
CUTTING THROUGH LEGAL ARGUMENTS: CONSTITUTIONAL RECOGNITION

by Kate Galloway

INTRODUCTION

On 19 January 2012, the Prime Minister's Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples ('the Panel') delivered its report on the constitutional recognition of Indigenous Australians.¹ From the convening of the Panel and since the report was delivered, there has been a lot of comment and public debate. Much of this has centred on the legal implications of constitutional change, although inevitably there has been political debate also. Sometimes it is difficult to tell the difference.

The goal of proposed constitutional change is to advance reconciliation between Indigenous and non-Indigenous Australians, through recognising in the Constitution the special place of Aboriginal and Torres Strait Islanders in Australian society. Aboriginal and Torres Strait Islander Australians were excluded from the process of nation building involved in the drafting of the Constitution. This exclusion has resulted in a Constitution that not only fails to recognise Aboriginal and Torres Strait Islander peoples in an inclusive way, but in fact may provide for lawful discrimination against them after the decision in *Kartinyeri*.²

For those who are not expert in constitutional law, the arguments for and against the recommendations offer an array of ostensibly convincing alternatives. This article outlines the primary recommendations for change,³ before identifying a means by which to sort through the legal arguments. The goal is to resolve the question of whether or not to support the recommendations.

RECOMMENDATIONS FOR SUBSTANTIVE CHANGE

The recommendations for substantive constitutional change follow a logical path.

First is the repeal of s 25. This is not regarded as a troublesome recommendation.⁴ It relates to the limits on federal representation of any State that excludes people based on their race from voting in that state.

Second is the repeal of the so-called 'race power': s 51(xxvi). As it stands, this provision allows the Commonwealth to make powers with respect to the people of any race with no restriction on whether these laws would be beneficial or not to those people. As a general proposition, the notion of race is repugnant as a basis for law-making, and is probably inconsistent with international human rights treaties including the *International Convention on the Elimination of Racial Discrimination*, as well as contemporary societal norms. As Mick Gooda has observed:

Most Australians I meet pride themselves on being part of a liberal democratic society that does not condone discrimination or racism. However, it can be inferred from the National Human Rights Consultation that the majority of Australians are probably not aware these provisions are contained in the Constitution.⁵

Having said this, there is still a strong argument in favour of power to make laws with respect to Aboriginal and Torres Strait Islander Australians as a means of addressing the well-known gap in health, education, employment, housing and life expectancies between Indigenous and non-Indigenous Australians. Interestingly, Chief Justice Robert French has suggested extra-curially that such a provision would be not a 'race' provision, but a provision responding to 'the special place of those peoples in the history of the nation'.⁶

On the basis of the need still to enact legislation with respect to Aboriginal and Torres Strait Islander Australians, the Panel's third recommendation is to insert a proposed s 51A giving such power. It is prefaced by a number of preambular provisions including an acknowledgement of 'the need to secure the advancement of Aboriginal and Torres Strait Islander peoples.'

To accompany this provision, and to flesh out its context, is a proposed anti-discrimination provision (s 116A). This would prohibit laws discriminating on the basis of race, except 'the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.'

Finally, is the recommendation for a new s 127A recognising Aboriginal and Torres Strait Islander languages. This is considered likely to have a declaratory rather than substantive effect.

ARGUMENTS

The report was well-received in many quarters, though there has been legal debate in particular about the 'race' power and anti-discrimination provision. Anne Twomey for example has suggested that it may be preferable to remove race from the Constitution altogether.⁷

Broadly speaking in the public domain, and for those not expert in constitutional law, these debates can be considered within three categories. First is the argument that the breadth of the proposed provisions means that we do not know how they will be interpreted in future. There is a concern that the Commonwealth will derive more power than is anticipated. Some find laws for 'the advancement' of peoples as ambiguous, and have difficulty in pinning down a meaning. It may be clear in lay terms, but to use such a broad phrase to support the making of a law is considered contentious.

The Panel recommendations offer a once-in-a-lifetime opportunity to advance reconciliation and human rights through important Constitutional change.

It is entirely possible that the proposals may be interpreted to give more power than is anticipated. But that is no different from many other constitutional powers. One only has to consider the external affairs power and the corporations power as examples. It is unlikely that the authors of the Constitution would have expected these powers to be used so extensively to legislate in so many areas. This is somewhat of a misleading argument simply because we cannot ever know what a future court will find, or how it will interpret any constitutional provisions. Any new law stands to be challenged as its meaning and the boundaries of its operation come to be established through judicial interpretation.

