Chapter 10

Aboriginal Recognition and the Constitution of Western Australian

Michael Mischin

The issue of recognising the original Aboriginal people of Western Australia in the State's Constitution has gained increasing momentum during the past few years. In many respects it has been overshadowed in the campaigns to achieve such recognition in the Commonwealth Constitution.

It is has nevertheless attracted considerable debate. This paper does not propose to go into the merits or otherwise of such recognition, or the arguments for and against it, or the form that it should take. The questions of whether and how such recognition should be effected are for each jurisdiction in turn, and have yet to be determined in some, including the Commonwealth. Nor does it propose to recount in any depth the history of the issue in Western Australia, which can be traced back several decades.

Although it is not so much a "federal" constitutional issue of the type commonly discussed and debated by The Samuel Griffith Society, it does fit with the theme of constitutional change to accommodate recognition of Indigenous peoples, and this will serve to inform how Western Australia has approached the matter.

Western Australia's approach is marked in a few curiosities – they may well have also been experienced by our sister jurisdictions – and they shall be mentioned here because they gave the author pause for reflection as to what approach to take and how to balance three roles – that of first Law Officer of the State; that of representative of the Government; and that of a parliamentarian – in a pragmatic way that would also reflect principle and not set undesirable precedents in the future.

Background

But first, a context.

There is a private member's bill before the Parliament of Western Australia. It seeks to recognise Aboriginal people in the Constitution of Western Australia.[1] It passed the Legislative Assembly on 19 August 2015 and was introduced into and read a second time in the Legislative Council on 20 August. It is expected to be given some priority when Parliament resumes on 8 September. Although one cannot presume to say what Parliament will do, one is on safe ground in predicting that it will pass all stages and become law well before the end of 2015 because, although it is a private member's bill introduced by a member of the Opposition, it has the support of the Government, and the Government has facilitated its debate and passage.

History

The present bill had its genesis over a year ago. On 11 June 2014 the ALP member for Kimberley, Ms Josie Farrer, MLA, a Gidja woman, introduced and gave the second reading speech on her private member's bill, the *Constitution Amendment (Recognition of Aboriginal People) Bill* 2014, an earlier version of the current bill.[2]

The bill proposed to insert two paragraphs into the preamble of the WA *Constitution Act* 1889. The first updated the historical narrative in the preamble to record creation of the Western Australian Parliament and Western Australia subsequently attaining Statehood as a part of the Commonwealth. The second indicated the resolve of the Houses of the Parliament of Western Australia "to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land" and that Parliament[3] "seeks to effect a reconciliation with the Aboriginal peoples of Western Australia."[4]

When this bill came on for debate in the Legislative Assembly on 12 November 2014, the Premier of Western Australia, the Honorable Colin Barnett, MLA, indicated that the WA Government was prepared, in principle, to support legislation amending the Constitution of Western Australia to recognise Aboriginal people, and that the State Government was "prepared to work in a genuinely bipartisan way" toward that end.[5]

Given that a constitutional amendment was being proposed, the Premier expressed the need to exercise caution. In particular, he alluded to the legal and constitutional uncertainties that might arise and which required that the Parliament and the Government be fully informed about the possible impact of the proposal. The Premier referred, for example, to possible implications for Native Title, and other land titles including pastoral leases, as well as to the fact that the bill did not, unlike some other State constitutions which already recognised Aboriginal people, propose a "no-effect" or non-justiciability clause.

Upon resumption of debate on 19 November 2014, the Leader of the National Party in the Legislative Assembly, the Honourable Terry Redman, suggested that, because of the various legal issues and uncertainties and the importance of the bill, there be established "a bipartisan select committee [to] consider the bill, its language and all the things that are issues". He indicated that he had consulted with the Premier, the Deputy Premier, the Leader of the Opposition and the Member for the Kimberley. In particular, because of the need to obtain constitutional law advice, which is often most readily available from the Government's legal advisers, he suggested "that the Attorney General chair the committee."[6]

