AT THE RISK OF RIGHTS:

DOES TRUE RECOGNITION REQUIRE SUBSTANTIVE REFORM?

by Alexander Ward

Prior to the 2010 Federal election, the Labor Government announced that it would hold a referendum in the current term of Parliament or at the next election to recognise Aboriginal and Torres Strait Islander peoples as the First Australians in the Commonwealth Constitution. This announcement was met with support from the Coalition, the Australian Greens and Independents.

The Government subsequently established an Expert Panel to develop options for constitutional reform. The terms of reference for the Expert Panel require it to:

> report to the Government on possible options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for each option by December 2011.[1]

Attention has now turned to the possible content of constitutional change. A variety of views have already emerged, highlighting the enormous challenge which lies ahead. The Expert Panel released a Discussion Paper on 19 May 2011, summarising a number of those ideas. There are two broad schools of thought regarding the proposal that might ultimately be taken to referendum.

The first school of thought is that we should not attempt reforms that go beyond bare recognition in a preamble to the Australian Constitution. This view was put forward very early by the Leader of the Opposition. Although he subsequently declared himself open to consider other options,[2] the Coalition's 2010 Election Policy commits the Coalition to 'hold a referendum to recognise Indigenous Australians in the preamble of the Constitution'. Proponents of this school of thought warn against over-reaching, suggesting that attempts at substantive reform will place the entire exercise at greater risk. This is a legitimate concern, given the history of referenda in this country, and should be carefully considered in this debate.

The second school of thought is that more substantive reform is required: that recognition in the preamble may be less meaningful if anachronistic and discriminatory provisions remain in the Constitution. This view has been explored in detail by the Law Council in its Discussion Paper on *Constitutional Recognition of Indigenous Australians*.[3] For proponents of this view, it is fundamental that recognition of Aboriginal and Torres Strait Islander peoples should be accompanied by removal of, or amendment to, provisions of our Constitution designed to discriminate and to enshrine principles of equality before the law, regardless of racial or cultural background.

This paper examines these opposing views in the context of Australia's traditionally conservative approach to constitutional reform.

PREAMBULAR RECOGNITION

There are strong arguments in favour of recognition of Aboriginal and Torres Strait Islander peoples in a new preamble to the Constitution.

Preambular recognition, whilst perhaps a symbolic gesture, could nonetheless amount to a powerful statement of reconciliation from which a greater sense of belonging and shared understanding could flow.

In this regard, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, has said:

> I am convinced that building positive relationships based on trust and mutual respect between Aboriginal and Torres Strait Islander peoples and the broader Australian community is critical to overcoming Indigenous disadvantage. I believe that constitutional reform is necessary to facilitate the building of these positive relationships.[4]

These sentiments echo those of the former Social Justice Commissioner, Dr Tom Calma, who wrote that:

> In my view, amending the Preamble to the Constitution would be of great symbolic importance, and go some way to redressing the historical exclusion of Indigenous peoples from Australia's foundational documents and national identity.[5]

Symbolic recognition, even if it has no direct or practical consequence, could have a meaningful impact on our national identity and how we respect and relate to Aboriginal and Torres Strait Islander Australians. It may also lay the foundation for more substantive change in the future.

The concept of preambular recognition is attractive to the government because it is less likely to have unforeseen legal consequences. However, the process for amending or inserting a new preamble is somewhat less clear. The Preamble to the Australian Constitution exists in the Imperial *Commonwealth of Australia Constitution Act 1900*, an Act of British Parliament which granted independent sovereign status to Australia by Royal Proclamation of Queen Victoria.[6] Arguably, the *Australia Acts* of 1986 have empowered the Australian Parliament to amend the Imperial Act without requesting passage of such an amendment through the British parliament. If that is the case, a further question is raised as to whether a referendum is necessary to amend the preamble, as there would not strictly need to be any amendment to the Constitution[7]; or whether there would need to be an affirmative vote by a majority in every state, in order to amend a proclamation for the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia.[8]

