
A TALE OF TWO QUESTIONS?

AN ARGUMENT FOR COORDINATED CONSTITUTIONAL REFORM

by *AJ Brown and Ron Levy*

Australia's Commonwealth Constitution, formally altered eight times since it took effect on 1 January 1901, is elegant in its brevity and simplicity. However, with simplicity comes gaps and silences which, as a political system evolves, can become just as problematic as difficulties in the actual text. This article focuses on not just one, but two key silences in the Australian Constitution, currently being addressed by new deliberative processes. The questions are whether and how to recognise the special place of Australia's first peoples in its history, society and politics; and whether and how to recognise the existence, importance and future of local government.

After years of debate and attempts to address each, commitments to conduct referenda on these topics were made in agreements between the now federal government, Greens and Independents in August and September 2010. Separate expert panels were appointed to progress these issues in December 2010 (Indigenous recognition) and August 2011 (local government recognition), each with a mandate to consult and report to government in December 2011. The formation and briefs given to these large expert panels represent an important new experiment, in a long and ongoing debate about how to approach constitutional reform.¹

The existence of two separate panels, without a clear process for the next step of providing the Parliament and people with coordinated advice about the proposals, raises natural questions. Assuming that recommendations can be found for both proposals to proceed, should the people be presented with two proposals for constitutional alteration, or just one? If not presented together, then should there be a staged process of reform, and if so, what should be its public logic? Given that there are also other issues of constitutional reform of importance to many Australians, how does the Parliament proceed with either or both these particular issues in a way that makes public sense, rather than one open to accusations of an attempt to pander to sectional political interests, engage in *ad hoc* tinkering as a political distraction, or worse?

The ultimate answers lie in better research, consultation and strategic decision-making. In the authors' view, based on data from the 2010 Australian Constitutional Value Survey ('ACVS'), the two issues (Indigenous and local government recognition) should not be seen as separate, but rather as already intrinsically linked, for at least three reasons beyond the simple reality that they are being investigated simultaneously. First, the current evidence suggests that there is a substantial base of shared support for both initiatives. Second, the issues are linked by questions as to how each might receive basic symbolic recognition in the Constitution (for example, through inclusion in a new constitutional Preamble or other statement of values). Third, each is also likely to involve a more substantive, practical change to the Constitutional text proper, creating a mutual interest in ensuring that all proposed changes are seen by the populace as improvements for the sake of the nation as a whole – not simply for particular constituencies or sectional interests.

These analyses confirm the need for these proposals to capture what Helen Irving described as a 'utopian moment' – a moment of 'both optimism and dismay', of belief in the need for reform and confidence to undertake it.² Both proposals need to draw not only on a sense of particular silences needing to be filled, but a shared sense of how the change will contribute to the nation's future – especially given that neither silence is accidental.

SILENCES IN THE CONSTITUTION

The Constitution's silence with respect to Aboriginal and Torres Strait Islander peoples is a product of a deliberate decision. From 1901 until 1967, two exclusory, negatively discriminatory references to 'the Aboriginal race' were to be found in the Constitution. However, the silence since 1967 has done little to address Australia's unresolved legal history as a nation founded through substantial dispossession, with ongoing social, economic and political impacts; nor the special status and unrecognised rights of Indigenous Australians as the continent's first peoples. While the race power (s 51(xxvi)) became a power through which the Commonwealth could take measures

to promote reconciliation and address social disadvantage, cases brought by Aboriginal plaintiffs in 1997 and 2009 illustrated that the power could also be used to withdraw or diminish rights and entitlements.³ Options for re-occupying this silence include symbolic references to the realities of pre-European Australia and subsequent history, to amending or removing the race power, to creating new powers for the Commonwealth to make laws with respect to the special place, status or needs of Indigenous people.⁴

In contrast, the Constitution has always been silent about the existence of local government. However, contrary to popular belief, even though the Constitution is silent on local government, the Federation Conventions which drafted it were not. Local government was left out because it was to be part of the assumed 'plenary' power of the States, and because the States did not want, by association with local government, to have their own relationship with the new, superior level of government diminished to an equivalent status.⁵ The range of options for adjusting this result to now recognise Australia's third sphere of government span a similar spectrum, from symbolic to substantive.⁶

