CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDERS: ARE WE READY AS A NATION?

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Can I begin by taking all of us back to the 9th of July 1900, when Queen Victoria gave her assent to the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict ('*Constitution*'), the founding document of our nation, causing Australia and its federated structure to come into being on the first of January 1901.

Being the legal and political foundation of our country, our *Constitution* is commendably simple, concise and well thought-out. Yet the document contains one conspicuous silence, a notable absence of any recognition or reference to the first people of this nation and the role that Aboriginal and Torres Strait Islander peoples have played in our history.

One hundred and nine years later, on 12 December 2010, the Federal Government appointed 22 indigenous and community leaders, constitutional experts and parliamentary members to an Expert Panel to decide the question 'has the time come for recognition of the Aboriginal and Torres Strait Islander peoples in our nation's Constitution?'

Today, I will speak on the process of change. I will speak of some aspects of the history of this country that many of us would prefer to ignore, and I will speak on the question that the people of this country will soon be required to answer.

Firstly, I would like to take a short moment to explain the journey that has led me to this point, and why this issue is so important to me personally. I was schooled at De La Salle College in Sydney. After graduating I started a mining engineering degree before joining the New South Wales Police Force. As was the case with many people of my generation who grew up in a sheltered middle class world in suburban Australia, Aboriginal and Torres Strait Islander peoples were somewhat of a mystery.

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My understanding of Aboriginal culture was limited and it wasn't until I was in my early twenties that I realised two good school friends of mine had Aboriginal heritage. Likewise, friends I played rugby with had Aboriginal heritage. It was something that was not discussed or talked about and is something I still regret today.

When I joined the Police Force I was initially stationed in the inner suburbs of Sydney around Redfern. For those of you who might not know, Redfern has had a very long history of tensions between Aboriginal residents, the police and authority.

The main area of focus in Redfern was an Aboriginal-run low cost housing precinct known as the Block. It gained prominence in Australia for all the wrong reasons, and well before the name became famous for the current popular reality television show. It was during this period that I first encountered racism against the Aboriginal peoples. It opened my eyes to what I believe is a great shame on our nation. It has stayed with me through my life.

I subsequently studied law and always promised myself that in my career I would become a person who would actively seek to make change rather than be a passenger. My career in the legal profession has spanned over 22 years, beginning as a barrister here in the great city of Townsville before moving to the Sunshine Coast in the early 1990's and starting my own practice and more recently in Brisbane.

During that time I have served as the President of the Queensland Law Society, the President of the Law Council of Australia and the President of the law Association for Asia and the Pacific. These positions I have been fortunate to hold, but importantly they have given me the opportunity to work towards encouraging change. One position that allowed me to make a real difference in the last six years was Chair of the Indigenous Legal Issues Committee of the Law Council of Australia.

In 2010, I was asked by the Prime Minister to be a part of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples. In all the capacities I have served in over the past 22 years, by far the role to which I was most honoured to be appointed and in which I was most proud to be involved was this Expert Panel. One of my fondest memories during my work on the panel was returning to Redfern and the Block to conduct the expert panel consultations.

When the Expert Panel first came together there was a great diversity of personalities, perspectives and professional backgrounds. We were tasked with

the responsibility of leading a broad national consultation and community engagement program to obtain the views of people from all corners of the community, including regional and rural areas. We were to work closely with relevant organisations, including the Australian Human Rights Commission, the National Congress of Australia's First Peoples, and Reconciliation Australia, and we were to instigate broad public awareness and discussion on the importance of Aboriginal and Torres Strait Islander constitutional recognition.

Following from this, we were to report to the Federal Government on the key issues raised in the course of our community engagement, the most appropriate form of and approach to constitutional recognition of Aboriginal and Torres Strait islanders and the potential implications of any proposed changes.

In January this year, we delivered the report to the Prime Minister. It recommended the following changes to the *Australian Constitution* ('*Constitution*'). Firstly, that s 25 and s 51(xxvi) of the *Constitution* be repealed. Secondly, that new sections 51A, 116A and 127A be inserted.

Before considering the proposed changes in more detail, I want to look at the Constitutional history of our country and Aboriginal and Torres Strait Islander peoples, and the circumstances necessitating this significant constitutional reform.

