



Chapter 12: Law as a Determinant of Indigenous Health—Some Constitutional Issues

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Introduction

It has long been recognised that illness and its problems are rarely randomly distributed across communities—in so many cases they are skewed towards the disadvantaged. The poorest in our community, those with the least opportunities, are also our sickest. Thus it is crucial that we recognise and take account of how the social dimension influences patterns of ill health if we are to address this problem in any useful way. Indigenous health presents a particularly marked pattern of disadvantage, and the social contexts have become the principal way of explaining that disadvantage. Indeed, the comparison between Indigenous and non-Indigenous health in Australia is so stark that the social context is the most meaningful way of explaining those differences.

Those social contexts are defined and shaped by a number of factors including law, which can play a significant role in influencing health outcomes. In the case of Indigenous health outcomes, the law has a complex and longstanding role. Sometimes it has supported Indigenous communities, but often it has legitimated their social disadvantage and authorised and sustained policies, such as the separation of families, or allowed, and even required, unequal treatment and discrimination. In Australia our most fundamental law is the Constitution, which is the foundation of the Australian Commonwealth and which sets the scene for the relationships between citizens and their State. But how can the Australian Constitution influence Indigenous health? Potentially it can: for example, it is the case that Indigenous health in other broadly comparable countries, New Zealand, Canada and the United States of America (USA), though bad, is not as bad as in Australia. It is also the case that those countries have constitutional arrangements that are different to Australia's insofar as they acknowledge and take account of a prior Indigenous relationship with the land. Potentially these constitutional differences might offer one explanation for the health differences. We might speculate that where constitutional arrangements reflect and support Indigenous rights and interests, health outcomes potentially might be better. With this possibility in mind, the relationship between Indigenous Australians, the Constitution and possibilities for constitutional reform are examined, especially in the context of rights.

Indigenous Australians were constitutionally 'invisible' until 1967

The Constitution was drafted against the beliefs that traditional Indigenous communities were dying out. One of its founders, Alfred Deakin, was an idealist—a man concerned about safety in factories, a man who wanted to eliminate the ill-use of animals. He also approached the business of Federation with lofty visions and high morals. Yet in 1905, he wrote this about Indigenous Australians:

These rights of property in land and stock about which the earliest [European] settlers are of necessity most keen among themselves are incomprehensible... to [an Indigenous] race whose ideas upon such questions are of the rudest and most archaic (Deakin 1968:147).

His comment demonstrates the gulf between Europeans and Indigenous Australians at the time.

When it came into being, the Constitution made Indigenous Australians invisible and specifically prevented the Commonwealth from making laws that might apply to them. Section 127 read, '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' (Atwood & Marcus 1997:2).¹ Section 51 (xxvi) gave the Commonwealth power to make laws with respect to 'the people of any other race other than the aboriginal race in any State for whom it is deemed necessary to make special laws' (Atwood & Marcus 1997:2).²

Both these provisions were changed by popular referendum in 1967. Section 127 was repealed and the phrase 'other than the aboriginal race' was deleted from section 51(xxvi).

Since that date the Commonwealth has used its power to pass a range of laws relevant to Indigenous issues, including funding, protecting heritage, Native Title, and establishing the now defunct Aboriginal and Torres Strait Islander Commission (ATSIC).³ Mainly these have been for beneficial purposes, advancing Indigenous interests, though there is no reason why the Commonwealth could not use the power to make laws that are not beneficial to Indigenous Australians. Arguably, the 1998 amendments (which introduced the '10 Point Plan') to the *Native Title Act 1993* were not beneficial, as the essential effect was to make Native Title more difficult to claim. Neither was the act that abolished ATSIC in 2005. In the *Kartinyeri* case the High Court was split on the point: two judges argued that there was no reason why detrimental law could not be made by the Commonwealth, one judge argued that detrimental law could not be made, and a fourth judge offered a test of proportionality against which a Commonwealth law could be tested.⁴ It is most likely that a future court will allow detrimental legislation under the power, with the only limit being that the law could not be a 'manifest abuse' of power. What that might mean in practice remains unclear.

The scope of the race power is thus an issue that needs further consideration, particularly in light of the *Kartinyeri* case.