The ACVS of March 2010 provides a reminder that first peoples and local government are not the only significant silences in the Constitution.⁷ Nevertheless, as shown in Table 1, a substantial majority of adult citizens (75 per cent) agreed it was important to have a referendum about recognition of the 'history and culture' of Aboriginal and Torres Strait Islander people in the Constitution in the next few years – with 43 per cent indicating it was very important. These results parallel the evidence from a subsequent Newspoll, conducted in February 2011, which indicated that 75 per cent of adults might also support Indigenous recognition at a referendum.⁸

However the survey also gives insights into the likely 'softness' of some of this support, even assuming that all those who see a referendum as important are inclined to vote 'yes'. While most of those who believe it is 'very important' to hold a referendum might be presumed to be inclined towards change, this may also be influenced by the question. Here, the survey wording referred to recognising the 'history and culture' of Indigenous people, but a different result might be expected from a reference to Indigenous 'rights'. Some citizens would be likely to see such a change as more meaningful than mere symbolic recognition, but others might see it more negatively. Moreover the debate, if conducted divisively, is capable of alienating much of the critical 'middle ground'.

These realities are demonstrated by the available research on attitudes to constitutional recognition of local government. As Table 1 shows, 73 per cent of Australians as at March 2010 saw it as at least somewhat important to hold a referendum on levels of government – but this does not necessarily mean to recognise local government. Many Australians question whether we need local government at all, and whether there are more important adjustments to be made to what levels we have, and what they do.⁹ While some research suggests that as many as 61 per cent of Australians may support constitutional recognition of local government as a general proposition,¹⁰ results from the ACVS indicate that the proportion of adults currently likely to support local government recognition of may be much lower – only 51 per cent in 2010. This proportion is only slightly larger (55.6 per cent) among those who see importance in having a referendum about our levels of government. While 80 per cent of those who support constitutional recognition of local government (41 per cent) believe it is important to proceed to a referendum about the levels of government in the Constitution, it is

TABLE 1: REFERENDUM IMPORTANCE: Do you think it is important, or not important for Australia to have a referendum about the following things in the next few years? [If important, is that very important or somewhat important?]

		Very Important	Somewhat Important	(Total)	Not Important	Don't Know	(Total)
A	To decide if Australia should become a Republic	37.8	20.7	(58.5)	39.5	2.0	100.0
B	To recognise the history and culture of Indigenous Australians in the Constitution	43.2	31.5	(74.7)	24.2	1.2	100.0
C	About what levels of government Australia should have	47.2	26.2	(73.4)	24.4	2.2	100.0
D	To decide which level of govt is responsible for doing what	54.0	22.8	(76.8)	20.8	2.4	100.0

salient that 20 per cent of local government-recognisers do not see a referendum as important, or don't know.

Fortunately, there is evidence that if the form of constitutional recognition was substantive and meaningful, and citizens were persuaded that it would lead to a better federal system, public support would be likely to rise.¹¹ Perhaps up to 75 per cent support might be commanded, similar to the base level of support apparently enjoyed by the idea of Indigenous recognition. At present, however, citizens are fairly ambivalent. Moreover, while the question of Indigenous recognition commences from a higher base of support, equivalent questions can be expected. Equally important to the legal effect of any change, is how the policy intentions behind the proposal are perceived – indeed, popularly, these are more important. The fact that there is a hierarchy of importance in respect of the issues that might be dealt with when revising the Constitution, and that neither of the present issues are necessarily seen by most Australians as the most important, is relevant to both. Neither issue can afford to be pulled down by the other; nor can either afford to pull the other down. In fact, it is possible that neither may succeed unless a way is found for each to help the other up.

CONFLUENCE OR CONTAMINATION?

The apparent popularity of the general idea of Indigenous recognition, compared with local government recognition, leads to a natural suspicion that the former should be

progressed in isolation from the latter, lest Indigenous recognition be “contaminated”.¹² However, there is scant evidence to support this view, nor any opposing view. Where a divisive political campaign against multiple questions is conducted, then all are likely to be contaminated, as occurred in 1988 – but there is little evidence that this contamination stemmed from a mixing of questions, as opposed to the divisive campaign. Conversely, in some referenda involving two or more questions, such as in 1967, the Australian public has proved capable of supporting a proposal about which it is confident, even when insufficiently persuaded about others. It is even possible that absent a campaign aimed at ‘wrecking’ all questions for the sake of it, a less popular proposal may help a more popular one succeed, by giving citizens the opportunity to express a positive view on something even when negative about another.

