

Indigenous Constitutional Recognition Explained – The Issues, Risks and Options

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In January 2012 the ‘Expert Panel on Constitutional Recognition of Indigenous Australians’ issued its report to the Government, setting out its proposals for constitutional change.¹ This paper looks at the various options facing the Panel, examines the proposals that it has made and considers whether they give rise to any uncertainties or risks that might become issues during any referendum campaign.

Symbolic recognition in a Preamble?

Prior to the Panel’s Report being issued, there was an expectation that it might opt for a form of purely symbolic recognition, such as recognition in the Preamble to the Constitution. This might have involved what some have described as a ‘dignified statement’ recognising the prior occupation of Australia by Aboriginal and Torres Strait Islander peoples (hereafter ‘Indigenous Australians’), their continuing relationship with their traditional lands and waters and acknowledging respect for their cultures and contribution to the nation. Similar recognition is already given in the Preamble to the *Constitution of Queensland* 2001 and in s 1A of the Victorian *Constitution Act* 1975 and s 2 of the New South Wales *Constitution Act* 1902.

This approach is still a public favourite as it gives the appearance of being simple and uncomplicated. It is also the approach still favoured by the federal Opposition.² It is therefore worth discussing it in some detail, as far from being simple and uncomplicated, it gives rise to a number of traps³ which the Panel neatly avoided.

The first point to make is that the Commonwealth Constitution was enacted as section 9 of a British Act of Parliament – the *Commonwealth of Australia Constitution Act* 1900. The ‘Preamble’ that we talk about is the Preamble to this British Act. It is not actually a part of the Constitution itself. It is therefore doubtful that the referendum process, which allows the Constitution to be amended, can be used to amend this Preamble to a British Act.

There are other ways that this Preamble could be amended, but the question then is whether this is really appropriate. The Preamble is an historic statement of what was

¹ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, (January, 2012): <http://www.youmeunity.org.au/final-report>.

² Press release, ‘Constitutional Recognition of Indigenous Australians: Tony Abbott’ 19 January 2012: <http://www.theaustralian.com.au/national-affairs/opinion/an-answer-to-the-race-question/story-e6frgd0x-1226249768982>.

³ For a full analysis of the Preamble problems see: A Twomey, ‘Constitutional Recognition of Indigenous Australians in a Preamble’: http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf

intended at the time the Constitution was enacted. That intent cannot be retrospectively amended by a change to the Preamble. If the Preamble were to be given current relevance by the insertion of recognition of Indigenous Australians, then this would open up the question of whether the rest of it should be updated, including references to the Crown, to God, to the indissoluble nature of the federation and even the recognition of the States (as Western Australia missed out on a mention in the Preamble due to its tardy agreement to join the federation). Turning the Preamble into a dog's breakfast of historic statements and modern sentiments would leave the High Court struggling with how it was to be interpreted and used in the future.

The alternative is to introduce a new Preamble into the Constitution itself. Currently, it does not have one. This leads to other questions. What would the status of the two Preambles be and how would a court interpret them both, particularly if they clashed? Would a Preamble that is included in the text of the Constitution, after the enacting clause, be truly preambular in nature, or would it be regarded as having a different status by virtue of its position in the text? What else should be included in the new Preamble beyond the recognition of Indigenous Australians?

This last question has the potential to be highly contentious, with various groups and bodies, such as local government, seeking their own recognition in the Preamble. The experience in 1999 with Prime Minister Howard's proposed new Preamble and the acrimonious debate that ensued is probably enough to put anyone off this task. That proposed Preamble failed miserably at referendum, being defeated in all States and achieving less than 39% support overall. Understandably, the Panel did not want a referendum on the recognition of Indigenous Australians to be side-tracked by a debate about who and what should be included in a new Preamble.

The other big issue in relation to a Preamble is how it might be used in the future. The role of a Preamble is to introduce and explain the text of the Act which follows. Where there is any ambiguity in the text, a court may refer to the Preamble to aid its interpretation of the text. A change to a Preamble that introduced and explained an amendment to the text of the Constitution would be unlikely to be problematic because the Preamble would be fulfilling its intended role. However, amending a Preamble to insert new material, without associated changes to the text, potentially leads to interpretative difficulties. What is the new part of the Preamble intended to achieve and how is it intended to affect the interpretation of existing provisions in the Constitution? The effect of the Preamble becomes uncertain and uncertainty is likely to lead to loss in a referendum.

