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RECOGNISING AUSTRALIA'S INDIGENOUS PEOPLES IN THE CONSTITUTION

Prime Minister Julia Gillard received a report in January 2012 on recognising Aboriginal people in the Australian Constitution. It was delivered by an expert panel of Indigenous, community and business leaders, legal experts and representatives of Australia's major political parties, who spent the best part of last year canvassing opinion on the issue.

The Prime Minister was told that the Constitution needs to be changed and that this is backed by a clear majority of Australians. This is also supported by prominent Aboriginal leaders, including Patrick Dodson, Mick Gooda, Marcia Langton and Noel Pearson who were all members of the panel.

The opposition has participated in a spirit of goodwill, and it has become apparent that it will support enough change to produce a viable and worthwhile referendum. All up, the idea of recognising Aboriginal peoples in the Constitution has become Labor's best chance of winning a referendum since its solitary success in 1946.

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The starting point for Australia's political parties is that the Constitution should respect the place of Indigenous peoples in our community. It should recognise their long occupation of this continent and their continuing relationship with traditional lands and waters. Prime Minister John Howard first proposed such a change in 1999, and the panel recommended that this now occur by inserting the following symbolic language into a new section 51A of the Constitution:

> **Recognising**
> that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
>
> **Acknowledging**
> the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
>
> **Respecting**
> the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
>
> **Acknowledging**
> the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

However, positive words and symbolic change will not be enough. The panel also found a strong desire among Australians to see other problems in the Constitution fixed.

Race in the Constitution

Australians voted in the 1967 referendum to delete negative references to Aboriginal people from the Constitution. This included removing a direction in section 127 that, in calculating the number of people of the Commonwealth or a State, 'aboriginal natives shall not be counted'.

Unfortunately, two sections remain that treat people unequally because of their race. The first is section 25. It still recognises that the States can disqualify people, such as Aborigines, from voting.

The races power in section 51(xxvi) also says that the Federal Parliament can make laws based upon a person's race. This was put in the Constitution in 1901 to prevent Asians, Pacific Islanders and other races from living in areas reserved for whites or from taking up certain occupations. In the words of Sir Edmund Barton, Australia's first prime minister, the section permits laws that 'regulate the affairs of the people of coloured or inferior races'.

Separating people according to their race is based upon a discredited 19th-century scientific theory in which a person's race can determine everything from their intelligence to their suitability for certain roles. Unfortunately, this thinking remains embedded in Australia's constitutional DNA.

The panel recommended that these two provisions be deleted. This has been backed not just by the community, but by members of the federal opposition and conservative legal commentators.

Hard questions

Disagreement arises as to what should be inserted into the Constitution in place of the races power. It should not simply be repealed. An important achievement of the 1967 referendum was to extend this power to Aboriginal peoples so that the Federal Parliament can make laws for them in areas like land and health.

The best way forward is the panel's recommendation of replacing the races power with new federal authority, inserted in section 51A after the symbolic words set out above, to make laws for 'Aboriginal and Torres Strait Islander peoples'. This would support existing laws, and also future laws that a Labor, Liberal or any other government wishes to see enacted.

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The hard question is how to limit this new power. Unless it is restricted, laws might still be passed that discriminate against Aboriginal people on the basis of their race. The panel recommended that the new power only be used for the 'advancement' of Aboriginal people.

I share the concerns of people such as Indigenous advocate Warren Mundine and Shadow Attorney General George Brandis that 'advancement' is not the right term. It is a vague and likely unhelpful word. It also carries unfortunate baggage from the time when discriminatory measures against Aboriginal people were justified on the basis that they were for their 'advancement'.

Prohibiting racial discrimination

The better option is the panel's recommendation that a new section prohibit racial discrimination in Australian law. This would protect all Australians. Similar clauses have operated effectively in other national constitutions. The panel's new proposed section 116A would read:

1 The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
2 Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

The practical impact of this change would be significant. A freedom from racial discrimination in the Australian Constitution applying to all laws and programs would mean that a law or program could be challenged in the courts if it breached the guarantee.

Examples of recent federal laws that might be challenged on this basis include the *Native Title Amendment Act 1998* (Cth), which implemented the Howard Government's 'ten point plan' for native title after the Wik decision. In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, 'bucket-loads of extinguishment', the Act overrode the *Racial Discrimination Act 1975*. This was achieved through section 7 of the new Act, which provides that the *Racial Discrimination Act* has no operation where the intention to override native title rights is clear.