The preamble and a case for change

Preambles are the lead-in to constitutions. Often expressed in grand and memorable language, they set the tone and express the values, although they may not be followed through in the rest of the document or in practice. Mostly a preamble has a symbolic function, unless courts decide

¹ This 'exclusion from counting' related to the allocation of parliamentary seats and the distribution of funds to the States, both measured by the States' populations.

² It is often believed that the 1967 amendment allowed Indigenous Australians to vote. The changes did not address this issue.

³ ATSIC was a representative authority of appointed and elected members established by Commonwealth legislation in 1989, with funding and administrative functions. It was abolished in 2005.

⁴ *Kartinyeri v. Commonwealth* (1998) 195 CLR 337: the judgments of Gummow and Haines JJ, Kirby J and Gaudron J respectively.

that they will use it as an aid to interpretation. The preamble currently in the Australian Constitution is merely a bland statement of intent to federate.⁵

There is an argument that a preamble that properly reflects the past histories and seeks to reconcile the future relations between Indigenous and other Australians should replace the original version. A model that can provide guidance is the 1999 Draft Declaration for Reconciliation of the Council for Aboriginal Reconciliation. It reads as follows:

Speaking with one voice, we the people of Australia, of many origins as we are, make a commitment to go on together recognising the gift of one another's presence.

We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of traditional lands and waters.

We respect and recognise continuing customary laws, beliefs and traditions.

And through the land and its first peoples, we may taste this spirituality and rejoice in its grandeur.

We acknowledge this land was colonised without the consent of the original inhabitants.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

And so we take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.

Our new journey then begins. We must learn our shared history, walk together and grow together to enrich our understanding.

We desire a future where all Australians enjoy equal rights and share opportunities and responsibilities according to their aspirations.

And so, we pledge ourselves to stop injustice, address disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples to determine their own destinies.

Therefore, we stand proud as a united Australia that respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all (Council for Aboriginal Reconciliation 1999).

The 'republic' referendum in 1999 also contained a proposal for a new preamble, which included the following words: 'honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country' (AEC 1999:32). Along with the republic option, the proposed preamble was defeated in the referendum.

Would a new preamble incorporating language similar to the above draft declaration be significant? Would it have symbolic value, as an often repeated and potential rallying point?⁶ More particularly, would an accurate and prominent statement of the past and a valuing of the Indigenous contribution help to right the wrongly held assumptions of Deakin and so many others in 1901? Those who argue for a new preamble would say that as our most important and distilled national statement, and also as the lead-in to our most important document, a preamble has huge symbolic value and that an honest description of the realities of European settlement and its impact on Indigenous Australia should be made for that reason alone.

⁵ 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: And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: *Commonwealth of Australia Constitution Act 1900* (63 & 64 Victoria chapter 12). Available at <http://www.aph.gov.au/senate/general/constitution/>.

⁶ For example, the well-known commencement to the USA Declaration of Independence: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.'

A case for ‘positive’ rights

Among Western democracies, Australia is most unusual in not having a Bill of Rights, a comprehensive statement of the rights of citizens. Typically these are rights to privacy, to associate with other citizens, the right to free speech and rights to due process in the courts. The Australian Constitution contains little by way of rights. There is a tentative right to religious freedom and a right to be treated as a national citizen. Property rights are also protected to some extent. Beyond this the High Court has, since 1992, implied some rights into the Constitution, but these are limited and controversial and most significantly apply to ‘political’ communication as a necessary component of the democratic process.⁷ For Indigenous people, there are no rights in areas important to them—to equal treatment, to free association and to retain their culture.⁸

However, it should also be said that there is no guarantee that these rights, even if they had been in place during the twentieth century, would have altered the course of Indigenous policy. They are never taken as absolutes and many of the policies were paternalistic, believed by their creators to be in keeping with the good social policy of their day. Furthermore, it would also have been the case that most Indigenous Australians would not have been in a position to enforce these rights even if they had them.

Rights involve complex analysis, with individual rights sometimes conflicting and a particular right never interpreted absolutely. However, we suggest that a community with these rights may be in a better position to protect its citizens from arbitrary procedures than a community without them.

But there is also another set of rights that should be considered. These are positive rights, which entitle citizens to health services or to a clean environment, as opposed to rights that protect them from an overbearing State.

