



Land, Rights, Laws: *Issues of Native Title*

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Editorial note: The Australian government has made a commitment to a referendum on constitutional recognition of Australia's first peoples. In a series of two papers, *Land, Rights, Laws: Issues of Native Title* will explore where native title might fit into this debate. In the first paper, senior constitutional scholar George Williams provides an overview of the challenges facing constitutional change and the options for reform, and assesses what is required to achieve change, such as bipartisanship, popular education, and popular ownership. In the paper to follow, native title specialist Sean Brennan will outline five possible areas of constitutional change and discuss their practical implications for native title.

RECOGNISING INDIGENOUS PEOPLES IN THE AUSTRALIAN CONSTITUTION: WHAT THE CONSTITUTION SHOULD SAY AND HOW THE REFERENDUM CAN BE WON

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Abstract

The federal government has committed to holding a referendum at or before the next federal election on recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution. This Issues Paper examines the background to this proposal, and suggests how the Constitution can be changed to achieve this goal. It also explains how a referendum on this topic can be won, and sets out the legal, practical and political preconditions for referendum success.

INTRODUCTION

Indigenous peoples have long sought recognition in Australia's national and State Constitutions.¹ They have done so because these fundamental laws have either ignored their existence or permitted discrimination against them. They rightly argue that the story of our nation is incomplete without the histories of the peoples who inhabited this continent before white settlement. Prime Minister Julia Gillard has pledged a referendum on whether to recognise Indigenous peoples in the Australian Constitution. The referendum will be held before or at the next federal election. Nothing is yet known about the substance of the change. This is something that the government will receive advice on by the end of 2011 from an expert panel chaired by Professor Patrick Dodson, former Chairman of the Council for Aboriginal Reconciliation, and former Reconciliation Australia co-chair Mark Leibler.²

The coming referendum will not be the first time that Australians have voted to recognise Indigenous peoples in the Constitution. An unsuccessful attempt was made at the 1999 republic referendum. On that occasion, the people rejected a new preamble, or opening set of words, to the Constitution containing the text: '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'.

RECOGNITION IN STATE CONSTITUTIONS

Since 1999, the States have taken the lead, bolstered by the advantage of not needing to hold a referendum to recognise Indigenous peoples in their Constitutions. Victoria³ and then Queensland⁴ brought about this reform to their Constitutions by way of a simple act of

¹ Parts of this paper have been developed from other materials and publications written by the author. The paper is also based upon the author's contribution to the session 'Constitutional Reform – Can it Support Land Justice?' at the *National Native Title Conference 2011: Our Country, Our Future*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Brisbane Convention Exhibition Centre, 3 June 2011.

² For information on the panel and its discussion paper, see its website <http://www.youmeunity.org.au/>.

³ *Constitution Act 1975* (Vic), s 1A:

1A Recognition of Aboriginal people

- (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.
- (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—
 - (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.

See also *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble.

⁴ *Constitution of Queensland 2001* (Qld), preamble:

The people of Queensland, free and equal citizens of Australia— ...

- (c) honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community

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 have any actual legal effect, such as by assisting with the interpretation of other parts of the Constitution, this is not permissible. This is an unfortunate inclusion in removing any possible 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.⁵ It must be hoped that it is not copied in any federal provision.

RACE AND THE AUSTRALIAN CONSTITUTION

The Gillard Government may look to the New South Wales change as a starting point. However, in its case, symbolic change by way of a new section or new preamble to the Australian Constitution will not be enough. If federal recognition of Aboriginal Australians is not to ring hollow, it must also involve the removal of the last vestiges of racial discrimination from the document.⁶ The problem for Aboriginal people when it comes to the Australian Constitution lies deeper than mere recognition. The 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. The result was a Constitution that 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,

⁵ See Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 *University of New South Wales Law Journal* 382.

⁶ See George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643 and George Williams, *Human Rights under the Australian Constitution* (1999), Ch 2. See generally on the making of the Australian Constitution: JA La Nauze, *The Making of the Australian Constitution* (1972); J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 ed, 1995).

but other problems were left untouched. The result is a Constitution that in its text and operation still runs counter to the idea of Aboriginal Australians as equal members of the community.

The first problem is section 25.⁷ Headed ‘Provision as to races disqualified from voting’, the section provides that where a State disqualifies the people of 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. Although the section thus acts as a penalty, it does so by acknowledging that the States can disqualify people from voting due to their race. This reflects the fact that at Federation in 1901, and for decades afterwards, States denied the vote to Aboriginal people. Unfortunately, the Constitution still recognises this as being a legal possibility. The section should be deleted.

