
CONSTITUTIONAL REFORM

AND INDIGENOUS PEOPLES

by Megan Davis & Dylan Lino

The topic of federal constitutional reform concerning Australia's Indigenous peoples was one of the few Indigenous issues to surface during the 2010 federal election campaign. Though at the time of writing it was unclear what the new national political landscape would look like, significantly both major parties offered commitments for amending the Australian Constitution concerning Aboriginal and Torres Strait Islander peoples. The Labor Party committed to establishing an expert panel comprised of Indigenous people and constitutional law experts to consider options for Indigenous constitutional recognition.¹ Recognition of Aboriginal and Torres Strait Islander peoples in the Constitution was backed by the Liberal Party, pending unhurried consultations and community approval.²

In contemporary mainstream politics, the lowest common denominator for Indigenous-related constitutional reform is explicit recognition of Indigenous peoples, typically in a preamble. It is a largely symbolic reform aimed at inclusiveness and reconciliation. The constitutional recognition that predominates in the Australian context makes clear that it is not intended to create new rights or to be used in interpreting other constitutional or statutory provisions. This was the kind of reform proposal – ultimately unsuccessful – put to a referendum in 1999 by then Prime Minister John Howard. It is also the approach that has been taken in recent years by state governments, with Victoria, Queensland and soon New South Wales moving to recognise Indigenous peoples in their constitutions.³

Although recognition is valuable, important and overdue, it is by no means the only option that deserves consideration. There is a range of other reform possibilities that need to be on the table and given detailed scrutiny. Because of the rarity of opportunities for constitutional amendment, it is important that such scrutiny occur before any reform agendas are set in train. It has been more than 40 years since the last successful referendum on Indigenous-related constitutional amendments was held. Considering the current bipartisan support for further change, we now have

a golden opportunity to make sure that the Constitution works as best as it can for Indigenous people.

INDIGENOUS CONSTITUTIONAL REFORM, HISTORICAL AND CONTEMPORARY

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.⁴ In 1967 this advocacy culminated in the most successful referendum Australia has witnessed to date, with over 90% cent of voters approving changes to the Constitution relating to Indigenous people.⁵ 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. Some of the key reforms that have been proposed over the years include:

- inserting a new preamble recognising Aboriginal and Torres Strait Islander people;
- amending the 'race power' (s 51(xxvi)) – either total repeal or amendment so that it can only be used beneficially;
- the deletion of s 25, which contemplates electoral disqualification based on race;
- dedicated parliamentary seats for Indigenous people;
- the 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;
- changes to how federalism impacts on Indigenous people; and
- the move to an Australian republic.

There has been, with few exceptions, only limited analysis of the effects such reforms would have and whether they would improve the position of Aboriginal and Torres Strait Islander people in Australia. 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.⁶ 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,⁷ and it has been on the agenda of every Aboriginal and Torres Strait Islander Social Justice Commissioner since that position was created in 1992.⁸ 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

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Indigenous people and their rights had to be enshrined in the Constitution or in a treaty'.⁹

CONSTITUTIONAL REFORM IN CONTEMPORARY MAINSTREAM POLITICS

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.¹⁰ 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, amongst other things, 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.¹¹ In the lead-up to the 2007 federal election, Prime Minister John Howard committed to achieving constitutional recognition of Indigenous people should he be re-elected. This proposal gained the support of then Opposition Leader Kevin Rudd.¹² Following the election, the newly elected Prime Minister Rudd committed in the National Apology to constitutional recognition of Indigenous people. Prime Minister Rudd also endorsed constitutional reform after Yolgnu and Biniŋ 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 the Prime Minister received bipartisan support from the Opposition.¹³ 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.¹⁴ As of 2010, Indigenous-related constitutional reform remains a

feature of the Labor Party's national platform.¹⁵ And as we detailed earlier, both major parties made commitments to constitutional amendments concerning Indigenous people during the 2010 election campaign.

WHERE TO FROM HERE?

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. It would also help to ensure 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 for and prospects of formal constitutional amendment.

CONCLUSION

The current mainstream appetite for Indigenous-related constitutional reform presents a rare window of opportunity. Not only does it provide a chance to achieve long-overdue recognition of Australia's first peoples in our most fundamental governing document; it also offers the possibility for other symbolic and practical changes to the way Indigenous peoples are governed in Australia. Before embarking on any campaigns for specific reforms, we need to ensure that all of the major reform suggestions are given careful consideration. Alongside requisite consultation with non-Indigenous Australians, it is important to ensure that Aboriginal communities in remote, rural and regional areas and Torres Strait Islander peoples are adequately informed and consulted of potential options for reform. This can help to ensure that the full potential of this chance for change is realised and that the Constitution under which Indigenous people live works in their best interests.

Megan Davis and Dylan Lino from the Indigenous Law Centre, Faculty of Law, University of New South Wales are conducting a research project on Constitutional Reform and Indigenous Peoples. Further information about this project can be found at: <<http://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 Constitution 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 Constitution 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 that 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

- 1 Natasha Robinson and Lex Hall, 'Macklin Vows to Consider Indigenous Recognition in Constitution', *The Australian* (Sydney), 9 August 2010, 1–2.
- 2 Patricia Karvelas and Lex Hall, 'Coalition to Put Aboriginal Recognition to Referendum', *The Australian* (Sydney), 1.
- 3 *Constitution Act 1975* (Vic) s 1A; *Constitution of Queensland 2001* (Qld) preamble; New South Wales Department of Aboriginal Affairs, *Constitutional Recognition of Aboriginal People: Discussion Paper* (2010) <<http://www.daa.nsw.gov.au/data/files/cab%20min%20discussion%20paper.pdf>>.
- 4 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) ch 2.
- 5 *Ibid* 54.
- 6 See, eg, Natasha Robinson and Lex Hall, 'Macklin Vows to Consider Indigenous Recognition in Constitution', *The Australian* (Sydney), 9 August 2010, 1–2.
- 7 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) [4.1]ff; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (1995); Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (2000) ch 10 (recommendation 3); Council for Aboriginal Reconciliation, *Roadmap for Reconciliation: Recognising Aboriginal and Torres Strait Islander Rights* (2000) ch 4.
- 8 Aboriginal and Torres Strait Islander Social Justice Commissioner ('ATSISJC'), *Social Justice Report 1995* (1995) ch 4; ATSISJC, *Social Justice Report 2000* (2000) ch 4; ATSISJC, *Social Justice Report 2008* (2009) ch 2.
- 9 National Human Rights Consultation, *Report* (2009) 25.
- 10 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) [4.1]ff; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (1995).
- 11 Senate Legal and Constitutional References Committee, Parliament of Australia, *Reconciliation: Off Track* (2002) xiii (recommendations 11–13), 134 (comments by Government Senators on recommendations 11–13).
- 12 John Howard, 'A New Reconciliation' (2007) 19(4) *The Sydney Papers* 104.
- 13 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister); Lindsay Murdoch, 'Place for Aborigines in the Constitution', *The Sydney Morning Herald* (Sydney), 24 July 2008, 7; Natasha Robinson and Samantha Maiden, 'No Rush to Indigenous Amendment', *The Australian* (Sydney), 25 July 2008, 4.
- 14 Australia 2020 Summit, *Final Report* (2008) 228, 307–8; Australian Government, *Responding to the Australia 2020 Summit* (2009) 187, 226–7.
- 15 Australian Labor Party, *National Platform and Constitution 2009* (2009) ch 7 [55], ch 11 [18]–[22].

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