I do not intend to descend into moralising over past wrongs of a time socially, culturally and ideologically disparate from today, nor to reduce the complexity of our multi-coloured history into simplistic dichotomies of good and bad. Nevertheless, the modern-day consequences of a broken and gravely unjust past must be acknowledged and practical and achievable steps towards reconciliation defined and achieved.

In 1788, Britain took formal possession of Australia with the arrival of the first fleet. The British acted under the precept in European law that Australia was terra nullius, or belonging to no-one. It was not that the first fleet were unaware of the presence of indigenous people on Australian land, but that without evidence of permanent infrastructure, industry or land cultivation they did not consider the presence of the indigenous people sufficient to constitute sovereign ownership.

Upon arrival, the colonial government began to grant, lease and sell land to white settlers. The eventual expansion of agricultural tenements over vast areas of land and the promulgation of European livestock prevented Aboriginal communities from continuing in their traditional mode of existence in total kinship with the natural environment.

The Aboriginal and Torres Strait Islander peoples were taken for nomads and driven off their traditional lands at the will of the settlers and, inevitably, violence ensued. Violent acts of resistance by Aboriginal peoples arose all along the east coast as they attempted to defend their land and prevent the destruction of their social, religious, legal and communal systems.

The arrival of Governor King in 1800 saw a decree that settlers could fire on any native they saw. In 1834, John Dunmore Lang wrote:

> There is black blood, at this moment, on the hands of individuals of good repute in the colony of New South Wales, of which all the waters of New Holland would be insufficient to wash out the deep and indelible stains![1]

A number of lives were lost due to violent conflict in this period. Bishop John Bede Polding, who arrived in the colony in 1835, gave the following account of the settlers' approach to the indigenous:

> I have myself heard a man, educated, and a large proprietor of sheep and cattle, maintain that there was no more harm in shooting a native, than in shooting a wild dog. I have heard it maintained by others that it is the course of providence, that blacks should disappear before the white, and the sooner the process was carried out the better, for all parties. I fear such opinions prevail to a great extent.[2]

Forced relocation and violent massacres were not the only challenge to the Aboriginal and Torres Strait Islander peoples in the century following colonisation. Without immunity against common European diseases, more than half of the Aboriginal population in Sydney died of smallpox in 1789. Further epidemics of chickenpox, influenza and measles saw thousands of lives lost and, at times, entire indigenous communities decimated.

In the next hundred years, the cumulative effect of the dispossession of their traditional and fertile lands, the loss of life through disease, malnutrition and violent conflicts, and the introduction of alcohol and foreign custom by the settlers, tore apart the traditional social fabric and family structures of the Aboriginal and Torres Strait Islander peoples. Most Aboriginal people decided to live on the fringes of towns and pastoral properties or were moved into chari-

1 John Dunmore Lang, *An historical and statistical account of New South Wales: both as a penal settlement and as a British colony* (A J Valpy, 2nd ed, 1837) 37.

2 Osmund Thorpe, *First Catholic Mission to the Australian Aborigines* (Pellegrini and Co, 1950).

table reserves, missions or public housing.

In the final decade of the nineteenth century, government representatives from each of the State colonies were brought together to form a federation and draft a constitution for the new nation. The final draft was put to the people of Australia in a referendum in each of the six states and finally ratified by all states on 31 July 1900.

Two men prominent in its drafting, John Quick and Robert Garran, described the final document as the 'outcome of exhaustive debates, heated controversies and careful compromises' and as 'representing the aspirations of the Australian people in the direction of nationhood so far as is consistent and in harmony with the solidarity of the Empire'.[3]

Aboriginal and Torres Strait Islander peoples were excluded from any contribution or consideration in the framing of the Constitution.

There were two references to Aboriginal and Torres Strait Islander peoples in the *Constitution* at Federation, firstly under s 51(xxvi), the race power, which allowed laws to be made with respect to any race other than with respect to people of 'the aboriginal race in any State'.

Secondly, s 127 provided that 'aboriginal natives shall not be counted' in determining the population of the Commonwealth or another State.

Effectively, the *Constitution* at the time of Federation was silent as to Aboriginal and Torres Strait Islander peoples save that they were to be excluded from the census and from the lawmaking powers of the Commonwealth.

