HENRY PARKES FOUNDATION

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Mission impossible?: Achieving social justice through constitutional change

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As a constitutional lawyer, I am well aware of the large debt I owe to the life and works of Henry Parkes. More than any other person, he kick-started the process of drafting the Australian Constitution, and so put us on the road to Federation and nationhood.

He did so on this day 123 years ago when on 24 October 1889 at Tenterfield he called for the colonies to 'unite and create a great national government for all Australia'. He then wrote to the other colonial premiers proposing a meeting to devise a constitution for the new nation.

This began a decade of conventions and public debate in which the community and our leaders were seized with a bold spirit of reform. The outcome was a Constitution and the Australian Federation in 1901.

People today often remember Parkes as the 'Father of the Federation', without recognising that his Tenterfield speech came towards the end of a four decade political career in what was his fifth, and final, stint as Premier of New South Wales.

His contribution to the founding of Australia was remarkable, but no less so than his extraordinary achievements in democratic and social reform. These included:

- the introduction of universal male suffrage;
- free secular education for children;
- the training of nurses for public hospitals;
- funding the colony's first public library; and
- establishing areas for public enjoyment, such as Centennial Park in Sydney.

Parkes' vision for social justice and equal opportunity infused his work, including when it came to Federation. He saw that the new nation should serve the common good, as reflected in his proposal that it be known as the 'Commonwealth' of Australia.

Across many fields, Parkes was a reformer, and an extremely successful one at that. He demonstrated the qualities needed to achieve social justice in a tumultuous and unforgiving political process. He showed that this can be realised when it is backed by a clear vision, sound political judgement, persistence and a willingness to convince the community of the need for change.

These lessons can be too easily forgotten, and we can still learn much from Parkes today. This is particularly true when it comes to changing the Australian Constitution.

Parkes was embroiled in a number of constitutional debates, beginning with the creation of self government in New South Wales in 1856. He recognised that longer term goals such as equality and justice demand a continuing commitment to democratic and constitutional reform.

This insight was true in Parkes' time, and it is just as true today. Unfortunately, we have lost sight of this to our detriment.

Rather than being seen as a living document that fosters our national aspirations, the Constitution has faded into the background of public debate. As a result, we maintain a structure of government that is generally sturdy, but which reflects popular values and common understandings of government that made sense in the 1890s, but not today. These include the idea, written into Australia's constitutional DNA, that governments should discriminate between people on the basis of their race.

By not updating and improving the Constitution, we have failed to ensure that we have the structure of government that best meets our needs. This has many costs, including especially when it comes to social justice.

The Constitution

At first blush, the Australia Constitution is a dry and boring document. Indeed, former federal Attorney General and High Court judge Lionel Murphy remarked that he kept a copy of the Constitution by his bedside. If he found himself sleepless in the middle of the night, the document was a perfect antidote.

Murphy had a point. Our national Constitution is hard to read and often obscure, and much of it is now seemingly irrelevant to the issues of the day. After all, how could a set of rules written at the end of the century before last still be relevant today?

Part of the problem is that it was not written as a people's constitution. Parkes may have propelled the federal movement forward, but he had little influence over its drafting.

The Constitution produced by the end of the 1890s was a lawyers' document containing the nuts and bolts of how our system of government was to operate. This is reflected in its preamble which, tellingly, opens with the word 'whereas':

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

By contrast, the United States Constitution opens:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

On the surface, Australia's 111 year old Constitution would seem to have little to do with current questions of public policy such as how to fix the Murray Darling Basin, or matters of social justice such the human rights of asylum seekers or how to provide everyone in the community with access to first-rate schools and hospitals.

In fact, the Constitution has everything to do with these things. We must simply look deeper, often beyond the dry words on the page, to understand how fundamentally the Constitution continues to shape the nation and our capacity to realise our collective goals.

Among other things, the Constitution:

- establishes lines of power in our society (such as who can do what to whom);
- establishes relationships and the legitimacy of people and organisations; and
- provides recognition of groups and national aspirations.

