DOES TRUE RECONCILIATION REQUIRE A TREATY?

by George Williams

INTRODUCTION

Treaties are accepted around the world as the means of reaching a settlement between Indigenous peoples and those who have come to settle their lands.[1] New Zealand, for example, has the *Te Tiriti o Waitangi* (the Treaty of Waitangi), an agreement signed in 1840 between the British Crown and over 500 Maori chiefs, while Canada and the United States have hundreds of treaties dating back as far as the 1600s.

In Canada, its national Constitution grants strong protection to treaties. Section 35(1) states that: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed', while ('for greater certainty') s 35(3) stipulates that "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.'

Section 35(3) reflects the fact that new treaties are still being made in Canada. For example, after a 25-year process, the Nisga'a Agreement came into effect in 2000. It involved a substantial cash settlement (C$190 million) and established the Nisga'a Lisims Government, which was vested with over 1900 square kilometres of land and entitlements to fish stocks and wildlife harvests.

Australia stands apart. It is now the only Commonwealth nation that does not have a treaty with its Indigenous peoples. It has never entered into negotiations with Aboriginal and Torres Strait Islander peoples about the taking of their lands or their place in the new nation.

THE *CONSTITUTION*

Rather than Australia being built on the idea of a partnership with Aboriginal people, its laws have sought to exclude and discriminate against them. This is reflected in the text of the *Australian Constitution*, which in 1901 created the Australian nation.

That document was drafted at two conventions held in the 1890s. Aboriginal people were not represented at these conventions, nor were they consulted in the drafting of the *Constitution*. Indeed, they were viewed by the drafters as a 'dying race', and the Australian legal system was premised on the idea that they had no long-term future in the Australian nation. Until the *Mabo* case in 1992,[2] this was reflected in the idea that Australia was *terra nullius*, or no man's land, when white settlers arrived in 1788.

Australia stands apart. It is now the only Commonwealth nation that does not have a treaty with its Indigenous peoples.

It is no surprise then that the *Australian Constitution* was drafted to deny Aboriginal people their rights and their voice, even in their own affairs. Hence:

- The preamble, or opening words to the British law that enacted the *Constitution*,[3] set out the principles on which the *Constitution* is based and the fact that it was supported by the people of the colonies. The preamble makes no mention of Australia's first nations. The words give the impression that the history of the Australian continent began with white settlement in 1788.
- Section 25 recognised that any state could prevent people from voting because of their race. Where a state does so, the section reduces the state's 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', and was inserted, in the words of our first Prime Minister, Sir Edmund Barton, to allow the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[4]
- 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'.

Some of these things were fixed with the 1967 referendum. It:

- Removed the prohibition on the Commonwealth making laws for Aboriginal peoples.
- Deleted the prohibition in section 127 on the counting of Aboriginal peoples.

On the other hand, the referendum did not change the preamble or section 25, or alter the races power (as extended to Aboriginal peoples) to make it clear that it can only be used to pass beneficial laws. As a result, the *Constitution* still recognises that people can be discriminated against because of their race.[5] It may be the only *Constitution* in the world that now permits this.

The *Constitution* also treats Aboriginal and Torres Strait Islander peoples as if they do not exist. They are not mentioned anywhere in the *Constitution*, and so no mention is made of their language and culture or of their occupation and prior ownership of the continent and its islands.

At the heart of the idea is the notion that a place in the Australian nation cannot be forced upon Aboriginal people. It needs to be discussed and negotiated through a process based upon mutual respect.

A TREATY?

Given this history, it should come as no surprise that the settlers who came to this continent never entered into one or more treaties with Aboriginal peoples.

The question today is how to end this pattern of exclusion and discrimination. Constitutional change is certainly part of the answer,[6] but so is a treaty. These are separate debates, but they represent two things that both need to be done.

The idea of a treaty goes back many years. The failure to enter into a treaty was lamented in the early days of the Australian colonies. For example, the Governor of Van Diemen's Land, George Arthur, presided over a period of great conflict known as the Black War and later remarked in 1832 that it was 'a fatal error…that a treaty was not entered into with the' Aboriginal people of that island.[7]

In more recent times, a call for a treaty was made at the Corroboree 2000 convention, and the Council for Aboriginal Reconciliation identified a treaty as an aspect of the unfinished business of the reconciliation process. It recommended:

> That the Commonwealth Parliament enact legislation…to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.[8]

By a treaty, I mean an agreement between governments and Aboriginal peoples. Such an agreement could involve three things:

- A starting point of acknowledgment
- A process of negotiation
- Outcomes in the form of rights, obligations and opportunities.[9]

A treaty about such matters could recognise the history and prior occupation of Aboriginal peoples of this continent, as well as their long-standing grievances. It could also be a means of negotiating redress for those grievances and of helping to establish a path forward based upon mutual goals, rather than ones imposed upon Aboriginal people.

