Unfinished Business: Strategies and Lessons for Reform

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George Williams

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I. Introduction

The idea of a Treaty or Treaties between Indigenous peoples and the wider Australian community is again on the political agenda. It has been put there by bodies including ATSIC, with the elected chair of ATSIC, Mr Geoff Clark, restating the call for a Treaty at the Corroboree 2000 convention. The Council for Aboriginal Reconciliation also identified a Treaty as an aspect of the unfinished business of the reconciliation process. It recommended in its final report '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.'

A Treaty could be the lynchpin of the next stage in the reconciliation process. It might open up the Australian political and legal system, which, since Federation, has largely excluded Indigenous peoples. While a Treaty has connotations that suggest an agreement between sovereign nation states, this need not be the case. It may merely amount to an agreement between two or more parties. In many other countries, a Treaty has been signed between the settler and Indigenous inhabitants as a way of striking an agreement on governance and other issues. New Zealand provides a good example, with the Treaty of Waitangi signed in 1840. In fact, a Treaty is the accepted way in other nations of achieving an appropriate settlement. Australia is the only Commonwealth nation that does not have a Treaty with its Indigenous peoples.

While the idea of a Treaty has been put back on the agenda, no clear political or legal strategy has yet emerged for achieving it. The development of a strategy should be an immediate goal.

Australian history is littered with examples of failed attempts at reform of our system of government. It has been written of Federation and the creation of the Australian Constitution in 1901: 'There was no Damascus Road miracle about Australia's federal conversion. It took sixty years of spasmodic official effort and fluctuating public interest to bring the Commonwealth into being'. This achievement may have exhausted the nation because, for the next hundred years, reform has been very difficult to achieve. The referendum process to change the Constitution has been invoked 44 times with only eight proposals succeeding.

Such figures demonstrate that over the last century Australia has achieved a relatively poor record of bringing about structural reform of our system of public law and government. It also suggests that the process of reform is not working. When the money spent on processes including the 1999 referendum on the republic is put along side the long list of failures, it is clear that much improvement is needed. This raises serious concerns about any attempt at achieving a Treaty between Indigenous and non-Indigenous Australians, whether or not such an outcome involves a referendum. If the reform process itself is tending to jeopardise the success of structural legal reform, the idea may be doomed from the start. Of course, this is an unduly pessimistic view. My argument is merely that we need to be aware of the legal, political and institutional obstacles to reform and that we should develop a strategy to meet them. If this is not done, success is unlikely.

In this article I draw lessons for the ongoing Treaty process from two other long standing reform debates, those over a Bill of Rights and an Australian republic. I ask what went wrong in these areas and what do they suggest as approaches or strategies for the Treaty debate? These are appropriate areas for comparative analysis because they have strong parallels with the type of reform being considered in the area of a Treaty. Each could produce a significant change to the basic legal structure of the nation and raise complex legal as well as cultural and political questions. Each reform has as much to do with legal change as it does about symbolism and recognition.

My argument is not that every referendum proposal put to the people or attempt at structural legal reform ought to have succeeded. Instead, the record suggests that:

1. the reform proposals and models generated have often been flawed in their design, and
2. the process that has generated these proposals, and by which such proposals are considered by the Australian people, is not working as it should.

These factors explain why even broad based community support for a Treaty may not be enough to achieve a desired outcome. We must tackle the process of reform as well as the design of any model. Both the model and process must then be backed by effective political leadership.

In drawing conclusions and analysing the lessons from these other debates, I do not assume any particular outcome for the Treaty process (such as that a referendum will be necessary). I maintain an open mind as to the content and nature of any Treaty, and do not even presume that the culmination of the reconciliation process ought to be a Treaty. I merely argue that, if a Treaty or like process is to be tackled in Australia, there is much that we can learn from prior debates. Indeed, unless we learn these lessons the Treaty debate may not produce any outcomes of substance.

II. Republics, Preambles and the 1999 Referendum

On 6 November 1999, Australians were seemingly faced with a simple choice: become a republic with an Australian as Head of State, or retain the Queen and remain a constitutional monarchy. The results were clear and decisive. Despite strong support for the idea of a republic, Australians rejected the proposed change and kept the Queen. The republic proposal was defeated nationally by a vote of 54.40 per cent to 44.74 per cent and in all 6 states and the Northern Territory. There was a majority of 'Yes' votes only in Australian Capital Territory. The proposal to insert a new preamble into the Constitution fared even worse. It failed to pass nationally a vote of 38.96 per cent to 60.08 per cent and also failed in every state and territory.