The second problem is the races power in section 51(26). 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:

Section 51(26) 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’.⁸

One framer, Tasmanian Attorney-General Andrew Inglis Clark, supported a provision taken from the US Constitution requiring the ‘equal protection of the laws’. But the framers were concerned that 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’.⁹ 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

⁷ Constitution, s 25:

Provision as to races disqualified from voting 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 that race resident in that State shall not be counted.

⁸ *Convention Debates*, vol 4, Melbourne 1898, at 228-229.

⁹ *Convention Debates*, vol 4, Melbourne 1898, at 665 per Sir John Forrest. See *Goldfields Act 1895 (WA)*, sections 14, 92; *Goldfields Act (Amendment) Act 1898 (WA)*, s 4.

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.¹⁰

Clark's provision was rejected, and section 117, which merely prevents discrimination on the basis of State residence, was inserted instead. In formulating the words of section 117, Henry 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'.¹¹

In the 1967 referendum, Australians chose to strike out the words 'other than the aboriginal race in any State' in section 51(26). While the referendum thus meant that Indigenous peoples could from that time be the subject of laws made under the power, nothing was put in the Constitution to say that such 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 can be applied only for their benefit.

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* sought to override their claim. The Ngarrindjeri women brought a case against the Commonwealth in the High Court,¹² arguing that the *Hindmarsh Island Bridge Act* was invalid. They argued that the races power only allows Parliament to pass laws that are for the benefit or advancement 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 the power enabled it to do just that. It argued that there are no limits to the power so long as the law affixes a consequence based on race. In other words, it was not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Federal Solicitor-General, Gavan Griffith QC suggested that the races power 'is infected, the power is infused with a power of adverse operation'.¹³ He also acknowledged 'the direct racist content of this provision using 'racist' in the expression of carrying with it a capacity for adverse operation'.¹⁴ The following exchange then occurred:

¹⁰ *Convention Debates*, vol 4, Melbourne 1898, at 666.

¹¹ *Convention Debates*, vol 5, Melbourne 1898, at 1801.

¹² *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337.

¹³ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (Transcript of Argument, High Court of Australia, 5 February 1998).

¹⁴ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (Transcript of Argument, High Court of Australia, 5 February 1998).

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.¹⁵

In this case, the Howard Government argued that the Commonwealth has the power to pass laws that discriminate against Australians 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 had intended in conferring the races power.

A divided High Court handed down its decision in the *Hindmarsh Island Bridge Case* on 1 April 1998. The result in the case 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. However, in reaching this conclusion, the High Court divided on whether the races power can still be used to discriminate against Indigenous or other peoples. This fundamental question remains unresolved.

Justice Mary Gaudron found that 'it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid',¹⁶ and Justice Michael Kirby found that the power 'does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race'.¹⁷ Two of the judges, Chief Justice Sir Gerard Brennan and Justice Michael McHugh, did not address the issue, and Justices William Gummow and Kenneth Hayne left room for the power to be used in an adverse as well as a beneficial way.

The ambiguous result in the Hindmarsh Island case highlights the tenuous position of Aboriginal peoples and Torres Strait Islanders under the races power. As a result of the 1967 referendum, laws can be made by the Federal Parliament with respect to them under the races power. However, nothing was put into 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.

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:

¹⁵ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (Transcript of Argument, High Court of Australia, 5 February 1998).

¹⁶ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 367.

¹⁷ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 411.

1. Positive mention of Indigenous peoples and their culture in a new preamble to the Constitution;¹⁸
2. The deletion of:
 - (i) section 25; and
 - (ii) section 51(26).
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 that redress disadvantage, or recognise or protect the culture, identity and language of any group).
 - (iii) permit the making of legally binding agreements between Indigenous peoples and Australian governments.

These changes should not be seen as an exhaustive list of the possible, desirable changes that might be made to the Australian Constitution with regard to Aboriginal and Torres Strait Islander peoples. For example, it would be possible also to consider insertions that would provide specific recognition of language rights or a combination of symbolic and practical measures that might relate to Indigenous culture.

The alterations set out above would recognise Indigenous peoples in a positive way in the Australian Constitution for the first time. More fundamentally, they would provide a form of recognition that grants symbolic benefits and at the same time removes the possibility of legal discrimination on the basis of race.

The possibility of racial discrimination under the Constitution is removed by deleting section 25 and recasting the races power. It is important that the races power not simply be repealed as to do so could undermine the validity of existing, beneficial laws already enacted under the power. An important achievement of the 1967 referendum was to ensure that the Federal Parliament can pass laws for Indigenous peoples in areas like land rights, health and the protection of sacred sites. Federal power should be available over such areas, but only so that laws operate in a manner that does not discriminate on the basis of race.

