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THE LONG AND WINDING ROAD.....CONSTITUTIONAL RECOGNITION FOR AUSTRALIA'S INDIGENOUS PEOPLES.

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The long and slow process towards constitutional recognition of Australia's indigenous peoples is further delayed. Over the last 50 years there have been various attempts to reach a proper settlement between the Australian nation and its indigenous population. The most recent campaign began in the mid-1990s and gained momentum in 2007 when both the Prime Minister and the Leader of the Opposition agreed to hold a referendum to amend the constitution to recognise indigenous peoples. The last ten years has seen the process mired in technical and political arguments and a significant campaign against such a proposal. As a result there continues to be no settlement between the Australian nation and its indigenous peoples and its prospects are uncertain.

Constitutional context

With the establishment of a national government in 1901, following passage of the British legislation enacting the Australian Constitution, six British colonies were joined in a constitutional structure that fused British parliamentary government in a United States influenced federal system. In keeping with its British heritage, there was almost no constitutional

protection of personal rights. The new national parliament only enjoyed legislative power over matters expressly conferred on it by the Constitution. Aboriginal or indigenous peoples was not one of those matters.

The Constitution was remarkably silent when it came to indigenous persons. Two provisions made express reference to them – section 51 (xxvi) allowed the national parliament to pass laws relating to people of a particular race, except for aboriginal persons; section 127 provided that aboriginal persons were not to be counted in any census. In addition to these two sections, section 25 provided that should States pass laws disqualifying persons of a particular race from voting, then persons of that race also would not be counted in any census. These sections reflected the racial policies of the time. There was considerable concern about Asian migration and migrants and Australia adopted a "White Australia" immigration policy. Many believed Australia's Indigenous peoples were declining in number and would over time disappear.

The process for amending the Constitution is a conservative one. Section 128 of the Constitution requires any proposed change to be enacted in a law of the national parliament and then passed at a referendum that required both the majority of electors to support it and a majority of the electors in a majority of the States to support it (effectively 4 of the 6 Australian States). This has proved a very hard threshold to meet. Since 1901 only 8 of the 44 referendum proposals have been passed. The political reality is that proposed constitutional changes are only likely to succeed if both the major political parties support them. The most recent successful amendments, in 1977, were relatively uncontroversial 'machinery' amendments. Constitutional recognition of Indigenous Australians cannot be described as that.

Political context

Indigenous Australians were, for most of the 20th century, governed by State law and their personal lives closely regulated by government

officials. Residency rights, right to travel and indeed employment often required approval from government officials or their delegates. Political rights varied depending on which State the Indigenous person lived in.

By the 1960s such an authoritarian and paternalistic approach was becoming subject to sustained challenge and in 1967 a popular campaign led to successful constitutional change. Section 127 was repealed and section 51 (xxvi) amended to enable the national parliament to make laws based on race that now included Indigenous people.

This was only part of a campaign to acknowledge past injustice and undo contemporary disadvantage. The growth of the civil rights movement, the black power movement, a land rights movement all led to growing public recognition that a settlement had to be reached with Indigenous peoples. There was by the 1980s the beginnings of significant government investment to address indigenous disadvantage and in 1988, the bi-centenary of white settlement, the Australian Prime Minister, Robert Hawke, endorsed consideration of a treaty with Indigenous Australians.

Unlike Canada, parts of the United States, and New Zealand, in Australia the colonisers had not, for the most part, entered into treaties with Indigenous peoples whose lands they were occupying. It was regarded as, to use, the common law classification, terra nullius. They viewed Indigenous societies as having no recognisable government structures or land tenure systems. This remained a foundational principle of Australian law until 1992 when the High Court of Australia in a bold decision (*Mabo v Queensland*) decided that the common law would recognise customary native title and that it could continue in some situations to this day. Complementing with this development was the overdue recognition of the harsh past policy of forcible removal of some Indigenous children from their parents to 'better' prepare them for life in modern Australia. This led to national and state government apologies to the 'stolen generation' and helped foster an active reconciliation movement that underpins much of the current campaign for constitutional recognition.

So what is proposed?

The short answer is that we do not know. The Referendum Council and its predecessors have, since 2007, been engaged in a long process of consultation – with both Indigenous and non-Indigenous Australians. They have provided a number of reports to government. There have been parliamentary committees that have inquired and reported on the issue.

Almost everyone agrees that section 25 relating to discounting of persons of a race for electoral purposes should be repealed. Most seek to have section 51(xxvi) that enables the parliament to make race-based laws repealed but many argue for an expression provision to make laws relating to Indigenous persons. This is to support the enactment of positive measures to support Indigenous persons –but at least three different formulations have been suggested.

However there is an active group who oppose any change to the substantive parts of the Constitution. Some do support symbolic recognition of Indigenous persons but this, they argue, should be achieved by amending the Preamble to the Constitution. It would have no direct legal effect but would serve as a guide the parliaments and the courts.

At the other end of the spectrum are group of passionate advocates who argue that nothing less than some form of recognition of Indigenous sovereignty and self determination is needed. Any constitutional settlement with the Australian nation would be by way of a treaty. This, some argue, may not necessarily exclude supporting recognition in the existing Australian Constitution but this remains a contested issue, particularly in the Indigenous community.

So what next?

In July 2016 the centre-right national government was returned with a reduced majority – a majority of one seat. Its powerful conservative faction has become more assertive and has successfully campaigned to review the protections under the *Racial Discrimination Act* in favour of permitting race-based insults and offence. The recent election also saw

the return after many years of a nationalist party – One Nation – trading on the dislocation and discontent that has fuelled the success of the Brexit campaign in the United Kingdom and the election of Donald Trump in the United States. It is very opposed to any special recognition of Australia's Indigenous peoples.

Given recent electoral results, the lack of agreement on the best way to proceed even amongst some of those supporting constitutional recognition, and active opposition from some members of the Indigenous community, the road to constitutional recognition remains …long and winding.