Contemporary republican models focused mainly on apparently pragmatic 'minimalist' change; that is, a republic created by the 'minimal constitutional changes necessary to achieve a viable federal republic of Australia while maintaining the effect of our current conventions and principles of government'. Minimalist change might mean no more than altering the Constitution to delete references to the Queen and to replace the office with a President appointed by the Prime Minister.

Minimalism was sharply challenged on several fronts. Some argued for a stronger form of republicanism that would involve radical constitutional and political change aimed at enhancing the citizenship of the people. Non-minimalist models have, in particular,

incorporated a greater role for the Australian people in the selection of the President by, for example, providing for the President to be directly elected by the people or even through the establishment of a United States style presidency with full executive power. Other models have moved outside the narrow terrain of Head of State issues and have included changes such as a Bill of Rights or reconciliation.

The republic model put to the Australian people was opposed by a strong and well-organised coalition of interests. The 'No' coalition was made up of two extremes: monarchists who opposed any change, and direct election republicans who opposed this change on the basis that it did not go far enough. Despite the obvious conflict in their positions, they had enough in common to wage a coherent and effective campaign. Both wished to see this model defeated. Caught in the middle were the proponents of the minimalist model, most notably the Australian Republican Movement, who had to convince the Australian people to vote 'Yes' to a model that lacked bipartisan political support (or even the support of the Prime Minister), that had obvious weaknesses in design, and that had been unable to gain an absolute majority on the floor of the 1998 Constitutional Convention.

The 'No' coalition was effective in tapping into a cynical reaction in the electorate to the referendum. It was able to reinforce a growing perception among many Australians that the constitutional reform process was dominated by politicians to the exclusion of community views and aspirations. This was reinforced by the experience with the proposed new preamble to the Constitution, which did not include any role for members of the Australian community in its drafting. Even monarchists were prepared to argue that the failure of the republic model to involve any direct popular participation meant that this would be a 'politician's republic'. Community concerns were also fed by misinformation and by fostering fears that a 'Yes' vote might lead to the secession of one or more states from the Federation.

The task of comprehension was made more difficult for Australians by the complex legal issues raised by the republic and preamble. For example, the official advertising stated that 'there is currently no preamble in the Australian Constitution itself'. While strictly correct, this was misleading. There is already a preamble to the British Act which precedes the Constitution. This preamble has always been seen as prefacing the Constitution, and it is included when the Constitution is printed for sale. The official advertising material masked deep problems with the new preamble, including that a 'Yes' vote to this question would

insert a new preamble while also retaining the old version, thereby leaving the Constitution with two preambles.

The legal debate created by the proposed new preamble was of minor significance compared to the questions raised by the republic. Much was made of the fact that the republic involved 69 separate changes to the Constitution, as if to suggest that the mere number of changes reflected a radical revision of the Australian system of government. In fact, apart from five major changes designed to establish the new office of President, the remainder of the changes were largely consequential, and many merely replaced 'Queen' or 'Governor-General' with 'President'.

Prime Minister John Howard entered the fray in the last days of the campaign. He strongly supported a 'No' vote, arguing that Australia is already an independent nation, and stating that the proposed model was unsafe and flawed. He criticised the dismissal mechanism and the public nomination process for candidates for the office of President, correctly stating that the latter would give Australians no real say. He also sought to undermine the 'Yes' case argument that the republic was necessary to give Australia an Australian as Head of State. The Prime Minister adopted the monarchists' position that the Governor-General, and not the Queen, is effectively Australia's Head of State and thus, the shift to a republic was unnecessary.

The republic debate exposed deep, entrenched problems in Australia's system of government that help explain why this referendum failed and why any future referendum on the republic or on a Treaty may also fail. Two main weaknesses were brought to light. First, many Australians are alienated from the political process, and from the people who represent them in Parliament. In a context of uncertainty and insecurity brought about by rapid social and economic change, it is not surprising that there is distrust of political leaders and the system of representative government that has produced them. It is difficult to feel part of a system that is not understood and in which there are very few opportunities for participation. This has led to such problems as a lack of confidence in the political system. The symptoms of this can be seen in the declining support for the major parties (and consequently, in the high number of minority governments at the state level), and in the rise of protest parties such as Pauline Hanson's One Nation Party.

