CONSTITUTIONAL REFORM AND ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE:

WHY DO WE WANT IT NOW?

by Megan Davis

It is no secret to the Indigenous peoples of this world that the relationship between Aboriginal people and the state waxes and wanes; often in accordance with the colour of the political party that governs at any one point in time. Australia is no different. The relationship between Aboriginal peoples and Torres Strait Islander peoples and the Australian state has been difficult and also, at times, progressive. In recent history Australia has made great strides in relation to recognising the devastating impact of historical and contemporary discriminatory laws and policies upon Aboriginal communities. This is why no words can do justice to the way many Aboriginal people felt when Prime Minister Kevin Rudd delivered an Apology to the Stolen Generations on behalf of Parliament.[1] It delivered a lot of hope and optimism to the Aboriginal and Torres Strait Islander community in Australia. However, there are many untold stories of other ways the Australian state controlled the lives of Aboriginal people including the devastating protection era legislation that placed Aboriginal people on missions and reserves and limited their freedoms.

The current process of consulting with Aboriginal and Torres Strait Islander people and mainstream Australia about recognising 'Indigenous Australians in the Constitution' is regarded by many as the next step following on from the Apology.[2] The current process was an unexpected, but widely celebrated development courtesy of the Greens[3] and independent Member for Lyne, the Honourable Rob Oakeshott, who formed an agreement with the Australian Labor Party after the last election.[4] This paper will consider two themes significant to the question of why Aboriginal people want constitutional reform now: the limitations of the Parliamentary system to represent Aboriginal interests and the ineffectiveness of the human rights framework in Australia, especially the international human rights law system, as inadequate in recognising and promoting Aboriginal peoples rights, in particular non-discrimination on the basis of race.

BACKGROUND TO THE CONSULTATIONS ON THE RECOGNITION OF INDIGENOUS AUSTRALIANS IN THE CONSTITUTION

In 2010 Prime Minister Julia Gillard announced that the federal Labor Government would establish an Expert Panel on Constitutional Recognition of Indigenous Australians.[5] Both the Labor party and the Coalition had made policy commitments to the 'recognition' of Indigenous peoples in the Constitution during the 2010 federal election. Following the hung Parliament in 2010, the Australian Labor Party committed, with the Greens and the Honourable Rob Oakeshott, Member for Lyne, to 'hold referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution'.

This political development follows decades of advocacy by Aboriginal leaders for some form of institutional recognition of the important place that Aboriginal people and Aboriginal culture has in Australia. Recognition is viewed as a sign of respect; a gesture of acknowledgement by the Australian state that Aboriginal peoples are the first peoples of this country.

Indeed constitutional recognition has been raised many times with the Australian government: at the federal government's 2020 Summit in Canberra, at the Barunga Festival in the Northern Territory in 1998[6] and 2008 and in the Kalkaringi statement in 1998[7], by the Council for Aboriginal Reconciliation in 2001 and by the Council for Aboriginal Reconciliation ('CAR'), Aboriginal Torres Strait Islander Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner in the Social Justice Package in 1993 that followed the High Court of Australia decision in *Mabo No 2*.[8] It has also been suggested by Australia's own public institutions including the 1988 Constitutional Commission.[9]

The primary role of the Expert Panel is to: lead a broad national consultation and community engagement program to seek the views of a wide spectrum of the

community, including from those who live in rural and regional areas; work closely with organisations such as the Australian Human Rights Commission, the National Congress of Australia's First Peoples and Reconciliation Australia who have existing expertise and engagement in relation to the issue; and raise awareness about the importance of Indigenous constitutional recognition, including by identifying and supporting ambassadors who will generate broad public awareness and discussion.

According to the Terms of Reference, in determining what form constitutional reform should take, the Expert Panel will have regard to: key issues raised by the community in relation to Indigenous constitutional recognition; the form of constitutional change and approach to a referendum likely to obtain widespread support; the implications of any proposed changes to the *Constitution*; and advice from constitutional law experts.

Multiparty support for this process is particularly important. Section 128 of the *Constitution* requires the amendment proposal to be passed by a majority of people in a majority of states, with an overall national majority. Only eight of 44 referenda have been successful in Australia's history and of those eight alternations, the common factor was bipartisanship.

In the current process, bipartisan support is limited to recognition in a new preamble to the Constitution and deletion of s 25, a section which contemplates states passing discriminatory electoral laws. Whether this minimalist position would attract Aboriginal support is questionable, given that many Aboriginal people believe any symbolic gesture should be accompanied by a substantive right. Furthermore, the Law Council of Australia roundtable on Constitution Recognition of Aboriginal and Torres Strait Islander peoples[10] raised concerns about having a preamble whose recital bares no relevance to the substantive body of the Constitution; usually a preamble would be referencing a more substantive provision in the text.

Moreover, discussion about a non-legal effect clause, similar to that in some state Constitutions, has been identified as problematic by many constitutional scholars, since it would be unlikely to have legal effect.[11]Indeed, one wonders whether it is constitutionally sound to bind the judiciary's hands by altering the preamble and then directing them not to take it into account when interpreting the *Constitution*. Certainly for Aboriginal people, any proposed non-legal effect clause to a preamble would be, in effect, non-recongition.

