

## INDIGENOUS AUSTRALIANS AND THE PREAMBLE: TOWARDS A MORE INCLUSIVE CONSTITUTION OR ENTRENCHING MARGINALISATION?

MEGAN DAVIS\* AND ZRINKA LEMEZINA\*\*

### I INTRODUCTION

Indigenous leaders have sought constitutional recognition of their rights and legal legitimacy for decades. Political statements such as the Barunga<sup>1</sup> and Kalkaringi<sup>2</sup> statements reflect the importance of achieving recognition for Indigenous culture. Indigenous advocacy for the constitutional recognition of Indigenous rights crystallised into a framework of ‘Unfinished Business’ during the 1990s with the federal statutory body, the Council for Aboriginal Reconciliation (‘CAR’),<sup>3</sup> recommending constitutional recognition as fundamental to achieving reconciliation between Indigenous and non-Indigenous Australians.<sup>4</sup>

However, this advocacy waned during the Coalition-era of federal government (1996–2007) with the abolition of CAR and the Coalition’s explicit hostility to Indigenous rights that was inextricably linked to the reconciliation process. The momentum for constitutional reform stalled amidst the federal government’s preferred dichotomising of reconciliation into practical reconciliation (economic development, home ownership) versus symbolic

---

\* Director, Indigenous Law Centre, University of New South Wales; Senior Lecturer, Faculty of Law, University of New South Wales; independent expert of the United Nations Permanent Forum on Indigenous Issues.

\*\* Editor and Research Associate, *Indigenous Law Bulletin*, Indigenous Law Centre, Faculty of Law, University of New South Wales.

1 ‘Barunga Statement’ (1988) 2(33) *Aboriginal Law Bulletin* 16.

2 ‘Kalkaringi Statement’ (1998) 4(15) *Indigenous Law Bulletin* 14.

3 *Council for Aboriginal Reconciliation Act 1991* (Cth).

4 Aboriginal and Torres Strait Islander Commission (‘ATSIC’), *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995); 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); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice, Vol 1* (ATSIC, 1995); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (Australian Human Rights Commission, 2009) 154, 15 (‘*Social Justice Report*’).

reconciliation (constitutional reform, Indigenous rights, treaty). Since then, constitutional recognition of Indigenous peoples has re-emerged in the Australian civic conversation. In February 2008, following the National Apology to the Stolen Generations, Prime Minister Rudd<sup>5</sup> proposed the creation of a joint policy commission to work on the task of ‘constitutional recognition of the first Australians, consistent with the longstanding platform commitments of my party and the pre-election position of the opposition’.<sup>6</sup> Just five months later, the newly elected Prime Minister addressed a community cabinet meeting in Darwin, promising to ‘give attention to detailed, sensitive consultation with Indigenous communities about the most appropriate form and timing of constitutional recognition’.<sup>7</sup>

While Prime Minister Rudd stressed that the details of recognition are yet to be settled, it has been widely assumed in public discussion that ‘constitutional recognition’ of Indigenous Australians will come in the form of a new preamble. Former leader of the Opposition, Dr Brendan Nelson, for instance, responded to Prime Minister Rudd’s comments in Darwin with an offer of bipartisan support for an amended preamble to recognise ‘the place of Indigenous people in Australian life’, stating that he had already promised such support in private conversations with the Prime Minister earlier in the year.<sup>8</sup> The automatic assumption that the preamble is the most appropriate vehicle for ‘constitutional recognition’ is consistent with the pre-election policy platforms of both the Rudd Government and the Coalition. Yet recognition of Indigenous peoples in the preamble is but a small part of the comprehensive agenda of constitutional reform conceived by Indigenous peoples.

This paper examines this most recent development in the context of the decades-long trajectory of Indigenous Australia’s advocacy for constitutional reform. The foreground to this article is that while Indigenous peoples want recognition in the preamble this should not be a substitute for, or at the expense of, substantive and concrete recognition in the operative text of the *Constitution*. Part II will explain the importance of the renewed emphasis on constitutional recognition for Indigenous communities and the state. Part III discusses the historical significance of recognising Indigenous peoples in the *Constitution*. Part IV reports on recent developments in recognising Indigenous peoples in the preamble to state constitutions with reference to Victoria, Queensland, Western Australia and NSW. Part V examines the civic conversation about constitutional reform since the referenda of 1988 and 1999. Part VI considers the legal status of a preamble. Finally, Part VII discusses the well rehearsed difficulties and concomitant benefits of advancing constitutional reform to a civics–poor polity.

---

<sup>5</sup> Prime Minister at the time of writing.

<sup>6</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister) (‘Apology to Australia’s Indigenous Peoples’).

<sup>7</sup> Natasha Robinson, ‘Rudd Revives Push to Recognise Indigenous Rights in Constitution’, *The Australian* (Sydney), 23 July 2008.

<sup>8</sup> *Ibid.*

## II RENEWED EMPHASIS ON CONSTITUTIONAL REFORM

Indigenous advocacy for constitutional reform has recommended a raft of measures designed to give effect to and promote respect for Indigenous rights, including recognition of Aboriginal and Torres Strait Islander peoples in the preamble to the *Constitution*,<sup>9</sup> substantive constitutional recognition,<sup>10</sup> a treaty agreement<sup>11</sup> and designated Parliamentary seats.<sup>12</sup> These measures are suggested in order to arrest the serious, debilitating social and economic problems in Aboriginal communities, which Indigenous peoples argue are a direct consequence of the lack of settlement between the state and Indigenous peoples.<sup>13</sup> The failure to address the question of sovereignty and the failure to recognise, in any form, the prior ownership and continuing survival of Aboriginal and Torres Strait Islander culture, only fuels that dislocation.<sup>14</sup> Further, the lack of recognition reinforces the challenge of legitimacy within a utilitarian polity for Indigenous claims, meaning Indigenous affairs are always subject to the inconstancy of the political party of the day.<sup>15</sup>

For Indigenous peoples, constitutional protection provides a counterpoint to the utilitarian ethic so prevalent in contemporary market based liberal states.<sup>16</sup> In Australia this manifests in a political culture where public policy has an eye to the greatest good for the greatest number while dismissing cultural claims of minorities as 'special interest'.<sup>17</sup> This is because minority interests are thought to

9 Garth Nettheim, 'Reconciliation and the Constitution' (1999) 22 *University of New South Wales Law Journal* 625.

10 Hannah McGlade (ed), *Going Forward: Social Justice for the First Australians*; see also above n 4.

11 See generally Australian Institute of Aboriginal and Torres Strait Islander Studies, *Treaty: Let's Get It Right* (Aboriginal Studies Press, 2003); Sean Brennan et al, *Treaty* (Federation Press, 2005) 8.

12 Alexander Reilly, 'Dedicated Seats in the Federal Parliament for Indigenous Australians: The Theoretical Case and Its Practical Possibility' (2001) 2(1) *Balayi: Culture, Law and Colonialism* 85; John Chesterman, 'Chosen by the People? How Federal Parliamentary Seats Might Be Reserved for Indigenous Australians without Changing the Constitution' (2006) 34 *Federal Law Review* 261.

13 Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994); 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; Mick Dodson, 'Unfinished Business: A Shadow Across Our Relationships' in McGlade (ed), above n 10, 5.

14 See generally Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307; Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403.

15 See generally Megan Davis, 'Chained to the Past: The Psychological Terra Nullius of Australia's Public Institutions' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 175; Barbara Hocking (ed), *Unfinished Constitutional Business: Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, 2005).

16 John Plamenatz, *Democracy and Illusion: An Examination of Certain Aspects of Modern Democratic Theory* (Longman, 2<sup>nd</sup> ed, 1978) 11.

17 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 10; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press, 2002) 39; Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114 *Daedalus* 147.

potentially diminish opportunities or divert resources away from measures that should be aimed at increasing the satisfaction of the majority. It is no small task for two per cent of Australia's population to convince Parliament of the utility of passing legislative measures and adopting policies that benefit Aboriginal people alone. Even when successful in this endeavour, as in the *Native Title Act 1993* (Cth) for example, parliamentary sovereignty means the legislative agenda of one political party can be easily amended or abolished by the next, and with three-year political terms in Australia, Aboriginal rights are insecure and uncertain. Parliament is not seen as an effective safeguard of Indigenous peoples' interests. By contrast, entrenchment in a written constitution would mean Indigenous rights were given force through the rule of law, an independent judiciary and review of legislation.<sup>18</sup> For these reasons, constitutional reform remains the central pursuit of the Indigenous rights agenda. In order to ensure sustained attention on the chronic disadvantage that is suffered in Aboriginal communities across Australia, Aboriginal issues need to be taken out of the quotidian political arena.

