
RECOGNISING THE POLITICS OF CONSTITUTIONAL REFERENDA: INITIATION AND THE POLICY PROCESS FOR CHANGE

by Glenn Patmore and Sarah Moorhead

INTRODUCTION

The prospect of a referendum regarding recognition of Indigenous peoples in the Australian *Constitution* provides us with the opportunity to pause and reflect on how constitutional change through referenda is brought about and the way in which the people are engaged in the process of constitutional reform.

A constitutional referendum may be viewed as the ultimate democratic process: altering a country's fundamental law by asking the people, directly, if they want to make the change. Yet much of the process is effectively in the hands of the government and its leaders. To understand what motivates political leaders to initiate, delay or even sabotage referenda to amend the *Constitution*, Glenn Patmore conducted interviews with former Prime Ministers, Leaders of the Opposition and members of Parliament from 2008 to 2011.¹ Patmore focused primarily on the failed 1999 republican referendum, but also questioned some interviewees regarding the proposal to recognise Aboriginal and Torres Strait Islander peoples in the *Constitution*.

The research indicated the complexity of considerations that political leaders take into account in proposing a referendum to amend the *Constitution*, as well as the different conceptions of democracy that may be seen to underpin their views and actions. This article draws upon this research to address two specific aspects of constitutional amendment: first, how the issue of recognition came to be put on the political agenda; and, second, how the processes for formulating the textual change to be voted on are being developed. The purpose of this article is to consider these two aspects of the parliamentary politics of constitutional recognition in light of recent political history.²

PUTTING THE ISSUE ON THE AGENDA

The power to initiate constitutional amendment through a referendum rests with federal parliamentarians under s 128 of the *Constitution*. Before the formal process of constitutional amendment can commence, it is necessary for politicians to put the issue on the national agenda.

From Patmore's interviews, three main general justifications for proposing a change to the *Constitution* emerged:

- recognising the importance of the issue for the nation;
- success in passing a referendum and in re-election; and
- timeliness, in terms of it being the appropriate moment for the issue to be raised for public deliberation.³

These are not merely factors taken into account, but ways in which the politicians interviewed justified proposing amendment. These justifications may be found in the political history of the proposed referendum to recognise Indigenous peoples in the *Constitution*. The referendum for constitutional recognition has had cross-party support for some time, and formed part of party policy for the Australian Labor Party ('ALP'), the Coalition and the Australian Greens in the 2010 election. Indeed, both the Coalition and the ALP proposed concrete measures to begin the process of constitutional change in their party platforms.⁴ Unlike the 1999 republican referendum, though, this did not become a significant election issue.⁵

The 2010 election led to a hung parliament, resulting in negotiations to form government between the Australian Greens and the two major parties.⁶ This meant that the Greens had a unique degree of power to influence the political agenda at that time. Consequently, the statements made by Senator Bob Brown—who conducted negotiations on behalf of the Greens—in his 2011 interview are particularly illuminating in understanding how constitutional recognition came to be on the political agenda. Brown explained how he came to propose holding referenda to constitutionally recognise both Indigenous peoples and local government:

We were in a highly charged political firmament where it was for the Greens to decide whether they would support a Coalition government or a Labor government. We were talking to both sides, and at that stage we were moving towards an arrangement with ... Julia Gillard. I was aware that those two constitutional options were likely to have Labor support ... I put those questions on the agenda because I know how hard it is to get anything moving in terms [of] constitutional reform

...I have no doubt that if they were not part of that agreement, they would not be on the agenda now. But they are.⁷

Thus, Brown proposed the referenda because he was in a position of power to choose which major party would form government, and the proposals he made were influenced by this opportunity. His justifications attest to the influence of the timeliness of the proposal and its likely acceptance by his counterparts in the main political parties. However, he was limited to proposals that would be acceptable to a future government. As he explained:

There are of course a number of issues we could've put on that list. But in the very rapid process to an agreement, and there was huge pressure to consummate an agreement, and have it made public very quickly; it was just an opportunity to move forward on those two issues.⁸

Proposing these particular referenda was then seen as an achievable objective in light of these political constraints and time pressures, in contrast with other priorities that might have been more important for the Greens but were unlikely to gain acceptance. Regarding the proposal for constitutional recognition, Brown also made this proposal in order to fulfil his party's expectations and commitments: '[R]ecognition of Indigenous people has always been a high issue for the Greens, so it was likewise a good opportunity.'⁹

In sum, Brown justified his initiation of these proposals in terms of: meeting party objectives, cross-party support to form a government, political opportunities provided by a hung federal parliament, and the time pressures of the negotiations.