Table 2A shows there is a large base of shared support (59 per cent) for referenda dealing with both Indigenous recognition and levels of government. These citizens outnumber those who see no importance in either issue, by 6 to 1. Moreover, those citizens who see importance in having one of these referenda, but not the other, are evenly matched (14 per cent in each case). At a broad brush level, these data suggest we should not approach the present situation from a presumption that citizens are likely to vote ‘no’ to both issues simply because they might be less interested in one.

TABLE 2A: Do you think it is important, or not important for Australia to have a referendum about the following things in the next few years? [If important, is that very or somewhat?]

A referendum ...						
To recognise the history and culture of Indigenous Australians in the Constitution						
About what levels of government Australia should have						
Both unimportant	Either unimportant		Both important		Don't know	Total
	<i>Indigenous important, not levels</i>	<i>Levels important, not Indigenous</i>	<i>Both at least somewhat important</i>	<i>Both very important</i>		
10.3	13.7	13.7	34.2	24.9	3.2	100.0
10.3	27.4		59.1		3.2	100.0

TABLE 2B: Importance of having a referendum in the next few years – A referendum to recognise the history and culture of Indigenous Australians in the Constitution.

At the moment, the Constitution does not actually mention or officially recognise that local government (LG) exists in Australia. Which one of the following comes closest to your view? – Should be officially recognised / no real benefit.

Neither important / of any real benefit	Either unimportant / of benefit		Both important / of benefit	Don't know	Total
	<i>Indigenous ref important, but no real benefit to recognise LG</i>	<i>Recognise LG, but Indigenous ref not important</i>			
15.0	31.7	8.8	41.5	3.1	100.0
15.0	40.5		41.5	3.1	100.0

Table 2B nevertheless balances this picture by providing some limited insight into attitudes towards Indigenous recognition relative to recognition of the local level of government, in particular. Again, there is a substantial shared base of support – the single largest group (41.5 per cent) believes in *both* the importance of a referendum on Indigenous recognition, *and* constitutional recognition of local government. These citizens outnumber opponents of both, by more than 2 to 1. However, a similar sized group appears to attribute importance to one issue but not the other (with support for a referendum on Indigenous recognition obviously stronger than base support for local government recognition). While this suggests a higher risk of ‘contamination’ than shown by Table 2A, the risk rests on assumptions that most of the 32 per cent of citizens who see only the Indigenous referendum as important, are incapable of differentiating this issue from a question involving local government. This seems questionable.

Further research is needed into how citizens are likely to approach the confluence of questions, depending on the options for recognition identified by the current expert panels. However, the research to date, seen against the broader history of Australian referenda, leads to further reasons for a more coordinated approach.

At a practical level, the issues are linked not only by timing, but by the extent to which either change might be pursued through a symbolic form of recognition. This would most likely involve references to Indigenous Australia and local government, among other things, in a new Preamble.

Given the history of previous symbolic attempts, it is also already clear that neither is likely to win the support of key constituencies, or the public, unless symbolism is also accompanied by something more substantive. Past appeals that only the most minimal and legally inconsequential changes might be likely to win popular support, are unlikely to hold much currency – for example, the attempt to insert a new Preamble in 1999 that was non-justiciable¹³ appears to have convinced no-one apart from lawyers, and even then, some lawyers had their doubts.¹⁴ There are good reasons why citizens might be sceptical when promised that a change is only ‘minimal’. If it is only ‘minimal’, then citizens can either sensibly conclude that it does not matter (in which case, there is no real reason to vote ‘yes’), or sensibly suspect there is more involved than they are being told (in which case, it is actually best to vote ‘no’).

This likelihood of substantive recognition leads to a third, more important reason why the issues are now inseparable.

For perhaps the first time in Australian history, both proposed changes can be described as aimed at particular sections of the Australian political community. From the experiences in 1988 and 1999, the Australian community has been reacquainted with the reality that party-political polarisation spells the death of constructive constitutional deliberation. Referenda are rare moments of elevated democracy; yet the robust democracy of referenda can also catalyse conflict along demographic cleavages, which may heighten Parliament’s endemic levels of party-political disagreement. In the present circumstances, any undue sense of competition between the proposals may increase rather than decrease the likelihood of polarisation. While general goodwill towards Indigenous Australians as a social group is probably higher than towards local government as an institution, both are “constituencies” easily targeted by negative stereotypes and prejudices, even if unwarranted or false.