There are no laws on the federal statute book, nor is it apparent that there have ever been, that apply the races power to groups other than Aboriginal and Torres Strait Islanders.¹⁹ Hence, reform should proceed on the basis that a power is required to regulate the affairs of Australia's Indigenous peoples, but not those of other races. In any event, the concept of permitting laws to

¹⁸ As in the State constitutions, it would also be possible for such recognition to be contained in a new section in the body of the Constitution rather than in a preamble. However, a preamble would seem the most appropriate option as the opening words to a Constitution are usually regarded as the most effective place to make statements as to the history and aspirations that underlie it. A preamble would also be desirable given the likelihood that the insertion of new symbolic text would not likely only refer to Indigenous Australians, but also more broadly to other members of the community and to basic democratic values such as equality and the rule of law.

¹⁹ Where such laws have been passed, such as with regard to immigrant groups, they have been capable of being enacted under other federal powers like those over 'Naturalization and aliens' (s 51(19)) and 'Immigration and emigration' (s 51(27)).

be made based upon a person's race is derived from the discredited, 19th-century conception that human beings can be divided along racial lines. This conception has no place in a modern Constitution, except in so far as the Constitution prohibits discrimination on the basis of race. It is, however, appropriate to enable laws to be made for Indigenous Australians on the ground that they represent a distinct group within the community identified not by their race but by their status as constituting the first nations of the continent.

The most appropriate way of 'fixing' the races power is to grant power to the Federal Parliament to pass laws for 'Aboriginal and Torres Strait Islander peoples'.²⁰ Such a grant, consistent with the way that the High Court interprets the Constitution,²¹ would be broad enough to cover laws enacted in the past, such as the *Native Title Act 1993* (Cth), and those that might be enacted in the future, for Indigenous peoples. However, in this form, the power could still be used to pass negative laws. This could be avoided by expressly limiting the grant of power so that it enables the Federal Parliament to make laws with respect to 'Aboriginal and Torres Strait Islander peoples, but not so as to discriminate against them on the basis of their race'. This would be preferable to power to make laws with respect to 'the benefit of Aboriginal and Torres Strait Islander peoples'. The word 'benefit' conveys no clear legal meaning, and could leave decisions as to what constitutes a benefit largely in the hands of the Federal Parliament. It is possible, for example, that Parliament would regard the Northern Territory intervention as being broadly for the benefit of the Aboriginal peoples of the Territory. Even though the High Court would be the final arbiter of this question, it would be difficult for it to do other than to accept Parliament's assessment.

A power worded in the form 'Aboriginal and Torres Strait Islander peoples, but not so as to discriminate against them on the basis of their race' would provide more secure protection in at least providing a clear statement that laws passed under the power could not discriminate on the basis of race. The limitation might also provide protection to Indigenous Australians in respect of laws passed under the other heads of power in section 51 of the Constitution.²² It might not, however, provide protection against racial discrimination for laws passed under powers in other parts of the Constitution, such as the territories power in section 122.²³ It might thus continue to be possible for laws such as the *Northern Territory National Emergency Response Act 2007* (Cth) to be enacted under the territories power on a discriminatory basis.

To avoid this, the Constitution should contain both a new power over 'Aboriginal and Torres Strait Islander peoples' and an overarching freedom from racial discrimination. Such a guarantee is a standard feature of other Constitutions, and is lacking only in Australia because Australia is now the only democratic nation in the world not to have a national framework for human rights

²⁰ Other possible variations would be to confer power upon the Federal Parliament to make laws with respect to 'Aboriginal and Torres Strait Islander people' or 'Aborigines and Torres Strait Islanders'.

²¹ The general approach to interpreting the scope of such heads of power by the High Court is that the text is to be construed 'with all the generality which the words used admit' (*R v Public Vehicles Licensing Appeal at Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-6).

²² See s 51(13) of the Constitution, which enables federal legislation with respect to 'Banking, other than State banking'. In *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 it was held that the words 'other than State banking' are a limit not only on the "banking" power, but also on other heads of power in s 51. The guarantee of 'just terms' for any 'acquisition of property' in s 51(31) applies in the same way.

²³ But see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 and *Wurridjal v Commonwealth* (2009) 237 CLR 309.

protection such as a human rights act or Bill of Rights.²⁴ The freedom would not only protect Indigenous Australians. It would protect everyone in Australia from any law that discriminates against them on the basis of their race.

Alternatively, the overarching freedom could be drafted only to apply to federal laws, and not to State and Territory laws. It would also be possible for the freedom to be extended to government action, such as programs and policies supported by government funding and departmental action without a separate legislative basis. Given the past record of discrimination by the States and Territories, and the fact that as a matter of principle racial discrimination ought to be prohibited generally within Australian government, it would be preferable for the freedom to have the widest possible operation.

