CONSTITUTIONAL REFORM FOR INDIGENOUS PEOPLE:

A NEAR-TERM POSSIBILITY

SEAN BRENNAN

If a national constitution is meant to say something about who we are, then Australia has a problem. The Australian Constitution makes no reference to Aboriginal and Torres Strait Islander people. Consider the arithmetic of that proposition. Europeans have occupied this continent for about nine generations. Historians estimate that Aboriginal occupation dates back 2000 generations and involves a cumulative population of perhaps a billion people across 50 000 years into the present day.

There are also basic questions of justice. The Crown colonised Australia, as John Howard's government acknowledged, 'without treaty or consent'. A hundred years on, Aboriginal and Torres Strait Islander people were not included in the drafting of a constitution for a new nation. Today, our national parliament retains the power to make laws which single out groups for adverse treatment on the basis of their race.

This lack of acknowledgment and this legal capacity for racial discrimination cloud Australia's achievements as a stable liberal democracy.

The unusual outcome of the 2010 federal election, however, has created an opportunity to revisit the Constitution. Independent MP Andrew Wilkie and the Greens agreed to support a minority Labor government on conditions that included a referendum for recognising Indigenous people in the Australian Constitution at or before the next federal election, which is scheduled for late 2013. While both sides of federal politics have long-standing commitments to constitutional reform, these events have brought the issue into sharp focus during the current electoral cycle.

An Expert Panel on Constitutional Recognition of Indigenous Australians was established in late 2010. It includes, amongst its members, Professor Megan

Davis, the Director of the Indigenous Law Centre at UNSW. The Expert Panel is presently holding community consultations across the country and working through the issues. The Panel has established a website (youmeunity.org.au) and released a discussion paper. A public submission process ran until the end of September.

The Expert Panel is due to report by December 2011. There will then be eighteen months to two years to build the public interest and momentum necessary if a referendum is to succeed in 2013. Any proposal for constitutional change must meet two threshold requirements. First, it must secure strong support amongst Aboriginal and Torres Strait Islander people. Otherwise the point of the exercise is seriously undermined. Secondly, it must achieve wide support amongst the 97% of Australian voters who are non-Indigenous. Under section 128 of the Constitution, the referendum requires a voting majority in at least four out of six states, and a national majority as well.

Over the years, leading Aboriginal and Torres Strait Islander figures have identified a range of priorities for constitutional change. While we await the recommendations of the Expert Panel, it is appropriate to look at some of the options which have been put forward most often.

PREAMBLE OR STATEMENT OF RECOGNITION/VALUES

One idea for the constitutional recognition of Indigenous people in the Constitution is the insertion of a new preamble. The Australian Constitution is in fact section 9 of a UK Act, the Commonwealth of Australia Constitution Act 1900 (Imp). There is a preamble to that UK Act which refers mainly to the people of the colonies uniting in a federation under the Crown. But there is no preamble at the start of the actual Constitution itself.

One way of overcoming the silence and lack of acknowledgment in the Constitution regarding Aboriginal and Torres Strait Islander people, then, is to insert a new preamble. John Howard attempted to do so at the 1999 referendum. However it was undermined by a flawed and behind-closed-doors drafting process, as well as controversy over its wording, including the wording about Indigenous people and their relationship to land. The proposal was soundly defeated, with the No vote exceeding 60% nationally.

Since 2004, State Parliaments in Victoria, New South Wales and Queensland have inserted provisions recognising Indigenous people in their State constitutions (changes which required legislation and not a popular referendum). The first two of those States inserted recognition statements in the body of their constitution rather than the preamble. The Expert Panel has picked up that idea by suggesting that a national Statement of Recognition could be included in the body of the Australian Constitution. Alternatively, the Panel suggested that a Statement of Recognition might be coupled with a wider affirmation of societal values such as democracy, gender equality and the rule of law and placed either in a new preamble or in the body of the text.

Preambles or statements of values and recognition have a clear symbolic and potentially educative importance. Their impact on legal interpretation is likely to be very limited. The three states have gone out of their way to neutralise any legal effect, by inserting clauses which direct courts away from giving the added words any interpretive significance. A proposal to include a similar disclaimer in the federal Constitution

is likely to attract criticism from those who see it as a mean-spirited form of recognition.

While some may wish to confine the process to a preamble or some other symbolic statement in the Constitution, there are serious questions about a preamble-only approach. They include:

1. Can such a proposal attract a critical mass of support from that most vital constituency, the Aboriginal and Torres Strait Islander people of Australia?
2. Will the wider voting public be sufficiently motivated to vote Yes if the proposal steers clear of practical changes to the Constitution and confines itself to the largely symbolic?

TACKLING RACIAL DISCRIMINATION

One practical step which could be taken at a 2013 referendum would be to remove the capacity under the Australian Constitution for laws and programs which single out groups for adverse treatment on the basis of their race.

Unlike many modern constitutions, the Australian Constitution does not contain a prohibition on racial discrimination. On the contrary, section 51(xxvi) permits the Commonwealth Parliament to make special laws it deems necessary for the people of any race. There is no question that the drafters of the 1890s intended a Constitution that allowed racially discriminatory laws – that is evident from the verbatim record of their debates.

