

JUST MORE CONSTITUTIONAL WORDS?

by Neil Rees

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Editorial:
Just more words?

It might seem that the *Aboriginal Law Bulletin* merely adds to the mound of literature devoted to Australia's Aborigines. It is nearly five years since the *Legal Service Bulletin* devoted an issue to 'Aborigines and the Law' (December 1976). Aboriginal lawyer, Michael Dodson viewed the exercise with scepticism. He commented:

The continued discussions, conferences and publications appear to offer scant results immediately or in the long term. We, the Aboriginal people, are fully aware of the repressive and racist legal systems which subject us to great disadvantage and injustice. The great volumes of writings and works seem to be of little value to a people who live under exploitation, oppression and inequality not only before the law but in all other areas of social existence. We live that existence, we have small mileage in 'experts' exposing the 'problem'.

The point is well made. It is difficult to deny that Aborigines have long provided scholars from many disciplines with a fruitful field of study. Lawyers are starting to discover this fact as more begin to write about the impact of a white legal system upon Blacks. The many interesting legal issues which have arisen often serve to divert attention from the injustices and social distinction which the white Australian legal system has caused among Aboriginal communities. Is this just another journal devoted to an academic study of legal niceties? We hope not, but the future depends largely upon gaining the support of people working with Aboriginal Legal Services, Land Councils and research organisations.

The primary aim of this *Bulletin* is to become a source of useful practical information for people working in the field of Aborigines and the law. It begins as a very modest publication with some pretensions. At various times the concept of a series of Aboriginal Law Reports has been discussed. Too often, important decisions involving Aborigines are not included within the official reports and consequently they remain within the knowledge of a small band. Case notes will be a regular feature. They may expand into something larger.

A few Aboriginal Legal Services and Land Councils sporadically publish newsletters but there is no national journal which enables people in one part of the country to learn of the legal developments hundreds or thousands of kilometres away. There is a lot happening and if the people who work for Legal Services and Land Councils are to provide the most effective service to their communities, they must be aware of activities elsewhere in the country. If the communities are to make full use of their Legal Services and Land Councils they too must be informed of achievements and developments in other regions. The Makarrata, the current work of the Australian Law Reform Commission on customary law, the re-introduction to the Senate of the *Aborigines and Islanders (Admissibility of Confessions) Bill*, the *Human Rights Bill*, the Pitjantjatjara land rights legislation, proposals to amend the *Aboriginal Territory Land Rights Act*, training schemes for Legal Service staff and the report of the NSW Legislative Assembly's Select Committee on Aborigines are a few of the matters which must be noticed and discussed at a national level. This *Review* hopes to facilitate that discussion.

The Aboriginal Law Research Unit is the body responsible for the *Review*. On 24 April 1981 the Unit was formally established at the University of NSW. Its aims include the conduct and fostering of research on issues concerning Aborigines, Torres Strait Islanders and the law, the building of a specialised collection of resource materials, publication, the establishment of clearing-house activities for Aboriginal Legal Services and Land Councils and the promotion of conferences, seminars and teaching. The Unit does not claim to be a representative body; its present financial position has delayed plans for a national meeting of representatives of organisations working in the broad field of Aborigines and the law. The Unit's steering committee meets regularly in Sydney and is comprised of lawyers, anthropologists and activists in the Black community. The committee through its convener, Professor Garth Nettheim, has been in constant communication with Aboriginal organisations across Australia. We hope that this *Review* will facilitate further communication and action.

The NSW Law Foundation has donated sufficient funds to enable four issues of this *Bulletin* to be produced and mailed to interested persons. This assistance is gratefully acknowledged. Our next edition will be included in the December issue of the *Legal Service Bulletin*. We thank the *LSB* editorial committee for its support. We encourage people working with Aboriginal organisations to contribute information for national circulation; if this is done the *Bulletin* may, in a small way, further the cause of Aboriginal people.

Neil Rees



JOHNNY CUMMINGS

One of today's major Indigenous legal issues is the Gillard government's proposal to hold a referendum about recognising Indigenous Australians in the Constitution. An expert panel (co-chaired by Patrick Dodson and Mark Leibler) has been established to advise the Commonwealth Government about options for changing the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples. This step would culminate in a national referendum if both houses of Parliament passed the proposed law. The panel has also been asked to advise about the level of support for constitutional change from Indigenous people and the broader community.

The ILB is an ideal place to debate at least three questions associated with this proposal. First, is constitutional recognition a worthwhile exercise, or is it just more words? Secondly, if it is a worthwhile exercise, what words of recognition should be included in the Australian Constitution? Thirdly, is constitutional recognition a discrete exercise, or is it a step towards other means of formal and practical reconciliation?