In these ways, as Parkes would have anticipated, the Constitution has a profound, ongoing impact on the nation and community well-being. This is rarely noticed.

When it comes to government, people tend to be aware of sudden shifts and things that draw high levels of media attention, such as elections or High Court decisions that frustrate party policy.

By contrast, the influence wrought by the Constitution may only produce glacial change. Recording and explaining things that produce changes over the course of years and decades, even where they are of great importance, is not something that is well captured by today's 24-hour news cycle.

Constitutional change

Parkes recognised the link between constitutional reform and his political aspirations. He understood that structures of government and democratic processes are fundamental to achieving social justice.

This is reflected in at least one respect in the Constitution itself. Even though the Constitution was enacted by the British Parliament, it embodied the egalitarian notion that it should only be altered by the Australian people.

In a radical experiment for the time, this was not to be done by their representatives in Parliament, but by the people directly. Hence, section 128 of the Constitution requires that any change to its text be approved at a popular referendum.

Unfortunately, the Australian politicians who have since championed the cause of constitutional reform have found this hurdle almost impossible to surmount. They have only rarely been able to translate the success they have achieved in elections to winning referendums.

Constitutional change has always been hard to achieve, with only 8 out of 44 referendums succeeding. Disturbingly, however, change has become more difficult and less likely to be achieved as time has gone on, with no referendum passing since 1977.

As at 2012, 35 years have passed since Australia changed its Constitution. At around one-third of the life of the nation, this is by far the longest period that Australia has gone without amending the document. The next longest period was 21 years between the 1946 and 1967 referendums.

It seems that as the necessity of changing the Constitution increases, so does our inability to bring this about.

When it comes to constitutional reform in Australia, we have lost the plot.

Rather than seeking to re-engage, our politicians seek to avoid the whole topic whenever they can. After all, if something is doomed to failure, why bother making the attempt and risking not just defeat, but a public backlash? Even the idea of an Australian republic has seemingly been put off by its political backers until the death of our current monarch.

Australia has not held a referendum since 1999, when the people voted No to becoming a republic and inserting a new preamble in the Constitution. This made the first ten years of the 21st century the first decade in Australian history in which no referendum was held.

It looked like this drought might be broken when the Gillard government was cornered into promising one, and possibly two, referendums in 2013 on recognising Aboriginal Australians and local government in the Constitution.

These polls were put on the political agenda not because they represented a priority for the government, but as a result of the commitments the prime minister had to make to Greens and Independent members to secure power after the August 2010 federal election.

Since 2010, the government has not deployed the energy and resources required to hold the referendums successfully in 2013. Expert panels have been convened, but have yet to be responded to. Ministers have also failed to promote the referendums with any vigour in public debate. Most Australians remain unaware even that referendums have been proposed for next year.

Not surprisingly, the Aboriginal recognition referendum has been postponed for two to three years, and the prospects of holding a referendum on recognising local government are looking extremely shaky.

All this serves to reaffirm the perception that winning a referendum is 'mission impossible'. This also reinforces the destructive cycle whereby a strong political aversion to holding a referendum means that referendums are unlikely to be held, and also less likely to succeed, thereby in turn further strengthening the aversion to constitutional change in the first place.

This has major costs. In order to explain this, I will explore two examples where the Constitution must be changed in order to achieve important social justice goals. These are areas that Parkes himself engaged with: the idea that Australia should adopt a federal system of government, and justice for Australia's first peoples.

Federalism

When it comes to federalism, the problem is not that we have a federal system, but that the one we have is broken.

It is broken because we have a system designed for the needs of 1901, not one that has been updated for those of 2012.

Australia's federal system was drafted in the age of the horse and buggy, and it shows. In the 1890s, it was thought by the framers that the new nation would best be served by six strong State governments and a weak central Commonwealth, and the Constitution was drafted to reflect this.