International documents do recognise these kinds of rights. Indeed, they are embedded in some of our most significant documents. For example, article 25 of the Universal Declaration of Human Rights (1948)⁹ provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The International Covenant on Economic, Social and Cultural Rights (1966)¹⁰ also expresses a right to health in article 12 (HRI n.d.).

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.¹¹

⁷ *Lange v. ABC* (1997) 145 ALR 96. See also *Coleman v. Power* (2004) 209 ALR 182 and *Mulholland v. Australian Electoral Commission* (2004) 209 ALR 582. A useful discussion of the law in this area is to be found in Arcioni 2005.

⁸ *Kruger v. Commonwealth* (1997) 146 ALR 126.

⁹ Adopted and proclaimed by the United Nations General Assembly resolution 217 A (III) of 10 December 1948. Available at <http://www.universalrights.net/main/declarat.htm>.

¹⁰ Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200 A (XXI) of 16 December 1966. Available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>.

¹¹ There are also regional statements of rights. The *Charter of Fundamental Rights of the European Union* (2000/C 364/01) provides for the following in the preamble: ‘Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.’ Some relevant substantive provisions are Article 3 Right to the integrity of the person; Article 35 Health care; Article 37 Environmental protection.

These declarations do not imply binding obligations on signatory states to pass legislation providing these rights, and citizens cannot demand them in the clear absence of legislation providing the right.¹² The Constitution of the World Health Organization (WHO) (1946) also provides an underpinning for public health policy expressed in the language of rights. The Constitution's preamble makes the point that 'the enjoyment of the highest attainable standard of health' is 'one of the fundamental rights of every human being... The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States'.

This document is particularly significant for health policy in Australia. In 1947 the Commonwealth Parliament 'approved' Australia becoming a member of the WHO by passing a short act (*World Health Organization Act 1947* (Cth)). This act allowed the making of regulations necessary for carrying out and giving effect to the Constitution of WHO and the actions taken under it. However, nothing significant appears to have followed from this enactment, and in their actions Australian governments do not seem especially influenced by the terms of the WHO Constitution.

Some jurisdictions have expressed rights in a more significant and binding way by incorporating these kinds of positive rights into their constitutions. One example is the South African Constitution which provides for the following rights, particularly significant to Indigenous communities in Australia.

Section 24 Environment

Everyone has the right—

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 27 Health care, food, water and social security

- (1) Everyone has the right to have access to—
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment (Constitution of the Republic of South Africa 1996).

Constitutional rights such as these should direct government action in particular ways, but, as section 27(2) (above) illustrates, will not demand that they be given paramount attention at all costs. In relation to the right to an environment that is not harmful, the South African Supreme Court has required that the government authority, in considering whether or not to approve a mining application, accord 'appropriate recognition' to the right:

¹² In the *Minister of Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, it was said that, 'a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations' (Mason & Deane:286). But in cases of ambiguity the court was prepared to adopt a construction that favoured the international obligations. The case was controversial for this last point and is of limited effective significance in this area, especially as the decision may not be followed by a later High Court.

*The enormous damage which mining could do to the environment and ecological systems militated in favour of an application of the rule. When application was made for the issuing of a mining licence, it was necessary to ensure that development which met present needs would take place without compromising the ability of future generations to meet their own needs. The Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication required that environmental considerations be accorded appropriate recognition and respect in the administrative process.*¹³

In another case, relating to the constitutional right to housing, the Supreme Court concluded that:

*neither section 26¹⁴ nor section 28¹⁵ [of the South African Constitution] entitled the respondents to claim shelter or housing immediately upon demand... However, section 26 did oblige the State to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations.*¹⁶

Overall, the South African experience indicates the importance of positive rights, since these are triggers for achieving adequate standards of environmental health and health care. If they are pursued and actively enforced by courts, positive rights will prompt the environmental and social changes that so often are the causes of ill health within populations. They might provide the central pillar of public health law and the source from which many reforms might come.¹⁷

How might positive rights be relevant to Indigenous communities in Australia? We are a wealthy country and have the resources to provide a good level of healthcare for all of our citizens. More particularly, the deficits in Indigenous health are so great that a 'rights-based' approach would

demand more be spent on Indigenous health. Indeed, there is evidence that the current rate of spending is not great, particularly in light of the size of the problem. In 2002 the South Australian Coroner reported that the levels of government spending in the Anangu Pitjantjatjara lands amounted to 'around \$15000 per capita' when Community Development Employment Projects and Centrelink payments were discounted: he concluded that this 'does not seem a particularly high figure', particularly in a community with as many problems as this one (South Australian Coroner 2002:para 9.4). A constitutional right to health would provide a forum for an applicant, representing an Indigenous community, to take the matter to court and to seek an order that his or her constitutional right was not being met. In this model resources would no longer be the exclusive preserve of government policy makers, but would become a public issue, a right that individuals and communities could pursue in the courts.

