THE CONSTITUTION AMENDMENT (RECOGNITION OF ABORIGINAL PEOPLE BILL) 2015 (WA): ITS PASSAGE, SIGNIFICANCE AND IMPLICATIONS

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On 19 August 2015, the Member for Kimberley, the Gidja woman Ms Josie Farrer, moved that the Constitution Amendment (Recognition of Aboriginal People) Bill 2015 be read for the third time in the Legislative Assembly. This was done with unanimous support and transmitted to the Legislative Council. The Legislative Council, also unanimously, read the Bill for the third time on 10 September 2015. Thus, without the need for a referendum, following Royal Assent the Western Australian *Constitution Act 1889* was amended to add, at the end of the Preamble, the following words:

> And whereas the Parliament resolves to acknowledge the Aboriginal people as the First People of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia.

While there has long been discussion about 'cleaning up' redundant sections of our state's Constitution, this was outside the remit of the Joint Select Committee on Aboriginal Constitutional Recognition. However, we did take the opportunity to remove two redundant provisions that specifically referenced Aboriginal people.

Clause 5 of the Bill deleted s 42 of the Constitution. Section 42 provided that, in calculating the population of the Colony of Western Australia, the 'aboriginal natives' of WA were to be excluded. While the parliamentary debates surrounding the introduction of what became s 42 made no mention of why this approach to the population head count was adopted (probably because, at the time, it needed no debate), it was the committee's view that it was no longer appropriate that this remain on the statute books.

Clause 6 of the Bill deleted part of s 75 of the *Constitution Act 1889*, which was to delete the definition of the Aborigines Protection Board. The board had long been redundant, and the Parliament took the opportunity to also remove the last vestiges of the board from the Constitution.

While the desire to amend our state Constitution specifically to acknowledge Aboriginal people was not new, Western Australia was late to make this amendment, being the last of the mainland states to recognise Aboriginal people in its Constitution. South Australia was the most recent state to recognise Aboriginal people: it passed legislation on 5 March 2013. New South Wales passed legislation on 19 October 2010. Queensland passed legislation on

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23 February 2010. The first state to give recognition to Aboriginal people was Victoria, passing the Constitution (Recognition of Aboriginal People) Bill on 26 August 2004.

At a federal level the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 was passed by the House of Representatives on 13 February 2013 and was assented to on 27 March 2013. This Bill was part of the ongoing debate around Commonwealth constitutional recognition of Aboriginal people and had a two-year sunset clause. The purpose of the sunset clause was explained by the Minister at second reading as:

> The sunset date ensures that legislative recognition does not become entrenched at the expense of continued progress towards constitutional change.

The requirement for a referendum makes such change a much more difficult task than for the Australian states.

Constitutional history

While Josie Farrer's Bill eventually sailed through the state Parliament without a dissenting voice, the history of Aboriginal people with our state Constitution is, of course, problematic.

While we have amended our state Constitution to specifically acknowledge Aboriginal people, it is not in the context of a Constitution that was silent about Aboriginal people — indeed, the original *Constitution Act 1889* gave much thought to Aboriginal people. And, over the years, the position of Aboriginal people in the Constitution has been the subject of much debate. Most of it, of course, did not reflect favourably on Aboriginal people and, specifically, did not seek to acknowledge and celebrate the long connection to this country.

However, what is clear is that, in the lead-up to the granting of self-government in Western Australia, those in London did not trust its far-flung colony on the Swan River to provide for its Aboriginal inhabitants.

It was Western Australian Governor Broome who was largely responsible for making the case for self-government — acting as the emissary between an increasingly parochial and independent Swan River population and Whitehall. Writing to the then Secretary of State for the Colonies, Lord Knutsford, in May 1888, Governor Broome wrote:

> Unceasing vigilance is required to protect the Aborigines from ill-usage by those evil-disposed persons who are to be found in every community, and it appears to me, looking to the great extent and special circumstances of this Colony, in which the settlers are ever coming into new contact with the Natives at numerous points in a million square miles of territory, that it is absolutely necessary, when party Government shall be introduced, that some permanent body, independent of the political life of the day, shall be specially charged to watch over the Aboriginal population.

As we know, eventually the new state legislature was empowered to 'make laws for the peace, order and good government of the colony' — except with respect to Aborigines. Like all other states except Tasmania, Western Australia had established the Aborigines Protection Board under the Aborigines Protection Act. Its members were appointed by the Governor and were responsible directly to him. Those coming under the Act were defined as 'every aboriginal native of Australia, every aboriginal half-caste or child of a half caste, such half caste or child habitually associating and living with aboriginals'.

