Occasional Address

SHOULD ABORIGINAL PEOPLES BE RECOGNISED IN THE AUSTRALIAN CONSTITUTION?

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I INTRODUCTION

The idea of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution has been championed by both sides of politics for more than a decade. Prime Minister John Howard sought, unsuccessfully, to have the Australian people support a new preamble to the *Constitution of the Commonwealth of Australia (*the Constitution). This was a question on the ballot paper for the 1999 republic referendum. The new preamble would have stated:

> We the Australian people commit ourselves to this Constitution ... honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.[1]

Even though this attempt failed, it spurred like change at the State level. Victoria was the first to move, adding the following text in 2004 to its *Constitution Act 1975* (Vic):

> **1A Recognition of Aboriginal people**
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> (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
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> (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—

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[1] Constitution Alteration (Preamble) 1999 (Cth).

(a) have a unique status as the descendants of Australia's first people; and
(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

(3) The Parliament does not intend by this section—
(a) to create in any person any legal right or give rise to any civil cause of action; or
(b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

Similar statements of recognition have since been added to the constitutions of Queensland,[2] New South Wales[3] and South Australia.[4]

Howard's advocacy for change did not end with the 1999 referendum. In the lead up to the 2007 election, he stated: 'I announce that, if re-elected, I will put to the Australian people within eighteen months a referendum to formally recognise Indigenous Australians in our Constitution – their history as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, indivisible nation'.[5] He declared that his 'goal is to see a new Statement of Reconciliation incorporated into the Preamble of the Australian Constitution'.[6]

Howard lost the 2007 election, but his successor, Kevin Rudd, continued to argue for change. One of his first acts as Prime Minister was an Apology to the Stolen Generations. In that speech, he sought bipartisan support for the 'constitutional recognition of the first Australians'.[7]

Rudd did not progress the issue further, leaving matters to his successor as Prime Minister, Julia Gillard. The hung Parliament produced by the 2010 election lead her to make a commitment to hold a referendum on recognising Aboriginal peoples in the Constitution in that term of government. She made this to Independent and Greens MPs in return for their support for her government. The promise was,

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[2] *Constitution of Queensland 2001* (Qld) preamble, s 3A.
[3] *Constitution Act 1902* (NSW) s 2.
[4] *Constitution Act 1934* (SA) s 2.
[5] Prime Minister John Howard as quoted by Michael Brissenden in ABC TV, 'Michael Brissenden on the PM's Indigenous referendum plan', *The 7.30 Report*, 11 October 2007 (Michael Brissenden) <www.abc.net.au/7.30/content/2007/s2057247.htm>.
[6] Ibid.
[7] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd).

however, dropped in 2012 when it became clear that not enough work had been done to give the referendum a reasonable chance of success.

While the Gillard government did not hold a referendum, it did establish an Expert Panel to examine the issue. Chaired by Professor Patrick Dodson, former Chairman of the Council for Aboriginal Reconciliation, and former Reconciliation Australia co-chair Mark Leibler, the Panel travelled the length and breadth of Australia to talk to people about whether the Constitution should be changed, and, if so how. Its report,[8] released in early 2012, found strong support for the change, and proposed proposals for altering the text of the Constitution.

The Gillard government did not officially respond to the Panel's report. Instead, it funded Reconciliation Australia to raise community awareness of the issue. That has led to the creation of Recognise, a body that is actively involved at the grassroots level in explaining to Australians what this issue is about, and why they should support reform. Recognise is currently working with members of the community and both sides of politics to prepare the way for a referendum on the subject, perhaps in early to mid-2015.

II WHY THE EFFORT?

The idea of recognising Aboriginal and Torres Strait Islander peoples in the Constitution has certainly attracted considerable activity and attention over the course of more than a decade. What then is all the fuss about? Why have so many people championed the idea? There are many things that need to be done in the area of Aboriginal policy and disadvantage, so why focus on this?

