

Constitutional Recognition of Indigenous Australians*

Mick Dodson

I would like at first to acknowledge the first Australians on whose ancestral lands we meet and I would also like to acknowledge them for the many thousands of years they have been in careful possession of this land and the way in which they've sustainably utilised its resources. I also want to pay my respects to their elders, past and present.

Ladies and gentlemen many of you may know of a panel that's scooting around the country at the moment talking to people about constitutional recognition of Aboriginal and Torres Strait Islander Australians. What I want to do today in this address is to examine, among other things, what might be the recipe for a successful referendum and how we might mix the ingredients of that recipe to both achieve the symbolic recognition in our Constitution that many of us desire, but also how we might make substantive change that is required to the Constitution to reset the relationship, positively, between the first Australians and the rest of the country.

This expert panel that I have mentioned will report to government by 1 December this year and that report will no doubt advise the government on how to give effect to Indigenous constitutional recognition. They are required also to report on the level of support from the Aboriginal and Torres Strait Islander peoples and from the broader community. They have terms of reference which require them to lead a broad national consultation and community agreement engagement program to seek the views of a wide spectrum of the community, including those who live in rural and regional areas. They are also to work closely with organisations such as the Australian Human Rights Commission, the new National Congress of Australia's First Peoples and Reconciliation Australia, all of whom have existing expertise and are able to engage on this issue. They are also required to raise awareness about the importance of this step of Indigenous constitutional recognition and they are meant to support ambassadors in the campaign to generate broad public awareness and discussion.

The government has also said to the panel that in performing their task they need to have regard to key issues raised by the community in relation to Indigenous constitutional recognition and on the form of constitutional change; the approach to a referendum that is likely to achieve widespread support; to report on the implications of any proposed changes to the Constitution; and finally, to the glee of constitutional

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law experts, to get their advice. I hasten to add I am not a constitutional law expert but being a lawyer I had to read the Constitution at some stage way back in the distant past, although I have been looking at it more carefully recently since this process has got underway.

So what I want to do today in light of that introduction is to examine some of the options that may be available for us in this proposed referendum but also to pose some questions. I am not sure if I am in a position to answer these questions, but I think we need to ask them, and the first question is perhaps—and these are not necessarily in logical order—what do we need to do to make this succeed and how do we make that happen? Many of those who were involved in the 1967 referendum, which is the most successful referendum in Australian constitutional history, are no longer with us, but we can learn from the processes that they went through, I think, to try and maximise our chances of succeeding this time around. Perhaps there is a more pressing question we need to ask of ourselves before we get into the nitty gritty of the options that might be available to us and it's this question: will this referendum or any of its propositions bring us closer together? Indeed, will it unify us? And perhaps, in other words, what exactly is the purpose of this exercise? Will it deal with what we Aboriginal and Torres Strait Islanders refer to as unfinished business? Indeed should it deal with that unfinished business? Or should we regard it as the beginning process, where we are looking to start now and refine into the future?

I think the terms of reference give us some insight into what might be the purpose of this exercise but to me it's not all that clear and, as I said, I am not sure if I can answer those questions. But I do think there are some key matters we need to found this process on, or to put a philosophical basis to this endeavour. If we are going to rearrange and reset the relationship between Aboriginal and Torres Strait Islander people, us the first nations peoples of this wonderful country of ours, is this the way to do it? Is this how we are going to solidify, unify and reset our affairs with the rest of the country, for those who have come here since 1788? Now I agree that this referendum should be about recognition, and I think perhaps we can all agree about that, but it cannot just be about recognition. I think just doing that would be an enormously wasted opportunity for us. But what should be the core of this exercise? The elements I speak of go beyond mere recognition.

Recognition itself is one of the key elements; it is the first of the three. But I would like to put it more elaborately because it must include an acknowledgement in the Constitution that we, the Aboriginal and Torres Strait Islander peoples, were here first, and not only here first, we were in possession of the country when the British Crown asserted its sovereignty over all our lands. If we recognise that we were in possession at that time it must also be acknowledged and recognised that the place

was taken from us, without our consent, and that was wrong and that question has never been addressed. This fact of recognition or fact of acknowledgement is really acknowledging our status, a status of Aboriginal and Torres Strait Islanders as the first peoples of this land, which will enable us to build a platform to build on, in my opinion.