In that spirit, when debate resumed on 26 November 2014, the Premier proposed that a joint select committee should be formed, chaired by the Attorney General. It is unusual for a minister to be a member of a parliamentary committee, let alone to chair one. The advantage in this case was that it was hoped that it would facilitate the bi-partisan approach to the issue, while also satisfying the Government's need, on behalf of the State, to discharge its obligation of due diligence. As the Premier put it: "it would be desirable for the Attorney General to chair the committee. I say that because, apart from his own legal skills, the Attorney General would have the capacity to draw on government advice," including from the Solicitor-General, which would normally not be available to a parliamentary committee.[7]

In addition, the Premier indicated that following the committee's report, which might include recommendations about the content of the bill and its wording, it would be considered by Cabinet as would the drafting of a bill. To reaffirm the bi-partisan approach to the issue, the Premier also advised that when any bill emerging from the committee's work was introduced into Parliament, it would be introduced by the member for Kimberley.

That same day the Legislative Assembly passed a motion to establish a joint select committee "to consider and report on the appropriate wording to recognise Aboriginal people in

the Constitution of Western Australia."[8] The Legislative Council agreed to that motion on 2 December 2014, including appointing the Attorney General to the committee. The Legislative Council recognised that the committee would consist of "members of the Labor Party, the Liberal Party [and] the National Party," the three major parliamentary parties. It was also recognised and accepted that while the two Greens and the single member of the Shooters and Fishers Party would not be represented on the committee, they would have every opportunity to make submissions to and appear before the committee.[9]

The committee, as established, comprised the Attorney General [the author] (Lib) as chair; Ms Farrer (ALP) as deputy chair; and Hon Jacqui Boydell MLC (NP), Mr Murray Cowper MLA (Lib), Ms Wendy Duncan MLA (NP), Hon Dr Sally Talbot MLC (ALP) and Mr Ben Wyatt MLA (ALP) as members. It engaged the services of Mr Adam Sharpe of Counsel, a barrister with public law experience, to assist the committee in its enquiries and for the research and preparation of its report. It also obtained comprehensive legal opinions from an independent barrister, Mr Peter Quinlan, SC, on a variety of constitutional law issues. His opinions are annexed to the committee's report.

Importantly, because the Attorney General chaired the committee, members of the committee were able to be informed about the views of the Government's legal advisers, including the Solicitor-General and a senior legal officer from the State Solicitor's Office. Indeed, one of the first hearings was with those gentlemen, to give the committee the opportunity to be apprised of some of the issues that might need to be addressed during the committee's deliberations. Before settling its report, Mr Quinlan's opinions were provided to both the Solicitor-General and the legal officer from the State Solicitor's Office for consideration and comment. All this assisted in ensuring that the committee's report addressed all matters of foreseeable concern to the Government in a satisfactory manner.

But apart from the Attorney General's role as first law officer and being able to draw directly on government resources to assist the committee's work, there was also the political dimension. As a member of a Government committed to recognition as a matter of policy, he could ensure that any relevant issues that may affect that objective were properly anticipated and explored and resolved, with government assistance, rather than at arm's length and dissociated from the committee's work. Nevertheless, this needed to be done in a manner that would not set precedents and compromise the position of governments in the future in their dealings with Parliament and its committees.

The committee's report, *Towards a True and Lasting Reconciliation – Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia,* was tabled in both houses of the Parliament on the date it was due, 26 March 2015.[10]

Scope and work

The committee was assigned by Parliament a relatively short time in which to discharge its responsibility. One could be reasonably confident that an extension would have been readily granted if it was required. The committee, however, was aided by the considerable literature in existence and work that had been done by others in respect of the issue generally, and specifically in relation to the Commonwealth Constitution, the constitutions of other States of the Federation, and internationally.[11] The committee's ability to fulfil its remit was assisted by the

relatively narrow terms of reference which did not require consideration of the merits of *whether* recognition ought to be made, but simply *how* it ought to be done.[12]

The committee recognised that such an issue raises many competing considerations. On the one hand, it is viewed as a desirable, if not necessary, step towards "reconciliation" between the non-Aboriginal and Aboriginal peoples of the State; on the other, there are concerns that recognition may give greater recognition to one segment of the community over others and so work to aggravate, rather than to heal, relationships between the descendants of our pre-colonial inhabitants and their fellow citizens. Further, there is the legitimate concern that recognition, if not addressed with care in the statutes such as constitutions which found our body politic and define our sovereignty, may give rise to unintended and presently unforeseen consequences.