It was during the early 1990s that a formal statutory process for addressing 'Unfinished Business' began in earnest. The process undertaken by CAR led to the development of a roadmap toward addressing 'Unfinished Business' between Indigenous peoples and the state.<sup>19</sup> A significant aspect of that plan included constitutional reform, specifically introducing a non-discrimination provision, deletion of section 25 and recognition of Aboriginal and Torres Strait Islander peoples in the preamble.<sup>20</sup> In its final recommendations CAR urged the Commonwealth Parliament to prepare legislation for a referendum to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the *Constitution*, to remove section 25 of the *Constitution* and to introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.<sup>21</sup>

However with the election of a new Coalition federal government in the late 1990s the reconciliation movement stalled and the aspirations for constitutional reform were suspended.<sup>22</sup> This federal Parliament led by Prime Minister John Howard eschewed the Indigenous rights agenda in favour of what was termed

---

18 Martha C Nussbaum, 'Constitutions and Capabilities: "Perception" against Lofty Formalism' (2007) 121(4) *Harvard Law Review* 4, 56.

19 Council for Aboriginal Reconciliation Act 1991 (Cth).

20 Council for Aboriginal Reconciliation, *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and Commonwealth Parliament* (2000) ch 10 (Recommendations).

21 Ibid.

22 See generally John Howard, 'Politics and Patriotism: A Reflection on the National Identity Debate' (Speech delivered at the Grand Hyatt Hotel, Melbourne, 13 December 1995); John Howard, 'The Liberal Tradition: The Beliefs and Values which Guide the Federal Government' (Speech delivered at the Sir Robert Menzies Lecture, Melbourne, 18 November 1996); Sean Brennan, 'Reconciliation in Australia: The Relationship between Indigenous Peoples and the Wider Community' (2004) 11 *Brown Journal of World Affairs* 149; Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Ashgate, 2008) 109.

‘practical reconciliation’.<sup>23</sup> This distinguished the Coalition’s approach to Indigenous affairs from that of its predecessor government led by Prime Minister Paul Keating who had taken a progressive stance on Indigenous rights issues evidenced by the Redfern Speech and the formal statutory reconciliation process.<sup>24</sup>

The practical reconciliation approach sought to elevate ‘practical’ measures such as home ownership, education policy, housing policy or health policy above ‘symbolic’ (and often disparaged) measures such as constitutional recognition, reconciliation or Indigenous rights more broadly. This binary approach was fashioned as a way to diminish the significance of symbolic measures because their goal was more discursive and their outcomes not as tangible as more practical measures that would arguably lead to better service delivery. Many Aboriginal people objected to what they perceived as a false dichotomy between rights and practical measures. Indeed many viewed this new division as distorted because the practical measures that were being championed by the Howard Government were regarded as citizenship entitlements.<sup>25</sup> For this reason, some Indigenous leaders objected on the grounds that this has no place in the reconciliation process because the central objective of reconciliation should be substantive and concrete structural changes that all fall under the category of symbolic reconciliation, for example a treaty agreement.<sup>26</sup> Despite these objections the division between the practical and the symbolic has had considerable traction and for the remainder of the Howard era discussions about symbolic reconciliation measures were infrequent.

### A Reform Back on the Agenda

Despite this and surprisingly, three days prior to the federal election in 2007, Prime Minister Howard, with support from Aboriginal leader Noel Pearson, announced his renewed support for recognition of Aboriginal and Torres Strait Islander peoples in the preamble:<sup>27</sup>

I announce that, if re-elected, I will put to the Australian people within eighteen months a referendum to formally recognise Indigenous Australians in our *Constitution* – their history as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, indivisible nation.

23 John Howard, ‘Practical Reconciliation’ in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation* (Bookman, 2000) 89; see generally Jon Altman and Boyd Hunter, ‘Monitoring “Practical” Reconciliation: Evidence from the Reconciliation Decade, 1991–2001’ (Discussion Paper No 254, Centre for Aboriginal Economic Policy Research, 2003) v; William Sanders, ‘Journey without End: Reconciliation between Australia’s Indigenous and Settler Peoples’ (Discussion Paper No 237, Centre for Aboriginal Economic Policy Research, 2002).

24 Paul Keating, ‘Redfern Park Speech’ (2001) 5(11) *Indigenous Law Bulletin* 9; *Council for Aboriginal Reconciliation Act 1991* (Cth).

25 Short, above n 22, 144.

26 Ibid 145.

27 ABC Television, ‘The Prime Minister on the New Preamble’, *7.30 Report*, 11 August 2007 (John Howard); Noel Pearson, ‘Reconciliation U-Turn Shows Leader’s True Colours’, *The Weekend Australian* (Sydney), 24 November 2007.

My goal is to see a new Statement of Reconciliation incorporated into the Preamble of the *Australian Constitution*. If elected, I would commit immediately to working in consultation with Indigenous leaders and others on this task ...

I would aim to introduce a [B]ill that would include the Preamble Statement into Parliament within the first 100 days of a new government.

A future referendum question would stand alone. It would not be blurred or cluttered by other constitutional considerations. I would seek to enlist wide community support for a 'Yes' vote. I would hope and aim to secure the sort of overwhelming vote achieved 40 years ago at the 1967 referendum. If approached in the right spirit, I believe this is both realistic and achievable.<sup>28</sup>

This was significant because Prime Minister Howard had a difficult and controversial relationship with Indigenous peoples during his term of office. His announcement created bipartisan support given that the ALP national policy at the time also supported recognition of Indigenous peoples in the preamble.<sup>29</sup> Although defeated at the 2007 federal election, since then there has been steady momentum in the public conversation on Indigenous constitutional recognition.

In 2008 the newly elected Prime Minister Rudd conducted the *Australia 2020 Summit*, held on the 19–20 April, and invited 1000 participants from across Australia to generate ideas for building a modern Australia. One of the streams of the 2020 Summit was 'Options for the Future of Indigenous Australia'. A major outcome of the Indigenous stream discussion was the support for a new national dialogue on reconciliation and the formal legal recognition of Indigenous peoples.<sup>30</sup> In particular, the final report noted the 'strong view that recognition of Aboriginal and Torres Strait Islander people's rights need [sic] to be included in the body of the *Constitution*, not just in the preamble'.<sup>31</sup>

Further, in the Governance stream of the Summit, Indigenous issues were raised in relation to the theme of constitution, rights and responsibilities.<sup>32</sup> In particular it recommended that the *Constitution* be amended to include a preamble that formally recognises the traditional custodians of Australian land and waters, that the *Constitution* be amended to remove any language that is racially discriminatory, and that a national process be conducted to consider a compact of reconciliation between Indigenous and non-Indigenous Australians.<sup>33</sup> Indeed when the Governance stream proposals were put to a vote among the participants to identify the top proposals, the vote revealed Indigenous issues as the top priority.<sup>34</sup>

Following from the 2020 Summit, the federal government conducted a community cabinet meeting in eastern Arnhem Land on 23 July. While there, Prime Minister Rudd was presented with the Yolngu and Bininj Leaders

---

28 John Howard, 'A New Reconciliation' (2007) 19(4) *The Sydney Papers* 104, 108–9.

29 Australian Labor Party ('ALP'), 'ALP National Platform and Constitution 2007' (Presented at 44<sup>th</sup> ALP Conference, Sydney, 27–29 April 2007).

30 Commonwealth, *Australia 2020 Summit: Final Report* (Department of the Prime Minister and Cabinet, 2008) 226.

31 *Ibid* 231.

32 'Options for the Future of Indigenous Australia', above n 32, 303.

33 *Ibid* 307.

34 *Ibid* 349.

Statement of Intent, a document in which members of those communities expressed their desire for constitutional protection for traditional land and cultural rights.<sup>35</sup> The communiqué was written on behalf of Yolgnu and Bininj clans living in Yirrkala, Gunyangara, Gapuwiyak, Maningrida, Galiwin'ku, Milingimbi, Ramingining and Laynhapuy homelands, constituting approximately 8000 Indigenous people in Arnhem land.

The document was developed following meetings at Maningrida in West Arnhem Land on 1 July 2007 and other related meetings over the previous 18 months. It was given to the Prime Minister to by Yolgnu and Bininj people, who stated they had been 'marginalised and demeaned over the past decade and have been denied real opportunity to have a say about our aspirations and futures'.<sup>36</sup> The communiqué argued for preconditions for economic and community development in remote communities including the right to be recognised as committed to maintaining their culture and identity and protection of their land and sea estates.<sup>37</sup> They argued the importance of recognising their fundamental human right to live on their land and practice their culture and requested the Australian Government 'work towards constitutional recognition of our prior ownership and rights'.<sup>38</sup>

In accepting this communication, the Prime Minister pledged his support for recognition of Indigenous peoples in the *Constitution*.<sup>39</sup> He said that there was

nothing new about the fact that the national platform of the Australian Labor Party has said for some time that we've committed to the constitutional recognition of the first Australians. That is not new its been around for a long time. That remains our commitment.<sup>40</sup>

It was widely reported and assumed by the media and political leaders that any constitutional recognition of Indigenous Australians will come in the form of a new preamble. In response to the Prime Minister's comments in Darwin, former leader of the Liberal Party, Dr Brendan Nelson, offered bipartisan support for an amended preamble to recognise 'the place of Indigenous people in Australian life'.<sup>41</sup> These comments were consistent with the Liberal Party election platform of 2007 and former Prime Minister John Howard's pledge that if elected he would (once again) pursue preambular reform to recognise Aboriginal and Torres Strait Islander peoples.

