
ON SELF-DETERMINATION AND CONSTITUTIONAL RECOGNITION

by Peter Dawson

INTRODUCTION

For more than two centuries, our Elders and Ancestors have protected our right to self-determination. Ever since the tall ships arrived, each generation of Aboriginal and Torres Strait Islander people has reminded Australia that we are still here, our cultures still run through our veins, our languages still live on our tongues and we retain deep connections to our traditional lands and waters. Now we have the opportunity to write an acknowledgement of this important historical truth into Australia's highest legal document, and remove racial discrimination from it. The impact of this will be profoundly important. It has the potential to be one of the truly transformative moments for the nation on its step-by-step journey—sometimes halting and slow—towards dealing with the unfinished business of our original dispossession.

SELF-DETERMINATION

Self-determination is the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development.¹ It is the central right of the United Nations Declaration on the Rights of Indigenous Peoples and is considered a fundamental human right. Self-determination does not amount to a right to secession and does not undermine state sovereignty. It may be achieved from 'a range of possibilities of institutional re-ordering other than the creation of new states.'² Aboriginal and Torres Strait Islander peoples' right to self-determination is derived from our status as a distinct Indigenous 'peoples'—our continuing cultures, languages, heritage and relationships to our traditional lands and waters. These very attributes form the basis of the current proposals for constitutional recognition.

As I see it, constitutional recognition can help to improve the context in which laws and policies about Aboriginal and Torres Strait Islander peoples are made. The extent to which constitutional recognition promotes our self-determination depends on the model to be put to referendum, which is being considered by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples ('Joint Select Committee'). My own personal view is that the ideal form of recognition would be

one that enables us to (1) preserve and develop our continuing cultures, languages, heritage and relationships to country; and (2) participate in decision-making on matters that affect our rights, in accordance with our own processes and institutions.³

The first point is uncontentious, with many proposed models for constitutional reform in recent years including a statement of recognition to introduce the scope and purpose of a new Commonwealth head of power.⁴ This point is often lost in the debate on symbolic vs substantive recognition. Many of these proposals have suggested the Parliament's power to pass laws with respect to Aboriginal and Torres Strait Islander peoples might be read in light of their responsibility to secure the continuity of our distinct cultures, languages, heritage and relationships to traditional lands and waters. In this sense, constitutional recognition would provide a legal and moral framework for Aboriginal and Torres Strait Islander policy that is based on the recognition and preservation of our place as the First Peoples of Australia.

Substantive constitutional recognition should empower Aboriginal and Torres Strait Islander peoples to determine our own futures.

The second point has generated further discussion, with Noel Pearson recently proposing a constitutional mechanism to ensure the participation of Aboriginal and Torres Strait Islander peoples in decision-making on matters that affect our rights.⁵ Professor Greg Craven also supports the idea arguing that 'we need to imagine a structure of parliamentary and policy debate that remains as independent and effective as it ever was, but is routinely enriched by Indigenous counsel on Indigenous matters.'⁶ The Indigenous Youth Report on Constitutional Recognition⁷ and subsequent youth submissions to the Joint Select Committee⁸ also include

a detailed discussion on this aspect of self-determination, noting that substantive constitutional recognition should empower Aboriginal and Torres Strait Islander peoples to determine our own futures.⁹

WHY THE CONSTITUTION?

Constitutional reform is the most solemn and binding form of legal protection available in Australia, at last placing the interests of Aboriginal and Torres Strait Islander peoples outside the changing tides of election cycles. Aboriginal lawyer and academic, Professor Megan Davis, observes that 'in Australia, Indigenous interests have been accommodated in the most temporary way, by statute. What the state gives, the state can take away, as has happened with the ATSIC, the Racial Discrimination Act and native title.'¹⁰ Former United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has said that constitutions 'frame the way society functions and the values it has.' He says, 'It's important for Indigenous peoples wherever they live, whatever country they live, to feel genuinely included within those societies on terms that are equitable and are based on recognition and their rights as distinct peoples.'¹¹ Professor Marcia Langton has further suggested that 'by recognising Indigenous people, we put that foundation into the Constitution, Indigenous people exist, we overcome the hangover of terra nullius and the Constitution then is absolutely clear that we do, in fact, exist in the nation state ... It has to do with the legacy that we all leave to our children.'¹²

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One of the key roles of a Constitution is to reflect a nation's values, identity and heritage. Another is to provide checks and balances on the Parliament's legislative power. The Australian Constitution has failed Aboriginal and Torres Strait Islander peoples in both respects.

