Chapter Nine

Indigenous Recognition: Some Issues

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On a number of occasions at The Samuel Griffith Society conferences in past years the Founding President, Sir Harry Gibbs, presented "Issues" papers on topical questions such as a republic and a preamble to the Constitution. These papers were designed to highlight some of the key issues that would arise in consideration of those questions and to generate discussion. This paper aims to continue in the same vein. Its purpose is to highlight some of the key issues that will arise when considering the constitutional recognition of Indigenous Australians, and to foster discussion on what is an important constitutional question that is likely to be put to the Australian people within the next 18 months.

The Expert Panel on Constitutional Recognition of Indigenous Australians

At the 2010 federal election both major political parties declared their support for a referendum to recognize Indigenous Australians in the Constitution. The Australian Labor Party's *Closing the Gap* policy promised to establish an Expert Panel on Indigenous Constitutional Recognition. It declared that constitutional recognition "would be an important step in strengthening the relationship between indigenous and non-indigenous people, and building trust."[1]

The Coalition's *Plan for Real Action for Indigenous Australians* also indicated that it would support a referendum to recognize Indigenous Australians in the Constitution. It declared that this was something that "makes sense, and is overdue".[2] Following the 2010 election, the Prime Minister, Julia Gillard, also made commitments to the Australian Greens, Rob Oakeshott, MP, and Andrew Wilkie, MP, that a referendum on the constitutional recognition of Indigenous Australians would be held either during the term of the 43rd Parliament or at the next election.[3]

To this end, on 8 November 2010, the Prime Minister announced establishment of an Expert Panel to consult and provide advice on the question of constitutional recognition of Indigenous Australians. The report of the Panel was submitted to the Government on 19 January 2012. There are a number of issues concerning the Constitution considered by the Expert Panel that will be raised in this paper. These are, specifically, the preamble, section 25, the race power, prohibition of racial discrimination, and the question of reserved seats in Parliament. Before, however, considering the recommendations of the Expert Panel, there are two preliminary issues that are important in framing discussion.

Preliminary Issues

Discussion of Indigenous Issues

The first preliminary issue is a general point regarding discussion of Indigenous issues within Australia. In accepting the Final Report the Prime Minister spoke about the task

that had been given to the Expert Panel which included, amongst other things, bringing forward a proposal "that could contribute to a more unified and reconciled nation" and "be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums".[4] The spirit of optimism and inclusiveness that characterized acceptance of the report was somewhat tarnished when, only a few days later, two members of the Expert Panel wrote that if the referendum was lost, this would "brand Australians to the world as racists, and self-consciously and deliberately so."[5] Unfortunately this seems to be a common pattern, with public discussions about Indigenous issues all too frequently constrained by political correctness and stifled by cries of racism that are aimed at anybody who does not uncritically accept whatever proposition is being put forward.

When we are discussing significant issues of constitutional reform, the potential consequences are too important to allow debate to be stifled in this way. Individuals with reservations about the proposed constitutional changes have an obligation to engage in public debate. It is incumbent upon all of us to ensure that we give the broader Australian community the opportunity to hear and engage in a frank and meaningful discussion about these important issues, undeterred by criticisms of those who would prefer that discussion was limited to a politically correct or "black armband" view of Indigenous issues.

What type of document is our Constitution?

Secondly, there is the question of what type of document the Constitution is. Much of the discussion surrounding possible constitutional recognition of Indigenous Australians has focused on the "symbolic" importance of constitutional reform.

To my mind, whenever we discuss constitutional reform it is important to reflect not only on what the possible consequences (intended or otherwise) may be, but also on whether the proposed reforms enhance or detract from the fundamental purpose of a constitution. The Australian Constitution is not a Bill of Rights. It does not (beyond very limited examples) attempt to define and protect individual human rights.

