals from the grant of federal legislative power. And it removed s127 dealing with the exclusion of some Aboriginals from the national census. The national vote in favour of this change, which was carried in all six States, was 89.34%, with only 9.08% against. It was an astonishing affirmation of a broad national recognition that Australia had a big problem to address with its indigenous peoples. And that the only way that this could be done was by empowering the Federal Parliament to make laws specifically for the people of the Aboriginal race.

"The dregs of the cup of that victory were not then anticipated. But it did not take long for it to be revealed in decisions of the High Court of Australia in *Kartinyeri v The Commonwealth* and in *Wurridjal v The Commonwealth*. There it was made plain that the words "laws for" did not imply only laws favourable to the Aboriginal Australians. In each of those cases, laws restricting and curtailing the rights of Aboriginals under the 'races power' were upheld.

"The high hopes and idealistic aspirations of the electors of 1967 were turned on their head. The races power was revealed, in all of its ignominy, to be, as the framers of the Constitution clearly intended in the 1890s, a provision capable of regulating and restricting minority races in a way that would never be done for the majority, comprising the Anglo-Celtic settlers. Australia must be one of the few nations on earth that has a constitutional provision designed for the apartheid era of White Australia, given such an interpretation by its constitutional court. It lies in wait for the exercise of federal legislative power not only 'for' Aboriginals, but 'against' their equal rights with Australians of other races. Today, in this chamber, it behoves us as Australians to reflect upon such a shocking outcome of the idealistic aspirations of 1967.

"The 1967 referendum on Aboriginals was not the first time that a proposal had been made to enhance federal power to recognise the needs of indigenous Australians. The first such proposal was considered on 19 August 1944 when Dr. H.V. Evatt (the victor over Menzies in the Communism referendum) led the campaign to secure federal power over 14 new matters. He sought the powers for a mere period of five years and for the purpose of post-war reconstruction. But even this was too much to ask. Australians have generally been unwilling to agree to any referendum that involves affording more power to the Federal Parliament. The mood was not right for a vote to enlarge the entitlements of Aboriginal Australians. Yet Dr. Evatt, as Foreign Minister, was learning in the councils of the world that Australia's racist policies were offensive and intolerable to most nations because they were not white and a new spirit of liberty and multi-racialism was about to explode in the aftermath of the horrifying discoveries of the racial genocide of the pure white Nazis and their allies."

Following the keynote address, Dr Jeff McMullen AM facilitated a Q&A session with Mr Kirby.

Dr Jeff McMullen AM

"If constitutional change is to start with wisdom, it has to recognise that we are really asking Aboriginal and Torres Strait Islander people what they want, what they think is important. So, beyond the words, how do we do that? What would you recommend is the democratic just mechanism to say through the National Congress, through indigenous law centres, through community organisations and foundations, how do we know we will be hearing and that we will be listening to the voices of Aboriginal and Torres Strait Islander people?"

The Hon Michael Kirby AC CMG

"Well, I would be offending what I think is an important foundational principle if I were to answer that, because I think the answer has to come from the Aboriginal and Torres Strait Islander communities themselves and there are people here who can give a better answer for that than having yet another instance where people from outside have imposed the answer on the indigenous people. When I sat in the Wurridjal case and read of how there was the report in the Northern Territory at the request of the parliament of the Northern Territory, legislature for an examination of issues of sexual abuse, the one thing that Rex Wild and his colleagues—he was the former Solicitor General of the Northern Territory—insisted upon was it had to be done in the Northern Territory in full consultation with the Aboriginal people. And that was not done and it was just brushed aside and the races power was used and that really is the problem we've got to overcome, that the power that was inserted to be of assistance and support has been used really to impose obligations and burdens which other Australians don't have."

Leaders' forum: recognition or substantive rights?

Three leaders in their respective communities—Alexander Ward, Law Council of Australia President; Professor Mick Dodson AM, Chairperson, Australian Institute of Aboriginal and Torres Strait Islander Studies; Jo-Anne Weinman, ANU National Centre for Indigenous Studies; and Jody Broun, Co-Chair, National Congress of Australia's First Peoples—then discussed the extent of Constitutional reform necessary to give practical effect to Constitutional recognition. This session explored the Constitutional change process and whether substantive reform is necessary to make recognition of the first Australians meaningful.

Alexander Ward, President, Law Council of Australia

"Decades of entrenched discrimination, the grave mistreatment or neglect of the Aborigines and Torres Strait Islanders has created a legacy of disadvantage which in our view we as a nation need to rectify. The most compelling case in favour of substantive reform is the need to update the constitution and remove the outdated provisions which no longer should reflect who we are as a nation. It's a point that Michael Kirby made very strongly that we are the only country with race provisions. Section 25 as he's mentioned, it's meant to prevent certain racial groups from voting at Federal elections if they can't vote in their state elections. As he said it's probably never been used and that should go."

