

CONSTITUTIONAL REFORM AND INDIGENOUS PEOPLES

Research Brief No 2, 2010



Executive Summary

The Indigenous Law Centre is conducting a research project looking at reform of the *Australian Constitution* concerning Aboriginal and Torres Strait Islander people. The Constitutional Reform and Indigenous Peoples project will examine the history of constitutional development relating to Indigenous people since Federation, evaluate the current position of Indigenous people under the *Constitution*, and consider proposals for Indigenous-related constitutional reform. The project is funded by the University of New South Wales Faculty of Law and the Commonwealth Attorney-General's Department.

In recent years Indigenous advocacy for constitutional reform has increased. It is often assumed that reform would improve the position of Australia's first peoples, but this assumption is not always accompanied by detailed analysis or justification. The project aims to identify the main suggestions for reform to consider in detail what kinds of constitutional amendments concerning Indigenous people might be worthwhile. This research aims to inform government policy-making and Indigenous rights advocacy regarding constitutional reform.

Expected outcomes for the project are the publication of a monograph on Indigenous people and the *Constitution*, the holding of an invited expert workshop on constitutional reform, the publication of a thematic edition of the *Australian Indigenous Law Review* on constitutional reform, and the production of Research Briefs and a resources webpage.

The Chief Investigators on this project are:

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South Wales; Member of the UN Permanent Forum on Indigenous Issues; and

- **Dylan Lino**, Research Associate, Indigenous Law Centre.

Background

Reform of the *Australian Constitution* has been an enduring goal for advocates of the rights and interests of Australia's Indigenous people. Since the early decades of Federation, calls have been made to secure better governmental treatment of Indigenous people and stronger protection of their rights and interests through constitutional amendment. In 1967 this advocacy culminated in the most successful referendum Australia has witnessed to date, with over 90 per cent of voters approving changes to the *Constitution* relating to Indigenous people. Despite these constitutional amendments, there remains for many people, both Indigenous and non-Indigenous, a host of 'unfinished business' within Australia's governing document. There is a sense that, beginning with their exclusion from the constitutional drafting process in the late 19th century, Aboriginal and Torres Strait Islander people have on the whole been marginalised by both the terms and effect of the *Constitution*.

Many see the need for a range of constitutional amendments, both symbolic and practical, to redress the *Constitution's* shortcomings with respect to Indigenous people. There are also numerous unexplored possibilities within the existing provisions and jurisprudence of the *Constitution*.

In relation to constitutional amendments and Indigenous people, we will be exploring some of the following:

- inserting a new preamble recognising Aboriginal and Torres Strait Islander peoples; 

- the ‘race power’ – total repeal or amendment so that it can only be used beneficially;
- deletion of s 25, which contemplates electoral disqualification based on race;
- dedicated parliamentary seats for Indigenous people;
- entrenchment of a treaty or a treaty-making power;
- the protection of Indigenous-specific rights, such as rights to land;
- guarantees of equality and non-discrimination;
- Indigenous people and federalism;
- the move to an Australian republic;
- strategies for achieving reform and difficulties associated with the process; and
- constitutional developments in other jurisdictions.

There has been, with a few exceptions, only limited analysis of the effects such reforms would have and of whether they would improve the position of Aboriginal and Torres Strait Islander people. Despite the major significance of the issue of constitutional reform concerning Indigenous people, discussion in the area has been sporadic and piecemeal, and has often been conducted at a fairly high level of generality. Moreover, much of the discussion is now quite dated: there has been a relative lacuna in the field since the 1999 referendum and the conclusion of the work of the Council for Aboriginal Reconciliation in 2000.

Yet in contemporary times, constitutional reform remains a key aspiration for many Indigenous people. It has attracted broad support across the Indigenous political spectrum in recent years, including from Noel Pearson, Mick Dodson, Lowitja O’Donoghue, Marcia Langton, Pat Dodson, Tom Calma, Michael Mansell and Galarrwuy Yunupingu. Amending the *Constitution* to improve the position of Indigenous people was advocated by the Aboriginal and Torres Strait Islander Commission and the Council for Aboriginal Reconciliation, and it has been on the agenda of every Aboriginal and Torres Strait Islander Social Justice Commissioner since that position was created in 1992. Following extensive nationwide consultations in 2009, the National Human Rights Consultation Committee noted in its report that ‘[m]ost Indigenous people who spoke to the Committee held the view that, in order to move forward, reference to Indigenous people and their rights had to be enshrined in the Constitution or in a treaty’ (p 25).

