

# CONSTITUTIONAL RECOGNITION DOES NOT FORECLOSE ON ABORIGINAL SOVEREIGNTY

by Megan Davis

Since January, when the Expert Panel on the Recognition of Aboriginal and Torres Strait Islanders in the Constitution ('the Expert Panel') handed its final report to the Prime Minister, there has been growing momentum in the campaign for a referendum on this issue.<sup>1</sup> The Federal Government has allocated \$10 million toward an education campaign; taking up a recommendation from the Expert Panel as to the low level of civics knowledge in the community. Of course, what form 'recognition' will take is less clear. Although it has been important that, given the toxic nature of contemporary politics in Australia, the political sector has by and large not commented or intervened in either a favorable or adversarial way to the issue of recognition.

As members of the Expert Panel we found that the vast majority of Aboriginal and Torres Strait Islander people are in favor of constitutional reform. This was evident at the consultations and in submissions from the community. However, the nature of adversarial politics in Indigenous affairs is no different to other areas of politics such as climate change or education reform; it elicits automatic reactionary and contrarian positions. The project of constitutional reform though is particularly vulnerable to misinformation because of the low civics literacy in Australia. Aside from the frequently cited statistics that eight out of 44 referendums have succeeded and successful referendums require bi-partisan support, there is minimal and limited knowledge about the Constitution and how it works.

Take for example the claim that the Expert Panel's recommendation for a new head of power to make laws for Aboriginal and Torres Strait Islander people<sup>2</sup> would lead to the reintroduction of child bride practices—this is despite that the recommended section 51A is a 'head of power' which means it is a power for the Commonwealth to make laws. It provides authority or legitimacy to the Commonwealth's desire to make legislation in a particular area. To assert that section 51A, or section 51(xxvi) of the Constitution for that matter, can support legislation reintroducing child bride practices in Aboriginal

communities is to assert that the Commonwealth Government may in the future desire to introduce such a right. This claim is a fiction.

Another claim has been that section 51(xxvi) will have no impact on Aboriginal peoples' lives. This is despite the fact that such a power and its previous incarnation supported much legislation that has benefitted Aboriginal and Torres Strait Islander peoples, such as: the *World Heritage Properties Conservation Act 1983* (Cth); the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); the *Native Title Act 1993* (Cth); and, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Another claim, the focus of this brief comment, is that any constitutional recognition or reform would negate Aboriginal claims to sovereignty. Sovereignty was an issue raised by many Aboriginal and Torres Strait Islander peoples in the course of the work of the Expert Panel. In our report, the Panel was open about the many communities who raised the issue of sovereignty and the voices of those who raised such concerns were recorded. This is why an entire chapter was devoted to the issue.

From the outset it is useful to note what 'sovereignty' may mean. This is important because it does have different meanings. Submissions to the Expert Panel and consultations in Aboriginal communities showed that sovereignty means different things to different communities. In 2004, Brenda Gunn, George Williams and Sean Brennan explored the different meanings of sovereignty in the context of their treaty research.<sup>3</sup> They found that, 'Indigenous uses of the term vary, just as they do in non-Indigenous contexts' and that some use sovereignty in an external context and others in an internal context.

The external use of the word sovereignty is captured in the proposal of the Aboriginal Provisional Government for an Aboriginal Nation:

a nation exercising total jurisdiction over its communities to the exclusion of all others. A nation whose land base is at least all

crown lands, so called. A nation able to raise its own economy and provide for its people.<sup>4</sup>

The internal aspect, according to Gunn, Williams and Brennan, reflects contemporary Indigenous politics with:

language of 'governance' and 'jurisdiction' as exercised by Indigenous 'polities' [and it] also corresponds with the long-term political campaign waged by Indigenous peoples and their supporters using another term borrowed from international law and Western political thought: 'self-determination'.<sup>5</sup>

Gunn et al. also argue that some Indigenous peoples and nations frame their sovereignty claims in a popular rather than institutional sense, '[i]t is the basic power in the hands of Indigenous people, as individuals and as groups, to determine their futures'.<sup>6</sup> They conclude that:

A range of Indigenous views exist, and some seek to challenge authority in the external sense of the word sovereignty. But it is equally important to recognise that others adopt an internal perspective. They seek to re-negotiate the place of Indigenous peoples within the Australian nation-state, based on their inherent rights and their identity as the first peoples of this continent. That vision of an Australia where, in practical terms, sovereignty is shared or 'pooled' is, as it happens, consistent with the way the concept has evolved in Western thought – the original absolute and monolithic sovereign is a myth, the reality today is qualified sovereignty.<sup>7</sup>

Our report reflected the diverse views of Aboriginal and Torres Strait Islander peoples, for example: Tom Trevorrow, the chairperson of the Ngarrindjeri Regional Authority in South Australia, agreed that sovereignty should be among the principles driving discussion of constitutional change, but said that for him the term sovereignty had a broader meaning: 'Ngarrindjeri will continue to assert to Government its own sovereignty over its own people, place and knowledge'.<sup>8</sup>

It is well known that the Expert Panel adopted a methodology for determining which recommendations it would make to the Federal Government. The methodology was that any recommendation must: contribute to a more unified and reconciled nation; be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples; be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and, be technically and legally sound.<sup>9</sup>

It would come as no surprise to Aboriginal and Torres Strait Islander people that constitutional recognition of the sovereign status of Aboriginal and Torres Strait

Islander peoples would be highly contested by many Australians and would jeopardise broad public support for the Expert Panel's recommendations. Similarly, it would come as no surprise that qualitative research found that 'sovereignty' and 'self-determination' were poorly understood concepts and there were similar diverse understandings of sovereignty in the non-Indigenous community as there were in the Indigenous community.