Alternatively, it might be proposed that a new preamble be inserted into the opening paragraphs of the Constitution itself, accompanied by disclaimers as to any legal or interpretative effect such recognition might have. Such an approach would most likely give legislators certainty about the potential impact of constitutional recognition. However, many might argue that such a disclaimer would substantially nullify the symbolic value of the gesture, calling into question the worth of the entire exercise. It is this uncertainty which has led some federal politicians and commentators in the media to warn of the dangers of over-reaching, for example, by calling for recognition in the body of the Constitution or recognition of substantive rights. Arguably, more substantive reforms could have far reaching legal consequences, potentially limiting or expanding Executive or Parliamentary prerogative in unforeseen ways.[9] These individuals also caution that such proposals will be rejected by Australian voters as too radical or difficult to understand.[10]

These are not trivial concerns. Just eight out of 44 referenda since Federation have been successful. None of the eight successful amendments have been achieved without popular, bipartisan support, which is widely regarded as an essential requirement for successful constitutional change.[11] As pointed out by the Australian Human Rights Commission, any political opposition to the proposal may result in a divisive 'no' campaign, threatening prospects of a successful 'yes' vote.[12]

Voyage 2010 (Detail)
Arone Meeks
Acrylic on canvas, glass and sand, 2590mm x 1220mm

THE 1999 REFERENDUM

It is worth remembering that in the 1999 referendum, the Australian people voted against the insertion of a preamble to recognise Aborigines and Torres Strait Islanders by a majority of 60.66 per cent.

A number of reasons are commonly cited for its defeat. Firstly, the preamble question was largely overshadowed by the divisive republic debate. Secondly, there was very little consultation around the proposed form of words developed ultimately by the former Prime Minister John Howard together with poet Les Murray. Numerous commentators criticised the form of words ultimately put forward, largely for the failure to recognise Indigenous custodianship of the land. Thirdly, there was a lack of bipartisanship in support of the proposed preamble. The then Labor Opposition put forward its own suggested text, supported by the Australian Greens and Democrats, then voted against the model put forward by the Coalition Government in Parliament. They subsequently supported the 'yes' campaign in the lead up to the referendum, in support of the principle of constitutional recognition, rather than the substance of the reform. In such an environment, the prospect of the referendum succeeding was always poor.

The potential impact of the preamble on the interpretation of the Constitution or other laws and policies was another point of uncertainty, despite the proposed inclusion of a new s 125A in the body of the constitution. Section 125A would have excluded the possibility of the proposed preamble being used to interpret any other provision of the Constitution or any other law of the Commonwealth.[13] The former Chief Justice of the High Court, Sir Harry Gibbs, stated publicly that the proposed preamble could have considerable legal force, a concern which was echoed by another former Chief Justice, the Hon Sir Anthony Mason AC.[14]

The question of what legal force preambular recognition might have is likely to become a contentious issue once again as a referendum draws near. This will potentially be a polarising influence among those who support constitutional recognition. Those who support only preambular recognition may argue strongly for the inclusion of a disclaimer provision in the body of the Constitution, to nullify its legal impact, as was proposed in 1999. There may be considerable support for this, given the Parliaments of Victoria, Queensland and New South Wales have all constitutionally recognised their Indigenous populations but have included disclaimers to prevent any substantive legal force.

RECOGNITION BY STATE PARLIAMENTS

Arguably, federal constitutional recognition will be made easier because some State parliaments have already amended their Constitutions to include preambular recognition of Indigenous Australians. That is, Australian voters may be more receptive to federal constitutional recognition because the idea has already been tested.

Victoria was the first State to amend its Constitution, entrenching recognition of 'Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established'.[15] Queensland then amended its Constitution in 2010, followed by New South Wales. In each case, the State parliaments limited the ambit of recognition by incorporating a provision precluding use of the preamble to interpret other laws or provisions of their respective Constitutions.

However, such constitutional reform at a State level does not necessarily indicate that a federal amendment would pass easily. The last time the question was put to a national referendum (in 1999), over 60 per cent of Australians voted against the amendment. In 2009, the Queensland Parliament inquired into constitutional recognition of Indigenous Australians in Queensland and found that:

> the majority of public submissions did not support the inclusion of a preamble into the Queensland Constitution and felt that a preamble was neither required nor necessary.[16]

Notwithstanding this finding by the Parliamentary Inquiry, the Queensland Government introduced and enacted an amendment to the Queensland *Constitution Act 2001*, which it was able to do without a referendum or special Parliamentary majority. This was despite the Parliamentary Inquiry's recommendation that '... a referendum is the only way to ensure any proposed preamble can claim to legitimately enjoy the support and approval of the people of Queensland.'[17]

If the consultations preceding constitutional recognition in Queensland reflect the national mood on this issue, there is a significant question around whether the double majority required by s 128 of the Australian Constitution, will be achieved, particularly given the 2013 deadline for a referendum.