Thus, as a condition of granting responsible government to Western Australia, the British Government insisted that the Aboriginal Protection Board remain an autonomous body under the control of the Governor.

Our Constitution's original form had the well-known s 70:

> There shall be payable to Her Majesty, in every year, out of the Consolidated Revenue Fund the sum of Five thousand pounds mentioned in Schedule C to this Act to be appropriated to the welfare of the Aboriginal Natives, and expended in providing them with food and clothing when they would otherwise be destitute, in promoting the education of Aboriginal children (including half-castes), and in assisting generally to promote the preservation and well-being of the Aborigines. The said annual sum shall be issued to the Aborigines Protection Board.

It goes on to state, 'under the sole control of the Governor', and then later, importantly:

> Provided always, that if and when the gross revenue of the Colony shall exceed Five hundred thousand pounds in any financial year, an amount equal to one per centum of such gross revenue shall, for the purposes of this section, be substituted for the said sum of Five thousand pounds in and for the financial year next ensuing.

The Board and s 70 were very quickly the subject of critique by the governing establishment in the new self-governing colony, led principally, and interestingly, by the Premier, Sir John Forrest.

I say 'interestingly', as it was Forrest, as Surveyor General, who headed the commission for Governor Broome that recommended, in September 1884, the establishment of a board 'for the management of all matters connected with the Aboriginals, and to which all monies to be expended on them should be entrusted'. Forrest, as Premier, would seek the abolition of this board just six years later.

Westminster's hesitation in handing over authority over the colony's Aboriginal inhabitants continued after self-government was granted. Chamberlain, the then Colonial Secretary, wrote to Governor Broome advising:

> When in 1887 the Legislative Council of the colony passed a resolution that the time had arrived when the executive should be made responsible to the Legislature of the colony, and that Western Australia should remain one and undivided, Lord Knutsford, while accepting these resolutions in principle, stipulated for special protection for the natives, and, in his Despatch of January 3, 1888, he expressed his concurrence in the opinion of the Governor, Broome, that some measure would be necessary for placing the aboriginal inhabitants under the care of a body independent of the Parliament of the day…

It went on:

> This correspondence was before the Imperial Parliament when considering the Bill, and the provision respecting the Aborigines Protection Board was clearly understood to be one of the conditions of the grant of self government.

It did not take long for Forrest to succeed: the Western Australian Parliament passed a repeal Bill in 1894 and sent it to Britain for agreement. In a despatch to the British Parliament, Forrest wrote:

> The Parliament of Western Australia is more likely to look after the interest of the aborigines than the Imperial Government. I am not aware that the Imperial Government has ever done much for the aborigines of Western Australia, nor do I know of any special efforts being made for their welfare by the people of the United Kingdom. That being so, why all this outward show of sympathy for the aborigines and, at the same time, want of confidence in the colonists of Western Australia, who have alone done whatever has been done for their welfare?

The colonial legislation purporting to abolish s 70 then sat at Downing Street for a period of time. Chamberlain, lobbied by Forrest, was aware of the desire of a Western Australian Parliament, but he still had his concerns about the welfare of the Aboriginal inhabitants of the colony. He did not want to give up s 70 quite so easily, so he wrote to Sir AC Onslow, the

Acting Governor in 1895, about a year after the state Parliament passed the repeal Bill and said:

> I am anxious to meet the views of Colonial Government as far as possible. I am prepared to approve Reserved Bill, omitting from Section 70 as much as places expenditure under the care of independent unofficial Board, so that while permanent appropriation of 5,000L secures requirements of natives, your responsible advisers would advise Governor as to management of fund, same way as other expenditure.

That is, Chamberlain's compromise was that the board would not be abolished but made responsible to a government department instead of to the Governor.

Ultimately Forrest was, of course, successful in having s 70 repealed. However, the series of attempts to do so had what the late Peter Johnston described as 'an element of farce'.

The first attempt lapsed due to failure to receive Royal Assent within the required two years.

I am again indebted to the late Peter Johnston for bringing to my awareness a most interesting footnote to the repeal of s 70. In 1905, Mr F Lyon Weiss, a man of particular interest in the welfare of Aborigines, challenged the validity of the 1898 repeal of s 70. The end result was the Secretary of State for the Colonies recommending that another Bill be passed by the Western Australian Parliament as soon as possible, validating everything done since 1897 (and, of course, avoiding the necessity of paying out the £5000). Parliament took this advice and quickly passed the now infamous *Aborigines Act 1905* (WA), which validated everything between 1987 and 1905.

