

## **BILLS OF RIGHTS, THE REPUBLIC AND A TREATY: STRATEGIES AND LESSONS FOR REFORM**

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### **I. Introduction**

Australia has a relatively poor record in the field of structural legal reform. LF Crisp has said of the achievement of Federation: ‘There was no Damascus Road miracle about Australia’s federal conversion. It took sixty years of spasmodic official effort and fluctuating public interest to bring the Commonwealth into being.’ This achievement may have exhausted the nation, and, for the next hundred years, reform has been very difficult to come by. When the money spent on processes including the 1999 referendum on the republic is compared to the record of failures, it is clear that much improvement is needed. The referendum process has been invoked 44 times, with only eight proposals succeeding. 1980s and 1990s were a wasteland.

This is not to say that every referendum proposal put to the people ought to have passed, nor that policy making on such issues has always proceeded in an appropriate direction. Instead, the record suggests that:

- the reform proposals and models generated have often been flawed in their design, and
- the process that has generated these proposals, and by which such proposals are considered by the Australian people, is not working as it should.

This raises some serious concerns about any attempt at achieving a treaty between Indigenous and non-Indigenous Australians. If the reform process itself is tending to jeopardise the success of structural legal reform of this type and if appropriate policy is not being generated, the idea may be doomed from the start. Of course, this is an unduly pessimistic view. My argument is merely that we need to be aware of the legal, political and institutional obstacles to reform and develop a strategy to meet them. If this is not done, success is unlikely.

In this paper I want to focus on two reform debates and draw lessons from these debates for the ongoing treaty process in Australia. I want to take a step back and ask: What went wrong in these areas and do they suggest any approaches or strategies for the treaty debate? These are appropriate comparative areas for analysis because there are strong parallels in the type of reform being considered and the idea of a treaty. Each area would produce a very significant change to the basic legal structure of the nation and each is about legal issues and their connection with community and political attitudes. Each has as much to do with legal reform as it does about symbolism and influencing Australian culture.

In drawing conclusions and analysing the lessons from these other debates, I do not assume any type of outcome for the treaty process or that a referendum will be necessary (although there might be an Indigenous plebiscite). My aim is to keep an open mind as to the content

and nature of any treaty and even upon whether the culmination of the reconciliation process ought to be a treaty.

After examining the republic and Bills of Rights debates, I will state my 10 lessons and strategies and link them explicitly to the treaty process.

## **II. Republics, Preambles and the 1999 Referendum**

On 6 November 1999, Australians were seemingly faced with a simple choice: become a republic with an Australian as Head of State, or retain the Queen and remain a constitutional monarchy. The results were clear and decisive. Australians rejected the proposed change and kept the Queen.

Contemporary republican models focused mainly on apparently pragmatic *'minimalist'* change, that is, a republic created by the 'minimal constitutional changes necessary to achieve a viable federal republic of Australia while maintaining the effect of our current conventions and principles of government'. Minimalist change might mean no more than altering the Constitution to delete references to the Queen and to replace the office with a President appointed by the Prime Minister.

Minimalism was sharply challenged on several fronts. Some argued for a stronger form of republicanism that would involve radical constitutional and political change aimed at enhancing the citizenship of the people. Non-minimalist models have, in particular, incorporated a greater role for the Australian people in the selection of the President by, for example, providing for the President to be directly elected by the people or even through the establishment of a United States style Presidency with full executive power. Other models have moved outside the narrow terrain of Head of State issues and have included changes such as a Bill of Rights or reconciliation.

The republic model put to the Australian people was opposed by a strong and well-organised coalition of interests. The 'No' coalition was made up of two extremes: monarchists who opposed any change, and direct election republicans who opposed this change on the basis that it did not go far enough. Despite the obvious conflict in their positions, they had enough in common to wage a coherent and effective campaign. Both wished to see this model defeated. Caught in the middle were the proponents of the minimalist model, most notably the Australian Republican Movement, who had to convince the Australian people to vote 'Yes' to a model that lacked bi-partisan political support (or even the support of the Prime Minister), that had obvious weaknesses in design, and that had been unable to gain an absolute majority on the floor of the 1998 Constitutional Convention.

The 'No' coalition was effective in tapping into a cynical reaction in the electorate to the referendum. It was able to reinforce a growing perception among many Australians that the whole constitutional reform process was dominated by politicians to the exclusion of community views and aspirations. The experience with the *preamble* (and its drafting) made this difficult to refute. Even monarchists were prepared to argue that the failure of the republic model to involve any direct popular participation meant that this would be a 'politician's republic'. Community concerns were also fed by misinformation and by fostering fears that a 'Yes' vote might lead to the succession of one or more States from the Federation.

The task of comprehension was made more difficult for Australians by the complex legal issues raised by the republic and preamble. The official advertising stated that 'there is currently no preamble in the Australian Constitution itself'. While strictly correct, this was

misleading. There is already a preamble to the British Act which precedes the Constitution. This preamble has always been seen as prefacing the Constitution, and it is included when the Constitution is printed for sale. The official advertising material masked deep problems with the new preamble, including that a 'Yes' vote to this question would insert a new preamble while also retaining the old version, thereby leaving the Constitution with two preambles.

