Adressing Race in Australia's Constitution

verfassungsblog.de/australiens-verfassung-entrassistifizieren/

Guest Blogger Mi 1 Feb 2012

By PAUL KILDEA

Amending the text of the Australian Constitution has been described as a 'labour of Hercules'. It has been changed just eight times since Federation in 1901 (out of 44 attempts) and has remained unaltered for more than three decades. But a thawing of our famously 'frozen' Constitution may be just around the corner. On 19 January 2012 a government-appointed panel of experts recommended that the Constitution be amended to give recognition to Aboriginal and Torres Strait Islander peoples. It is likely that a referendum will be held on the subject some time in 2013.

Whether this referendum succeeds or not will depend on whether the government can put together a package of reforms capable of attracting broad support, and how well it addresses perennial process challenges around public education and engagement. In this post I outline the recommendations made by the panel in its report, and then suggest some steps that should be taken to strengthen Australia's approach to constitutional reform process – the 'how' question, as Tom Hickman put it so neatly in his recent post on this blog.

The need to give constitutional recognition to Aboriginal and Torres Strait Islander peoples has been debated on and off for decades. The most recent push began in August 2010 when the Gillard Labor government pledged to hold a referendum on the subject as part of a political deal with the Greens and Independent MPs, whose support enabled the government to retain power. In December 2010 the government appointed a panel of experts to conduct a community consultation process on the issue, and to report on options for reform. The panel had a diverse membership, featuring representatives from all major political parties as well as Indigenous, business and community leaders. After releasing a discussion paper, the panel conducted a public engagement program that included 250 consultations across urban, rural and remote locations (including targeted consultations in Indigenous

communities), the collection of 3,500 submissions and the maintenance of an online presence through its website, Facebook and Twitter. After analysing public input and seeking legal advice on its draft proposals, the panel compiled its report.

In the report the panel makes four recommendations for constitutional amendment: the removal of two 'race' provisions; the creation of a new head of power with respect to Aboriginal and Torres Strait Islander peoples; the inclusion of a prohibition on racial discrimination; and the insertion of a provision recognising Aboriginal and Torres Strait Islander languages.

The first of these is the least contentious, and currently holds cross-party support. It is widely felt that part of giving constitutional recognition to Indigenous peoples is removing those provisions that contemplate discrimination against them (as well as other peoples captured by the term 'race'). To this end, the panel recommends the *repeal of section 25,* which contemplates that State Parliaments can disqualify certain people from voting on the basis of their race. While not in operation now, it was a live provision in the decades following Federation when States denied voting rights to Indigenous peoples. Its presence in a modern constitution has been described as 'odious'.

The panel also recommends the *removal of the 'race power'*, a head of power (in section 51(xxvi)) that gives the national Parliament power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. This provision has an unsavoury genesis, having been included in the Constitution for the express purpose of supporting discriminatory laws against what one of the framers called 'the people of coloured or inferior races'. However, by the time Indigenous peoples were brought within the power in 1967, there was a strong public feeling that the national Parliament should only use the power for positive purposes, such as alleviating disadvantage. In the decades since, it has been used to support beneficial laws, such as those giving protection to sacred sites. Nonetheless, the panel recommended its removal out of a view that a provision framed around the concept of 'race' has no place in a modern constitution.

The panel's second recommendation concerns the insertion of a new section 51A that gives the national Parliament *the power to make laws 'with respect to Aboriginal and Torres Strait Islander peoples'.* In effect, this replaces the 'race power' with a head of power specific to Indigenous peoples. This is, in part, a matter of necessity: if the 'race power' were simply removed, certain laws that are currently supported by it (including native title and heritage protection laws) would have no constitutional basis and the subjects of those laws would revert to the States. For this reason, the panel only supports the repeal of the 'race power' if it is replaced by a new section 51A.

The contentious aspect of the proposed section 51A is the panel's recommendation that the description of the head of power be preceded by a 'statement of recognition'. This statement, which appears as a type of 'preamble' to the head of power, provides four types of recognition to Aboriginal and Torres Strait Islander peoples: it recognises their status as the first occupants of Australia; it acknowledges their continuing relationship with their traditional lands and waters; it expresses respect for their continuing cultures, languages and heritage; and it acknowledges 'the need to secure [their] advancement'. This last phrase has attracted attention in media debate. The panel included it with the intention of limiting the head of power – specifically, to guard against the possibility that the national Parliament might use it to pass laws detrimental to Indigenous peoples. The need to do this arises from a 1998 High Court decision that left open the possibility that the existing 'race power' could be used to support both beneficial and detrimental laws. But in the past two weeks, there has been debate among constitutional lawyers as to whether 'advancement' is too vague a term, and some have noted that such words have been used in the past to justify laws that harmed Indigenous peoples. There is also a question over whether including symbolic language in the body of the constitution will create uncertainty in interpretation. More broadly, some worry that the inclusion of a word like 'advancement' will not be supported at a referendum as many voters will see it as about giving Indigenous peoples 'special treatment', a potent and divisive theme in Australian political debate.

