THE 2014 H.C. 'NUGGET' COOMBS MEMORIAL LECTURE
LESSONS LEARNED: LOOKING BACK AND LOOKING FORWARD AFTER THE 'INTERVENTION'

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INTRODUCTION

Until its recent relegation by events in the Middle East and the war on terror, constitutional reform, involving some kind of specific acknowledgement of Indigenous Australians, was hanging in there as a top-order topic in the national media. The 'Recognise' movement has had some success in recruiting celebrities to its cause, and Noel Pearson has published a Quarterly Essay, bringing his not inconsiderable powers of persuasion to bear on the issue. The usual suspects have expressed concern about bills of rights and making blackfellas a specially favoured and privileged class of citizen. As if.

Going back 10 years or so, my support and enthusiasm for 'Recognise' would have been almost automatic. Even now there are probably some arguments from the no-change camp that will fire me up and make me bite back hard. Like the one which equates us with immigrant minorities, and characterises Aboriginal identity and culture as just one feature panel in the national multicultural patchwork quilt.

But in the main, the contemporary push to secure a proper place for Indigenous people in the Australian Constitution finds me, as an Aboriginal Territorian, weary and wary. This disengagement stems from the fact that it was Commonwealth power that was unleashed on us from on high in 2007. That power was ultimately sourced from the same Constitution which was purportedly amended for our benefit back in 1967.

None of the currently proposed constitutional amendments seem to directly address the 'Intervention' or how to prevent its repetition. And this may well be because there are no realistic constitutional reform scenarios capable of descending to the level of local and regional detail which needs to be grappled with. The challenge would be to preserve a capacity for effective action to fix our special Territory problems, while at the same time protecting us from any renewed exploitation of our special Territory vulnerability.

So my initial strong reaction to the constitutional reform agenda has been one of what's it good for? What's the point of all this symbolic 'feel-good stuff' if, after some future weekend brainstorming session, the Federal Government could just come in over the top of us again with a new shock and awe campaign?

But I have come to the view, hesitantly and somewhat reluctantly, that it is better to be a contributor than to just snipe away from the sidelines. The content of our national governing document deserves attention, even if the modest potential changes that are being canvassed at present will probably make no difference to life here in the Territory.

STRONGER FUTURES

Under Labor, the Commonwealth Government let the 'Intervention' run its full five-year term, ignoring advice received from an independent review team lead by Peter Yu. My hope had been that at the end of the five years the Commonwealth would simply butt out and leave us alone, and I conveyed that view to Minister Macklin. It wasn't to be. Instead we got 'Stronger Futures.'

It is probably not fair to describe 'Stronger Futures' as the 'Intervention'- mark two. Most of the five year measures in the Northern Territory National Emergency Response ('NTNER') were discontinued. The original stronger penalty for bringing alcohol into a restricted area was reinstated, but the whole alcohol restrictions situation was by then a mess, and so it has remained. The damage had already been done.

The scrapping of permits for community areas was quietly left undisturbed. In a pretty bogus exercise aimed at demonstrating colour blindness in the application of income management, the pre-existing 'Intervention' version of income management was extended to the whole of the Northern Territory ('NT'). This reminded me of the *Social Welfare Ordinance* which the Commonwealth minister administering the NT back in the 1950s devised as a replacement for the *Aboriginals Ordinance*. The whole idea back then was not to refer to Aboriginal people directly.

The desired policy outcome would be achieved by regulating individuals by reference to the term "wards". The people who would meet the criteria for being a ward would all be Aboriginal.

I accept that there are a small number of non-Aboriginal people who have been impacted by income management since it was expanded to the whole of the Territory. But the vast majority of people affected continue to be Aboriginal. And that might have been ok, if all the other states and territories have been dealt with in the same way. But they haven't been. A few token locations (of postage stamp size in comparison with the whole of the NT) have been selected as income management zones in other parts of Australia. The NT is the only complete jurisdiction where the 'Intervention' model of universal income management has been established and maintained.

THE CONSTITUTIONAL REFORM DEBATE

In 2014, we again have a coalition government in Canberra. The self-proclaimed 'Prime Minister for Indigenous Affairs' has emphasised his commitment to fixing up the Constitution so that Indigenous people have a proper place in it, and in the nation.

I'm not a constitutional lawyer, and there are aspects of the recent constitutional reform debate which have struck me as somewhat arcane. But I do know that what happened to Aboriginal people in the Territory under the 'Intervention' was wrong, and wrong at a constitutional level.

The content of our national governing document deserves attention.

I need to frankly acknowledge that it wasn't just the Commonwealth that was to blame for the sense of abandonment felt by remote NT communities in 2007 and 2008. In the immediate aftermath of the 'Intervention' announcement on the 21st of June 2007, senior NT bureaucrats were on a plane to Canberra to try and leverage support for the NT Government's explicitly mainstreaming local government 'reforms'. Their idea was that the pending 'supershires' could become part of the architecture of the 'Intervention'. I had no hand in any of that, but even after I later became Deputy Chief Minister the built-up momentum was such that I was unable to the stop the local government reforms, or even salvage the concept of community government councils and some of the actual existing community government council entities. It is something I regret greatly, and I apologise to Territorians for my failure to achieve a better outcome.