The committee's report examined and weighed each of those issues and had due regard to them.[13]

The committee had the benefit of a range of submissions from a range of sources: government, academic, legal, and from interest and advocacy groups. The experiences of other jurisdictions were also invaluable. While it did not have the time to conduct public hearings, and these were unnecessary in light of the narrow terms of reference, it was assisted by the work that had been done by Ms Farrer and the consultation that she had performed in the preparation of her bill.

Indeed, although the committee was not set up to consider her bill as such, it did form a convenient starting point and touchstone. Ultimately, the committee recommended largely what was proposed by the Farrer bill and the words she had advanced; namely, that the Western Australian "Parliament resolves to acknowledge the Aboriginal peoples as the First Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal peoples of Western Australia". The committee was attracted to her formula because it was simply framed, comparatively modest in its scope, and among the least contentious in terms of its content of the many alternative formulations the committee examined; had been the subject of significant consultation; and appeared to have the greatest level of current support among advocates of constitutional recognition.

With one grammatical qualification – changing the reference from Aboriginal "peoples" and First "Peoples" to Aboriginal "people" and First "People"[14] – that recommendation has been adopted by the *Constitution Amendment (Recognition of Aboriginal People) Bill* 2015 currently before the Parliament. (A copy of the current Preamble, displaying the proposed changes, is reproduced as an Appendix to this paper.)

Which constitution?

One curious issue that needed to be considered was, "what is the WA constitution?" Western Australia has the dubious distinction of having two Constitution Acts – the *Constitution Act* 1889 and the *Constitution Acts Amendments Act* 1899. Indeed, the committee noted that the "Constitution of Western Australia," in one sense, comprises at least those, and the Commonwealth Constitution, and the *Australia Act* 1986 (UK) and *Australia Act* 1986 (Cth). The 1889 Act is, however, the foundational constitutional document for Western Australia, as it was the legal document by which Western Australia was granted self-government, and so it did not take much reflection to be satisfied that that ought to be the location for any amendment.

Textual locations

Where a provision is located within a statute or constitution has both symbolic and legal significance. As to symbolism, the opening words of a constitution can and – subject to the character of the instrument and what it is intended to achieve – should be powerfully evocative. Two preeminent examples are the Commonwealth Constitution's opening three words, "WHEREAS the people," and the United States Constitution's "We the people".

We can contrast these with the more prosaic words of Western Australia's Constitution:

"Whereas by the 32nd section of the Imperial Act . . .".

As to the legal significance of a provision's particular textual location, principles of statutory and constitutional interpretation include the admonition that in ascertaining the scope, meaning and consequences of legal texts – that is, of words, phrases, sentences and paragraphs – their context is important and can be decisive.[15]

In this context the committee had three options about where to place the "appropriate words": namely, as part of the Constitution's Preamble; within the body of the WA Constitution; or in a schedule to the Constitution. For symbolic and legal reasons, the committee recommended placement in the Preamble.

The Preamble was the most logical. In the first place, it would fit with the historical narrative, such as it is, already in the Preamble, and (significantly when it comes to the question of its legal effect) be coloured by its context as a historical statement rather than a matter of substantive legal effect, as one might expect from a section in the body of the Act. Second, it was not readily apparent where such a statement might fit within the corpus of the statute without requiring some explanation and without raising the issue of what substantive effect Parliament intended it may have. Lastly, it likewise avoided the perception that it was being hidden away as an afterthought in a schedule.

Critical to all these considerations as to placement was what the potential legal effect of inserting the proposed recognition in one part of the Constitution Act or another. The legal advice to the committee that insertion in the Preamble would have no legal effect – which shall be touched on shortly – combined with the modest nature of the statement, confirmed the committee's view that inclusion in the Preamble as originally proposed was appropriate.