One of the most important reasons is that Aboriginal people themselves have identified the need for reform. They have long sought change to Australia's national and State Constitutions. Their advocacy culminated in a successful referendum in 1967 that deleted negative references to them from the Constitution. Since then, many have agitated for further change.

They have done so because they have recognised that Australia's legal structures, and ultimately the Constitution, have had a profound effect upon their lives. In the case of the Australian Constitution, it:

[8] *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report of the Expert Panel, January 2012).

- establishes lines of power in our society (such as who can do what to whom);
- establishes relationships and legitimacy of people and organisations; and
- provides recognition and a set of national aspirations.

When it comes to Aboriginal peoples, the Constitution has failed them on all of these counts. It has permitted discrimination against them and has made no mention of them or their history. They rightly argue that the story of our nation is incomplete without the histories of the peoples who inhabited this continent before white settlement.

It is been recognised that this failure of recognition contributes to a broader range of problems. Research on the social determinants of health shows how discrimination, disadvantage and exclusion can have a major, negative impact on mental and physical health. It is hard to underestimate the emotional and other costs of being cast as an outsider in your own land. Experts have recognised this. For example, the Royal Australian and New Zealand College of Psychiatrists has said:

> The lack of acknowledgement of a people's existence in a country's constitution has a major impact on their sense of identity and value within the community, and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people. There is an association with socioeconomic disadvantage and subsequent higher rates of mental illness, physical illness and incarceration.
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> Recognition in the Constitution would have a positive effect on the self esteem of Indigenous Australians and reinforce their pride in their culture and history. It would make a real difference to the lives of Indigenous Australians, and is an important step to support and improve the lives and mental health of Indigenous Australians.[9]

What then needs to be done to achieve constitutional recognition? To understand this, we need to look to the drafting and text of the Constitution itself.

[9] Royal Australian and New Zealand College of Psychiatrists, 'Mental Health Benefits in Constitutional Recognition of Indigenous Australians' (Media Release, 25 May 2011). See also Royal Australian and New Zealand College of Psychiatrists, *Recognition of Indigenous people in the Australian Constitution* (Position Statement 68, September 2011).

III THE AUSTRALIAN CONSTITUTION

The Australian Constitution was written in the 1890s against a backdrop of racism that led to the White Australia policy and a range of other discriminatory laws and practices. Many of these laws and practices were not directed at Aboriginal people, but Chinese and other non-white immigrants to Australia. Nonetheless, they demonstrate how Australia's legal system was created with an embedded capacity for racial discrimination. Separating people according to their race was 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.

Australia's 1901 Constitution referred to Aboriginal peoples only in negative terms. Section 127 even made it unlawful to include 'aboriginal natives' when counting the number of 'people' of the Commonwealth. Section 127 was removed by the 1967 referendum, but other problems were left untouched. Australia today has a Constitution that in its text and operation still runs counter to the idea that Aboriginal Australians are equal members of the community.

The first problem is section 25. Headed 'Provision as to races disqualified from voting', the section provides that if a State disqualifies the people of a race from voting in its elections, the people of that race are not to be counted as part of the state's population in determining its level of representation in the federal parliament. This section was proposed in the 1890s constitutional conventions by Tasmanian Attorney-General Andrew Inglis Clark, who adapted the wording from the 14th Amendment to the United States Constitution. The section has the apparently benign purpose of ensuring that states suffer a loss to the level of their federal representation when they disqualify people from voting because of their race.

Although section 25 acts as a penalty, it does so by acknowledging that the States may disqualify people from voting due to their race. This reflects the fact that at Federation in 1901, and for decades afterwards, Aboriginal people were denied the vote in federal, Queensland and Western Australian elections. Unfortunately, the Constitution still recognises this as being a legal possibility for State elections.