The imposition of the supershires smashed people's sense of autonomy out bush. All the pre-existing councils got swallowed up, even the larger amalgamated bodies which had been working well, like Nyirrangulung in the Barunga/Beswick/Bulman area, and Thamurrurr in Wadeye. Assets were expropriated even from community associations which did local government service provision as a sideline.

I mention what happened with local government in the Territory because it has a bearing on my response to the suggestion that as part of a constitutional reconciliation with Indigenous Australians, there should be a special advisory body made up of Indigenous representatives. As I understand it, the proposal is that this body could have input into government decisions affecting Aboriginal people. Alternatively it has been suggested that parliamentary seats be specifically set aside for Indigenous representatives. My thoughts on that are that while ATSIC had its good points, we shouldn't now go back to that sort of a model, especially if it's not going to involve Indigenous representatives exercising the direct control which ATSIC had over real money and real budgets. Instead, I think the focus should be on self-determination at a much more grassroots and local level. I'm not going to venture a comment in relation to the situation in other parts of the country, but what has happened in the Territory is that after a long campaign over decades, mainstream local government has managed to occupy the playing field where the real self-determination game gets played.

This is the space in which, in parts of the United States, tribal governments had already, throughout the last century, exercised authority over most aspects of life at the community level, including roads and essential services. Probably influenced by that example, the Commonwealth passed legislation in 1976 under which Aboriginal Councils could be established. As almost the first order of business for the first NT Government after the grant of self-government in 1978, it worked together with the Department of Aboriginal Affairs to head-off, at the pass, any attempts by Aboriginal communities in the Territory to establish Aboriginal Councils under the Commonwealth legislation. The argument was that mainstream local government should prevail and cover the field. The strategy of the Country Liberal Party government in the 1980s was canny and effective. What they did was to create a special form of local government entity, the community government council, which in many respects accommodated the identities and aspirations of the targeted remote communities.

In some community government schemes, voting rights were limited to Aboriginal people with recognised cultural connections to the relevant land area, and to those non-Aboriginal people

formally adopted into local clans. Alternatively, the franchise could be restricted by reference to a minimum period of years that a resident had to have lived in the area. Instead of collecting conventional local government rates, community government councils were allowed to charge service fees, as we did at Nguiu in the early 1990s. And there was an allowance for Aboriginal custom in the context of decision-making.

Applications by a number of communities to become Aboriginal Councils under the Federal legislation were objected to by the NT Government, and the regulatory body in Canberra simply never processed them. Over the years, remote Territory communities became accustomed to and reasonably comfortable with the community government model as a sort of 'halfway house' between mainstream local government and a Territory version of an Aboriginal Council.

The Commonwealth repealed the *Aboriginal Councils and Associations Act* in 2006, with barely a whimper of protest from the opposition or the cross-bench. The way was then clear for the NT Government to introduce wall-to-wall local government mainstreaming, binning the longstanding community government council in favour of the ridiculously named "shires".

We were saved at 11th hour before last year's federal election from a referendum seeking constitutional recognition for local government as a 'third tier of government.' In my view, the passage of such a referendum would have been the kiss of death for Aboriginal self-determination in the NT. It would have elevated and legitimised local government of the kind which has become standardised down south, and closed the door on the development in the NT of hybrid or customised self-determination options.

A last minute decision was made that local government referendum question shouldn't be determined at the same time as the federal election, but it is still lurking there, ready to be activated at some future time; perhaps in conjunction with other proposed referendum questions. I am not saying race-based bodies should replace the existing shires, but what I *am* saying is that there should be maximum flexibility into the future in terms of the establishment and evolution of entities tasked with providing local government-type services on Aboriginal land in the Territory. So my first constitutional reform contribution is a negative one. Do not vote in favour of constitutional entrenchment of local government.

My second constitutional reform contribution is this. Under section 51 of the Constitution, the Commonwealth Parliament has the power to make laws for the 'peace, order and good government of the Commonwealth' with respect to various things. But under section 122 of the Constitution, it is simply allowed to 'make laws for the government' of the NT. For reasons I have attempted to spell out, I don't believe the 2007 'Intervention' legislation was for the 'peace, order and good government' of the NT. Just as the Commonwealth legislation which has been enacted for the purpose of dumping nuclear waste from France in the Territory is not a law for the 'peace, order and good government' of the NT. Section 122 doesn't require such a law to be for the 'peace, order and government' of the NT, it just has to be 'for the government of' the NT.

The focus should be on self-determination at a much more grassroots and local level.

Personally, I think neither the 'Intervention' legislation nor the nuclear waste dump legislation can be characterised as being 'for the government of' the NT; but that is pretty low bar for the Commonwealth to clear.

In my opinion what is needed is an amendment to section 122, making it clear that the Commonwealth Government should be regarded as having a fiduciary duty towards the NT and its citizens and prohibiting the making of laws under section 122 that have an ulterior Commonwealth purpose. If possible, there should also be an explicit obligation not to amend the *Aboriginal Land Rights Act* without the consent of those Aboriginal Territorians who have traditional interests in land throughout the Territory.

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This extract on stronger futures and constitutional reform was first published on Crikey. To read further extracts from Dr Scrymgour's speech visit: http://blogs.crikey.com.au/northern.