Regional Indigenous autonomy

The question of Indigenous autonomy within regions of Australia is particularly divisive and unclear. It can be pictured as 'separate development' in the apartheid sense or as the creation of another nation within Australia. In practice, autonomy can mean many things. For example, across Australia local governments all enjoy a measure of autonomy in the sense that they can make by-laws, exercise statutory powers, raise revenue and regulate the use of the public lands vested in them. But they exercise these powers subject to the States' local government acts and can be disbanded or their powers changed. Furthermore, local councils and their inhabitants are not 'sovereign' (in the sense of being independent entities), since the general laws of the State and the Commonwealth continue to apply within the areas.

¹³ *Director, Mineral Development, Gauteng Region and Another v. Save the Vaal Environment and Others* Supreme Court of Appeal 1999 (8) BCLR 845 (SCA).

¹⁴ Section 26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹⁵ Section 28 Children

(1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

¹⁶ *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (Constitutional Court).

¹⁷ See the discussion in Gostin (2000:32–4) and commentary in Caldis (2002) and Loff (2002).

Indigenous autonomy may mean no more than the creation of local council-type entities and the vesting of certain powers (for example, to regulate the sale and possession of alcohol) in them. There are examples where this has happened, often as a consequence of land rights legislation, which vested a measure of local control over these lands.

Land rights and the creation of Indigenous community bodies as their managers have allowed some degree of Indigenous empowerment. The first is the ability of communities to regulate access to their lands and the resource use that occurs on them, notably mining. The second relates to their regulation of activities to do with the ongoing use of the land, such as possession of alcohol. Indeed, it is generally the case that land rights brings with it some acceptance of the rights of self-management, though the extent to which this can equate to the powers of local government varies. In South Australia the Aboriginal Lands Trust has a power to impose control over alcohol in Trust Lands, but it must have been proposed by the Indigenous communities on whose land it will apply.¹⁸ In Queensland the *Local Government (Aboriginal Lands) Act 1978* first created two communities as councils operating under the *Local Government Act 1993*. This was subsequently extended to other Aboriginal and Torres Strait Islander communities.¹⁹ This allows the communities to make by-laws in the range of public health activities that local councils administer (sanitation, housing and land-use controls). In Western Australia the *Aboriginal Communities Act 1979* also vests by-law making powers in areas that are brought under it.²⁰

It is important that local communities have adequate infrastructure to maintain a healthy population.

Some of the most dramatic and obvious failings in Indigenous health services relate to the lack of basic public health services, which were put in place in cities more than a hundred years ago and which were central in extending life expectancy and lowering infant mortality. Thus 'small scale' traditional public health issues relating to the effectiveness of community sanitary controls and local governance of public health are also

important and should be part of the autonomy debate. They might also be seen as part of the 'big picture' issues, as a component of a constitutional right to health.

In 2002 the National Public Health Partnership published a survey of public health laws relevant to remote Indigenous and Islander communities, and the following issues were said to be important (National Public Health Partnership 2002:5; see also chapter 13):

The lack of clarity in some jurisdictions as to the application of public health and related laws to remote communities and the responsibility for monitoring standards and granting of necessary approval, particularly where remote communities are on Crown land or land vested in instrumentalities of the Crown.

The lack of clarity as to the role of local government in relation to remote communities in some cases.

The role of remote area guidelines in filling gaps left by the laws, and their use as conditions of funding.

The opportunities being created by modernisation of public health laws to clarify the application of public health and related laws to remote communities.

The need for greater clarity with regard to the powers and responsibilities of Aboriginal Community Councils in relation to local government type functions and maintaining public health standards, together with appropriate responses for these functions.

