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CONSTITUTIONAL CHANGE AND AUSTRALIA'S FIRST PEOPLES

Australian Law Students Association
ALSA Reporter

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A NEW OPPORTUNITY: THE 2010 PROMISE

*A political commitment? W*e have a new opportunity to consider reform of the *Australian Constitution* to incorporate provisions respectful of the indigenous people of our country: Aboriginals and Torres Strait Islanders. Like most things constitutional, the opportunity derives from politics. One of the conditions for the support for the Government of the Greens and of the Independents, Mr. Andrew Wilkie MP and Rob Oakeshott MP, following the 2010 election, was that the government, led by Julia Gillard, would work collaboratively to hold a referendum during the 43rd Parliament on "indigenous constitutional recognition"[1].

Any referendum for such a purpose would therefore need to be held at or before the next federal election. This must be conducted, at the latest, on or before 30 November 2013. In the current fragile political circumstances, the chances of an earlier federal election cannot be overlooked[2]. In pursuit of the foregoing political agreement, the federal

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* Extract based on an address on 27 July 2011 at Old Parliament House, Canberra to a conference convened by the Law Council of Australia.

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[1] Agreement Between the Australian Greens and the Australian Labor Party, 1 September 2010, para.3(f) and Agreement Between the Hon. Julia Gillard MP and Mr. Wilkie, 2 September 2010, para.3.2(f). The Coalition Parties had also earlier promised a referendum on indigenous recognition at the 2013 election. See P. Karvelas and L. Hall, "Coalition to put Aboriginal Recognition to a Referendum", *The Australian*, 10 August 2010, 1.

[2] Anne Twomey, "The Preamble and Indigenous Recognition", unpublished paper, 2011, 1.

government established an "expert panel" to consult and report by the end of 2011 upon options to fulfil the given promise. The panel has proposed recommendations for constitutional change.

The panel criteria and pillars: The panel identified four principles to guide their proposals[3]. They concluded that they must be:

- A contribution to a more unified and reconciled nation;
- Of benefit to, and accord with the wishes of, indigenous people;
- Capable of securing support of an overwhelming majority across political and social spectrums; and
- Technically and legally sound.

The panel also listed seven possibilities for constitutional recognition that it has considered. In these remarks, I will concentrate on the four most likely to fulfil the stated criteria. And in my view, one must add to the announced criteria two more. Any referendum proposal must:

- Keep closely in mind the history of, and the lessons from, past referendums in Australia; and
- Conform harmoniously to the basic language and structure of the Constitution, for it is the sixth oldest continuously operating such instrument in the entire world.

Learning from the history of referendums is vital. Those who fail to do so are condemned to yet another humiliating defeat. Amongst the lessons of the history are those proposed by Williams and Hume. After

[3] Australia, Expert Panel, *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition*, Discussion Paper, May 2011, 16.

recounting the long and sorry record of defeated proposals, the authors suggest five pre-conditions for success, which they call 'pillars'[4]:

- The pillar of bipartisanship;
- The pillar of popular ownership of the proposal; not control by politicians or an elite;
- The pillar of effective popular education;
- The pillar of sound and sensible proposals, in keeping with what Mr. Peter Reith has called "the constitutional temper of the Australian people"[5]; and
- The adoption of modernised procedures for the conduct of the referendum, including the removal of expenditure restrictions presently imposed on federal governmental spending designed to explain the proposal[6].

Additional complications: In the particular case of a proposed referendum concerning Australia's indigenous peoples, I would add to this list another requirement. It is suggested by history, including recent history. Whatever the general political dynamics, fundamental principle demands that nothing should be done concerning constitutional recognition of our indigenous people without a proper, thorough and transparent process of consultation with them, in all of their varieties. There must be no more rushed political moves to meet other peoples' agendas[7]. There must be no more paternalistic impositions of solutions upon Indigenes, supposedly for their benefit and whatever they might

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[4] G. Williams and D Hume, *People Power: the History of the Future of the referendum in Australia* (UNSW Press, Sydney, 2010) 244. See review (2011) 30 *Uni of Tasmania L. Rev*. 172.

