Chapter 11

Competing Proposals for Recognition
An Evaluation

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Saturday 27 May 2017 will mark the 50th anniversary of the successful referendum to alter the Constitution to give the Commonwealth power to make laws about Aborigines and count them in the census. While the 1967 referendum removed barriers to Commonwealth power in relation to Aborigines it also incidentally removed all references to Aborigines in the Constitution.

Two decades later, in 1988, the question of constitutional recognition of Aboriginal and Torres Strait Islanders was considered by the 1988 Constitutional Commission. While the Constitutional Commission rejected the recognition of indigenous[1] peoples in the Constitution, the debate has not gone away.

This paper will attempt to do three things: firstly, to examine the history of indigenous recognition since 1988; secondly, to look at where the debate is now; and then, thirdly, to examine where those of us who wish to uphold the Constitution might engage in discussions about this issue. The fact that The Samuel Griffith Society has produced a range of different papers on a range of different topics indicates that there is, at least within our organisation of constitutional conservatives, lively debate about this issue.

History

In the mid-1980s the Hawke Government established the Australian Constitutional Commission under Sir Maurice Byers, the former Solicitor-General of the Commonwealth. That Commission reported in 1988. It rejected constitutional recognition of indigenous people on the basis of "the difficulty of reaching an agreement on an appropriate form of words".[2]

Agitation for indigenous recognition nevertheless continued throughout the 1990s through organisations like the Aboriginal and Torres Strait Islander Commission, the Council for Aboriginal Reconciliation and the Constitutional Centenary Foundation.

The indigenous recognition debate was caught up with other political, legal and constitutional debates in the 1990s like that arising from the *Mabo*[3] decision of the High Court, the Human Rights Commission's *Bringing Them Home* report, the activism of the High Court when Sir Anthony Mason was the Chief Justice, and the republic debate. It was in the context of these debates that The Samuel Griffith Society was formed.

These events unhelpfully coloured discussions about indigenous recognition. Particular decisions of the Mason Court rightly made constitutional conservatives nervous as a consequence of its activist approach. The high point of this activism came in a speech in 1992 entitled, "A Government of Laws and Not of Men",[4] by then High Court Justice John Toohey. In this address his Honour argued that, if the Parliament did not create a bill of rights, the Court might, over time, imply one at any rate.

Toohey's speech and the jurisprudence of the High Court in the 1990s effectively put Australians on notice that any language added to the Constitution needs to be carefully considered to ensure that it does not create unintended consequences or grant unexpected additional rights. The more symbolic and imprecise the proposed constitutional amendment, the greater the potential for creative and unintended judicial interpretations will be.

The present discussion about indigenous recognition seems to have forgotten these essential facts.

Conservative support for recognition: the 1998 Constitutional Commission

In 1998, the Howard Government established a partly appointed, partly elected Constitutional Convention to determine whether Australia should become a republic and, if so, what model might be presented to the Australian people. I was the youngest elected delegate to that Convention.

The Convention established a number of working parties to deal with the republican model and related matters which would need to be addressed if Australia became a republic. I participated in a working party established to examine recognition of indigenous people in the Preamble to the Constitution. It was the only working party to contain both monarchists and republicans. Members of the working party included indigenous delegates, Lois (later Lowitja) O'Donoghue, Neville Bonner and Gatjil Djerrkura as well as several monarchists including Dame Leonie Kramer and myself as well as Peter Grogan from the Australian Republican Movement.

A number of constitutional monarchists adopted the cause of indigenous recognition at the Convention. Dame Leonie Kramer said: "I want to appeal for you all to agree unanimously, as we did the other day, to the inclusion of Aboriginal and Torres Strait Islanders in the Preamble." [5]

One of the more trenchant conservative monarchists at the Convention was Brigadier Alf Garland. Garland said:

> I personally believe that the rights of aboriginals ought to be included in the Constitution. Indeed, over many years of service, I have had many aboriginals and many individuals from the Torres Strait Island serve with me and for me and I can say without a shadow of a doubt they have been magnificent soldiers and, what is more, even greater Australians. I do not believe any preamble will cover the sorts of things that the Aboriginal community wants. Most certainly put it into the Constitution but do not let us worry about putting it into the Preamble. Let us make it a Section of the Constitution and then there can be no doubt about exactly what we are talking about.[6]

