HOW TO WIN THE REFERENDUM TO RECOGNISE INDIGENOUS PEOPLES IN THE AUSTRALIAN CONSTITUTION

by George Williams

INTRODUCTION

There is a major hurdle standing in the way of the attempt to change the Australian Constitution to recognise Indigenous peoples: the change can only be made by way of a referendum. The process as set out in s 128 of the Constitution requires that an amendment to the Constitution be:

1. passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and
2. at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states.

Since Federation in 1901, 44 referendum proposals have been put to the Australian people with only eight of those succeeding. Significantly, no referendum has been passed by the people since 1977 when Australia voted, among other things, to set a retirement age of 70 years for High Court judges. As at 2011, 34 years have passed since Australia changed its Constitution. At around one-third of the life of the nation, this is by far the longest period that Australia has gone without amending its Constitution.[1]

The Australian Labor Party has been the political party most likely to champion constitutional reform. Twenty-five of 44 proposals (about 57 per cent) for constitutional change have been put by Labor governments, despite Labor having been in office for less than a third of Australia's federal political history. On the other hand, proposals sponsored by Labor governments have almost always been unsuccessful. Just one of 25 Labor proposals – the 1946 (Social Services) referendum put by the Chifley government – has succeeded, a failure rate of 96 per cent. By contrast, seven of 19 non-Labor proposals (36.8 per cent) have been passed.

In *People Power: The History and Future of the Referendum in Australia*,[2] David Hume and I examine Australia's record of failed and successful referendums in detail, and how this experience might be applied to hold referendums with greater prospects of success. We conclude that Australia must avoid repeating, yet again, the same past mistakes, and that there are realistic prospects that the Australian people will vote Yes if a referendum is approached in the right way. To win the coming referendum on Indigenous recognition, the process should be based upon the following five pillars.

BIPARTISANSHIP

Bipartisan support has proven to be essential to referendum success. Referendums need support from the major parties at the Commonwealth level. They also need broad support from the major parties at the state level. The history of referendums in Australia provides many examples of proposals defeated by committed opposition from a major party at either level. This has been a particular feature of failed referendums put by the Australian Labor Party. Its proposals have tended to be opposed by either or often both of the Opposition and the States.

The proponents of constitutional reform have long known of the need for bipartisan support. The challenge has always been how to achieve it. It is very easy for a federal Opposition to campaign against a referendum. Defeating the government at such a poll not only stymies the government's agenda, but can inflict lasting electoral damage. In this way, referendums can operate like by-elections. They can be a useful means for an Opposition to generate a negative public reaction to the government. Equally, they can enable voters to indicate their dissatisfaction in a way that does not threaten the government's hold on power. State-level parties can also find it easy to oppose a proposal. They can have strong political incentives to champion local State interests over the national interest, without any imperative to secure support from the residents of other States.

To secure bipartisanship, it is not enough merely to involve a range of political groups in the process; the process must also commit those groups to reform. This can be very difficult to achieve. In 1920 and 1929, the Commonwealth thought it had reached agreement with the states on proposed reforms, but several states backed out and the Commonwealth ultimately never put the proposals to the people. Similarly, in 1977, Queensland and Western Australia extricated themselves from an 'agreement' to

support simultaneous elections. The problem in each of those cases was not a failure of 'involvement', but a failure to achieve a binding political commitment.

When it comes to Indigenous recognition, the need for bipartisanship is no less apparent. It is highly unlikely that any referendum on the topic could succeed without the support of each of the major parties. An advantage in this respect is that the reform has not only had the support for some time of the Australian Labor Party, but also of the Coalition. In fact, the Coalition has done more than any other party over recent years to address this issue, including through Prime Minister John Howard's championing of a new preamble at the 1999 referendum and his advocacy for constitutional change to bring about Indigenous recognition in the lead up to the 2007 election. The challenge here will not be to obtain bipartisanship, but to maintain it all the way to polling day.

POPULAR OWNERSHIP

Just as deadly as partisan opposition is to constitutional reform is the perception that a reform idea is a 'politicians' proposal'. From the 1967 nexus proposal, which was felled by the cry of 'no more politicians', to the Republic referendum, which was killed off by the claim that it was the 'politicians' republic', Australians have consistently voted No when they believe a proposal is motivated by politicians' self-interest. This reflects a well-known undercurrent of distrust of politicians by Australians. The constitutional design of Australia's reform process exacerbates this problem. Politicians, and only politicians, can initiate constitutional reform through the Federal Parliament. This renders every referendum proposal at risk of being perceived as self-serving, especially of those interests aligned with the Commonwealth.