---

35 Communiqué from Yolgnu and Bininj Leaders at Yirrkala to the Australian Government, *Yolgnu and Bininj Leaders' Statement of Intent* (23 July 2008) (Copy on file with author).

36 Ibid 1.

37 Ibid 2.

38 Ibid.

39 Robinson, above n 7; ABC Radio National, 'Rudd Pledges Indigenous Recognition in the *Constitution*', *ABC PM*, 23 July 2008 (Kevin Rudd); Prime Minister Kevin Rudd, 'Joint Press Conference with the Chief Minister of the Northern Territory, Paul Henderson' (Press release, 24 July 2008); 'Indigenous leaders Call for Constitutional recognition', *ABC News* (online), 8 June 2008 <<http://www.abc.net.au/news/stories/2008/06/08/2268308.htm>>.

40 Ibid.

41 Natasha Robinson and Samantha Maiden, 'No Rush to Indigenous Amendment to *Constitution*', *The Australian* (Sydney), 25 July 2008.

However, the assumption that constitutional reform is synonymous with preambular recognition is a substantial re-reading of the Yolgnu/Bininj Statement of Intent. It reveals a limited construction of constitutional reform that betrays a narrow and dismissive interpretation of Indigenous aspirations. It is evident that Rudd's commitment signalled a definite shift in what *form* recognition should take in the *Constitution*. During the 1990s serious thought was being given to recognition of Indigenous rights in the operative text of the *Constitution* as well as amendment to the races power. However there has been a gradual move away from this as bipartisan support indicates a preference for recognition of Indigenous Australians only in the preamble. Labor's position has especially shifted since the 1990s. Although the current ALP National Policy states that it supports amending the races power and will 'build public support for constitutional recognition of Aboriginal and Torres Strait Islander peoples', the current political discourse of the ALP seems to limit recognition to the preamble.<sup>42</sup> Thus the conversation driven by political actors remains solely about amending the preamble. The concern is that this is to the exclusion of the raft of other recommendations made by CAR and the type of recognition of ownership sought by the Yolgnu and Bininj.

As an aside, it is interesting to note that the Prime Minister's language reveals a synergy with the previous government's stance on practical and symbolic reconciliation.<sup>43</sup> Prime Minister Rudd argued that constitutional reform is not at the forefront of government thinking because 'our first priority is closing the gap between Indigenous and non-Indigenous Australians'.<sup>44</sup> Although many Indigenous and non-Indigenous commentators argue that the practical and the symbolic are two sides of the same coin, Prime Minister Rudd's comments demonstrate the impact that Howard's division of reconciliation into practical measures and mere symbolism has had on Australian political culture.

## B 2010 Federal Election

During the campaign in the lead up to the federal election on 21 August 2010, the issue of the recognition of Indigenous peoples in the *Constitution* was raised again. During its first term the federal government had not developed any further its platform for constitutional recognition of Indigenous peoples in the preamble. Indigenous Affairs Minister Jenny Macklin announced that a bipartisan panel would be established following the election in order to develop a process of consultation with a view to bipartisan agreement and community support for a referendum.<sup>45</sup>

---

42 ALP, *National Platform and Constitution 2009*, (2009) ch 7 (Securing an Inclusive Future for All Australians) 7.

43 John Borrows, 'Practical Recolonisation?' (2005) 28 *University of New South Wales Law Journal* 614.

44 Rudd, 'Joint Press Conference', above n 39.

45 Jenny Macklin, 'Address to the Garma Festival' (Speech delivered at the Garma Festival, North East Arnhem Land, 8 August 2010); Lex Hall, 'Macklin Pledges Labor Push to have Aborigines Recognised in *Constitution*', *The Australian* (Sydney), 8 August 2010.

The result of the 2010 federal election was a hung parliament. This situation occurs when no party has more than half the required Members of Parliament in the House of Representatives. No party is able to pass laws without gaining the support of other parties or independents. In this case, the ALP was able to negotiate to form a government with the support of independents Tony Windsor, Rob Oakeshott, Andrew Wilkie and Adam Bandt. During those negotiations, the ALP and the Greens entered into a formal parliamentary agreement.<sup>46</sup> This agreement stated that the two parties will work together and with other parliamentarians to ‘hold referenda during the 43<sup>rd</sup> Parliament or at the next election on Indigenous constitutional recognition’.<sup>47</sup> At the time of publication no bipartisan expert panel has been constituted.

### III THE HISTORICAL CONTEXT OF INDIGENOUS PEOPLES AND THE *CONSTITUTION*

It is well known that the federal *Constitution* was drafted and adopted by the narrowest section of Australian society.<sup>48</sup> Our ‘founding fathers’ were white, male, Christian, middle-aged and drawn almost exclusively from Australia’s ruling classes.<sup>49</sup> The homogenous underpinnings of the *Constitution* are, to some extent, hidden from view by the preambular reference to ‘the people’. But this central term – which is nowhere defined – disguises the true nature of the composition of the Australian polity at the time of Federation. In many ways the reference to ‘the people’ is ‘remarkable more for those it cast outside of the polity than for those it included. This was and is a preamble tainted with racism, sexism and xenophobia’.<sup>50</sup> That is, in determining whether to fuse the separate colonies into a unified federation, women, Indigenous people, Chinese and Kanak labourers were all denied the right to vote and thus excluded from the collective ‘people’.

---

46 The Australian Greens & The Australian Labor Party, *Agreement* (1 September 2010) <[http://greensmps.org.au/webfm\\_send/448?](http://greensmps.org.au/webfm_send/448?)>.

47 *Ibid* 2.

48 See generally George Williams, ‘The High Court and the People’ in Hugh Selby (ed), *Tomorrow’s Law* (Federation Press, 1995) 271; George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) 39; Kim Rubenstein, ‘Citizenship and the Centenary – Inclusion and Exclusion in 20<sup>th</sup> Century Australia’ (2000) 24 *Melbourne University Law Review* 576, cited in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5<sup>th</sup> ed, 2010) 932.

49 Greta Bird and Loretta Kelly, ‘Women Speak Out: Critical Perspectives on the Preamble to the Constitution’ (2000) 6(1) *Australian Journal of Human Rights* 265, 266; Michael Coper, *Encounters with the Australian Constitution* (CCH Australia, 1987), 63.

50 *Ibid* 267; see generally Kim Rubenstein, ‘Citizenship and the Constitutional Convention Debates: A Mere Legal Inference’ (1997) 25 *Federal Law Review* 296.

For Aboriginal and Torres Strait Islander people, the systematic exclusion preferred by the framers is particularly poignant.<sup>51</sup> George Winterton argues that, in its current form, the preamble impliedly perpetuates the myth of terra nullius, since it fails to acknowledge an Australian presence prior to the Australian colonies mentioned therein.<sup>52</sup> Even so, the legal and ideological exclusion goes much further than a silent preamble or failure to include a prefatory reference to a pre-colonial presence. The myth of terra nullius is all pervasive: the body of the *Constitution* is built on the premise of racial segregation and cultural superiority, with ‘aboriginal natives’ unequivocally consigned to the fringes of legal and public life in federated Australia.<sup>53</sup> Not only were Indigenous people overwhelmingly denied the right to vote for or against the draft constitution at the time of Federation, under section 127, they were explicitly excluded from ‘reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth’. Similarly, section 51(xxvi) provided that the Parliament could make laws for ‘the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws’ (emphasis added). Galligan and Chesterman describe the ‘race power’ as a ‘conscious choice for the Aborigines’ continued oppression, and not one merely motivated by respect for States rights [sic].<sup>54</sup>

Since the 1967 referendum there has been little development in terms of formal recognition of Aboriginal and Torres Strait Islander peoples in the *Constitution*.<sup>55</sup> After the abolition of the protection era, Aboriginal and Torres Strait Islander communities were transitioned from being under the protection of the state to ordinary Australian citizens. This happened with regard neither for their role as traditional owners and carers of country nor of the historical disadvantage experienced as a result of state laws and policies.<sup>56</sup> Thus this intended seamless transition failed to alter or interrogate the culture of public institutions that Indigenous peoples were now expected to engage with and respect. This has manifested in a distrustful relationship between public institutions and Indigenous peoples. Indeed many Indigenous leaders, as well the Royal Commission into Aboriginal Deaths in Custody, have suggested

---

51 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007); John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (University of Queensland Press, 2005).

52 George Winterton, ‘Documents of Reconciliation and Constitutional Issues: Constitutional Preamble’ (Paper presented at Australian Reconciliation Convention, Melbourne, 1997) Seminar Session 3.

53 See generally Davis (2006), above n 15, 177; Dodson and Strelein, above n 13.

54 Brian Galligan and John Chesterman, ‘Aborigines, Citizenship and the *Australian Constitution*: Did the *Constitution* Exclude Aboriginal People from Citizenship?’ (1997) 8(1) *Public Law Review* 45, 47.

55 David Mercer, ‘“Citizen Minus”?: Indigenous Australians and the Citizenship Question’ (2003) 7 *Citizenship Studies* 421.