Preamble

Adding a new paragraph to the Preamble indicating that the Parliament of Western Australia seeks to effect a reconciliation with the Aboriginal People of Western Australia obviously maximises its symbolic effect as an aspirational statement.

In addition, the committee addressed a second location question. Where, within the Preamble, should this new paragraph be placed? Its recommendation that this paragraph be placed at the end of the Preamble was influenced by the importance of historical chronology and narrative.

As importantly, the committee grappled with several legal questions arising out of these contextual decisions.

The first concerned the question of whether a Preamble, as opposed to provisions in the body of a Constitution, has or can have any substantive or interpretative legal effects. It is

generally considered that preambles do not have a substantive legal operation and do not create, alter or remove legal rights, powers or duties. As with all generalisations there is always the possibility of exceptions. Indeed, there are examples within Australian and constitutional law elsewhere where preambles have been judicially held to have a substantive legal operation.[16] Likewise, examples exist where preambles have been judicially considered to have some relevance in the interpretation of constitutions and statutes.[17]

Accordingly, the committee was most concerned to ensure that should the question arise for consideration in future, it would be plain that it was Parliament's intention that the amendment would have no substantive or interpretive effect. This, it considered, could be effected by virtue of the committee's report, in the bill's second reading speeches and debates, and the bill's explanatory memoranda.

This conclusion obviously had an effect on the committee's consideration about whether to include in the Preamble or elsewhere a further provision expressly indicating that the new preambular provision did not have any such legal effect or operation – a "no-effect clause". As a matter of principle such a clause is undesirable if it can be avoided. The enactment of a provision acknowledging a matter of historical significance as a foundation for an aspirational statement loses its impact if it is immediately qualified by another statement announcing that the former should be thought to mean anything! Nevertheless, it was also important that there be no substantive unintended legal consequences flowing from the proposed amendment.

The committee also recognised that there could be debate about the legal efficacy of a "no-effect" clause. It concluded that such a clause was not necessary and that Parliament's intentions could be made plain through the alternative avenues mentioned.[18]

An amendment to the Preamble of the *Constitution Act* 1889 was most likely to affect the interpretation and operation of that Act, rather than any other statute law of the State, and based on the advice available to the committee, the proposal would have no such effect. That being so, the prospect of it having any impact – let alone a decisive one – on the interpretation of other Western Australian legislation and on State executive and administrative power appears to be negligible.

This comfort was reinforced by the language and limited character of the proposed amendment, from which it could be difficult to infer any legal limitation on parliamentary sovereignty. Furthermore, for reasons to be referred to, if any unforeseen consequences were to emerge, the committee considered that Parliament could remedy the position through further amending the Constitution.

Amendment and State legislative power

The committee also had to grapple with the possibility that a Court might take a different and opposite view to the committee and the WA Parliament regarding the legal operation of the proposed amendment. This required consideration of two interrelated questions: first, whether the words to be inserted might in some way limit State legislative power; and, second, if they did so, whether the proposed constitutional amendment might itself be unconstitutional.

On the first question, the amendment's location, the nature, character, and effect of preambles and the WA Parliament's intentions suggest that there would be no such limitation.

Because of the possibility of an affirmative answer, however, a deeper constitutional law problem needed to be addressed.

The Western Australian Parliament's principal source of State legislative power is provided by section 2 of the *Constitution Act* 1889 (WA). Section 2 is entrenched by section 73(2) (e), however. This latter provision stipulates that any "Bill that . . . expressly or impliedly in any way affects" section 2 must be passed by absolute majorities of both Houses of the Parliament and be approved at a State referendum. All of this involves intricate manner and form issues, questions about section 6 of the *Australia Act* 1986 (Cth), and the High Court's decision in the *Marquet* case.[19] Despite the scope of section 73(2) (e), the better view is that the proposed amendment, because of its contextual location and non-justiciable character, does not fall within it.

This conclusion has at least two important legal consequences. The first is that the Preamble can be amended by the WA Parliament exercising its normal legislative procedures and powers. This recognises that the WA Constitution, despite its nomenclature, is an ordinary, albeit a primary and important, statute. It also recognises that the WA Constitution falls within the general rule, enunciated by the Judicial Committee of the Privy Council in the McCawley case,20 that State constitutions can, subject to valid and binding manner and form restrictions, be amended by State legislation. Second, as a matter of constitutional law, the proposed amendment does not require to be put to and approved by a referendum. The representative character of State parliaments is a further, albeit policy, reason why a referendum need not be held.