This vision has since unravelled, while the text of the Constitution has remained largely static. Two world wars have demonstrated the need for national leadership and centralised regulatory control over many aspects of business and daily life. Australia's integration into the global economy has also shown the need for national laws that support competition with other countries, and not just competition between the States.

The result today is a Constitution and federal system that distorts government priorities and policy outcomes to the great cost of the community.

Matters such as service delivery are often determined not by which tier of government can do the best job, but which tier of government has managed to raise the funds to take control.

In our system of government, who has the money matters more than who should do the job. It is often just a matter of good fortune if the two happen to coincide.

In this respect, the financial dominance of the Commonwealth is all pervasive. It has the money to run the Federation, with or without State consent.

This issue is not a function of who is in government. Indeed, recognition of the magnitude of problem is bipartisan, as is the failure to champion a solution.

Unfortunately, by seeing the referendum as a no-go zone, governments have avoided tackling these important areas, and have seemingly given up on any prospect of holistic federal reform.

The referendum has a continuing, necessary, role to play because the text of the Constitution continues to shape Australia's system of government in inescapable ways. At the most basic level, the Constitution establishes a set of binding rules for Australia's federal system that cannot be ignored.

These rules have an, often unacknowledged, impact upon Federal-State relations in almost every policy area, including those of greatest contemporary concern, such as health, the environment, education, Indigenous disadvantage, taxation, business regulation and water policy.

In many areas, the constitutional rules enable effective and efficient governance. In others, they impose a set of values and principles derived from 1901 that can be an awkward, almost impossible fit for the solving of current problems.

This can stop reform in its tracks, or put sufficient obstacles in the way that the political price becomes too high for the reform to proceed, or it may permit reform to be achieved only in a second best manner.

There are many examples of where the Constitution has driven policy development down wrong turnings or less desirable paths. For example, the attempt to meet the environmental and other problems besetting the Murray Darling basin has been shaped by the Australian Constitution.

It affects everything from the chances of achieving a national solution for the basin, through to the environmental, social, economic and other factors that may or may not be taken into account in developing a new Murray Darling Basin Plan.

The Constitution, and in particular its division of legislative and other responsibilities between the Commonwealth and the States, has made what might seem a desirable national approach exceedingly difficult to achieve. It is also a key reason why the current attempt to achieve a Plan for the Murray Darling Basin has become mired in confusion and political controversy, and faces years of High Court litigation.

The root of many such problems lies in the age of Australia's Constitution and the failure to adapt it to changing circumstances. To continue the water example, Australia's Constitution remains based upon the desire of the framers of the 1890s to reach a settlement that accommodated the now non-existent riverboat trade from South Australia. It is not surprising that constitutional text derived from such concerns is out of kilter with contemporary needs.

The result is a system that can produce major failures of public policy. This has a major financial impact.

One recent study has found that problems with our federal system mean that every Australian family pays an unnecessary $1,100 in tax each year. This is wasted money. Overall, we are taxed a pointless $9 billion. This is the amount being used to prop up the Australian federal system.

The figure is the conservative estimate of the Business Council of Australia. It is how much the community pays for the duplication of services, buck-passing and inefficiency that bedevils the relationship between our federal and state governments.

Even this understates the true cost. It is only the amount of extra tax we pay and does not include the money lost to businesses in having to comply with unnecessary red tape and extra regulation from multiple layers of government.

Taking some of these other costs into account, it has been estimated that the duplication and extra coordination costs in Australia's federation are an astonishing $20 billion a year, or 9% of all general government expenses or 3% of GDP.

This is an enormous strain upon the economy and the public purse. It also represents a massive lost opportunity. A federal system will never operate at peak efficiency, but even if some of this money could be clawed back, it would represent an enormous pool of money that could be directed to things like improved funding for education and a national disability insurance scheme.

Our dysfunctional federal system necessarily impacts upon the quality of government services and our capacity to meet the needs and welfare of the most vulnerable in the community. A consequence is that we have lower standards in health and education than we could otherwise attain.