…

"If the referendum is to succeed resulting in the insertion of a new preamble containing words of recognition, inclusion and reconciliation it would be an unfortunate irony if the provisions that actually affect those and restrict them would remain in the body of the constitution. In many respects it seems the logical extension of symbolic recognition that provisions designed to exclude indigenous Australians from participating in civic life should be amended or removed and the point that I would make is that what basis would there be morally to have provisions you could pass laws on the basis of race and in my instance if somebody passed a law saying that people of Irish descent couldn't drive vehicles on the weekend let's say, where would you go, I mean how far back would you go and say well who's Irish and who isn't, that's where my people came from, does that still mean I'm a member of the Irish race. Michael Kirby mentioned Chinese people came from the goldfields, would you say only people who have been here for the last ten years from China were Chinese or people who have lived here for the last 200 years are also Chinese. That's the sort of ugliness that you have to look at looking at these racial provisions which people just think apply to the Aborigines only. But as I think many Aboriginals that I know are called Ward, you'd probably get caught by the ban on the Irish as well if you look at how far back does one go in determining what race actually is. So these are the things that should have no part in our view in the modern Australia."

Professor Mick Dodson AM, Chairperson, Australian Institute of Aboriginal and Torres Strait Islander Studies; and Jo-Anne Weinman, ANU National Centre for Indigenous Studies

Professor Dodson: "In relation to a preamble or a statement of values in our view if it's to be a preamble and preamble alone why bother? Any kind of preamble and/or a statement of values is less preferable than substantive change in our view and should not be proposed alone in the upcoming referendum. However if there is to be one or a statement of values it should have the strongest possible wording. It should be using words like ownership rather than occupation and custodianship which will truly reflect the existing recognition of pre-existing indigenous rights to our land and waters and it should be

Dr Jeff McMullen AM

open to public opinion and not in the usual way of submissions, consultations but in an even more inclusive way and I've showed our moderator, facilitator Jeff what they're doing in Iceland for their new constitution where they're doing it online through Twitter and Facebook. Perhaps that's something we ought to think about.

"Any preamble or statement of values I think will open up or we think I should say open up the floodgates to appeals from other various interest groups, for example Australians with Christian heritage and migrant influences who'd be seeking recognition of their various non indigenous specific interests and Michael Kirby touched on this this morning as well and that could derail the focus on the recognition of indigenous peoples because there'd be opportunities to deal with those issues in subsequent debate and no doubt the issue of a republic will be revisited at some time."

Jo-Anne Weinman: "We can see that an agreement making power should not be proposed at the upcoming referendum because it is unlikely to succeed at this point. As well as requiring the usual bi-partisan support, the support of indigenous peoples and non indigenous peoples it would also require the support of all the states and it's an important long term goal to have a Commonwealth power to enter into agreements with indigenous peoples and to include this kind of non exhaustive list of broad areas that the agreements could cover and because it's a long term goal we consider it in our submission and we would like to see it considered in the consultations but we wouldn't like to see it put as a proposal to the peoples."

Jody Broun, Co-Chair, National Congress of Australia's First Peoples

"Michael Kirby spoke about the guiding principles and the two I think that will end up being in conflict are obviously the one around any proposal having to accord with the wishes and have the support of Aboriginal and Torres Strait Islander peoples and the other being capable of being supported by an overwhelmingly majority of Australians because I think there'll be some distance between those two. And in the discussions we've had or the ones that I've been to at least Aboriginal and Torres Strait Islander peoples are asking for recognition as Australia's first people and ownership of the land, protection of rights consistent with the rights of indigenous people, protection of heritage and culture including sacred sites and customary law, acknowledgement of the history and past wrongs and some contributors I have to say and I don't want to discount or disregard their view is don't feel we should be involve dininvolved in this at all until there's been a treaty. So that's another view that's being put out there on the table and many people were also saying well how is this going to protect us from what they see as police actions, deaths in custody, housing, health, that there's enormous waiting lists for housing, all of those sort of more social issues and how is that going to change their lives on the ground and that came up in a number of those consultations as well."

Race and the Australian Constitution: an historical and international perspective

Forum attendees were also addressed by Professor Bradford Morse, Dean of Law, University of Waikato, New Zealand. Professor Morse explored the historical origins of the 'race power', its implications for Aboriginal and Torres Strait Islander peoples and the treatment of race and indigenous peoples in other post-colonial states.

"Some of the messages I think coming out of the Canadian experience is that indigenous involvement in negotiating the proposed amendment package and endorsing its terms is vital for its credibility. It's vital to foster that popular support. There is no question about the support for the amendments that came through in 1984 which did not go to referendum by the way, but it was overwhelming support for it. All of the politicians supported it and most importantly, aboriginal people supported it and so Canadians said, "Yeah, sure. That's fine." Recognition about the fundamental place of indigenous peoples within the history and future of the nation is essential. In Canada there's part two of the constitution that speaks solely to first nations, Inuit and metis peoples. We still don't have a provision that expressly recognises them as the original owners, governors of the land. That went down in 1992 and it hasn't been replaced. We do have the guarantee of future participation in any proposals that will amend it in the future. We still have a kind of a certain level of uncertainty around if you will, our race power, Section 94(24) is still there, the Parliament in Canada can still pass laws. The belief generally is in part because of the presence of the entrenched bill of rights and the Canadian charter of rights and freedoms, that provision cannot be used in a negatively discriminatory way, but only in a positive one. So, it's been restrained, not within that clause itself, so it doesn't have to be restrained within Section 51(26) in your terms, so long as it is restrained. And in our case, it is restrained by Section 15 of the charter of broad non-discrimination clause."