It is important when reflecting on debates around constitutional recognition of Aboriginal people, be it at a state or federal level, that Aboriginal people have not been absent from those documents. Indeed, much time was spent working out the place of Aboriginal people in the developing legal structures of the Swan River colony. Perhaps most surprising is the level of concern that Whitehall and Westminster had about the intentions of the colonialists towards the welfare of Aboriginal people.

Western Australian amendment

Recognising Aboriginal people in the state Constitution took a bit of time in Western Australia.

The Bill, introduced by Ms Farrer on 11 June 2014 as a Private Member's Bill, came on for substantive debate at second reading on 12 November 2014.

In the first instance the Government did not support Ms Farrer's Bill. There were three main arguments advanced for this refusal to accept the Member for Kimberley's Bill:

1. It was proper to wait for the Commonwealth constitutional amendment to proceed beforehand.
2. It might jeopardise the Noongar claim.
3. It will have impacts on freehold title renewal.

Ultimately, Kim Hames gave the real indication about why the Government was reluctant, initially, to support Ms Farrer's Bill when he advised the Parliament that 'bipartisan manner is normally initiated by the government of the day'.

Two weeks later, on 26 November 2014, the Member for Kimberley moved to suspend Standing Orders to move the following motion:

> That the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 be immediately referred to a select committee of six members for consideration and report by 26 March 2015 …

After some discussion, both Houses of the Parliament passed a motion that established a joint select committee of seven members — three from the Council (Mr Michael Mischin, the Chair and Attorney-General), Ms Sally Talbot and Ms Jacqui Boydell; and four from the Assembly — Ms Josie Farrer, Mr Murray Cowper, Ms Wendy Duncan and me.

The time frame for the committee was tight: the committee was instructed by the Parliament to report to both Houses on 26 March 2015. Accordingly, the terms of reference were deliberately narrow and crafted to not include the merits of whether recognition ought to be made (by now this was universally accepted in the Parliament) but how it ought to be done.

Interestingly, the third clause of the motion establishing the Joint Select Committee stated that 'the standing orders of the Legislative Assembly relating to standing and select committees will be followed as far as they can be applied'.

Standing Order 251 of the Legislative Assembly states:

> No Minister of the Crown will be eligible to be appointed as a member of a committee.

Nothing was made of this dichotomy in the Legislative Assembly with the Attorney-General on the committee — we were taken by the Premier's offer to have the Attorney-General on the committee, thereby giving the committee access to the advice of the Solicitor General. In any event, each chamber controls its own destiny and we had suspended Standing Orders so appointed as we saw fit.

The Hon Nick Goiran, disgruntled at having a fewer members on the committee from the Legislative Council, did point out this contradiction — however, the committee was duly formed and away we went.

Towards a true and lasting reconciliation — Report into the appropriate wording to recognise Aboriginal people in the Constitution of Western Australia

The report of the committee contained 16 findings and two recommendations.

The findings primarily deal with issues concerning manner and form requirements in the *Constitution Act 1889*, any potential unintended consequences of the proposed amendment (including potential to limit the legislative powers of the state), and whether a non-effects clause was necessary to protect the Parliament from any unintended consequences. The committee also made a finding regarding two other sections of the Constitution, being ss 42 and 75.

Having spent most of my political life in opposition, it was also of some satisfaction to be able to access the advice of the Solicitor General, Mr Grant Donaldson SC, and the State Solicitor's Office Legal Officer, and old Constitutional law lecturer, Dr Jim Thomson SC. Noting that both represented the Government, the committee also engaged its own legal advice and had the benefit of barrister, Mr Adam Sharpe, as a research support, and commissioned two pieces of advice from Mr Peter Quinlan SC — our new Solicitor General.

For the benefit of public debate, the committee elected to make public the advice that we received from Mr Quinlan SC as an appendix to the committee report.

Special legislative procedure

The first issue considered by the committee was: did constitutional recognition of Aboriginal people require a special legislative procedure to be followed?

It is well established that the Constitutions of the various Australian states can be amended by legislation that is enacted following the ordinary procedure — unless there is a special procedure specified by the Constitution of that state.

The only provision in the *Constitution Act 1889* that provides for special procedures is s 73.

Section 73(1) provides that any Bill which makes 'any change in the Constitution of the Legislative Council or the Legislative Assembly' must be passed by an absolute majority in each House of Parliament.

Section 73(2) specifies five categories of Bill which must be passed by absolute majority and then obtain the support of a majority of electors at a referendum to be lawfully enacted.

I do not propose to go through s 73 in detail but suffice it to say that the committee found that the proposed recognition of Aboriginal people in the form set out in the Member for Kimberley's Bill would not trigger the provisions of s 73 and thus could be enacted by ordinary legislative procedure.