Personal beliefs were also important in justifying the proposal for constitutional recognition. Senator Brown, for instance, spoke of addressing past injustices to Indigenous peoples, and aligning Australia's *Constitution* with developments in other comparable countries:

We are way behind Canada and New Zealand in not only recognising Indigenous people but restoring, through that recognition, a little of what's been taken from them ... It is an important step towards doing that in a nation that has two centuries of shameful history as far as first Australians are concerned.¹⁰

As indicated above, the Greens were not the only party supporting constitutional recognition. Malcolm Turnbull, who was the Coalition's Shadow Minister for Communication at the time, was also interviewed in 2011. In contrast to Senator Brown, Turnbull justified the proposal for constitutional recognition on politically pragmatic grounds, and spoke of the need to revise the *Constitution* to reflect contemporary community standards:

The recognition of Indigenous people is essentially a symbolic statement ... It's hard to see why anybody would oppose that. It is

really just ensuring that our *Constitution* recognises the reality of 21st century Australia ...¹¹

Overall, these two leaders' opinions may be assessed in light of the three main justifications for initiating a referendum evident from the research. Although both leaders justified the proposal in terms of its timeliness, political good sense, and national importance, each had different reasons for adopting these justifications. Brown proposed the referendum to modestly address a past injustice; Turnbull agreed because the change would be symbolic and reflect contemporary Australian values. These views indicate the potential variation in the opinions of political leaders regarding the reasons for the initiation of a referendum to recognise Indigenous peoples in the *Constitution*.

Clearly, the way in which a referendum is initiated will vary as the surrounding circumstances differ. The timing of the referendum proposal during these negotiations depended upon the political opportunities to reach interparty agreement, not just its likely success and public support. Given the cross-party support for a proposed referendum that eventuated—and persists today, as discussed below—this suggests that while politicians' beliefs may differ, political cooperation in moving towards a referendum need not be impeded. At this time, there was a consensus among political leaders that a referendum on constitutional recognition of Indigenous peoples should be put to the voters.

Through providing an opportunity for delegates from the community to express their views either supporting or opposing particular referendum questions, such a forum would build broader overall community support, thereby building legitimacy for change.

DEVELOPING THE POLICY PROCESS

The previous section outlined key justifications that led to the referendum proposal being initiated. The next stage in the process of constitutional amendment is the policy process for developing the textual change to the *Constitution*. Two government-supported committees have recently proposed potential policy processes, which will now be considered.

The Federal Parliament's Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples ('the

JSC) published its *Final Report* in 2015.¹² The Referendum Council, meanwhile, is a bipartisan committee that was established in December 2015.

Previous research conducted by Patmore found that two different visions of participatory democracy have influenced political leaders' choice of policy processes for developing textual changes to the *Constitution*.¹³ The two guiding principles were that the process should advocate and seek the public support necessary for a successful referendum; and, on the other hand, that the process should provide for debate and discussion of the proposed amendment. The proposals of the recent government committees can be examined in the light of these concepts of democracy.