"Q&A – recognition or substantive rights?"

The final session of the Forum involved a panel of leading academics and Indigenous rights experts who engaged in a facilitated Q&A discussion, inviting audience participation, which considered central themes discussed throughout the Forum. Members of the panel included: Dr Tom Calma, National Coordinator for Tackling Indigenous Smoking, Department of Health & Ageing; Professor Megan Davis, Director, Indigenous Law Centre, University of New South Wales; and Dr Sarah Pritchard, Barrister. The session was facilitated by Dr Jeff McMullen AM.

Dr Tom Calma, National Coordinator for Tackling Indigenous Smoking, Department of Health & Ageing

"I think the key thing to recognise is that at the moment we don't have an Aboriginal and Torres Strait Islander view. There are many views out there. It depends on who you are and your sort of experiences with legislation, with access to your rights will determine how you feel about it and I guess from the general view that I've been able to gauge around the nation not only just this year but in the past few years is really about recognition as the first peoples of the nation and for us that means recognition that we have a relationship with land which is also a relationship with culture and language and that to the vast majority of people is paramount to our survival and our maintenance as a group of people. In saying that it's important to recognise there are so many different Aboriginal groups and Torres Strait Islanders around the nation. So it's always difficult to get a panned view but what generally people are after is equality and recognition of non discrimination, non discriminatory practices that would have an adverse effect on us and at the moment we can't find that in the Constitution and that the interpretation state by state and territory varies as is the application by the Commonwealth and so it's that certainty that may be brought about by recognition in the Constitution and some of the amendments that have been touched earlier today. But it's the recognition of us as a peoples and the recognition of us as being the first peoples of the nation.

Professor Megan Davis, Director, Indigenous Law Centre

"I think certainly doing the consultations and talking quite frequently on this issue around constitutional recognition the focus is always on the what, how are you going to do it, what is it going to look like which is probably part of the reason why it hasn't really I guess captured the nation's attention is the question of why, why do you we want to do this. There was a real sense in the consultations that I've done among the Aboriginal community of just this enormous feeling of hurt about that collective amnesia, about who Aboriginal and Torres Strait Islander people are, the value of their culture to the nation. I mean the language that's used is just extraordinary. I mean people used words like hate, they feel like white people hate them. They talk about sadness. They talk about, when I was in Cherbourg for example the consultations were held in the rations shed which the women of Cherbourg they've reclaimed and they're put as a pride of place in the middle of Cherbourg and painted and created this cultural precinct and all of the women that came to our consultations were the women who grew up under the permit system on the mission system and just this palpable feeling of just hurt, exclusion, rejection and I think that's been really interesting in terms of me doing those consultations is they feel like what happened to them with the stolen wages for example that nobody in Australia recognises that part of Australian history, that so few Australians know that that went on and so few Australians know about the impact of the permit system, what was the impact on not only those people who are still alive but their children."

Dr Sarah Pritchard, Barrister

"What might be a preferable approach is to have a very strong preferred option and there seemed to me listening to all of the speakers today that there is an emerging view that one needs to do something about the preamble but one can't do anything with the preamble unless one addresses the substance otherwise there's a disconformity between the preamble and the content of the constitution. Pat Patrick Dodson used the expression false binaries this morning and I think that is an apt description of just addressing the preamble without the body. There seemed to be also a view of many although not all speakers that a prohibition of racial discrimination guarantee of equality is desirable and that that's where courage is called for in relation to that. In addition one would need some sort of what we've been told in Canada is so popular, non derogation clause to ensure that a guarantee of non discrimination couldn't be used to invalidate beneficial laws with respect to Aborigines and Torres Strait Islanders. There's no reason why that couldn't be done as a package and then there would be the options that Patrick expressed such interest in and which others have expressed including Mick grave reservations about something about constitutional conferences or agreement making or something like that as a further option."

Wrap-up (cont.)

Dr Jeff McMullen AM, facilitator

"So how far really have we got down the road, Charlie Perkins' road to equality? I thought we showed that it is possible that there is an opportunity, that given the time restraints complicating the words and the educational process reduce the chances of a clear success but it points also to the broader pattern and challenge of the educational effort required. I would like to say that the Aboriginal people who I ask about this I have not had a conversation with a single Aboriginal person that thinks this is a hollow, pointless exercise. I have heard a wide array of views about how much of it will be meaningful and whether we as a nation will keep our word but I believe that Aboriginal and Torres Strait Islander people are looking for change and still see some hope that in our process we can find that, that we can recognise who they are, what they are asking for and shows that we've been listening.

