

CONSTITUTIONAL REFORM AND INDIGENOUS PEOPLES

Options for Amendment to the *Australian Constitution*

Research Brief No 3, 2011



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.

This Research Brief is written by Associate Professor Megan Davis and Dylan Lino. It is the second in this project and considers some of the potential options for reform of the *Constitution*. The first Research Brief published for this project is available at: www.ilc.unsw.edu.au.

Background

In 2010, Prime Minister Julia Gillard announced that the federal Labor Government would establish an Expert Panel on Constitutional Recognition of Indigenous Australians. This followed a long period of bipartisan support for recognition of Indigenous peoples in the *Constitution* since the 1999 referendum. Indeed both the Labor Party and the Coalition had policy commitments to the recognition of Indigenous peoples in the *Constitution* during the 2010 federal election. Following the hung Parliament in 2010, in forming government the ALP entered into an agreement with the Australian Greens to 'hold referenda

during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the *Constitution*'. Similarly PM Gillard wrote to Rob Oakeshott, Independent Member for Lyne, confirming that the Government would seek a referendum during the 43rd Parliament or at the next election on recognition of Indigenous Australians in the *Constitution*.

In December 2010, the Prime Minister announced the membership of the Expert Panel to oversee the process toward a referendum to recognise Aboriginal people and Torres Strait Islanders. Details about the Expert Panel can be found at: http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Pages/constitutional_recognition.aspx.

The primary role of the Expert Panel is to:

- lead a broad national consultation and community engagement program to seek the views of a wide spectrum of the community, including from those who live in rural and regional areas;
- work closely with organisations such as the Australian Human Rights Commission, the National Congress of Australia's First Peoples and Reconciliation Australia who have existing expertise and engagement in relation to the issue; and
- raise awareness about the importance of Indigenous constitutional recognition including by identifying and supporting ambassadors who will generate broad public awareness and discussion.

In determining what form constitutional reform should take, the Expert Panel will have regard to:

- key issues raised by the community in relation to Indigenous constitutional recognition;

- the form of constitutional change and approach to a referendum likely to obtain widespread support;
- the implications of any proposed changes to the *Constitution*; and
- advice from constitutional law experts.

The Expert Panel is to report to the Federal Government in December 2011.

Why Constitutional Reform?

One of the reasons that Indigenous leaders and communities have advocated constitutional recognition and reform is that powers and rights under the *Constitution* have greater force than statute law. Statute law or legislation such as the *Native Title Act 1993* (Cth) or the *Racial Discrimination Act 1975* (Cth) can be changed relatively easily by Parliament. Amendments to both of these statutes which have curtailed protection of Indigenous rights have been passed in recent years without adequate consultation with Indigenous groups.

A principle of Westminster parliamentary sovereignty is that no law can bind a future Parliament. Acts of Parliament can be amended or repealed. Thus, laws enacted to protect Indigenous rights can be changed from Parliament to Parliament, creating a situation of uncertainty and vulnerability for Indigenous peoples' rights.

Similarly any rights established under the common law, known also as judge-made law, can be altered by subsequent legislation. This is what occurred in relation to the *Mabo* decision. Native title, as determined by the common law in *Mabo*, was recognised in the *Native Title Act 1993* (Cth) after extensive negotiations in Parliament and with Indigenous leaders. However, following the *Wik* decision, amendments were made to the *Native Title Act 1993* (Cth), which were motivated by a concern to limit the effects of the *Wik* decision. Of course it is true to say that some decisions of the courts have themselves significantly reduced the potential for native title to benefit Indigenous peoples. However, the legislative amendments negotiated by Parliament in 1998 severely impacted upon Indigenous common law rights to native title.

The *Constitution*, on the other hand, cannot be amended without a referendum and the Australian people agreeing to that change. Any conflicts about what the *Constitution* means and the rights that are established under the *Constitution* can be reviewed and adjudicated by the High Court of Australia. This provides greater security of rights and ensures that debates about Indigenous rights are played out in the High Court of Australia rather

than in the cut and thrust of federal and state politics where Parliaments work to quick electoral timetables and frequently fall prey to a majoritarian politics that is traditionally unsympathetic to Indigenous peoples' issues.

Finally, the *Constitution* is the supreme founding document in Australian society. Many Indigenous people believe that it is important for Aboriginal and Torres Strait Islander peoples be recognised for their prior occupation and ownership as the first peoples of Australia with distinct histories and identities.

The Process of Reform

1 The Importance of Indigenous Peoples' Participation: Relevant Articles of the United Nations Declaration on the Rights of Indigenous Peoples

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

2 How is the Constitution Amended?

Section 128 of the *Australian Constitution* sets out the manner and form in which the *Constitution* can be changed. It requires that, in order to become law, any proposed amendment must be approved by:

1. a national majority of voters, and
2. a majority of voters in a majority of states (ie, approval by voters in four out of six states).

Depending on the outcome of the Expert Panel, all Australian voters will be asked to vote on an option or series of options for 'recognising' Aboriginal peoples and Torres Strait Islanders in the *Constitution*.

Given the difficulty of achieving enough voter support for referendum success, a primary question in considering options for reform is: **What is most likely to achieve the consensus of both Indigenous and non-Indigenous Australians?**

Options for Reform

1 Who has Considered and Suggested Potential Options for Amendment in the Past?

- Senate Standing Committee on Constitutional and Legal Affairs, 1983
- Constitutional Commission, 1988
- Social Justice Package, 1992–1995
- Constitutional Convention, 1998
- Council for Aboriginal Reconciliation, 2000
- Senate Legal and Constitutional Affairs Committee, 2003
- Australia 2020 Summit, 2008
- House of Representatives Standing Committee on Legal and Constitutional Affairs, 2008.