The bottom line is: if you care about Australia's schools and hospitals, you also need to care about the poor state of our federal system of government.

Aboriginal peoples

Aboriginal peoples have long sought recognition in Australia's national and State Constitutions. They have done so because these fundamental laws have either ignored their existence or permitted discrimination against them. They rightly argue that the story of our nation is

incomplete without the histories of the peoples who inhabited this continent before white settlement.

Parkes himself was not silent about the injustice being done to Aboriginal peoples. He was known not just as a politician and statesman, but also as a poet. One of his poems from 1857, entitled *The Murdered Wild Boy*, was written about the torture and death of a young Aboriginal boy by settlers on the Hawkesbury River near Sydney. It opens:

> Loud talk ye of the savages,
> As they were beasts of prey! –
> But men of English birth have done
> More savage things than they.

He then describes the 'horrid' and 'cowardly' deed, which he says 'haunts' him 'day and night'.

What sympathy Parkes had for Aboriginal Australians ran largely against the grain of his time.

The Australian Constitution was drafted to deny Aboriginal people their rights, their voice and even their identity as peoples. It was drafted against a backdrop of racism that led to the White Australia policy and a range of other discriminatory laws and practices.

The 1890s Conventions that wrote the Constitution did not include representatives of Australia's Indigenous peoples. In many cases, Aboriginal people were not even allowed to vote for the delegates to the Convention. It is not surprising then that the Constitution did not reflect their interests or aspirations.

In fact, the Constitution was premised upon their exclusion. They were not conceived of as citizens (and even the term second-class citizens would be to put their status too high), but as a dying race lacking a long-term place in the Federation.

This was reflected in the terms of Australia's 1901 Constitution:

- Section 25 recognised that the States could disqualify people from voting in the elections on account of their race. Headed 'Provision as to races disqualified from voting', the section provides that if a State disqualifies the people of a race from voting in its elections, the people of that race are not to be counted as part of the State's population in determining its level of representation in the federal parliament.
- Section 51(xxvi) provided that the Commonwealth could legislate 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'. This was the so-called 'races power'.
- Section 127 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'.

Section 51(xxvi) was inserted to allow the Commonwealth to discriminate against sections of the community on account of their race. Aboriginal people were not originally subject to this section. However, this was not because they were to be protected, but because it was thought that the Aboriginal issues were a matter for the States and not the federal government.

By today's standards, the reasoning behind s 51(xxvi) was clearly racist. Edmund Barton, the Leader of the 1897-1898 Convention and later Australia's first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.

Given the drafting history of the Constitution, it is not surprising that legislation enacted by the Commonwealth Parliament has been based on racially discriminatory policies. For example:

- The White Australia policy, as provided for by the *Immigration Restriction Act 1901* (Cth).
- The denial of the vote in federal elections to Aboriginal people. The federal franchise determined by the *Commonwealth Franchise Act 1902* (Cth) extended the vote to women, but denied it to any 'aboriginal native of Australia'. Aboriginal people are finally granted the vote

in 1962. Even then, full equality did not occur until 1983, when the law was amended to make enrolment for and voting in federal elections compulsory for Indigenous people as it is for other Australians.

- The suspension of the *Racial Discrimination Act 1975* (Cth) in order to facilitate 'bucketloads of extinguishment' of native title in 1998 and the Northern Territory intervention in 2007.

In 1967, a referendum proposal was put before the Australian people under which the words 'other than the aboriginal race in any State' in s 51(xxvi) would be struck out and s 127 deleted entirely. The people overwhelming voted 'Yes'. The proposal was supported in every State and nationally by 90% of Australians.

The 1967 referendum was an important turning point in the place of Aboriginal people within the Australian legal system. However, it is important to note that, while the referendum deleted an obviously discriminatory provision in the form of s 127, it did not insert anything in its place. Nor did it remove the recognition of State race-based voting in section 25.