The panel's third recommendation has also attracted early opposition from some quarters. It involves the insertion of a new section 116A that would operate as a *prohibition on racial discrimination*. It would provide that '[t]he Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national

origin', except where a given law or measure is for the purpose of 'overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group'. Protection against racial discrimination already exists in national and State legislation, but the panel's proposal would remove its existing vulnerability to subsequent legislative override. This recommendation has been welcomed by many commentators, who argue that it is consistent with Australia's contemporary values and international obligations, and point to the existence of similar prohibitions in the constitutions of Canada, South Africa and India. But it has attracted criticism from some conservative commentators, who argue that the categories of 'race, colour or ethnic or national origin' are too broad and will give rise to unpredictable interpretive consequences. Others have referred to the proposed reform as a 'one-clause bill of rights', a potentially resonant criticism in a nation that has tried and failed several times to introduce constitutional and statutory charters of rights.

The panel's final recommendation is the insertion of a new section 127A concerning the **recognition of languages**. It would, first, recognise English as the national language of Australia and, second, recognise that the Aboriginal and Torres Strait Islander languages were 'the original Australian languages, a part of our national heritage'. The panel has described the first limb as 'simply acknowledg[ing] the existing and undisputed position', while seeing the second limb as providing 'an important declaratory statement in relation to the importance of Aboriginal and Torres Strait Islander languages'. It is not intended to give rise to any substantive rights or obligations. Perhaps surprisingly, there has been little public debate about this recommendation so far, but this is liable to change. One issue that is likely to be discussed is whether the first limb serves any real purpose, and whether the declaratory nature of the second limb renders it more suitable for inclusion in the statement of recognition in proposed section 51A.

Overall, the panel has provided the Gillard government with a substantial package of reform proposals. Just over a year ago, some wondered whether the panel would limit its recommendations to symbolic forms of constitutional recognition, such as the assertion of values and aspirations in a preamble. However, the panel has shown itself to be more ambitious than this. Its report lays the foundation not only for a vigorous legal debate about different forms of constitutional recognition, but also for a wider public debate about the building of relationships between Indigenous and non-Indigenous Australia, and the combating of racial discrimination.

An obvious question at this point is whether the constitutional reforms recommended by the panel have any chance of succeeding. Certainly, the Australian Constitution sets a high bar for change: a proposed amendment must attract the support of an absolute majority of both Houses of the national Parliament, followed by the approval of a 'double majority' at a referendum – that is, a majority of voters nationally, plus a majority of voters in at least four of the six States. The referendum record tells us that few proposals clear this hurdle; in fact, 36 out of 44 reform attempts have failed. Whether the suggested reforms regarding Indigenous recognition buck the trend will depend largely on whether cross-party support can be maintained, and whether the Gillard government commits the necessary resources to engaging and informing the public, and making a coherent case for change.

The challenges of public education and engagement loom particularly large. The panel ran an impressive program of national consultations but, given resource and time constraints, it was only ever going to be capable of reaching a relatively small proportion of the Australian population. The next stage of the process involves widening the debate to a 'mass' public of 22 million people: raising awareness, sparking interest, improving understanding, and prompting input. It is this aspect of constitutional reform that Australia has never handled particularly well. This is perhaps reflected in the fact that the primary tool of public education prior to a referendum is a confusing and adversarial campaign pamphlet that half of the population tosses away without reading. It was a laudable innovation when it was first introduced in 1912; a century later, the nation's referendum machinery is creaking and in need of reform. To draw on Tom Hickman again, it is time that we began to focus more intensely on the 'how' question.

The panel was alert to this, and recommended that the government implement 'a properly resourced public education and awareness program' in the lead up to the referendum. This is a sensible suggestion, but my feeling is that we need to start getting more specific about how this can be achieved. An obvious starting point for Australia is to focus on producing better quality information materials and to distribute them through all available media,

including social networking sites. To avoid the perception that government is tweaking the message, an independent body could be appointed to oversee all education and engagement activities. This body could also serve as a watchdog on public debate, requiring that basic standards of accuracy be met by campaign organisations receiving public funds.

What else? A modern constitutional reform process should also involve a variety of fun and engaging community activities. Gone are the days when we were limited to dull town hall meetings. Iceland showed this definitively last year when it 'crowdsourced' the drafting of its new constitution, inviting citizens to join experts in an online dialogue about proposed reforms. Alongside online innovations, deliberative forums such as citizens' assemblies and citizen juries have an important role to play. Their model of face-to-face discussion gives participants a rich learning experience and a sense that they have made a real contribution to national debate, while also helping to raise awareness across the community.

More mundanely, government should look to community groups and NGOs to help carry the load. It could establish a grants program to support the grassroots initiatives of worthy organisations interested in advancing public education and engagement. In the current reform process this would ideally include the many cash-strapped organisations that serve remote Indigenous communities. Additional resources could also be made available to the National Congress of Australia's First Peoples and Reconciliation Australia, which are certain to play a pivotal educative role as the process unfolds.

These suggestions do not amount to a comprehensive program for strengthening constitutional reform process in Australia. But they would be steps in the right direction. The panel's report makes clear that this constitutional moment is of great national significance, and it deserves an approach to process to match. It should be participatory, educative and inclusive – and well-resourced. The payoff will come in the form of a popular process capable of building genuine consensus around the constitutional recognition of Indigenous Australians.

Dr Paul Kildea is a Lecturer in the Faculty of Law at the University of New South Wales, and Referendums Project Director at the Gilbert + Tobin Centre of Public Law

This blog post was originally posted on UK Constitutional Law Group's Blog and his reposted here with thanks.

Foto: John McGerr, Flickr Creative Commons

SUGGESTED CITATION , : *Adressing Race in Australia's Constitution, VerfBlog,* 2012/2/01, http://verfassungsblog.de/australiens-verfassung-entrassistifizieren/.