Second, Australians lack basic understanding and knowledge of their system of government. The republic model put to the people in the 1999 referendum was supported by a $24.5m Government-funded advertising campaign, a 71 page 'Yes' and 'No' case booklet sent to every voter, and saturation coverage in the media. Despite this, most Australians had little or no idea of what a republic would entail, let alone how the proposed model would work in practice. The referendum 'debate' generated considerable confusion, as well as strong disagreements on issues ranging from the mechanism for the dismissal of the President to the identity of the current Head of State. Rather than being an example of informed deliberation, the debate often involved each side seeking the support of celebrities and other notable figures in the expectation that such people would attract voters to their side.

This disagreement obscured the fact that the proposed model remained impenetrable to many Australians. Republicans faced an uphill battle. They had the task not only of informing Australians about the merit of the proposed changes, but also of providing enough information about the current system to allow the changes to be evaluated. This proved an impossible task in the heated and partisan atmosphere of the campaign, particularly given the spilt in their own ranks between minimalist and direct election republicans.

The central arguments of the 'No' case were 'Vote No to the Politician's Republic' and 'Don't Know—Vote No'. These slogans effectively exploited Australians' lack of engagement with, and knowledge of, the political process. However, this is not to say that in voting 'No' most Australians cast their votes stupidly. The most rational choice when faced with a change to a system that appears to work at least tolerably well from their perspective, but of which little or nothing is known, is to reject that change. This is especially the case where it is perceived that those promoting the change have a vested interest in the result (in this case the, misplaced, suggest that the same politicians promoting the republic model would gain a benefit under the new system).

III. The Struggle for an Australian Bill of Rights

There have been several attempts to introduce an Australian Bill of Rights and to amend the Constitution to incorporate new fundamental rights. The first of these came in the form of a referendum put to the people on 19 August 1944, which proposed that the Constitution be amended to grant the Commonwealth 14 new heads of power for the purposes of post-war

reconstruction. The proposal also sought to insert guarantees of speech and expression, as well as extend the guarantee of religious freedom in s 116 to the states. These powers and guarantees would have operated for a period of only five years. The referendum was lost with a 45.39 per cent 'Yes' vote to a 53.30 per cent 'No' vote.

The referendum that has received the highest ever 'Yes' vote was a proposal put to the people on 27 May 1967. That referendum gained the support of 89.34 per cent of voters and was carried overwhelmingly in every state. Previously, s 51(xxvi) of the Constitution had empowered the Parliament to make laws 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' (emphasis added). The 1967 referendum deleted the words in italics. It also repealed s 127 of the Constitution, which had 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'. Although these changes to the Constitution have been popularly seen as granting Aboriginal people 'equal rights', and in particular the right to vote, this is not correct. The 1967 changes to the text of the Constitution gave recognition to Aboriginal people and repealed the discriminatory s 127, but they did not actually grant Aboriginal people any rights.

Despite the success of the 1967 referendum, the next three attempts to bring about greater protection for fundamental rights came in the form of statutory Bills of Rights. In 1973 Lionel Murphy, as Attorney-General in the Whitlam Labor Government, introduced the Human Rights Bill 1973 (Cth) into the federal Parliament. The Bill sought to implement the *International Covenant on Civil and Political Rights 1966* in Australia and would have protected a range of rights, including freedom of expression, freedom of movement, the right to marry and found a family, and individual privacy. It even sought to prohibit 'Any propaganda for war'. The Human Rights Bill met strong opposition and eventually lapsed with the prorogation of Parliament in early 1974.

The failure of the Human Rights Bill did not end attempts to bring about rights protection by Commonwealth implementation of international instruments. The Whitlam Government, for example, was successful in enacting the *Racial Discrimination Act 1975* (Cth), while the Hawke Labor Government enacted the *Sex Discrimination Act 1984* (Cth). Senator Gareth Evans, as Attorney-General in the Hawke Labor Government, sought to take up where

Murphy had left off in promoting a statutory Bill of Rights. In 1983 he oversaw the drafting of a Bill of Rights Bill that, like its 1973 predecessor, would have implemented international rights instruments. However, the 1983 model was weaker than its 1973 predecessor in several ways—most significantly in that it would only have applied to governmental action, whereas the Murphy Bill would have applied to any action that infringed the protected rights. Although the Evans Bill was given Cabinet support, it was not introduced into Parliament. Lionel Bowen replaced Evans as Attorney-General after the December 1984 federal election. After being redrafted and having its operation watered down, the Bill was introduced into the federal Parliament in November 1985 as the Australian Human Rights Bill 1985 (Cth). It was passed by the House of Representatives, but failed to gain majority support in the Senate. Encountering strong opposition, the Bill was finally withdrawn in November 1986.