[5] Peter Reith, cited Williams and Hume, above 4, *ibid*, 254.

[6] *Referendum (Machinery Provisions) Act* 1984 (Cth). See Williams and Hume, above n5, 260. These follow the report of the Australian House of Representatives, Standing Committee on Legal and Constitutional Affairs, *A Time for Change, Yes/No? Enquiry into the Machinery of Referendums* (December 2009), 60.

[7] *Wurridjal v The Commonwealth*, (2009) 237 CLR 409 at 400 [233]-[234].

think[8]. We are talking of serious and substantially eternal things. These are not the play things of politicians, temporarily in office. Our indigenous people walk to a different drum. And if that requires a longer process for accomplishment than two years, then so it must be. The national humiliation of a second rejection would be best avoided.

There is another consideration. Whilst Australian electors have proved themselves capable of differentiating between different referendum proposals submitted at the same time[9], experience tends to show that the simpler and clearer the proposal, the more likely the success. As Mr. Reith put it, "a genuine problem and a reasonable solution" makes victory more likely[10].

A proposal to recognise local government in the Constitution has now been added to the questions under national consideration. This, like the Preamble for Indigenes, was also put before the people in an earlier form. It happened on 18 May 1974[11]. Now, the former Chief Justice of New South Wales (James Spigelman) has been appointed to head an expert panel dealing with this further topic[12]. It would seem desirable that such disparate subject matters should be kept separate. Not least because a further "pillar" that needs to be considered, based on the

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8 *Ibid*, at 400 [233].

9 As they did on 13 April 1910 when a proposal in respect of State debts was carried; but a proposal on financial and legislative powers was not. And on 28 September 1946, when a proposal on social services was carried; but proposals on organised marketing and industrial employment were not. And on 27 May 1967 when the proposal on Aboriginals was carried; but the proposal for a severance of the nexus between the Houses of Federal Parliament was not. And on 21 May 1977, when proposals for casual Senate vacancies and retirements of federal judges and voting on referendums in the Australian Capital Territory and the Northern Territory were carried. But proposals on elections, local government bodies and simultaneous House of Representatives and Senate elections were not.

10 Peter Reith, cited Williams and Hume, *ibid*, above n4, 254.

11 A proposal to grant power to the Commonwealth to borrow money to make financial grants to any local government body. This was carried in only one State and rejected nationally. See Williams and Hume, above n4, 274.

12 Reported *Lawyers Weekly*, 1 July 2006, 6.

history of referendums in Australia, is that, once rejected, a proposal does not tend to become more palatable by being re-presented in new terms. On the whole, repeatedly re-submitted questions tend to suffer increasingly powerful rejection: as if the electors become irritated by the politicians' persistence. This was the fate of the repeated efforts to secure federal powers to regulate directly industrial relations and to avoid conciliation and arbitration. Such a proposal was rejected at referendums in 1911, 1913, 1919, 1926 and 1946. But then, it was remarkably obviated by the High Court's majority decision in the *Work Choices Case* in 2006, by using a re-conceived notion of the corporations power[13].

Keeping the criteria and pillars of action steadily in mind, what are the 'ways forward' (if I may coin a phrase) to secure appropriate constitutional provisions with respect to the Aboriginal and Torres Strait Islander people of Australia? And what should these be?

FOUR PROPOSALS FOR CONSITUTIONAL RECOGNITION

Deletion of section 25: One possibility for sharing constitutional respect towards of Australia's indigenous peoples, would be the deletion of s25 of the Constitution. This is a little known provision that says:

> "25. For the purposes of the last section [governing the number of members of the House of Representatives] if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then in reckoning the number of people of the State or of the Commonwealth, persons of that race resident in that State, shall not be counted."