Another former President of the RSL, Major-General William "Digger" James, also supported recognition. He said:

> Aboriginal and Torres Strait Islanders served in World War I, World War II, Korea and Vietnam, indeed, in every campaign of this century. Their services recognized in the Army as being normal, ordinary, equal people. That is what we are talking about. I think our Constitution should be written to deal with all of its people, with all Australians and not to suggest any other way[7]

Another monarchist, the former Lord Mayor of Sydney, Doug Sutherland, said:

> when our Constitution was adopted one hundred years ago our knowledge of the history of this great land was far diminished from that which it is today. We had no idea, for example, that this continent had been occupied for something like 50,000 years. I think it would be remiss of us if we did not pick up in the Preamble the recognition of that fact and the prior occupancy of the indigenous people.[8]

South Australian Monarchist and Catholic Priest Father John Fleming moved:

> That this Convention resolves that in the failure of a republican model at a referendum, another referendum be put to the Australian people that would add to the Preamble a clause recognizing Aboriginal and Torres Strait Islanders, as the original inhabitants of Australia who enjoy, equally with other Australians, fundamental human rights and that there be wide community consultations at ATSIC and other relevant bodies to reach an agreement on the form of words of proposed constitutional change before it is put to the people.[9]

Father Frank Brennan refers to my own role in this debate in his book, *No Small Change: The Road to Recognition for Indigenous Australians*. Brennan points out that I argued:

> I think there is broad based support in this place for the fact that recognition of indigenous people is long-overdue in our Constitution. . . . I think we have to take positive steps at this Convention and show that on certain issues, we as an Australians community can unite. I believe that on recognition of indigenous people in the Constitution that we can unite.[10]

It should be said that my own contribution to this debate was not without caution. While I supported the notion of indigenous recognition, I acknowledged that it was unsafe to say that "the High Court will never [use] the Preamble [to interpret the Constitution]… We cannot predict what the High Court will do in fifty, sixty or one hundred years' time." I went on to point out some of the issues the High Court had raised in the *Leeth*[11] and *Kruger*[12] cases to which I will return later in this paper.[13]

Frank Brennan also noted that I moved there be a separate question put to the Australian people to recognise indigenous people at the same time as the republic question be put. On this point I was ruled out of order by Convention Chairman, Ian Sinclair.[14]

It was at that point in the proceedings that Sir David Smith sprung to his feet and said:

> Mr Chairman, I appeal to you. Is there no way that this Convention can support what we have just heard from my friend Councillor Julian Leeser, without it being ruled out on a technicality? Please, this is not the place for a technicality on this issue.[15]

Sir David Smith, in what must have been a first in his life, was also ruled out of order.

What this history demonstrates is that constitutional conservatives have a track record of supporting some idea of indigenous recognition.

John Howard's Preamble

In March 1999 John Howard proposed that a new preamble be inserted into the Constitution and put as a separate referendum question to coincide with the republic referendum. Howard produced a preamble with the poet, Les Murray, which contained a range of symbolic aspirational

and historical statements. There was widespread criticism of the Howard-Murray Preamble both because of the substance of the sentiments and the lack of consultation in its design. Later John Howard consulted Senator Aden Ridgeway, an Aboriginal senator representing the Australian Democrats from NSW. The final preamble proposal contained the following words:

> With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good. We the Australian people commit ourselves to this Constitution:
>
> proud that our national identity has been forged by Australians from many ancestries; never forgetting the sacrifices of all who defended our country and our liberty in time of war; upholding freedom, tolerance, individual dignity and the rule of law; **honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with the lands and for their ancient and continuing cultures which enrich the life of our country;** recognizing the nation-building contribution of generations of immigrants; mindful of our responsibility to protect our unique natural environment; supportive of achievement as well as equality of opportunity for all; and valuing independence as dearly as the national spirit which binds us together in both adversity and success. [Emphasis added]

There was little debate on the Preamble and the fact that it was largely drafted by three people meant that it lacked popular legitimacy.

The official "No" case for the republic referendum took no position on the Preamble while the official "Yes" case encouraged Australians to vote "yes" to both the republic and the Preamble. Despite this, the Preamble attracted the support of only 39.34 percent of Australians and a majority in none of the States – one of the largest losses for any referendum question since Federation.