Unlike other constitutions that are born of revolution or emerge from particularly dark moments in a nation's history, the Constitution of Australia does not attempt to embody the hopes, values and aspirations of the people in soaring and symbolic prose. Rather, it is a measured, practical and workmanlike document that was produced after years of careful debate and compromise. This undoubtedly is part of the reason it is amongst the most enduring and successful examples of a national constitution.

As a constitutional conservative naturally wary of any proposals to amend the Constitution, I assess proposed amendments not by their symbolic value but by their practical implications for the workings of our constitutional structure. Judged by this criterion, although constitutional recognition of Indigenous Australians might contribute to a more "reconciled nation", the practical implications are such that I have serious reservations about uncritically proceeding down this path.

The Preamble

In discussion about constitutional recognition of Indigenous Australians, one of the first suggestions is usually that the preamble to the Constitution should be amended to acknowledge the special place that they hold as the original inhabitants of Australia. It

is important, when considering such a suggestion, to be precise about what exactly we mean, what it is we want to amend, and what the implications of this would be.

A preamble in the legal sense "is an introductory passage or statement that precedes the operative or enforceable parts of the document".[6] The proper function of a preamble, as explained by Quick and Garran, is to "explain and recite certain facts which are necessary to be explained and recited before the enactments contained in an Act of Parliament are to be understood".[7] In a constitutional setting, as observed by Mark McKenna, Amelia Simpson and George Williams, a preamble may have both symbolic and justiciable functions:

> First, in its symbolic aspect, a preamble can capture and chart, in a pithy and quotable form, the history and aspirations of a nation. Although a preamble does not create substantive rights or obligations, its symbolic aspect may assist in the interpretation of the constitution itself by providing normative guidance. Thus, in its second, justiciable aspect, a preamble can be used in constitutional interpretation and in the construction of statutes and the development of the common law as a legally useful statement of fundamental values.[8]

The Constitution of Australia itself, contained in clause 9 of the *Commonwealth of Australia Constitution Act* 1900 (Imp), does not contain a Preamble. What people are referring to when they raise this issue is usually the Preamble to the Imperial Act which provides as follows:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
> And where it is expedient to provide for the admission into the Commonwealth of other Australian Colonies and possessions of the Queen;
> Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: . . .

An important implication that follows is that the existing Preamble – being part of the Imperial Act and not actually part of the Constitution itself – will not be capable of amendment using the procedure outlined in section 128 of the Constitution of Australia. Further, as noted by Associate Professor Anne Twomey:

> The Preamble is an historic statement of what was intended at the time the Constitution was enacted. That intent cannot be retrospectively amended by a change to the Preamble . . . Turning the Preamble into a dog's breakfast of historic statements and modern sentiments would leave the High Court struggling with how it was to be interpreted and used in the future.[9]

These considerations were recognized by the Expert Panel, who then considered as a possible alternative the introduction of a new Preamble to sit within the Constitution itself. Again, Anne Twomey identified some of the difficulties with this proposal:

> What would the status of the two Preambles be and how would a court interpret them both, particularly if they clashed? Would a Preamble that is included in the

text of the Constitution, after the enacting clause, be truly preambular in nature, or would it be regarded as having a different status by virtue of its position in the text?[10]

A further difficulty is that the operative provisions of the existing Constitution and, for that matter, the proposed substantive amendments to the Constitution, do not refer to the matters that the various proposed preambles are intended to contain. A preamble is meant to enhance our understanding of the operative provisions that it precedes. In this case, however, there would be a substantial disconnect between the matters raised in the preamble and the operative provisions. There would also be a degree of uncertainty about the effect of a new Preamble that is inserted not to explain a related amendment to the constitutional text, but rather without any related substantive changes to the operative provisions of the Constitution. As noted earlier, the very role of a Preamble is to introduce and explain the operative provisions that follow. It is not clear if and how the new Preamble would be intended to affect the interpretation of the existing operative provisions.