The legal debate created by the proposed new preamble was of minor significance compared to the questions raised by the republic. Much was made of the fact that the republic involved 69 separate changes to the Constitution, as if to suggest that the mere number of changes reflected a radical revision of the Australian system of government. In fact, apart from five major changes designed to establish the new office of President, the remainder of the changes were largely consequential, and many merely replaced 'Queen' or 'Governor-General' with 'President'.

The Prime Minister entered the fray in the last days of the campaign. He strongly supported a 'No' vote, arguing that Australia is already an independent nation, and stating that the proposed model was unsafe and flawed. He criticised the dismissal mechanism and the public nomination process for candidates for the office of President, correctly stating that the latter would give Australians no real say. He also sought to undermine the 'Yes' case argument that the republic was necessary to give Australia an Australian as Head of State. Howard adopted the monarchists' mischievous position that the Governor-General, and not the Queen, is effectively Australia's Head of State and thus, the shift to a republic was unnecessary.

The republic debate exposed deep, entrenched problems in Australia's system of government that suggest why this referendum failed and why any future referendum on the republic may also fail. Two main weaknesses were brought to light. First, many Australians are alienated from the political process and from the people who represent them in Parliament. In a context of uncertainty and insecurity brought about by rapid social and economic change, it is not surprising that there is distrust of political leaders and the system of representative government that has produced them. It is not easy to feel part of a system that is not understood and in which there are very few opportunities for participation. This has led to problems such as a lack of confidence in the political system. The symptoms of this can be seen in the drop in support for the major parties (and consequently, in the high number of minority governments at the state level) and in the rise of protest parties such as Pauline Hanson's One Nation Party.

Second, Australians lack basic understanding and knowledge of their system of government. The republic model put to the people in the 1999 referendum was supported by a \$24.5m Government-funded advertising campaign, a 71 page 'Yes' and 'No' case booklet sent to every voter, and saturation coverage in parts of the media. Despite this, most Australians had little or no idea of what a republic would mean, let alone how the proposed model would have worked. The referendum 'debate' generated considerable confusion as well as strongly differing opinions on issues ranging from the mechanism for the dismissal of the President to who is currently the Head of State.

This disagreement obscured the fact that the proposed model remained impenetrable to many Australians. Republicans faced an uphill battle. They had the task not only of informing Australians about the merit of the proposed changes, but also of providing enough information about the current system to allow the changes to be evaluated. This proved an impossible task in the heated and partisan atmosphere of the campaign, and, given the split in

their own ranks, between minimalist and direct election republicans. Rather than being an example of informed deliberation, the debate was more an exercise of each side seeking to gain the support of celebrities (actors in the popular television series 'Sea Change' and Rugby Union players) and other notable figures in the expectation that this would attract voters to their side.

The central arguments of the 'No' case were 'Vote No to the Politician's Republic' and 'Don't Know—Vote No'. These slogans effectively exploited Australians' lack of engagement with, and knowledge of, the political process. However, this is not to say that in voting 'No' Australians cast their votes stupidly. The most rational choice when faced with a change to a system that seems to work at least tolerably well, but of which little or nothing is known, is to reject that change. This will be particularly true where it seems that those promoting the change may have a vested interest in the result.

### **III. The Struggle for an Australian Bill of Rights**

There have been several attempts to bring about an Australian Bill of Rights or to amend the Constitution to incorporate new fundamental rights. Referendum put to the people on 19 August 1944 that the Constitution be amended to grant the Commonwealth 14 new heads of power over post-war reconstruction. The proposal also sought to insert guarantees of speech and expression, as well as extend the guarantee of religious freedom in s.116 to the states. These powers and guarantees would only have operated for a period of five years. The referendum was lost with a 45.39 per cent 'Yes' vote to a 53.30 per cent 'No' vote.

The referendum that has received the highest 'Yes' vote was a proposal put to the people on 27 May 1967. That referendum gained the support of 89.34 per cent of voters and was carried overwhelmingly in every state. Previously, s.51(xxvi) of the Constitution had empowered the Parliament to make laws with respect to 'The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws' (emphasis added). The 1967 referendum deleted the words in italics. It also repealed s.127 of the Constitution, which had provided, 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'. Although these changes to the Constitution have been popularly seen as granting Aboriginal people 'equal rights' and in particular the right to vote, this is not correct. Although the 1967 changes to the text of the Constitution gave recognition to Aboriginal people and repealed the discriminatory s.127, they did not actually grant Aboriginal people any rights.

Despite the success of the 1967 referendum, the next two attempts to bring about greater protection for fundamental rights came in the form of statutory Bills of Rights. In 1973 Lionel Murphy, as Attorney-General in the Whitlam Labor Government, introduced the Human Rights Bill 1973 (Cth) into the federal Parliament. The Bill sought to implement the *International Covenant on Civil and Political Rights 1966* in Australia and would have protected a range of rights such as freedom of expression, freedom of movement, the right to marry and found a family, and individual privacy. It even sought to prohibit 'Any propaganda for war'. The Human Rights Bill met strong opposition and was never enacted, lapsing with the prorogation of Parliament in early 1974.