In its final report, the JSC proposed, among other things:

- a full day devoted to debating its report concurrently in each house of the Federal Parliament;¹⁴
- constitutional conventions, including some comprised only of delegates from Aboriginal and Torres Strait Islander communities;¹⁵
- other conventions allowing for a diversity of people to be involved in the process;¹⁶ and
- a final national constitutional convention or conventions.¹⁷

The JSC also recommended the establishment of a parliamentary process to oversee the holding of a successful referendum.¹⁸

The JSC may be seen as a proponent for change, in that it was bipartisan and composed of like-minded people working together towards the common goal of developing a proposal.¹⁹ The final recommendation of the JSC highlights its objective: 'that a parliamentary process be established to oversight [sic] progress towards a successful referendum.'²⁰ The success of such a process will depend upon the degree of bipartisan support that can be maintained for the proposal, as well as the support of Aboriginal and Torres Strait Islander peoples. The other conception of participatory democracy assumes that constitutional recognition requires debate and discussion. The JSC argued that no proposal could succeed without the support of Indigenous peoples,²¹ and its proposal for Aboriginal conventions and consultations—allowing for debate and dissent—implicitly acknowledges that Indigenous support is not guaranteed.²²

Furthermore, the JSC Report's proposal of consultation of the Australian community as a whole through a national constitutional convention may well reflect both conceptions of participatory democracy. This process would provide another forum for debate and involve the people in 'settling' the question to be put to referendum.²³ As the JSC mentioned, citing the view of Williams

and Hume, '[i]t should not be possible for Australians to feel that they have not had a chance to "have their say".'²⁴

Through providing an opportunity for delegates from the community to express their views either supporting or opposing particular referendum questions, such a forum would build broader overall community support, thereby building legitimacy for change.

The JSC did not explain, however, how national convention delegates would be chosen, nor how the process of debate would be determined. The last national convention, held before the 1999 republic referendum, involved a system by which half of the delegates were appointed by the government and half were elected. The advantage of elected delegates is that the public will likely be more engaged with the issue and the forthcoming referendum question itself widely publicised.²⁵

While disagreements within Australian society more broadly may become more prominent through a general convention, divisions can be properly managed if they emerge through a fair debate allowing for equitable consideration of different points of view and proposals for change.²⁶ To allow for this, if delegates are appointed, the choice must not be biased in favour of one particular view over others. Great care will be required in the selection process if there are to be appointed delegates to a people's constitutional convention.

Overall, current bipartisan support for constitutional recognition—persisting at least since the issue was put on the political agenda in 2011—has continued to the present day. The strength of the ongoing support for this referendum is illustrated by the establishment of the Referendum Council, which held its first meeting on 14 December 2015.²⁷ The Council is composed of 16 people, providing a range of experience and expertise, and is comprised equally of Indigenous and non-Indigenous members.²⁸

The purpose of the Council is to advise the Prime Minister and the Leader of the Opposition on progress towards, and next steps for, holding the referendum.²⁹ In addition, the Council will oversee a concurrent series of Indigenous-designed and -led consultations within the national process.³⁰ From the government description of its role, the intent of establishing the Council appears to be ensuring a successful referendum:

This referendum is important for all Australians and we recognise this by our firm bipartisan commitment.³¹

It is important that any proposal has the broad support of Indigenous Australians, and the Australian community more generally, before proceeding to a referendum.³²

These positive statements indicate that the Council, like the JSC, is principally intended to be a proponent of change. Recent developments highlight the challenges confronting the Referendum Council in developing a successful proposal. Opposition to constitutional recognition within Indigenous communities in favour of treaty reform has become more prominent.³³ Meanwhile, broader public interest in a treaty has grown, with the Victorian Government's indication of support for an agreement with Australia's First Peoples.³⁴ A division also appears to have developed recently between the leaders of the two major political parties, after Bill Shorten indicated his support for a 'post-constitutional recognition settlement with Indigenous leaders'; a position Prime Minister Turnbull criticised on the grounds it distracted from the recognition effort.³⁵ Such disagreements are, of course, to be expected in a democracy and all form part of the policy process for developing a constitutional amendment and assessing levels of community support for the change.

CONCLUSION

We hope this article has demonstrated some of the political complexities of constitutional reform, at both the initiation and policy process stages. Supporters of constitutional recognition may draw two principal points from our discussion of the recent history.