At the heart of the idea is the notion that a place in the Australian nation cannot be forced upon Aboriginal people. It needs to be discussed and negotiated through a process based upon mutual respect that recognises the sovereignty of Aboriginal peoples.

By contrast, what we tend to see today, at best, is only consultation with Aboriginal people. This is worthwhile, but it will not be enough.

The international evidence is compelling in showing that listening to Indigenous peoples is by itself insufficient to bring about real change. Change must be built on the genuine partnership between Indigenous peoples and governments that can arise through the making of a treaty.

This is the most important finding of The Harvard Project on American Indian Economic Development. It has run hundreds of research studies over more than two decades on what does and does not work in Native American communities. One of its key reach findings is that 'sovereignty matters'.[10]

The evidence in the United States and Australia shows time and time again that redressing disadvantage over the longer term depends upon Indigenous people having the power to make decisions that affect them. They must be responsible for the programs designed to meet their needs, and must be accountable for the successes and failures that follow.

This is not only necessary; it is the best and most efficient way forward. The Harvard Project has found that:

> When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.[11]

Positive change in Australia depends upon Aboriginal people having more control over their own lives. Improvements in education, employment and quality of life must be achieved by policies and programs owned and developed by the people affected.

Success cannot be imposed from Canberra. The hard work must be done by Aboriginal people. The problem in Australia is that we lack the laws and institutions necessary for Aboriginal people to make such decisions.

Unlike nations such as New Zealand, Canada and the United States, agreements such as treaties have not been reached that recognise a measure of Indigenous sovereignty. Instead, in Australia, decisions have often been imposed on Aboriginal people by parliaments and governments lacking even a single Indigenous member.

CONCLUSION

A negotiated treaty with Aboriginal people could mark an important break from a system that for many decades has disregarded the views of Aboriginal people, and reinforced their feelings of powerlessness. A treaty could give rise to stronger, and more capable, institutions of Aboriginal governance.

This is not to suggest there is any quick and easy fix. It is simply to say that a treaty is one piece of the puzzle. It is something that needs to be done both to achieve reconciliation and underpin the long-term prosperity of Aboriginal and Torres Strait Islander peoples.

Prime Minister Tony Abbott spoke about such matters in Parliament last year in a speech in support of the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (Cth). He did not adopt the idea of a treaty, but spoke in a supportive manner of the idea. He said:

> Australia is a blessed country. Our climate, our land, our people, our institutions rightly make us the envy of the earth, except for one thing – we have never fully made peace with the First Australians. This is the stain on our soul that Prime Minister Keating so movingly evoked at Redfern 21 years ago. We have to acknowledge that pre-1788 this land was as Aboriginal then as it is Australian now. Until we have acknowledged that we will be an incomplete nation and a torn people. We only have to look across the Tasman to see how it could have been done so much better. Thanks to the Treaty of Waitangi in New Zealand two peoples became one nation.[12]

Tony Abbott got it right. Now is the time to take the steps that would finally unite us as one people. Other countries have done this, however imperfectly. They, unlike Australia, have recognised that true reconciliation requires a treaty.

George Williams AO is the Anthony Mason Professor, a Scientia Professor and the Foundation Director of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. *This is based upon a speech given at an Intelligence Squared Debate hosted by The Wheeler Centre on 12 November 2013***.**

1 See generally Sean Brennan et al, *Treaty* (Federation Press, 2005).
2 *Mabo v Queensland* (*No 2*) (1992) 175 CLR 1.
3 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.
4 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 228–9 (Edmund Barton).
5 Expert Panel on the Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Commonwealth of Australia, 2012) 38.
6 See also George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the *Constitution* Should Say and How the Referendum Can be Won' (2011) 5 *Land, Rights, Laws: Issues of Native Title* 1.
7 Quoted in Robert Manne (ed), *Whitewash: On Ketih Windschuttle's Fabrication of Aboriginal History* (2003) 115.
8 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (Commonwealth of Australia, 2000) 106.
9 These ideas are developed in Brennan et al, above n 1, ch 1.
10 The Harvard Project on American Indian Economic Development, *Overview* <http://hpaied.org/about-hpaied/overview>.
11 Ibid.
12 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2013, 1123.