One answer is to include a clause that states that the new material in the Preamble (or a new Preamble itself) is not to be used for the purpose of interpreting the Constitution or giving rise to any rights or causes of action. This is the approach that has been taken by the three States that recognise Indigenous Australians in their Constitutions. However, many have expressed strong objections to such a clause, arguing that it would look

defensive and insincere and undermine the point of constitutional recognition.⁴ If the statement of recognition had no substance or effect, it would also risk being regarded as tokenistic and failing at a referendum simply because people could not see the point of it. Alternatively, if it promised things, by including rights or a statement of values, that were not given substance in the operative part of the Constitution, then it would be regarded as either a false promise or a Trojan Horse.

The Panel avoided these various problems by neither proposing to amend the existing Preamble or insert a new one in the Commonwealth Constitution. Instead, it included recognition of Aboriginal and Torres Strait Islander peoples, their prior occupation of Australia, their relationship with their traditional lands and waters and their continuing cultures, languages and history, in a preamble to a new section of the Constitution. By confining the preamble to a particular section, the Panel sought to avoid the potential uncertainty of its application in the interpretation of the rest of the Constitution. It also ensured the close connection between the preambular words and a substantive amendment. This preamble can be seen as introducing and explaining the substantive words of the text which follow it in that particular section. There are still important interpretative issues that arise in relation to this proposal, which are discussed below, but it must be acknowledged that this approach quite cleverly avoids the main problems discussed above.

Substantive constitutional change

The Panel went beyond proposals for symbolic recognition of Indigenous Australians in its recommendations to the Government. It proposed the deletion of two sections of the Constitution – ss 25 and 51(xxvi) – and the insertion of three new sections – ss 51A, 116A and 127A.

The repeal of section 25

The Panel's least controversial recommendation is the repeal of s 25. The Constitution provides in s 24 for a House of Representatives that is directly chosen by the people. It distributes the electorates amongst the States 'in proportion to the respective numbers of their people'. It is followed by s 25 which provides:

For the purposes of the last section, 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 the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

This provision has been regarded by many as racist because it contemplates the exclusion of people from voting in a State on the basis of their race. A closer reading, however,

⁴ See further: Anne Winckel, 'A 21st Century Constitutional Preamble – An Opportunity for Unity Rather than Partisan Politics' (2001) 24 UNSWLJ 636, 646; and Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) UNSWLJ 239, 261.

shows that its intended effect is to penalise any State that does so discriminate by reducing its representation in the House of Representatives. This is supported by the origins of the provision. Section 25 was first introduced into the draft Constitution in 1891 at the same time as a companion clause which would have provided for 'equal protection of the law'. Both clauses were derived from the 14th Amendment to the United States Constitution which was adopted in the wake of the US Civil War and intended to protect the rights of emancipated slaves. They were anti-discrimination clauses, both of which made it into the final draft of the Commonwealth Constitution in 1891. This draft was later revised in 1897-8, and both clauses again survived that revision until the last hurdle in 1898 when the 'equal protection' clause was struck out in a familiar debate that raised issues of States' rights and concern about the uncertain meaning of the clause and how it might be applied by the courts in the future. The clause that penalised the States if they passed racially discriminatory voting laws survived and became section 25. It is therefore the only remnant of the civil rights in the 14th Amendment left in the Australian Constitution.

Section 25 is now regarded as archaic and outmoded and has been recommended for repeal by nearly all constitutional review bodies since 1959. It is hopefully no longer necessary as it is unimaginable that any State would exclude the right to vote on the basis of race. It is therefore appropriate to repeal it – not as a 'racist' provision, but one whose work is now done.

The repeal of the 'race power'

More controversial is the repeal of s 51(xxvi) of the Constitution, known as the 'race power'. Section 51 sets out the various heads of legislative power of the federal Parliament. Section 51(xxvi) originally provided that the Parliament could make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The original intention behind it was to permit the Parliament to make laws that discriminated against Chinese and Japanese workers in Australia. It was, without doubt, a 'racist' provision. The power to make laws with respect to Aboriginal people was left to the States, as it did not have the same 'international' aspect. In 1967 a referendum was passed to amend this provision by removing the words 'other than the aboriginal race in any State'. The general intention appears to have been to allow the Commonwealth to enact laws with respect to Aboriginal people to improve their living conditions and provide them with other special assistance.

