
RECOGNITION OF INDIGENOUS PEOPLE IN THE CONSTITUTION:

WHAT WILL IT TAKE TO BRING ABOUT CHANGE?

by Kristyn Glanville

(Reflections on the Indigenous Law Centre's Open Forum, 17 March 2011)

In light of the Gillard Government's promise of a referendum to recognise Indigenous Peoples in the Australian Constitution, the Open Forum discussed the key questions facing this reform: whether such a change is in the interests of Indigenous people, what form recognition would take and whether a referendum would ultimately be successful. The Open Forum also discussed essential questions: why Australia as a nation needs to recognise Indigenous people in the Constitution, what are the next steps to a successful referendum, and what role would the Expert Panel play.

The panel opened with a brief presentation from each of the panel members; Professor Megan Davis,¹ Mick Gooda,² Professor George Williams,³ Les Malezer,⁴ and Paul Kildea.⁵ Questions from the floor were then directed at the Panel for discussion, encouraging members of the audience to critically engage with the issues, and raise their concerns about any prospective constitutional reform. Each contribution highlighted the complexity and diversity of opinions held by Aboriginal peoples and their Elders, the broader community and legal academics in the field of constitutional recognition of Indigenous people.

IS CONSTITUTIONAL RECOGNITION IN THE INTERESTS OF INDIGENOUS PEOPLE?

This is the foundational question facing any constitutional reform concerned with recognising Indigenous people in the constitution. The question proved to have no consensus; the panel and forum contributors were divided on whether constitutional recognition would lead to any meaningful change.

George Williams described the historical foundations of the Australian constitution as a document which was designed to fail the Aboriginal people, initially drafted to deny their rights, voice and identity. He argued that reform was needed to address this past conduct, and make the constitution a document which not only recognised Indigenous people, but entrenched fundamental rights and protections. On this point, Megan Davis discussed how such recognition could provide security for Indigenous people, by mandating provision for and protection of

their interests, particularly in light of the tendency for governments to address issues facing Indigenous people on a political whim. She also added that it would give the High Court greater capacity to interpret the law in a way amenable to the interests of Aboriginal people.

Mick Gooda focused on using constitutional change as a basis for changing the relationship between Indigenous and non-Indigenous Australians. He acknowledged that people had a right to be cynical towards the process, given the suffering brought on by government policy within living memory. However, he argued that the task of constitutional change was not a question of chipping away at the edges of the problems facing Indigenous people: a holistic, nation building approach was needed to create a new document which accurately expressed what it means to be Australian.

Les Malezer was more critical towards whether constitutional recognition would have any meaningful result. Les discussed the Constitution's unchanging nature, its design aimed at empowering the crown and upholding Commonwealth and state institutions and the way in which it fails to reflect the views or identity of modern Australians. In light of the failures of other government reforms, such as 'Reconciliation' and the amendment of the Races Power, Les advocated for following in the direction of the *International Declaration of the Rights of Indigenous Peoples*. He argued that the time spent developing a constitutional amendment, which could fail, would be better used to lobby government for compensation, address social issues, improve development in Indigenous communities and support the self-determination of Aboriginal and Torres Strait Islander communities.

An alternative suggestion given by members on the panel and members on the floor was to supplement the current constitution with a treaty or agreement making provision. Such a treaty might impose an obligation upon, or provide the power for, the Parliament to reach agreements with Indigenous peoples. Les Malezer felt creating a treaty would be simpler and more productive than constitutional change. George Williams also felt that the New Zealand

Waitangi Treaty model, which forces consultation with the Maori people, could be of benefit to Indigenous people. However, he argued that a treaty and constitutional recognition were still necessary. Williams also explained that the two were not mutually exclusive. The issue of constitutional recognition does not take the option of treaty off the table.

A concern raised by a member of the floor was that constitutional change would ignore the sovereignty of Indigenous people. Les Malezer responded to this by discussing the strength of International Law as an alternative path, as it provides a right to autonomy for Indigenous peoples. Ultimately, as Megan Davis expressed, this is a question which must be resolved by consulting community voices through the Expert Panel assembled by the Gillard government.

WHAT FORM SHOULD RECOGNITION OF INDIGENOUS PEOPLE TAKE?

There were a number of suggestions for what kind of change should be incorporated into the Australian Constitution. In the current political climate, there appears to be multi-party support for adding recognition of Indigenous people into the Preamble of the Constitution. However, as the panel discussed, such a change would be unable to achieve anything more than symbolic recognition, doing little to secure and protect the rights of Indigenous people.