The second key element that I want to mention goes to the question of identity, not just our Aboriginal identity, our Torres Strait Islander identity, this question of identity is about all of us. It's about our identity as Australians. So far as we are concerned, the first peoples of this land, we want our identity to be protected and respected within our legal and constitutional arrangements within our nation state. It is about us as a nation valuing these ancient identities and what that stands for, for us, a modern nation in the modern internet world—somewhere I suggest our Constitution isn't at the moment.

The final key element that should found our thinking on this referendum question is to do with citizens and citizenship. Now we, the Aboriginal and Torres Strait Islander peoples of this country, are not full citizens at present under our Constitution. Our Constitution allows the first Australians to be treated by the Parliament with racially discriminatory laws, laws that don't respect the principles of equality and laws that do not respect principles of non-discrimination. So we are not equal citizens, so the question has to be part of our thinking.

So I ask you to think about those elements when you think about eventually casting a vote on this question. So how do we achieve this? George Williams and David Hume¹ have given us some idea in a paper they both published and they say the following: firstly, that the question has to have bipartisan support. There has to be genuine popular engagement generating ownership for the populace, for those of our citizens who are entitled to vote. There has to be education around the question, and there has to be a great deal of clarity about the proposal and the message. There has to be a good referendum process. Of the 44 referenda we have had in this country, only eight have succeeded. I think it is safe to say if you examined all of those that failed, that one ingredient of this recipe at least had been breached.

I want to talk a bit about most things and looking at some of the practical issues that confront us, at the same time trying to speak of some of the opportunities that this constitutional referendum could afford us. I want to look at the whole gamut of possibilities, at least the ones I have looked at, from what I call the very minimalist position to the maximal position. It is what I call in your wildest dreams stuff. I want

¹ George Williams and David Hume, *People Power: The History of the Future of the Referendum in Australia*, UNSW Press, Sydney, 2010.

to firstly reject the minimalist approach and my preference is for incremental change with a view to long-term goals. One of the things we shouldn't do and what Williams and Hume should inform us is we should not be running the local government referendum question with this question. Just don't do it. It's dumb and it's going to increase the chances that both questions will fail. There will be a lot of arguments about that, but if the Parliament insists that that is what happens we have got to make sure that the two questions are clearly distinguishable from each other because they are both talking about recognition, recognition of local government and recognition of Aboriginal and Torres Strait Islander peoples. I don't think a proposal for local government should be tied with this referendum question because it muddies the waters with two proposals that are quite different. I won't accept arguments—I know I will be overridden—but I will not accept arguments of practicality and economy because of something I want to say later.

I do not think those sort of questions should inhibit us in really bringing our Constitution back to life, getting it out of the 1890s and getting it into the 21st century because we as a nation need to drag this instrument into the internet globalised age. In particular we need to think about how we accommodate the developments in the recognition and protection of the rights and interests of the world's indigenous peoples that's occurring internationally through the United Nations system and through other international forums. Because what is happening internationally, we like to be a part of it globally when it comes to trade and commerce and economics and politics but we are not very good at engaging internationally when it comes to things like our rights and particularly the rights of indigenous peoples.

Indigenous peoples worldwide are repositioning themselves within the nation states that they live in today, particularly in light of the overwhelming adoption by the UN General Assembly of the UN Declaration on the Rights of Indigenous Peoples. Australia was one of the four nations that voted against it in the General Assembly, but has since reversed its position on that and has now endorsed the declaration but we shouldn't be left behind in bringing it to reality here at home for Aboriginal and Torres Strait Islander peoples. I think in this context, in this pursuit, if you like, we have got to abandon our old settler colonial societal thinking, and come with a good heart to the task of resetting the relationship in line with what is now through this declaration the global standard. I think the education component of the awareness raising should include talking about terminology particularly as it is used in the Declaration of the Rights of Indigenous Peoples. A declaration that in the history of the United Nations has achieved the biggest ever 'yes' vote, a bit like our 1967 referendum. This is what the international community supports as the standard. We shouldn't be dragging the chain.