John Howard's Last Election

During the 2007 election campaign, prompted by correspondence he had been having with indigenous leader Noel Pearson, John Howard again proposed a new constitutional preamble:

> I believe we must find room in our national life to formally recognise the special status of Aboriginal and Torres Strait Islanders as the first people of our nation. We must recognise the distinctiveness of Indigenous identity and culture and the right of Indigenous people to preserve that heritage. The crisis of indigenous social and cultural disintegration requires a stronger affirmation of indigenous identity and culture as a source of dignity, self-esteem and pride. I announce that if re-elected, I will put to the Australian people within eighteen months, a referendum to formally recognise Indigenous Australians in our Constitution – their history, as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, but not indivisible nation. My goal is to see a new Statement of Reconciliation incorporated into the Preamble of the Australian Constitution.[16]

John Howard lost the 2007election but, in *Lazarus Rising*, he indicates the background to that speech and his continued desire for indigenous recognition in the Preamble – a point he has continued to make since the publication of that book.

Kevin Rudd to Tony Abbott

At the 2007 election Kevin Rudd became prime minister. One of the first acts of the Rudd Government was the apology to the stolen generation.[17] On 23 July 2008 Kevin Rudd and the Leader of the Opposition, Brendan Nelson, committed Labor and the Coalition to the constitutional recognition of indigenous Australians.[18]

During the 2010 election campaign, the Indigenous Affairs Minister, Jenny Macklin, now serving under Prime Minister Julia Gillard, announced a bipartisan panel would be established following the election. The 2010 election resulted in a hung parliament and, as part of the negotiations with the Greens and Independents, the parties agreed to "hold a referendum during the 43rd parliament or at the next election on indigenous recognition".[19]

The Gillard Government established the Expert Panel under the co-chairmanship of Patrick Dodson and Mark Leibler. The Expert Panel reported in January 2012 and made the following recommendations:

1 That section 25 be repealed.

2 That section 51(xxvi) be repealed.

3 That a new "section 51A" be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples; the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples. The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

4 That a new 'section 116A' be inserted, along the following lines:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

5 That a new "section 127A" be inserted, along the following lines:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.
(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

On the 22 September 2012, Jenny Macklin announced that the Gillard Government had decided to postpone the vote on recognition on indigenous people before the 2013 election saying: "I think we also have to acknowledge that there isn't community awareness for the change of the Constitution."[20]

The Government instead proposed to introduce an Act of Recognition into the Parliament before the end of 2012 to mirror the recommendations of the Expert Panel. The Act of Recognition came up for debate in the Commonwealth Parliament on 13 February 2013.

Prime Minister Tony Abbott was Leader of the Opposition at the time of the Act of Recognition. Abbott has had a long interest in indigenous policy. For years he volunteered at indigenous programs in Sydney, as well as spending a week each year as teacher's aide in Cape York. As prime minister he has spent a week each year running the country from a remote indigenous community. In his speech on the Act of Recognition Tony Abbott used highly emotive language to describe the history of indigenous/non-indigenous relations:

> We have acknowledged that pre-1788, this land was as aboriginal then as it is Australian now and, until we have acknowledged that, we will be an incomplete nation and a torn people. . . . In short, we need to atone for the omissions and for the hardness of heart of our forebears to enable us all to embrace the future as a united people. . . . I believe that we are equal to the task of completing our Constitution rather than changing it. . . . As the Prime Minister said: we shouldn't feel guilty about our past but we should be determined to rise up against that which now makes us embarrassed.[21]

In December 2014, Abbott, now prime minister, at an address to the Recognise Annual Gala Dinner in Sydney, avowed that he was "prepared to sweat blood" for indigenous recognition.[22]

The State of the Debate in August 2015

It is fair to say that the debate on indigenous recognition has stalled. After election of the Abbott Government the Parliament established a Joint Select Committee on the Recognition of Aboriginal and Torres Strait Islander Peoples with Western Australian Liberal, Ken Wyatt, MP, as the chair. That committee reported in June 2015.[23]

It did not, however, reach a consensus on key questions. Rather than choosing a model for a referendum and setting a timetable, the committee recommended that "the referendum on constitutional recognition be held when it has the highest chance of success".