There has been a long debate within Australia as to whether this benevolent intention in any way conditions the scope of the power. Can s 51(xxvi) only be used to enact laws for the benefit of Indigenous Australians, or could it be used to enact laws that discriminate against them to their detriment? On its face, the words would permit any type of legislation for the 'people of any race for whom it is deemed necessary to make special laws'. The original intent behind the provision was clearly to permit laws that discriminated against the people of particular races. All the words of the 1967 referendum did was delete an exclusion – they did not otherwise alter the terms of the

grant of power or specify that the power could only be exercised for the benefit of the people affected. If the people in a referendum did not change the *words* of the provision to confine it to a beneficial effect, could their *intent* in voting achieve that change, and if so, how is that intent to be ascertained?

The notion that the Parliament can only make laws for the ‘benefit’ of a particular group of people, leads to all sorts of constitutional and interpretative difficulties. How is ‘benefit’ to be assessed and to whom must it be beneficial? For example, a law permitting traditional ‘pay-back’, such as leg-spearing, might be regarded as beneficial by those Indigenous Australians who practise traditional customs and as detrimental by those who do not. The Northern Territory intervention might be regarded as beneficial to Aboriginal women and children, but not to others. Must a majority of the group regard it as beneficial or must a court make that assessment? If a law can only be passed if it is beneficial, does each provision have to be beneficial, or can some be detrimental with other parts being beneficial as long as it is regarded overall as beneficial? If it is the latter, would an amendment which later altered a beneficial part of the law result in the entire law becoming invalid if it tipped the balance from overall benefit to detriment?

Would a law repealing a beneficial law be invalid, because the repeal was not to the benefit of the group? If so, the effect would be to constitutionally entrench all beneficial laws so that they could not be repealed without amending the Constitution. This issue was raised in *Kartinyeri v Commonwealth*⁵ where the High Court held that if the Parliament had the power to enact a law, it also had the power to repeal it. The Court did not finally resolve, however, the arguments about whether laws under s 51(xxvi) must be beneficial and if so, what this means in practice.

It is this debate which underlies the Panel’s recommendation to repeal s 51(xxvi) and insert a new s 51A. Ideally, there should be no provisions in the Constitution that permit laws to be enacted by reference to race. The simple repeal of s 51(xxvi) would therefore be acceptable to most people. The problem, however, is that this provision also supports existing federal legislation such as the *Native Title Act* 1993 and the heritage protection of sacred sites. The repeal of s 51(xxvi), without the substitution of a new power, would potentially render these laws invalid, leaving it to the States to legislate to deal with these matters and opening up the risk that lesser levels of protection might be given. Further, direct Commonwealth funding of programs that aid Indigenous Australians might be threatened if the Commonwealth did not have an express legislative power to make laws with respect to them.

The insertion of a new power to make laws with respect to Aboriginal and Torres Strait Islander peoples

The Panel accordingly recommended the insertion of section 51A in the Constitution in the following terms:

⁵ (1998) 195 CLR 337.

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.

On its face, the actual power given is one to make laws with respect to Aboriginal and Torres Strait Islander peoples. The power is not made subject to any conditions regarding ‘benefit’ or the like. Potentially, just like s 51(xxvi), it could be used to make laws that discriminate against Indigenous Australians to their detriment. However, the complicating aspect is the fourth recital in the preamble to this provision which acknowledges the need to ‘secure the advancement of Aboriginal and Torres Strait Islander peoples’. Under the ordinary canons of statutory interpretation, a recital in a preamble can only be resorted to in order to resolve an ambiguity in the text. There would appear to be no ambiguity in granting a power to make laws ‘with respect to Aboriginal and Torres Strait Islander peoples’.

Yet the Panel’s report makes it clear that it sees this recital as imposing a condition on the power. It said at pp 150-1:

The Panel proposes use of the word ‘advancement’ in the preambular or introductory words to the new substantive power in ‘section 51A’ rather than in the power itself. This approach should ensure that the purpose of the power is apparent and would, as a matter of interpretation, be relevant to the scope given to the substantive power. The Panel considers that this approach would achieve a satisfactory balance between making the purpose of a law justiciable, and at the same time allowing a court to defer to legislative judgment. It should not enable individual provisions in a broad scheme to be attacked as not beneficial if the law as a whole were able to be judged beneficial.