Sir Harry Gibbs has previously raised a number of reasons, "besides those of form and style, why a preamble should not include a statement of values or beliefs not reflected in the existing words of the Constitution".[11] These include the use of the Preamble as an aid to interpretation, with it being permissible to refer to the Preamble to resolve ambiguity or uncertainty when interpreting existing words in the operative provisions of the Constitution; the use of the Preamble beyond simply as an aid to interpretation in that at "a reference in a preamble to a matter will make evidence of that matter admissible"[12] with recitals in a preamble being prima facie evidence to the facts recited; the potential for a Preamble to influence executive office-holders in the exercise of their discretionary powers; and the reliance that could be placed on the words of the Preamble by both domestic interest groups and international bodies (such as the United Nations) when pursuing their agenda for political change. For these reasons, he concluded that "if there is to be a Preamble, it should be narrowly and circumspectly drawn."[13]

Precisely what any new Preamble should include is itself a matter of some controversy. Should the new Preamble be limited to recognizing Indigenous Australian, or also include other groups who were not amongst the Founding Fathers at the time of the Constitutional Conventions, such as women? As a proud West Australian it would also be remiss of me not to mention Western Australia – such a reluctant participant in the Federation that we are not mentioned in the existing Preamble. Should we now be included? And should the Preamble be limited to recognizing the contribution made by particular groups, or also set out core beliefs, values and aspirations of the Australian people. If so, which ones? The "question of what matters should be included in a new preamble is controversial and inherently divisive".[14]

Sir Harry Gibbs identified the difficulty in this when he spoke on the topic of the Preamble at the 1999 Conference: if the Constitution is to be a unifying document for all Australians, then the Preamble must only include those beliefs, values and aspirations which would meet with the general approval of the Australian community, and given that it is to be an enduring document, "they should not only be generally acceptable today, but also should be likely to be generally acceptable during the whole life of the Constitution".[15]

There are examples within Australia of the insertion of constitutional preambles recognizing Indigenous Australians. Victoria, Queensland and New South Wales have all amended their State constitutions in recent years to recognize Indigenous people within an amended Preamble. Each of these amendments included a "no legal effect" clause that expressly provides that the preambles are not to be used as an interpretive tool and are not to give rise to any rights or causes of action.[16]

The Expert Panel ultimately recommended against the inclusion of a "no legal effect" clause, fearing that "if the Statement of Recognition had no substance or effect, it would also risk being regarded as tokenistic and failing at referendum simply because people could not see the point of it".[17] Proponents of a new Preamble tend, however, to emphasise its symbolic value and downplay any substantive effects. If it is the symbolism that is important, then a "no legal effect" clause would be entirely appropriate. The strong opposition to such a clause perhaps indicates that an amended Preamble is, indeed, intended to have a substantive effect and legal significance.

The Constitution, section 25

Probably the least controversial aspect of the Expert Panel's final report is the recommendation that section 25 of the Constitution should be removed. Section 25 is entitled *"Provision as to races disqualified from voting"* and provides:

> 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.

This is not, as frequently charged, a racist provision. In fact, it was intended as an anti-discrimination clause, being designed to penalize any State that excluded people from voting on the basis of their race by reducing that State's representation in the House of Representatives.[18]

The provision is, however, clearly obsolete and no longer serves any effective purpose. It is unthinkable that any State would – now or in the future – attempt to exclude people from voting based on their race. The removal of section 25 is a proposal that appears to have broad support and is a reform that carries little or no risk in terms of possible unintended consequences.

Race Power

The Expert Panel also considered the race power under section 51(xxvi), which provides that Parliament has the power to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". There is no denying the racist origins of this power. It was originally designed to enable the Commonwealth to pass laws concerning foreign workers, including "the Indian, Afghan and Syrian hawkers, the Chinese miners, laundrymen, market gardeners and furniture manufacturers; the Japanese settlers and Kanuka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia".[19] Today, however, the race power sits somewhat uneasily within the Constitution and stands as an enduring reminder of policies that are well in the past.