The change left the Constitution, including the preamble, devoid of any reference to Indigenous peoples. In addition, while the objective of the 1967 referendum was to remove discriminatory references to Aboriginal people from the Constitution and to allow the Commonwealth to take over responsibility for their welfare, it may be that, in failing to set this intention into the words of the Constitution, the change actually laid the seeds for the Commonwealth to pass laws that impose a disadvantage upon them.

This is because the racially discriminatory underpinnings of s 51(xxvi) were extended to Aboriginal people, but without any textual indication that the power could be applied only for their benefit.

The possibility that the races power, as extended to Aboriginal peoples, might be applied to their detriment was raised in the High Court *Hindmarsh Island Bridge Case* in 1998.

The Commonwealth argued in the case that there are no limits to the races power: that is, provided that the law affixes a consequence based upon race, it is not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Commonwealth Solicitor-General, Gavan Griffith, suggested that the races power 'is infused with a power of adverse operation'. He acknowledged 'the direct racist content of this provision' in the sense of 'a capacity for adverse operation'. The following exchange then occurred:

> Kirby J: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary … or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.
>
> Griffith QC: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.

Of course, without a national Bill of Rights or express protection from racial discrimination, there was no such over-arching reason.

The overall effect of the judgments was inconclusive. The Court split 2:2 on the scope of the races power, with a further two other judges not deciding. The Court thus left open the possibility that the Commonwealth still possesses the power to enact racially discriminatory laws.

The ongoing recognition of racial discrimination in Australia's Constitution and the fact the concepts of race remain embedded in our Constitution has again produced a movement for constitutional change.

Both of Australia's major parties support recognising Aboriginal peoples in the Constitution, and removing references to race from the document.

While a referendum to bring these changes about has been put off for some years, grassroots activism for change continues to build.

Changing the Constitution

In our book *People Power: The History and Future of the Referendum in Australia*, David Hume and I examine all of Australia's 44 referendums. We ask why so many have failed, and what needs to be done to achieve success?

We find that Australia's poor referendum record reflects the fact that our political leaders make the same mistakes time and time again. Rather than learning from the last failure, they tend to simply follow the same flawed path.

The upside of this is that if these mistakes are recognised and avoided, there are realistic prospects that the Australian people will vote Yes to the right proposal.

One of the main problems is that referendums are usually approached in an ad hoc, one-off way. Australia has never put in place the long-term machinery to identify and refine the right proposals for reform, and to build popular support for change. Instead, referendums tend to emerge somewhat randomly out of the hurly-burly of daily politics and, not surprisingly, then founder.

Putting referendums on a stronger foundation could start with the simple act of updating the legislation that establishes how referendums are run. These rules are set out in the *Referendum (Machinery Provisions) Act 1984* (Cth). That law was adopted in 1912, and has changed little since.

It was written at a time when voting was not compulsory, Australia's population was far smaller and far less diverse, and the print media and public speeches were the dominant modes of communication. The system is showing its age and is not suited to contemporary Australia. The law does not even permit voters to receive information about a referendum via electronic means. It must be posted to them.

To modernise Australia's referendum process, the Act should be changed to:

- abolish restrictions on expenditure by the Commonwealth Government;
- rethink the official Yes/No pamphlet, by which the Electoral Commissioner must send each elector a pamphlet showing the proposed amendment to the Constitution, with arguments 'for' and 'against' the proposal of not more than 2,000 words each, authorised by members of Parliament on each side of the debate; and
- continue the Yes and No committees from the 1999 referendum by which the cases 'for' and 'against' were championed by two opposed committees funded by the Commonwealth.

These changes are reflected in the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs made in 2009 in its inquiry into the holding of referendums. They have yet to be implemented.

In addition, we need to recognise that tens of millions of dollars of taxpayers' money are being wasted on inadequately conceived and poorly run proposals. Rather than wasting public funds and energy in this way, we should invest funds earlier in the process to generate better ideas more likely to attract popular support. Just as we have bodies like the Productivity Commission to help identify and refine economic reforms, so too do we need such institutions in the constitutional area.