Addressing these issues and vesting powers to regulate public health issues is sensible and sits within the framework of autonomy, which, given its limited nature, will not sustain the accusations of 'separate development'. But its limited scope should also be acknowledged. The powers given to communities exist in State statutes and can be taken, amended or withdrawn as governments see fit and their parliaments then allow. The ease with which ATSIC could be disbanded by the coalition government in 2005 illustrates this point.

¹⁸ *Aboriginal Lands Trust Act 1996* (SA): see the regulation-making powers, section 21.

¹⁹ The two original communities were the Shires of Arakun and Mornington (section 9). More recently, see the *Local Government (Community Government Areas) Act 2004*. See also the *Community Services (Aborigines) Act 1984*, which also dealt with a number of non-local government management issues.

²⁰ Section 7, by-laws, which sets out a range of areas in which they can be made, including public health and safety. For a general survey see Way [undated].

More particularly, any measure of self-government or autonomy could only happen effectively if there are the skills and resources to make it happen. Autonomy should not be accompanied by reduced services or permit the creation of a judicial vacuum. The South Australian Coroner made the point about the need for effective policing in remote communities where violence and crime is often a serious and ongoing issue, marring the lives of many and corroding the fabric of the community. Yet policing is erratic and responses delayed on account of the distance from the nearest police station. In a call for the provision of local police services, he commented that the 'issue of the adequacy of policing goes beyond mere rhetoric about empowering local communities. There are real human rights issues involved which are not at present being addressed by [the SA police]' (South Australian Coroner 2002:para 11.5).

Autonomy as a constitutional arrangement—treaty arrangements

If Indigenous autonomy is to be taken seriously as an issue, it may need to be preceded by more fundamental change that establishes a permanent and fixed relationship between Indigenous Australians and Australians more generally. Much thought has been directed to these ideas and one proposal, considered by the Senate Constitutional and Legal Affairs Committee in 1981, involved an amendment to the Constitution, adding a new section 105B, to allow for specific agreement with respect to the States and to make provision for treaties.

The key element of this proposal is that the Commonwealth would be empowered to make a treaty with Indigenous persons or bodies recognised as representatives of Indigenous peoples relating to 'the status and rights' of Indigenous persons. The scope of these agreements would include restoring or compensating for land lost as a result of settlement; political status and matters of self-government and sovereignty; health and education; cultural and heritage matters; and the exercise of Indigenous laws. The proposal would then go on to provide that 'the [Commonwealth] parliament shall have the power to make laws for the implementation by the parties of such treaty or treaties' and that the laws passed under the section would be binding

on the Commonwealth and States and Territories. Section 105B would itself be protected from amendment or repeal by a special requirement (S105B(6)) that it receive two-thirds majority support of Aboriginal and Torres Strait Islander peoples, and there is a treaty in place that permits such amendment or repeal and that the terms of the treaty are complied with (Dodson 2003:37).

Such a proposal, were it ever to be implemented, has the obvious strength of 'constitutionalising' the agreements between Indigenous Australians and the wider Australian community through the federal government. The programs and the governance arrangements that emerge from this process are protected from being overturned by the unilateral action of the government or through the parliamentary process. For example, if ATSIC was to be established under such an arrangement it could not be abolished without the agreement of Indigenous Australians. Implicit in this provision is the recognition that Indigenous Australia warrants a separate legal structure and, once created and agreed upon, the measure of independent constitutional legitimacy that section 105B envisages.

However, implementing such a provision requires two things. First, it requires a federal government willing to see Indigenous sovereignty as sufficiently important to warrant limiting its own constitutional sovereignty. The issue has been around since at least 1981 and there is no indication that the current Howard Coalition government would be remotely interested in furthering the proposal. Indeed, recent developments imply the opposite. Second, it requires the Australian electorate to support the proposal to the extent necessary to obtain a majority of States and a majority of electors overall (as required by section 128 of the Constitution). While the 1967 amendment did receive near-overwhelming support, it is more than likely that the section 105B proposal would be painted by its opponents as divisive, creating 'separate Australias', and thus generate a substantial level of opposition, as well as support. The history of referendums in Australia demonstrates that they are generally not successful and that a proposal that does not have the support of all major parties is most unlikely to pass.

The likelihood of a constitutional provision like section 105B coming into operation is, at this time, extremely remote.