This, again, offered comfort to the committee. If the proposed amendment could be said to affect the State's legislative power, it needed to be passed by an absolute majority followed by a referendum of electors approving the bill. By not adopting that process, it would be plain that Parliament's intention was that it have no such effect upon Parliament's power, and failure to adopt that process would result in it having no such effect.

Entrenchment

A further interesting legal question is also prompted by the existence of section 73(2) in the WA Constitution. That is, whether, as a matter of law, the proposed amendments could be entrenched. There are in a system of representative or parliamentary democracy several important policy reasons not to entrench.[21] Whether a past or current Parliament can bind future parliaments again raises manner and form conundrums. In particular, section 6 of the *Australia Act* 1986 (Cth) and the *Marquet* case require careful consideration.

In the committee's view, section 6 would not confer upon a provision entrenching the proposed amendment validity or binding authority.[22] There are other sources, including the Privy Council's decision in *Bribery Commissioner v Ranasinghe*[23] characterising constitutions as having intrinsic efficacy, which might assist some form of entrenchment. That would, however, detract from the Western Australian Constitution's democratic legitimacy and State Parliament's ability to amend. Interestingly, at least the recognition provision in section 1A of the Victorian *Constitution Act* 1975, which is in the body of the Constitution and contains a non-justiciability clause, requires a three-fifths majority in each chamber of the Victorian Parliament to repeal, alter or vary section 1A. The validity and legal efficacy of this entrenchment has not, as yet, been judicially tested.[24]

Conclusion

The Joint Select Committee's Report is to be recommended to anyone, including Attorneys-General, interested in the legal and constitutional law issues that surround the debate about constitutional recognition of Aboriginal people. It succinctly addresses a plethora of questions with which lawyers take an intellectual delight. It exposes and evaluates the multi-faceted sides and layers of each issue. In addition, the Report has a practical dimension. It applies the legal position and its variance to the prevalent practical and policy topics about amending constitutions.

For this reason, the debates and developments in Western Australia will not become irrelevant or obsolete when the Western Australian Parliament enacts the 2015 bill. As discussion and possibly drafting proceeds in relation to the Commonwealth Constitution, themes relating, for example, to that Constitution's preamble will inevitably demand careful scrutiny.

The committee's report and the manner in which it approached the issues may offer a worthy contribution to that exercise.

Appendix

Constitution Act 1889
An Act to confer a Constitution on Western Australia, and to grant a Civil list to Her Majesty.

Preamble
Whereas by the 32nd section of the Imperial Act passed in the session holden in the 13th and 14th years of the Reign of Her present Majesty, intituled " *An Act for the better Government of Her Majesty's Australian Colonies*", it was among other things enacted that, notwithstanding anything thereinbefore contained, it should be lawful for the Governor and Legislative Council of Western Australia, from time to time, by any Act or Acts, to alter the provisions or laws for the time being in force under the said Act or otherwise concerning the election of the elective members of such Legislative Council, and the qualification of electors and elective members, or to establish in the said Colony, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses, to consist of such members to be appointed or elected by such persons and in such manner as by such Act or Acts should be determined, and to vest in such Council and House of Representatives, or other separate Legislative Houses, the powers and functions of the Legislative Council for which the same might be substituted; and whereas it is expedient that the powers vested by the said Act in the said Governor and Legislative Council should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council, with the powers and functions hereinafter ~~contained:~~ contained;

And whereas the Legislature of the Colony, as previously constituted, was replaced through this Act with a Parliament, to consist of the Queen, the Legislative Council and the Legislative Assembly with the members of both Houses chosen by the people, and, as constituted, continued as the Parliament of the Colony until Western Australia's accession as an Original State of the Commonwealth of Australia in 1901 and thereafter has been the Parliament of the State;

And whereas the Parliament resolves to acknowledge the Aboriginal people as the First People of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia:

Be it therefore enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows: —

Endnotes

1. Constitution Amendment (Recognition of Aboriginal People) Bill 2015. WA Parliament website: http://www.parliament.wa.gov.au/Parliament/Bills.nsf/08CEDFB61948DAEB48257E67000A0DA4/$File/Bill138-1.pdf.