It did not set a timetable and its views are quite tentatively expressed. The committee recommended:

- The repeal of section 25 of the Constitution; and
- The repeal of the "race" power and the retention of a person's power so that the Commonwealth might legislate for Aboriginal and Torres Strait Islander peoples.

Then it recommended three options, either:

- An Aboriginal and Torres Strait Islander power with recitals;
- A racial non-discrimination clause under Section 116A;
- A non-discrimination clause under Section 80A.

Having not come to any particular conclusion, it recommended that a series of conventions be held. The first set of conventions would comprise Aboriginal and Torres Strait Islander delegates. This would be followed by a national convention of both indigenous and non-indigenous people.

On 6 July 2015 indigenous leaders held a significant meeting with the Prime Minister, Tony Abbot, and the Leader of the Opposition, Bill Shorten. The joint media release committed to a referendum:

- when such a referendum has the best chance of success;
- in the next term of parliament;
- not in conjunction with an election.

They also agreed:

- to establish a series of community conferences across the country for everyone to have a say on recognition;
- for the joint select committee to produce a document outlining the issues for consultation; and
- to establish a Referendum Council that is broadly reflective of the Australian people to progress a range of issues around constitutional change including how a question might be settled, timing and constitutional issues.

All the indigenous leaders also sent Abbott and Shorten a message, however. This referendum would not be about symbolic issues. It needed to be about substantive issues or it would not get indigenous support.[24]

And there is no point having a referendum unless indigenous people support what is proposed.

There are some similarities here with the 1999 republic referendum. In that referendum campaign republicans were split between minimalist republicans – who only wanted symbolic change – and maximalist republicans who wanted sweeping changes to our system of government.

Consideration of Preamble Proposal

In the context of future consultation I want to bed the idea that indigenous recognition can be achieved safely in the Preamble to the Constitution because the Preamble has no legal effect. This proposal has been advocated by John Howard, Tony Abbott and even Gary Johns This idea is mistaken. The Preamble has legal effect.

Over the years, the Preamble has been used as an interpretive device and as a source of Commonwealth power and prohibitions respectively. Even the framers of the Constitution thought that the Preamble would be used as an interpretive provision. In the *Annotated Constitution of the Australian Commonwealth*,[25] lawyers Sir John Quick and R. R. Garran anticipated that sections of the Preamble might be "of valuable service" and have "effect in the courts of the Commonwealth," particularly to help resolve any ambiguities in the text of the Constitution itself. But words and phrases that might have appeared settled in 1901 may in time be "obscured by the raising of unexpected issues and by the conflict of newly emerging opinions".

Section 116 of the Constitution, for example, was introduced because the framers were concerned that the words "humbly relying on the blessing of Almighty God" in the Preamble might lead to the establishment of a particular religion in Australia. In 2001, the historian, Mark McKenna, and lawyers Amelia Simpson and George Williams wrote that "at least some of the framers believed that some of the Preamble might affect the scope of federal legislative power and that it might play a role in constitutional interpretation in other areas not subject to a provision such as Section 116".[26] They noted that the Preamble has not been used a great deal in interpretation and posit two reasons. First, because the "Preamble offers rather slim pickings for judges seeking interpretive assistance". Second, they noted that:

> from the time of the *Engineers Case* in 1920, the court rejected the use of the debates in the interpretation of the Constitution. The court only revised its approach and permitted reference to the convention debates on a limited basis in 1988 in its unanimous decision in *Cole v Whitfield*. The court has yet to set out any like statement of approach to the Preamble.[27]

The late Professor George Winterton also urged caution in relation to recognising Aboriginal people in the Preamble to the Constitution:

> care should be taken to avoid inclusion of any provision which may have legal consequences, especially because some of those consequences are likely to be unintended and indeed unwelcome. Thus many of the proposed new constitutional Preambles include recognition of aboriginal dispossession but, while not denying its general truth, it is suggested that such a provision would be unwise … it could have unintended legal consequences deleterious to Aboriginal rights.[28]

There are serious constitutional dangers in putting words into the Preamble to the Constitution. It can easily become the repository of language that can affect the entire document. Writing in 1996, two (then junior) barristers considered the Preamble. Their observations should be treated with great weight, not only on account of the force of their argument, but also because one of them, Mark Leeming, is now a Judge of Appeal in New South Wales, while the other, Stephen Gageler, is now a Justice of the High Court. Leeming and Gageler demonstrate that:[29]