2 What are the Most Frequently Mentioned Amendments?

There are a number of proposals raised by Indigenous people and others for amendment of the *Constitution*. Many of these are for the benefit of all Australians, not only Aboriginal and Torres Strait Islander people. Some of the most frequently mentioned amendments are these:

- a non-discrimination provision
- a new preamble recognising Aboriginal and Torres Strait Islander peoples
- amendment or deletion of the ‘race power’
- deletion of s 25
- a provision providing for agreement-making between Indigenous peoples and the state
- recognition of pre-existing Aboriginal land rights or native title.

3 Which Amendments are the Most Likely to Succeed at a Referendum?

- a non-discrimination provision
- a new preamble
- amendment or deletion of the race power
- deletion of s 25.

Non-discrimination provision: benefitting all Australians

Inserting a non-discrimination guarantee in the *Constitution* would address the problem of uncertainty that dominates Indigenous rights in the Australian polity. It would create certainty by providing constitutional entrenchment and therefore security

for the prohibition of racial discrimination. This is an option that would benefit all Australians and would not be Indigenous-specific.

While the *Racial Discrimination Act 1975* (Cth) has been reasonably effective in protecting Indigenous peoples against racial discrimination, the Northern Territory Intervention highlighted how that statute can be made ineffective or invalidated by subsequent legislation.

Preamble: benefitting all Australians

There is bipartisan support for the recognition of Aboriginal and Torres Strait Islander peoples in the preamble to the *Constitution*. It has been argued that technically the preamble does not require a referendum to be amended because it operates in a section that falls outside of the *Australian Constitution* (it is the preamble to the *Commonwealth of Australia Constitution Act 1900* (Imp), the British Act of Parliament that the *Australian Constitution* is contained in). However, even if this is the case, there is an expectation manifest in democratic principles and the rule of law that the preamble be changed via referendum.

This option would require inserting into the *Constitution* new paragraphs that recognise Aboriginal and Torres Strait Islander peoples’ distinct cultural identity and prior ownership and occupation of waters and lands. The preamble would most likely also contain reference to other elements of Australian society, history and values, and could be of benefit to all Australians.

This option is often regarded as symbolic because it will confer no rights upon Aboriginal and Torres Strait Islander people, have only a limited effect (if any) upon the interpretation of the *Constitution*, and thus have no substantial impact upon Indigenous people’s daily lives (for example, by helping to close the gap in living standards).

Amendment or deletion of the ‘race power’

The race power is contained in s 51(xxvi). Historically this section empowered the Commonwealth Parliament to make laws with respect to ‘[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’. The 1967 referendum amended this section so that the words ‘other than the aboriginal race in any State’ were deleted.

This meant that the Commonwealth Parliament was given a new and more expansive power to make laws for Aboriginal people and Torres Strait Islanders. Consequently there is now greater scope for the Commonwealth Parliament to pass legislation protecting Indigenous rights and interests and providing for Indigenous people's welfare. However, High Court cases have led to a situation where the race power is considered to give the Parliament power to make laws that discriminate against Aboriginal people and Torres Strait Islanders or are to their detriment.

The most commonly suggested options for addressing the problem of the race power are these:

- total deletion of the race power;
- replacement of the race power with a new power to pass laws only with respect to Aboriginal people and Torres Strait Islanders specifically, not people of other races;
- amendment of the race power to ensure that it can only be used to make laws for the benefit or advancement of Indigenous people and other racial groups; or
- a guarantee of non-discrimination and racial equality to neutralise the discriminatory impact of the race power.

Deletion of s 25

Put simply, s 25 is a provision that contemplates discrimination on the basis of race by state governments. It envisages that a state Parliament can pass a law disqualifying a particular race from voting at elections for that state's lower house of Parliament. Under s 25 of the *Constitution*, if a state denies a racial group the right to vote in state elections, the people of that race will not be counted in determining the number of seats that state is entitled to in the Federal House of Representatives.

While in operation s 25 disadvantages a state that does enact racially discriminatory voting laws (by effectively reducing the state's population and potentially, therefore, the state's entitlement to House of Representatives seats), Indigenous peoples and many Australians regard s 25 as being an outdated

and unnecessary provision in the *Constitution* and one that sits uncomfortably with Australia's commitment to human rights and equality. Accordingly, many are in favour of deleting s 25. In fact, the deletion of the section has already been attempted in two referendums. Inserted in its place could be a substantive guarantee of racial equality and non-discrimination.

4 An Option Less Likely to Achieve National Consensus: Agreement-making

The *Constitution* could also be amended to enable the Commonwealth to enter into agreements with Aboriginal and Torres Strait Islander communities on issues fundamental to the relationship between those communities and the state. Such agreements could be on a range of issues: for example, education agreements for knowledge houses in secondary schools, agreements for the protection of individual communities' cultural heritage and rights to land, or agreements for the practical implementation of the fundamental rights that are recognised in the United Nations *Declaration on the Rights of Indigenous Peoples*.

In 1983, amidst growing demands for a 'makarrata', the Senate Standing Committee on Constitutional and Legal Affairs recommended that a provision be inserted into the *Constitution* enabling the making of agreements between the Commonwealth and Indigenous bodies or groups. As the Senate Committee suggested, the provision could be similar in form to s 105A of the *Constitution*, which provides constitutional backing for financial agreements reached between the Commonwealth and the states. Such agreements have constitutional force and can only be modified by further agreement between the parties involved, not by legislation.

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