They were further excluded from voting, pensions, particular government jobs, joining the armed forces and maternity allowance. The White Australia Policy was a system of exclusion and control. It legislated for the dominant ideological thought of that time, that there was no such thing as racial equality.

In the words of the Prime Minister at the time, Edmund Barton:

These races are, in comparison with white races … unequal and inferior. … Nothing in this world can put these two races upon an equality. Nothing we can do by cultivation, by refinement, or by anything else will make some races equal to others.[4]

Alfred Deakin, the Attorney General of that first Federal Government, spoke of

[3] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1910) vii.

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 1901, 233 (Edmund Barton).

the desired outcome of the policy as:

> The prohibition of all alien coloured immigration, and more, it means at the earliest time, by reasonable and just means, the deportation or reduction of the number of aliens now in our midst. The two things go hand in hand, and are the necessary complement of a single policy – the policy of securing a 'white Australia'. [5]

As for the indigenous Australians residing in the country at that time, the public thought was no less racist or xenophobic. Deakin declared in relation to the Aboriginal peoples that:

> Little more than a hundred years ago Australia was a Dark Continent in every sense of the term. There was not a white man within its borders. In another century the probability is that Australia will be a White Continent with not a black or even dark skin amongst its inhabitants. The aboriginal race has died out in the South and is dying fast in the North and West even where most gently treated. Other races are to be excluded by legislation if they are tinted to any degree.[6]

Following Federation, and under the ill-conceived understanding that Aboriginal people would eventually dissipate and disappear, each of the mainland States enacted series of legislation known as the 'Aborigines Acts'.

These Acts could require Aboriginal people to live on reserves run by governments or missionaries in which all aspects of their lives were minutely regulated by an extensive regime of subordinate legislation. These by-laws denied Aboriginal people entry to swimming pools, theatres, hospitals, and other areas of public use and enjoyment. There were further restrictions controlling marriage, alcohol, and curfews. Aboriginal people in the reserves were also constrained in their personal interaction between non-Aboriginal people and Aboriginal people outside of the reserve.

Those Aboriginal people living in more rural areas outside of the catchment of the reserves were required to comply with 'protectionist' legislation. Distinctions were made between so-called 'full-bloods', 'half-castes' and even 'quarter-castes'. Many States proceeded to introduce policies in an attempt to assimilate those Aboriginal people who were less than full Aboriginal de-

5 Commonwealth, *Parliamentary Debates,* House of Representatives, 12 September 1901, 4805–4806 (Alfred Deakin).

6 Ibid 4812.

scendants back into European culture and encourage the adoption of European social values.

Protectionist legislation further saw the involuntary removal of children from their parents under the auspices of Protectionist Boards, or through the Chief Protector, who in some states was granted legal guardianship over all Aboriginal children, including those with parents.

The terra nullius fiction, the constitutional silence, the White Australia policy, and the draconian assimilation and protectionist policies all propagated and celebrated by Australians during the early part of the 20th century, unilaterally and unequivocally declared to Aboriginal and Torres Strait Islander peoples that they did not legally exist in the place they called home; that they were without fundamental legal rights in the only country they had ever known. It broadcast that there was a distinct and unassailable divide between the 'whites' and the 'blacks' and that the thousands of years of traditions, stories, and customs that underpinned their pre-colonial existence were to be forcibly abandoned.

The words of Deane and Gaudron JJ were apt in their joint judgment in *Mabo v Queensland (No 2)* that the dispossession, degradation and devastation of the Aboriginal peoples had left a 'national legacy of unutterable shame'.[7] I do not intend to dwell upon the injustices of the past, or urge shame or guilt upon ourselves or our forefathers. It is a given that as a nation we have failed. I think the best way forward is found in the oft-quoted words of Senator Herron from the 1996 Joe and Enid Lyons Memorial Lecture:

> Certainly, as a nation, we have a responsibility to be frank and forthright about those aspects of our history that are not always palatable, and importantly to learn from the mistakes that have been made. However true reconciliation between Indigenous and non-Indigenous Australians is not about assigning guilt for the actions of our forebears. Rather it is about achieving an appropriate balance between acknowledging and respecting the lingering pain from past injustices and acting decisively to ensure full equality of opportunity in the future.[8]

7 (1992) 175 CLR 1, 104 ('*Mabo (No 2)*').