The second problem is the races power in section 51(xxvi). As drafted in 1901, the section stated:

> 51. Legislative powers of the Parliament The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: –
> (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

This power was intended to allow the Commonwealth to restrict the liberty and rights of some sections of the community on account of their race, though not Aboriginal peoples because it was thought that such laws for them should be passed by the States. By today's standards, the reasoning behind the provision was clearly racist. Sir Edmund Barton, later Australia's first prime minister and one of the first members of the High Court, made the position clear when he told the 1897–98 Constitutional Convention that the races power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[10] By this, he was indicating that the federal parliament needed a power to pass negative laws in areas like employment for the Chinese and other non-white people who had entered Australia. In this, the framers were driven by a desire to maintain race-based distinctions when it came to 'Chinamen, Japanese, Hindoos, and other barbarians'.[11]

Inglis Clark supported a counter provision taken from the US Constitution requiring the 'equal protection of the laws'. However, the framers were concerned that Inglis Clark's clause would override laws such as those in Western Australia under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field'.[12] Sir John Forrest, the premier of Western Australia, summed up the mood of the convention when he stated:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.[13]

Inglis Clark's provision was rejected, and section 117, which merely prevents discrimination on the basis of state residence, was instead

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[10] *Official Record of the Debates of the Australasian Federal Convention: 1891–1898*, Melbourne, 27 January 1898, 228–229 (Edmund Barton).
[11] *Official Record of the Debates of the Australasian Federal Convention: 1891–1898*, Melbourne, 3 March 1898, 1784 (Dr Quick).
[12] *Official Record of the Debates of the Australasian Federal Convention: 1891–1898*, Melbourne, 8 February 1898, 665 (Sir John Forrest).
[13] Ibid 666.

inserted. In formulating the words of section 117, Henry Bournes Higgins, one of the early members of the High Court, said that it:

> would allow Sir John Forrest … to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based on colour and race'.[14]

In the 1967 referendum, Australians chose to strike out the words 'other than the aboriginal race in any State' in section 51(xxvi). While the referendum thus meant that Aboriginal peoples could be subject to laws made under the power, nothing was put in the Constitution to say that these laws had to be positive. In effect, the racially discriminatory underpinnings of the races power were extended to Aboriginal people without any indication that the power should only be used for their benefit.

IV THE *HINDMARSH ISLAND BRIDGE CASE*

Nearly a century after the *Constitution* came into force, the federal parliament used the races power to pass the *Hindmarsh Island Bridge Act 1997* (Cth). A group of Aboriginal women belonging to the Ngarrindjeri people had sought to protect an area near Hindmarsh Island in South Australia from development by using the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). They argued that they were the custodians of secret 'women's business' for which the area had traditionally been used.

The *Hindmarsh Island Bridge Act* presumptively overrode their claim without allowing it to be tested. The Ngarrindjeri women brought a case against the Commonwealth in the High Court,[15] arguing that the *Hindmarsh Island Bridge Act* was invalid. They said that the races power should be interpreted by the High Court so as to only allow Parliament to pass laws for the benefit of a particular race. Hence, the parliament could pass legislation directed at providing health care for the specific needs of a racial group. On the other hand, the power could not support laws banning people of a race from working in certain professions or from attending particular schools.

In response, the Commonwealth asserted that there are no limits to the power so long as the law affixes a consequence based on race. In other

[14] *Official Record of the Debates of the Australasian Federal Convention: 1891–1898*, Melbourne, 3 March 1898, 1801 (Henry Bournes Higgins).
[15] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*'). The author appeared as counsel for the plaintiffs in this case.

words, it was not for the High Court to examine the positive or negative impact of the law. The federal Solicitor-General, Gavan Griffith QC argued that the races power 'is infected, the power is infused with a power of adverse operation'.[16] He also acknowledged 'the direct racist content of this provision using "racist" in the expression of carrying with it a capacity for adverse operation'.[17] The following exchange then occurred:

> Justice Michael Kirby: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or whatever the words say or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.
>
> Mr Gavan Griffith QC: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.[18]

The federal government thus argued that the Commonwealth could apply the races power to pass laws that discriminate against people on the basis of their race. This possibility is obviously abhorrent to most Australians, and is also inconsistent with accepted community values such as equality under the law. But this is exactly what the framers of the Constitution intended in drafting the power.

