CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES: EXPLORING THE LIMITS OF BENEVOLENT LANGUAGE

by Shelley Bielefeld

INTRODUCTION

This article explores constitutional recognition of Aboriginal and Torres Strait Islander peoples, a topic of ongoing debate.[1] It considers Australia's history of failing to protect Indigenous peoples from racially discriminatory legislation, and the problem of cultural racism which remains in contemporary law and policy. The article evaluates recommendations of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples which refer to the notion of 'advancement' and prohibition of racial discrimination unless it is for the purpose of 'overcoming disadvantage'.[2] These issues are critically analysed in light of current law and policy intended to be beneficial for Australia's First Peoples: the new Indigenous Advancement Strategy announced in the 2014–15 Federal Budget; and the Improving School Enrolment and Attendance through Welfare Reform Measure ('SEAM'). These matters suggest that more robust constitutional protection of the rights of Indigenous peoples is necessary to guard against racial discrimination that can be entrenched in purportedly benevolent law and policy.

BACKGROUND

The Constitution[3] has, from its inception, failed to protect Indigenous peoples from legislatively enshrined racism. The Constitution has previously contained and still does contain provisions which allow racially discriminatory laws. Section 25 refers to the possibility of state laws that disqualify people from voting because of their race. The original s 127 stated that Aboriginal people were not to be counted '[i]n reckoning the numbers of the people' in Australian jurisdictions. Section 127 was repealed in the 1967 referendum. This referendum also amended the wording of s 51(xxvi) so the Commonwealth could enact laws for Aboriginal peoples as 'the people of any race, for whom it is deemed necessary to make special laws'. The 1967 referendum received an overwhelming 'yes' vote, which indicated a significant shift in public attitudes about Aboriginal peoples. However, it did not resolve the problem of the Constitution permitting the Commonwealth Parliament to enact legislation with a detrimental impact upon Aboriginal peoples via s 51(xxvi), as seen in *Kartinyeri v Commonwealth*.[4]

The context of *Kartinyeri* was that the Ngarrindjeri people had sought protection of Kumarangk (Hindmarsh Island) and its surrounding waters, an area of cultural and spiritual significance. The Commonwealth removed the right of the Ngarrindjeri people to have a declaration made under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) via the *Hindmarsh Island Bridge Act 1997* (Cth) (the 'Bridge Act'). In *Kartinyeri*, the High Court held that the Bridge Act was supported by s 51(xxvi), proving that the race head of power can be used in a discriminatory manner.[5] There is a need to redress this constitutional deficiency.

THE EXPERT PANEL REPORT

The Expert Panel was convened to explore constitutional recognition of Indigenous peoples and make recommendations to the Commonwealth about possibilities for constitutional change. The Panel were instructed:

> [T]hat each proposal 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.[6]

The Expert Panel report is a valuable resource and contains important information. However, its terms of reference were limited and did not expressly address some issues considered to be important to many Indigenous peoples, namely, their right to self-determination and acknowledgement of their sovereignty.[7] Recommendations had to be acceptable to 'an overwhelming majority of Australians',[8] which effectively excluded recommendations regarding Indigenous claims to sovereignty and self-determination—because such claims are seen as controversial by governments and many non-Indigenous Australians. Although numerous Indigenous peoples remain understandably enthusiastic about sovereignty and self-determination,[9] the Expert Panel did not make recommendations about sovereignty and self-determination

because it was deemed 'likely to jeopardise broad public support for the Panel's recommendations'.[10]

The Expert Panel's recommendations were to repeal s 25 and s 51(xxvi) and to enact several new provisions:[11]

- s 51A – recognising Aboriginal and Torres Strait Islander peoples and providing the Commonwealth with law-making power 'with respect to' such peoples.
- s 116A – prohibiting racial discrimination unless it is 'for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group'.
- s 127A – recognising that English is the national language but that Aboriginal and Torres Strait Islander languages 'are the original Australian languages' and 'part of our national heritage'.