The Panel also said at p 150:

Based on the Panel’s legal advice, the preambular language proposed by the Panel for ‘section 51A’ would make it clear that a law passed pursuant to that power would be assessed according to whether, taken as a whole, it would operate broadly for the benefit of the group of people concerned, rather than whether each

and every provision was beneficial or whether each and every member of the group benefited. The Panel does not believe that this would create any particular difficulty or uncertainty for Parliament, or create any real risk of excessive court challenges.

This disjunct between the Panel's intention and the wording of the provision is likely to give rise to uncertainty and controversy. It is all very well for the Panel to assert that the word 'advancement' will qualify the power in this way, but that is a matter for the courts to decide. They might take quite a different approach, given the wording of the provision. First, it is not obvious that there is any ambiguity in the grant of power in section 51A which would permit the Court to qualify the grant by reference to 'advancement' in its preamble. Secondly, the Panel's interpretative assumptions appear to be focused upon the notion of 'benefit', whereas the word actually used – 'advancement' – is quite different and might give rise to a completely different interpretation. Thirdly, the Panel's view that individual provisions could not be challenged and that a court would instead assess whether the law would operate broadly for the benefit (or more accurately the advancement) of the group may not necessarily be followed by a court.

Finally, the greatest controversy will hang on the fact that it would ultimately be a matter for a court to decide what was, or was not, for the advancement of Indigenous Australians (although, no doubt, it would give a degree of deference to the view of the Parliament). On the whole, Australians have proved most reluctant to shift such assessments from the Parliament to the courts, as has been seen by the failure to introduce a bill of rights. Warren Mundine, amongst others, has raised concern that this will open a Pandora's Box of litigation and dispute.⁶

A constitutional prohibition of racial discrimination

The other controversial proposal is the introduction into the Constitution of a prohibition of racial discrimination. Proposed section 116A provides:

- (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.

This gives rise to both policy and legal issues. On the policy side a question arises as to whether such a provision should be constitutionalised. There has been federal and State legislation prohibiting racial discrimination for decades. However, once placed in the Constitution, such a provision can be interpreted by the courts in ways that were not

⁶ Stuart Rintoul, 'Race power opens Pandora's box', *The Australian*, 22 December, 2011: <http://www.theaustralian.com.au/news/features/race-power-opens-pandoras-box/story-e6frg6z6-1226227961794>

intended and there is no option of reversing such an interpretation by legislation. The only option is to amend the Constitution, which is expensive and extremely difficult. The level of discretion left to the courts in determining what amounts to discrimination, who is protected and whether a law or executive act is for the purpose of overcoming disadvantage etc, is significant.

Some are also likely to argue that if an anti-discrimination provision is to be included in the Constitution, then it should not just be directed at race but also at discrimination against women and other groups. Back in the 1890s when s 25 of the Constitution was drafted, it penalised States that enacted racially discriminatory voting laws, but did not penalise States that excluded women from voting, despite the far greater disparity in voting numbers that this caused. To perpetuate the privileging of anti-racial discrimination measures over anti-sex discrimination measures in the twenty-first century would seem inappropriate to some.

Others may also be concerned that some groups may be interpreted as falling within the category of ‘race, colour or ethnic or national origins’ while other groups are not. For example, Jewish people would be constitutionally protected because they are recognised as an ‘ethnic group’⁷ while, so far, Muslims have not received the same protection. The mere uncertainty as to who would be covered by the provision and who would not and the perception that some groups may be unfairly privileged over others, is likely to give rise to controversy.

One legal issue is how s 116A connects with the rest of the Constitution. It should be noted that its potential scope is very wide. It covers not only legislation but also the exercise of executive power by governments, and it applies not only to the Commonwealth, but also to the States and Territories. It presumably, therefore, operates as a limitation upon all other legislative powers in the Commonwealth Constitution, including proposed s 51A. It is arguable that any law under s 51A with respect to Aboriginal and Torres Strait Islander peoples is one that discriminates on the grounds of race, because it applies only to a racial or ethnic group. Such laws would therefore be prohibited unless the requirements of s 116A(2) were met – namely, that the law is ‘for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group’. Section 116A might, therefore, be regarded as a ‘back-stop’ against the risk that ‘advancement’ in the preamble to s 51A would not be accepted by a court as qualifying the power granted in that section. The question then arises as to whether all existing laws made under s 51(xxvi) would avoid being struck down under s 116A(1) because they fall under the exception in s 116A(2). Would, for example, the *Native Title Act* 1993 (Cth) be held to be ‘for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group’? Most likely it would be, but this would again be up to a court to decide.