THE CASE FOR SUBSTANTIVE REFORM

This raises the question of whether substantive reform, if properly explained, might rest more easily with a conservative public than symbolic recognition.

A key finding of the National Human Rights Consultation in 2009 was that, while most Australians believe human rights should be protected, they are unaware that many of their presumed rights have absolutely no constitutional or legislative foundation. The majority of Australians know more about the US Bill of Rights than the Australian Constitution and assume rights such as free speech, personal liberty, due process and equality before the law are similarly guaranteed in Australia.[18]

Those who do not support entrenchment of rights in our Constitution commonly refer to the existence of 'adequate safeguards', embedded in our democracy through the principles of responsible government, independent judiciary, independent media and 'core Australian values'. Inherent in this is an assumption that 'Australian values' are universal and have been consistent throughout the life of this nation.

However, there was a long period in our history when mainstream Australia considered removal of Aboriginal children from their families to be an acceptable practice. In 1901, most Australians could not have imagined Aboriginal peoples being able to vote in elections or exercise the rights of citizens. The White Australia Policy clearly did not envisage a place for Aboriginal people in the future of this country. Decades of entrenched discrimination and grave mistreatment or neglect of Aborigines and Torres Strait Islanders has created a shameful legacy of disadvantage.

The most compelling case in favour of substantive reform is the need to update the Constitution and remove outdated provisions, which no longer reflect who we are as a nation.

Most Australians are unaware that s 25 of our Constitution could prevent racial groups from voting in Federal elections, or that s 51(xxvi) allows and provides a mechanism for discrimination on the grounds of race. These provisions reflect prejudices that were common in Australian society at the turn of the twentieth Century. Indeed, prior to the 1967 referendum, the only reference to Aboriginal people and Torres Strait Islanders in our Constitution was cast in language of exclusion.[19]

Many Australians may also be surprised that the government could, by a simple Parliamentary majority, vote to remove the right to racial equality. Recent examples include the suspension of the *Racial Discrimination Act 1975* (Cth) under the *Northern Territory Emergency Response Act 2007* (Cth) and limitation of its operation under the *Native Title Amendment Act 1998* (Cth). Clearly, systemic racial discrimination remains possible in this country, despite the checks and balances of our parliamentary system.

Many people are also unaware that Australia is one of the only Commonwealth nations which does not constitutionally guarantee racial equality, distinguishing it from Canada, Fiji, India, Malaysia, New Zealand, South Africa and the United Kingdom. In the United States, the Fourteenth Amendment to the US Constitution guarantees equal protection under the law, regardless of race.[20]

Australia lags behind many other democracies, despite numerous requests by the UN Human Rights Council and Committee on the Elimination of Racial Discrimination to constitutionally guarantee racial equality.[21] Similar recommendations have emerged from the Council for Aboriginal Reconciliation and the Australian Human Rights Commission.[22]

Given Australia's racial and cultural diversity, it is likely that the voting public would embrace a guarantee of racial equality, if it were supported politically. If asked, 'Do you believe our Constitution should be amended to ensure Australians cannot be prevented from voting in general elections because of their racial or cultural background?', most Australians would probably answer 'yes'. Many would be incredulous that a provision to the contrary currently exists. The same answer would most likely be given if the question was, 'Do you believe the Parliament should be prevented from making laws discriminating against a particular racial group?'.

If a referendum succeeded, resulting in the insertion of a new preamble containing words of recognition, inclusion and reconciliation, it would be an unfortunate irony if provisions were to remain in the body of the Constitution that are entirely inimical to those sentiments. In many respects, it seems to be a logical extension of symbolic recognition that provisions designed to exclude Indigenous Australians from participating in civic life should be amended or removed.

CONCLUSION: CONDITIONS FOR SUCCESS

Whatever form the proposed constitutional reform takes, success in a referendum will depend on two key conditions.

First, passage of an amendment will rely on political support. Throughout Australia's history, no referendum has ever passed without bipartisan support. There is already political unity around the broad question of preambular recognition and Newspoll told us in February 2011 that

around 75 per cent of ordinary Australians surveyed supported some kind of constitutional recognition.[23] These are positive early signs. On the other hand, it remains unclear whether political consensus can be forged around the question of substantive reforms. Neither the Government nor the Opposition has confirmed whether they would support substantive amendments to the Constitution. Nor is there any indication that the public regard substantive rights as sufficiently important or desirable to warrant entrenchment in the Constitution. This does not mean substantive change should not be attempted, but significant work must be done to galvanise support for these more ambitious reforms.