This article will not evaluate the full range of recommendations analysed elsewhere.[12] It examines the discursive limitations of using language such as 'advancement', and 'overcoming disadvantage' in order to address the aspirations of Indigenous peoples. These concepts appear in the work of the Expert Panel in several ways. First, whilst containing many positive statements about recognition, the proposed preamble to s 51A also refers to 'the need to secure the advancement' of Indigenous peoples.[13] Second, the proposed s 116A(1) prohibits racial discrimination, but s 116A(2) permits laws and measures for 'overcoming disadvantage', amongst other things.[14]

THE LIMITATIONS OF REFERRING TO 'ADVANCEMENT' AND 'OVERCOMING DISADVANTAGE'

Recognition of Indigenous peoples is regarded by some as 'as a sign of respect',[15] but it is worth considering what a genuinely respectful relationship between the government and Australia's First Peoples would look like. This requires a substantial shift in government attitudes. Arguably, if respect is genuine, it ought to extend to respect for cultural difference, autonomy and self-determination for Indigenous peoples.[16]

ADVANCEMENT: PROPOSED PREAMBLE TO S 51A

It is unclear how the High Court would interpret the proposed preamble, or what influence it might have on judicial decision-making. Although the preamble mentions the importance of respecting the culture of Indigenous peoples, it also refers to the need for their 'advancement'.[17] The problem with the word 'advancement' is that 'so much harm, knowingly or unknowingly, has been wrought on Aboriginal and Torres Strait Islander peoples in the name of advancement.'[18] To say that Indigenous peoples require 'advancement' could be taken to imply that they are not currently advanced, but unsophisticated, requiring reform in order to be suitable for society.[19] It is not difficult to see the discursive connection between the notion of 'advancement' and Australia's earlier colonial discourse of Indigenous inferiority. It is a word poorly chosen for any constitutional recognition proposal.

The concept of 'advancement' is likely to be interpreted by government as permitting a neoliberal law and policy framework to continue to dominate Indigenous affairs.[20] It seems plausible that government would interpret 'advancement' as consistent with modernity's notions of 'progress' and 'development', which can have an assimilatory impact upon Indigenous peoples. Yet it may legitimately be asked: '[p]rogress for whom, measured against what?'[21] In the Northern Territory ('NT') Intervention, entire communities were negatively stereotyped, weighed in the scales of supposedly objective benchmarks and found wanting. Indigenous communities were consequently subjected to a range of disciplinary measures purportedly designed to advance their well-being. Alas, numerous evaluations later, there is little evidence that the Intervention increased well-being for Indigenous peoples.[22] By contrast, there was a sharp increase in 'attempted suicide and self-harm reports … from 57 in 2007 to 261 in 2011', along with numerous other negative trends.[23]

Nevertheless, measurement against neoliberal benchmarks is strongly influential with government. According to neoliberalism a 'utopian free capitalist market' is 'the only means' by 'which human advancement can be made.'[24] Within this framework Indigenous '[c]ultural differences … are constructed as … hindering the rational market … [and] as irrational ways of organising society.'[25] For this reason, policies designed to homogenise rather than respect cultural difference feature in neoliberal and colonial governance.[26] This perpetuates cultural racism, whereby Indigenous disadvantage is rationalised 'as a product of dysfunctional cultural traditions'[27] which must be altered by paternalistic governance. Yet, to truly change the dynamic between the government and Indigenous peoples, the government would have to acknowledge that Indigenous peoples are to have a primary role in constructing and defining their 'social meaning and economic well-being'.[28] The Federal Government's new Indigenous Advancement Strategy falls far short of this, and is about 'achieving results in the Government's key priority areas in Indigenous Affairs of getting children to school and adults to work and making communities safer.'[29] Within this framework, the role of remote Indigenous communities is to 'adjust to the new arrangements'.[30] There are no process protection rights for Indigenous peoples. There is no room for self-determination, consultation or negotiation, just more top down decision-making disguised in emancipatory rhetoric.

The Indigenous Advancement Strategy aims to ensure that 'the ordinary law of the land applies in Indigenous communities'.[31] This language is loaded with ominous assimilatory implications, and excludes the operation of customary law. The claim about 'ordinary law' seems ironic given the punitive alcohol laws currently operating in Aboriginal communities under the Stronger Futures legislation, which are clearly not 'ordinary' across all Australian communities.[32] However, perhaps the reference to 'ordinary law' indicates a desire for neoliberal governance of land, further freeing up Indigenous lands for non-Indigenous commercial interests. The Indigenous Advancement Strategy aims to ensure that 'effective use'[33] is made of Indigenous land. All things considered, the prospects for respectful treatment of Australia's First Peoples do not seem promising under the 'advancement' framework.

The notions of 'advancement' and 'overcoming disadvantage' have been key rhetorical devices to justify a range of punitive and disciplinary regimes seen as an indispensable part of the 'civilizing mission'.