A full transcript from the Law Council's Constitutional Change Discussion Forum, including full speeches and Q&A sessions, is available online.

International Chapters helping expat lawyers stay connected


Dr Gordon Hughes

Lawyers make up a significant portion of Australians working overseas in regions including Asia, Europe and North America. In recent years, as part of the Law Council's International Strategy, the International Law Section (ILS) has been in the process of establishing International Focus Groups, now called International Chapters, in countries which include the UK, the United States, China (Hong Kong), Thailand, Indonesia and South Korea. The Chapters will enable expat lawyers to remain in contact with each other and the Law Council's work. The initiative will provide Australian lawyers with an opportunity to filter back issues of concern to the Australian profession, advise on the Law Council's International Strategy and assist in the coordination of future international Law Council delegations.

"In time it is expected that these ILS Chapters will provide an invaluable advisory resource for the Law Council and access to the international legal services market access," said Law Council of Australia President Alexander Ward. "The ILS intends to employ low-cost communications technologies such as web-conferencing to liaise periodically with its Chapters overseas. They will play an important role in helping us develop and refine tools for overseas practitioners such as the international Country Profiles that assist Australian practitioners on what they need to know when practising in a foreign jurisdiction."

Mr Ward recently addressed Australian lawyers in New York following his return from an American Bar Association Conference. He updated them on issues including the National Profession Project, the admission of foreign lawyers in Australia, overseas law firms in Australia, the export of legal services overseas, admission rights, free trade agreements, key national policy areas and the possibility of establishing a New York Chapter for Australian lawyers. "The address was an ideal beginning for how a Chapter could run in an important legal services market like New York," Mr Ward said. "There's a lot of interest from expat Australian lawyers about developments in the profession back home—particularly in relation to the National Legal Profession Reform Project and the Law Council's International Strategy."

"I met a young practitioner in New York who did work experience at Ward and Ward with me 15 years ago! How small is the world?"

"It became apparent to the ILS that there are an increasing number of Australian practitioners who are posted overseas by their firms or who have elected to work overseas temporarily," added Chair of the ILS, Dr Gordon Hughes, when discussing why the Chapters are being established. "The Section is aware that these practitioners are well placed to assist the ILS and the Law Council form policies and strategies relevant to various overseas jurisdictions. The ILS formed the view that we should try and embrace Australian practitioners located in certain overseas jurisdictions where there is a significant Australian contingent."

The ILS is the key driver of the initiative and views the Chapters as playing a key role in the Section's ongoing agenda. The ILS provides a focal point for judges, barristers, solicitors, government lawyers, corporate lawyers, academics and law students working in Australia and overseas, who are involved in transnational and international law matters, migration and human rights issues. The Section also establishes and maintains close links with overseas legal bodies such as the IBA and LAWASIA. It provides expert advice to the Law Council, its constituent bodies and to government through its focus groups and panels. It is envisaged that the International Chapters will become an integral source of that expert advice to the Law Council, and also play an important role in helping the Law Council execute its International Strategy.

"A key part of the Law Council's International Strategy is to improve practice rights in foreign markets for Australian lawyers—the overseas Chapters will be important in helping us achieve this strategic milestone," Mr Ward said.

The Law Council's International Chapters officially started with the launch of the Hong Kong Chapter by former Law Council President John Corcoran in 2009. Since then it has expanded to the major international cities including Seoul, Bangkok, London, Jakarta and New York. The Law Council and the ILS are still mindful, however, that the project is very much in its infancy, but are confident the Chapters will play an important role in the ongoing implementation of its International Strategy. The UK Chapter in particular has shown great promise since it was launched this year. "We initially had 160 Australian lawyers attend a function at Australia House in London where I first floated the idea of establishing a UK Chapter," said Mr Ward. "Since then we have had great interest in membership and the feedback has been very positive. The Law Council has, this year, also formally approached and met with lawyers in Hong Kong, Bangkok and New York in order to encourage them to become members of the ILS and to ascertain how the ILS and the Law Council can usefully cater to their interests as Australian practitioners working overseas."


Australian lawyers in Bangkok


Australian lawyers in London

Mr Ward said the benefits of joining the Chapters are numerous, "You're able to make strong linkages with other Australian lawyers in the jurisdiction you're practising in; you can belong to the International Law Section, which can be responsive to any particular issues you wish raised or have followed up; and you have your national body behind you as an Australian lawyer," said Mr Ward.

"By being involved in a Chapter, members are encouraged to provide the ILS and the Law Council with feedback regarding issues of concern in a particular jurisdiction," Dr Hughes said on the added benefits of Chapter membership. "For example, overseas members of particular jurisdictions might have concerns about certain restrictions placed on the ability of foreign lawyers to practice law in that jurisdiction. They can then encourage the Law Council to engage in dialogue with local authorities in relation to the removal of those restrictions that are considered excessive or which in some way unnecessarily inhibit their ability to practise Australian law in those jurisdictions."