1. in two cases (*Sharkey*[30] and *Leeth*) Justices of the High Court have relied on the words of the Preamble as "sources of Commonwealth power and prohibitions respectively";[31]
2. the Preamble "is undoubtedly used to interpret and develop constitutional law. How precisely it will be used by the High Court cannot be predicted;"[32]
3. the "tendency of Justices of the High Court to rely on the words of the Preamble in matters of constitutional interpretation means that extreme care should be taken in considering what words might replace the present Preamble;"[33]
4. a "new Preamble to the Constitution … as a source of constitutional law might be anticipated to be greater than one composed a century ago;"[34]
5. "the effect of the inclusion of broad statements of contemporary values as has been repeatedly urged by numerous non-specialist commentators would be highly uncertain."[35]

Gageler and Leeming also discuss the use of the Preamble in a number of cases and noted that in "the cornerstone of modern constitutional jurisprudence", the *Engineers' case*, the language of the Preamble – particularly its reference to the unity of the Australian people under the Crown – played no small part in the reasoning of the majority.

The observations made by these and other commentators indicate how the Preamble has been used, and that it must be treated carefully and with caution before any words are added to it. In the 1999 referendum on the Preamble, John Howard was presumably given advice that he needed a non-interpretive clause for his Preamble. For the very reason that the Preamble can have legal effect, part of Howard's proposal involved a new section 125A, which stated:

> The Preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law interpreting the Commonwealth or any part of the Commonwealth.

This indicates that John Howard knew that the Preamble could have legal force. But a clause such as this substantially undermines the purported symbolic effect of any preamble. It is the equivalent of saying, "Australians believe X—only joking."

I am very much opposed to the idea of using the Preamble to the Constitution as a place for symbolism. It is clearly dangerous and any attempt to use the Preamble to insert symbolic material should be resisted by anyone who rejoices in the name, "constitutional conservative".

Even Abbott's formulation of "Aboriginal heritage, British foundation, and multicultural character" could have unintended consequences if inserted into the Constitution. Consider:

- How would our multicultural character affect laws that sought to ban certain terrorist groups or established English literacy tests for university admissions?
- If certain immigrant groups are disproportionately denied access to Australia's refugee program, does that undermine Australia's multicultural character?
- Does the multicultural character require quotas for certain groups in certain areas?
- What does the reference to indigenous heritage mean for land law protections?

All of these questions may in time be raised if such symbolic language is put into the Preamble. It could have far-reaching, unintended effects, despite being intended to have none. Further, introduction of symbolic language that is not intended to have any effect on the interpretation of the Constitution is not in keeping with the spirit of the Constitution our framers designed. The Constitution is a practical, working document and the only changes made to the Constitution should be practical ones. On this point, there is unexpected potential for indigenous leaders and constitutional conservatives to agree.

Proposed package of reforms

Finally, I want to consider a four-point package of constitutional reforms that are consistent with the values of The Samuel Griffith Society. That package comprises:

(i) the Australian Declaration of Recognition;
(ii) repeal of section 25 of the Constitution;
(iii) codification of section 51(xxvi), the races power; and
(iv) creation of a consultative body to improve indigenous public policy-making.

Let me say The Samuel Griffith Society is not the "always say no to amending the Constitution" society. For instance, the aims of the Society include:

To restore the authority of Parliament as against the Executive.
To defend the independence of the Judiciary.
***To foster and support any reforms of Australia's constitutional arrangements which would help achieve these objectives**.*

We should also remember the support of many constitutional conservatives at the 1998 Constitutional Convention for indigenous recognition.

In that context it is worth considering a package of reforms that members of our Society might consider supporting.

First, any package of reforms worth considering must be consistent with Australia's constitutional architecture. It should not affect the Crown, the Federation, the sovereignty of Parliament, or create a bill of rights.

Secondly, it should enhance national unity and the centrality of indigenous people in the broader Australian story.

Thirdly, it should remove spent provisions and codify 114 years of well-established constitutional practice.

Finally, it should aim to create better public policy by mandating that Aboriginal and Torres Strait Islander people, as the only people about whom that Parliament can make specific laws, be consulted about those laws.