The failure of the Human Rights Bill did not end attempts to bring about rights protection by Commonwealth implementation of international instruments. The Whitlam Government, for example, was successful in enacting the *Racial Discrimination Act 1975* (Cth), while the

Hawke Labor Government enacted the *Sex Discrimination Act 1984* (Cth). Senator Gareth Evans, as Attorney-General in the Hawke Labor Government sought to take up where Murphy had left off in promoting a statutory Bill of Rights. In 1983 he oversaw the drafting of a Bill of Rights Bill that, like its 1973 predecessor, would have implemented international rights instruments. However, the 1983 model was weaker than its 1973 predecessor in several ways – most significantly in that it would only have applied to governmental action, whereas the Murphy Bill would have applied to any action that infringed the protected rights. Although the Evans Bill was given Cabinet support, it was not introduced into Parliament. Lionel Bowen replaced Evans as Attorney-General after the December 1984 federal election. After being redrafted and its operation watered down, the Bill was introduced into the federal Parliament in November 1985 as the Australian Human Rights Bill 1985 (Cth). It was passed by the House of Representatives, but failed to gain majority support in the Senate. Encountering strong opposition, the Bill was finally withdrawn in November 1986.

The Bills promoted by Murphy, Evans, and Bowen sought to enact a statutory Bill of Rights. In the wake of the failure of the Bowen Bill, the Government changed tack. It established the Constitutional Commission in December 1985 to report on the revision of the Australian Constitution in order, among other things, to ‘ensure that democratic rights are guaranteed’.

The Commission responded in an interim report in April 1987, in which it made recommendations to expand the scope of the express rights already in the Constitution, but also foreshadowed the need for wider change. The Commission’s final report was provided in June 1988 and was more ambitious. It proposed significantly greater protection for rights by constitutional means than had the Advisory Committee. The Commission recommended that a new Chapter (‘Chapter VIA—Rights and Freedoms’) containing a wide range of fundamental rights should be inserted into the Constitution.

Bowen had requested that the Commission provide an interim report so that a referendum to amend the Constitution could be held in 1988. Accordingly, after the interim report had been provided, but before the Commission had completed its final report, the Hawke Government announced that it would initiate constitutional change. Legislation was introduced to this effect on 10 May 1988 and four proposals were put to the Australian people on 3 September 1988. The proposals were derived, with some variations, from the recommendations of the Constitutional Commission in its interim report. The first and third proposals concerned four-year maximum terms for the federal Parliament and recognition of local government, respectively. The second proposal sought to guarantee ‘one vote one value’ by requiring that the population count in each electorate not deviate by more than 10 per cent. This proposal would also have inserted a right to vote into the Constitution. The fourth proposal also sought to guarantee basic freedoms, but only by extending the operation of existing guarantees in the Constitution.

All four proposals were defeated. The results were dismal. The highest national ‘Yes’ vote for any of the proposals was 37.10 per cent, which was in respect of the proposal on ‘one vote one value’. The fourth proposal received an astonishingly low vote, the lowest of any of the proposals. Nationally, 30.33 per cent of voters registered a ‘Yes’ vote, while 68.19 per cent voted ‘No’. This was the lowest ‘Yes’ vote ever recorded in any referendum. In South Australia, the ‘Yes’ vote was only 25.53 per cent, while in Tasmania it was 25.10 per cent. The failure of the 1988 referendum undermined any suggestions that an attempt should be

made to insert other rights into the Constitution or to implement the final report of the Constitutional Commission.

The 1988 referendum showed the difficulty in gaining the popular vote for constitutional change. It demonstrated that bipartisan support for a proposal will be essential for successful constitutional change and that the support of the Australian people cannot be assumed, even for a proposal that is designed to protect the rights of Australians as against government. Lack of bipartisan support leaves open the prospect of a determined opposition misrepresenting the effects of constitutional change through use of the media for its own political purposes. To achieve reform in the area of constitutional rights it will be necessary to build a broad political and popular base for change, underpinned by real understanding of the issues and proposals. The result in 1967, as well as a recent successful referendum in New South Wales that entrenched judicial independence and the security of tenure of judges in the *Constitution Act 1902* (NSW), shows that it is possible to harness the will of the Australian people in favour of changing the Constitution to protect human rights. However, the 1988 result shows that this is by no means easy and that any attempt to insert new rights into the Constitution should be carefully considered and prepared.

#### **IV. Ten lessons for reform**

May find that many below are obvious, but despite this they often not bring applied. In no particular order:

##### *1. Focus on the long and not the short term*

Major public policy debates in Australia, perhaps due to our short three year political cycle, tend to develop and be resolved quickly. There tends to be little room for reflection or revision. This means that one plan is commonly put up and either fails or succeeds. A longer term approach is needed that extends beyond any one political cycle. The answers to structural legal reform of the type being considered generally cannot be generated in a short space of time because of their complexity and because of the level of consultation and education required.

##### *2. Not just politicians*

The long term commitment required means that parties other than our elected representatives must be involved in the reform process. Any reform must be underpinned by ongoing research of some standing undertaken by the university sector or by organisations such as AIATSIS or Reconciliation Australia Ltd. This is not only necessary because of the long term nature of such projects, but also because the level of alienation of the Australian people from their representatives means that any outcome that is seen as generated completely within the political process will be viewed with suspicion as being potentially self-serving.