Requirement to entrench?

The committee also examined whether the Parliament should seek to require that any future amendment of the constitutional recognition of Aboriginal people only be effected by special legislative procedure. Victoria 'entrenched' their amendment by requiring any future amendment to require a three-fifths majority in each House of Parliament.

The committee did not consider it necessary to include any entrenching provisions, as it was the view of the committee that future parliaments should be well placed to make their own decisions about the contents of the Constitution. Further, entrenching provisions tend to transfer power away from Parliaments to the courts — always a sure way to scare off a proposed amendment.

Inhibit the Parliament's power to legislate?

Could such amendment limit the power of the Parliament 'to make laws for the peace, order and good Government of Western Australia'? As is often the case, parliaments worry themselves with any potential implied limitation that a court may find on state legislative power. The Government's lawyer, Mr Donaldson SC, advised that there is a remote risk of a court in future interpreting aspirational words of recognition as limiting the power of Parliament so that Parliament could not enact legislation that was inconsistent with those aspirations. However, such a notion was also acknowledged as being contrary to the law as presently understood.

The general presumption that Parliament intends to pass legislation that is valid was taken by the committee, from advice, that any Bill intended to alter the legislative power of the Parliament would need to be enacted in accordance with the special procedure set out in

s 73(2). It follows that, if a Bill proposing the constitutional recognition of Aboriginal peoples were enacted in accordance with ordinary procedures, this would lead a court to presume that the Bill was not intended to affect legislative power because it was not enacted in accordance with s 73(2).

Thus the committee found that any likelihood of the proposed amendment in the Member for Kimberley's Bill limiting the legislative power of the state could be discounted.

Location of recognition?

The Member for Kimberley's Bill had the words of recognition in the preamble. The committee noted that, of the other Australian states to have included statements of recognition, Queensland is the only jurisdiction to have chosen the preamble as the preferred location. Victoria, New South Wales and South Australia all included their statements in the operative provisions.

The committee concluded that the risk of unintended consequences is very low no matter where the statement of recognition is included in the *Constitution Act 1889*. However, we did come to the conclusion that the risk of unintended consequences is reduced further if words of recognition are included in the preamble because, while the interpretation of a preamble as having a substantive legal operation is not unprecedented, it is unusual.

Requirement of a non-effects clause?

The committee spent quite some time on this question.

All Australian states that have statements of recognition also have non-effects clauses. In Victoria, the non-effects clause provides that Parliament, in its statement of recognition, does not intend to create in any person any legal right or give rise to any cause of action, or to affect the interpretation of the Constitution or any other law of the state. The Queensland provision has similar scope. The New South Wales provision goes further by adding that the statement of recognition does not give any right to review of administrative action. The South Australian provision simply provides that the statement of recognition is not intended to have any legal force or effect.

The committee looked hard at this issue as the inclusion of a non-effects clause clearly diminish the words of recognition.

The committee examined both whether a non-effects clause is required to achieve the intended result that the words of recognition will not have substantive legal effect and whether a non-effects clause would have any efficacy in practice.

Because of some of the findings of the committee that I have already outlined and the impact of extrinsic materials, such as the Explanatory Memorandum, as per s 19(2) of the Interpretation Act it was the committee's view that it is amply clear that the proposed statement was not intended to have any substantive legal effects. Further, a non-effects clause would thus be superfluous where a court is following the orthodox approach to statutory interpretation. The committee took the view that the only case in which a non-effects clause might become relevant is if a judge was determined to ignore the clear intention of Parliament as confirmed by the extrinsic materials and find some substantive legal effect in the words of the preamble. A judge so determined would not see the presence of a non-effects clause as too much of a hurdle it was broadly thought.

Thus the committee found that a non-effects clause *should not* be incorporated into any statement of recognition, as such a clause would either be superfluous, or ineffective, and undermine the spirit in which the statement of recognition is made.

The passage

The Member for Kimberley's Private Member's Bill, with the unanimous support of both Houses of Parliament, amended the *Constitution Act 1889*.

There are, in effect, two parts to the amendment:

- first, the acknowledgment — that Parliament resolves to acknowledge the Aboriginal people as the first People of Western Australia; and
- secondly, the aspiration — that Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia.

And, of course, two pieces of the now redundant section of the Constitution that sought to embed the discriminatory relationship that the state had with its Aboriginal inhabitants were removed.