56 See, eg, *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Protections Act 1909* (NSW); *Northern Territory Aborigines Act 1910* (SA); *Aborigines Ordinance 1911* (NT); *Aborigines Ordinance 1918* (NT); *Welfare Ordinance 1953* (NT); *Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qld); *Aborigines Act 1911* (SA); *Aborigines Act 1934* (SA); *Aboriginal Affairs Act 1962* (SA); *Aborigines Protection Act 1886* (WA); *Aborigines Act 1905* (WA); *Native Welfare Act 1963* (WA).

'institutional racism' is fuelling this distrust and is embedded within the Australian polity.<sup>57</sup> According to the Royal Commission into Aboriginal Deaths in Custody:

When Aboriginal people say they lived with racism every day they are not meaning to say that all day every day they met non-Aboriginal people who insulted them and called them names (some of the time, of course, they did), but that every day the system of inequality put them down. They are talking about the laws, the systems, that were put in place pursuant to the laws which operate every day whether the people who operate the system are well meaning and helpful or personally racist.<sup>58</sup>

Today Indigenous peoples argue that recognition is integral to effectively addressing institutional racism and Indigenous dislocation from the state. These 'symbolic' measures such as constitutional reform, a treaty agreement and designated parliamentary seats are significant and influential in improving Indigenous health.<sup>59</sup>

#### IV CONTEMPORARY DEVELOPMENTS IN THE RECOGNITION OF INDIGENOUS PEOPLES

Particularly frustrating for Indigenous peoples in Australia is that around the world, state actors have provided for varying degrees of aboriginal recognition within their constitutional systems. Recognition is viewed as an essential step towards inclusive and productive socio-political communication.<sup>60</sup> In Canada, where the state entered into a number of treaties at first contact, the state is

57 See Dodson and Strelein, above n 13; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Barbara R Henry, Shane Houston and Gavin H Mooney, 'Institutional Racism in Australian Healthcare: A Plea for Decency' (2004) 180 *Medical Journal of Australia* 517; Gavin Mooney, 'Institutionalised Racism in Australian Public Services' (2003) 5(26) *Indigenous Law Bulletin* 10; Martin Flynn, 'Why Has the *Racial Discrimination Act 1975* (Cth) Failed Indigenous People' (2005) 9(1) *Australian Indigenous Law Reporter* 15; Jeffrey Rosales-Castaneda, 'Flogging a Moribund Horse While the Emperor is Naked: Issues in Proving Institutional Racial Discrimination in State Housing in Western Australia' (2003) 10(4) *Murdoch University of Electronic Journal of Law* 37 <<http://www.murdoch.edu.au/elaw/issues/v10n4/rosales104.html>>.

58 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), vol 2 [12.1.27].

59 Brennan et al, above n 11, 8; Fletcher (ed), above n 13; Stephen Cornell and Joseph P Kalt, 'Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development' (2000) 29 *Journal of Socio-Economics* 443; Dodson and Strelein, above n 13; Michael Dodson, 'Social Justice for Indigenous Peoples' (Speech delivered at 3<sup>rd</sup> David Unaipon Lecture, Darwin, October 1993); Patrick Dodson, 'Until the Chains Are Broken' (Speech delivered at the Vincent Lingiari Memorial Lecture, Darwin, 27 August 1999).

60 See Peter Jull, *The Politics of Northern Frontiers in Australia, Canada and Other 'First World' Countries: A Discussion Paper* (Australian National University, 1991); Peter Jull, *Nations with Whom We Are Connected: Indigenous Peoples and Canada's Political System* (University of Queensland Press, 3<sup>rd</sup> ed, 2001); Christine Fletcher, 'Living Together but Not Neighbours: Cultural Imperialism in Australia' in Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, 1999) 335; Aaron Senkpiel, 'North to North: The New Discourse' (2000) 21 *The Northern Review* 11; Mark McKenna, *This Country: A Reconciled Republic?* (UNSW Press, 2004).

continuing the process of entering into post-colonial treaty-making with non-treaty groups (for instance, in British Columbia) as well as recognition of Aboriginal people in its constitution;<sup>61</sup> Denmark has provided for a 'Home Rule' in respect of the Inuit majority of Greenland;<sup>62</sup> Norway established a Sami Parliament for the Sami;<sup>63</sup> the US has concluded numerous treaties with its Indigenous peoples, recognising residual sovereignty under the doctrine of 'domestic dependent nations',<sup>64</sup> and the Treaty of Waitangi is fundamental to the constitutional system in New Zealand.<sup>65</sup>

Notwithstanding the doctrinal differences between these developments, the underlying normative imperatives for formal state recognition of legal and moral claims to Indigenous entitlements are the same in Australia as they are in other post-colonial states, namely original custodianship, substantive equality and preservation of aboriginal cultural identity.<sup>66</sup>

Thus an appropriately worded preamble is regarded as an important step towards proper recognition of Indigenous Australians. Not only would it acknowledge past harms, and the reality of Australia's legal underpinnings, but it could serve as an express declaration of Indigenous culture as a legitimate and valued part of contemporary society. A preamble is widely seen as an appropriate mechanism to provide recognition of Indigenous peoples as original owners of land, and pay due respect for the unique position of Aboriginal and Torres Strait Islander people in Australian public life. Victoria and Queensland have both moved to amend their preambles to recognise Aboriginal and Torres Strait Islander peoples. NSW is currently undertaking similar reform.

### A Victoria

The amended preamble to the *Constitution Act 1975* (Vic) ('*Victorian Constitution*') recognises both the original exclusion of Aboriginal people from the Victorian legal system, as well as their continued contribution and intricate connection to that State:

- (1) The Parliament acknowledges that the events described in the Preamble to this *Act* occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
- (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established –
  - (a) have a unique status as the descendants of Australia's first people; and

---

61 Bradford W Morse, 'Indigenous-Settler Treaty Making in Canada' in Marcia Langton et al (eds), *Honour among Nations: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 50; Paul McHugh, *Aboriginal Societies* (Oxford University Press, 2004).

62 *Greenland Home Rule Act 1978* (Denmark).

63 *Sami Act 1987* (Norway).

64 See, eg, the Marshall Trilogy: *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia*, 30 US 1 (1831) and *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

65 Shannan Murphy, 'State of Diversity: Constitutional Development and Indigenous People in the Northern Territory 1985–1998' (2005) 9(2) *Australian Indigenous Law Reporter* 1, 19.

66 See Andrew Lokan, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1999) 23 *Melbourne University Law Review* 65.

- (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
- (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.<sup>67</sup>

This is the first explicit reference to Indigenous people in any constitutional preamble in Australia. In addition the preamble to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises that rights ‘have a special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters’.<sup>68</sup> Furthermore, section 19 of the *Act* protects the distinct cultural rights of Aboriginal people.

## B Queensland

In December 2008, Queensland Premier Anna Bligh called for bipartisan support to insert a similar preamble into the *Constitution of Queensland 2001* (Qld) (*‘Queensland Constitution’*).<sup>69</sup> This was a marked departure from the Queensland government’s position in 2004, when the Queensland Legal, Constitutional and Administrative Review Committee recommended against such a change to the *Queensland Constitution*.<sup>70</sup> On 24 February 2010, Queensland’s preamble was amended to acknowledge:

The Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and ancient and enduring cultures, which deepen and enrich the life of our community.<sup>71</sup>

Section 3A of the *Act* provides that in acknowledging Aboriginal and Torres Strait Islander peoples, the Parliament does not create in any person any legal right, or give rise to any civil cause of action or affect the interpretation of the *Queensland Constitution* or any other law in force in Queensland. Even so the Bill attracted controversy, with the Opposition Leader John-Paul Langbroek arguing that it would elevate ‘one ethnic group in the Queensland community to the exclusion of all others.’<sup>72</sup>

## C Western Australia

Western Australia has no mention of Indigenous peoples in the preamble to the *Constitution Act 1889* (WA); although in 2006, the Western Australian Law Reform Commission’s report into Aboriginal customary law made a

<sup>67</sup> *Constitution Act 1975* (Vic) s 1A.

<sup>68</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>69</sup> ‘Activists Welcome Indigenous Preamble for Qld Constitution’, *ABC News* (online), 5 December 2008 <<http://www.abc.net.au/news/stories/2008/12/05/2438520.htm>>.

<sup>70</sup> Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *A Preamble for the Queensland Constitution?* (2004); see John Chesterman, ‘Toward Indigenous Recognition in the Australian Constitution: Getting the Words Right’ (2008) 7(4) *Indigenous Law Bulletin* 10.

<sup>71</sup> *Constitution (Preamble) Amendment Act 2010* (Qld).

<sup>72</sup> Jessica Marszalek and David Barbel, ‘Recognising Indigenous People in Qld Preamble “Divisive”’, *Brisbane Times* (Brisbane), 23 February 2010.

recommendation for the constitutional recognition of the unique status and contribution of Aboriginal people to Western Australia:<sup>73</sup>

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the *Constitution Act 1889* (WA) to effect, in section 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of this state. The Commission commends the following form, modelled on a similar provision in the *Victorian Constitution*:

1. Recognition of Aboriginal peoples
  - (1) The Parliament acknowledges that the Colony of Western Australia was founded without proper consultation, recognition or involvement of its Aboriginal peoples or due respect for their laws and customs.
  - (2) The Parliament recognises that Western Australia's Aboriginal peoples, as the original custodians of the land on which the Colony of Western Australia was established
    - (a) have a unique status as the descendants of Australia's first people;
    - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Western Australia; and
    - (c) have made a unique and irreplaceable contribution to the identity and wellbeing of Western Australia.
  - (3) The Parliament does not intend by this section –
    - (a) to create in any person any legal right or give rise to any civil cause of action; or
    - (b) to affect in any way the interpretation of this *Act* or of any other law in force in Western Australia.