8 John Herron, 'Lecture by Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs Commonwealth of Australia' (Speech delivery at the Joe and Dame Enid Lyons Memorial Lecture, Australian National University, Canberra, 15 November 1996).

We should be proud of where we have come as a nation in the past 50 years in overcoming aspects of historical discrimination against Aboriginal and Torres Strait Islander peoples. The 1967 referendum was the most overwhelmingly successful referendum in our short history, and saw 90.8% of the population voting in favour of the repeal of the overtly discriminatory s 127 of the *Constitution* and the reference to 'the people of Aboriginal race in any state' in s 51(xxvi).

Since this time, the slow but steady progression toward the recognition of Aboriginal and Torres Strait Islander peoples as full and equal citizens and the first Australians has been evidenced in the passing of key legislation such as the *Racial Discrimination Act 1975* (Cth), the *Native Title Act 1993* (Cth), and other laws which address the denial of rights and entitlements to Aboriginal and Torres Strait Islander peoples.

Particular credit should go to people such as Les Malezar, Megan Davis, Mick Dodson, Lowitja O'Donohue and Tom Calma whose work has led to the endorsement of the United Nations Declaration on the Rights of the Indigenous Peoples by the Australian Government.

The greatest milestone however has been the decision of *Mabo (No 2)* in 1992, which overturned the terra nullius legal fiction and for the first time recognised the laws and customs of the Aboriginal and Torres Strait Islander peoples, as well as their right and title to their traditional lands.

Since this time the tide of public support and community pressure has been swelling to take strong affirmative action on Constitutional reform. In March 1995 following *Mabo (No 2)*, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Council for Aboriginal Reconciliation, and the Aboriginal and Torres Strait Islander Social Justice Commissioner each provided a report on the required social justice reforms in the area. Each report stressed the need for constitutional reform.

In considering what shape this Constitutional reform should take, the Expert Panel decided upon and was guided by four key principals, namely that any changes to the Constitution must contribute to a more unified and reconciled nation; be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples; be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and be technically and legally sound.

In the public consultations that the Expert Panel conducted around the country many people were surprised to discover that our Constitution provides a head

of power for the Commonwealth to discriminate on the basis of race under both s 51(xxvi) and s 25. Along with the removal of these two sections, it was advocated that three new sections be inserted.

1. *Section 116A: Non-discrimination*

A racial non-discrimination or equality provision providing that: the Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin. Subsection (2) of the section provides that this 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.

2. *Section 51A: Recognition of Aboriginal and Torres Strait Islander peoples*

Recognising that the continent and its islands now known as Australia were first occupied by the Aboriginal and Torres Strait Islander peoples; acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples; acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples; the Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

3. *Section 127: Recognition of Languages*

The national language of the Commonwealth of Australia is English. The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

4. *Section 116A: Racial non-discrimination*

This represents a constitutional entrenchment of the principle of racial non-discrimination which has been legislated in every jurisdiction in Australia. It would ensure the constancy and integrity of racial non-discrimination legislation and would further qualify the territories power in the *Constitution* s 12, among others.

5. *Section 51A: Statement of recognition*

This provides for the recognition of the valued place Aboriginal and Torres Strait Islander peoples hold within our national identity. Relevantly, in re-

sponse to the Constitutional changes effected at the 1967 referendum, Noel Pearson gave the following comment:

> The original Constitution of 1901 established a negative citizenship of the country's original peoples. The reforms undertaken in 1967... can be viewed as providing a neutral citizenship for the original Australians. What is still needed is a positive recognition of our status as the country's Indigenous peoples, and yet sharing a common citizenship with all other Australians.[9]

The inclusion of this positive statement of recognition within the new s 51A head of power gives the statement of recognition functional significance within the Constitution. It recognises the Aboriginal and Torres Strait Islander peoples as the first peoples of our nation as well as the spiritual, social, cultural and economic relationship that they possess with our lands and waters. Finally, and in conjunction with section 127A, the provision recognises the unique cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

The Expert Panel is confident that the abolishment of ss 25 and 51(xxvi) and the insertion of ss 51A, 116A and 127A will go far in contributing to a more unified and reconciled nation. Our consultations have seen that a majority of the indigenous community groups and leaders believe the changes will benefit Aboriginal and Torres Strait Islander peoples.