In an ideal world, the ILS views the overseas Chapters as taking primary responsibility for arranging the Law Council's activities and agendas in those respective jurisdictions. "We would like to see the overseas Chapters advising us on issues that could usefully be pursued and then taking responsibility for organising the relevant meetings to take place in those jurisdictions," Dr Hughes said. The ILS is also keen to see the overseas Chapters expand to new jurisdictions given the promising start they have already received. Cities where the presence of Australian of lawyers is increasing—Tokyo is a prominent example—are of particular interest to the ILS."

Expat lawyers can become involved in the Chapters by contacting the ILS at the Law Council of Australia. "New members will receive complimentary membership to the ILS for the first 12 months and will also have the added benefits of cheaper renewal fees given they are based overseas," said Mr Ward. "We already have an excellent number of members of the UK Chapter and we're receiving strong interest for Hong Kong, Thailand, South Korea and New York."

For further information on the Law Council's International Chapters, contact Margery Nicoll (margery.nicoll@lawcouncil.asn.au); or Joe Forbes (joe.forbes@lawcouncil.asn.au).

@TheLCA August 2011

Q&A—National Disability Insurance Scheme

The Australian Government's recently announced National Disability Insurance Scheme (NDIS) has received widespread support from the millions of Australians who are affected every day by disabilities.

The Law Council of Australia strongly supports the proposal to establish a NDIS to fund and coordinate care and support for Australians with a permanent disability, but has raised significant concerns in regards to the rights of victims who are catastrophically injured. The Law Council is disappointed many of the recommendations made by the legal profession to the Productivity Commission's inquiry were largely ignored, including criticism of the proposal to establish a separate scheme for catastrophically injured people.

@theLCA sat down with Law Council President Alexander Ward to discuss the issue in depth and discuss the Law Council's concerns with the new scheme.

*A copy of the Law Council's submission to the Productivity Commission's Review into Disability Care and Support is available online. A copy of the Productivity Commission's inquiry into Disability Care and Support is also available online.

What is the National disability scheme and how will it help people affected by disabilities?

The Productivity Commission has proposed that a National Disability Insurance Scheme be established, which basically applies a sort of Medicare-style safety net for people with a long-term, serious disability. If the Productivity Commission's proposal is adopted it will be a three-tier system.

Tier one is open to the entire community and enables anybody who wants information or advice to call up the NDIS. Tier two is open to those with a long term disability, but who can generally manage on their own. Under tier two you can get referrals to disability services, but would not actually be covered for any treatment unless your disability is serious enough that you qualify for tier three. Those with a severe core activity limitation, who require daily care or who are identified as being in an early intervention group, would have all care and support needs covered by the NDIS. This would include home modifications, wheelchairs, approved treatment and carer support. Carers will also receive significant help under the third tier of the scheme.

The idea of the NDIS is to establish an all-encompassing system which is entirely funded by the Commonwealth and basically centralises the haphazard approach that is currently in place with all the disparate services currently operating in the states and territories.

However, it is also proposed that a separate scheme, called a National Injury Insurance Scheme, be established to provide lifetime care and support for those who have acquired a severe disability as a result of injury. It is proposed that this separate scheme would be a federation of state and territory schemes, established and funded by state and territory governments in each jurisdiction.

The Law Council has warned the rights of catastrophically injured people may be eroded if the Productivity Commission's scheme is implemented. Can you explain these concerns and why the Law Council believes it will be detrimental to the scheme?

The Productivity Commission has produced what we regard as a very unbalanced analysis of the extent to which common law is able to assist people who have been negligently injured or catastrophically injured as a result of somebody's negligence. The Productivity Commission's primary thesis is that currently people who are catastrophically injured, if they aren't covered under some sort of no fault scheme, must rely on the common law--that is, suing a negligent party for compensation, if there is one--which means those people are subject to what the Productivity Commission describes as the 'vagaries of the legal system', where people who don't have a negligent party to sue are just left high and dry.

The Law Council's primary concern is that the Productivity Commission has not given adequate consideration to whether or not a no fault scheme can coexist with common-law rights as they do in a number of jurisdictions in Australia. Currently in Australia there are a number of well run 'hybrid' schemes, which provide no-fault care and support while allowing people who are injured as a result of negligence by another person to seek further compensation through the courts. Conversely, some of the most expensive schemes around are the New Zealand Accident Compensation Scheme and the South Australian Workcover scheme, both of which deny any access to fair compensation through common law and yet have massive unfunded liabilities. In 2008, the New Zealand scheme had unfunded liabilities of around NZ$23 billion, which is roughly equivalent to 17 per cent of New Zealand's Gross Domestic Product.

We are fundamentally opposed to the Productivity Commission's proposal that common-law rights be removed for anyone who is involved in an accident that wasn't their fault – particularly the most catastrophically injured.