##### *3 Incremental, not immediate change*

The Bill of Rights debate has been characterised by the failure of several models, which arguably have been too ambitious in their scope. The lack of community understanding of such issues requires a gradual approach whereby the model is developed and refined in line with changing community perceptions and new understandings. The change itself ought to drive this, such that acceptance of an initial approach in these areas might then contribute to community support for more progressive outcomes.

##### *4. Reject minimalism*

Minimalism has its advantages in enabling debate to be focussed on one model and a specific set of issues. However, the 1999 republic debate and referendum demonstrated that this also opens the likelihood that such a change will not only be opposed by people who reject the idea, but also by people who would prefer a different model. Any change ought to be tailored to the problem in a way that matches community aspirations without seeking to confine the solution to such a narrow outcome as to alienate potential supporters. Minimalism rightly failed as a strategy at the 1999 referendum.

#### *5. Community ownership and involvement*

The strong reaction against the preamble and the fact that it received even less support than the republic proposal indicates the danger in not fully consulting the Australian people. The people are unlikely to support any proposal which they do not 'own' through an appropriate consultative process. A mere vote at a referendum is not enough to generate community feelings of ownership and support. By that time it is too late, and the vote is more likely to represent community rejection of the process to date. Consultation can take many forms, but models that have succeeded in the past might involve conventions with a high level of community membership or an inquiry processes with a range of political and community members which hold hearings at centres around Australia. Ideally, any reform ought to have a strong grass-roots base.

#### *6. Community education*

Australians possess an appalling lack of knowledge about their system of government. This was found by the 1994 report on citizenship by the Civics Expert Group. The Civics Expert Group found that only 18% of Australians have some understanding of what their Constitution contains, while only 40% can correctly name both Houses of the Federal Parliament. More than a quarter of those surveyed nominated the Supreme Court, rather than the High Court, as the 'top' court in Australia. Some Australians, particularly younger Australians, even demonstrated a greater awareness of the United States Constitution than the Australian Constitution. These results should come as no surprise. A 1987 survey conducted for the Australian Constitutional Commission found that 47% of Australians were unaware that Australia has a written Constitution.

One of the most powerful arguments at the 1999 referendum was the argument 'Don't Know – Vote No'. It will be very difficult, if not impossible, to gain support for major change unless it is underpinned by adequate community education. Information must be available on websites and in pamphlet form that is accessible by schools and other community organisations. The information must be credible, accurate and reliable. Unless Australians have access to such information, they are likely to reject any change. Rather than representing apathy, this can often be the most rational choice available. It makes no sense to support a large scale reform of the system when that change is not understood and where the current system may work tolerably well. Australians are even more likely to vote no when there is suspicion that the change is motivated by self-interest on the part of its proponents.

In 1999, Australians did not have access to any generally available source of factual information. This should be remedied for future referendums. A new system should be introduced that would clearly separate the basic information required by Australians to cast their vote from the partisan arguments of the Yes and No cases. Without such information, referendums will continue to be plagued by the destructive argument 'Don't Know-Vote No'.

### *7. Draft a model that can be understood in the community*

The reform ought to be constructed in a way that it can be communicated simply and effectively to a community audience. It should be constructed upon a set of guidelines principles or criteria that match community aspirations. The reform should be accompanied by ‘plain English’ guides and material that accurately state the issues and proposed change. If this is not possible, the proposal is unlikely to gain sufficient support to be implemented.

### *8. Develop support Australia-wide*

The need for a double majority in a referendum held under s.128 has not proved to be a significant impediment to constitutional change. Only in three instances, two referendums held in 1946 and one in 1977, would the removal of the requirement for a state majority in at least four states have enabled the referendum to be carried. The evidence instead suggests that to be successful a referendum must gain support across Australia. In every case where a referendum was carried, with the exception of the referendum of 13 April 1910 that amended s.105, a national majority was accompanied by a majority voting ‘Yes’ in every state.

Need a broad and deep basis of support. The 1967 referendum achieved this.

### *9. Seek bi-partisan support*

Major reforms are almost never achieved without this.

### *10. Tackle the reform process along with the reform*

Need reform of the reform process – cannot ignore or may bring down any proposal – both issues must be considered together.

The issue is not really about the proposed change at all, but more broadly about how we undertake the process of constitutional change and how referendums are conducted. If we do not engage with this question, there is a strong possibility that the republic or like debates of this decade will repeat those of the 1980s and 1990s.

Making the referendum process work is an important policy challenge of the second century of our Federation. We should examine how Australians can become more involved throughout the reform process. The provision of better information to voters only requires a rewrite of the basic referendum procedures (*Referendum (Machinery Provisions) Act 1984* (Cth)) and not of the Constitution. This can be brought about by the Federal Parliament. It should convene a joint parliamentary inquiry that would examine the effectiveness of the current process, including the Yes and No case procedures, in providing information to the Australian people.