I am frequently asked what my personal thoughts are on the possibility of the referendum succeeding. It is not easy to change our *Constitution*, and for good reason. The proposal must be approved by a majority of electors in a majority of States and by a majority of electors across Australia. Only 8 of the 44 referendums since our federation have been successful. There is no question that we will need bi-partisan and, in our modern democracy, multi-party political support. The question must be separated from partisan agendas.

Professor George Williams gives four other requirements for a referendum to succeed: popular ownership, popular education, a sound and sensible proposal, and a modern referendum process.

There has not been a referendum since 1999, and the technological advances leading to the prevalence of social media and online communication and networking since will create huge opportunities for public education and garnering widespread support. It will also create potential avenues for opposition and

[9] Noel Pearson, 'Aboriginal referendum a test of national maturity' *The Australian (Online)*, 26 January 2011 <http://www.theaustralian.com.au/opinion/aboriginal-referendum-a-test-of-national-maturity/story-e6frg6zo-1225994516918>.

anonymous criticism.

It is critical that the right information and the true merit of this proposal is properly and extensively disseminated through the social media space. This will greatly assist in launching a comprehensive and cost-effective popular education campaign.

The interactivity of the web and the now near ubiquitous use of personal facebook, myspace, or tumblr profiles as well as blogging, podcasting, you-tube and twitter will enable the public to take popular ownership of the merits of the question.

As to the third of the requirements for a successful referendum, I personally believe that the proposal is not just sound and sensible, but an entirely necessary step on the path to becoming a reconciled and unified nation and to addressing the loss of identity and disadvantage that has come as a consequence of our dark colonial history.

Constitutional recognition of Aboriginal and Torres Strait Islander peoples is not merely symbolic.

The co-chair of the Expert Panel, Pat Dodson puts it well:

> If we have our history with courage, and if we pledge the integrity of our improving relationship firmly within our *Constitution*, then a real dialogue between us can proceed secure in the knowledge of our shared commitment to the nation and its future. Not incidentally, we can also address the task of ensuring that education, economic and health outcomes for Indigenous people reach parity with all other Australians.[10]

When the report of the Expert Panel on Recognising Aboriginal and Torres Strait Islander peoples in the *Constitution* was handed to the Prime Minister, despite the ceremony of the moment, we were aware that there remain many hurdles to overcome before constitutional reform can be realised.

The mood in Canberra is positive surrounding constitutional reform and major and minor parties alike have pledged their full support. However the million dollar question is what form that support will take. Ultimately multi-party political support is essential, but will not be enough.

The Federal government has not yet responded to the Expert Panels' report.

[10] Patrick Dodson, 'Can Australia Afford not to be Reconciled?' (Speech delivered at the National Indigenous Policy and Dialogue Conference, University of New South Wales, Sydney, 19 November 2010).

In the current toxic political environment, the timing of the actual referendum will be crucial.

When the time comes for the people to consider the question, there can be no distractions or partisan point-scoring. This is a crucial issue for Australia as a nation and for Australia as a global citizen.

A small group from the Expert Panel including myself are working with Reconciliation Australia to ensure there remains a strong push for this change and that the process is carried out in a way which best ensures success. We need to get it right.

If the referendum is unsuccessful and Australians decide not to recognise Aboriginal and Torres Strait Islander peoples in our *Constitution*, it could seriously harm our national unity and set back the reconciliation agenda for decades. We can't afford to lose.

If you want to be involved, and I urge you all to become involved, visit the website youmeunity.org.au and become part of the national debate.

Our *Constitution* is what defines our national identity. It is the legal foundation of our governmental and parliamentary structures. It is the last point of referral for those in need of justice. It has been described as our Nation's Birth Certificate and as 'defining our legal universe'.

Hopefully, we will soon be asked the question whether our First People should be recognised in this document. The philosophical question we must ask ourselves is whether we are ready to reframe our relationship with Aboriginal and Torres Strait Islander people as one of mutual respect, dignity, acknowledgment of the past, and hope for a reconciled future.

My paper proffers the question: 'Are we ready as a nation?' When the time comes, and the nation, you and I have to answer this question, I hope you join with me by saying 'yes'.

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