2. WA Parliamentary Hansard, Legislative Assembly, 11 June 2014, 3699.

3. Joint Select Committee on Aboriginal Constitutional Recognition Report, *Towards a True and Lasting Reconciliation: Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia* (Report No. 1), March 2015. http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/DC46B0A198420E6848257E140009FAC5/$file/FINAL+-+Web+Version+-+20150326.pdf, ("Report"), page x. Section 2(2) of the *Constitution Act* 1889 (WA) states that: "The Parliament of Western Australia consists of the Queen and the Legislative Council and the Legislative Assembly."

4. Constitution Amendment (Recognition of Aboriginal People) Bill 2014, clause 4(2).

5. WA Parliamentary Hansard, Legislative Assembly, 12 November 2014, 8084.

6. WA Parliamentary Hansard, Legislative Assembly, 19 November 2014, 8421.

7. WA Parliamentary Hansard, Legislative Assembly, 26 November 2014, 8813.

8. Report, 7.

9. WA Parliamentary Hansard, Legislative Council, 2 December 2014, 9086.

10. Report, *op cit*.

11. Report, 9-25.

12. Report, 7.

13. Report, 15-16.

14. The 2014 Bill and the committee recommendation referred to "First Peoples", which was inconsistent with the title of that Bill. The 2015 Bill, with Ms Farrer's concurrence, resolved that conflict by referring to "First People". Amendments made to the constitutions of other Australian States speak of both "Peoples" and "People". Even minor textual differences can have legal significance. In the context of proposed amendments, especially to preambles, that may not, however, be as relevant and, in any case, it all seems a matter of preferred style rather than substance.

15. See, generally, Jonathan Crowe, "The Role of Contexual Meaning in Judicial Interpretation," (2013) 41 *Federal Law Review* 417. Four obvious examples concerning the Commonwealth Constitution may suffice. First, debates over the list of section 51 Commonwealth legislative powers, including section 51(xxxi)'s just terms limitation on acquisition: *Commonwealth v Tasmania* ("Tasmanian Dam Case") (1983) 158 CLR 1, 282 (Deane J); *Theophanous v Commonwealth* (2006) 225 CLR 101, 112-113 (Gleeson CJ). Second,

section 92 which – both within itself and within its surrounding provisions, such as sections 90, 91 and 93 through to 97 – expressly alludes to fiscal or monetary matters: *Buck v Bavone* (1976) 135 CLR 110, 132 (Murphy J). Third, section 122 which, in the Territorial Senators cases, was famously juxtaposed or contextualised with the fairly distant section 7: *Western Australia v Commonwealth* ("First Territorial Senators Case") (1975) 134 CLR 201; *Queensland v Commonwealth* ("Second Territorial Senators Case") (1977) 139 CLR 585. Fourth, the now somewhat, but not completely, discarded "federal balance" interpretative doctrine: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* ("Tasmanian Dam Case") (1983) 158 CLR 1; *New South Wales v Commonwealth* ("Work Choices Case") (2006) 229 CLR 1.

16. Report, paragraph 4.73, 44.

17. Report, paragraph 4.73 (referring to *Leeth v Commonwealth* (1992) 174 CLR 455, 475 (Brennan J); 486 (Deane & Toohey JJ)) 44.

18. Report, 48-51.

19. Generally, Report, 35-37; *Attorney-General (WA) v Marquet* [2003] HCA 67; 217 CLR 545; 202 ALR 233; 78 ALJR 105 (13 November 2003).

20. *McCawley v R* [1920] AC 691.

21. Report, 33-34.

22. Report, 34 paragraph 4.35.

23. *Bribery Commissioner v Ranasinghe* [1965] AC 172.

24. Report, 65 (Appendix Four), reproducing section 1A of the *Constitution Act* 1975 (Vic).