In the wake of the failure of the Bowen Bill, the Government changed tack. It established the Constitutional Commission in December 1985 to report on the possibility of revising the Australian Constitution in order to ensure, among other things, that democratic rights are guaranteed'. The Commission responded in an interim report in April 1987, in which it made recommendations to expand the scope of the express rights already in the Constitution, but also foreshadowed the need for wider change. The Commission's final report was released in June 1988, and was more ambitious. It proposed significantly greater protection for rights by constitutional means than had the Advisory Committee. The Commission recommended that a new Chapter ('Chapter VIA—Rights and Freedoms') containing a wide range of fundamental rights be inserted into the Constitution.

Bowen had requested that the Commission provide an interim report so that a referendum to amend the Constitution could be held in 1988. Accordingly, after the interim report had been provided, but before the Commission had completed its final report, the Hawke Government announced that it would initiate constitutional change. Legislation was introduced to this effect on 10 May 1988 and four proposals were put to the Australian people on 3 September 1988. The proposals were derived, with some variations, from the recommendations of the Constitutional Commission in its interim report. The first and third proposals concerned four-year maximum terms for the federal Parliament and recognition of local government, respectively. The second proposal sought to guarantee 'one vote one value' by requiring that the population count in each electorate not deviate by more than 10 per cent. This proposal would also have inserted a right to vote into the Constitution. The fourth proposal also sought

to guarantee basic freedoms, such as freedom of religion and the right to a jury trial, but only by extending the operation of existing guarantees in the Constitution.

All four proposals were defeated. The results were dismal. The highest national 'Yes' vote for any of the proposals was 37.10 per cent, which was for the proposal on 'one vote one value'. The fourth proposal received an astonishingly low vote, the lowest of any of the proposals. Nationally, 30.33 per cent of voters registered a 'Yes' vote, while 68.19 per cent voted 'No'. This was the lowest 'Yes' vote ever recorded in any referendum. In South Australia, the 'Yes' vote was only 25.53 per cent, while in Tasmania it was 25.10 per cent. The failure of the 1988 referendum undermined any suggestions that any further attempt should be made to insert other rights into the Constitution or to implement the final report of the Constitutional Commission.

The 1988 referendum showed the difficulty in gaining the popular vote for constitutional change. It demonstrated that bipartisan support for a proposal can be essential for a successful constitutional change and that the support of the Australian people cannot be assumed, even for a proposal that is designed to protect the rights of Australians as against government. Lack of bipartisan support leaves open the prospect of a determined opposition misrepresenting the effects of constitutional change for its own political purposes, as occurred in 1988.

To achieve reform in the area of constitutional rights it will be necessary to build a broad political and popular base for change, underpinned by real understanding of the issues and proposals. The result in 1967, as well as a recent successful referendum in New South Wales that entrenched judicial independence and the security of tenure of judges in the *Constitution Act* 1902 (NSW), shows that it is possible to gain the support of the Australian people in favour of changing the Constitution to protect basic rights. However, the 1988 result shows that this is by no means easy and that any attempt to insert new rights into the Constitution should be carefully considered and prepared.

The failure to achieve a Bill of Rights in Australia at any level of government may indicate that Australia, unlike other nations, has never had its 'constitutional moment' in which a Bill of Rights has become politically achievable; that is, one of those 'fleeting junctures of opportunity for radical re-design of a polity'. However, in addition to the absence of the right 'moment', the record of failure also demonstrates the need for new approaches that harness the respective

responsibilities and interests of parliaments and the courts, as well as the community. The community, whose support will be vital for the successful implementation of any Bill of Rights, must be engaged. Significantly, none of the constitutional or statutory proposals for a Bill of Rights explicitly recognised a role for the community in the rights protection process. Each was essentially a Bill of Rights model in the traditional form in which the focus would have been on the judicial interpretation and application of rights. This suggests problems with the models relating to their design and to the political leadership backing them.

IV. Ten Lessons for Reform

The attempts to achieve structural change to Australia's public law system in the areas of a republic and Bills of Rights suggest the following lessons (which do not all point in one direction and may in some cases even conflict).

1. Focus on the long and not the short term

Major public policy debates in Australia, perhaps due to our short three year political cycle, tend to develop and be resolved quickly. There may be little room for reflection or revision. This means that one plan is commonly put and either fails or succeeds. A longer term approach is needed that extends beyond any one political cycle. At least in the absence of powerful political leadership, structural legal reform cannot generally be achieved in as short a space of time as three years because of its complexity and because of the level of community consultation and education required.