This is especially the case if substantive recognition is seen as a path for particular groups or institutions to access more taxpayers’ money. A core imperative for recognition of local government is financial – to confirm local government’s status as part of the one, federal system of public finance by removing any doubt regarding its entitlement to directly receive ‘general purpose’ grants from the Commonwealth, as currently occurs, and not simply indirectly through the States.¹⁵ Empirical evidence suggests that if understood as a change to deliver ‘a reasonable level of funding’ to local government, public support will increase.¹⁶ This is consistent with the evidence in Table 1, that out of current constitutional issues, Australians are most interested in improvements to the operation of the federal system, also including – perhaps – mechanisms for more cooperative, collaborative and ‘seamless’ government across existing levels.¹⁷ Local government recognition is important because it may be the path to a coherent, national program for reform of local government itself, building its capacities and competence to deliver more and better local and regional services. Seen in isolation, however, more funding for local government does not necessarily capture these arguments. If access to money is perceived as the sole extent and purpose, it can also easily be targeted by critics as a case of throwing good money after bad.

Unfortunately, some logical forms of substantive Indigenous recognition could also be laid open to an equivalent charge. Given the difficulty of amending the ‘race power’ to ensure that racially-specific laws may only be made for ‘beneficial’ or positive purposes, one sensible option is to repeal the power altogether, and instead

insert a new power for the Commonwealth to make laws with respect to ‘the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples’.¹⁸ Assuming this can be developed in a way that retains popular support, it is equally prone to criticism that the primary substantive effect is to channel more Commonwealth funds at Indigenous programs, whose efficacy is frequently questioned – often undeservedly, but sometimes also from within Indigenous communities. The risk of such perceptions is exacerbated if both proposals continue to be framed, or are left open to attack, as concessions to particular social sectors. Already, the risk of this in respect of Indigenous recognition needs to be confronted. We need only recall the appeals of One Nation representatives in 1999, that ‘we should never allow one group of Australians to be treated as more significant than another’.¹⁹ However, the risk of sectionalism pulling down proposals is not limited to those who fail to understand principles of legal pluralism with respect to Indigenous peoples. In Canada, a decade of ill-fated attempts to constitutionally accommodate Québec founded over debate between those of competing European heritages, as to whether that province was a ‘distinct society’.²⁰

In Australia, there are parallel risks that some citizens will see each change as being ‘for’ Indigenous people, and ‘for’ local government. In fact, the viability of each is more likely to rest on whether they are seen as benefiting the nation as a whole.

CONCLUSION: A TALE OF TWO QUESTIONS

Constitutional recognition of the special place, history and needs of Australia’s Indigenous peoples, and recognition of local democracy as a third sphere of governance in Australia’s federal system, each offer both symbolic and substantive benefits for Australia’s social and political destiny. While there are also other issues of reform to be debated, each of these historic issues is capable of being addressed in the near term, in ways that can both positively reconnect the Australian people with the evolution of their 109-year-old Constitution, and help address real problems caused by these constitutional silences.

At the same time, those who see the benefit in either reform – and especially if they see benefit in both – have a mutual interest in ensuring that any proposals are seen by the populace as improvements for the sake of the entire nation. Given that the nature and operation of the Australian Constitution is fundamentally practical – the backbone of our federal system of government – the key measure of such improvement is whether our system of government is going to work better for Australia as a

result. Both proposals need to capture what Helen Irving described, with respect to the popular adoption of the original Constitution, as a ‘utopian moment’ – a moment of ‘both optimism and dismay, of disillusionment with old constitutional relations and confidence in the... ability to forge new ones’.²¹

Consequently, there is a need to unite these issues within a larger narrative, which confirms and convinces the populace that these two changes are not simply *ad hoc* concessions. Australian citizens have both a right, and a need to be confident that these two reforms represent the best ones we can make to our Constitution, for our country’s future, at this particular time.