[13] *Work Choices Case* (2006) 229 CLR 1 at 135-155 [239]-[327]. This was over the dissents of Callinan J *Ibid* at 331 [793] ff and myself at 205 [481] ff.

This is clearly a racist provision. It is elliptically worded, but it carries nineteenth century notions that Chinamen in the gold fields and Aboriginals in the remote outback might, by reference to their race, be disqualified from voting in a State, and therefore in federal Commonwealth, elections. The possibility that this might be so was quite congenial to their then attitudes to racial discrimination. However, the Northern Territory Intervention laws were enacted in a rush, just before the 2007 federal election, singling out Aboriginals in that Territory for treatment different from, and less than, that accorded to the people of every other race. The Intervention law lifted the application to them of the *Racial Discrimination Act* 1975 (Cth). It removed the protections of the *International Convention on the Elimination of All Forms of Racial Discrimination*[14]. In the *Wurridjal Case*, which I suggest is not one of the finest hours in Australian legal history, when 'on a demurrer' the Aboriginal plaintiffs were denied their day in court, I said[15]:

> "If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable. ... We should not slam the doors of the courts in their face. This is a case in which a transparent public trial of the proceedings has its own justification."

Yet the door was slammed, albeit politely, observing legal forms. The purposes of the legislation were said to be beneficial and protective. But there was no consultation with the Aboriginal people. And the outcomes are strongly contested to this day.

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[14]. *Wurridjal* (2009) 237 CLR 309 at 394 [213].

[15] *Wurridjal* (2009) 237 CLR 309 at 394-5 [214]. Although the Intervention legislation relied additionally on the Federal Parliament's power to make laws for a Territory (NT), the law also purported to rely on the races power. In that decision, the majority held that restrictions on the Federal Parliament's powers in section 51 also applied to laws enacted for territories. Thereby imparting in the case any limits applicable to laws with respect to acquisition of property or special race laws.

The lesson is that, so long as racist provisions exist in the Australian Constitution, they stand at risk of being used. This would be a powerful reason for removing them. A referendum simply to delete s25 from the Constitution would, I believe, stand a strong chance of qualifying on all of the criteria and satisfying all of the pillars of past experience. However, it would be an empty gesture, devoid of any present practical utility. Constitutional change in Australia is hard enough to secure without expending the necessary effort for little or no practical use.

A non-discrimination provision: A second proposal is for the insertion in the Constitution of a modern provision forbidding discrimination against any person (or perhaps any citizen) on the grounds of their race. Historically, such a provision would incorporate novel concepts into the Australian constitution, given that the adoption of the 'races power' was specifically intended to permit unequal treatment, under the Australian Constitution of Chinese and other non-Caucasian people, then seen as a potential threat to the Anglo-Celtic settlers.

When Andrew Inglis Clark secured the inclusion in the 1891 draft of the Constitution of a clause forbidding a State to make or enforce any law abridging any privilege or immunity of citizens of other States and denying persons "the equal protection of the laws"[16], the provision (and an expanded version proposed for it) was rejected in 1897. The rejection occurred on the basis of the arguments of Isaac Isaac Isaacs,

[16] See J. Williams, "Race, Citizenship and the Formation of the Australian Constitution" (1996) 42 *Australian Journal of Politics and History*, 10.

that United States models for such a law were "intended to protect the blacks. Nobody denied these rights to the whites"[17]. Isaacs warned[18]:

> "You could not make any distinction between these people [Chinese] and ordinary Europeans. You could lay down all the conditions you like to apply all round, but you could not impose conditions that would in effect, no matter how the language was guarded, draw a distinction between them and ordinary citizens."