Australia's British heritage is already recognised in our Constitution, both implicitly through the Westminster and liberal democratic institutions it creates and explicitly through the recognition in the preamble of 'the Queen's most Excellent Majesty' and 'the Crown of the United Kingdom of Great Britain.'¹³ Our Judeo-Christian tradition is explicitly recognised through an agreement between the colonies 'humbly relying on the blessing of Almighty God.'¹⁴ Not one word in our Constitution attests to over 60 000 years of Aboriginal and Torres Strait Islander heritage that exists in this country.

Our Constitution recognises and safeguards a number of values that were important to its drafters: responsible government; the separation of powers; an implied freedom of political communication; trial by jury; just terms for the acquisition of property; religious non-discrimination and freedom from state-based discrimination. Unfortunately, our Constitution includes another value that was important to its drafters: racism. To this day, the Australian Constitution explicitly allows for the adoption of racially discriminatory laws in sections 25 and 51(xxvi). The task before all of us is to fix this blight on our nation's legal system.

CALLS FOR RECOGNITION

Many new to the discussion on constitutional recognition might assume this issue has only just entered public debate. In fact, calls by Aboriginal and Torres Strait Islander leaders for recognition in the Constitution go back several decades. This moment does not stand alone. It is connected to many of the great moments in our nation's black history. As a young Wiradjuri man working to bring about this next successful referendum, each of those moments is a lesson and an inspiration.

The 1963 Yirrkala bark petitions signed by the 12 leaders of the Yolngu clans of Arnhem Land called for recognition of Indigenous people in Australian law.¹⁵ That document laid the foundations for land rights and helped to spur on the 1967 referendum to count Aboriginal and Torres Strait Islander people as citizens in our own land.

Wali Wunungmurra—who was 17 when he signed the petition alongside elders at Yirrkala—knows the discipline, courage and stamina it took to achieve that previous referendum victory. On the 50th anniversary he said, 'We have fought hard to get what we are getting now.'¹⁶ He understands the importance of this next referendum too: 'We are the first people of this continent and we need to be recognised in the body of the Constitution. But it's up to the younger generation now.'¹⁷ At the Garna Festival in 2013, Senior Gumatj Elder Djunga Djunga Yunupingu talked up the urgency for a referendum. He said, 'It is the right time and the right thing to do. Don't wait five or ten years—otherwise some of us will be old or gone.'¹⁸

Recently, Aunty Pat Turner spoke at a forum in Tasmania and said, 'I think it's important for the future generations of my family to come, to know that we were formally acknowledged. It's not about me and what I'm going to get out of it because it's just been a long, hard, bloody struggle to get the social justice. But this issue is about the proper recognition of the place of our people in our country, in our land, finally.' Aboriginal lawyer and academic, Professor Larissa Behrendt, believes constitutional recognition will help Australians

realise that the fate of our nation is tied to that of the First Peoples. She hopes that constitutional recognition might bring us closer 'to a community where Aboriginal and Torres Strait Islander people are not just considered marginalised and "a problem" but are seen as central and necessary in all aspects of Australian political, economic, cultural and social life.'¹⁹

It's a sentiment shared by many of our Elders, those who have lived the policies of dispossession, segregation, displacement and control. So many of them have urged us to secure this change. They want the younger generations and the generations yet to come to have it better. Put simply, they want recognition in the Constitution.

For many in my generation, we see this as an important way to carry on the legacy of those who have come before. Last year, young Noongar woman Tiana Culbong asked Fremantle to stand with her in supporting the movement. She said, 'It is now 2014. A time for change; a time to move forward as a nation united; a time to remove a constitutional silence; a time to recognise Aboriginal people and our history in this country.'²⁰

Gubbi Gubbi woman Alethea Beetson, a great niece of NRL legend Arthur Beetson, has campaigned through her country and that of her ancestors in southern Queensland. She said, 'When I ask young people what they want for the future, they often say creating more compassionate relationships between Indigenous and non-Indigenous people. I can see that the 'Recognise' campaign fosters that aim. It enables us to grow a more compassionate Australia for our young people to grow up in.'

That view is echoed by almost a quarter of a million grassroots supporters of the 'Recognise' movement across Australia. While we may not know what the final model is yet, we know in principle what we are seeking. We want to see Aboriginal and Torres Strait Islander peoples rightfully recognised in the Constitution and we want to see racial discrimination removed from the nation's highest legal document.

