

Rights-based reconciliation needs renewed action from Canberra

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The importance of responsibility and rights in reconciliation.

The Council for Aboriginal Reconciliation delivered its Final Report to parliament in December 2000.¹ It came at the end of a year made remarkable by its popular commitment to reconciliation between Indigenous peoples and the wider Australian community. Looking back, those events seem a long time ago. Yet it has been less than three years since Cathy Freeman lit the Olympic torch and hundreds of thousands of people took part in the Walks for Reconciliation in capital cities and towns across Australia.

After 2000, despite a strong and continuing grass roots commitment, reconciliation soon ceased to be a significant federal political issue. Eighteen months after the Council had delivered its Final Report the government had still not responded.² This prompted Social Justice Commissioner Bill Jonas to recommend a Senate inquiry into progress towards national reconciliation. In August 2002 the Senate asked its Legal and Constitutional Committee³ to inquire into the adequacy of the government's response to the Council's Final Report and to other recommendations made to the government since 2000. This article is based on our submission to that Inquiry. We suggest means by which public law could be used to advance reconciliation at the national level.

In part, the lack of national attention to reconciliation flowed from the pursuit by the Howard Government of what it called 'practical reconciliation' to the exclusion of any 'rights agenda' for Indigenous peoples. This occurred despite the Council for Aboriginal Reconciliation emphasising that reconciliation means addressing both practical measures to tackle disadvantage and legal mechanisms to recognise Indigenous rights. We believe that the Council was right for two reasons.

First, the so-called practical reconciliation and rights agendas are not mutually exclusive. Steps to improve service delivery and government performance are welcome and important, but there is no reason why legislative and constitutional reform should not proceed at the same time. Indigenous people have been excluded from our Constitution for more than 100 years, and any process of reconciliation that does not include such legal change is inadequate.

Second, the two reconciliation agendas are inextricably linked. Practical measures to tackle social and economic disadvantage will only be effective in the long term if Indigenous peoples are able to operate within a framework of responsibility and rights. We agree with the findings of the members of the influential Harvard Project on American Indian Economic Development (who visited Australia in 2002). Whether conceived as 'jurisdiction', 'self-determination', 'sovereignty' or something else, the concept of shifting power from governments to Indigenous communities is a necessary (though not sufficient) condition of sustained development. As the Harvard Project has stated:

Without jurisdiction indigenous Nations are subject to other people's agendas. You can't ask people to be accountable if you don't give them

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decision-making power. Whoever is making the decisions has the accountability. To reserve decision-making power in one place and then tell someone else that they're accountable, is to kid yourself. Jurisdiction marries decisions to consequences, which leads to better decisions.

... We have yet to find a single case in the United States of sustained economic activity on indigenous lands in which some governmental body other than the indigenous Nation itself is making the decisions about governmental structure, about natural resource use, about internal civil affairs, about development strategies and so forth.⁴

In dealing with the contribution that public law can make to the reconciliation process at the federal level, we consider 'unfinished business' including issues of acknowledgement, Australia's history of racial discrimination under the law, and the capacity for a treaty or agreement to encourage long-term partnerships between Indigenous Australians and the wider community. Such reform would also contribute towards meeting Australia's obligations under international instruments such as the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.

Acknowledgement

A new preamble to the Constitution

Our Constitution, the fundamental legal document of the Australian nation, is silent on the history and rights of Indigenous peoples. This was not the case in 1901. As drafted, the Constitution contained explicit negative treatment of Indigenous peoples.⁵ Section 51(xxvi) provided that the Commonwealth Parliament could legislate 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'. Section 127 provided: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'. Significantly, neither section referred to Indigenous peoples as people, such as in the latter case of 'aboriginal natives'.

The Australian Constitution cast Indigenous peoples as outsiders to the nation. In 1967 these discriminatory references were deleted from the Constitution by referendum. However, these changes left the Constitution, including its preamble, devoid of any reference to Indigenous peoples. Currently, there is no recognition of Indigenous peoples as Australia's 'First Nations'. Our constitutional system has moved from one of explicit discrimination to silence, rather than to inclusion and acknowledgement.

The Council for Aboriginal Reconciliation recommended alteration of the Constitution to 'recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution'.⁶ Such a preamble could acknowledge the original occupancy and ownership of Australia by Indigenous peoples and their unique 'First Nations' status. This change would not grant any new rights but would be an important symbolic statement.

The Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report — Reconciliation: Australia's Challenge affirmed that Indigenous people were the original custodians of the land and its waters and that these were settled without treaty or consent.⁷ The government also agreed that Aboriginal and Torres Strait

Islander peoples hold a unique position as the first people of Australia and this must be recognised, respected and understood by the wider community.⁸ However, the government did not support a new preamble being inserted into the Constitution. It reached this conclusion due to the rejection of a preamble in the 1999 referendum.⁹ We disagree with the government's conclusion and believe that work on a new preamble is necessary and can begin now.

The 1999 attempt at a new preamble was flawed.¹⁰ In the midst of the debate over an Australian republic, Prime Minister John Howard announced that a second referendum question would be put before the Australian people. He then proceeded to draft a new preamble without public or Indigenous involvement. His proposed version contained a clause that read: 'Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures'.¹¹ After opposition to the use of terms such as 'mateship' and concern at the lack of public consultation, the Prime Minister produced a new preamble that, with the support of the Democrats, was passed by parliament. The revised preamble put to the Australian people on 6 November 1999 contained a clause that read:

We the Australian people commit ourselves to this Constitution: honouring Aborigines and Torres Strait Islanders, the nations first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.¹²

This preamble was not the subject of public consultation and was not widely embraced by the Indigenous community. Like the vote on the republic, the preamble was defeated nationally and in all six states.

From the experience of 1999 it should now be clear that a successful process for preamble reform requires significant consultation and negotiation with Indigenous people and the broader community. The consultation could be initiated through community activities, including a competition run by parliament to determine a preamble model for Australia.¹³ Such a competition might capture the public imagination like the national flag competition of 1901, which attracted 32,823 entries.¹⁴ The competition should set out guidelines for the preamble, including the need to appropriately recognise Indigenous peoples. Submissions should be encouraged from across the community, including from school groups and Indigenous communities.

A national apology

The 1997 *Bringing Them Home* Report by the Human Rights and Equal Opportunity Commission¹⁵ found that reparations should be made to the Stolen Generations, including an apology and monetary compensation. The Council for Aboriginal Reconciliation also advocated a national apology for the injustices of the past. The government does not support a formal apology:

Such an apology could imply that present generations are in some way responsible and accountable for the actions of earlier generations, actions that were sanctioned by the laws of the time, and that were believed to be in the best interests of those concerned, but which when judged by today's standards were not.¹⁶

Yet recent tragic events such as the Bali attack demonstrate the importance and value of a public healing process. The significant role played by the Prime Minister in this process also shows why the direct involvement of our political

leaders is necessary. For an apology to have the effect its proponents desire, however, it must come voluntarily and be heartfelt. As those preconditions do not exist at the federal level at this point, instead of repeating the call for an apology, we make the following public law observations.

An apology need not imply that the present generation is responsible for the actions of earlier generations. Nor need an apology, if made in parliament, mean that the government is liable for monetary compensation. Article 9 of the *Bill of Rights 1688* has stood for centuries for the notion ‘That the Freedom of speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament’. The same effect is achieved today by s.16 of the *Parliamentary Privileges Act 1987* (Cth).

Responding to Australia’s history of racial discrimination under the law

Removal of section 25 of the Constitution

The Council for Aboriginal Reconciliation recommended the removal of s.25 from the Constitution,¹⁷ which states:

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.

The government is generally supportive of this recommendation, and has stated that given adequate support, it will put the matter to a referendum at the appropriate time. The government further noted that the section does not have any practical effect today, as no state has racially discriminatory voting provisions. It also argued that any racially discriminatory state voting legislation would be rendered inoperative by s.109 of the Constitution due to inconsistency with the *Racial Discrimination Act 1975* (Cth).¹⁸ However, this cannot be stated with certainty. The High Court may find that the *Racial Discrimination Act* cannot apply to state voting laws because the states have an implied immunity from Commonwealth laws that inhibit or impair their capacity to function as a constitutional system. For example, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, the High Court split and did not determine whether, under this principle, a Commonwealth law could validly regulate political advertising in state elections.

We support the removal of s.25. A provision that contemplates discrimination on the basis of race in state elections has no place in our modern Australian democracy and should be deleted. It should be replaced with a clause that generally prohibits discrimination on the basis of race.

Removal of s.51(xxvi) of the Constitution

The Council for Aboriginal Reconciliation noted the potential for s.51(xxvi), the ‘races power’, to be used to discriminate against Aboriginal and Torres Strait Islander peoples, and recommended its removal from the Constitution. This power was extended to Indigenous peoples by the 1967 referendum, primarily so that laws could be passed for their benefit by the federal parliament.