The Expert Panel sought legal advice as to the impact of constitutional recognition on Aboriginal sovereignty. That advice confirmed that:

the sovereignty of the Commonwealth of Australia and its constituent and subordinate polities, the States and Territories, like that of their predecessors, the Imperial British Crown and its Australian colonies, does not depend on any act of original or confirmatory acquiescence by or on behalf of Aboriginal and Torres Strait Islander peoples.<sup>10</sup>

The constitutional legal position on sovereignty is that:

recognition of Aboriginal and Torres Strait Islander peoples in the Constitution as equal citizens could not foreclose on the question of how Australia was settled. Nor should constitutional recognition in general have any detrimental effect, beyond what may already have been suffered, on future projects aimed at a greater place for customary law in the governance of Australia.<sup>11</sup>

This is still the position. Here, it is useful to refer to the work of Professor Robert A. Williams on sovereignty and constitutionalism. He has issued caution about Indigenous peoples buying into settler colonial logic when they situate their struggle in the legal frameworks of the coloniser. He argues that by asking the state to recognise 'sovereignty' under their system one is accepting of the foundational principles of the doctrine of discovery that has abrogated and extinguished Aboriginal rights.<sup>12</sup>

The Constitution is not a place for conversations about sovereignty. As the Expert Panel argued:

The High Court has developed its own 'working definition' of sovereignty and Australia's legal system continues to operate accordingly. The judiciary is only one arm of government, however, and questions of settlement and legitimacy continue to be agitated in parliament and in discussion with government and in the public arena.<sup>13</sup>

This latest version of constitutional recognition is an important project for Aboriginal and Torres Strait Islander communities. It is a pragmatic approach aimed at, among other things, ameliorating a flaw in the constitutional alteration of section 51(xxvi) in 1967. When this provision

was amended in a 1967 referendum to remove the words ‘... other than the aboriginal people in any State...’ it conferred upon the Federal Parliament the power to make laws with respect to Indigenous peoples. However, it did not stipulate that such laws would be for the ‘benefit’. Rather, High Court jurisprudence supports an argument that there is nothing in section 51(xxvi) to prevent its adverse application against a people of any race.<sup>14</sup>

Similarly, the Expert Panel argues that a non-discrimination clause is an integral part of a package of amendments to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.<sup>15</sup> Australia’s commitment to the principle of racial non-discrimination is reflected in the *Racial Discrimination Act 1975* (Cth) and is accepted in legislation and policy in all Australian jurisdictions. By constitutionalising non-discrimination, only the Commonwealth Parliament will have an additional burden placed on it. The fact is that the submissions to the Expert Panel overwhelmingly supported a racial non-discrimination provision and argued in favour of the principle of racial equality: and it was our job to reflect what the community including the Aboriginal and Torres Strait Islander people was thinking.

The view of the Expert Panel was that such a provision was reasonable. The practical need for this is based on real experiences of Indigenous people of discrimination at the hands of the Commonwealth Parliament. For example, the Northern Territory Emergency Response, the Native Title Act and the Wik amendments. These were commonly cited as examples in community consultations in Aboriginal communities. Finally, a prohibition on racial discrimination reinforced by submissions, public consultations and polling was that this was indeed about ‘recognition’ of Indigenous people. As Noel Pearson has responded to those who say that non-discrimination is not about ‘recognition’:

Elimination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past. So extreme was the discrimination against Indigenous people, it initially even denied that we existed. Hence, Indigenous Australians were not recognised. Then, Indigenous people were explicitly excluded in our Constitution. Still today, we are subject to racially targeted laws with no requirement that such laws be beneficial, and no prohibition against adverse discrimination.<sup>16</sup>

When Newspoll conducted national surveys of Australians on the topic of constitutional recognition of Aboriginal and Torres Strait Islander peoples and related issues

of constitutional reform, the final Newspoll survey confirmed that, as at 28 October, 2011, 80 per cent of respondents were in favour of amending the Constitution so that there is a new guarantee against laws that discriminate on the basis of race, colour or ethnic origin.

To conclude, constitutional recognition—whether amendment of the race power or a non-discrimination clause—does not foreclose on the question of sovereignty. The Australian legal system is a system that was received from the Imperial British Crown. Aboriginal people have never consented nor ceded. Sovereignty did not pass from Aboriginal people to the settlers.<sup>17</sup>

*Megan Davis is a member of the Expert Panel on the Recognition of Aboriginal and Torres Strait Islanders in the Constitution, a Professor of Law and Director of the Indigenous Law Centre, UNSW, and a UN expert member of the United Nations Permanent Forum on Indigenous Peoples.*

1 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (Canberra, 2012) 211 <<http://www.youmeunity.org.au/final-report>>.

2 The Panel recommends that: a new section 51A is adopted [in the Constitution] to recognise Aboriginal and Torres Strait Islander peoples and to preserve the Australian Government’s ability to pass laws for the benefit of Aboriginal and Torres Strait Islander Peoples.

3 Sean Brennan, Brenda Gunn and George Williams, ‘Treaty – What’s Sovereignty Got To Do With It?’ (Issues Paper No 2, UNSW, January 2004) 2 <[http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Issues\\_Paper2.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Issues_Paper2.pdf)>.

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid.

8 Expert Panel, above n 1, 211.

9 Ibid.

10 Ibid 212.

11 Ibid.

12 Robert A Williams Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (University of Minnesota Press, 2005) 151.

13 Brennan et al., above n 3, 7.

14 Expert Panel, above n 1, 151.

15 Ibid xviii.

16 Noel Pearson, ‘A Letter to the Australian People’, Submission No 3619 to Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 2012.

17 Expert Panel, above n 1.