To date this recommendation has not been implemented.

#### **D New South Wales**

In 2010, the NSW government announced it would be moving to amend the *Constitution Act 1902* (NSW) to acknowledge the Aboriginal people of NSW and their contribution to the State, subject to a public consultation period from 16 June to 11 August 2010.<sup>74</sup> The amendment approved by Cabinet reads as follows:

- (a) The People and Parliament of New South Wales acknowledge and honour the Aboriginal people as the first people and nations of the State, and
- (b) The People and Parliament of NSW recognise that Aboriginal people have a spiritual, social and cultural relationship with their traditional lands and waters and have made a unique and lasting contribution to the identity of New South Wales
- (c) Nothing in this section creates in any person any legal right or gives rise to any civil cause of action, or affects the interpretation of this *Act* or any other law in force in New South Wales.

The amendment would create a new section 2A. Section 2(c) also creates a similar exclusion clause to that operating in Victoria and Queensland. According

<sup>73</sup> Western Australian Law Reform Commission, *Aboriginal Customary Laws*, Report No 94 (2006) 365 (Recommendation 6).

<sup>74</sup> NSW Department of Aboriginal Affairs, 'Constitutional Recognition of Aboriginal People' (2010).

to the NSW government the new provision is an ‘enduring symbolic gesture of reconciliation between Aboriginal and non-Aboriginal people of NSW and does not create any legal liability on the part of the people or Parliament of NSW’.<sup>75</sup> On 8 September 2010 a Bill was introduced into the Legislative Assembly of the Parliament of NSW with bipartisan support although at the time of publication it had not been passed by the Legislative Council.<sup>76</sup> The Bill reads as follows:

2. Recognition of Aboriginal people
  - (1) Parliament, on behalf of the people of New South Wales acknowledges and honours the Aboriginal people as the State’s first people and nations.
  - (2) Parliament, on behalf of the people of New South Wales, recognizes that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
    - (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
    - (b) have made and continue to make a unique and lasting contribution to the identity of the State
  - (3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any *Act* or law in force in New South Wales.

The value of a ‘symbolic gesture of reconciliation’ is significant. The constitutional preamble can act as a powerful instrument of change; navigating the technical limits of legal and political discourse, it can form part of a country’s ‘social and cultural fabric’, a potential ‘totem’ for the state, community and individual.<sup>77</sup> Indeed, it is important not to undervalue the importance of the ‘nation’s vision’<sup>78</sup> as a part of reconciliation between Indigenous and non-Indigenous Australia. For example, the preamble to the *Constitution of the Republic of South Africa Act 1996* (South Africa) (*‘South African Constitution’*) provides a powerful example of this healing potential, explicitly referring to ‘injustices of our past’ and stressing that the state’s national unity ‘belongs to all who live in it, united in our diversity’ and that the *South African Constitution* was adopted to establish a society based on, inter alia, ‘social justice and fundamental human rights’.<sup>79</sup>

As an expression of collective beliefs, the preamble is a weighty statement with significant transformative potential. It is a statement that can speak ‘of a shared history and a current identity as a nation’ and a means by which we may

---

75 Ibid 3–4.

76 Constitution Amendment (Recognition of Aboriginal People) Bill 2010.

77 George Winterton, ‘A New Constitutional Preamble’ (1997) 8 *Public Law Review* 186, 186; see also Mark McKenna, Amelia Simpson and George Williams, ‘First Words: The Preamble to the *Australian Constitution*’ (2001) 24 *University of New South Wales Law Journal* 382, 382.

78 Gatjil Djerrkura, ‘Making the Republic Important to a Majority of Australians’, in John Uhr (ed), *The Australian Republic: The Case for Yes* (Federation Press, 1999) 92, 96.

79 McKenna, Simpson and Williams, ‘First Words’, above n 77, similarly discuss the German and Japanese Constitutions, which espouse a desire for ‘world peace’, thereby expressly recognising their part in past harms, and simultaneously rejecting such behaviour for the future, hoping instead for a different, more enlightened approach: at 383.

‘acknowledge the reality of our history’.<sup>80</sup> But to properly displace the doctrine of terra nullius, we must move beyond calls for uplifting prefatory change towards *qualitative* recognition. In former Prime Minister Kevin Rudd’s own words, ‘symbolism is important but, unless that great symbolism of reconciliation is accompanied by an even greater substance, it is little more than a clanging gong.’<sup>81</sup> To this end, it is useful to reflect on why it is that the preamble has come to embody the national response to calls for constitutional recognition of Indigenous Australians.

## V SHIFTING NOTIONS OF RECOGNITION

In the most comprehensive review conducted to date, the 1988 Constitutional Commission recommended against altering or repealing the existing preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp) and against the inclusion of a newly worded alternative.<sup>82</sup> A year earlier, in 1987, the Advisory Committee had suggested to the Constitutional Commission that the preamble be amended to include the following statement: ‘Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership’. Prophetically, the Commission considered that a new preamble ‘could be a source of passionate debate which would be a significant distraction from other substantive and more important proposals submitted to the electors’.<sup>83</sup>

At that time, the Commission gave considered attention to more substantive provisions, including the race power and the constitutional scope for a treaty. In respect of the race power, the Commission recommended its deletion, commenting that:

It is inappropriate because the purposes for which, historically, it was inserted no longer apply in this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based.<sup>84</sup>

The Commission further recommended that a new paragraph be inserted, giving the federal Parliament the express power to make laws with respect to ‘those groups of people who are, or are descended from, the Indigenous inhabitants of different parts of Australia’.<sup>85</sup> Such a provision would be important to ensure that Commonwealth policies and programs targeted specifically at Aboriginal people and Torres Strait Islanders would be constitutionally sound.

---

80 See generally Bird and Kelly, above n 49; see also the majority judgment in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, accepting Australia as a settled nation despite repudiation of the doctrine of terra nullius.

81 Apology to Australia’s Indigenous Peoples, above n 6.

82 Australian Constitutional Commission, *Final Report of the Constitutional Commission* (1998).

83 Ibid [3.43], [3.44]. See also Legal, Constitutional and Administrative Review Committee, above n 70.

84 Australian Constitutional Commission, above n 82, [10.372], [10.373] cited in Graeme Neate, ‘Aborigines and Torres Strait Islanders and the *Australian Constitution*’ (1989) 1(37) *Aboriginal Law Bulletin* 16.

85 Ibid.

While the Commission recommended against a treaty at that time, it commented that:

There is no doubt that the Commonwealth has sufficient constitutional powers to take appropriate action to assist in the promotion of reconciliation with Aboriginal and Torres Strait Island citizens and to recognise their special place in the Commonwealth of Australia. Whether an agreement, or a number of agreements, is an appropriate way of working to that objective has yet to be determined ...

[We] agree with the Powers Committee that a constitutional alteration to provide the framework for an agreement provides 'an imaginative and creative approach to the immensely difficult situation which exists.' But any alteration should not be made until an agreement has been negotiated and constitutional alteration is thought necessary or desirable.<sup>86</sup>

Following the Commission the next significant development was the Constitutional Convention of 1998 leading up to the 1999 referendum. For years momentum had been growing in the community in regards to the debate for and against Australia becoming a republic. The Constitutional Convention was conducted at Old Parliament House in Canberra on 2–13 February 1998. The Convention was to determine support for a republic and an appropriate republican model.<sup>87</sup>

However, in tracing the shifting notions of recognition it is important to keep in mind that while the Constitutional Convention of 1998 was broad ranging in its scope, the 1999 referendum was primarily concerned with the question of whether Australia should become a republic. Nevertheless, the recognition of Indigenous peoples was on the agenda in the form of preambular recognition. By 1998, national debates had shifted considerably, giving much greater prominence to the preamble. Former Chairman of the Australian Republican Movement, Malcolm Turnbull, submitted that if the preamble 'is to remain a statement of history, then it should pay appropriate regard and respect to Aboriginal history'.<sup>88</sup> This statement reflected a significant shift in thinking from the more integrative approach of the previous decade.

At that time the Constitutional Centenary Foundation, an educational body formed in 1991 to enhance public understanding and debate about the *Constitution*, commissioned a report that included over 400 public submissions suggesting possible drafts. The submissions were prepared by Australians of different ages and backgrounds.<sup>89</sup> The Foundation reported widespread support

---

86 Ibid [10.455], [10.457], [10.459].

87 Australian Constitutional Convention, *Report of the Constitutional Convention* (Department of Prime Minister and Cabinet, 1998).