So Clark's idea was dropped. Attempts to read into the language and structure of the Constitution a fundamental notion of the equality of all peoples in the Commonwealth has so far only mustered the support of three Justices of the High Court of Australia[19]. So have we overcome our racial demons sufficiently to progress from the asserted use of the races power to do *unfavourable* things on the grounds of race to our Indigenes. So that now we are ready suddenly to proclaim a complete reversal of direction, turning constitutional *power* into a constitutional *restriction* in the name of equality? Given that the power of restriction was asserted in the Northern Territory Intervention as recently as 2007, and was continued despite a change of government and is forever lauded by the News Limited press throughout Australia, the prospects of gathering the essential preconditions to meet the stated criteria and the accepted pillars for an equality provision seems rather unlikely.

There would be a further complication. Any such non-discriminatory provision in our Constitution would have to extend to the people of every race (indigenous and non-indigenous). A non-discriminatory principle would itself have to be non-discriminatory. But then, the question would

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[17] *Australian Constitutional Debates*, Melbourne, 1898, 669.

[18] *Ibid*. See J. Williams, "The Emergence of the Commonwealth" in H.P. Lee and G. Winterton, *Australian Constitutional Landmarks* (Cambridge Uni Press, Melbourne, 2003) at 26-27.

[19] *Leeth v The Commonwealth* (1992) 124 CLR 455 at 486 ff (relying on the Preamble to the Act) per Deane and Toohey JJ; at 501-503 per Gaudron J. Contrast per Mason CJ, Dawson and McHugh JJ at 466-471 and per Brennan J at 475-476.

be posed, why forbid discrimination on the grounds only of race? Why not also sex or gender? Why not culture or religion? Why not physical or mental disability? And if you want to be really modern and in tune with the *Zeitgeist*, why not, like the South Africans, forbid discrimination on the grounds of sexual orientation? Racial prejudice is not the only demon that some Australians and their politicians have rattling around in their heads.

The ideas of a great new principle of non-discrimination worked in South Africa because of the overthrow of brutal apartheid. We have had no such catharsis in Australia. The undercurrents of racial prejudice remain all too evident. Witness the wholly disproportionate political and media responses to the tiny trickle of so-called "boat people" leading to departures from this nation's obligations under the *Refugees Convention and Protocol*[20]. So the prospects for a non-discrimination clause look bleak indeed.

Amendment or deletion of the races power: A third more important subject for constitutional reform could be the deletion, or modification, of the power in s51(xxvi) of the Constitution that permits the Federal Parliament to make laws with respect to the "people of any race for whom it is deemed necessary to make special laws".

Originally, this power did not extend to the Aboriginal people of Australia. That was so because their regulation was to be left to State parliaments. The aim of deleting the exclusion was to afford the power to the Federal Parliament to enact laws beneficial to the indigenous people of the nation. However, the power to make laws that were beneficial has been

[20] See e.g. Michael White, "The Tampa Incident" (2006) 78 ALJ 101 at 249.

held to include the making and amendment of laws that discriminate against people on the grounds of their race. This, in part, is what was done in the Northern Territory Intervention legislation.

It is a shocking thing, in this day and age, to empower our national parliament to enact laws depriving one segment of our population and citizenry of basic rights enjoyed by others, specifically by reference to their race. Particularly because there is no counter-balancing provision for non-discrimination or equality. Such a notion reflects nineteenth century concepts of racial superiority and paternalistic interventions for 'the natives'. As the 2007 legislation on the Northern Territory Intervention shows, ideas of these kinds can sometimes get caught up in the heat of election campaigns, when emotive, complex and sometimes selfish issues are thrown into the debates. A better defined power, specifically permitting the Federal Parliament to make laws with respect to the advancement of the health, welfare and housing of Aboriginal and Torres Strait Islander peoples, would make more clear what was obviously intended in the 1967 referendum.