The intended purpose of s.51(xxvi) as originally drafted was expressed by Sir Edmund Barton, Australia’s first Prime Minister and one of the first judges of the High Court, at the 1898 Convention in Melbourne. He argued that s.51(xxvi)

was necessary to enable the Commonwealth to ‘regulate the affairs of the people of coloured or inferior races who are in the Commonwealth’.¹⁹ In summarising the effect of s.51(xxvi), Quick and Garran, in *The Annotated Constitution of the Australian Commonwealth*, stated: ‘It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came’.²⁰ Lest it be thought that s.51(xxvi) might confer any protection from racial discrimination, Quick and Garran continued: ‘On the contrary, it would seem that by sub-sec xxvi the Federal Parliament will have power to pass special and discriminating laws relating to “the people of any race,” and that such laws could not be challenged on the ground of unconstitutionality’.²¹

The effect of the 1967 referendum was twofold. In a positive sense it brought Indigenous affairs to national prominence by giving the Commonwealth Parliament direct power to pass measures which could advance the position of Indigenous Australians. However, as the history of s.51(xxvi) shows, the referendum also ensured a power designed to enable racial discrimination applied to Indigenous peoples. In *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, the High Court split on whether the power could still be used in this way. The issue remains unresolved. Accordingly, until this racially discriminatory provision is deleted from the Constitution, it can hardly be said that the Constitution provides a sound basis for the reconciliation process.

The government does not support the removal of the races power, due to the view that this legislative power is necessary to advance the interests of Aboriginal and Torres Strait Islander peoples. To meet this concern, s.51(xxvi) should be deleted and replaced by a power that enables the making of laws for the advancement of Indigenous peoples. At the very least, the potentially discriminatory power conferred by s.51(xxvi) should be limited by a separate provision that prohibits racial discrimination.

Freedom from racial discrimination and a Bill of Rights

The Council for Aboriginal Reconciliation noted that there is no mechanism that would override laws that discriminate against people on the basis of race. The protection afforded by legislation, including the *Racial Discrimination Act*, can be removed by parliament enacting inconsistent subsequent legislation, as for example occurred under the *Native Title Amendment Act 1998* (Cth). Section 7(1) of that Act states ‘this Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act*’. However, s.7(2) provides that the *Racial Discrimination Act* has no operation if the intention to override native title is unambiguous.

The Council for Aboriginal Reconciliation recommended, as an immediate priority, that the Constitution should be amended to expressly prohibit racial discrimination. Such an express provision in the Constitution would override legislation that discriminates on the basis of race, whether at the federal, state or territory level. The 2000 Social Justice Report²² recommended a parliamentary inquiry into a Bill of Rights. Whilst a constitutional Bill of Rights was recognised as a long-term objective, a legislative Bill of Rights was recommended in the shorter term to protect human rights.

The government does not support these recommendations. The government believes ‘that the best guarantee of fundamental human rights in this country is to have a vigorous and open political system, an incorruptible judicial system, and a free press’.²³ The government also believes that the framework of Commonwealth, state and territory laws adequately prohibits racial discrimination.²⁴

The government recognises that ‘Discrimination on the basis of race is contrary to law and to the Australian way of life’.²⁵ Unfortunately, however, the concept remains entrenched in the Australian Constitution. No legislation can change this, and new federal laws are not subject to a provision that prohibits discrimination of this kind. We believe that this should be remedied by a new provision that prohibits racial discrimination. The Constitution might include a provision modelled on the successful s.15 of the Canadian Charter of Rights and Freedoms 1982:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Amendment of the Constitution to expressly prohibit racial discrimination will ensure that all levels of government are unable to enact legislation that adversely discriminates against a particular race. Such an amendment would symbolise that the Australian people are committed to prohibiting racial discrimination at the highest level and wish to break from the racially discriminatory law, policies and practices of the past. We are not aware of any other Constitution in the world that still confers on a legislature the power to pass racially discriminatory laws. This amendment should be complemented by a more broad ranging Bill of Rights enacted by the federal parliament that would operate for the benefit of all Australians.²⁶ Australia is the only western nation without a Bill of Rights.

Building new relationships — a treaty or treaties?

The Council for Aboriginal Reconciliation recommended ‘That the Commonwealth Parliament enact legislation ... to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved’.²⁷ The Council noted that the ‘treaty debate’ should result in a formal document, negotiated between Aboriginal and Torres Strait Islander peoples and the wider Australian community.