First, the key justifications of political leaders to initiate a constitutional amendment can be identified from previous empirical research as: the national importance of the issue; success in passing a referendum and in re-election; and timeliness. The interview with Bob Brown referred to above indicates the complexity of considerations present in leaders' minds while negotiating a proposal for a referendum. This multiplicity of influences should be kept in mind by recognition advocates: it will be necessary to persuade political leaders that their concerns regarding timeliness, party support and national importance will be allayed—that this proposal is worth the expense and political risk attendant upon a referendum.

Second, political leaders' choices regarding the policy process for developing a referendum proposal are apparently influenced by two conceptions of participatory democracy. Policy processes may act as proponents for change or for debate. It is of course likely that both visions will have their place in obtaining the support of Indigenous peoples and achieving successful constitutional change, but managing the tension between the two will take political acumen.

Glenn Patmore is a Senior Lecturer in Law at the Melbourne Law School. He is the author of *Choosing the Republic* (University of New South Wales Press, 2009) *which was longlisted for the John Button Prize for*

the best piece of political writing in 2010. For further reading about the process for constitutional change, see particularly chapter 3, 'Altering the Australian Constitution'.³⁶ Sarah Moorhead is a Research Assistant at the Melbourne Law School.

Parts of the discussion of putting the issue on the political agenda draw on Glenn Patmore's own previous work, specifically: Glenn Patmore (2012) 'Justifications For Initiating A Constitutional Amendment to Establish an Australian Republic: An Empirical Study' 40, Federal Law Review 89–110.

This article has been peer reviewed.

- 1 Glenn Patmore, 'Justifications for Initiating a Constitutional Amendment to Establish an Australian Republic (2012) 40 *Federal Law Review* 89. This study sought to address the lack in the literature of direct research into political leaders' justifications for proposing constitutional change: see 94–5. To date there have been no further Australian empirical studies of this nature that appear to have been published.
- 2 The purpose of a historical inquiry is to understand the views of the people at the time, hence we rely particularly on two interviews conducted in 2011.
- 3 Patmore, above n 1.
- 4 The Coalition, 'The Coalition's Plan For Real Action For Indigenous Australians' (Election Policy Document, 2010); Australian Labor Party, 'Closing the Gap' (Election Policy Document, 2010).
- 5 It was briefly mentioned in the ALP's campaign launch: Julia Gillard, 'Speech to the ALP Campaign Launch' (Speech delivered at ALP campaign launch, Brisbane, 16 August 2010), and was not mentioned at all by the Coalition: Tony Abbott, 'Speech to the Coalition Campaign Launch' (Speech delivered at Coalition campaign launch, Brisbane, 8 August 2010).
- 6 The Australian Greens and the Australian Labor Party, 'Agreement' (1 September 2010) <http://greensmps.org.au/sites/default/files/greens-labor_agreement.pdf>. Subsequent agreements were signed with independent members of the Federal Parliament Andrew Wilkie MP and Rob Oakeshott MP.
- 7 Glenn Patmore, Interview with Bob Brown (Telephone Interview, 8 February 2011).
- 8 Ibid.
- 9 Ibid.
- 10 Ibid.
- 11 Glenn Patmore, Interview with Malcolm Turnbull (Telephone Interview, 25 February 2011).
- 12 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Commonwealth Parliament, *Final Report* (June 2015) ('JSC Report'). This report built upon the earlier work of the Prime Minister's Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, which published its report in 2012: *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012).
- 13 Glenn Patmore, *Choosing the Republic* (University of New South Wales Press, 2009), ch 3 'Altering the Australian Constitution' 31.
- 14 JSC Report [2.32].
- 15 Ibid [8.50].