88 Ibid vol 3, 10.

89 Ibid 405; see also Cheryl Saunders, 'Insights from the Experience of the Constitutional Centenary Foundation for a Future Republican Movement' in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 201.

for specific recognition of Indigenous Australians.<sup>90</sup> Moreover, many went beyond simple statements of historical fact, emphasising variously continuing rights, the value of culture and the unique status of Indigenous people in contemporary Australian culture.<sup>91</sup>

Ultimately the 1998 Convention Report recommended that the preamble provide explicit ‘acknowledgement of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders’, and ‘recognition of Australia’s cultural diversity’.<sup>92</sup> It further provided that the following matters ought to be considered for inclusion in the preamble:

- affirmation of the equality of all people before the law;
- recognition of gender equality; and
- recognition that Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia’s Indigenous peoples.<sup>93</sup>

The ‘remarkable spirit of unanimity’<sup>94</sup> with which these recommendations were received suggests underlying support for the imperatives of the reconciliation movement. In 1994, the Civics Expert Group and the Centenary of Federation Advisory Committee had pointed to a need for a ‘restatement’ of the values of Australian citizenship, including some form of constitutional recognition for Aboriginal and Torres Strait Islander people.<sup>95</sup> This was echoed in the 1996 *Social Justice Package* report and the CAR recommendations.<sup>96</sup>

Prime Minister Howard himself took the lead in drafting a new preamble leading up to the 1999 referendum – including the issue of Indigenous recognition. The Prime Minister initially engaged Australian poet Les Murray to assist him in redrafting the text. The Howard-Murray preamble read:

With hope in God, the Commonwealth of Australia is constituted by the equal sovereignty of all its citizens.

The Australian nation is woven together of people from many ancestries and arrivals.

Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people.

90 Constitutional Centenary Foundation, ‘*We the People of Australia ...*’: *Ideas for a New Preamble to the Australian Constitution* (1999); see generally Mark McKenna, Amelia Simpson and George Williams, ‘With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble’ (2001) 24 *University of New South Wales Law Journal* 401, 403.

91 See, eg, ATSIC, *Recognition, Rights and Reform* (1995); Gervase Green, ‘PM under Pressure on Preamble’, *The Age* (Melbourne), 25 February 1999, 10; Stefanie Balogh, ‘Students Rewrite History with an Eye on the Future’, *The Australian* (Sydney), 25 February 1999, 4; Norman Abjorensen, ‘Keep It Simple: Preamble Message’, *The Canberra Times* (Canberra), 25 February 1999, 2.

92 Constitutional Convention, above n 87, vol 1, ch 7.

93 *Ibid.*

94 McKenna, Simpson and Williams, ‘With Hope’, above n 90.

95 See Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (Australian Government, 1994).

96 Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 1996* (1997) (*‘Social Justice Report 1996’*); Council for Aboriginal Reconciliation, *Going Forward*, above n 4.

*Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures.*

In every generation immigrants have brought great enrichment to our nation's life.

Australians are free to be proud of their country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals.

We value excellence as well as fairness, independence as dearly as mateship.

Australia's democratic and federal system of government exists under law to preserve and protect all Australians in equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement.

In this spirit we, the Australian people, commit ourselves to this *Constitution*.<sup>97</sup>

This version was criticised by Indigenous leaders because it failed to recognise Aboriginal and Torres Strait Islander people beyond prior occupation. Furthermore the use of the word 'custodianship' offended many Aboriginal people. At the same time, the ALP and the Australian Republic Movement argued for the preamble proposal to be abandoned entirely because they thought it risked diverting attention away from the Republican movement. Les Murray resigned from the process because he felt that his language was being interfered with, stating that, '[t]he preamble has now been compromised away to mush, compromised so much it doesn't matter anymore. I'm not saying that out of peevishness. It went into the political compromise machine and came out mush'.<sup>98</sup> The Prime Minister engaged Democrats Senator Aden Ridgeway who continued to work with Howard in revising the Howard-Murray version. The final proposed preamble that went to the Australian people referred to Indigenous Australians in the following way:

With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.

We the Australian people commit ourselves to this *Constitution*:

proud that our national unity has been forged by Australians from many ancestries;

never forgetting the sacrifices of all who defended our country and our liberty in time of war;

upholding freedom, tolerance, individual dignity and the rule of law;

*honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;*

recognising the nation building contribution of generations of immigrants;

mindful of our responsibility to protect our unique natural environment;

supportive of achievement as well as equality of opportunity for all;

and valuing independence as dearly as the national spirit which binds us together in both adversity and success.<sup>99</sup>

97 Parliament of Australia, *Constitutional Alteration (Preamble) 1999*, No 32 of 1999, 11 August 1999, <<http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd032.htm>> (emphasis added).

98 Helen Lambert, 'A Draft Preamble: Les Murray and the Politics of Poetry' (2003) 27 *Journal of Australian Studies* 5, 8; ABC Radio National, 'Preamble Shamble', *ABC AM*, 8 November 1999 (Sally Sara).

99 *Constitutional Alteration (Preamble) Bill 1999 (Cth)* (emphasis added).

This version was criticised by Aboriginal leaders, especially on the basis that no other Aboriginal leaders were consulted on its development.<sup>100</sup> Many leaders objected to the word 'kinship' as simplistic and diminishing the significance of Aboriginal and Torres Strait Islander connection to land and the practice of their lore. On the contrary, Howard and Ridgeway argued that the preamble was better than the current text that makes no mention of Aboriginal and Torres Strait Islander peoples and was therefore an improvement. The eventual vote saw the preamble rejected by every state and territory and nationally by 60.7 per cent. The rejection was especially pronounced in electorates with Aboriginal and Torres Strait Islander populations.<sup>101</sup> The fact that the preamble was attached to the same referendum as the question of an Australian republic was argued by some commentators to be less a manifestation of reconciliation than a political red herring designed by the Howard Government to dilute the mounting strength of the republic debates.<sup>102</sup>

Despite advocacy by Indigenous leaders and organisations for continued constitutional reform, the debate stalled after the nationhood debates of the late 1990s. Despite continued and consistent efforts by Indigenous Australians to achieve formal state recognition, it seems that political anxiety about creating a formal place for Indigenous people continues to inform the limits of political possibility. Tony Abbott as Shadow Minister for Indigenous Affairs, for instance, stressed that the preamble is the best mechanism for recognition because, should the body of the *Constitution* be substantively amended, 'the worry would be that we are in the business of creating new rights. One thing you certainly couldn't do, is give more rights to one group of Australians than to others'.<sup>103</sup> Yet CAR stressed in 1996 that a new preamble could only be understood as a *first step*; CAR reported significant concern that a new preamble 'would be seen as an easy symbolic step which would be all that was needed to address constitutional issues for Indigenous peoples'.<sup>104</sup> Former ATSI chairwoman, Lowitja O'Donoghue puts the matter plainly, stressing that, 'if you're going to put a preamble that says what Australians think about their aspirations for governance ... then you've got to pay some attention to the rest of the *Constitution* as well so that the two bits match up'.<sup>105</sup> The failure of contemporary politics to relocate the preamble in its broader context demonstrates a flawed, simplistic and insensitive concept of *constitutional recognition*.

---

100 ABC Television, 'New Constitution Preamble', *7.30 Report*, 11 August 1999 (Kerry O'Brien); Damien Murphy, 'Aborigines and Hanson Attack the Latest Wording', *Sydney Morning Herald* (Sydney), 12 August 1999; Lauren Martin, 'Ridgeway Criticised ...', *Sydney Morning Herald* (Sydney), 13 August 1999.

101 David Nason, 'Preamble Defeat Blow to Howard', *The Australian* (Sydney), 8 November 1999.

102 See generally McKenna, Simpson and Williams, 'With Hope', above n 90, 401; Bruce Stone, 'A Preamble to the *Australian Constitution*: A Criticism of the Recent Debate' (2000) 35 *Australian Journal of Political Science* 291.

103 ABC Local Radio, *Open Calls for "Subtle Diplomacy" in Indigenous Recognition*, *ABC PM*, 24 July 2008 (Samantha Hawley).

104 Council for Aboriginal Reconciliation, *Going Forward*, above n 4, 36.

105 AAP, 'Don't Call Me Indigenous: Lowitja', *The Age* (Melbourne), 1 May 2008.

## VI THE (OLD AND NEW) LIMITS OF A PREAMBLE

Quick and Garran, in their commentary on the *Constitution*, anticipated that the preamble

may be of valuable service and potent effect in the Courts of the Commonwealth, aiding in the interpretation of words and phrases which may now appear comparatively clear, but which, in time to come, may be obscured by the raising of unexpected issues and by the conflict of newly emerging opinions.<sup>106</sup>

This interpretive potential propels much of the case for a new preamble: theoretically, in the event of ambiguity in interpreting constitutional provisions, judges of the High Court might make reference to the preamble as a national statement of values and principles. For Aboriginal and Torres Strait Islander people, a preamble that gives proper recognition to past dispossession, as well as the principle of equality, could be useful in constructing the limits of the race power.