WHY CONSTITUTIONAL REFORM?

In a general sense, constitutional law is an entrenched law that is stronger than legislation, which can be repealed or amended easily whereas the *Constitution* can only be altered with the consent of the Australian people. Of course its meaning is interpreted by the High Court of Australia. This is one of the main reasons for Aboriginal advocacy for constitutional reform. The rationale driving this is that it removes consideration of Aboriginal issues and interpretation of the law that impacts Aboriginal communities and the content of Aboriginal rights out of the hands of Parliament and shifts it to the judiciary. For some, the Parliament is considered better equipped to understand and promote the interests and needs of the people who they represent and certainly Native Title is a persuasive example of how the common law has got it wrong. Yet it is an important challenge to a contemporary liberal democracy that a group would prefer judges, who are not democratically elected, to determine fundamental questions about Aboriginal people rather than the Parliament who are supposed to have a more nuanced idea about the lives of their constituents.

This lack of faith in Parliament also explains why the notion of designated parliamentary seats has been a commonly suggested option for alteration. The inclusion of an agreement making power is another suggestion. Based on the historically explicable s 105A of the *Constitution,* it would entrench a head of power for the federal Parliament to directly enter into an agreement with an Aboriginal community. This has been of particular interest to more remote communities, for example, one can envisage it working in more discrete communities such as Palm Island, Cherbourg or Weipa. However, an interesting ancillary question arises here out of whether Aboriginal people across Australia would take a utilitarian approach in not supporting an alteration that is likely to benefit only a few.

It is clear that Aboriginal people as two percent of twenty two million people, do not have any confidence that their views are adequately represented by the current system. Another benefit to constitutional entrenchment is that the federal Parliament cannot alter the law as easily as it amends or repeals legislation. This means that parliamentary deliberation and consultation, public discussion and Indigenous advocacy is slowed down. It means more considered media scrutiny.

However, there are limitations to the constitutional approach. Contestation requires judicial review and litigation. Given the complexity of litigation, costs and

time delays, any litigation will require careful planning and decision-making in addition to the stress of litigation. It also means that the High Court's interpretation may potentially limit the scope of a particular provision for all time. This has been raised as a concern by Aboriginal communities in the event that Aboriginal culture or Aboriginal traditions were recognised by the *Constitution*.

Another reason in favour of constitutional reform is the ineffectiveness of the international human rights law system, as well as the lack of human rights protection in Australia.[12] The Australian Human Rights Commission ('AHRC') refers to this as a 'protection gap' – the difference between the rhetoric of the state and *actual commitments* of the state in regards to human rights protection.[13] According to the AHRC, the protection gap exists because of the 'limited consideration of the government's human rights obligations in the settling of policy and delivery of programs as they affect Indigenous Australians'.[14] Additionally, the frequent ineffectiveness of the international human rights system – international law and the moral force and often binding legal force, in the case of Indigenous peoples – is not sufficient to secure legal protection or recognition.

In the Aboriginal political domain there are those who adopt an uncritical and ritualistic approach to human rights discourse. Yet it is a perfectly legitimate criticism of the international human rights system that it is limited in its ability to effect change domestically and one that is a very robust and lively debate in international human rights law. Raising this does not diminish the importance of the international system or deny that it has been transformative to the lives of citizens globally, especially, Indigenous peoples'. However, many become disillusioned when the state ignores its human rights obligations to Indigenous peoples; for example, as Australia did in relation to the suspension of the *Racial Discrimination Act 1975* (Cth) ('RDA') in 1999 over amendments to the *Native Title Act* and in 2006 in relation to the Northern Territory Intervention. Despite the evangelical fervour that the United Nations *Declaration on the Rights of Indigenous Peoples* ('UNDRIP') attracts, it does not have binding effect currently in Australia. The *Constitution* has stronger force than legislation and stronger force than a non-binding Declaration of the UN General Assembly.

This is why a conversation is critical about s 51 (xxvi), 'the race power'. If it is no longer appropriate for a modern liberal democracy such as Australia to contain a race power in its *Constitution*, then should it be repealed entirely and what should it be replaced with? Deleting the race power without inserting an alternative power for the federal Parliament to make laws for Aboriginal people would mean there is no head of power to pass special laws for Aboriginal people.

Moreover the common suggestion that 'benefit' should be inserted into the race power could have unintended consequences for Aboriginal people. For example, the High Court has adopted a historical, chronological approach to understanding this particular provision, and the race power would remain encumbered by its clearly discriminatory intent despite any potential amendments to its wording.[15] This is what occurred in the much derided, but correctly decided, decision in *Kartinyeri* as far as the normative content of the race power.[16] Another unintended consequence may be the role of the High Court in determining the content of 'benefit' to an Aboriginal community. If the High Court does not defer to the Parliament's determination of what benefit is, then the High Court will be invited to exercise a more subjective or value-laden notion of what 'benefit' is.