- 16 Ibid [8.49].
- 17 Ibid [8.42]–[8.44].
- 18 Ibid [9.33].
- 19 Ibid v–vi.
- 20 Ibid [9.33].
- 21 Ibid [8.42].
- 22 The proposal for multiple, Indigenous-only conventions gained traction in 2015: Michael Gordon, ‘Trust us: Patrick Dodson and Noel Pearson forge a pact on constitutional recognition’ *The Sydney Morning Herald*, 18 July 2015; Natasha Robinson, ‘Recognition: Patrick Dodson and Noel Pearson unite for cause’ (*The Australian*, 18 July 2015). Aboriginal conventions and consultations have now been adopted as official government policy led by the Referendum Council, see further below.
- 23 JSC Report [8.45].
- 24 Ibid [8.46].
- 25 See also, for example, Paul Kildea, ‘A people’s convention can make Indigenous recognition a reality’ (*The Conversation*, 11 December 2014) <<https://theconversation.com/a-peoples-convention-can-make-indigenous-recognition-a-reality-35139>>.
- 26 The 1998 republican constitutional convention can be seen as having emphasised divisions between republicans arguing for different models of a republic: direct as opposed to parliamentary election of the president.
- 27 Referendum Council, ‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’ (Communiqué, 14 December 2015) <<https://www.dpmmc.gov.au/indigenous-affairs/publication/constitutional-recognition-communique-14-december-2015>>.
- 28 Department of Prime Minister and Cabinet, ‘Referendum Council meets for first time’ (Media Release, 14 December 2015) <<https://www.dpmmc.gov.au/pmc/media/2015/referendum-council-meets-first-time>>.
- 29 Prime Minister and Leader of the Opposition, ‘Referendum Council’ (Media Release, 7 December 2015) <<https://www.pm.gov.au/media/2015-12-07/referendum-council>>.
- 30 Ibid.
- 31 Ibid.
- 32 Department of Prime Minister and Cabinet, above n 28.
- 33 See Liam McLoughlin, ‘Treaty Yeah! Momentum Grows for National Agreements’ (*New Matilda*, 13 March 2016); Mark McMillan, ‘Treaty a recognition of ongoing lawful relations’ (*SBS: National Indigenous Television*, 16 June 2016); Myles Morgan, ‘Referendum Council considers ‘agreement making’ power’ (*SBS: National Indigenous Television*, 29 March 2016) <<http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2016/03/29/referendum-council-considers-agreement-making-power>>.
- 34 Minister for Aboriginal Affairs, ‘Statement on Self-Determination’ (Statement, 26 March 2016) <<http://www.premier.vic.gov.au/statement-on-self-determination/>>.
- 35 Timna Jacks, ‘Shorten backs treaty, but won’t call British settlement an ‘invasion’’ (*Sydney Morning Herald*, 14 June 2016) <<http://www.smh.com.au/federal-politics/federal-election-2016/shorten-backs-treaty-but-wont-call-british-settlement-an-invasion-20160613-gpi8vu.html>>; Tony McLroy and Michael Koziol, ‘Federal election 2016: Indigenous leaders push for treaty negotiations as Malcolm Turnbull agrees with “invasion”’ (*Sydney Morning Herald*, 14 June 2016) <<http://www.smh.com.au/federal-politics/federal-election-2016/federal-election-2016-indigenous-leaders-push-for-treaty-negotiations-as-malcolm-turnbull-agrees-with-invasion-20160614-gpiwqg.html>>.
- 36 Accessible at: <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=94102>.

CUSTODY

Chico Monks

Mixed media
260mm x 350mm x 160mm
2016

Aboriginal lore has governed this land since time began, but since colonisation this lore has been blatantly disregarded and Aboriginal people have been incarcerated under a foreign system of governance, the Australian *Constitution*.

The *Constitution* is bias and based on a lie, as it does not recognise Aboriginal people as the First Peoples of this land, nor does it recognise the existing Aboriginal lore.

The artwork *Custody* focuses on the incarceration of Aboriginal people, both physically and mentally under the *Constitution*. On a daily basis, Aboriginal people are forced to live under a foreign system of governance, this system has led to Aboriginal children being 24 times more likely to be in custody than non-Aboriginal children.

Christianity and the monarchy are forever present when dissecting the hierarchy of systems that govern us; their symbols are placed within the work to highlight their impact on Aboriginal culture and lore.

Until a fair and just governance system is implemented, this form of incarceration will be perpetuated.