Research suggests millions of Australians stand with us too. Last December, polling found 63 per cent of voters say they are ready to vote in a referendum, and 3 out of 4 of those who are ready say they would vote yes.²¹ At a political level, there is wide multi-party support for constitutional recognition. There is also strong backing from a wide cross-section of organisations across the Australian community—including peak Indigenous groups, churches, businesses, unions, and community organisations.

In February, the Northern Land Council ('NLC') noted that its full council of 78 traditional owners passed resolutions in support of

constitutional recognition and the 'Recognise' campaign. NLC CEO, Joe Morrison, penned an opinion piece in the Sydney Morning Herald and addressed the National Press Club. He said, 'I think it is fundamentally important for the nation to reach a level of maturing ... We need it, obviously, from my point of view, for the nation to realise that it has had a particular history but it's also got a particular exciting future for itself.'²²

CONCLUSION

Constitutional reform that is consistent with Aboriginal and Torres Strait Islander self-determination, together with protection from racially discriminatory laws and policies, would provide substantive recognition to Aboriginal and Torres Strait Islander peoples within the life of the nation. It would continue the work started by our Elders and Ancestors many years ago and would honour their legacy.

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- 1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('UNDRIP') Preamble and art 3; *Charter of the United Nations* art 1(2); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 1(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 1(1).
- 2 James Anaya, 'The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples' in Gudmunder Alfredsson & Maria Stravropoulou (eds), *Justice Pending: Indigenous Peoples and Other Good Causes: Essays in Honour of Erica-Irene Daes* (Kluwer Academic Press, 2002) 12; Aboriginal and Torres Strait Islander Social Justice, *Self-determination and effective participation 'within the life of the nation': An Australian perspective on self-determination*, 2003, Australian Human Rights Commission < <https://www.humanrights.gov.au/self-determination-and-effective-participation-within-life-nation-australian-perspective-self> >.
- 3 UNDRIP, articles 3, 5, 18, 19, 20; Australian Human Rights Commission, *Community Guide to the Declaration on the Rights of Indigenous Peoples* (2010) 24; James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004), ch 3.
- 4 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), p 131; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Progress Report* (2014) 5-10.
- 5 Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay*.

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- 8 Indigenous Youth Engagement Council, National Centre of Indigenous Excellence, 'Supplementary Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples', 19 June 2013 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/~media/wopapub/senate/committee/jscatsi_ctte/consultation/300413/sub4_IYEC.ashx>; Evidence to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Sydney, 30 April 2013, p 6 (Peter Dawson) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld:%22committees/commjnt/c9ea75ee-ddb1-403b-88fd9f39c0cc396/0000%22>>.
- 9 Above n 7, 28.
- 10 Megan Davis, 'A woman's place...' (2009) 24 *Griffith Review* 156-57.
- 11 Melanie Arnost, 'UN says constitutional recognition overdue', *ABC News* (online), 27 May 2013 <<http://www.abc.net.au/news/2013-05-27/un-says-constitutional-recognition-overdue/4715616>>.
- 12 ABC Radio National, 'Behind the Gap: constitutional recognition for Australia's first peoples', *RN Drive*, 18 February 2015 (Professor Marcia Langton) <<http://www.abc.net.au/radionational/programs/drive/behind-the-gap3a-indigenous-constitutional-recognition/6142926>>.
- 13 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, preamble.
- 14 *Ibid.*
- 15 Museum of Australian Democracy, *Petitions of the Aboriginal people of Yirrkala 14 August and 28 August 1963* <<http://foundingdocs.gov.au/item-did-104.html>>.
- 16 Heather Stewart and Clare Rawlinson, 'Yirrkala bark petitions: A turning point in recognition of Indigenous rights', *ABC News* (online), 10 July 2013 <<http://www.abc.net.au/news/2013-07-10/yirrkala-bark-petitions-50-years-on/4809610>>.
- 17 *Ibid.*
- 18 Tanya Hosch, 'Bring our people in from cold', *The Australian*, 5 August 2014.
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'Recognise This' Paste Up project

'Recognition of Aboriginal and Torres Strait Islander people is important for ALL Australians. It's 2014, we need to fix this!'

Kimba, 21
Broome, WA.



'Recognise This' Paste Up project

'Constitutional recognition is about all Australians coming together as part of the human family, while learning from and celebrating the unique cultures of the First Australians.'

Acacia, 20
Fremantle, WA.

