

Indigenous recognition and nation building through a new preamble

Introduction

5.1 This chapter reviews the main issues raised at the roundtable session on constitutional recognition of Aboriginal and Torres Strait Islander peoples (Indigenous Australians) and a possible new preamble. It outlines:

- previous changes to the Constitution and the current provisions which refer to Indigenous Australians;
- amending the Constitution to recognise the special position of Indigenous Australians; and
- the development of a preamble to the Constitution which could encompass:
 - ⇒ recognition of Indigenous Australians; and
 - ⇒ a broader statement of identity and belonging for all Australian people.

The Constitution

Background

- 5.2 Indigenous people were not represented at the constitutional debates of the 1890s and the only references to Indigenous Australians in the Constitution reflected that they were not full and equal members of Australian society.
- 5.3 The successful referendum of 1967 removed two exclusionary references to Indigenous Australians in the Constitution concerning:
- the power of the Commonwealth to legislate for the people of any race ‘other than the aboriginal people of any state’ (section 51 xxvi)
 - the counting of ‘aboriginal natives’ as part of determining state and Commonwealth populations (section 127).
- 5.4 Although these references do not mention Indigenous identity, the campaign for the 1967 referendum focussed not on the two constitutional provisions, but on the identity of Indigenous Australians and their place as equal members of the national community.
- 5.5 Ms Thomas succinctly summarised the importance of identity and belonging to Indigenous Australians:
- At the core of this issue for Aboriginal people is how we can be considered by people in Australia and by other Australian people around us as equals – as having equal citizenship rights. I think that starts from the top, in affecting people’s attitudes regarding cultural rights and how we are treated as Aboriginal people and Australian citizens here.¹
- 5.6 Roundtable participants identified a range of possible areas for reforming the Constitution including the two discriminatory provisions (section 25 and section 51 xxvi, discussed below) and addressing the lack of positive recognition of Indigenous Australians and provisions to protect their rights.

1 Ms Thomas, *Transcript of Evidence*, p. 56.

Counting the population to determine representation: Section 25

5.7 In introducing the session, Professor Charlesworth identified section 25 of the Constitution as a particularly discriminatory provision. Sections 24 and 25 of the Constitution are concerned with the composition of the House of Representatives. Section 25, 'Provision as to races disqualified from voting', provides that:

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.

5.8 As Dr Twomey noted, the original intention of section 25 was not overtly racist but to 'discourage the disqualification of people by virtue of race in the state by reducing the representation of that state in the parliament if they did it'.²

5.9 Section 25 no longer has any significant legal effect, as the *Racial Discrimination Act 1975 (Cth)* would prevent the States from discriminating against people on grounds of race. Nevertheless, section 25 'recognises that people might constitutionally be denied the franchise on the ground of race'.³ The 1988 Constitutional Convention described section 25 as 'outmoded' and 'odious' and recommended that it be repealed.⁴

5.10 There was strong agreement among participants on the need to repeal section 25 due to its overtly racist reference notwithstanding the fact that the provision is now redundant. It was noted that the repeal of section 25 is unlikely to attract opposition.⁵

The power to legislate on the grounds of race: Section 51 (xxvi)

5.11 The power of the Commonwealth Parliament to legislate on the grounds of race presents a more complex constitutional problem. Section 51(xxvi) enables the Commonwealth to make laws for the

2 Dr Twomey, *Transcript of Evidence*, 1 May 2008, p. 61.

3 Constitution Commission, *Final Report of the Constitutional Commission*, Summary, Australian Government Printing Service, 1988, p. 16.

4 Constitution Commission, *Final Report of the Constitutional Commission*, Summary, Australian Government Printing Service, 1988, p. 16.

5 For example, Professor Zines, *Transcript of Evidence*, p. 62.

peace, order and good government of the Commonwealth with respect to:

... the people of any race for whom it is deemed necessary to make special laws.

5.12 While the provision does not directly discriminate against Indigenous Australians, and indeed can be employed to their benefit, Professor Charlesworth advised that the provision could also be employed to the detriment of Indigenous people as evidenced by the Hindmarsh Island Bridge case.⁶

5.13 In 1998 the High Court was unable to reach a majority view on the meaning of s. 51(xxvi) in relation to the Hindmarsh Island Bridge.⁷ Professor Zines confirmed that, while the High Court held that a law made under the race power may be withdrawn, it did not resolve the question of the scope of section 51(xxvi).⁸

5.14 It appears therefore, that section 51 (xxvi) may support laws that discriminate on the grounds of race in ways that are either adverse or beneficial to a particular racial group. Commenting on this provision Dr Twomey notes:

My problem with the argument about the 1967 referendum and the suggestion that that power can only be exercised in a way that is beneficial to Aboriginal people is to say, 'How do you decide what is or is not beneficial?' There are all sorts of tricky questions – beneficial to whom?⁹

5.15 Dr Twomey advised that any amendment to the provision would need careful consideration:

Obviously on the face of it the provision is racist. It allows racist laws, it allows discriminatory laws and on the face of the Constitution that is a bad thing. The question is how you deal with it. A possible way of doing it is to get rid of it altogether. But if you do get rid of it altogether, do you still want the Commonwealth parliament to have some sort of

6 Professor. Charlesworth, *Transcript of Evidence*, p. 53.

7 *Kartinyeri v The Commonwealth* [1998] HCA 22. The case concerned the validity of *Hindmarsh Island Bridge Act 1997* (Cth), which partially repealed the Minister's power to make a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). See E Barker, 'The Race Power under the Australian Constitution: Altered Meanings', *Sydney Law Review*, vol. 21 (1), 1999.

8 Professor Zines, *Transcript of Evidence*, p. 53.

9 Dr Twomey, *Transcript of Evidence*, p. 61.

legislative power to legislate for and in relation to Aboriginal and Torres Strait Island people? So you have to think about that. And if you do want that, can you sensibly constrain that in a way that is beneficial?

5.16 Participants discussed possible options for reforming section 51 (xxvi) including repealing the provision entirely and creating a new legislative power in Indigenous affairs subject to the rule of non-discrimination on the grounds of race.¹⁰

5.17 There are a number of ways in which this could be achieved. Professor Zines raised the possibility of inserting a general provision of equality for all people into the Constitution and noted that there are different options to achieve this, including the inclusion of a substantive provision on equality.¹¹

5.18 A general provision on equality for all people would be subject to judicial interpretation which cannot be wholly controlled but can be directed. Professor Blackshield noted:

[Y]ou cannot preclude judicial interpretation, but you can try to control it a bit on some issues. For example, you can have some form of words to make it clear that you do not just mean formal equality or equality before the law; you also mean some kind of real, substantive equality. If you are having an antidiscrimination provision, you have to think about whether or not you want to permit so-called benign discrimination. You can settle that issue one way or the other in the way you draft it.¹²

5.19 Ms Thomas supported a general provision on equality for all people as long as it also recognised the unique rights of Indigenous Australians:

What I would like to see within the Constitution in terms of recognition for Aboriginal people is a very broad, encompassing principle of equality and equal rights that recognises Aboriginal people as having unique rights as well as human rights and citizenship rights – a broad principle but one that also recognises our unique position in Australia.¹³

10 Professor Williams, *Transcript of Evidence*, p. 69.

11 Professor Zines, *Transcript of Evidence*, p. 62.

12 Professor Blackshield, *Transcript of Evidence*, p. 64.

13 Ms Thomas, *Transcript of Evidence*, p. 63.

5.20 'Unique rights' are seen as:

[A]ccess to customary law or our rights to engage in our cultural practices and also our traditional laws and restorative justice. Those things would be dealt with on the ground, at the community level, because of our right to practice our culture, our right to self-government and things like that.¹⁴

5.21 In addition to the suggestion of a general provision of equality for all people there was also discussion of the need to specifically recognise Indigenous Australians in the Constitution either through substantive provisions or through a preamble.

Recognition through substantive provisions

5.22 The roundtable considered the means available for positive recognition of Indigenous Australians in the Constitution from symbolic statements through to substantive provisions detailing specific rights. This section focuses on possible substantive recognition provisions. Symbolic recognition through a preamble to the Constitution is discussed in the section below.

5.23 Professor Behrendt argued that the issue of a treaty between Indigenous and non-Indigenous Australians warranted further consideration, particularly in relation to engagement and consultation mechanisms with Indigenous people. She explained that the Aboriginal and Torres Strait Islander Commission developed the concept over ten years ago.¹⁵

5.24 Dr O'Donoghue also noted, with some frustration, that discussions about a treaty, agreement, compact or makarrata have been on going for many years:

A lot of this stuff has been around us forever, it seems. We have had discussions on agreements and compacts. I do not know if anybody remembers the makarrata – also an agreement. It seems that this has gone on forever, and nobody takes enough notice of what has been happening.¹⁶

5.25 Participants stressed the importance of learning from the experience of other countries in recognising the rights of Indigenous people

14 Ms Thomas, *Transcript of Evidence*, p. 63.

15 Professor Behrendt, *Transcript of Evidence*, p. 65.

16 Dr O'Donoghue, *Transcript of Evidence*, p. 56.

through treaties. Canada and New Zealand were cited as particularly relevant examples.