Amending the *Australian Constitution* in relation to Indigenous people has also been a perennial theme of mainstream politics. Calls for a treaty or treaties between Indigenous peoples and the Australian state, which have regularly made their way onto the national political agenda since the late 1970s, have often stressed the need for constitutional reform. In discussions and consultations surrounding the Keating Government’s promised (but undelivered) post-Mabo ‘Social Justice

Package’, the centrality of constitutional change to the notion of ‘social justice’ was regularly emphasised. As is well known, the most recent federal referendum in 1999 involved an ultimately unsuccessful proposal to insert a preamble into the *Constitution* which would have, inter alia, recognised Indigenous people.

Though the last decade has not witnessed the same preponderance of public attention to Indigenous-related constitutional reform as the 1990s, mainstream political parties remain attuned to community support for such reform. Significantly, the political backing for reform in recent years has often been bipartisan, which accepted wisdom holds is a necessary (if insufficient) precondition for a successful referendum. The Senate Legal and Constitutional Affairs Committee, in its 2003 report *Reconciliation: Off Track*, made several recommendations for constitutional amendment concerning Indigenous people, most of which attracted full or partial bipartisan support. In the lead-up to the 2007 federal election, Prime Minister John Howard committed to achieving constitutional recognition of Indigenous people if he was re-elected. This proposal gained the support of then Opposition Leader Kevin Rudd. Following the election, the newly elected Prime Minister Rudd committed in the national apology to constitutional recognition of Indigenous people. Rudd also endorsed constitutional reform after Yolgnu and Bininj elders presented him with a Statement of Intent at the Federal Government’s Community Cabinet meeting in Yirrkala, Northern Territory in 2008. In each instance Rudd received bipartisan support from the Opposition. Constitutional reform concerning Indigenous people was a key theme to emerge from the Indigenous and governance streams of the Australia 2020 Summit held in 2008, elements of which were endorsed by the Labor Government. As of 2010, Indigenous-related constitutional reform remains a feature of the Labor Party’s national platform, with the Labor Party committing to the establishment of an expert panel on Indigenous constitutional recognition if it wins the 2010 election.

In light of these facts, there is a clear need for current, considered and in-depth analysis of the various options to amend the *Constitution* to improve the position of Indigenous people. Such analysis would help to ensure that, in moving towards constitutional reform, the best options are on the table and that unintended and unwanted consequences of reform can be identified and taken into account. There is also a need to probe into future directions and possibilities for Indigenous-relevant jurisprudence on the existing terms of the *Constitution*. This will have the potential to inform judicial thinking and the litigation strategies of Aboriginal and Torres Strait Islander groups, and will also influence assessments as to the need and prospects for formal constitutional amendment.

The Research Project

The Indigenous Law Centre's Constitutional Reform and Indigenous Peoples project will aim to meet these needs for current and detailed research. The project is expected to have four main outcomes:

- the publication of a monograph on Indigenous people and the *Constitution*;
- the holding of an expert workshop on constitutional reform;
- the publication of a special edition of the *Australian Indigenous Law Review* on constitutional reform; and
- the production of Research Briefs and a resources webpage.

1 Monograph

Any moves towards constitutional reform need to be apprised of the history and present position of Indigenous people under the *Australian Constitution*, as well as the possibilities for constitutional development. An understanding of the directions in which the *Constitution* could travel in the coming years – whether by formal amendment or judicial elaboration – demands an awareness of where the *Constitution* is at presently and where it has come from. While textbooks on Australian constitutional law have increasingly displayed an awareness of Indigenous issues, these textbooks, being general surveys of constitutional law and jurisprudence, have tended to devote at most a chapter to selectively cover Indigenous constitutional issues. Similarly, textbooks on Indigenous legal issues typically address constitutional questions as one amongst a range of legal topics of relevance to Aboriginal and Torres Strait Islander people. Megan Davis and Dylan Lino will be co-authoring a monograph that provides a comprehensive account of the *Australian Constitution's* past, present and future in relation to Indigenous people. It is intended that this resource will be of use not only to scholars and students but also to Indigenous rights advocates and governments.

2 Invited Expert Workshop and *Australian Indigenous Law Review* Special Edition

Too little attention has been paid to the specifics of Indigenous-related constitutional reform: its likely benefits, disadvantages and limitations. Yet gaining a proper understanding of the prospects for and consequences of reform is crucial as Indigenous

advocates and governments move forward with their reform campaigns and policies.

An invited expert workshop will be held by the Indigenous Law Centre in 2011, bringing together leading scholars on constitutional law from Australia to discuss possibilities for judicial reform and textual amendment of the *Constitution* concerning Indigenous peoples. Some of the issues up for discussion at the workshop have already been flagged above in the 'Background' section. Each workshop attendee will circulate and later present a detailed paper on a specific aspect of Indigenous-related constitutional reform, which will then be constructively and mutually discussed at the workshop.