Such a package should contain four elements:

Australian Declaration of Recognition

First, the package offers a non-constitutional 300-word Australian Declaration of Recognition, an idea proposed jointly by Damien Freeman and myself. The Australian Declaration of Recognition is a 300-word document that would have no legal status and would not appear in the Constitution of Australia.

The Australian Declaration of Recognition would have similar status to the Australian Flag or the National Anthem and we have suggested using similar mechanisms to adopt the Declaration.

Like the Flag, the Declaration would be designed by Australians through a public competition, and not by politicians and bureaucrats. When the Australian National Flag competition was held in 1901, the prize money for the winning design was shared by five people including a fourteen-year-old schoolboy from Melbourne, an apprentice optician from Sydney, an architect from Melbourne, an artist from Perth, and a ship's officer from New Zealand. We think a similarly diverse group of Australians would submit Declarations of Recognition on this occasion.

Australian electors will vote for the Declaration in a preferential ballot with a choice of up to five declarations. They will be asked to indicate, in order of preference, their views about the best option. This was the same method used to choose *Advance Australia Fair* as the National Anthem in 1977.

The Declaration of Recognition would have similar cultural status to the National Anthem or, in an American context, the Declaration of Independence or the Gettysburg Address, in that it would be used at civic, school, cultural, religious, and even sporting ceremonies. In that sense, over time, it would be imprinted on the hearts and minds of all Australians.

The Declaration need not refer solely to indigenous issues but it might also refer to other aspects of our history and values to which all Australians should subscribe. It could be a very useful document to inculcate Australian values in new migrants and school children.

The Declaration has the advantage of avoiding unintended legal consequences and allows for more Australians to have a role in the design and content of any statement of recognition. We also wanted to give Australians the ability to use soaring language unconstrained by the need to second guess the High Court and we hope the Australian Declaration of Recognition will do this.

The Declaration would be a popular and well known document. By contrast, putting a sentence in the Preamble to the Australian Constitution – a document fewer than 50 percent of Australians know we have and fewer than 20 percent of Australians have ever read and constrained by legal technicalities – seems to be a complete waste of the political capital needed to achieve success in a referendum.

Machinery Provisions

Secondly, the package would remove spent provisions and codify existing constitutional practice.

The Constitution, section 25

One of the proposals for constitutional reform is repeal of section 25. Section 25 was described by Sir Edmund Barton as a "machinery clause". Section 24 of the Constitution provides for the number of seats in the House of Representatives from each State to be determined by reference to the population of each State. At the time of Federation, Queensland and Western Australia had large indigenous populations who did not have the right to vote. The other colonies were concerned that Queensland and Western Australia would use their disenfranchised indigenous populations to claim more seats. Hence section 25 was placed in the Constitution as an encouragement to those States to enfranchise their indigenous populations if they wished to have a greater say in the new Commonwealth Parliament. Today, section 25 is a spent machinery provision and a referendum on indigenous recognition might provide an opportunity to repeal it. Section 25 was a machinery provision designed to address a public policy problem at the time of Federation.

The race power

Section 51(xxvi) of the Constitution – the race power – gives the Commonwealth Parliament the power to make laws for the people of any race for whom the Parliament deems special laws to be necessary. Until 1967, this excluded the power to make laws for "the aboriginal race in any State", but, since the 1967 referendum, it has included them. This so-called race power is an anachronism from a bygone era. The race power was never used by the Commonwealth Parliament before 1967. Since 1967, it has only ever been used to make laws relating to indigenous affairs (for example, protection of Aboriginal heritage sites, the *Hindmarsh Island Bridge Act*, and Native Title).

This race power should be removed and replaced with a plenary power to make laws with respect to Aboriginal and Torres Strait Islander peoples. Doing so would ensure that Parliament retains the power that it needs, whilst removing the idea of "race" from the Constitution.

Some people argue that the race power could be removed and not replaced. But this is not possible. Without a replacement power, the ability to amend legislation like the Native Title Act is put into doubt. Not replacing the race power would also remove the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander people – which was the achievement of 1967.

Other people worry that this power may be needed for counter-terrorism purposes. None of the existing counter-terrorism laws relies on the race power. In the event that the Commonwealth's power in this area was lacking, a reference of power could be obtained from the States. State governments of all political persuasions have been very cooperative in referring powers in this regard. As federalists we should not be worried about the Commonwealth needing to share power with the States.