It is a fact of life we have lawyers. Lawyers will argue about the meaning of these things, as they have done. It's what lawyers do. I don't think that those things, their concerns, are insurmountable and unachievable, particularly for Australians. I think we can achieve just about anything if we set our minds to it and, as I say, if we come with a good heart, we'll do it. For example the use of the term 'peoples'. 'Peoples' in international law has a significant meaning. It means that you have a right to self-determination. Australia has endorsed the declaration. It uses that term and of course the term is being used by the national indigenous body, the new National Congress of Australia's First Peoples. Of course it invokes things that we are pretty shy talking about, or are turn offs to us when we start talking about human rights, or rights and interests. There is a significant portion of the population that are antagonistic towards talking about this stuff. We have to overcome that if we are fair dinkum about resetting relationships in this country.

We also have to be game enough to talk about terms like race, racism and racial. These are outmoded, outdated concepts. They are potentially inflammatory to the debate, but above all we should have a discussion and abandon this stuff and we shouldn't be talking about race in our Constitution. This is discredited language. It's being used in a context that is no longer valid or relevant. We talk more about cultural and ethnic differences these days. That's got nothing to do with race. After all, we are all members—me, you, people across the oceans on other parts of the planet—we are all members of the human race. So we shouldn't be frightened in the process to talk about these things.

There has been talk about a preamble and even, heaven forbid, in my view, a statement of values in the process thus far. Firstly I think we should tell the panel to forget about a statement of values, we are not ready for that. We weren't ready for it ten years ago and I think it's going to be more than ten years before we are ready. If you put that ingredient into the recipe it will cock up the cake. We don't need to do that now and we don't need, as I said, just to have a preamble. You know some lawyers say 'well people say stick something in a preamble'. We say 'well no, there is no preamble'. We would have to create a new preamble; the Constitution doesn't have a preamble. What might be considered a preamble is an Act of the British Parliament, the British Imperial Parliament of 1901. Some lawyers take a different view, but as I said that is the nature of lawyers. Put three lawyers in a room and you have five legal opinions. So it shouldn't just be that, and I think I have already indicated if we are going to have a statement of reconciliation I have indicated my preference for what it ought to contain and that ought to be in a new preamble.

There are also lawyers who argue that well if you want to insert a preamble you don't have to have a referendum so that is another issue. Are we wasting our time worrying

about a preamble? But the lawyers aren't agreed on this and ultimately it's probably a question for a bunch of lawyers in another building not far from here. I think we should forget about having just a preamble and shouldn't muddy the waters with the idea of a statement of values. I say that about the statement of values because why put that question in with this question? It will just open the floodgates. Everybody will want something in there. It might be about their Christian heritage, or about the influence of migrants or about some other issue that we are never ever going to agree on because the list is endless. This could really derail the focus on the question we're trying to deal with here which is the recognition of the first Australians. If we want to do that down the track there will be other opportunities to have that debate. Perhaps when we become an inclusive republic with a new constitution, but that is not what we are on about at the moment. Some people (again lawyers) argued about the justiciability of the words in a preamble. I think we should trust our High Court on that question. I think in dealing with legal issues like this I would prefer them to the Parliament.

So a preamble of recognition would be both symbolic and address the first key element of my proposition. What about substantive changes and the Constitution? There are two highly offensive provisions in our Constitution and one is section 25, which gives the Parliament the power to disenfranchise members of a particular race and the other is subsection 26 of section 51, part of which was repealed in the 1967 referendum to remove reference to Aboriginal natives. I forget the exact words, but certainly Torres Strait Islanders weren't mentioned because they were the exception. The Commonwealth couldn't make laws with respect to Aboriginal people. The reference was removed. So the federal government now has that power and this is the power that allowed them on at least five occasions in the last two decades to suspend the Racial Discrimination Act and pass racially discriminatory laws against Aboriginal and Torres Strait Islanders only. I should add that power has never been used to discriminate against members of any other race. It has only ever been used to discriminate against Aborigines and Torres Strait Islanders.

So they are the two offending sections. Should we deal with both of them? I think we have got to do something substantive. Should we just repeal section 25? Leave it for another day to what we might put in there in its place? Should we repeal subsection 26 of section 51? I say yes. Some will say 'well, what happens to all those laws that were passed under that power?' Prior to 1967 the federal government passed something like 48 separate pieces of legislation that all had something to do with the affairs of the Aboriginal and Torres Strait Islander peoples. The federal parliament has never been without power to make laws for first Australians. Some say, well laws will fall over that have been passed under that power. I hope some of them do, like the Northern Territory emergency response legislation. Others that have been arguably of

some benefit to us, like the Native Title Act, should stand. I think there is sufficient precedent in the Constitution to save those things, to preserve those things. There is already precedent there at federation to save state constitutions, state laws etc.