⁷ See *Miller v Wertheim* [2002] FCAFC 156 [14] and *Jones v Toben* [2002] FCA 1150 [69]. The Supreme Court of the United Kingdom has reached the same conclusion: *R (on the application of E) v Governing Body of JFS* [2009] UKSC 15. Sikhs have also been characterised as falling under ‘ethnic origin’ for the purposes of racial discrimination legislation: *Mandla v Dowell Lee* [1983] 2 AC 548.

The other legal issue is how this blanket prohibition on racial discrimination would affect existing exemptions under anti-discrimination laws. For example, s 8 of the *Racial Discrimination Act 1975* (Cth) excludes from the application of anti-discrimination provisions any provision of a deed or will that confers charitable benefits on persons of a particular race, colour or national or ethnic origin. Not all such charitable gifts would meet the requirements of s 116A(2). Sections 12 and 15 of the same Act also exclude the application of anti-discrimination measures to people who seek someone to share their home or be employed in their home. Other exemptions exist in State anti-discrimination laws, such as discrimination in the employment of actors in theatrical performances for reasons of ‘authenticity’. It is likely that s 116A would wipe out such exemptions unless they could be accommodated under s 116A(2). Again, this will depend upon interpretation by the courts.

Recognition of Indigenous languages

The Panel proposes introducing a new section 127A which recognises that the ‘national language’ of Australia is English, but also that ‘Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage’. The Panel rejected a proposal to include a provision that ‘all Australian citizens shall be provided the opportunity to learn, speak and write English’ as it might give rise to legal challenges to the adequacy of literacy programs. It also rejected a proposal that ‘all Australian citizens shall have the freedom to speak, maintain and transmit the languages of their choice’ as this might give rise to arguments about the right to deal with government in languages other than English.

It is not clear what section 127A is intended to achieve in practice. Disputes arise from time to time as to whether Aboriginal children in outback schools should be taught in English or in their local Aboriginal language. For example, the National Congress of Australia’s First Peoples has argued for bilingual education in Northern Territory schools and the end to the Northern Territory Government’s policy of requiring the first four hours of school to be taught in English.⁸ It is unclear whether a provision such as s 127A is intended to affect such a debate. Alternatively it might be directed at supporting claims for funding to preserve Indigenous languages on the basis that they are part of our ‘national heritage’. The Panel contended at p 132 of its Report that the insertion of s 127A in the Constitution ‘would not give rise to implied rights or obligations that could lead to unintended consequences’. It appears that the provision is most likely intended to be declaratory and symbolic in nature.

Conclusion

The Panel’s proposals go beyond the recognition of Indigenous Australians in the Constitution. They include substantive provisions that both grant and limit legislative power. They potentially affect the validity of Commonwealth, State and Territory laws. They include a broad guarantee against racial discrimination which will not only protect

⁸ Patricia Karvelas, ‘Writing on wall for remote tongues’, *The Australian*, 26 January 2012: <http://www.theaustralian.com.au/national-affairs/education/writing-on-wall-for-remote-tongues/story-fn59nlz9-1226253883496>.

Indigenous Australians but also people of other races, colours, and ethnic and national origins. If enacted, they would leave to the courts the important role of interpreting the scope of the federal Parliament's power to make laws with respect to Indigenous Australians and applying a constitutional prohibition on racial discrimination that affects both legislation and executive acts of all Parliaments and government across the nation.

The proposals are substantive and important and deserve an informed debate and rigorous analysis. Given the notable reluctance of the Australian people to change the Constitution, there is a substantial risk that the complexity and extensive reach of these proposals will result in their failure if put to a referendum. Two members of the Panel recently wrote that if the referendum was lost, this would 'brand Australians to the world as racists, and self-consciously and deliberately so'.⁹ This appears to be going too far – there are many reasons why such a referendum could fail other than racism. The vast majority of previous referendums have failed, without racism entering the equation.

At the time of writing, neither the Government nor the Opposition had formally responded to the Panel's report, although both remain broadly in favour of the constitutional recognition of Indigenous Australians. Bipartisan support is generally regarded as essential for a referendum to pass. It is therefore likely that there will be much political negotiation to come before any proposals are put to a referendum.

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26 January 2012.

⁹ Marcia Langton and Megan Davis, 'An answer to the race question', *The Australian*, 21-22 January, Inquirer p 14: <http://www.theaustralian.com.au/national-affairs/opinion/an-answer-to-the-race-question/story-e6frgd0x-1226249768982>.