Some Australian states already recognise Indigenous people in their constitutions. In 2004, Victoria added a section to its constitution which acknowledges, amongst other things, that European settlement 'occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria'.⁶ The new section goes on to say Parliament recognises Victoria's Aboriginal people 'as the original custodians of the land on which the Colony of Victoria was established'.⁷ Importantly, the 2004 amendment also provides that these statements do not create any legal rights and do not affect the interpretation of any laws.⁸

Both Queensland and New South Wales ('NSW') amended their constitutions last year to recognise Indigenous Australians. The preamble to the *Constitution of Queensland 2001* (Qld) says that the people of Queensland 'honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share'.⁹ It goes on to say that Queenslanders 'pay tribute to their unique values, and their ancient and

Since 1981 significant Indigenous legal issues have been reported, debated and analysed in the pages of the *Indigenous Law Bulletin* ('ILB').¹

For instance, a short news piece in early 1982 (written by Garth Nettheim) informed readers of a now famous conference held at James Cook University in August 1981 to discuss land rights.² The speakers list included Mr Eddie Mabo and many others, such as Barbara Hocking and Greg McIntyre, who contributed to the long struggle that led to the High Court's landmark decision about native title a decade later.³ Later in 1982, the *Bulletin* reported that Eddie Mabo and four others had commenced action in the High Court claiming that their traditional land rights had survived colonisation in 1879.⁴ The report went on to indicate that the matter had come before Justice Deane in the High Court on 28 October 1982 in response to the state of Queensland's attempt to strike out the proceedings.⁵

enduring cultures, which deepen and enrich the life of our community'.¹⁰ A new section in the legislation also provides that these statements do not create any legal rights and do not affect the interpretation of any laws.¹¹

Section 2 of the NSW constitution 'acknowledges and honours the Aboriginal people as the State's first people and nations'.¹² It also recognises Aboriginal people 'as the traditional custodians and occupants of the land' who, amongst other things, 'have a spiritual, social, cultural and economic relationship with their traditional lands and waters'.¹³ It also provides that these statements do not create any legal rights and do not affect the interpretation of any laws.¹⁴

It would be interesting to hear whether Indigenous Australians living in these parts of the continent consider state constitutional recognition to be a valuable exercise, whether the differences in wording are important to them and whether the disclaimers in all three state constitutions about the legal effect of these provisions detract from their impact.

No doubt the expert panel will consider options for words of recognition that could be included in the Australian Constitution. ILB readers may wish to read some of the existing suggestions¹⁵— as well as examples from other countries¹⁶— in order to gain a sense of the language that appeal to some people. Those readers might also assist the expert panel with ideas on how to perform its task of advising the Commonwealth Government about the level of support for constitutional change. Is polling a cross-section of the Indigenous community a viable means of obtaining this information?

The ILB is already a rich source of information about other possible means of achieving formal and practical reconciliation. In 2008, Indigenous Law Centre Director Megan Davis suggested that 'the repeal of the races power and the inclusion of a non-discrimination and equality provision in the Constitution' would be significant.¹⁷ In 2010, she and Dylan Lino identified a range of additional constitutional reforms, such as dedicated parliamentary seats for Indigenous people and the entrenchment of a treaty, or the inclusion of a treaty-making power, in the Australian Constitution.¹⁸

The ILB might continue to be 'a source of useful practical information' and 'a very modest publication with some pretensions'¹⁹ during its 30th year if it becomes a focal point for debate about constitutional recognition. Next

year, some of the more adventurous suggestions by Megan Davis might occupy centre stage.

Professor Neil Rees is the Chairperson of the Victorian Law Reform Commission. He was foundation co-editor (with Dr Greg Lyons) of the Aboriginal Law Bulletin.

- 1 The ILB was published as the *Aboriginal Law Bulletin* until 1997.
- 2 'Queensland Land Rights Conference' (1982) 1(3) *Aboriginal Law Bulletin* 15.
- 3 *Mabo v Queensland* (No 2) [1992] HCA 23; (1992) 175 CLR 1.
- 4 'News: *Mabo v Queensland and the Commonwealth*' (1982) 1(6) *Aboriginal Law Bulletin* 5.
- 5 *Ibid.*
- 6 *Constitution Act 1975* (Vic) s 1A(1).
- 7 *Ibid* s 1A(2).
- 8 *Ibid* s 1A(3).
- 9 *Constitution of Queensland 2001* (Qld) Preamble.
- 10 *Ibid.*
- 11 *Ibid* s 3A.
- 12 *Constitution Act 1902* (NSW) s 2(1).
- 13 *Ibid* s 2(2).
- 14 *Ibid.*
- 15 See, eg, George Winterton, 'A New Constitutional Preamble' (1997) 8 *Public Law Review* 186, 190-192; Mark McKenna, 'The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights' (Parliament of Australia, Research Paper 12, 1996-97); Patrick Dodson, 'Until the Chains are Broken: the Fourth Annual Vincent Lingiari Memorial Lecture' (1999) 10 *Public Law Review* 248, 250-251; John Chesterman, 'Towards Indigenous Recognition in the Australian Constitution: Getting the Words Right' (2008) 7(4) *Indigenous Law Bulletin* 10.
- 16 See, eg, Winterton above n 15, 190.
- 17 Megan Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6, 8.
- 18 Megan Davis and Dylan Lino, 'Constitutional Reform and Indigenous Peoples' (2010) 7(19) *Indigenous Law Bulletin* 3.
- 19 Neil Rees, 'Editorial: Just More Words?' (1981) 1(1) *Aboriginal Law Bulletin* 1.