Exploring the value of constitutional reforms—here and overseas

These constitutional or 'big picture' reforms might be undertaken for a number of reasons, one being that such changes more fairly and more properly provide a recognition of the past and a way forward. An argument grounded in fairness and a desire for reconciliation would alone make the argument for the constitutional changes canvassed above. But there is another reason to consider them. Structural changes may improve health and welfare outcomes. While the causes of Indigenous ill health are many, it is often said that dispossession and a failure to repair the legacy of colonisation is a substantial cause and that reforms to Indigenous health must also address these structural issues. This view needs to be considered carefully; in a sense our arguments for reform and change should be an application of 'evidence-based law'. For example, it could be said that 'land rights is the issue'. But if that was the case we would expect, after some thirty years of land rights, the health status of Indigenous Australians in the Northern Territory to be far better than it is. Similarly, after nearly twenty-five years of land rights in South Australia, we might also expect the social indicators for people in the Pitjantjatjara lands, a large area in the north-west of the State, to be far more positive than they currently are.

One way of assessing whether constitutional differences are relevant to health and welfare outcomes—and if they are relevant, why they are relevant—is to compare the health of Indigenous Australians with Indigenous populations in other parts of the world whose experiences of dispossession are broadly similar but whose constitutional arrangements are different. This is a promising field of inquiry, and comparative research is currently being undertaken, which may lead to identification of some important issues (see NHMRC 2002).

The work in Australia on Indigenous ill health is mirrored elsewhere and it is recognised that the health of Indigenous peoples is generally worse than that of the 'dominant settler' population. For example,

it is reported that in New Zealand, 'Maori die on average 10 years younger than people of Anglo-European descent' (McPherson *et al.* 2003:443). In the USA it has been reported that, 'a persistent gap in health status remains between American Indians and non-Hispanic whites' (Anon 2004:935; see also Anon 2000:1415). In Canada, life expectancy for Indigenous peoples is 7.4 years less for males and 5.2 years less for females (Government of Canada 2000). There is also an over-representation for a range of disease. In a 2003 editorial, the *British Medical Journal* outlined the general poor health status of Indigenous peoples. In exploring this, it identified a first group of historical health risks that the settlers introduced (for example, measles, smallpox, tuberculosis and so on) and a second, contemporary group of risks from 'lifestyle diseases' (for example, injury, alcohol-related problems, obesity and so on). In identifying causes, the editorial focused on a range of issues, notably a group it called the 'long-distance' issues of 'government policies and constitutional standing' (Durie 2003:510). How might we 'test' Indigenous health outcomes against the idea that these long-distance issues do matter?

If we make Canada the point of comparison, it is the case that Indigenous health is improving. Taking life expectancy as an example, there has been an *improvement* of some 13 per cent in Indigenous Canadian health between 1980 and 2002. More significantly, Indigenous health in Canada is substantially better than in Australia. The following table of life expectancies for Indigenous people was compiled from Australian Bureau of Statistics and equivalent overseas data:

Australian Aboriginals (1997–99)	56	63
Maoris (1997–99)	68	73
Canada Aboriginals (1990)	67	74
US American Indian (1999)	69	78

Source: Australian College of Health Services Executives 2002

The difference in life expectancies between Indigenous and non-Indigenous peoples also indicates the difference is greatest in Australia. It has been estimated to be 19–21 years in Australia, 9–10 years in New Zealand, 5–7 years in Canada and 4–5 years in United States' (Ring & Brown 2003:404; see also New Zealand Ministry of Health 2003).

There may be many issues that explain these differences: different social structures before and after colonisation, different opportunities and different physical environments. But there are some important constitutional differences that may also be significant and are worth exploring as a potential basis for the different health outcomes.