I agree with Anne Twomey that, "ideally there should be no provisions in the

Constitution that permit laws to be enacted by reference to race. The simple repeal of s. 51(xxvi) would be acceptable to most people".[20]

The desirability of removing the concept of race as a legitimate constitutional basis for legislation was outlined by Noel Pearson:

> As long as the allowance of racial discrimination remains in our Constitution it continues, in both subtle and unsubtle ways, to affect our relationships with each other. Though it has historically hurt my people more than others, racial categorizations dehumanize us all. It dehumanizes us because we are each individuals, and we should be judged as individuals. We should be rewarded on our merits and assisted in our needs. Race should not matter.[21]

The Final Report of the Expert Panel supports the removal of the existing race power, but recommends the insertion of a new power specifically to allow the Commonwealth to legislate for Aboriginal and Torres Strait Islander peoples. It has been suggested that this new power would not be based on race but rather "on the special place of those peoples in the history of the nation".[22] To the extent that the laws we are talking about are laws recognizing and protecting Aboriginal history and culture the existing nationhood power would seem ideally placed to provide constitutional support without the need for a new constitutional head of power to be introduced. When we move beyond this, however, to consider laws designed to address present day disadvantage within Indigenous communities, what we are describing is a constitutional power to legislate based on race.

Which brings me back to the fundamental proposition that our Constitution should not discriminate against Australians on the basis of race – even if such discrimination is rooted in the genuine desire to benefit a race that has traditionally suffered significant disadvantage. Both "detrimental" and "beneficial" racial discrimination are rooted in the same habit of mind, and even a "beneficial" race power undermines the concept of equality by reinforcing the idea that distinguishing between individuals by reference to their race may be acceptable. A constitutional head of power that is expressly premised upon a targeted race being treated differently ultimately undermines racial equality and reconciliation, whatever the good intentions that inform it.

It should be acknowledged that there are practical consequences that follow from simply removing the race power. One difficulty is the effect this may have on existing federal legislation and funding that relies upon it. While the vast majority of existing legislation in this field would arguably find alternative grounds of constitutional support, notably from powers such as the external affairs power, territories power and nationhood power, if this is seen as an unacceptable constitutional risk, then retaining the existing power would be preferable to replacing it with an amended race power as recommended by the Expert Panel.

The Expert Panel recommended the introduction of a new "section 51A", with a Statement of Recognition embedded at the beginning of the section. Section 51A would grant the Commonwealth the power to make laws with respect to Aboriginal and Torres Strait Islander peoples. It is proposed that the Statement of Recognition would use the word "advancement" to ensure that the beneficial purpose of the power is apparent. That is, the intention is for the power to be confined by the Statement of Recognition to laws made "for the advancement of" Aboriginal and Torres Strait Islander peoples.

Putting to one side the question of whether the Statement of Recognition would be

capable of confining the interpretation of section 51A in the manner intended (with, for example, Anne Twomey suggesting this may not be entirely straightforward or certain),[23] a "beneficial" power such as the proposed section 51A raises a number of important practical questions. Who decides what is meant by "advancement"? What if the interests of all Aboriginal people are not identical and a legislative scheme benefits some while disadvantaging others? Does every section of an Act need to be beneficial, or is it sufficient that the overriding purpose is beneficial? Does the power allow us to introduce legislation that imposes short-term detriment in order to achieve longer-term benefits? What about legislation seen as detrimental to the individual, but that would produce benefits for the broader Aboriginal community? The difficulty with introducing a subjective and value-laden term like "advancement" into the Constitution, and asking it to play a central role in qualifying and controlling a substantive power, is that it creates uncertainty and risks unexpected outcomes.