A number of sections of the constitution were identified as being in particular need of reform. For example, s 51(xxvi) ('the Races Power') was identified by panellists as a section which needed to do more than merely neutralise marginalisation, but actively ensure that power can only be exercised for the benefit of Indigenous people. Another section identified as problematic was s 25 which was drafted to permit states to exclude voting on the basis of race. Most panel members advocated for its removal as it is largely redundant and in its current form contemplates discrimination on the basis of race.

Mick Gooda took a broader view of the changes which need to happen, arguing that more holistic change was needed than merely amending the current constitution. Mick took the view that a new constitution was needed which redefined and reflected the relationship between, and identity of, Indigenous and non-Indigenous Australians. Another popular suggestion from the floor was to add the contents of the *Declaration of the Rights of Indigenous Peoples into the Constitution*.

WOULD SUCH A REFERENDUM ULTIMATELY BE SUCCESSFUL?

The general consensus amongst the panel was that the double majority required to pass a referendum would be difficult, but not impossible, to achieve. The broad consensus of George Williams, Paul Kildea and Mick Gooda was that for any constitutional change to go ahead there would need to be popular ownership. This would involve public engagement and education through reaching out to the public in a variety of easily accessible and understandable mediums. The public would have to participate in the process, in a genuine and meaningful way, rather than just some tokenistic role. To hold a successful referendum the focus must be about the relationships between Australian people, not politicians

Mick Gooda also discussed how public engagement would have to come to terms with the past, as well as present, impact of policies on Indigenous people. He felt it would not be enough for the reform to receive the minimal yes vote needed, but rather we should aim for resounding agreement amongst all Australians. He pointed to the Apology given by former Prime Minister Kevin Rudd as showing the potential for Australians to come together and reflect upon Indigenous and non-Indigenous relations with their hearts and minds.

Les Malezer believed that the most important in any prospective constitutional change would be gaining a consensus amongst Aboriginal and Torres Strait Islander people first.

CONCLUSION

The ILC Open forum raised many pressing concerns about recognising Indigenous Australians in the Constitution. Some took the broad view that the whole Constitution required reform to become a document which reflects the values and identity of modern Australia. Others took the view that the present Constitution could be altered to produce meaningful recognition and protection of Aboriginal and Torres Strait Islander peoples' rights. Alternative suggestions for improving the situation of Indigenous Australians, such as a treaty and relying on International Law, were also suggested as alternatives or supplementary to such a reform.

The ILC forum highlighted that for meaningful constitutional recognition to occur, Australians as a whole must come together and own the political process. Indigenous Australians and non-Indigenous Australians must both be given a meaningful role and voice within

this process of recognition. It is not enough to merely scrape over the line, but rather, the proposed changes to the constitution must be part of a wider nation-building process that comes to define what it means to be an Australian and how Indigenous and non-Indigenous Australians come to relate with one another.

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- 1 Director, Indigenous Law Centre, Faculty of Law, UNSW and a member of the Federal Government's Expert Panel on Constitutional Recognition of Indigenous Australians.
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- 4 Co-chair of the National Congress of Australia's First Peoples, Chairperson of the Foundation for Aboriginal and Islander Research Action (FAIRA), 2008 AHRC Human Rights Medal recipient.
- 5 Co-Director of the Referendums Project at the Gilbert + Tobin Centre of Public Law, Faculty of Law, UNSW.

Magroves

Arone Meeks

Limited Edition Etching
800mm x 1200mm

In *Magroves* we continue the journey of the wet season as the rains flush out the creeks and rivers to create a rich alluvium that washes into the mangroves and then the sea. The mangroves are vitally important to many infant/growing species that live there; as this is the rich nursery nurturing and protecting vast forms of sea life, until each creature is able to fend for itself. Aboriginal people have always relied on the mangroves as a food source. When I was growing up I lived with family on the edge of the mangroves, we were never hungry being there. But the mangroves also were a place of important stories and sorcery with rules which were important to be followed. The blue figure is that of a mangrove spirit, it has a small dillybag around its neck and possesses both male and female characteristics. When you are in the mangroves you can hear this spirit by its clicking sound, as it lures/talks. To the right is the mangrove with its protective root structure. The central image is that of a woven cane trap. Though the main purpose of this is to trap fish/ crabs etc, it also signifies the womb in which life grows. We are still following the path of the first rain.