Can you explain how the NDIS and a separate National Injury Insurance Scheme (NIIS) are proposed to work together?

Under the Productivity Commission's proposal, the NDIS and NIIS are intended to function as parallel schemes. The NDIS will be set up and operated by the Commonwealth, while the NIIS will be established as a federation of state-based schemes, established by state and territory governments. It appears to be the intention that there would be separate bureaucracies established to run each scheme at the national level, which would work closely together. However, the role of the NIIS authority would be limited to setting standards and assisting state governments to get schemes up and running.

As a quick example, under the NDIS if someone is involved in a car accident, which was not their fault, and subsequently is rendered quadriplegic would they then not be able to pursue action through the courts?

At the commencement the proposal involves establishing the NIIS—the NIIS is supposed to be state run so supposed to be a federation of different state-based schemes which are set up in each jurisdiction by the State governments to basically cover anyone with the catastrophic injury. So first of all, if you don't have a catastrophic injury, you don't get in. You have to have an injury that is severe enough—we're talking quadriplegic, severe brain injuries; those sorts of really catastrophic injuries. If you have a severe injury that is not quite severe enough, you can't access the NIIS scheme.

Assuming the state governments set up these schemes, the proposal states that, initially, people will lose their common-law right to sue for future care and treatment expenses. However, they would retain the right to sue at common law for other things, including economic loss and pain and suffering.

But the Productivity Commission has further proposed that the scheme will be reviewed five years after it is established, with a view to removing all other common law rights. This means that someone who suffers an accident and becomes a quadriplegic will have fewer common law rights than someone who has suffered a severe injury, which is not quire serious enough to allow them into the scheme.

Can injured parties still sue for personal suffering and damages?

You can sue them for general damages; you can sue them for economic loss; but the proposal is that after the scheme has been running for five years, there will be a review of how the NIIS is working with a view to removing all other common-law rights. The Productivity Commission sees this as a Trojan Horse to basically do away with common-law as a means of compensating injury and set up a no-fault accident compensation scheme, similar to what is operating in New Zealand, where there are no rights to sue anybody.


Alexander Ward

So the governments of Australia will be taking on the burden of other people's negligence?

Basically, yes—or more accurately, the taxpayer will be relieving insurers and negligent injurers of the burden. If the ultimate proposal for a NIIS is adopted, whereby all common law rights are removed, the idea is you don't get compensation anymore. What you will get is your care and treatment expenses covered and to some extent coordinated by a national bureaucracy. You also might get some weekly benefits for your lost income. You won't get any kind of a lump-sum payout for the loss of enjoyment of life which the general damages component of compensation is supposed to cover.

Why is the Productivity Commission seeking to remove common-law from personal injury claims?

The Productivity Commission outlines a whole range of arguments against common law. Largely it is a product of the fact that the Productivity Commission has always been opposed to common-law—they argue it is an inefficient way of compensating people. Their argument is that legal costs associated with compensation claims are high and therefore we should penalize injured people for that by removing their rights. The Productivity Commission has also recommended in its report that legal services commissions be required to collect information on legal costs in cases involving damages claims and collate that information so it can be assessed at the time they conduct the five-year review of the NIIS to determine what the situation is with legal costs. I think they firmly believe their case is going to be proven if that information is collected and governments will see the sense of removing common-law rights and cutting out lawyers.

The reality is that the costs of administration of no-fault schemes are often as high, if not higher, than transaction costs associated with common law. There is simply no evidence that common law is less efficient than government-run no-fault schemes.

The strongest argument in favour of hybrid schemes (schemes that provide no fault care and support while permitting access to common law) is that people who are injured can get immediate access to treatment, care and support. However, this does not have to be at the expense of common law rights.

Upcoming Events

September 2011

- **Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration**
  7-9 September, Sydney
  www.aija.org.au
- **LAWASIA Law Management Conference: From 'Good' to 'Outstanding' – it's all about your people**
  9-10 September, Hong Kong
  http://lawasia.asn.au/Law_Management_Conference_Home.htm
- **Australian Young Lawyers' Conference & National Golden Gavel Competition**
  16 September, Melbourne
  www.liv.asn.au
- **ALPMA Summit**
  16-17 September, Crown Exhibition Centre, Melbourne
  http://www.alpma.com.au
- **Towards Success in the Law - Relaunch Your Career: Restart, Reshape, Reenergise**
  22-23 September, Queen Victoria Women's Centre, Melbourne
  www.liv.asn.au/whatsoncalendar

October 2011

- **Amnesty International 'Change the World' Human Rights Conference**
  6-8 October, Brisbane
  http://hrc.amnesty.org.au/
- **24th LAWASIA Conference**
  9-12 October, Grand InterContinental, Seoul, Korea
  www.lawasia2011seoul.org
- **Annual Conference of the International Institute of Law Association Chief Executives**
  19-23 October, Adelaide
  Email Jan.Martin@lawsocietysa.asn.au
- **Essentials of Family Law Practice**
  20-22 October, Hilton Hotel, Adelaide
  www.familylawsection.org.au
- **CLEAA Conference: "Elevating the E in CLE"**
  26-28 October, Hobart
  www.cleaa.asn.au
- **UIA 55th Congress**
  31 October - 4 November, Miami, Florida, USA
  http://congres.uianet.org/en/miami2011/

Q&A—National Disability Insurance Scheme (cont.)