- 5.26 For example, Professor Charlesworth noted that Section 35 of the Canadian Constitution preserved the existing rights of Indigenous people, created a framework for negotiation and a duty to consult in good faith on Aboriginal claims.¹⁷
- 5.27 Similarly, Dr O'Donoghue argued that the Treaty of Waitangi in New Zealand had continued to be important for Maori people, more so than the provision for separate parliamentary representation:
- [T]he thing that is very high there is the Treaty of Waitangi. I think that has been by far the biggest step there. It has given them lots of rights and so on which we in Australia miss out on.¹⁸
- 5.28 The negotiation of a treaty or statement of rights is complex. Professor Charlesworth noted that the *United Nations Declaration on the Rights of Indigenous Peoples* is a source of guidance on the content of Indigenous rights. She also reiterated that it is an example of a highly negotiated statement of rights, taking over 20 years to draft.¹⁹
- 5.29 Professor Williams suggested that a provision could be inserted into the Constitution to enable the recognition of agreements, settlements or other forms of negotiations between Indigenous people and local, State and Federal governments. The purpose would be to provide a framework for negotiation, rather than setting out specific terms. This has the potential to provide the capacity for a longer term process of engagement and the encouragement of local leadership.²⁰
- 5.30 A further approach to Indigenous representation and rights protection was suggested by Professor Rubenstein who put forward the potential role for a special Indigenous executive council. The council would review government legislation and seek an explanation in Parliament on legislation that did not meet its approval.²¹

17 Professor Charlesworth, *Transcript of Evidence*, p. 54; *Constitution Act 1982* (Canada).

18 Dr O'Donoghue, *Transcript of Evidence*, p. 57.

19 Professor Charlesworth, *Transcript of Evidence*, p. 54.

20 Professor Williams, *Transcript of Evidence*, p. 69.

21 Professor Rubenstein, *Transcript of Evidence*, p. 67.

A preamble to the Constitution

- 5.31 The suggestion of a new preamble dominated the discussion as a means to provide symbolic recognition of Indigenous people in the Constitution.
- 5.32 The Australian governance session of the 2020 summit also put forward as its top ideas:
- that the Constitution be amended to include a preamble that formally recognises the traditional custodians of our land and waters – our Indigenous people [and]
 - that the Constitution be amended to remove any language that is racially discriminatory.²²
- 5.33 Preambles are used extensively in international instruments and national constitutions. Generally a preamble will contain references to the sources of power and to the object and purposes of the instrument. In a national Constitution a preamble may also express the broader aspirations of the nation and reflect the principles on which the society is based.
- 5.34 The Australian Constitution is section 9 of the *Commonwealth of Australia Constitution Act 1900* and as such has no preamble. There is, however, a preamble to the Act which states:

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in his present Parliament assembled, and by the authority of the same, as follows: ...

22 Department of Prime Minister and Cabinet, *Australia 2020 Summit – Final Report*, May 2008, p. 308, <australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf>, p. 307, accessed 13 June 2008.

- 5.35 A preamble does not have direct legal effect or give rise to substantive rights and obligations but may be used as an aid to interpretation or to resolve ambiguities.
- 5.36 In 1999 the Government drafted a new preamble to coincide with the referendum on the republic. That preamble was designed so as to prevent it from being used to interpret the Constitution. Professor Saunders considered this appropriate as the preamble 'had nothing to do with what was in the Constitution.'²³
- 5.37 Professor Saunders also suggested that a preamble should be consistent with the rest of the Constitution and therefore it would be appropriate that a preamble recognising Indigenous people is accompanied by the repeal of section 25 as discussed above.²⁴

Recognition in a new preamble

- 5.38 The text of the preamble proposed in 1999 included the following statement recognising Indigenous Australians:
- ... honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.²⁵
- 5.39 Professor Williams suggested the preamble was rejected because it lacked public involvement and was seen as 'the politicians' preamble':
- I think it was a process problem rather than being an objection to the idea of encapsulating aspirations in a document, as other nations tend to do.²⁶
- 5.40 Most roundtable participants supported the recognition of Indigenous Australians in a new preamble. Professor Williams stressed the importance of having a general preamble that expressed the identity and aspirations of the nation as whole while also specifically recognising Indigenous Australians.²⁷
- 5.41 Similarly, Professor Rubenstein emphasised the need for the preamble to be a 'meta-narrative,' or a grand story encompassing Australians

23 Professor Saunders, *Transcript of Evidence*, p. 60.

24 Professor Saunders, *Transcript of Evidence*, p. 60; Professor Williams, p. 69.

25 The 1999 Referendum, Civics and Citizenship Education, <civicsandcitizenship.edu.au/cce/default.asp?id=9546> accessed 4 June 2008.