Currently the scope of the power is unclear: whether it allows the Parliament to pass laws to the detriment of a particular race, or whether it is strictly limited to beneficial laws, is a matter that has not been conclusively settled by the High Court.<sup>107</sup> According to McKenna et al the preamble is a ‘bland, largely inconsequential collection of sentiments’ and has offered very little assistance in this regard.<sup>108</sup> McKenna et al argue that that a new preamble could ‘add to the High Court’s interpretive armoury’ because a declaration of shared values could override the *Jumbunna* principle of broad interpretation, lending support to the narrower construction of the power, clarifying that the Australian people understand it to be limited to beneficial laws.<sup>109</sup>

But it is questionable whether even this secondary function would offer much utility in the development of Australian constitutional law. In *Leeth v Commonwealth*, Deane and Toohey JJ found a Commonwealth law invalid because it offended an implied guarantee of legal equality, which was part of the *Constitution*, but also part of the preamble: ‘As the Preamble ... make[s] plain, that conceptual basis was the free agreement of ‘the people’ – all the people – of the federating colonies to unite in the Commonwealth under the *Constitution*. Implicit in that free agreement was the notion of the inherent equality of the people’.<sup>110</sup> For these judges, the preamble was a legitimate source to limit Commonwealth legislative power.<sup>111</sup> This is one of very few cases where the

106 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 286.

107 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (‘Hindmarsh Island Bridge Case’).

108 McKenna, Simpson and Williams, ‘First Words’, above n 77, 392.

109 Ibid 398; cf Anne Winckel, ‘A 21<sup>st</sup> Century Constitutional Preamble’ (2001) 24 *University of New South Wales Law Journal* 636, who argues the general nature of the preamble could also yield counterproductive results: references to democracy and representative government could equally be interpreted liberally, thus legitimating any piece of legislation enacted by democratically elected representatives: at 641.

110 (1992) 174 CLR 455, 286.

111 See also Brennan J’s comments: ibid 475.

Court has made reference to the preamble in considering constitutional matters and the possibilities raised were quickly quashed in subsequent cases.

*Kruger v Commonwealth* explicitly rejected any such use of the preamble; Dawson J (with whom McHugh J agreed) found that it is illegitimate to invoke the 'conceptual basis' of the *Constitution* to limit the scope of any express grants of power.<sup>112</sup> Indeed, it is a well established legal principle that a preamble cannot affect substantive provisions where Parliament intended to legislate beyond its scope; the preamble cannot prevail over substantive text where both have equal clarity. In reality, given the constrained use of its legitimate interpretive role, preambles offer little power as an instrument of legal change.

Yet notwithstanding the technical check on the practical benefits of a revised preamble, national discussions reveal a persistent unease about even this limited form of constitutional recognition. It seems the resistance stems from matters beyond strict legalism, tapping into much more visceral national sentiments. Discussions at the Constitutional Convention of 1998 were marked by an overwhelming scepticism towards rights discourse, liberal ideology and expanded judicial power; the push for a non-justiciable preamble undercut much of the debate.<sup>113</sup> Queensland Attorney-General, Denver Beanland, for example, argued that any substantive changes to the preamble would have to be attended by an explicit provision precluding the High Court from referring to it or 'using it in judicial decisions.'<sup>114</sup> In a similar vein, legal author Gregory Craven feared that the insertion of 'vague terms like 'equality', 'democracy' and 'freedom' in a preamble would almost certainly encourage the courts to take those values throughout the *Constitution* as if they were substantive and controlling values'.<sup>115</sup>

In the end, the 1998 Constitutional Convention recommended that care be taken 'to draft the preamble in such a way that it does not have implications for the interpretation of the *Constitution*' and that 'Chapter Three of the *Constitution* should state the preamble not be used to interpret other provisions of the *Constitution*'.<sup>116</sup> As a result, the draft preamble was put to the public in conjunction with section 125A, which provided that 'the preamble to this *Constitution* has no legal force and shall not be considered in interpreting this *Constitution* or the law in force in the Commonwealth or any part of the Commonwealth.'<sup>117</sup> This provision was intended to quarantine any potential legal

---

112 *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Stolen Generations Case*'). The majority agreed that any protection for equality falls within the exclusive province of Chapter III federal judicial power.

113 See generally John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 169; Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11 *Constitutional Forum* 60; Gregory Craven, 'Conservative Republicanism, the Convention and the Referendum' (1998) 21 *University of New South Wales Law Journal* 886.

114 Constitution Convention 1998, above n 87, 493; see generally McKenna, Simpson and Williams, 'With Hope', above n 90, 382.

115 Constitutional Convention [2<sup>nd</sup> to 13<sup>th</sup> February 1998] (9 February 1998) Department of the Prime Minister and Cabinet, 472 <<http://pandora.nla.gov.au/parchive/O1998-Nov-12/www.dpmc.gov.au/convention/hansard/con0902.pdf>>.

116 *Ibid* 165.

117 *Constitution Alteration (Preamble) 1999* (Cth) s 4 (emphasis added).

effect of the draft preamble, in the event of a successful referendum.<sup>118</sup> Given that the High Court has historically ‘treated the Preamble with a mix of indifference and reticence’,<sup>119</sup> this rather alarmist inclusion seems excessive.<sup>120</sup>

But more than a simple matter of legislative overzealousness, as a ‘definitive statement of a people’s aspirations’,<sup>121</sup> this self-defeating approach to ‘constitutional recognition’ is revealing. The Constitutional Commission’s endorsement of section 125A clearly demonstrates the quality of recognition that has been contemplated to date. Indeed, it is the only substantive amendment that has been given any serious consideration since the erasure of Indigenous people from the *Constitution* in 1967. Such a change would effectively clarify, once and for all, that there is no place for Aboriginal or Torres Strait Islanders in our national compact. Perversely, even after the many submissions supporting Indigenous recognition, the Constitutional Commission ultimately recommended the insertion of this provision into Chapter III, effectively guarding against any potential expansion of Indigenous rights. For many Indigenous peoples such ‘recognition’ is meaningless: it would effectively consign Indigenous people to the legal and political fringes, establishing for certain that they share no legitimate place in Australian public life.

Although the public ultimately rejected both the draft preamble and section 125A, the appeal of *un-recognition* seems to have captured the political imagination. So while Victoria has provided express recognition for its Indigenous people in the preamble to its state *Constitution*, section 3 of the *Victorian Constitution* provides that the Parliament does not intend by this section:

- a) To create in any person any legal right or give rise to any civil cause of action; or
- b) To affect in any way the interpretation of this Act or of any other law in force in Victoria.

Notably, at the state level, constitutional reform can be effected by ordinary statute; there is no need for popular approval at referendum. And yet, even within this more flexible context, the conciliatory sentiment was subordinated to utilitarian imperatives. From a normative standpoint, one must question the value of a purely ‘symbolic’ preamble in renegotiating the relationship between Indigenous and non-Indigenous Australia. Not only is such a step misconceived as a matter of legalism, it would demean the very values it purports to extol.<sup>122</sup> A new preamble, immediately followed by a non-justiciability clause, is disingenuous and has the potential to disaffect Indigenous people further from the legal and political mainstream. For Aboriginal and Torres Strait Islanders

---

118 Michael Lavarch in above n 115, 804 <<http://pandora.nla.gov.au/parchive/O1998-Nov-12/www.dpmc.gov.au/convention/hansard/con1102.pdf>>; but see McKenna, Simpson and Williams, ‘First Words’, above n 77, 411.

119 McKenna, Simpson and Williams, ‘First Words’, above n 77, 386.

120 Winckel describes it as ‘an inelegant example of “over-kill”’: above n 109, 646.

121 McKenna, Simpson and Williams, ‘First Words’, above n 77, 383.

122 *Ibid* 382.

recognition along these lines entrenches Australia's colonialist paradigm, reinforcing the notion that Aboriginal and Torres Strait Islander people have no place within Australia's broader legal, political or civic community in anything but a cursory or emblematic way.

## VII EDUCATIVE POTENTIAL OF A PREAMBLE – ANOTHER WASTED OPPORTUNITY?

Much has been said about the role a public debate on the preamble would play as an educator of the Australian voting public. Professor George Winterton, for example, extols its 'moral, educational and socially unifying function'.<sup>123</sup> Certainly, it is well established that Australians' knowledge of civics is poor. A survey carried out on behalf of the Constitutional Commission in 1987 indicated that only 53.9 per cent of the 1100 people surveyed were aware of the existence of a written federal *Constitution*; nearly 70 per cent of respondents in the 18–24 age group were unaware of the existence of a written *Constitution* at all.<sup>124</sup> More recently, an Australian National University study found that 63.5 per cent of Australians think that the High Court can amend the *Constitution*, or are unaware of the process for reform.<sup>125</sup> These studies demonstrate the scale of civic ignorance prevailing within the broader Australian polity.<sup>126</sup> Because public engagement is pivotal to constitutional reform, this lack of substantive and procedural knowledge presents a significant impediment.

Clearly, improved civic literacy would considerably enrich Australian public discourse and would benefit the Indigenous cause. A better informed voting public would be more alert to the limits of a new preamble as a mechanism for 'recognition'. Discussions about the preamble may be helpful in developing such knowledge because they would invite the public into a conversation that is, for the most part, the 'province of the specialists'.<sup>127</sup> As Justice Ronald Sackville writes:

We should not be surprised that the Australian people are so reluctant to approve change in our constitutional arrangements when the principles underlying those arrangements are so difficult to grasp and so little is done to engage the community in a sustained dialogue about our constitutional development.<sup>128</sup>

Indeed, it is now a familiar fact that, since Federation, only eight of 44 referenda have been successful. Much of this is attributable to the practical challenges of the manner and form of section 128, which effectively requires a

---

123 See, eg, George Winterton, 'The 1998 Convention: A Reprise of 1898?' (1998) 21 *University of New South Wales Law Journal* 856, 863.