Following the workshop, the Indigenous Law Centre will work with each of the workshop attendees to coordinate revision and editing of their papers, which will then be collated, published and distributed in a thematic edition of the *Australian Indigenous Law Review*. To mark the edition's publication and to increase community awareness and education about the important issue of constitutional reform, the Indigenous Law Centre will organise and hold a free public event in Sydney to launch the edition.

Providing current and in-depth scholarly analysis, the workshop and thematic edition will progress public debate and knowledge on the issue of constitutional reform concerning Indigenous people. This is an issue of great importance both to Aboriginal and Torres Strait Islander people and to the nation generally. The thematic edition will also provide a valuable resource to Indigenous advocates and to policy-makers and legislators looking at options for constitutional amendment in the coming years.

3 Research Briefs and Resources Webpage

We will continue to produce Research Briefs as the project continues in order to provide the community with detailed information about proposals for reform. The Indigenous Law Centre will also maintain a resources webpage that can be used by students, policy-makers, academics and community groups in order to access up-to-date and historical information and resources about the issue of constitutional reform: www.ilc.unsw.edu.au.

Timeline of Federal Constitutional Developments

1891–1898	Convention Debates for a federal constitution take place; Indigenous people are not involved and are barely mentioned in the Debates
1901	Federation; the Australian Constitution comes into effect; ‘aboriginal natives’ are excluded from the power to make ‘special laws’ on the basis of race (s 51(xxvi)) and from the reckoning of the population (s 127)
1929	Royal Commission on the Constitution recommends against amending s 51(xxvi) to empower the Commonwealth to make special laws concerning Indigenous people in the States, because ‘on the whole the States are better equipped for controlling aborigines than the Commonwealth’
1944	Referendum proposes to insert 14 new Commonwealth powers for a five-year post-war reconstruction period, including a power to make laws concerning ‘the people of the aboriginal race’; the referendum is defeated
1967	Following a long campaign by Indigenous and non-Indigenous activists, a referendum is held to delete s 127 and to give the Commonwealth power to make special laws concerning Indigenous people in the States; the referendum succeeds with over 90 per cent of voters approving the changes
1974	Referendum puts four separate questions to Australian voters, one of which includes the deletion of s 25; all four questions fail
1983	Senate Standing Committee on Constitutional and Legal Affairs recommends that the <i>Constitution</i> be amended to facilitate the implementation of a treaty between Indigenous peoples and the Australian state; no action is taken by the Hawke Government
1988	Referendum proposes to, amongst other things, strengthen rights protection in the <i>Constitution</i> and make several changes to the electoral system, including the deletion of s 25; the referendum is unsuccessful
1992	High Court hands down its decision in <i>Mabo v Queensland (No 2)</i> , holding that native title survived the acquisition of sovereignty by the British
1992–1995	In response to the <i>Mabo</i> judgment, the Keating Government proposes to implement amongst other things a ‘Social Justice Package’; Indigenous groups and organisations propose the package should include a range of constitutional reforms; the Keating Government loses office before the package can be implemented
1999	Referendum proposes to make Australia a republic and to insert a preamble recognising Indigenous people; both referendum questions are defeated
2000	Council for Aboriginal Reconciliation recommends several constitutional reforms, including the insertion of a preamble recognising Indigenous people, the deletion of s 25, the insertion of a section making it unlawful to discriminate on racial grounds, and the amendment of s 51(xxvi) so that it only permits the making of ‘beneficial’ race-based laws; the recommendations are not taken up
2003	Senate Legal and Constitutional Affairs Committee recommends the insertion of a preamble recognising Indigenous peoples, the deletion of s 25, and the amendment of s 51(xxvi) so that it only permits race-based laws for the benefit of any particular race; despite receiving partial support from government Senators on the Committee, the recommendations are not acted upon
2007	In the lead-up to the 2007 election, Prime Minister John Howard commits to achieving constitutional recognition of Indigenous people if re-elected
2008	Prime Minister Kevin Rudd commits to constitutional recognition of Indigenous people in the national apology and later after a petition by Yolngu and Bininj elders; 2020 Summit recommends constitutional reform concerning Indigenous peoples, elements of which are endorsed by the Labor Government
2009	In its National Platform, the Labor Party commits to inserting a constitutional preamble recognising Indigenous people and to removing or amending ss 25 and 51(xxvi) so that they cannot be used to discriminate against Indigenous people
2010	In the 2010 election campaign, the Labor Government commits to establishing an expert panel on Indigenous constitutional recognition; the Coalition Opposition supports Indigenous constitutional recognition following careful discussion with Indigenous people and the wider community

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