There is a possibility that a freedom from racial discrimination might be interpreted by the High Court to strike down laws and programs that provide special benefits or recognition to Aboriginal people and Torres Strait Islanders. It might be held that these discriminate against non-Indigenous people. This could affect programs which, for example, provide accelerated entry into university in order to redress the long-term shortage of Indigenous doctors and lawyers. To avoid this, the freedom from racial discrimination should be made subject to a clause stating that it does not affect laws and programs aimed at redressing disadvantage. Such a clause is typically found in other nations as part of their protection from discrimination or their equality guarantee.²⁵ The clause should also ensure that, irrespective of whether Indigenous peoples continue to suffer disadvantage, laws may be made to recognise or protect culture, identity and language (of Aboriginal peoples or indeed any other group). Laws as to such matters are appropriate irrespective of whether there is continuing disadvantage.

The practical impact of these constitutional changes 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.²⁶ 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.²⁷ 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

²⁴ George Williams, *A Charter of Rights for Australia* (UNSW Press, 2007), 16-17.

²⁵ See, for example, *Canadian Charter of Rights and Freedoms 1982*, s 15:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

²⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1.

²⁷ *Northern Territory National Emergency Response Act 2007* (Cth).

possible in the future to suspend the *Racial Discrimination Act* so as to permit racial discrimination.²⁸

Any change to the Australian Constitution should be clear and specific as to how it will protect Indigenous rights. A freedom from racial discrimination is an example of this. A more open ended statement that the Constitution protects 'Indigenous rights' is not. The latter runs the risk of being read very narrowly by the High Court. This means that it is not clear what operation or benefit a provision like section 35(1) of the Canadian *Constitution Act 1982* ('The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed') would have if inserted into the Australian Constitution.

The Australian Constitution should also speak to the longer term settlement that has yet to be achieved between Australian governments and Indigenous peoples. In other nations, such a settlement is normally expressed in a treaty or like instruments.²⁹ 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 the Constitution 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.

An agreement making mechanism would be an appropriate way within the Australian Constitution of recognising in practical terms the continuance of Indigenous sovereignty. This would be preferable to any express recognition of sovereignty, which could have the perverse effect of implicitly undermining any strong assertion of Indigenous sovereignty (due to it being given recognition within the foundational legal document of the settler state). On the other hand, a provision that enables agreement making between Australian governments and Aboriginal and Torres Strait Islander peoples would recognise on behalf of the latter the capacity and power to enter into legal arrangements on behalf of their communities.³⁰ This would be an important and meaningful recognition of their rights of self-government without compromising any broader aspirations to sovereignty that they may have. The scope of such agreements ought not to be closed off, and might range from symbolic and cultural matters to practical considerations such as governance arrangements and the use of natural resources.

CHANGING THE CONSTITUTION

There is a major hurdle standing in the way of the attempt to change the Australian Constitution

²⁸ The normal operation of a guarantee of protection from racial discrimination would mean that applies both to new laws and also laws already on the statute book enacted at an earlier time. However, if it was felt necessary that the guarantee only apply to laws enacted from the point at which the guarantee comes into force, this could be achieved by setting an appropriate commencement date for the guarantee as part of the change.

²⁹ Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (2005).

³⁰ See generally Sean Brennan, Brenda Gunn and George Williams, "'Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307.

to recognise Indigenous peoples. That change can only be made by way of a referendum. The process as set out in section 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 (the next longest period was 21 years between the 1946 and 1967 referendums).

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*,³¹ 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, we find that the process should be based upon the following five pillars.

1 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 that bipartisan support. The challenge has always been how to achieve it. It is very easy for a federal Opposition to decide to oppose a referendum. Defeating the government at a referendum not only stymies the

³¹ David Hume and George Williams, *People Power: The History and Future of the Referendum in Australia* (2010).

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, and no need 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.

2 *Popular ownership*

Just as deadly as partisan opposition 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 Australian politicians. 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.

3 *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, with the figure being nearly 70 per cent of Australians aged between 18 and 24.
- The 1994 report on citizenship by the Civics Expert Group 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.

4 *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. 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 a grab 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 the prospects of success of such change.

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.

5 *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 *Referendum (Machinery Provisions) Act 1984* (Cth) 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.³²

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 we had a Constitution founded upon equality that recognises Indigenous history and culture with pride. Australia's long record of failed attempts at constitutional reform does not mean that winning such a referendum 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. A lot of this of course is common sense, yet the referendum record displays a tendency to repeat these same mistakes time after time. Australia's referendum history contains few successes for good reason.

³² Commonwealth, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums: House of Representatives Standing Committee on Legal and Constitutional Affairs* (2009), 60.

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% 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 good prospect of success.

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