Constitutional Prohibition of Racial Discrimination

The Expert Panel also proposed introducing a new constitutional prohibition on racial discrimination. The proposed section 116A would prohibit the Commonwealth and States from discriminating on the grounds of race, colour or ethnic or national origin, although it would also be expressly noted that this prohibition "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".[24] The insertion of this substantive constitutional protection was supported by groups such as the Law Council of Australia.[25]

There is already legislation prohibiting racial discrimination at both the Commonwealth and State level. The move from statutory to constitutional protection is significant. It should not be entered into without a clear understanding of the consequences. This proposal is a clear step towards introduction of a Bill of Rights into the Constitution of Australia and should be rejected for all the reasons that I believe a Bill of Rights should be rejected. The debates surrounding issues such as native title, the Northern Territory Intervention and racial vilification laws highlight how politically controversial policies dealing with Indigenous issues and racial issues more broadly can be.

It is also not clear how existing exemptions under anti-discrimination law would fit within this new constitutional regime. These types of issues, inherently political and requiring a wide range of competing interests and considerations to be balanced, should be debated and decided by a democratically elected parliament. They should not be removed from this forum to the exclusive oversight of the judiciary.

The Northern Territory Intervention provides a good example of the uncertainty that would surround operation of a new constitutional prohibition of racial discrimination. Although advocates claim the Intervention is designed to address long-term issues of Indigenous disadvantage, critics claim it is a discriminatory policy that violates the *Racial Discrimination Act* 1975 (Cth). Within Indigenous communities there is disagreement about whether the Intervention is beneficial or not. To ensure that the Intervention could be implemented immediately, the Federal Government exempted it from operation of the *Racial Discrimination Act*. This would not have been possible had the prohibition against racial discrimination been a constitutional prohibition, and a program that has made a measurable difference to the lives of many Aboriginal

women and children in particular may very well be rendered unconstitutional. In any event, the future of the Intervention would rely ultimately on the approval of the High Court, rather than the continuing support of elected representatives in Parliament.

Reserved Seats in Parliament

A number of submissions to the Expert Panel raised the idea of constitutional provision for reserved seats in the Parliament for Aboriginal and Torres Strait Islander peoples.[26] This is not a new idea. It can be traced back to 1933 when King Burraga called for guaranteed Aboriginal federal parliamentary representation. It is, however, an idea that should be resisted. Over and above the technical issues that would need to be resolved before such a provision could be inserted into the Constitution, including primarily the hurdle created by section 29, introduction of reserved Indigenous parliamentary seats should be opposed for the same reason that introduction of quotas for female parliamentary representatives should be opposed. The only criteria on which our parliamentarians should be selected is individual merit. Far from achieving its stated aim, a policy of quotas will actually, in the long-term, undermine equality and does not advance Aboriginal representation other than in a superficial way. It marginalizes Aboriginal parliamentary representatives by, firstly, implying that they are reliant on the quota system for their election and, secondly, limits them to being representatives of Aboriginal people in relation to Aboriginal issues.

When I was thinking about this question I re-read the maiden speech of the Member for Hasluck, Ken Wyatt, MP, the first Indigenous Australian to be elected to the House of Representatives. In this speech he began by noting that he stood as an Aboriginal man before the members of the House of Representatives as an equal. Whilst acknowledging the significance of being the first Aboriginal to be elected a member of the House of Representatives, he said that when researchers in the future analyse the decision made by the people of Hasluck in 2010, "what they are likely to find is that the personal and professional qualities of the candidate were the reasons for their decision".[27] Since his election he has also noted that "my election is a chance to show quality leadership, not just Indigenous, but within Australian society and that sends a strong message to Australia".[28] That message would be lost with the introduction of reserved Indigenous seats in Parliament.

Conclusion

The issues identified in this paper are by no means the only issues that have been raised during the discussion about possible recognition of Aboriginal peoples in the Constitution. For example, in its submission to the Expert Panel, the Law Council of Australia noted that, in the course of their consultations, a "significant number" raised issues including sovereignty, self-determination, recognition of customary law, and the constitutional entrenchment of the *United Nations Declaration on the Rights of Indigenous Peoples*.[29] What I hope to have done by touching on the key recommendations made by the Expert Panel is to demonstrate that these are important constitutional issues with potentially serious implications. Although advocates of constitutional recognition of Indigenous Australians focus on the symbolic benefits of such recognition and the importance of it to the process of reconciliation, it is incumbent upon constitutional conservatives to examine the proposed changes not for

their symbolic value, but rather their practical effect. In my view, doing so highlights some serious concerns about the recommendations made by the Expert Panel.