The history of colonisation in both the USA and in Canada suggests that Indigenous rights were taken more seriously than they were in Australia. The independence of Indian tribes in the USA was reflected in the United States Constitution (Article 1, S8), where the commerce power allows regulation of commerce 'with foreign nations, and among the several States and *with the Indian tribes*' (authors' italics). In the 1821 case of *Cherokee Nation v. Georgia*, Chief Justice Marshall referred to the various Indian tribes as 'domestic dependant nations'.²¹ While the Native American experience was not positive, with lands taken and communities dispossessed, the current position has been summarised as follows: 'US Indian Tribes exercise a wide variety of governmental powers. These powers extend well beyond the mere right to occupy reservation lands or enjoy subsistence hunting and fishing rights' (Myers 1998:3). It has also been said that:

[the] result of the legal relationships of tribes with the United States is that they continue to be ruled by their own laws. Today tribal governments exercise legislative, judicial and regulatory powers and it is clear that their authority is derived from their aboriginal sovereignty, not delegated from the federal government. Indian governments are rapidly expanding their operations to implement their police power through tribal courts, zoning ordinances, taxation bureaux, environmental controls, business and health regulation, and fisheries and water management codes (Getches et al. 1993, cited in Myers & Landau 1998:3).

McRae *et al.* add that under USA law, 'Indian treaties are accorded the same dignity as that given to treaties with foreign nations. United States courts have developed rules of interpretation which, in case of doubt, favour the Indians' (1997:148). But it is possible for later federal laws to overturn a treaty if it specifically intends to do so without reference to the parties to the treaty. It is this possibility that a new section 105B in the Australian Constitution would seek to prevent.

In Canada the constitutional arrangements also incorporate Indigenous Canadians. Native title was first recognised in 1889, arising from The Royal Proclamation of 1763. It was expanded in 1973, in *Calder v. Attorney General of British Columbia*, when the Supreme Court concluded that 'when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. That is what Indian title means.'²² Treaties are also recognised in Canada and continue under the title of 'comprehensive land claim settlements' (McRae *et al.*:148). They are recognised in the *Constitution Act 1982* by section 35(3), which includes these rights as treaties given constitutional protection. There is continuing activity in Canada in this area. An Inherent Right to Self Government policy commenced in 1995 and 'recognises that self-government is an inherent right held by Aboriginal people that... attracts constitutional protection' (Behrendt 2003:23). This policy allows for an ongoing reworking of old agreements, envisaging that a range of issues could come within the scope of self-government, including education, health, marriage, child welfare and cultural traditions. Further areas are negotiable, including environmental and resource management, while areas such as defence, substantive criminal law, and postal and shipping services fall outside the scope of self-government (Behrendt 2003:23,24).

Overall, we can see in the USA, Canada and New Zealand (where the Principles of the 1840 Treaty of Waitangi influence many current statutes and the decisions made under them)²³ constitutional arrangements that recognise the prior rights of Indigenous communities and vest some formal levels of constitutionally protected governance in those communities.

²¹ *Cherokee Nation v. Georgia* 30 US (5Pet)1, 17–20 (1821).

²² *Calder v. Attorney General of British Columbia* (1973) 34 DLR (3d) 145 cited in Myers and Landau (1998:4).

²³ Not discussed but see Myers and Landau (1998:5,6). It should also be noted that the status and the legal significance of the Treaty of Waitangi has been, and continues to be, the subject of much debate. See, for example, the discussion in Orange 1987.

Do these arrangements contribute to the fact that Indigenous health status is substantially better in those communities than it is in Australia, where, beyond some statutory provision of land rights and the limited potential to claim Native Title, nothing has happened?

There is value in comparative analysis: one study that considered this question was published in 2000. While tentative, and recognising that many issues might come into play, it could be argued that self-governance provides more resilient structures, which lead to better outcomes. The author concluded that the arrangements in Canada provide opportunities for better practice, for greater ownership and for empowerment 'at individual, community, regional and national levels' (Moran 2000).²⁴ The paper concluded that 'there should be a shift in existing attitudes, policy and programs in Australia away from implied assumptions of dependence, towards greater community control and economic empowerment' (Moran 2000).

We might speculate whether these opportunities, which seem to exist in the United States and Canada, and which may substantially explain the differences in health status, are more prevalent and more resilient *because they are grounded in a constitutional base* and are part of a tradition that has taken, and continues to take, the theory, if not always the practice, of Indigenous rights seriously. More investigation of this proposition needs to be undertaken, but it is a promising line of inquiry, emphasising the potential importance of the 'big picture', while seeing some useful links between the law and Indigenous health and welfare.

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²⁴ See also the work of Dr Dale Bramley, Waitemata District Health Board (New Zealand), and his conference paper at the Public Health Law Symposium (Bramley 2005).

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