124 Enid Campbell, 'Fashioning and Refashioning the *Constitution*' (2001) 24 *University of New South Wales Law Journal* 620, 624 citing Australian Constitutional Commission, above n 82, [1.56].

125 Australian Election Study, *Public Responses: Civics and Other Issues* (2007).

126 Megan Davis, 'Civics Education and Human Rights' (2003) 9 *Australian Journal of Human Rights* 236.

127 Ronald Sackville, 'The 2003 Term: The Inaccessible *Constitution*' (2004) 27 *University of New South Wales Law Journal* 66.

128 *Ibid* 66–7.

national majority and a majority of people in a majority of states for any proposed amendment. Describing the *Constitution* as ‘both prosaic and, from the non-specialist’s perspective, obscure’, Justice Sackville considers that its inaccessibility means that the *Constitution* is a limited vehicle for ‘reflecting and influencing the aspirations of the Australian people’.<sup>129</sup> The lack of knowledge has obvious impacts for constitutional reform because ‘uncertainty and obscurity breed fear of change’;<sup>130</sup> in this climate of fear, we overwhelmingly vote no. Given our fundamental gap in civics knowledge, national debate about a new preamble is widely regarded as a mechanism for redressing this widespread ignorance.

In this regard, it is encouraging that there is bipartisan support for community consultation in formulating a new preamble. Parliamentary leadership is crucial because of the eight out of 44 referendum proposals that have been successful all have had bipartisan support. Leadership in this context means ‘reinvigorating public debate on the *Constitution*, on what the *Constitution* says about us as a people and about how we choose to be governed’.<sup>131</sup>

Certainly, renewed discussion about the function of the preamble, and its connection to the *Constitution*, is an important step towards recasting the *Constitution* as ‘a form of *activity*, an intercultural dialogue in which the cultural diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time’.<sup>132</sup> At this stage, though, it is not clear whether any public consultations, or public campaigns, would extend to examination of any operative constitutional provisions. Normatively and substantively, revision of the preamble without more, would be short-sighted and unnecessarily constrained. Given the significant public resources required to remobilise the discussion, the authors argue that there is limited benefit in promoting an abstracted preamble, divorced from any discussion of its broader constitutional role. As Chair of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Mark Dreyfus, argued:

To show leadership on the issue of constitutional reform does not necessarily require support for a particular proposal. Instead, leadership is about creating an environment in which reform can be countenanced, in which public engagement can occur, in which bipartisanship can lead to improved constitutional arrangements.<sup>133</sup>

While it is encouraging that constitutional recognition remains on the agenda – at least as of 2008 – the narrow terms of the debate are rather dispiriting. Is the

---

129 Ibid 86.

130 Ibid.

131 Mark Dreyfus, ‘Leadership for Constitutional Reform: A Way Forward’ (Speech delivered at the 13<sup>th</sup> Annual Public Law Weekend, Public Law: Public Leadership, Canberra, 31 October 2008) 1.

132 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 30 (emphasis added).

133 Dreyfus, above n 132, 4.

Sisyphean nature<sup>134</sup> of constitutional law reform in Australia such that we have relinquished all hope of structural change?<sup>135</sup> Does our unsophisticated understanding of constitutional issues categorically preclude any chance of a re-examination of our founding national document? In many ways, it seems that little has changed since Howard and Ridgeway postulated about the 1999 preamble draft that 'isn't it better for those who want the Aboriginals and Torres Strait Islanders recognised to have something rather than to have nothing at all?'<sup>136</sup>

The failure by both political parties to commit to such revision betrays an overwhelmingly limited conception of 'recognition'. The assumption that any change will be effected by way of a new preamble imposes a restrictive approach to national and intercultural dialogue. Ultimately, the preamble only tells a very small part of the story; it is the *Constitution* that 'provides the framework for our political system', the legal structure in which we 'resolve disputes over distribution of resources and settle questions of power and liberty'.<sup>137</sup> Accordingly, the issue of constitutional recognition, and surrounding national discussion, needs to be much more sophisticated than the content of a new preamble. As a polity, we must seek answers to much bigger questions, namely, how can we move beyond 'non-recognition' or deletion, 'to achieve appropriate and substantial recognition of the distinct rights of Aboriginal and Torres Strait Islander people as the first Australians'?<sup>138</sup> As McKenna et al write: 'having embarked on the difficult process of constitutional renewal in the 1990s, Australia is only at the beginning of an ongoing national discussion that will recast the self-image and identity of the Australian people in the 21<sup>st</sup> century.'<sup>139</sup>

John Howard expressed a fear in 1999 that constitutional reference to Indigenous custodianship of land would alienate middle Australia.<sup>140</sup> Clearly, before we see any progress from this position, a lot of work needs to be done to restore 'confidence in our ability as a nation to engage with these issues'.<sup>141</sup> We need to move beyond conceptions of constitutional reform as controversial, or a dangerous path to social instability. To do this, consultation about constitutional reform must be advanced carefully, strategically and vocally. It must be well orchestrated and tailored to the Australian polity, with Australia's history, to Australian conditions.<sup>142</sup> To the extent that the preamble reignites dialogue

---

134 Megan Davis, 'A Sisyphean Task: Indigenous Rights and the *Constitution*' on *Australians for Native Title and Reconciliation* (4 September 2008) <<http://antar.org.au/blog/a-sisyphean-task-Indigenous-rights-and-the-constitution/>> (emphasis in original); Megan Davis, 'Indigenous Rights and the *Constitution*: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6.

135 Dreyfus argues that even the reformers have given up hope: above n 131.

136 G Greene, 'Howard pressure on Preamble: Like it or Lump it', *The Age* (Melbourne), 27 March 1999, cited in Bird and Kelly, above n 49, 277.

137 Dreyfus, above n 131, 3.

138 Sarah Pritchard, 'Documents of Reconciliation and Constitutional Issues: An Australian Bill of Rights' (Paper presented at Australian Reconciliation Convention, Melbourne, 27 May 1997) 3.

139 McKenna, Simpson and Williams, 'With Hope', above n 90, 419.

140 Dennis Shanahan, 'The Getting of Arrogance', *The Weekend Australian* (Sydney), March 27–28, 1999.

141 Dreyfus, above n 131, 4–5.

142 Davis (2003), above n 126.

between Indigenous and non-Indigenous Australia, it is a welcome development in the national political conversation. But, to have lasting meaning, discussions about a new preamble must be conducted with a view to more fundamental reassessment of our legal and political underpinnings.<sup>143</sup>

## VIII CONCLUSION

This article has described the recent shifts in the public conversation about recognition of Indigenous Australians in the *Constitution*. This essay raises the concern of the Indigenous community that their aspirations for substantive recognition are being eschewed in favour of a more politically palatable recognition in the preamble. Keeping in mind the practical realities and difficulties of amending the *Constitution* – bipartisan support, national majority and a majority of states – an amended preamble, where it comprises one element of a more broad ranging shift in the relationship between Indigenous and non-Indigenous Australians, has the power to contribute to a cultural shift in Australia's relationship with its first peoples. Nevertheless, as this essay has posited, it is discouraging for Indigenous peoples to see how little the debate has progressed since the 1998 Constitutional Conventions.

Perhaps the preamble is seen as a gentle way to ease back into the confronting questions that we must address as a nation, to properly examine the harms of our past. But, to achieve meaningful constitutional reform, the Australian public will need to confront the difficult issues of racism, dispossession and exploitation that are embedded not only in our *Constitution* – our founding legal document – but that underpin our public institutions. It seems that the preamble will either be a discrete forerunner to substantive constitutional provisions or a mechanism that allows us to sidestep these uncomfortable elements of Australian life.

To achieve proper recognition of Indigenous people, we need to resist the allure of the preamble as a panacea to the shortfalls of Australian public law: for it to mean anything at all, we must demand something more substantial than a socio-political teaching aid, or a mechanism for legal edification. It is important that, in discussing constitutional recognition of Aboriginal and Torres Strait Islander peoples, we do not allow the feel good factor of public education to supersede structural change. While greater civic awareness is a laudable achievement in its own right, ultimately public advocacy for a more inclusive preamble must assist in the long-term goal of constitutional reform. To the extent that the preamble debate supplements this greater conversation, it is a welcome development. But we must guard against reform that, in effect, obfuscates and distracts from substantive issues of 'Unfinished Business'. We ought not to forget the limitations of its transformative potential, not only as an instrument for

---

143 See generally Noel Pearson, 'Reconciliation Must Come with the Republic', *The Australian* (Sydney), 14 January 2010.

social change, but also as a tool for legal or political empowerment. Indeed, what kind of recognition are we offering Indigenous Australians if we cannot countenance a place for Aboriginal and Torres Strait Islander peoples within the four corners of the *Constitution*?