Unless the referendum process itself is reformed to better involve Australians, the factors at work in 1999 may again play a large role in the next vote on the republic. The lessons of 1999 should be acted upon now, before they are overtaken by a partisan referendum or plebiscite campaign.

## **V. Strategies for the treaty debate**

These 10 lessons provide important indications as to how the treaty process ought to be approached. It ought to be approached in a way that takes account of the long term prospects of reform without alienating people with suggestions of immediate solutions. Immediate solutions are not likely to be well thought through and are unlikely to gain community support given the lack of underlying education and involvement.

The very nature of the reform suggests an informed choice of both Indigenous and non-Indigenous Australians. A choice implies consideration and debate by communities based upon the ability to engage with the material at a useful and informative level. Particularly if the debate is to lead to constitutional reform and a referendum, the debate and education ought to be long standing and before any vote is taken.

The outcomes of the treaty process should be viewed in the short, medium and long term. Each stage must be supported by credible independent research and analysis by bodies such as AIATSIS. Deep and complex issues are raised by this debate such as sovereignty and reform of the existing constitutional structure. They must be tackled along with any consultative process.

In the short term, an appropriate outcome is to raise awareness of Australians about issues and about the range of possible models. Australians should also be made more aware of why a legal instrument of this type would be an appropriate for the reconciliation process. This period should see the production of community guides and web resources for use at the community level and in schools, other education institutions and the media. The materials should be based upon a strong, credible and independent research agenda.

In the medium term, there should be significant public debate over the types of models that are proposed, and formal community consultation should be undertaken through processes such as conventions and plebiscites. Such processes would be designed both to deliberate upon the options and so as to build support for the idea. Such processes would also naturally contribute to and deepen community understanding of the issues. This is necessary given that the debate, like that on Bills of Rights and the republic, involves conflicts over legal issues and many matters of genuine disagreement.

In the long term, the treaty process should lead to the drafting of an instrument that would represent the first significant step in an ongoing treaty process. Any referendum would be held at this stage. It would be a mistake to think that any initial instrument could satisfy all of the aspirations of any of the parties. Any outcome might be prefaced by a statement that it should be reviewed in a period of five years such that it might be refined and further developed. The five year point might be marked by further community consultation and deliberation. Such involvement is needed if the treaty were to have the flow-on cultural impact that would make it worthwhile and more than merely another legal document.

## **Discussion Session**

**Patrick McConvell:** As I understand the timetable, one of the first things to happen in the treaty debate will be that the Indigenous community is going to be asked for their opinions before the wider process starts. Don't you think that some of the same issues that you have raised about problems with understanding the legal framework, 'Vote No if You Don't Know' would also apply to the Indigenous community? As you said, doing something in a short time frame can be very dangerous.

**George Williams:** I agree strongly with that, because I think exactly the same issue does apply. As a constitutional lawyer, there are many angles in the treaty debate that I myself am still unsure about, particularly communicating the basic information to people need to deliberate upon. I find it very hard to imagine how the Indigenous community could reach any rational outcome on a treaty at the moment simply because the work and the information is

not yet available. The Indigenous community, like the wider community, could very rationally just say, 'No, we're not interested in this,' because they would recognise the possibility that it might actually be more harmful to their longer-term aspirations if they are not convinced that indeed a treaty would necessarily build them into the process and actually represent something substantive and important. My own view is that we ought not to have any form of plebiscite within the Indigenous or any part of the community for some years, until there has been appropriate discussion and education. I have seen pamphlets; I have read a lot of the material that has come out, and that is great. But I think we just have a long way to go, frankly, before we ought to go down that type of path.

**Speaker A:** You've talked about the importance of detaching both the treaty, a Bill of Rights and the republic referendum from the parliamentary process and the identification with politicians. Isn't it always going to be a difficulty to do that? The only way you can amend the Constitution or indeed pass a treaty is through the parliament, so at some stage it has to become a political exercise. So to pretend that it is not is deceptive, on the one hand, and nugatory on the other, because really it is always going to have to have parliamentary and political will behind it. That having been said, is it possible in Australia to have a citizen-initiated referendum?

**George Williams:** You are obviously right that we must involve the political process, and I certainly would not suggest otherwise. It is not only necessary but it is desirable to involve the political process. Our representatives ought to be involved, because if they are not, then we just can't achieve the level of cultural and symbolic change we must have. They must be the engine-room of what is happening.

My point is simply that politicians should not be the only people driving this process. Too often it has been seen that way. Indeed, if you look at the Bill of Rights debate, there had been a series of politically inspired models without any second-track development, if you like. I think we need political development but at the same time AIATSIS and other like bodies must be involved in a clearly non-political way. What might happen is that a model or other information generated outside the political process is then adopted within the process, but still clearly has an origin that is not immediately seen as self-serving because it has been developed by people who are experts or who do not have a particular agenda.

As to a citizens-initiated referendum, no, we can't do that. In fact, there is no capacity for citizens-initiated referenda in Australia. It could be done; the federal parliament could bring that in if they wanted to. But it is not going to happen.

**Agnes Shreiner:** I would like to know if perhaps the international environment had some influence on the successes of the eight successful referenda. For instance, in '67 people all over the world held the position that the Constitution was discriminatory to civil rights. So it was easy for the Australians to vote against the discriminatory part of the Constitution. Is it a good idea to look to the international world for support for the Treaties?