It turns out, apparently, that no Commonwealth law relied exclusively on the races power for its validity before 1967 and, since that year, it has supported only laws about Aboriginal and Torres

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Strait Islanders. Originally s 51(xxvi) contained words excluding Aboriginal people in any of the six states, with the intent that Indigenous affairs would remain predominantly a state matter. Those words of exclusion were removed by the 1967 referendum. The wider national power after 1967 has been used for positive laws, for example to protect cultural heritage or support the restoration of land to Indigenous groups. But there is a strong likelihood, in light of the Hindmarsh Island Bridge case (Kartinyeri v Commonwealth (1998) 195 CLR 337), that national laws which single out people for adverse treatment on the basis of their race are also possible.

Various suggestions have been made to remedy

Susan Charles Rankin, better known as Aunty Sue Rankin, elder of the Dja Dja Wurrung people of the Kulin nation, at Human Rights Day gathering December 11, 2005 in Melbourne.
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this situation. Many involve a two-step change: one which revisits the wording of the existing races power and another which inserts a new constitutional prohibition on laws and programs which discriminate on the basis of race. Abolishing the races power altogether would leave a partial vacuum at the centre of the federation similar to the pre-1967 situation, making it difficult to achieve national laws in Indigenous affairs and, if necessary, bind the states. Re-wording the power in s 51(xxvi) alone, however, would leave open the possibility of using other federal powers to enact racially discriminatory laws – as illustrated by the use of the Territories power in s 122 to remove the protection of the Racial Discrimination Act 1975 (Cth)when the Northern Territory Intervention was initiated in 2007.

A key challenge under this two-step model would be finding the right qualifying words so that a power to make positive Indigenous-specific laws can co-exist with a prohibition on racial discrimination of an adverse kind. The Expert Panel will no doubt be considering this issue as it reviews the submissions received and finalises its own deliberations.

An appropriate counterpart to such changes would be the deletion of section 25 of the Constitution. This provision contemplates the possibility that States might enact racially discriminatory voting laws. Getting rid of section 25 would help fulfil the task of eliminating the remaining potential for racial discrimination embedded in the current text of the Constitution. Like a new preamble, the idea of deleting section 25 has bipartisan political support.

OTHER POSITIVE CHANGES TO THE CONSTITUTION

There are other possibilities for realigning relationships between the State and Australia's first peoples. One interesting idea is the provision of constitutional support for agreement-making between governments and Aboriginal and Torres Strait Islander people.

This is up the more ambitious end of proposals for constitutional change, though in a sense it does no more than create a legal tool or process, an option to reach agreements between governments and first peoples. Ultimately progress to an agreement still depends on consent from the elected government of the day (as well as, of course, the consent of the relevant Indigenous group).

Aboriginal and Torres Strait Islander people have frequently objected to unilateral approaches and policy discontinuity in Indigenous affairs. Whether the objective is delivery of important services like

health and education or achieving native title and land rights recognition or protecting cultural heritage or something else, agreement-making can be a flexible way of achieving enduring outcomes and commitments and in the right setting it can help overcome the instability of policy changing from year to year.

The Constitution can do a lot to support agreement-making. In fact we already have an example of that in the Constitution which has worked well. In 1928 the Constitution was changed at a referendum. The people voted to include a power to make agreements between the Commonwealth and the States regarding their finances. The new section 105A gave those agreements the force of law binding the Commonwealth and the States. It authorised the parties to revisit their agreements and amend them in the future and to give any such changes also the force of law.

The Constitution could be amended in the present century to allow governments and first peoples to make agreements and to revise them in the future if circumstances changed. Of course such an amendment – a new section 105B – does not change things on its own: there is a big difference between process and substance. This amendment would support a process of agreement-making and give legal force to the outcomes. But whether the power gets used remains a question of political will: whether governments are motivated and whether first peoples are able to use their leverage successfully to encourage governments to the negotiating table and to obtain worthwhile agreements.

But the basic point is that an amendment that makes it possible to negotiate agreements which are backed by the Constitution itself could be a practical measure, encouraging governments to engage with Indigenous communities in a genuine rather than lopsided version of shared responsibility. And in a symbolic sense the Constitution would also be doing something to acknowledge and recognise the status of Aboriginal and Torres Strait Islander peoples as Australia's first peoples. An agreement-making power in the Constitution would point to a change from the ways of the past and address something that has been missing previously in the relationship between government and Aboriginal and Torres Strait Islander peoples.

CONCLUSION

The Constitution has never spoken positively about the place of Australia's first peoples. Most of them were excluded from national jurisdiction in the original races power and indeed section 127 said quite explicitly that 'in reckoning the numbers of the people of the Commonwealth' they should not be counted. Those two forms of exclusion were remedied by the 1967 referendum, which was supported by 90% of Australian voters. Since 1967, the Constitution has been simply silent on Aboriginal and Torres Strait Islander people. And the potential for racial discrimination persists. With bipartisan support for some constitutional change, an Expert Panel process engaging in community consultation and a political commitment to hold a referendum within two years, Australia is in a position to take a positive step forward and make significant symbolic and practical changes to its foundational legal document.