Perhaps we just replace subsection 26 with a simple statement that says ‘for the peace, order and good government of the nation the federal parliament is empowered to make laws for Aboriginal and Torres Strait Islander peoples’. Or we could say ‘to make *beneficial* laws’, which would carry the message that we’re not talking about racial discrimination here. Repealing section 25 isn’t really going to do any damage. It has never been used in the 110 years of the Constitution. It has hardly ever even been referred to in judicial pronouncements. I think up until 1978 there had been three mentions of it as asides, irrelevancies, to judgements. It is not a provision we have sought to use to disadvantage or to disenfranchise people who happen to be from a different cultural or ethnic background so why have this offensive piece of draughtsmanship in our Constitution? It is an embarrassment to us. We should get rid of it.

The maximum position would include a new section 105b which would allow the federal government and the states and territories to enter agreements with representatives of Aboriginal and Torres Strait Islander peoples, primarily—but not exclusively—to deal with the unfinished business which is around status, identity, citizenship, recognition and finally to give us some time to discuss things. I mentioned earlier that we really don’t have much knowledge—unless you happen to be a constitutional lawyer or a law student—of our Constitution. A recent poll said that something like 58 per cent of Australians think we have a right to bear arms in our Constitution. It sends a message to me that we know more about what the Yanks have got in their constitution than we know about our own. So I think we have got to bring our Constitution to life, bring it into the 21st century. We should be having more frequent referenda. We should be examining this instrument and saying ‘it is time to bring this into the Facebook and the Twitter generation’.

This is what Iceland is doing. Iceland is throwing their constitution out and they’re bringing it into the 21st century and their consultation process includes the government running stuff through for comment through Twitter and Facebook and other ways of getting to people through the internet. It’s not about town hall meetings, although they are doing that as well, but not solely, and it’s not about news polls, it’s not about politicians getting up. It’s about the people saying, well look this is what we want. I think we should take our Constitution back. Take it back from the politicians and take it back from the courts and say look we want these things done because they are decent and proper things for us to do. It’s about our identity. It’s about us, we Australians. And we should tell politicians to stop running referenda with general

elections. They're too highly politically charged and it's the wrong place to do it. We are not broke, we can afford separate referenda. We should get in the habit of saying mid-term between general elections we are having a referendum about X or Y. So we can all think about it rationally and sanely without some hysterical politician chasing you for your vote.

So anyway ladies and gentleman thanks for coming, and I hope these few thoughts might stimulate you into action.



Question — I noticed that when you started your speech you paid homage to the first Australians, not the traditional owners. Could you explain that please?

Mick Dodson — The term 'traditional owner' is used in a number of pieces of legislation throughout Australia, but it was first used in the federal law that is the Northern Territory Lands Right Act. It speaks of traditional owners and has a definition of tradition owners. To some people it's an artefact of anthropological thinking that has been grasped by lawyers and put into legal form and doesn't truly reflect the status in a way that the 'first peoples' or the 'first Australians' or 'first nations' does. Again, it is like native title, it's something that came over on the ships and it is not about our status before those ships arrived. We weren't called Australia back then but when we say first Australians everybody in this room would know who we were talking about. There are some Aboriginal and Torres Strait Islander peoples who object to that term. If I was in the Northern Territory I would say 'traditional owners'. In Victoria, the Victorian Government now has a Traditional Owner Settlement Act in relation to land settlements in Victoria and many Kooris in that state are comfortable with that term, but there are other people who aren't. So I was not just using a neutral term, I was using something that talks about, I think, the true status question.

Question — Would what you outlined today be achieved if we were to follow New Zealand and have a number of indigenous peoples directly elected into the federal parliament?

Mick Dodson — New Zealand can be distinguished from us in their legal and constitutional arrangement. They don't have a written constitution. A lot of their constitution is circumvention and they have a treaty of course—the Treaty of Waitangi—that has been elaborated and solidified in the legislation. They have a

unicameral system; they don't have an upper house. These are the differences that they have.

