
CONSTITUTIONAL RECOGNITION: RECOGNISING THE FLAWS IN INDIGENOUS AFFAIRS?

by Jessica Kitch

INTRODUCTION

Constitutional recognition of Indigenous Australians has become heavily publicised; from airplanes to billboards, articles and public discussions. Some suggest the proposal to recognise Aboriginal and Torres Strait Islander peoples in the preamble of the Australian Constitution needs to be introduced alongside functional, practical measures.¹ Others suggest that constitutional recognition needs to follow after education about Indigenous peoples and histories becomes a priority, in order to fully understand the significance of such an event.² The reality is, there are varying views on what recognition means and, within the Indigenous population, there are numerous political agendas including the desire for a treaty.³ This essay looks at the Expert Panel's recommendations while taking into consideration the current Prime Minister's views on Indigenous affairs and the current attitudes of non-Indigenous Australians towards Indigenous affairs. It will then question whether constitutional recognition means anything in light of these attitudes.

ONE MOB: THE RECOGNISE CAMPAIGN TO UNIFY AUSTRALIA

The Recognise campaign is a part of Reconciliation Australia and is governed by the Board of Reconciliation Australia.⁴ There is a lack of information about Recognise and the birth of the campaign, however Recognise are the promoters of constitutional recognition of Indigenous Australians.⁵ The publicity surrounding the Recognise campaign only promotes the brand of the campaign and the theme of 'recognition' in a broad sense, and not a great deal about the content of the proposal. This is due in part to not having a date for a referendum secured, or a specific model of recognition known. So far the Expert Panel on Constitutional Recognition of Indigenous Australians, appointed by former Prime Minister Julia Gillard in 2010, have gone some way as to providing a proposal that can be promoted by Recognise. The Expert Panel conducted an extensive consultation process with Indigenous and non-Indigenous people and organisations; as well as collecting more than 3600 submissions.⁶ From this a long and worthwhile process, the Panel compiled a substantive report in 2012, which expressed many ideas about what

constitutional recognition should look like. The recommendations for constitutional recognition in their final report included:

- The removal of section 25 – this abolishes the possibility that a government can revoke voting rights based on race. The removal of this section has remained largely undisputed by community members and all sides of politics as it is irrelevant to today's society.⁷
- The removal of section 51 (xxvi) – this would ensure that laws cannot be passed that discriminate against people based on race.⁸
- The insertion of a new section 51A – this is proposed to recognise Aboriginal and Torres Strait Islander peoples and reserves the right of the Commonwealth to make laws that benefit Aboriginal and Torres Strait Islander peoples.⁹
- The insertion of a new section 116A - Section 116A is intended to ban racial discrimination by the Commonwealth.
- The insertion of a new section 127A¹⁰ – this is to recognise Aboriginal and Torres Strait Islander languages as being the country's first languages and it also confirms that English is Australia's national language.¹¹

THE BREAKDOWN OF THE PROPOSAL: IS THIS REALLY WHAT OUR MOB WANTS? LANGUAGES

Section 127A recognises Aboriginal and Torres Strait Islander languages as the first languages of this country, which is a fair and truthful statement and is something the Expert Panel strongly promoted.¹² The proposed s 127A confirms that English is the national language of Australia; however the author believes this is where an issue lies. Not only does it damage Australia's reputation of being a multicultural country, but it also places Aboriginal and Torres Strait Islander languages in the past. This results in placing Aboriginal and Torres Strait Islander cultures firmly in the past, adding to the myth that Indigenous cultures are a 'dying' race.¹³

Additionally, it has the potential to shame the Indigenous peoples of Australia who are unable to speak their nation's language, further pushing this idea of an "authentic" Indigenous person. This

creates a culture that further enables the repressive authenticity of Indigenous peoples.¹⁴ Repressive authenticity refers to the selectivity of what constitutes an “authentic” Indigenous person, often based on stereotypes.¹⁵ The authenticity of Aboriginal peoples has always been defined and enforced by non-Indigenous peoples, or the colonisers, which further exacerbates the repression of Indigenous peoples. It also perpetuates problems of identity for those Indigenous peoples who do not fit this non-Indigenous person’s view of what an (“authentic”) Indigenous person should be.

Sitting at the dinner table discussing my Aunty’s cultural awareness training and the discussions surrounding our Aboriginality, my cousins’ claimed that they have been accused, countless times, of not being Aboriginal because of their appearance. Their father’s heritage is purely English and thus, they may not appear as the stereotypical image of an Aboriginal person. Given the policies of the assimilation era, it is not unusual for Indigenous peoples to appear different and in a range of skin colours. After explaining to my cousins that when you add milk to coffee, it is still considered coffee and having a discussion surrounding identity, they quietened down. However, it disappoints me that the stereotypes that are heavily publicised make it difficult for Indigenous peoples to identify as such and thus repressive authenticity becomes relevant again.¹⁶

LAWS FOR THE BENEFIT OR DETRIMENT?

The Expert Panel proposed to replace s 51 (xxvi) with a new s 51A that ensures the Commonwealth can make laws for Indigenous peoples for the benefit of further advancement of Indigenous peoples, aimed at addressing the disadvantage faced by Australia’s First Peoples.¹⁷ It was also recommended that a statement of recognition including recognising that ‘that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples’¹⁸ be inserted as a preamble to s 51A. The problem with this amendment is the fear of a reoccurrence of historic betrayal as seen with the 1967 referendum, which is constantly made worse by government decisions in the field of Indigenous affairs.¹⁹ The 1967 referendum that implemented s 51 (xxvi) was also thought to allow the Commonwealth to make laws to address the disadvantage of Indigenous peoples.²⁰ Instead however, this section has been used for both the benefit and *detriment* of Indigenous Peoples. Section 51 (xxvi) was used to implement detrimental measures and legislation such as the Northern Territory Emergency Response (‘NTER’) and its continuance under ‘Stronger Futures’.²¹

The historical treatment of Indigenous peoples by governments is shown by the NTER, assimilation policies, the Stolen Generations, and the high level of Indigenous people being imprisoned. The

ongoing injustices Indigenous peoples face and the inaction of the Australian Government to address social problems have resulted in protests such as the Palm Island Riots and Redfern Riots. It is an inconsistent relationship with little trust and thus it would be hard for some Indigenous people to support any ‘good intentions’ of the government, given that past policies have largely failed Indigenous people.