The government does not support a treaty. The government’s view is that negotiated outcomes should be achieved outside the federal legislative process and that legal frameworks are not necessarily the answer to social issues. Current agreements between Indigenous groups and businesses, local and state governments and other institutions and agencies are seen as examples of how agreements can be achieved outside of the legislative process. The government has expressed concern that a treaty may be divisive and that it could ‘undermine the concept of a single Australian nation’.²⁸

The process of agreement-making with Indigenous groups is growing in Australia and will continue, as the government suggests, even without a federal legislative framework to support treaty negotiations. But federal legislation *is* an important part of the picture for at least two reasons. First, although agreements can be made with local and state governments and private interests, it is only the Commonwealth that can address the national and constitutional position of Indigenous people in Australia. Second, the government has referred to the success of current agreements, such as the Indigenous Land Use Agreements made under the *Native Title Act*. Yet such an agreement is a perfect example of the need for well-designed legislation to facilitate effective negotiation processes. One reason so few native title agreements were reached before 1998 was that the agreement-making provisions of the original Act simply did not provide the requisite legal support.

Building new relationships through the framework of a treaty may well be the lynchpin of the next stage in the reconciliation process. It could open up the Australian political and legal system, which, since Federation, has largely excluded Indigenous peoples. In other countries, treaties have been signed between the settler and Indigenous inhabitants as a way of striking an agreement on governance and other issues. For example, Canada, the United States and New Zealand have all managed to do so without fracturing their concept of nationhood. In fact, it is clear that a treaty is an accepted way in which other nations have worked toward achieving an appropriate settlement. Australia is the only Commonwealth nation that does not have a treaty or treaties with its Indigenous peoples.

We see three elements at the heart of the treaty debate that are relevant to the wider question of reconciliation. In general terms, they reconfigure the idea of treaty around a premise, a process and an outcome.²⁹ The premise is one of *acknowledgement*: recognition of the history of this country and the damage done to Indigenous peoples and cultures, and recognition of the unique status of Indigenous people within Australian society and government. The preferred process by which progress can be made in Indigenous affairs policy is one of *negotiation*, in which Indigenous people come to the table as equals and directly participate in decision-making about the fundamental things which affect their daily lives.

The outcomes from a treaty or formal negotiation process should be *rights* and *opportunities*. A political process, such as treaty negotiations, which failed to recognise and legally protect the citizenship rights and the inherent rights of Indigenous people would fail to meet this repeatedly expressed Indigenous aspiration. As the Harvard Project research suggests, negotiating a new and more autonomous space for Indigenous people within our political system will create the possibility of sustainable social and economic development. Indeed it is an essential precondition. So, as well as entrenching rights, a treaty process can create opportunities for Indigenous communities to solve their problems, and to develop their communities, themselves. A treaty process also creates an opportunity for the broader Australian community: the chance to address the fundamental problem of social justice in our community and to strike a new relationship with the first peoples of this country.

This framework — *acknowledgement/negotiation/rights and opportunities* — has a broader application. It offers a general means of assessing what progress governments are

making in Indigenous affairs. These concepts are integral to the reconciliation process generally.

The way forward

In order to promote national reconciliation between Indigenous peoples and the wider Australian community, work can begin now on a new preamble to the Constitution through a national preamble competition. Work should also begin on drafting changes to the Constitution to delete ss.25 and 51(xxvi) and replace them with a power to legislate for the advancement of Aboriginal and Torres Strait Islander peoples and freedom from racial discrimination. A referendum, on at least these latter issues, could be held at the next federal election.

Parliament through its committee structure should now further investigate the options for enacting a statutory Bill of Rights. It should look to models such as the recently enacted United Kingdom *Human Rights Act 1998*. This will be an important part of a reconciliation process that recognises and affirms the rights of all Australians. This instrument should be enacted as soon as possible.

In the longer term, the government should establish a process by which to negotiate with Indigenous peoples on the possibilities for treaties or other legislative models for acknowledging Indigenous rights and interests. This process may bring about a formal close to the reconciliation process and lay a foundation for building future economic, social and political partnerships.

Much of the symbolic and rights aspects of the reconciliation process are being undertaken at the state, local and community level. However, the commitment of federal government is vital. Without it, the reconciliation process will not encompass the national acknowledgment of Indigenous peoples or changes to our structure of government and we as a nation will be diminished.

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