I do not have any problem with reserve seats as a proposition but I don't think it's a proposition we should be dealing with in this referendum. It's again one of those questions we need to deal with down the track, maybe in a new constitution where we have got the room and the space to have a proper debate about it and it's not bundled in with general elections and other referenda; that we actually have some clear air to fly in, or a bit of blue sea to navigate through. When it's bundled up with other stuff it tends to fail and our record shows that. If you were a corporation trying to change its constitution to fit in with modern practices and new technology and you had the sort of record we have of changing our Constitution you would have been out of business long ago. But the place to put that would be section 25 or perhaps not 25 exactly but in that chapter which deals with election to, and the constitution of, our Parliament.

Question — I think the referendum question should be kept very simple and the argument should be kept very simple. We should stay if we can out of the economic impact on individuals if people are worried about that. We should have some very strong arguments that go against those views. I take the carbon tax as an example. I think the Gillard Government is struggling to get the message across because it is complex and because people are worried about their hip pocket nerve. I think we could all probably draw a lesson out of that.

I remember the freedom marches of the early to mid-60s. I think we need a long lead time to sell the message not just an advertising blitz and I wonder whether we could perhaps take a leaf out of that earlier period and introduce something like that? Because as a young man that appealed to me and I hope it will appeal to many others.

Mick Dodson — We have got to get the process right and we have got to have enough time to raise awareness and build confidence for people that they are making an informed decision. The question should just be 'do you agree with inserting the words attached into the Constitution—yes or no?' You shouldn't split the question, shouldn't say do you agree with the preamble, do you agree with changing subsection 26? They have got to be joined together and you can only give one answer to the question.

Question — It just seems to me a no-brainer this constitutional consideration and the referendum. If we have a Constitution which at the moment enables Australian governments to prepare and implement discriminatively laws like the legislative response law and to suspend the Racial Discrimination Act, it is pretty obvious that there's overt discrimination associated with our Constitution. It just seems to me that

it's black or white. You either agree with discrimination or you don't. And it just seems like a very simple process. Why we are having all this argument about preambles and stuff, I really don't know. And I note that Justice Kirby, for example, spoke to the Law Council a couple of weeks ago and he made a comment along the lines of when we voted in the 1967 referendum, which I did, we never thought we would ever see a Racial Discrimination Act being suspended as it was and having the soldiers go in and god knows what and really imposing a very patronising system on Aboriginal people. We've really gone wrong. I think it's a black-and-white question: we discriminate or we don't.

Mick Dodson — In relation to section 25 you say 'do you want to repeal this or not? Yes or no?' If you say no, you're actually supporting a racially discriminatory provision in the Constitution. No doubt, some people will say no. It may not be because they are racist, but because they just don't trust government on anything.

Question — You mentioned the possibility of 'beneficial' decisions to Indigenous people being acceptable. I would just be interested in your thoughts on who would decide whether it is beneficial or not?

Mick Dodson — Ultimately the arbiter of the meaning of the words in our Constitution is the High Court and I think they have done a pretty good job up till now and they can of course overrule previous rulings with subsequent judgement. So there is a safety net in a sense. But there is a huge amount of international human rights jurisprudence around these questions. They would guide our High Court. The international community has been dealing with this particularly since the Second World War. The Human Rights Council in its former incarnation as the UN High Commission for Human Rights. Their committees have been dealing with all of these questions. I'm not wedded to that word, but you need to be proscriptive but not prescriptive in the Constitution. It has got to be strong language, but it's really not useful to bring in trying to confine the court in its interpretation. What you want to do is to try to stop the court from saying 'yes these laws are valid' even though they're racially discriminatory, or discriminatory in some other way. Perhaps that might need eventually a provision in the Constitution that prohibits racial discrimination or entrenches the principles of equality and non-discrimination. But that is not a debate for now. If there is a new preamble that is in the terms that I suggest without any qualification, that will aid the judges in interpreting and they will look at the debates in Parliament, they will look at the second reading speeches, they will look at the vote and say the people voted. This is what we thought we did in 1967—that we were voting for the Commonwealth to make beneficial laws—but the courts did not take any notice of that. They went back to what the bearded white men of the 1890s and their conventions had in mind not what modern Australia has in mind, and what the

Australia of 1967 had in mind. I am sure it included the gentleman who spoke earlier who voted in that election. He can answer himself, but I'm sure most of them thought they were voting for beneficial stuff not for the racial discrimination to continue through the Parliament.