It seems like the injured party's will ultimately lose a lot of their rights under this proposed scheme?

Tort law changes over the last 10 or 15 years have largely been moved to restrict the rights of the injured party. In some jurisdictions they have moved so far as to cap the amount of legal costs that can be claimed and to limit what lawyers can do, such as advertising.

Largely the restrictions have been placed on the rights of injured people through the application of thresholds, caps on damages and limits on the amount of compensation that can be claimed. The idea is that by limiting the payout amounts, you cut the incentive to bring damages actions. In this context though we're only dealing with catastrophically injured people: people who would be at the highest end of the damages scale. If they were to be compensated, by far the most significant component of a claim would be their future care and treatment costs.

If you look at New South Wales they currently have a lifetime care and support scheme for people who are catastrophically injured in motor vehicle accidents. The New South Wales Government's annual report shows the annual cost of caring for somebody in that scheme is $100,000 a year so if you think about applying that to everybody who is catastrophically injured, the expense is going to be quite significant. The idea is that the expense will be borne by the states and they will have to set up their own schemes. It's far from clear that they're going to agree to do that.

The states could probably ameliorate some of the expenses associated with that scheme by allowing people, if they had a common-law claim, to sue the negligent party, usually their insurer. The component of their claim surrounding future care and treatment could be assessed by the authority in terms of what they think it would cost to provide care and treatment to that person for the rest of their life. That amount would then be clear evidence of what that person should get in terms of future care and treatment expenses and then that person would have the option of the claims concluded to buy into the NDIS and thereby the NDIS could recoup some of the expenses associated with the scheme from those people who have been negligently injured. That is the proposal the Law Council put to the Productivity Commission but there was no reference to it in the report.

Are common-law and the NDIS mutually exclusive entities? Can they coexist together?

There is no reason why they cannot. Common-law rights coexist with most no-fault schemes, to varying degrees. Under most workers' compensation schemes, you can still sue a negligent employer while still being covered by the scheme. The Productivity Commission has not ruled out that approach but they said it's not preferred— they would prefer to remove common-law altogether. However, I think most people would be quite alarmed if told they would not be able to sue a person whose negligence had dramatically altered their lifestyle and diminished their quality of life.

The proposed NDIS scheme will not be implemented for up to seven years. How would you like to see the scheme changed between what has been initially proposed and what the actual scheme eventually becomes?

The Law Council believes the government should abandon the proposal for a separate NIIS. People with catastrophic injuries should be covered by the NDIS, which should be a one-stop shop for anyone who has a severe disability. It should be set up as a single scheme, which in the case of someone who has been injured would be a no fault scheme so they wouldn't have to prove negligence to get access.

People who have the right to pursue someone through common-law should retain the right to do that.

Living and working in RRR Australia: Port Lincoln

On 20 May this year, the Law Council of Australia launched its RRR Law initiative, which is aimed at increasing the number of legal professionals practicing in rural, regional and remote Australia. As part of the ongoing support of the initiative, this month *@theLCA* is highlighting a case study with a practitioner from the rural town of Port Pirie in South Australia.

Joe Anderson is a partner at the law firm Jenkins Anderson in Port Lincoln, South Australia. He was born and raised in Port Lincoln and has practised law in London, Edinburgh and Sydney.

In 2006, Joe relocated to Sydney and took up a position as a lawyer for ASX Limited, the operator of the Australian Stock Exchange. After three years in Sydney, Joe returned to Port Lincoln in 2009 where he lives with his wife—also a lawyer—and young child.

What motivated you to make the move back to Port Lincoln from Sydney?

I think the quality of life that you can have in a country town is higher than that of the city. Of course everyone has their own different views about what they want to do in terms of leisure activities and lifestyle, but in my view a capital city is never that far away and so you can get the best of both worlds in a regional area.

Coming from Sydney, simple things like the lower cost of housing and living were an attraction. I knew that as a partner in a successful commercial firm my earning capacity would be similar to what it would be in Adelaide and I would have the added advantage of far lower living costs. But the most important reason I moved back here was that it is a great place to raise a family.

What lifestyle benefits do you specifically enjoy in a location like Port Lincoln?

We really enjoy having easy access to the beaches, the ocean and natural areas surrounding Port Lincoln—it's a beautiful part of the world. I appreciate being out in nature and being able to get in the car and drive 10 minutes to a beautiful beach where there's almost no one there. From a selfish point of view, it's something that I really love, but it's also something I really want my kids to be able to experience.

What do you believe are the major selling points about living and working in a regional area like Port Lincoln?