2. Not just politicians

A long term commitment requires that persons other than our elected representatives be involved in the reform process. Any reform must be underpinned by ongoing research undertaken by the university sector or other expert organisations. This is not only necessary because of the long term nature of such projects, but also because many of the Australian people have become alienated from their representatives such that any outcome that is seen as generated completely within the political process will be suspected of being potentially self-serving.

3. Incremental, not immediate change

The Bill of Rights debate has been characterised by models that were inadequate in terms of their design or due to a failure to engage the community in their drafting or through giving a sense that the models reflected community aspirations. In some cases a model may also have been too ambitious in its scope. The lack of community understanding of the complex issues linked to public law reform requires a gradual approach whereby a model is developed and refined in line with changing community perceptions and new understandings. The change itself ought to drive this, such that acceptance of an initial approach in these areas might then contribute to community support for more progressive outcomes.

4. Reject minimalism

Minimalism has its advantages in enabling debate to be focussed on one model and a specific set of issues. However, the 1999 republic debate and referendum demonstrated that this also creates the likelihood that such a change will not only be opposed by people who reject the need for reform altogether, but also by people who would prefer a different model. Any change ought to be tailored to the problem in a way that matches community expectations without seeking to confine the solution to such a narrow outcome as to alienate potential supporters. Minimalism rightly failed as a strategy at the 1999 referendum.

5. Community ownership and involvement

The strong reaction against the 1999 preamble proposal and the fact that it received even less 'Yes' votes than the republic proposal indicates the danger in failing to fully consult the Australian people. The people are unlikely to support any proposal which they do not 'own' through an appropriate consultative process. A mere vote at a referendum is not enough to generate community feelings of ownership and support. By that time it is too late, and the vote is more likely to reflect the extent to which the community feels they have been alienated from the process. Consultation can take many forms, but models might include a convention with a high level of community membership or an inquiry process with a range of political and community members that holds hearings at centres around Australia. Any major structural reform ought to have a strong grassroots base from an early stage.

6. Community education

Australians possess an appalling lack of knowledge about their system of government. A 1987 survey conducted for the Constitutional Commission found that 47 per cent of Australians were unaware that Australia has a written Constitution. Similarly, the 1994 report of the Civics Expert Group found that only 18 per cent of Australians have some understanding of what their Constitution contains, while more than a quarter of those surveyed nominated the Supreme Court, rather than the High Court, as the 'top' court in Australia. Significantly, only one in three people felt reasonably well informed about their rights and responsibilities as Australian citizens.

One of the most powerful arguments at the 1999 referendum was the argument 'Don't Know – Vote No'. It will be very difficult, if not impossible, to gain support for major change unless it is underpinned by adequate community education. Information must be available on websites and in pamphlet form that is accessible by schools and other community organisations. The information must be credible, accurate and reliable.

In 1999, Australians did not have access to information of this kind on the Constitution or the proposed change. This should be remedied for future referendums. A new system should be introduced that would clearly separate the basic information required by Australians to cast their vote from the partisan arguments of the 'Yes' and 'No' cases. Without such information, referendums will continue to be plagued by the destructive, but effective, argument 'Don't Know – Vote No'.

7. Draft a model that can be understood in the community

The reform ought to be constructed in such a way that it can be communicated simply and effectively to a community audience. It should be based upon a set of guidelines, principles or criteria that match community aspirations. The reform should be accompanied by 'plain English' guides in appropriate languages as well as by material that accurately states the issues and proposed change. If this is not possible, the proposal is unlikely to gain sufficient support to be implemented.

8. Develop support Australia-wide

The need for a double majority in a referendum held under s 128 has not proved to be a significant impediment to constitutional change. Only in three instances, two referendums held in 1946 and one in 1977, would the removal of the requirement for a majority in at least four states have enabled the referendum to be carried. The evidence instead suggests that to be successful a referendum needs to gain support across Australia. In every case where a referendum was carried, with the exception of the referendum of 13 April 1910 that amended s 105 of the Constitution to enable the Commonwealth to take over State debts, a national majority was accompanied by a majority voting 'Yes' in every state. A broad and deep basis of support should be developed across the nation. The 1967 referendum achieved this.