Secondly, the question of timing is critical. At present, the government is committed to holding a referendum in the current Parliamentary term or at the next election. It may be disastrous if this issue is caught up in divisive electioneering politics. It will become as party-political as the carbon price or industrial relations. If the current state of federal politics is anything to go by, a referendum will be lost in the quagmire of a bitter election battle and will come as a complete surprise to most voters come election-day. The 1967 referendum took over 10 years to prepare for, and involved extensive grassroots campaigning and unanimous political support. These conditions must be recreated to ensure a successful referendum. This means moving the referendum beyond the electoral cycle to allow time for public education and participation in the national discussion over this critical issue for all Australians.

Alexander Ward is the 2011 President of the Law Council of Australia. This paper is based on a speech by Alexander Ward to the Law Council of Australia's Discussion Forum on 'Constitutional Change: Recognition or Substantive Rights?' on 22 July 2011.

1 Expert Panel on Constitutional Recognition of Indigenous Australians, Terms of Reference. See <http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Documents/Constitutional_recognition6.pdf>.

2 Patricia Karvelas, 'Coalition shifts on preamble stance', *The Australian*, 28 January 2011, 7.

3 Law Council of Australia, *Constitutional Recognition of Indigenous Australians* (2011) < http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2D64AD56-CCF1-979E-72D9-9D0714E6855B&siteName=lca>.

4 Mick Gooda, *Social Justice Report 2010*, Australian Human Rights Commission (2010) 33.

5 Tom Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2008) 66.

6 The Royal Proclamation reads: 'WHEREAS by an Act of Parliament passed in the sixty-third and sixty-fourth years of Our Reign intituled, "An Act to constitute the Commonwealth of Australia," it is enacted that it shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia:

> And whereas We are satisfied that the people of Western Australia have agreed thereto accordingly:
> We, therefore, by and with the advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do hereby declare that on and after the first day of January, One thousand nine hundred and one, the people of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.
> Given at Our Court at Balmoral, this seventeenth day of September, in the year of Our Lord One thousand nine hundred and in the sixty-fourth year of Our Reign.
> God Save The Queen!'

7 Law Council of Australia, *Constitutional Recognition of Indigenous Australians* Discussion Paper, April 2011.

8 As noted by the Hon Michael Kirby AC CMG, "Constitutional Law and Indigenous Australians: challenge for a parched continent", speech given at the Law Council of Australia *Discussion Forum on Constitutional Change: Recognition or Substantive Rights?*, 22 July 2011, Old Parliament House, Canberra.

9 See, eg, Dr David Bennett AC, QC, 'Rights in the Australian Constitution', Ch 3, *Proceedings* (Vol.21, 2009) the Samuel Griffith Society.

10 See, eg, Janet Albrechtsen, 'Radical approach hinders Aboriginal cause', The Australian, 2 February 2011; ABC News Online, *Abbott cautious on Indigenous constitutional recognition*, 24 July 2008.

11 See, eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010).

12 Australian Human Rights Commission, *Historical Lessons for a Successful Referendum* (2011) <http://www.humanrights.gov.au/constitution/factsheet/successful-referendum.html>.

13 Gareth Griffith, *Constitutional Monarchy or Republic: The November 1999 Referendum*, Briefing Paper 19/99, NSW Parliamentary Library Service (1999) 32.

14 Ibid.

15 *Constitution Act 1975* (Vic), s 1A(2).

16 Parliament of Queensland, *A preamble for the Constitution of Queensland 2001: Law, Justice and Safety Committee*, Report No 70 (September 2009).

17 Ibid, 17.

18 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), Appendix B: Colmar Brunton Community Research Report, 28.

19 Prior to 1967, the Commonwealth was prevented from making laws with respect to Aboriginal peoples and Torres Strait Islanders.

20 *Brown v Board of Education* 347 U.S. 483 (1954).

21 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/AUS/CO/14) (2005).

22 Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (1995); Calma, above n 5.

23 As noted in 'You Me Unity – Equality and Recognition, *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition',* Discussion Paper (May 2011) 8.