The resolution to acknowledge is, to be frank, almost mundane in its impact. For years the vast majority of Western Australians have acknowledged the position of Aboriginal people as the first people of Western Australia — whether it be through the regular 'Welcome to Country' words we speak at the beginning of most public and corporate events or through those that travel through our vast state and country, with the Burrup Rock art and rock art of the Kimberley perhaps the most powerful statement that Aboriginal people have had this country for a long, long time. The 'normalisation' of the bitter and divisive native title debate that followed the High Court's *Mabo* decision has also led Australians to acknowledge that Aboriginal people have a title to country that predates any of our more recent forms of tenure.

It is the aspirational side of the amendment that will challenge us all in the years ahead. Reconciliation is, by its very nature, a personal journey. Yes, it is a symbol. I have outlined the effort that the committee went to to ensure that the recognition in our Constitution would have no unintended consequences and would not impinge on the legislative power of the State. So is there a point? Of course.

Back in 2009, Dr John Falzon, the CEO of the St Vincent de Paul Society National Council, wrote a very thoughtful piece for the Catholic magazine *The Record*. In his article he reflected on the importance of symbolism:

> Human beings are profoundly personal in the way we relate to the world, at the same time as being profoundly symbolic and profoundly political. I know that there are many who baulk when I put things this way but this is a truth that must be spoken. The human being is indeed, as Aristotle phrased it, zoon politikon, a political animal. We do not exist in a limbo; we are both the product of, and producers of, the social world. We are born into social relationships until we die.

The historical relationship between Aboriginal Australia and non-Aboriginal Australia is perhaps our greatest social weakness. Symbols are important. That is why so much effort is going into the debate around reconciliation and constitutional recognition, and why so many waited and depended on the Apology to the Stolen Generation. As Ms Farrer said in her second reading speech to this amendment Bill, recognition gives us 'the opportunity for us to stride into the future, not to shuffle forward with eyes closed from the truths of the past'.

Symbols deal with the personal — the relationships between people. The past terrible actions of government must be recognised and accounted for. Without them, the more 'practical' outcomes of reconciliation that we desire will not eventuate.

Noongar recognition Bill

In parallel with the Member for Kimberley's recognition Bill has been the state government's settlement negotiations with the Noongar people of the south-west of Western Australia. The first, and key, part of the Government honouring its side of the settlement has been the introduction, and subsequent passage, of the *Noongar (Koora, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*.

Schedule 1 to this Act has the 'Noongar Recognition Statement':

> We, the Noongar people, are the largest single Aboriginal cultural bloc on the Australian continent. We belong to one of the oldest surviving living cultures on this earth. As a people, we have a common ancestral language, and a similar history and spirituality. We know that our traditional country is south and west of a line that stretches from Geraldton in the north to Cape Arid in the south-east, and that the spirit of this place can never be conquered.
>
> Noongar culture, spirit and economy have always depended on the resources of Noongar boodja. Families still return to the biddi (paths) of our ancestors. Our people continue to refer to natural landmarks, especially hills and waterways when describing which families belong to different areas of Noongar boodja. Although barriers may exist, it is still in our hearts, in our blood, it is still our country.
>
> Our living culture, which is long and continuing in this part of the world, begins with Noongar people. This is the opportunity for all Western Australians to experience the ancient tradition of respect, relationships and reciprocity with Noongar people. We have survived.

We have survived. The Noongar people, at the very first instance, wanted the Parliament to recognise the survival of the Aboriginal community that bore the brunt of colonialism. But the Noongar people also want all Western Australians to 'experience the ancient tradition of respect, relationships and reciprocity' with the Noongar.

Symbols examine our social psychology. For too long non-Aboriginal Australians had an entitled ignorance to the cause of the Aboriginal world. The *Aborigines Act 1905*, Stolen Generation, Noonkanbah, citizenship and deaths in custody all reflected a long-embedded ignorance — that Aboriginal people need not be considered in the quest for the greater good.

It is symbols that challenge us to address this ignorance.

Conclusion

Earlier this year I was privileged to give the Rob Riley Memorial Lecture, 20 years after Rob's death. In that speech I examined my fear that what has replaced Australia's entitled ignorance is a 'great impatience' — a great impatience with Aboriginal people, culture and aspirations; and a great impatience with Aboriginal people's demand for inclusion, genuine inclusion, in laws that affect them. To me, this has been the underlying frustration from government about our state's remote communities: not that they exist but that they have failed to thrive. The fact that, when we pass laws in the state Parliament, we specifically exempt our housing and public health laws from these lands and that most remote communities exist on a land tenure of no security whatsoever is lost in government demands for immediate satisfaction.

Symbols require us to examine, personally, our social relationships. This is what the Member for Kimberley challenged us to do with her Private Member's Bill to recognise Aboriginal people in our state Constitution.

It is significant and it is something of which the Parliament should be proud.