Popular ownership is often used as a catch-cry, with little content. That is because popular ownership is an outcome, and an unquantifiable outcome at that. There is no one way of engendering popular ownership. What will always be essential, however, is popular participation, both in the process of generating ideas, and the consultation and deliberation that follows. This might include:

- extended national debate and consultation on a proposal;
- debate and consultation occurring across a wide variety of forums;
- a process that is open and responsive;
- a process that makes full use of available media; and
- above all, a commitment that public engagement will permeate and drive the whole process.

A problem with the coming referendum on Indigenous recognition is that it is not born out of a peoples' movement like that which led to the very successful referendum in 1967 on eliminating discrimination towards Aboriginal people from the Constitution. The current referendum has instead arrived on the national agenda after a high level political deal between the governing Australian Labor Party and Greens and Independent members, whose support in a hung Parliament enabled the Gillard government to retain power. As a result, this referendum lacks a strong community base. There is also no dedicated campaign organisation, like the Australia Republican Movement on the republic issue, to argue the popular case. This will need to be remedied if the referendum is to have the best chance of success. By polling day, the referendum proposal needs to have a strong connection to both the Indigenous and broader Australian community.

POPULAR EDUCATION

Surveys of the Australian public show a disturbing lack of knowledge about the Constitution and Australian government. Rather than being engaged and active citizens, many Australians know little of even the most basic aspects of government. This is often a reflection of the fact that disengaged citizens tend to have less knowledge about their system of government and any reform being proposed. The problem has been demonstrated over many years. For example:

> A 1987 survey for the Constitutional Commission found that almost half the population did not realise Australia had a written Constitution,[3] with the figure being nearly 70 per cent of Australians aged between 18 and 24.[4]
>
> The 1994 report on citizenship by the Civics Expert Group[5] found that only one in five people had some understanding of what the Constitution contained, while more than a quarter named the Supreme Court, not the High Court, as the 'top' court in Australia.

These problems can be telling during a referendum campaign. A lack of knowledge, or false knowledge, on the part of the voter, can translate into a misunderstanding of a proposal, a potential to be manipulated by the 'Yes' or 'No' cases and even an unwillingness to consider change on the basis that 'don't know, vote 'No' is the best policy.

Overall, the record shows that when voters do not understand or have no opinion on a proposal, they tend to vote 'No'. Polls from the 1999 referendum showed that many people had not read the official pamphlet distributed by the Commonwealth to explain the proposals, and that people who had not read the pamphlet were far more likely to vote 'No'. Polling in the lead-

up to the 1967, 1977 and 1988 referendums also suggested that those who did not know which way they would vote shortly before the referendum swung heavily into the 'No' column on the day of the vote.

Misunderstanding of the Constitution can also mean that people can cast a 'Yes' or 'No' vote to a proposal in a way that does not reflect their real beliefs. Hence, a person may vote 'No' out of concern about what the proposal might do, even where they would have supported the proposal had they fully understood it.

Governments will never be entirely effective at educating Australians about the Constitution and the referendum process. The Constitution is a complex document. People can spend many years studying it and still have only an imperfect understanding. The basic principles that illuminate it – federalism, representative government, responsible government and more – are vague and contested ideas.

The project of educating Australians about the Constitution may be difficult, and it will never be perfectly completed, but it is a project that must be undertaken. Australians deserve access to the information they need to understand their system of government and any proposal for reform. They must be given the opportunity to cast an informed vote.

Misinformation and misunderstanding has often beset a range of important initiatives designed to benefit Indigenous peoples. For example, there was a popular myth that an apology to the Stolen Generations would give rise to a large volume of legal cases for compensation. The community needs sufficient information about Indigenous recognition so that scare campaigns can be headed off, and so that voters can feel confident in embracing the change.

SOUND AND SENSIBLE PROPOSAL

As important as it is to get the process of generating proposals right, it is equally important to get the proposals themselves right. A major weakness in Australia's referendum record to date is that attempts at reform have been dominated by what have been (often rightly) perceived by the population to be grabs for extra federal power.

Good proposals can also be generated where they are based upon past experimentation and practice. Australians are more likely to agree to such changes. The successful 1928, 1946, 1967 and 1977 (Senate Casual Vacancies) referendums were all based upon, to a greater or lesser extent, the people being asked to ratify pre-existing arrangements.

There is a lesson in this: constitutional change is easiest when it codifies a principle that has already been tried and tested. This has long been acknowledged in the United States, where national constitutional reforms have often followed constitutional or legislative change in a majority of the States, thereby giving people the time to assess new ideas on a smaller scale. For example, before the United States amended its Constitution in 1920 to guarantee women the right to vote, female suffrage had already been recognised in 29 states.