If anyone in 1967 had suggested that such laws would be used to take away rights; to take over property; to intrude into homes and communities; to do so with federal police and soldiers; and to take control of income and dignity, it would have come as a rude shock to the electors[21]. The present races power is a relic of colonial thinking. It would be better not to have it at all (and to rely on other powers, including the external affairs power, or new confined powers, for assisting indigenous people) than to have it stand with the current

[21] *Kartinyeri v The Commonwealth* (1998) 195 CLR at 397 [126] referring to the views of Murphy J; and at 397 [127] referring to the views of Brennan J; and at 398 [128[-[129] referring to the views of Gaudron J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 56.

interpretation as evidence that, constitutionally speaking, we are still basically White Australia, however much we boast that we have changed.

Still, in the present fragile political circumstances in Australia, and with the unyielding daily propaganda of powerful media interests, would repeal of the races power secure bipartisan support and popular endorsement? At the very least, against the background of the experience in the past decade, this must be doubtful. The world would look with astonishment at a decision of the Australian electors to retain its legislative power over prejudicial racial enactments when elsewhere in the world this is seen as an anathema and contrary to universal fundamental rights.

PREAMBLAR RECOGNITION

These conclusions bring me to the idea of a new constitutional preamble. Something simpler, and noble, brief and true, that (with the repeal of s25) might conform to the requisite criteria and pass through the pillars that must be faced by constitutional referendums in Australia.

There are real questions of a technical kind concerning any such Preamble. The only preamble that presently exists is not contained in the Australian Constitution itself. It appears in the Imperial statute that formally, at the request of the Australian electors, brought our Constitution into operation. Does our Federal Parliament have the power to amend the “covering clauses” of the Imperial statute? Or is that something that we must seek, cap in hand, in the plenitude of our

independence, from the Palace of Westminster[22]? If this were done, does the constitutional amending provision of s128 of the Australian Constitution apply at all? Or is it concerned only with amendment of the text of *our* part of the document? Have the *Australia Acts* of 1986[23] provided to independent Australia a late Imperial legislative gift to allow us to change the Imperial statute and to insert a new preamble respecting the Aboriginal people? Would we do so anyway, as a matter of politics, without a referendum? And on such a matter, would an affirmative vote be required in *every* State, and not just in a *majority* of States as s128 provides[24]?

If there are any doubts about these technical questions, must we insert any new preamble, awkwardly, at the beginning of our own constitutional text, leaving the "covering clauses" of the Imperial preamble to record the historical events as they stood in 1900? And when we start inserting a simple preamble statement invoking, and respecting the indigenous people of this ancient land, will the majority of our fellow citizens be content with such exceptionalism? Or will they demand references to the other values evident in our history? Perhaps 'mateship' would get another run. Perhaps the baggy green or the ANZAC spirit. Once you start altering a constitution, the plethora of interest groups come out of the woodwork demanding that their interests be acknowledged. And in the background, the hard-nosed practical people of local government will be pressing their claims and demanding their special recognition.

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[22] Cf. *Attorney-General for Western Australia v Marquet* (2003) 217 CLR 545 at 571 [68]-[69] per Gleeson CJ, Gummow, Hayne and Heydon JJ; contrast at 612-617 [202]-[215] of my reasons.

[23] See *Australia Acts* 1986 (UK and Commonwealth), s15(1).

[24] Discussed Twomey, above n2, at 26-27.

CONCLUSIONS: SECURING A NEW PEACE

These remarks show the complexity of the issues raised by the political promise to consider collaboratively "indigenous constitutional recognition". Whilst great constitutional themes remain to be resolved, so do many urgent tasks of day to day importance to daily indigenous disadvantage:

- The shockingly high rates of incarceration of indigenous people in Australia's prisons[25], where Aboriginal and Torres Strait Islanders constitute 26% of the full-time prisoner population whilst being only 2.5% of the total population. They suffer a fourteen times higher imprisonment rate than non-indigenous people. They represent 2,208 members of their ethnicity per 100,000 of the adult population, surely one of the highest such proportions in the world;
- The lack of after-care and support for indigenous prisoners produces serious risks of breakdown, return to prison and post-release suicide. This is a reason why we should be addressing substance and not just words. Judges and lawyers know this. They should inform their fellow citizens[26];
- Housing levels for indigenous people are seriously below the national standards. So are health levels and educational attainments. The British with their huge Empire had a much better record in securing graduate and post-graduate recognition and advancement of colonial people than we have yet attained. Neglect and indifference were the companions of White Australia. Despite many fine efforts, and high hopes, the situation remains one of shocking disadvantage;

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[25] Indigenous prison rates were set out *Sydney Morning Herald*, News Review, 18 June 2011, 3.