This amendment to the race power would merely codify existing Australian constitutional practice.

Indigenous consultative body

The fourth part of the package is a suggestion of Noel Pearson developed with constitutional conservatives (Greg Craven, Anne Twomey, Damien Freeman and myself) for an indigenous consultative body in the Constitution. Pearson's proposal involves the kind of machinery clause that belongs in the Constitution. It also avoids the endlessly uncertain proposals for a racial discrimination clause that is effectively a "one-clause bill of rights". Pearson's proposal introduces a machinery provision as an alternative to a racial non-discrimination clause.

By engaging with constitutional conservatives, Noel Pearson has come to see that the Constitution is a practical and pragmatic charter of government. His proposal grapples with the issues presented by constitutional conservatives about judicial activism. At the same time indigenous Australians are telling the broader community that recognition is not about symbolism alone. It is also about ensuring that the failed policies of the past do not happen again.

Pearson wanted to devise a proposal that went with the grain of the Constitution, rather than against it; one that responded to objections of constitutional conservatives while delivering the practical change that indigenous people have been seeking.

He proposes a consultative body that simply provides advice. It cannot veto the Parliament, but instead provides greater input into the policy-making process, which should lead to policy improvement and greater "buy in" from indigenous people throughout Australia.

His proposal involves a machinery provision that is in keeping with the practical nature of the Constitution. The drafting of the provision can be based on similar sections of the Constitution. The insertion of this kind of modest machinery provision is an entirely different proposition from inserting uncertain symbolic language into the Preamble, or inserting a broad and ambiguous one-clause bill of rights. Some people have asked: "Why are indigenous people special; why do they need a particular body to advise about them?" There are two answers to that reasonable question.

First, indigenous people are special because they are the indigenous people of Australia and we are always going to need to make laws about indigenous matters: for example, amendments to native title legislation and protection of cultural heritage. The Commonwealth already has the power to make laws specifically about indigenous people.

Second, because indigenous people were here first, they are the only class of citizen about whom Parliament makes special laws. In the same way that you should have the right to be consulted if your local council is going to make laws about what sort of building can be built next door to you, similarly it is important that if the Parliament is going to make laws about indigenous people, indigenous people should be consulted about those laws.

There is nothing incongruent about articulating that rule in the Constitution.

The Constitution is where rules for Parliament are set out. The difficulty is in balancing the requirement for Parliament to consult indigenous people with the need to preserve the sovereignty of Parliament. Professor Anne Twomey has drafted provisions based on Noel Pearson's proposal that support, rather than undermine, parliamentary sovereignty.[36]

Others have suggested that it will be too hard for legislators to identify who is or is not indigenous, and that this is too complex an issue. I disagree. There is an established common law and legislative definition of what it means to be an indigenous Australian: the test requires self-identification, descent and acceptance by the community. That working definition is well-established. It is certainly not beyond the wit of Australian society to determine what it means to be indigenous. We do so for native title law, and our law and policy-makers are well equipped to deal with such issues in collaboration with indigenous people.

In my view, the proposal for an advisory body has real merit and sits most comfortably with the nature of the Constitution. It is the kind of machinery clause that Griffith, Barton and their colleagues might have drafted had they turned their minds to it. A machinery clause like this can sensibly sit in the Constitution, where it can have its intended practical effect.

Conclusion

The indigenous recognition debate has reached an impasse. This provides an opportunity for constitutional conservatives to shape the future of the debate. The four proposals listed above provide a modest way of achieving constitutional recognition without the downsides of unintended consequences of symbolic or historical statements in the Preamble or a one-clause bill of rights.

Endnotes

1. In this paper I often refer to Aboriginal and Torres Strait Islander peoples as indigenous as a short hand way of referring to them.

2. Commonwealth of Australia, *Final Report of the Constitutional Commission*, 1998, pp. 109–10.

3. *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

4. John Toohey, "A Government of Laws, and not of Men", (1993) 4 *Public Law Review,* 158–74, 170.

5. Leonie Kramer in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 497.

6. Alf Garland in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 493.

7. W. B. "Digger" James in Constitutional Convention *Transcript of Proceedings* 9 February 1998, 494.

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