In particular, I would like to see Australia adopt a system whereby:

- A small, ongoing Constitutional Review Commission is charged with reviewing the Constitution, generating proposals for constitutional reform, consulting with the public on draft proposals and recommending them to Parliament.
- The recommendations of the Commission are fed into a regular, popular Constitutional Convention, convened once each decade or 'half-generation'. It should consider the

> recommendations of the Commission as well as proposals put to it by the federal Parliament, a majority of the States or by petition of a large number of Australians. The Convention should debate reform ideas and recommend proposals to the federal Parliament for submission to a referendum.

These changes would improve how Australia goes about the process of changing its Constitution.

Even with this, a successful referendum will still be a major challenge, and will require the conviction and persistence of Parkes. It must also be based upon the following principles distilled from Australia's long referendum record:

1 Bipartisanship

Bipartisan support has proven to be essential to referendum success. Referendums need support from the major parties at the Commonwealth level. They also need broad support from the major parties at the State level. The history of referendums in Australia provides many examples of proposals defeated by committed opposition from a major party at either level.

This has been a particular feature of the referendums put by the Australian Labor Party, which has lost 24 out of its 25 referendum attempts. Only its one successful proposal, put in 1946, had Opposition support.

2 Popular ownership

Just as deadly as partisan opposition is to constitutional reform is the perception that a reform idea is a 'politicians' proposal'. From the 1967 nexus proposal, which was felled by the cry of 'no more politicians', to the Republic referendum, which was killed off by the claim that it was the 'politicians' republic', Australians have consistently voted No when they believe a proposal is motivated by politicians' self-interest.

The design of Australia's reform process exacerbates this problem. Politicians, and only politicians, can initiate constitutional reform through the Federal Parliament. This renders every referendum proposal at risk of being perceived as self-serving.

3 Popular education

Surveys of the Australian public show a disturbing lack of knowledge about the Constitution and Australian government. Rather than being engaged and active citizens, many Australians know little of even the most basic aspects of government. This is often a reflection of the fact that disengaged citizens tend to have less knowledge about their system of government and the reform being proposed.

The problem has been demonstrated over many years. For example, a 1987 survey for the Constitutional Commission found that almost half the population did not realise Australia had a written Constitution.

These problems can be telling during a referendum campaign. A lack of knowledge, or false knowledge, on the part of the voter, can translate into a misunderstanding of a proposal, a potential to be manipulated by the Yes or No cases and even an unwillingness to consider change on the basis that 'don't know, vote No' is the best policy. Overall, the record shows that when voters do not understand or have no opinion on a proposal, they tend to vote No.

4 A sound and sensible proposal

As important as it is to get the process of generating proposals right, it is equally important to get the proposals themselves right. Changes to the Constitution must be drafted to last 50 or 100 years. Just as we are living with the compromises and values of Parkes' time, so might generations to come have to live with ours.

Conclusion

Australia needs to recapture Parkes' vision for achieving social justice through constitutional reform. Our federal system has a habit of frustrating such goals, or of wasting enough money to make them difficult to achieve. This needs to change.

We also aspire to be a country that treats people fairly and equally. Yet we still have a Constitution that expressly recognises that people can be denied the vote or subject to different treatment because of their race. It is hard to describe us as a free and tolerant democracy when this possibility remains.

Australia's long record of failed attempts at constitutional reform does not mean that winning such referendums is 'mission impossible'. Instead, it shows that we should expect a referendum to fail whenever our major political parties disagree, or when poor management means that the Australian people feel left out or confused as to what is being changed. People will also vote No to a proposal that is dangerous or has been poorly thought out.

We need to recognise this if we are to overcome the current political aversion to changing Australia's Constitution.

Indeed, my own view is that constitutional change in the name of social justice can, and must, be brought about.