9. *Seek bi-partisan support*

Major constitutional reforms are almost never achieved without bipartisan support. In fact, there has never been a successful referendum in Australia that has not had bipartisan support. However, in matters of structural public law reform, such support will not always be attainable. In the absence of bipartisanship, there should instead be a focus on incremental change of a statutory type rather than seeking a constitutional referendum. A referendum may incur a high financial cost and polarise people without gaining a positive vote. A failed referendum may also preclude subsequent reform in an area through strategies that do not involve a referendum. Once the people have rejected a change it will be very difficult to gain further political or popular support to pursue the issue in the short term.

10. Tackle the reform process along with the reform

Both the republic and Bill of Rights debate shows that a change may not succeed for reasons that have little to do with the merits of the general reform proposal. In fact, surveys of public opinion on both the republic and a Bill of Rights show strong underlying community support for change. Opinion polls around the time of the 1999 referendum on the republic consistently showed that majority of Australians support generally the idea of the nation becoming a republic. One Newspoll taken a few days before the republic referendum correctly predicted its defeat but also found that that 74% of Australians (with 23% against) were in favour of 'Australia becoming a republic'. Similarly, one opinion survey found strong underlying

community support for the concept of a Bill of Rights; in that case 72% of those surveyed favoured some form of Bill of Rights for Australia. This demonstrates that, even with strong community support, structural legal change can be difficult to achieve and that community support will not translate into outcomes unless the process by which such change is addressed is also effective. To overcome this, any program for structural reform should also tackle the process by which that reform will be achieved.

Making the referendum process work is an important policy challenge of the second century of our Federation. We should examine how Australians can become more involved throughout the reform process. The provision of better information to voters only requires a rewrite of the basic referendum procedures (*Referendum (Machinery Provisions) Act 1984* (Cth)) and not of the Constitution. This can be brought about by the federal Parliament. It should institute a joint parliamentary inquiry to examine the effectiveness of the current process, including the 'Yes' and 'No' case procedures, in providing information to the Australian people. Unless the referendum process itself is reformed to better involve Australians, the factors at work in 1999 may again play a large role in the next vote on the republic, or indeed any future referendum on issues of public law reform. The lessons of 1999 should be acted upon now, before they are overtaken by a partisan referendum or plebiscite campaign on a Treaty or other topic.

V. Strategies for the Treaty debate

These ten lessons give a preliminary indication of how the Treaty process might be approached. In particular, they suggest that the debate must be conducted in a way that takes account of the long term prospects of reform. Any strategy must not alienate people with suggestions of short term or immediate solutions. The nature of a Treaty also makes it essential that any reform stems from an informed choice of both Indigenous and non-Indigenous Australians. A choice implies consideration and debate by communities based upon engagement with the material at a useful and informed level. The debate and education ought to be long standing before any attempt is made to bring about specific change. This is particularly desirable if the debate is to lead to constitutional reform and a referendum.

The outcomes of the Treaty process can be viewed in the short, medium and long term. Each stage must be supported by credible independent research and analysis. Deep and complex

issues raised by this debate, such as sovereignty and reform of the existing constitutional structure, must be tackled along with any consultative process. In the short term, an appropriate outcome is a heightened awareness among Australians about the relevant issues and about the range of possible models. Australians should also be made more aware of why a legal instrument of this type would be appropriate for the reconciliation process and why it might be seen as a matter of unfinished business. This period should see the production of community guides and web resources for use at the community level and in schools, other education institutions and the media.

In the medium term, there should be significant public debate over the types of models that are proposed, and formal community consultation should be undertaken through processes such as conventions and plebiscites. Such processes would be designed both to deliberate upon the options and, if appropriate, to build support for the idea. They would also naturally contribute to and deepen community understanding of the issues. This is necessary given that the Treaty debate, like that on Bills of Rights and the republic, involves many complex legal and other issues that are likely to provoke genuine disagreement. The issues of sovereignty is a good example.

In the long term, the Treaty process should lead to the drafting of an instrument that would represent the first significant legal outcome in an ongoing Treaty process. For example, a statutory instrument might be achieved to be followed after some time by a referendum. It would be a mistake to think that any initial instrument, or even a referendum, could satisfy all of the aspirations of any of the parties. The process must be an generational one. Any statutory instrument preceding a referendum might include a requirement that it reviewed after five years so that it could be refined and further developed. The five year point might be marked by further community consultation and deliberation. Ongoing community involvement is necessary if a Treaty is to have the flow-on cultural impact that would transform from what could otherwise merely be just another legal instrument.