**George Williams:** Yes, I think we could not consider a treaty effectively in Australia without looking at the Draft Declaration on Indigenous Rights and what is happening in Canada and the US. We would be crazy to embark on any treaty process without an understanding of what works and what does not work in other nations, to avoid their problems and also to bring in emerging norms as they are being developed at the international level. I think that is essential. Of course, that takes a lot of time. It is a very long process to actually look at what is

happening overseas; you need to talk to people and that can't be done quickly. But that is the sort of information which should then be factoring into community education.

As to how this might play a wider role in the debate, international developments are always very tricky in Australia. If you look at what is happening in the *Tampa* debate at the moment, there is almost a sense of pride that we are snubbing our nose at the world. Suggesting that we should go down this path because internationally it is a sensible thing to do could be the kiss of death. But that changes; it just depends on the political context.

In my own view the best way to approach it is that we are doing this because domestically it is the right thing to do. That is the real reason. However, once we have recognised that, then we would be fools not to take into account international developments and what we can learn from other countries. But if we suggest we are doing it because of international pressure, politically it becomes almost unsaleable.

**Agnes Schreiner:** It is also the other way around. You could be proud of what you are achieving here and spread it internationally and get support from that point.

**George Williams:** I agree very strongly with that personally; we ought to be a model for these things. We ought to say we are good international citizens. It is a very sad reflection upon our political debate today that that has so little support. When Australians look at issues like rights of the child and such matters, it is almost that we want to do it differently because we are afraid, falsely, of being controlled too much by the UN. Maybe that will change; maybe this process could be part of shifting community attitudes. They should be shifted, but at the moment it is an argument that just doesn't seem to have any particular weight.

**Jilpia N Jones:** Would it be any good if you put a proposal to the groups in different areas to discuss with themselves, the Whites and the Blacks, whether it is in the desert, the Top End or wherever, to work out their own model? I feel that if you just put it in one basket, nothing will be done and nothing will be achieved.

**George Williams:** Thanks, Jilpia. I agree with that. The point at which I thought the republic debate was going well was when it led a lot of Australians to start drafting their own republic models. When we had competitions that some organisations ran in schools on drafting the preamble, there was a genuine engagement. Once you focus too much on just one model, particularly at an early stage, it becomes just a Yes or No exercise and inevitably, it seems, we vote No.

I also have a very open mind on even the use of the word 'treaty'. I am not sure whether that is really going to be the right word, in a short or a medium or a long term. Maybe treaty is a very long way off, and maybe what we should be thinking about is, as you suggested, more regional agreements, drafted through a process of negotiation and consultation. That has a lot of attractions, because it involves people at the grassroots level; it means the communities actually feel as if they are part of the process as opposed to its being abstracted from them. Perhaps, if information is provided and there is a level of consultation, then we should be listening to what people say. I mean, what do people want? I don't think we can reach any conclusions on that at the moment.

Certainly my own perspective as a constitutional lawyer from the White community is that I see my role as being facilitative, in the sense of trying to assist people to achieve their own aspirations. To do that you have got to know what they want, and for them to know what they want they have got to have the information in the first place to make up their mind. We just

haven't got anywhere near that yet, I think. So I like the suggestion, but it will take a long time to get there.

**Jilpia N Jones:** The thing is that the Prime Minister's government is spending millions in their advertisements on all sorts of stuff, so surely it would be the same effect to educate the masses on the treaty.

**George Williams:** Yes, and you raised whether 'treaty' is even the right word. I also have some doubts about that. I think seeing this as part of the reconciliation process is the better way of going. Really we are looking at instruments that will help us progress the reconciliation process. They should perhaps have some legal impact, because so many of the issues over the last century have been legal questions that have caused issues like the Stolen Generations and the Constitution's discriminatory treatment. It has been the law that has been flawed. So we should simply say we want a debate and we want to look at instruments that will actually move us forward in that sense, without actually suggesting a treaty is the right way of going.

I actually quite like some aspects of a treaty, and maybe that might be an outcome, but maybe it might be built upon many, many regional agreements and then we lead to a national agreement at some stage. But I just can't see that happening for a long, long, long time – if it ever happens.

**Richard Davis:** Thank you, George, I enjoyed that talk. You captured part of the problem really well when you said people did know what was on offer but at the same time you said that they also realised that whatever was on offer was more of benefit to parliamentarians than to themselves.

That leads to a second point. However you put the argument, you point to the complex political points that are involved and the need to simplify that to present it in accessible language, but isn't it also the case that there are different arguments about what the treaty is in different communities? I think that is what I have heard from Patrick's and Marjorie's Jilpia's comments: whatever the treaty is to the mainstream community, it might be very different from what the treaty is in the minds of Indigenous people. So there are different Treaties, or different arguments, and that further complicates how you put forward a message.