A divided High Court handed down its decision in the *Hindmarsh Island Bridge Case* in 1998. The result was clear in upholding the capacity of the *Hindmarsh Island Bridge Act* to amend the *Aboriginal and Torres Strait Islander Heritage Protection Act* so as to deny the Ngarrindjeri women their claim. In reaching this conclusion, the High Court split on whether the races power can still be used to discriminate against Indigenous and other peoples. The overall effect of the judgments was inconclusive. The Court divided 2:2 on this aspect of the races power, with a further two judges not deciding. It thus left open the possibility that Commonwealth still possesses the power to enact racially discriminatory laws.

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[16] *Kartinyeri v Commonwealth* (*Hindmarsh Island Bridge Case*) (Transcript of Argument, High Court of Australia, 5 February 1998).
[17] Ibid.
[18] Ibid.

The ambiguous result in the Hindmarsh Island Bridge case highlights the tenuous position of Aboriginal peoples and Torres Strait Islanders under the Constitution. As a result of the 1967 referendum, laws can be made by the federal parliament with respect to them. However, there is nothing in the Constitution to indicate that such laws should be for their benefit, or that such laws should not discriminate against them on the basis of their race.

V WHAT CHANGE IS NEEDED?

When the history and current text of the Constitution are taken into account, Aboriginal and Torres Strait Islander peoples should be recognised in the Australian Constitution by way of:

1. Positive recognition of Indigenous peoples and their culture;
2. The deletion of:
   (i) section 25; and
   (ii) section 51(xxvi);
3. The insertion of new sections that:
   (i) grant the Commonwealth Parliament the power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples';
   (ii) prohibit the enactment of laws by any Australian Parliament or the exercise of power by any Australian government that discriminates on the basis of race (while also providing that this does not prevent laws and powers which redress disadvantage or recognise and preserve the culture, identity and language of any group).

These changes were all accepted by the Gillard government's Expert Panel. In addition, the Panel recommended that the Constitution also contain a new clause providing recognition for Aboriginal languages. The question now is whether Australia's political leaders are prepared to support, and to bring about, these changes via the process set down in the Constitution.

VI CHANGING THE CONSTITUTION

There is a major hurdle standing in the way of the attempt to change the Australian Constitution to recognise Aboriginal peoples. It can only occur by way of s 128 of the Constitution, which requires that the change 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 1901, 44 referendum proposals have been put to the Australian people with only 8 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 2013, 36 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.

In *People Power: The History and Future of the Referendum in Australia*,[19] David Hume and I examined Australia's record of referendums, 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 Aboriginal recognition, the process should be based upon the following principles:

A *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.

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, at least in general terms, has for some time had the support of both sides of politics.

[19] (University of New South Wales Press, 2010).

B *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. 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.

For this referendum to succeed, it must be backed by a genuine people's movement. This makes the work of Recognise all the more important, as well as the need for people who support this change to get involved in their work and that of other community bodies such as AnTAR. By polling day, the referendum proposal needs to have a strong connection to both the Aboriginal and broader Australian community.

C *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. 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, with the figure being nearly 70 per cent of Australians aged between 18 and 24.

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. 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.

D *A 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. Australians need to vote on a proposal that they can see has been well thought out. It needs to be safe and sensible. The recommendations of the Expert Panel are a good start in this regard.

VII CONCLUSION

Australia ought to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. It does not speak well of our nation that after more than a century we have yet to achieve this, and have not removed the last elements of racial discrimination from the document. It is past time that Australia had a Constitution founded upon equality that recognises Indigenous history and culture with pride.