CONCLUSION

This paper has raised two important themes that are central to the current consultation process, the dying faith among Aboriginal people in the current Parliamentary system to represent Aboriginal people's interests and second, the current protection gap in human rights severely impacts upon Aboriginal people particularly when a 'race power' is contained in the *Constitution*. Indeed the ineffectiveness of the international human rights law system plays a major role in informing Aboriginal advocacy for constitutional reform because legislation such as the RDA and declarations of the General Assembly such as the UNDRIP are not entrenched.

Having said that, even with a statutory charter of rights or a bill of rights in the *Constitution*, the problem of racism and discrimination on a daily basis would not end for Aboriginal people. If anything can be reported about the current consultations, it is that most Aboriginal people want Australians to have a better idea of the culture, lives and history of Aboriginal Australians. There is a deep sense that Australians do not learn about or acknowledge Aboriginal history, although there is a resignation of the fact that many Australians know very little about Australian history generally. Thus, the importance of teaching history, including both the positive and negative aspects of Australia's past, has been a dominating factor in consultations to date. It is important to remember that a

substantive alteration to the Constitution is as important as the educative function that this consultation plays, including the final report of the Expert Panel which will become a historical document. Thus it is important to keep in mind the non-legal transformative power of constitutionalism including education.

The other significant limitation of constitutional rights is that they alone are not wholly capability-enabling. For example, South Africa's constitutionalising of socio-economic rights has had limited effect in reducing social, cultural and economic structural inequality so far.[17] Even so, while constitutionalism can be a constraint, as the path that is available is limited by the constitutional text and judicial interpretation, it can also be a galvanising and channelling force for the Aboriginal community as there are extra-legal benefits of constitutionalism including identity, protest, media coverage and access.

If the nation did vote 'NO' on a question of removing or amending the race power, at least we would have finally had an open and honest engagement regarding our nation's commitment to the rule of law, democracy and our desire to continue our historical and constitutional tradition of discrimination against people on the basis of their race. Alternatively, it may highlight the destructive consequences of limited civics education. To that extent, I do not think a failed referendum would be as destructive as many suggest. I would argue that it will draw out an express and frank (albeit uncomfortable) admission of those community leaders, citizens and politicians who believe it is appropriate to have the power to discriminate against people in a detrimental way on the basis of race. This may bring to the surface the simmering racism that some commentators suggest is thinly veiled beneath the surface of the Australian community. Perhaps it would force us to face both the positive and the negative aspects of ourselves and our history as a nation.

In the event that the nation voted 'YES', depending on the question, that would be an acceptance by all that Aboriginal peoples were the first peoples and that Aboriginal culture is *the inheritance of all Australians* and that is something worth protecting and recognising.

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1 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister) ('Apology to Australia's Indigenous Peoples').

2 Transcript of joint press conference, Melbourne 8 November 2010 Prime Minister, Minister for Indigenous Affairs, Attorney General.

3 Para 3 (f), Agreement between the Australian Greens and the Australian Labor Party, signed 1 September 2010: 'Hold referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution'.

4 Letter from Prime Minister Julia Gillard to Hon Rob Oakeshott, Member for Lyne, (7 September 2010): A referendum during the 43rd Parliament or at the next election on recognition of Indigenous Australians in the Constitution.

5 Above n 2.

6 'Barunga Statement' (1988) 2(33) *Aboriginal Law Bulletin* 16.

7 'Kalkaringi Statement' (1998) 4(15) *Indigenous Law Bulletin* 14.

8 Council for Aboriginal Reconciliation, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Towards Social Justice? An Issues Paper Commencing the Process of Consultation* (ATSIC, 1994); Native Title Social Justice Advisory Committee, Report of the Council for Aboriginal Reconciliation to Federal Parliament, *Walking Together: The First Steps*, 1994; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (Australian Government Publishing, 1996).

9 *Report of the Constitutional Commission* (1988).

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

11 See Anne Twomey, 'The Preamble and Indigenous Recognition Constitutional Reform Unit, Sydney Law School', September 2011, Report No 2, available at: <http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf>.

12 See generally, Mick Dodson and Lisa Strelein, 'Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24 *University of New South Wales Law Journal* 826; Michael Dodson, 'Social Justice for Indigenous peoples' (Speech delivered at 3rd David Unaipon Lecture, Darwin, October 1993); Patrick Dodson, 'Until the Chains are Broken' (Speech delivered at the Vincent Lingiari Lecture, Darwin, 1999).

13 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, 179.

14 Ibid.

15 The Hon Justice Robert French, 'The Race Power: A Constitutional Chimera', chapter 8 in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, Cambridge University Press) 180, 208.

16 *Kartinyeri v The Commonwealth* [1998] HCA 52.

17 Penelope Andrews, 'Imagine all the Women: Power, Gender and the Transformative Possibilities of the South African Constitution' in *Power, Gender and Social Change in Africa and the Diaspora* (forthcoming) 3; See also Penelope Andrews, 'Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law' (1998) 8 *Temple Political and Civil Rights Law Review* 425.