Dr A J Brown is John F Kearney Professor of Public Law, Griffith Law School, Griffith University, and a member of the Commonwealth Government’s Expert Panel on Constitutional Recognition of Local Government. Views expressed are entirely personal and do not reflect views or deliberations of the Expert Panel. Dr Ron Levy is a Lecturer, Griffith Law School, Griffith University.

- 1 See Cheryl Saunders, *Parliament as Partner: A Century of Constitutional Review*, Commonwealth Department of the Parliamentary Library, Research Paper No. 3 2000-01, Canberra, 2000; George Williams and David Hume, *People Power: The history and the future of the referendum in Australia*, UNSW Press, Sydney, 2010; House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No?*, Canberra, 2010; Ron Levy, ‘Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change’, (2010) *Melbourne University Law Review* 34(3), 1-34.
- 2 Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution*, Cambridge University Press, 1999, 212.
- 3 *Kartinyeri v Commonwealth* (1998) 195 CLR 337; *Wurridjal v Commonwealth* (2009) 237 CLR 309.
- 4 Megan Davis and Dylin Lino, ‘Constitutional reform and Indigenous peoples’, Research Brief No.3, Indigenous Law Centre, University of New South Wales, 2011; You Me Unity (Equality & Recognition), *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition: Discussion Paper*, May 2011; other contributions to this issue.
- 5 A J Brown, ‘Subsidiarity or subterfuge? Resolving the future of local government in the Australian federal system’, (2002) 61(4) *Australian Journal of Public Administration* 24-42.
- 6 A J Brown, ‘In Pursuit of the “Genuine Partnership”: Local Government and Federal Constitutional Reform in Australia’, (2008) 31(2) *UNSW Law Journal* 435-466; Nicola McGarrity & George Williams, ‘Recognition of Local Government in the Australian Constitution’ (2010) 21 *Public Law Review* 164.
- 7 The ACVS was a twenty minute telephone survey conducted nationally for the authors by Newspoll Limited, of 1,100 Australian citizens and permanent residents aged eighteen years and over, on 1 to 14 March 2010. In line with standard sampling variances, national results are estimated as accurate to plus or minus 3 per cent or better, to a 95 per cent level of confidence. The ACVS was made possible by Australian Research Council

Discovery Project 0666833 and a 2010 Griffith University New Researcher Grant. Further details at <<http://www.griffith.edu.au/federalism/>>.

- 8 See You Me Unity (Equality & Recognition), *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition: Discussion Paper*, May 2011, p 26.
- 9 See A J Brown, 'Thinking Big: Public Opinion and Options for Reform of Australia's Federal System' (2009) 4 *Public Policy* 30; A J Brown, 'Escaping Purgatory: Public Opinion and the Future of Australia's Federal System', in Nicholas Aroney, Gabrielle Appleby and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, forthcoming 2011).
- 10 Cr Geoff Lake, President, 'Update on strategy to include Local Government in the Australian Constitution', Presentation to National General Assembly of Local Government, Canberra, July 2010.
- 11 Brown, above n 6.
- 12 See e.g. comments of Professor Greg Craven, ABC Radio National, *Australia Talks*, 29 November 2010.
- 13 *Constitution Alteration (Preamble)* 1999 (Cth), s 4.
- 14 See, e.g., Leslie Zines, 'Preamble to a Republican Constitution' (1999) 10 *Public Law Review* 67, 68.
- 15 McGarrity and Williams, above n 6.
- 16 Brown, above n 6.
- 17 See e.g. Andrew Lynch & George Williams, 'Beyond A Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?' (2008) 31(2) *UNSW Law J* 395-434; Senate Select Committee on Reform of the Australian Federation, *Australia's Federation: An Agenda For Reform*, Parliament House, Canberra, June 2011.
- 18 You Me Unity (Equality & Recognition), *A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition: Discussion Paper*, May 2011, 18.
- 19 David Oldfield MLC, Parliament of New South Wales, Hansard, 9 November 1999.
- 20 See Brian O'Neal, *Distinct Society: Origins, Interpretations, Implications*, Political and Social Affairs Division, Library of Parliament (Canada), December 1995 <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp408-e.htm>> (accessed September 2011).
- 21 Above n 2, 212.

Spirit Ark 2010
Arone Meeks

Linocut on Hahnemuhle Paper
2000mm x 1000mm