It would have to be the general ease of living—everything here is just a bit easier. Whether it's getting kids to and from school or getting to and from work and not having to commute, it's generally easier to get the everyday things in life done so you have more time to spend on activities you enjoy such as spending time with your family or spending time out in nature. From a work perspective, working in a regional firm exposes you to lots of varied, interesting areas of practice, you never know what's going to walk through the door on any given day. I am also able to use my skills as a lawyer to enhance the local community: I'm on the board of the local community bank; I'm often called upon by various organisations to provide assistance and I do feel like I'm having a positive influence on the community, which is pretty satisfying.

You've experienced life in major metropolitan cities across the world. What are the major differences between these cities and an area like Port Lincoln?

I loved working and living in London and Sydney. It was exciting. Sure I cant now go to a world class restaurant every night, but I was only taking advantage of that opportunity occasionally anyway. If I need a dose of the big city I can get on a plane and be in Adelaide in 30 minutes. Over here the people are different and the interaction with my local community is different. People certainly have a greater sense of community in Port Lincoln, and even from a work perspective, the work that I do here involves more of a personal touch which establishes connections to people; you have a real impact on their life. I've found this a positive change as opposed to dealing with major corporations where it's all a bit faceless.

With your career in mind, how has your work advanced since you returned to work in Port Lincoln?

I've jumped the rungs quicker than I would have in a large metropolitan firm. I'm 30 now and am in my second year of being partner at the firm. I'm the managing partner of this firm now, so from that point of view, I've been able to walk into an established business in terms of their client base and take control of it from a fairly early stage of my career. It has been a great opportunity that I have really enjoyed and reveled in. I have many opportunities since being here to do interesting

Living and working in RRR Australia: Port Lincoln (cont.)

work: I am constantly getting challenged by clients and there are so many varied cases. My general legal knowledge has expanded exponentially and it makes me think more broadly about issues that come across my desk.

As a youngster you grew up in Port Lincoln and now have a young family of your own. What is Port Lincoln like in terms of raising a family?

From my point of view, growing up in Port Lincoln, I certainly feel like I had an amazing childhood. Being able to go surfing, camping and having full access to sports I wanted to play, I don't feel like I missed out on anything. A big part of the decision to come back here was that I wanted my children to be able to experience the great childhood I had.

If someone came to you seeking advice regarding making a lifestyle and career change to an area like Port Lincoln, what would you say to them?

My advice would be to make sure it's not just a whim: make sure you're really prepared to commit to it. If you're prepared to give it a solid go and come with a positive attitude, there's a lot of opportunity in a place like Port Lincoln.

For more information about the RRR Law Initiative, visit the website at http://rrrlaw.com.au/

Law Council launches Reconciliation Action Plan

The Law Council of Australia launched its Reconciliation Action Plan at Old Parliament House last July following the Constitutional Reform Discussion Forum.

"The Law Council's RAP seeks to provide practical measures to improve Aboriginal and Torres Strait Islander participation in the legal profession and to promote understanding between people in the legal sector," said Law Council of Australia President Alexander Ward.

The Law Council's RAP aims to set down some clear and measurable targets to help address the disparity in opportunities and expectations for Aboriginal and Torres Strait Islander peoples. "The legal profession has an important role to play in efforts to improve life expectancy, to improve living standards for Indigenous Australians and to eradicate discrimination," Mr Ward said in the RAP's launch speech. "While we can't control government policy, the Law Council has an influential role to play in recommending policy directions. The Law Council also has a role to play in improving education outcomes and career opportunities for Indigenous people."

The RAP has been described as ambitious in its scope and intended impact. It commits the Law Council to a number of tangible initiatives, including:

- consulting and engaging with representative bodies for Indigenous lawyers;
- developing and maintaining databases on the numbers of Indigenous lawyers and law students in this country;
- mandatory cultural awareness training for Law Council office holders and staff members;
- promoting the inclusion of cultural awareness training in mandatory continuing legal education, and at other stages of undergraduate and post-graduate legal study;


Tony McAvoy, Alexander Ward, and Dr Tom Calma

- engaging in policy initiatives which promote Indigenous rights, such as today's Discussion Forum on Constitutional recognition of Indigenous Australians;
- exploring ways of promoting legal study and practice of law by more Aboriginal and Torres Strait Islander peoples, and supporting them so they stay in law school and legal practice; and
- promoting commercial opportunities for Indigenous enterprise.

"The Law Council's vision for reconciliation is to ensure relationships with Aboriginal and Torres Strait Islander peoples are enhanced through improved knowledge and respect of their culture and through the provision of opportunities to improve education outcomes and career paths," Mr Ward said.

Ward added that the initiatives outlined in the RAP were worthwhile and challenging, and he firmly believed they would be achieved by the Law Council in collaboration with its constituent bodies. "The Law Societies and Bar Associations of every state and territory have either commenced development of a RAP or are already in the process of doing so," he said. "This gives me great cause for optimism that the legal profession can make a real difference, which we will build upon from year to year. "