**George Williams:** It certainly does. A lot of people who have come to see me have asked what do I understand by a treaty. I give them different answers at different times because I am not quite sure what a treaty would mean either. But that does link in to your main point, about the issue of its being identified with a particular group. If you think that was a problem in the republic debate, it would be magnified tenfold in a treaty debate, because a treaty is supposedly an agreement between two parties, and in any contract you have always got the question: Is one party getting an unfair advantage? At least in the republic debate there was a notion that it was a model for all of us; it was meant to be a nation wide model. But in the treaty, immediately people are going to suspect that somebody is getting the better deal, Indigenous communities or the broader community. Even that assumes we know who would sign or take part in such a treaty anyway, which is a very difficult and contested issue.

In the medium term I think one way of dealing with the treaty process is that we simply put out a variety of models. What you might do is a lot of education aimed at getting information, getting feedback from people. You might say, 'If you're thinking about a treaty or like instrument, here are 10 ways of doing it that fairly reflect the different ideas that are coming

up from different communities.' Once you put up a variety of models, then you get a level of deliberation and discussion, particularly if there is a convention or something like that. It will give some focus. Because when you have representation from different groups, you get more focus on different models. The model might be a regional-based agreement structure, it could be a national model, whatever it might be. Of course you need some process that involves education and joint consultation, otherwise you end up with self-interest and too many models, and no real understanding and no joining of minds. If you don't get the joining of minds, you don't get a treaty and you don't get any sense of changing cultural attitudes either, I think.

**Lisa Strelein:** Those of you who have been to this seminar series will realise the number of different visions of the treaty that have been put forward in the seminars. I don't think it is the word 'treaty' that is the problem; there needs to be a word that encapsulates whatever it is we are talking about and 'treaty' is probably a good one.

**George Williams:** I think that to say that we are having a 'treaty debate' is potentially a good way of putting it.

**Speaker C [Sally?]:** Last week when Fred Chaney was speaking, if I understood him correctly, about a number of local agreements. I feel that as these agreement processes go ahead, as this process matures, then the treaty will be an outcome of what pretty much already exists within the larger population within Australia. In fact, to some extent we have practical agreements operating in the country and then the treaty can draw from what already exists, because everybody can understand what is really involved.

**George Williams:** There is a lot of merit in that approach of incrementally working your way up, if you like. That is important. My own view is you also need something extra. As part of the reconciliation process we need some more national recognition that actually suggests a national commitment of a different kind than we had for the first 100 years of the nation. It is a bit like talking about a national apology. I think the symbols and commitments of that kind are incredibly important, and having something at the higher national level might be a way of binding those together and actually achieving something that can't be achieved through regional-based agreements. As to what form that might be, I don't know. But I think it might be necessary, if you like, to bring some closure to the reconciliation process, to actually suggest there is an outcome of a national kind. After all, it has been a national debate. And that might be a good reason to look at it from that angle as well.

The other thing I want to mention, also coming out of something Lisa said, relates to the drafting of different models. I think one of the major challenges of the treaty debate is that it is completely different in Australia from anywhere else in the world because it is a contemporary debate. If you look to New Zealand, the *Treaty of Waitangi* is 150 years old; if you look to Canada, the current treaties have over a century of history. But we are forced to look at a treaty in a contemporary sense, with completely different attitudes and a different mindset with the influence of international law. It is quite unlike any treaty process anywhere else in the world that I am aware of, because every other country – at least in the Commonwealth – has already got a treaty, often of many, many years' standing. So we have unique challenges that make this an entirely different debate, and much more complex, I think, as well. Also, if we do actually want a treaty process that has some equality of bargaining power, that is conspicuously absent from many of the comparative treaties, which means that we would want to do it differently this time. Again, asking how we would

structure the negotiations has just never been done before, as far as I am aware. It makes it very exciting that it might happen, but also very challenging.

**Lisa Strelein:** I perceive from talking to ATSIC people in the Treaty Think Tank that they see the process of agreement-making, the agreement-making culture that we have now through native title, as a great thing. But there are perceptions about the bargaining power, about what is actually being interlinked in these agreements, that leads them to think that there needs to be some sort of national framework and protection for those agreements, as well as principles upon which those agreements are being framed. From my own perspective I think there are also a number of issues that people want to talk about in those agreements that they can't in a native title context. So even though that is creating a culture of agreement-making that ought to make people feel comfortable with the idea of a treaty, there is also a lot that they are not able to do, that feeds into that idea of having some sort of national approach, of whatever form.

**Mick Dodson:** Thanks for your paper. I agree with almost everything you have said. I think the process being encouraged by ATSIC largely follows the rules you have laid out quite clearly. I was just wondering if you had any comments about the treaty. I think that among all of those things that you mentioned there has to be grassroots support and confidence-building amongst the population. The most recent poll on the idea of a treaty comes from the Age-Neilsen poll which says that 53 per cent of Australians don't have any difficulty with the idea of a treaty. Of course, the trick is to build that percentage by confidence-building, in many of the ways you have suggested.

Again I agree that there ought to be scope for what Jilpia says is a regional-based treaty-making capacity, but I think that that must be underpinned by some national framework. Whether that is constitutional-based or in some other way needs to be decided, perhaps through a convention process. I would prefer regional conventions working up to state- and territory-based ones and to a national convention.

