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A practical, constitutional promise to do things with Aborigines, not to them

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Noel Pearson has said that in the process of reconciliation, after sorry should come a promise - a promise that the wrongs of the past will not be repeated.

Constitutions are where enduring promises are made.

Indigenous constitutional recognition is not just about symbolism. The conversation did not begin with John Howard's failed proposal for a new constitutional preamble in 1999 - though Howard's leadership was crucial in putting the issue on the national agenda.

The conversation started decades before, with indigenous leaders asking for practical reform to the way they are treated under the Constitution. It began with letters and petitions to kings and prime ministers, asking for representation in parliament, reformed institutions and constitutional protections of their rights.

In asking for these forms of practical constitutional recognition, indigenous advocates understood precisely the purpose and nature of Australia's Constitution.

The Constitution is primarily a rule book. It is a practical and pragmatic charter of government. It may not be the appropriate place for symbolic statements. But it is the place for rules.

The rules of entrenched constitutions are more binding than legislative rules. They are enduring rules to manage government behaviour over time; rules for intergenerational stability, justice, peace and prosperity.

Australia's constitutional rules are like intergenerational promises from the founders to the future. While the Constitution has worked well to protect the rights and freedoms of most Australians, it has not worked well to protect the rights and freedoms of indigenous Australians.

The story of breached promises is long. Captain James Cook on his exploration voyages carried secret royal instructions authorising him to take possession, but "with the consent of the natives". Cook declared possession of the east coast in 1770, without indigenous consent. In 1787, King George III further instructed Arthur Phillip "to open an intercourse with the -natives, and to conciliate their -affections, enjoining all our subjects to live in amity and kindness with them".

As the process of dispossession played out, this royal injunction went unheeded. The force and -violence of conquest cannot accurately be described as a relationship of "amity and kindness".

A similar observation applies to the establishment of the Constitution. Indigenous people were excluded from the constitutional conventions, so couldn't negotiate themselves a fair place in the constitutional compact.

There were no guarantees of equality, unlike in the US; no guarantees of representation, as the Maori have in New Zealand; no protections of distinct indigenous rights, as in Canada. There was no founding treaty.

In Australia, there are no constitutional clauses to which indigenous people could appeal to challenge unjust laws made about them.

Our Constitution provides the opposite: clauses stating that racial discrimination is allowed. Professor Greg Craven describes Australia's past discriminatory policies as "mercifully past malice". Indeed, the worst of it is in the past. Yet indigenous people still tell us that they feel excluded and discriminated against. I can understand why.

Policies have changed over time, but the fundamental constitutional dynamic has not. Government decisions about indigenous affairs are made often without genuine indigenous consultation. Prime Minister Malcolm Turnbull's promise, in his closing the gap speech, to "do things with indigenous people rather than to them" demonstrates good intentions.

But true reconciliation calls for a binding promise to conduct our relationship with indigenous peoples in a fairer way.

An obvious solution is to promise to treat everyone equally. An expert panel and joint select committee recommended a racial non-discrimination clause, but constit-utional conservatives opposed this proposal because it would transfer power to the High Court.

Through our engagement with conservatives, an alternative proposition emerged. Perhaps instead of empowering the High Court to decide what is in the interests of indigenous people through a racial non-discrimination clause, the Constitution could guarantee indigenous people themselves a fair say when parliament makes laws and policies about them.

The key promise could be political and procedural: a guarantee that indigenous people will have a non-binding voice in political decisions made about indigenous affairs - a practical, constitutional promise to do things with indigenous people, rather than to them.

It wouldn't give more power to the High Court. No laws could be struck down. It would uphold parliamentary supremacy. Such a -reform could give effect to longstanding indigenous aspirations for meaningful and practical recognition, while also upholding the Constitution.

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