OVERCOMING DISADVANTAGE: PROPOSED S 116A(2)

Like the conceptual difficulties attaching to 'advancement', much colonial paternalism and 'neoliberal assimilation'[34] can be fostered within the discursive framework of 'overcoming disadvantage'. The proposed s 116A(2), whilst well-intentioned, could readily result in the kind of cultural racism which has a prominent history in Australian law and policy. There have been many occasions throughout Australia's colonial history where Aboriginality has been seen as synonymous with backwardness, with assimilation prescribed as the cure. This highlights one of the legitimate concerns about the proposed reforms: who is it that gets to define what disadvantage is and the process by which such disadvantage is to be addressed? If it is left to government to define disadvantage according to western cultural values[35] then this proposed section may fail to prevent more colonising legislation. There is therefore a risk that the proposed s 116A(2) may operate as a 'paternalist' provision. It contains no process protection rights such as good faith consultation to obtain the 'free, prior and informed consent'[36] of Indigenous peoples. The proposed s 116A(2) may provide the Commonwealth with power to enact legislation like that introduced as part of the Intervention and Stronger Futures.[37] Although the Commonwealth asserts that Stronger Futures is beneficial for Aboriginal people,[38] this legislation has been described as racially discriminatory by numerous Aboriginal people subject to it.[39] For a genuinely respectful relationship between governments and Indigenous peoples it is important to 'ensure that laws are not contrary to the wishes of the targeted community.'[40]

One contemporary example which illustrates the limitations of relying upon language such as 'overcoming disadvantage' is SEAM. The government claims that SEAM is beneficial for welfare recipients,[41] despite an absence of unequivocal evidence to support this position.[42] Although presented by the Federal Government as non-racial law and policy, SEAM disproportionately applies in Indigenous communities.[43] Through SEAM, the Commonwealth aims to improve educational outcomes for Aboriginal people—an admirable goal—but one accompanied by a punitive process. SEAM imposes conditions upon welfare income and can result in suspension of welfare payments for families if parents do not ensure that children meet the Government's criteria for school enrolment and attendance.[44]

In justifying the expansion of SEAM, the Federal Government has relied heavily on anecdote, ideology and populism.[45] Evaluations of SEAM have suggested that 'the trial's impact on school enrolment was unclear', and whilst 'there were some small improvements in school attendance levels, these often proved temporary.'[46] Nevertheless, the Commonwealth has committed '$107.5 million' to implement SEAM as part of Stronger Futures, which includes expansion of SEAM in the NT until 2022.[47]

The Federal Government claims to have curtailed rights to welfare in the name of 'overcoming disadvantage'. Yet the reality of those subject to these laws is different to the government's narrative of benevolence.[48] This welfare reform resonates with the notion of the 'beneficent whip'.[49] It opens up possibilities for children to go without essential needs for up to 13 weeks in the name of furthering their education. There are serious problems with SEAM. The North Australian Aboriginal Justice Agency has been contacted by Indigenous people whose payments have been 'suspended under SEAM' who 'do not understand why their payment has been suspended, or what they need to do to have their payment restored.'[50] It perpetuates a grave injustice to suspend the income of remote living Aboriginal welfare recipients who have not understood the reason for the suspension. In 2013, 254 welfare recipients had their payments suspended under the enrolment aspect of SEAM, and 60 under the attendance requirement.[51] Although parents who have their income suspended can later receive back pay if they comply with SEAM, the period of suspension imposes severe economic hardship on families.

The Federal Government maintains that SEAM promotes the right to education, however there are other human rights

incompatibility issues with SEAM concerning the right to be free from 'racial discrimination', and rights to 'social security', 'privacy and family', and 'an adequate standard of living'.[52] Arguably 'human rights should not be breached on the basis that the breaching measures are taken to advance other "superior" human rights.'[53] These issues with SEAM leave considerable room for scepticism about government narratives of benevolence as a safeguard for Indigenous peoples.

CONCLUSION

A narrative of benevolence has been an essential aspect of colonial exertions of power over Indigenous peoples since the earliest days of Australian colonisation. Central to this narrative is the notion that Indigenous peoples need 'advancement': that they require this in order to overcome the inherent 'disadvantage' that attaches to them by virtue of their Indigenous identity. The notions of 'advancement' and 'overcoming disadvantage' have been key rhetorical devices to justify a range of punitive and disciplinary regimes seen as an indispensable part of the 'civilizing mission'.[54] The danger, therefore, in using this kind of language in any proposal for constitutional change is that these concepts may well continue to justify paternalistic policies. A question put to the public about constitutional recognition needs to be the right question to effectively address injustice experienced by Australia's First Peoples. If the wrong question is put to the public and voted upon with a 'yes' vote, it may not protect Indigenous peoples from their 'protectors', but perpetrate the fiction that the issues with racism in the Constitution are now resolved. It may 'whitewash' the lingering problem of colonial values continuing to define and determine the circumstances under which Australia's First Peoples are to live in their own country.

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Mina Mina Jukurrpa (Mina Mina Dreaming) - Ngalyipi
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