A similar suspension of the *Racial Discrimination Act* was achieved under the legislation that brought about the Northern Territory intervention. Both of these statutes are examples of laws that could not stand in the face of a constitutional guarantee of freedom from racial discrimination. It would also not be possible in the future to suspend the *Racial Discrimination Act* so as to permit racial discrimination.

Getting broad support

Unfortunately, and not surprisingly, this idea has attracted criticism from conservative quarters, and seems unlikely to win the support of the opposition. Even though I strongly favour such a clause, I would also be the first to say that it should not be put to a referendum unless it has bipartisan support. Australia's dire record, with

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8 successes out of 44 attempts, demonstrates the futility of seeking to win a referendum without broad political support.

Recent political debate in Australia has been characterised by fierce and often bitter partisanship. However, this has not infected the panel's work. There is a genuine opportunity here to achieve cross party backing. Opposition members such as Brandis have been forthright and constructive. They were represented on the panel by Ken Wyatt, who became the first Aboriginal member of the House of Representatives in 2010 when he was elected Liberal member for Hasluck in Western Australia. The Liberal party also has strong credentials in this area, from Robert Menzies and Harold Holt in the 1967 referendum, to Howard's more recent actions.

The final set of changes that go to a referendum will need to attract broad cross-party support, and so will not be as bold and progressive as many will want. The changes may end up only providing respect and recognition for Aboriginal peoples in the Constitution, combined with the deletion of race based clauses and a new, limited federal power with respect to Aboriginal peoples.

These outcomes would certainly be more modest than those proposed by the panel, but they would still be worthwhile. An example of this is the 1967 referendum, which itself made only minor changes to the Constitution, but has since been heralded as an important political and legal victory for Aboriginal peoples.

Constitutional change is extremely difficult to achieve, and must often proceed in an incremental fashion. These changes would still amount to significant improvements to the Constitution, and could also be used as a platform upon which to build support for further reforms.

For example, I would like to see the Constitution one day speak to the longer-term settlement that has yet to be achieved between Australian governments and Indigenous peoples. In other

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nations, such a settlement is normally expressed in a treaty or like instruments. Australia is alone in the Commonwealth in not having entered into such agreements with its Indigenous peoples.

The Constitution is not the right place to set out the specific terms of a treaty. The best role that it can play is to facilitate the making of such agreements in the future. Hence, the Constitution should contain a provision that permits the making of agreements between governments and Indigenous peoples. It should also give those agreements, once ratified by the relevant parliament, the force of law. This would not guarantee that a treaty would be made. However, it would provide, for the first time in Australia, a clear path for doing so, and could also create an expectation that this is a necessary and desirable part of Australia's future constitutional development.

Winning a referendum

The panel's work and recent public debate demonstrates that this referendum can be won. This should not be surprising. After all, the 1967 referendum achieved a record Yes vote of over 90%. The task now is to build on the panel's work to bring about a vote of equal significance.

A referendum loss must be avoided at all costs. A majority 'No' vote at a referendum to recognise Aboriginal Australians in the Constitution would not just be a vote for the status quo, it would amount to an explicit rejection of their aims. This could put the fight for Aboriginal recognition and rights back many years.

The single greatest reason for Australia's poor referendum record is political mismanagement. Time after time governments have put poor proposals to the people, have taken voters for granted or left them in the dark, and have asked Australians to approve major constitutional changes that have divided their political leaders.

The Australian Labor Party is responsible for the lion's share of these failures. It has put 25 referendums, with only one success. This was a 1946 proposal by Prime Minister Ben Chifley to grant federal power over social services, including maternity allowances, widows' pensions and unemployment benefits. Labor's 96% referendum failure rate is an exact match for its failure to attract opposition support.

The only time Labor went to a referendum with such support was when opposition leader Robert Menzies backed Labor's 1946 poll. The 1946 referendum provides useful lessons. Chifley's social services proposal did not go to the people in the form Labor wanted. Menzies pressed for an amendment to ensure that the Commonwealth could not, in providing the new benefits, 'authorise any form of civil conscription'. Labor wisely accepted the amendment, and in so doing won opposition support and then the referendum.

Labor must similarly accept opposition changes to the expert panel's recommendations. The final proposal must be 'owned' not just by the government, but by all major political parties. It must then also be backed by a strong community campaign for change. The result can be a worthwhile referendum that will improve our Constitution and mark an important milestone in our democratic development.

REFERENCE

1 This has been developed from an article by the author published in the Autumn 2012 issue of *Australian Options*.