The framework would perhaps primarily address itself to setting the legal means by which people could treaty-make at the local level. I think it also needs to deal with some of the outstanding issues or Unfinished Business, which isn't provided for in the present regional agreement or native title processes. The Unfinished Business is not being dealt with. Perhaps small parts of it may be, but key aspects of Indigenous status, the Stolen Generations, the apology, and dispossession are not covered and, very importantly, the substance and basis of the present sovereignty of the Australian nation-state. You didn't mention these sorts of things. There is some argument that we are not really sure, apart from controlling the defence forces, what is the present basis of Australian sovereignty in a legal sense, *terra nullius* having been rejected by the High Court.

I wonder if you have any comments about this question, and how a treaty process might deal with it. Politicians are saying, 'Well, this is a nonsense. There is no question about sovereignty.' Other people in the broader Australian population would think, 'What's this nonsense?' But I think if you look at it, even going back to Cook there was some cause – perhaps you'd say it's academic or theoretical – for those who want to think about these things for some disquiet about the present basis of Australia's sovereignty. How would a treaty be a way of fixing that problem?

**George Williams:** Thank you for your question. Before I get onto sovereignty, you mentioned the 53 per cent of people supporting a treaty. One thing I always remember is towards the end of the republic debate, as it got closer to the referendum, those in favour of a republic just increased. It got to about 69 or 70 per cent saying they wanted a republic. Of course, it failed. I think the treaty debate is equally likely to be prone to fracturing into different camps with different aspirations, and particularly prone to political manipulation as well. So it might be that through this process a great deal of goodwill and confidence is built, but without an appropriate convention model and research and involvement by AIATSIS and other bodies, in the end it just goes nowhere because of the other difficulties in the debate, despite the fact that there is a good foundation.

On the sovereignty issue, I think because sovereignty is so important to any treaty process that again it highlights why it has got to be a long-term process. I just can't see how you can deal with a treaty without having the concept of sovereignty at the core of it. Surely that is what a treaty raises. It raises issues of sovereignty, of the place of Indigenous peoples within the Australian nation. When their own history is taken into account, it raises issues of settlement. Unless you deal with that you simply can not negotiate any instrument, or even draft anything that bears any relation to reality. So I think sovereignty must be dealt with.

I think also you are right that sovereignty is contested, uncertain at the moment. As a constitutional lawyer I was actually just the other day rewriting a chapter in our book on Indigenous peoples and the question of sovereignty. The issue that we are dealing with in that chapter is indeed that the High Court itself has got this fractured notion of sovereignty. It has great legal significance, because the *Mabo* case clearly established competing conceptions of sovereignty within our system – a whole different set of legal norms emerging from a different source. On the other hand the High Court has never really dealt with it in the context of saying that the sovereignty now comes somehow from the Australian people. So it is a very real legal question that I know a lot of people have written about but, in terms of how the courts might approach it, still has a long way to go.

The other thing I am convinced of is that the courts aren't the way to approach the issue any further. I think any well-meaning attempts to get further on this issue at the moment with the current court are simply going to go nowhere. The current court has no interest in these issues. Until the membership changes, probably around 2008, I think it is going to be very difficult to get anything in terms of good outcomes. This means you have to look at the community grassroots level; you have to look at political debate, and sovereignty must be a key component. I think personally what we need in Australia is to develop a more sophisticated sense of what we understand by sovereignty. That is something we have never done. Who has sovereignty has always been polarised into Us and Them, without an understanding that sovereignty itself is quite a diverse concept. It is quite possible to have a very broad understanding of what the concept means. Indeed, because of *Mabo* it is possible to have a legal system that has sovereign laws emerging from different cultural and historical contexts. I just don't see any problem with that, but we should be moving further down that track and I think a treaty process might offer a way of doing that well – if it is taken slowly. Otherwise people will just be turned off by it.

**Jilpia N Jones:** George, as a hypothetical: at the end result, when everybody is not warm and fuzzy but knows exactly what is happening, will something be put in the Constitution acknowledging Aboriginal people as the First People?

**George Williams:** It certainly ought to. I think at least in the form of a preamble it is very likely it will get there at some point. Our Constitution is silent on these issues; it is so obviously wrong. And to go from the point of being discriminatory to just ignoring Indigenous peoples, though not as bad, perhaps, as being discriminatory, is still clearly wrong. Broadly the Australian people were very supportive of a preamble that did recognise Indigenous peoples. There were some fairly ridiculous debates about what word went where which really hid the real merit in the argument. So I think yes, it is likely to happen and I think it will be a very important step.

I think, however, you have also got to deal with the race power at the same time, because dealing with the symbolism and not with the substance is a problem. I think that power ought to be deleted and replaced with something providing that laws can be passed for the advancement of different groups. I would probably remove the word 'race' entirely, because I think it is a 19th century concept that does not belong in our Constitution. It has certainly got to happen.

The other thing I think we need in the Constitution is a freedom from racial discrimination. All of these issues should be seen as part of the reconciliation debate, because if we have a nation whose fundamental legal document ignores Indigenous peoples, we would have to ask: What sort of a foundation for reconciliation is that? Certainly not a very strong one. Given that the Constitution has great legal and cultural force, it has just got to be dealt with at some point.