The recommendations of the Expert Panel may well be put to the Australian people, in some form, at the next election. These recommendations go beyond merely symbolic constitutional recognition of Indigenous Australians, and recommend substantive constitutional change. The public debate on these issues leading to a referendum will be important. Whilst addressing continuing Indigenous disadvantage and the removal of racial discrimination are both undoubtedly important topics, it is my belief that we do not make up for past discrimination, further reconciliation between Australians or address systemic disadvantage by entrenching discrimination in the Constitution.

Endnotes

1. Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap (Election 2010)*, 18. Accessed at: http://www.alc.org.au/media/49360/federal labors.pdf.

2. Coalition Election Policy, *The Coalition's plan for real action for Indigenous Australians* (2010), 4. Accessed at: http://www.alc.org.au/media/49211/coalitions plan.pdf

3. Expert Panel, on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, 2.

4. Prime Minister of Australia (The Hon Julia Gillard MP), *Handover of the final report to the Government on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Speech),* 19 January 2012. Accessed at: https://pmtranscripts.dpmc.gov.au/release/transcript-18339

5. Marcia Langton and Megan Davis, "An answer to the race question", *The Australian,* 21 January 2012.

6. Mark McKenna, Amelia Simpson and George Williams, "First Words: The Preamble to the *Australian Constitution*" (2001) 24(2) *UNSW Law Journal* 382, 382.

7. Quick and Garran, *Annotated Constitution of the Australian Constitution* (1901), 284.

8. McKenna, Simpson and Williams, *op. cit.*, 382-383.

9. Professor Anne Twomey, *Indigenous Constitutional Recognition Explained – The Issues, Risks and Options,* 26 January 2012, 1. Accessed at:

http://sydney.edu.au/law/cru/documents/2012/Indigenous_Recognition.pdf

10. *Ibid*., 2.

11. Rt Hon Sir Harry Gibbs, "A Preamble: The Issues", *Paper presented at the Samuel Griffith Society Conference* (1999), 3.

12. *Ibid*., 4.

13. *Ibid*., 4.

14. Professor Anne Twomey, "The Preamble and Indigenous Recognition", 2011, 15(2) *Australian Indigenous Law Review* 4, 12.

15. Gibbs, *op. cit*., 5.

16. See *Constitution Act* 1975 (Vic), s. 1A; *Constitution Act* 1902 (NSW), s. 2; *Constitution of Queensland* 2001 (Qld), Preamble and s. 3A.

17. Twomey, *op. cit*., 3.

18. *Ibid*., 3-4.

19. Law Council of Australia, *Constitutional Recognition of Indigenous Australians: Discussion Paper*, 19 March 2011, 20.

20. Twomey, *op. cit*., 5.

21. Expert Panel on Constitutional Recognition of Indigenous Australians, above no. 3, 139.

22. Robert French, "The Race Power: A Constitutional Chimera" in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks*, Cambridge University Press, 2003, 208.

23. Twomey, *op. cit*., 6-7.

24. Expert Panel on Constitutional Recognition of Indigenous Australians, *op. cit*., 173.

25. Law Council of Australia, *op. cit*., 15.

26. Expert Panel on Constitutional Recognition of Indigenous Australians, *op. cit*., 177.

27. Ken Wyatt, MP, Governor-General's Speech: Address-in-Reply Speech, *Hansard*

(House of Representatives), 29 September 2010, 211.

28. *Ibid.*

29. Expert Panel on Constitutional Recognition of Indigenous Australians, *op. cit.*, xv-xvi.