The Australian States can play a particular role here. Successful State reform, such as the recent recognition of Indigenous peoples in several State constitutions, makes the effects of national constitutional change much less of an unknown. It makes change incremental, rather than abrupt. It can also turn those States that have adopted the reform (and people in those States) into advocates of the reform. The States are a logical place to 'test' potential nationwide reforms. The effects of good reform are easier to see; the consequences of bad reform are less widespread. Further, because States usually do not require a referendum to reform their Constitution, constitutional change at the State level is often much easier to achieve. In this way, one of the advantages of having a federal system, the capacity for diversity and experimentation, can be turned to improving the proposals ultimately to be put to a national referendum, and thus magnify the prospects of such change succeeding.

This coming referendum has the advantage of a measure of symbolic recognition of Indigenous peoples already having been achieved in some of the Australian States. Victoria and then Queensland brought about this reform to their Constitutions by way of a simple act of Parliament. New South Wales is the most recent State to do so. The change made in 2010 to the New South Wales Constitution takes the form of a new section 2. It states:

> **Recognition of Aboriginal people**
>
> (1) Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State's first people and nations.
>
> (2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
>
> (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
>
> (b) have made and continue to make a unique and lasting contribution to the identity of the State.
>
> (3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.

These are fine words, and the language used is generous and inclusive, but it must be remembered that they are just words. The section does no more than make a symbolic change to the State Constitution. In fact, some of that symbolic effect is undermined by subsection 3. It makes clear that, in case the words might offer any actual legal effect, such as assisting with the interpretation of other parts of the Constitution, this is not permissible. This is a very unfortunate inclusion in undermining the role of the new words and in removing any possible minor substantive benefit to Aboriginal people from the new section. It is not needed in any event given the very limited role that such symbolic words play in the interpretation of a constitution. It must be hoped that it is not copied in any federal wording.

In any event, the sole addition of a new preamble to the Australian Constitution will not likely be sufficient to amount to a sound and sensible proposal. Australians will be reluctant to vote for symbolism alone, and are more likely to support something practical and substantive. Only adding a new preamble would also suffer from the problem that it would likely contain positive words that run counter to the actual text of the Constitution. It will be legally and symbolically incoherent to recognise Aboriginal Australians while at the same time maintaining provisions in the Constitution in ss 25 and 51(26) that allow them to be discriminated against on account of their race.

A MODERN REFERENDUM PROCESS

Australia's present system for the holding of referendums is set out in the *Referendum (Machinery Provisions) Act 1984* (Cth). That law was adopted in 1912, and has changed little since. It was designed at a time when voting was not compulsory, Australia's population was far smaller and far less diverse, and the print media and public speeches were the dominant modes of communication. The system is showing its age and is not suited to contemporary Australia. To modernise Australia's referendum process, the Act should be changed to:

- abolish restrictions on expenditure by the Commonwealth Government;
- rethink the official Yes/No pamphlet by which the Electoral Commissioner must send each elector a pamphlet showing the proposed amendment to the Constitution, with arguments 'for' and 'against' the proposal of not more than 2,000 words each, authorised by members of Parliament on each side of the debate; and
- continue the Yes and No committees from the 1999 referendum by which the cases 'for' and 'against' were championed by two opposed committees funded by the Commonwealth.

These changes are reflected in the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs made in 2009 in its inquiry into the holding of referendums.[6]

CONCLUSION

Australia's long record of past failed attempts at constitutional reform do not mean that winning a referendum today is 'mission impossible'. Instead, it shows that we should expect a referendum to fail whenever our major political parties disagree, or when poor management means that the Australian people feel left out or confused about what is being changed. People will also vote 'No' to a proposal that is dangerous or has been poorly thought out. Of course, a lot of this is common sense, yet the referendum record displays a tendency to repeat these mistakes time after time. Australia's referendum history contains few successes for good reason.

These points also suggest a path to winning the referendum. Reform of Australia's Constitution to recognise Indigenous peoples is achievable. Despite the pessimism that often pervades the idea of holding a referendum in modern Australia, the vote can be won. If nothing else, we should not forget the achievement of the 1967 referendum which deleted discriminatory references to Aboriginal people from the Constitution. Not only was that referendum passed, the 'Yes' vote reached a record high in securing over 90 per cent support from the Australian people. That and other successful referendums confirm that, if the change is based upon the pillars set out in this article, it has a strong prospect of success.

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1 The next longest period was 21 years between the 1946 and 1967 referendums.

2 (University of New South Wales Press, 2010).

3 Constitutional Commission, *Bulletin*, No 5 of 1987 (September 1987).

4 Reported in Constitutional Commission, *Final Report* (1988) [1.56].

5 Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (Australian Government Publishing Service,1994).

6 Commonwealth, *A Time for Change: Yes/No?:Inquiry into the Machinery of Referendums: House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 40/2010 (2009) 60.