In terms of the meaning of 'advancement' or the context of 'beneficial laws', I would expect that longstanding human rights jurisprudence can offer sufficient guidance on the meaning of such a provision, which finds, it seems, parallels in other constitutions and at international law.⁸

Secondly, is the '100 steps too far' or 'one-clause bill of rights' argument. I see this as reflecting an inherently conservative

understanding of our Constitution. While this overlaps to some extent with the issue of interpretation above, it also reflects the existing nature of our Constitution as overwhelmingly a blueprint for governance, without any explicit human rights. Again, I see no need to be afraid of addressing human rights within our Constitution. This would accord with Australia's international human rights obligations, and jurisprudentially, represents a valid constitutional undertaking.

These two arguments include the warning that there 'will be legal challenges'. This is no argument at all, in my view. Any change is likely to attract legal challenge. That is the nature of the law. Opposing change citing that there 'will be legal challenges' is really nothing more than fear mongering.

Thirdly is that the proposals are too complex and therefore will fail at referendum. The way to a successful vote, on this argument, is by putting as simple a proposition as possible. Usually this is framed as a provision 'recognising' Aboriginal and Torres Strait Islander Australians. But what would this look like? How would it be phrased, and what would it mean? Back to square one... In fact, the Panel has investigated this, and has recommended how such recognition could look within our Constitution. We now have something to work with.

It should be noted also that it is not the simplicity or otherwise of proposed changes that has been shown to pass Australian referenda, but rather it is political bipartisanship. If the 'experts'—and politicians—keep telling the public that the recommendations are 'too complex to pass' then by definition there is no bipartisanship. It simply demonstrates an unwillingness to implement the goals of the process. Instead of becoming obstructed by these objections, I suggest that it would be more productive to remember what we have set out to do. Indeed National Congress has called on 'the Parliament to remain open to additional means of achieving reform including legislation, a treaty, and genuine implementation of the UN Declaration of the Rights of Indigenous Peoples.'⁹

RECOGNITION AS THE GOAL

Many of the responses to the Panel's report have been based on legal argument. This is because lawyers are argumentative people. The law is never truly settled and is always open to challenge and re-interpretation. On this basis, it can be difficult to assess which argument is legally 'correct', or how courts of the future will read the Constitution. It is difficult to calculate the 'legal risk' in making the proposed changes.

To resolve this, legal argument must be put in context of the purpose of the recognition process. As Noel Pearson points out,

this constitutional change is about reconciliation, recognition and creating a new and inclusive national narrative.¹⁰ This necessarily involves both Indigenous and non-Indigenous Australians.

Failure to change the Constitution represents a grave risk: that of missing the chance to have Aboriginal and Torres Strait Islander Australians write themselves into our national story, with the support of the wider Australian public. That risk is in one sense far worse than the 'risk' of courts having to interpret the proposed changes.

CONCLUSION

It needs to be accepted that no one can predict exactly how these proposed changes will be interpreted if they are successful. At some point, trust is needed that recommendations for change must work on some level. Instead of becoming mired in doubt about legal implications of the proposals, it should be recognised that the Panel has already completed the first stage of consultative groundwork. The mantle has since been taken up by the Recognise campaign.¹¹ The formal work of the Panel has also been supplemented by passage of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) and the findings of a Joint Select Committee of Parliament.¹²

If we desire change in our national story, then the Panel recommendations offer a once-in-a-lifetime opportunity to advance reconciliation and human rights through important Constitutional change. It cannot happen without the first step of supporting the principles of progressive amendment.

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- 1 Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Commonwealth of Australia, 2012).
- 2 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
- 3 See also, eg, Melissa Castan, 'Closing the Gap on the Constitutional Referendum' (2013) 8(4) *Indigenous Law Bulletin* 12.
- 4 Anne Twomey, *Indigenous Constitutional Recognition Explained – The Issues, Risks and Options* (26 January 2012) University of Sydney, Publications, <sydney.edu.au/law/cru/documents/2012/Indigenous_Recognition.pdf>.
- 5 Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (Australian Human Rights Commission, 2010) 46.
- 6 Chief Justice Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, Cambridge University Press) 180, 208.

- 7 Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36 *Sydney Law Review* 381.
- 8 The Report of the Expert Panel provides a comparative overview of constitutional provisions that support Indigenous peoples within the relevant nation, and internationally. See Expert Panel on Constitutional Recognition, above, n 1, chapter 2.
- 9 National Congress of Australia's First Peoples, 'Stop the Constitutional Merry-Go-Round' (Media Release, 12 September 2014) <<http://nationalcongress.com.au/stop-the-constitutional-merry-go-round/>>.
- 10 Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay*.
- 11 Recognise (2014) <<http://www.recognise.org.au/>>.
- 12 See commentary in Melissa Castan, 'Explainer: what Indigenous constitutional recognition means' *The Conversation* (online) 18 September 2014 <<http://theconversation.com/explainer-what-indigenous-constitutional-recognition-means-31770>>.

Mina Mina Jukurrpa (Mina Mina Dreaming) – Ngalyipi

Pauline Napangardi Gallagher

610mm x 910mm