26 Professor Williams, *Transcript of Evidence*, p. 59.

27 Professor Williams, *Transcript of Evidence*, pp. 58-59.

from all backgrounds, while also acknowledging the Indigenous story as the starting point.²⁸

5.42 Professor Behrendt considered the development of a preamble as a crucial opportunity to engage Australians in discussions about national identity and belonging. Such discussions could have ‘an enormous symbolic importance and the ability to be a nation-building exercise in terms of the dialogue that can be had.’²⁹

5.43 She argued that inclusive broad based discussions on a new preamble would be critical in gaining widespread support:

Unless we feel that a majority of Australians are invested in this document in a really sincere way, it is not going to be possible. So I think there is a lot of potential with the preamble and I think we should be prepared for it to be a very long but important dialogue.³⁰

5.44 A number of suggestions were made to encourage the involvement of the public in discussions about the Constitution and a preamble. Ideas put forward included the use of civics education and national competitions.³¹

5.45 However, some participants were less supportive of a preamble for a variety of reasons. Dr O’Donoghue did not consider the preamble the way to lead real change, preferring consideration in the body of the Constitution: ‘That is where most of our people would be asking for recognition – not in the preamble but in the body of the Constitution’.³²

5.46 Professor Craven expressed concern that the preamble could inappropriately drive interpretations of the Constitution:

If you put enough abstract values in a preamble and you put it in a constitution with the right High Court, that preamble could drive interpretations which I think would be unacceptable and not properly referable.³³

28 Professor Rubenstein, *Transcript of Evidence*, p. 59.

29 Professor Behrendt, *Transcript of Evidence*, p. 59.

30 Professor Behrendt, *Transcript of Evidence*, p. 60.

31 Professor Charlesworth, *Transcript of Evidence*, p. 72.

32 Dr O’Donoghue, *Transcript of Evidence*, pp. 56-57.

33 Professor Craven, *Transcript of Evidence*, pp. 60-61.

- 5.47 Dr Twomey was also cautious about this and indicated a preference for addressing substantive aspects of the Constitution, such as section 25 and the ‘races power’ in section 51(xxvi).³⁴
- 5.48 Professor Craven suggested that a preamble should not contain elements that would be better dealt with in substantive provisions. He noted that this has the potential to become deeply divisive as was evidenced by the bitter debate at the 1998 Constitutional Convention.³⁵

Committee comment

- 5.49 The roundtable session on the recognition of Indigenous Australians took place following the historic and bipartisan Apology to the Stolen Generations delivered at Parliament House on 13 February 2008. The session also complemented the related discussions at the 2020 Summit by focusing on the question of how Indigenous Australians could be recognised in the Constitution rather than the question of why such recognition was important.
- 5.50 As noted earlier, while the original purpose of section 25 was not overtly discriminatory, it does not reflect the values of contemporary Australian society and should be removed. The Committee agrees with Professor Charlesworth’s summary:
- [Section 25] is quite an extraordinary provision to have in a constitution. Were a Martian to pick up our Constitution, they would get quite a shocking reflection on current modern Australia.³⁶
- 5.51 The Committee also notes the current uncertainty regarding the application of the ‘race power’ of the Commonwealth under section 51(xxvi) and is concerned about the potential for it to be used to disadvantage Indigenous people. However, it is important that the Commonwealth retains its power to legislate in Indigenous affairs and any legislation under section 51 (xxvi) should continue to be carefully scrutinised.

34 Dr Twomey, *Transcript of Evidence*, p. 61.

35 Professor Craven, *Transcript of Evidence*, p. 61.

36 Professor Charlesworth, *Transcript of Evidence*, p. 52.

- 5.52 Clearly, there is no one answer as to the best way to provide recognition of Indigenous Australians in the Constitution. There are areas in which substantive provisions are warranted, but there are also questions surrounding the need for recognition within a preamble.
- 5.53 However, the process of developing a preamble may in itself resolve some of the tensions surrounding the appropriate recognition of Indigenous Australians in the Constitution. A preamble, based on extensive consultation and engagement with *all* Australians, has the potential to be an important aspirational statement of how we define our national identity. The process of developing such a preamble has the capacity to act as a nation-building exercise that embraces all aspects of our nation's history, including the contribution of Indigenous Australians.
- 5.54 Many of the points raised in the session reflect the need for legislative, policy and cultural solutions to address the needs of Indigenous Australians. However, these points also call into question the very purpose of the Constitution and any preamble. There is no easy solution to these issues but it is essential that the discussion continues.