While a final proposal to take to a referendum is yet to come, it seems that it may not live up to all of the Expert Panel’s recommendations.²² After the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples recommended a referendum be held ‘at or shortly after the next election in 2016’²³, negotiations concerning the content of the Expert Panel’s recommendations were discussed by the committee. These discussions leaned towards the abolition of the clause in s 51A that outlined legislation made for Indigenous Australians needs to be done to secure the advancement of Indigenous Peoples.²⁴ The Committee also reviewed options to recognise Indigenous Australians in the Constitution, two of these options included the protection of Indigenous Peoples from discrimination and a third option contained no reference to racial discrimination.²⁵

LEADING BY EXAMPLE: DO AS I SAY, NOT AS I DO

Prime Minister Tony Abbott is becoming renowned for his sometimes controversial statements.²⁶ He has made ignorant statements about Indigenous peoples and his view of the invasion of Australia such as, calling Australia ‘unsettled or scarcely settled’ before British colonization;²⁷ and claiming that Australia was ‘nothing but bush’ before colonisation.²⁸ These two quotes by Tony Abbott completely contradict the constitutional recognition campaign, as one of the main aims is to recognise Indigenous peoples as the First Peoples of Australia. Another example was in relation to employment where Tony Abbott said ‘...there may not be a great job for them but whatever there is, they just have to do it, and if it’s picking up rubbish around the community, it just has to be done’²⁹

Responses to these controversial statements have not been filled with complete disgust or outrage as one may think. Instead, some people have aligned themselves with Tony Abbott’s obnoxious and oppressive statements.³⁰ Mick Dodson said in his recent speech at the National Press Club that the Government’s actions ‘certainly aren’t conducive to creating an atmosphere that would enable a successful referendum’.³¹ Thus, the stereotype of Indigenous peoples continues, making constitutional recognition—supported by a Prime Minister who has done little to improve Indigenous affairs—a potentially meaningless pursuit.³² This is problematic given that the Australian Constitution is meant to represent the

'aspirations of the Australian people in the direction of nationhood, so far as is consistent and in harmony with the solidarity of the Empire.'³³

Soon after Tony Abbott was elected as Prime Minister, he formed an Indigenous Advisory Council appointing those who he believed were leaders in the Indigenous community. But this resulted in a lack of confidence in the government by Indigenous peoples, as there was no consultation and no election of the council members. This has become problematic because the representation of Indigenous peoples and their many views are not taken into account by the committee.³⁴ The appointment of Warren Mundine as chairperson of the committee also sparked controversy as his views are often opposed by many Indigenous Australians.³⁵ Alongside the unelected Indigenous Advisory Council, Abbott promised to make Indigenous affairs his priority and aimed to deliver results. This has been contradicted by the Federal Government's major cuts to Aboriginal and Torres Strait Islander Services, including cutting \$500 million from the Indigenous Affairs program, and \$13.41 million from the Indigenous Legal Aid and Policy Reform Program, which includes significant cuts to Aboriginal Legal Services.³⁶ These services are necessary because indigenous specific legal aid assists in reducing Aboriginal incarceration rates; and also provide a platform for Indigenous peoples to express their views and assist in policy reform.

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As well as cutting funding, the Prime Minister has argued that Welcome to Country rituals are tokenistic and that the Labor party only introduced this ritual to parliament to reduce white guilt.³⁷ The Abbott Government also sought to amend the Racial Discrimination Act with the Attorney General saying people have rights to be a bigot.³⁸ As Nova Peris said:

If the Prime Minister truly believes that constitutional recognition is a forward-looking, unifying movement, he must get rid of the changes to 18C. Anything less will condemn the referendum to failure.³⁹

The fact that Australia's Prime Minister can cut funding to such vital services for Aboriginal and Torres Strait Islander peoples, and then support a campaign for constitutional recognition causes concern. Does he believe in making genuine reform in this area? Or, is he doing this just to tick boxes?

CONCLUSION

Now is not the time for the constitutional recognition of Indigenous peoples. The contradictory opinions held by the current Prime Minister, and by a large proportion of the Australian public, means that recognition at this current time will mean very little to Indigenous peoples, and even less to non-Indigenous people.⁴⁰ The current attitudes to Indigenous affairs mean that constitutional recognition will amount to a meaningless act of symbolism.

For constitutional recognition to mean something there needs to be a genuine understanding of Indigenous disadvantage and history. There needs to be a general understanding of the significance and reasons why constitutional recognition will lead to reconciliation. For constitutional recognition to mean more than it does currently, education needs to be at the forefront of the campaign to help reduce the discrimination and racism faced by the Indigenous population.⁴¹ When this is achieved, and when non-Indigenous people understand Indigenous disadvantage and Indigenous identity, then constitutional recognition could be a step towards reconciliation.

Jessica Kitch is a proud Wiradjuri woman from the Central West of NSW. She has just completed her third year of her arts/law degree at UNSW.

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Mina Mina Jukurrpa (Mina Mina Dreaming) - Ngalyipi

Pauline Napangardi Gallagher

610mm x 760mm