[26] Stuart Kinnear (Burnet Institute, Melbourne, July 2011, reported in *Medical Journal of Australia*): Death rates amongst newly released prisoners in Australia are ten times higher than amongst inmates sentenced to non-custodial punishments with one-third of deaths occurring in the first four weeks after discharge. *The Australian* 18 July 2011, 3.

- The high hopes that the *Mabo* case[27], following *Koowarta v Bjelke-Petersen,*[28] provoked[29], that land rights would alter the economic dynamics of indigenous Australians, have only partly been fulfilled. Other cases and laws have taken away what was given, including by insisting on a burden of proving links to the land that is sometimes hard to discharge in the absence of records and documents[30]. Contrast the way, in a stroke, the New Zealand Parliament has changed this in that country, under a conservative government, by reversing the necessary burden of proof. See *Marine and Coastal Area (Takutai Moana) Act* 2011 (NZ), s106(3). A similar proposal was lately made in Australia by former Prime Minister Keating[31]. It is well past time for such a law. Without economic change and responsibility, social progress will remain pitifully slow.
- Even in a simple matter like the preservation of a unique artistic collection of a fine Aboriginal artist, Gordon Syron, disrespect is all too evident. Where is the indigenous museum at Circular Quay or Federation Square in Melbourne? A nation that truly respected its indigenous people would not leave the preservation and advancement of their culture solely to the vicissitudes of the private sector.

So can we find a formula of words for a constitutional preamble? And would it be accompanied as late time with a swift re-assurance, to gain the votes of the sceptical, that it would have no legal effect anyway? If

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27 *Mabo v Queensland* [No.2] (1992) 175 CLR 1.

28 (1982) 153 CLR 168

29 Reinforced by *Wik Peoples v Queensland* (1996) 187 CLR 1.

30 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

31 P.J. Keating, Lowitja O'Donoghue Lecture 2011, reported *The Australian*, 1 June 2011, 3; *Sydney Morning Herald*, 1 June 2011, 15.

so, what is the point? These are the complex questions that the Australian people must consider. They do not become less complex by glossing over the difficulties or by ignoring the history precedes the current debates.

At the beginning of the AIDS epidemic, a remarkable international civil servant, Jonathan Mann, taught the world and me a vital lesson. It was that necessary actions of high moment and moral purpose will only succeed if we engage, consult and respect those in the front line. The countries that followed Mann's advice in this respect, including, with bipartisan support, Australia, made progress in tackling the challenge of HIV. Those that did not have suffered grim consequences which are continuing.

We can derive a lesson in the present context from this experience. The beginning of wisdom in a constitutional recognition of Australia's indigenous peoples must be to ask them what they want. What is important to them? What will help them to heal the wrongs of the past with which we began the modern story of Australia? What will herald a new beginning? Whilst the constitutional text belongs to all Australians, the beginning of the journey that we must make belongs with the indigenous people, who were in this land first.

If our constitutional alteration is informed by this approach, we may make progress. Otherwise, we are in danger of yet another failure, compounding the wrongs of the past with new wrongs inflicted in the present. In the end, constitutional words are important; but they are not enough. A new attitude of mind and heart is necessary. In the logjam of Australian politics, and its often 'toxic' media, change will be difficult to

attain. Perhaps any constitutional changes should be postponed to a later time as a number of indigenous leaders have recommended. But this difficulty is our challenge. The spirit of our country will not be at peace until this challenge is met and properly answered.

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