Aboriginal and Torres Strait Islander peoples and constitutional reform

By Megan Davis

For more than three decades there has been advocacy for constitutional reform pertaining to Aboriginal and Torres Strait Islander peoples.[1] No single aspect of reform has dominated this advocacy but in general it can be viewed as being for 'recognition' and for the removal of 'race' from the Australian Constitution.

The result of the 2010 federal election was a hung parliament and following negotiations with the Greens and with the Independent MP Rob Oakeshott, who were committed to a process of constitutional reform, Prime Minister Julia Gillard established an Expert Panel on Constitutional Recognition of Indigenous Australians.[2]

The Expert Panel was tasked with the responsibility of reporting on possible options for constitutional change including giving advice on the level of support among Indigenous people and the wider Australian community for each option. This article analyses the process the Expert Panel undertook, lists the recommendations of the panel and explains the next steps towards a referendum on this issue.

THE EXPERT PANEL PROCESS

The Expert Panel was issued Terms of Reference requiring that it oversee a process involving a broad national consultation and community engagement program on the question of constitutional 'recognition'.[3] 'Recognition' was the language the Expert Panel received from the Prime Minister; 'recognition' being a relatively recent state constitutional trend. Politically, the Prime Minister was no doubt attracted to the minimal or 'weak' nature of the reform, for which it would be easier to gain bipartisan support. In addition, the Expert Panel was asked to consult constitutional lawyers in order to consider unintended consequences of constitutional reform.

In March 2011, the Expert Panel, meeting for a second time in Melbourne, agreed on a methodology by which to guide its assessment of potential proposals for constitutional 'recognition'.[4] Any proposal must: (1) contribute to a more unified and reconciled nation; (2) be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples; (3) be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and (4) be technically and legally sound. Following this meeting, the Expert Panel then set about consulting widely with a broad spectrum of the Australian community in order to elicit ideas about 'recognition' and what form it should take.

The panel adopted a variety of approaches to seeking community views. It developed and published a public discussion paper.[5] This paper sought submissions from the public on potential options. The panel also developed a website by which to disseminate to the community, particularly Australian youth, the reasons for the process.[6] The panel then travelled around Australia holding public meetings and events. Finally, a short film was created explaining the reason for the process and summarising the public discussion paper. This film was translated into 15 Aboriginal and Torres Strait Islander languages and interpreters of Aboriginal and Torres Strait Islander languages attended consultations, as needed and where possible. Between May and October 2011, the panel held more than 250 meetings.[7]

After the consultations were held, the panel commenced a series of high-level focus groups in October and November 2011 with Aboriginal and Torres Strait Islander leaders in order to further test proposed recommendations. These discussions with the Indigenous community were instrumental in meeting the panel's criteria on proposed recommendations – that they be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples. In addition, through Newspoll, the panel tested the broader community response to its proposed recommendations.[8] And finally, there were extensive consultations with lawyers and scholars who practise in constitutional law and have technical knowledge of the Constitution.

THE FINAL RECOMMENDATIONS OF THE EXPERT PANEL

The Expert Panel made five recommendations. The first recommendation was that section 25 be repealed.[9] Section 25 is a provision which contemplates the possibility of state laws disqualifying people of a particular race from voting at state elections. There is multi-party support for the deletion of section 25 and universal agreement among commentators that it should be deleted.

The second recommendation was that section 51(xxvi) – commonly known as the race power – be repealed.[10] >>

Section 51(xxvi) was, in fact, amended in a 1967 referendum to remove the words '… other than the aboriginal people in any State…'. The removal of this wording saw the conferral upon the federal parliament of the power to make laws with respect to Aboriginal and Torres Strait Islander peoples. Prior to this, such exercise of power was committed to the states. During the consultation process the panel had become persuaded by the argument that there is nothing in section 51(xxvi) to prevent its adverse application against a people of any race.[11] Therefore the Expert Panel recommended that section 51(xxvi) be replaced with a new head of legislative power, 'Section 51A', which would have a 'statement of recognition' as its introductory words or preamble.[12]

The decision to place a 'statement of recognition' in a preamble to the new substantive power was because of the unanimous view that you cannot have a preamble to the UK Act and there would be interpretative consequences of placing a preamble at the beginning of the Constitution. In addition, the panel was reminded of the recent Australian history in 1999 when a preamble to the Constitution was put to a referendum and failed. In that case, many groups wanted to be included in such a preamble.

Importantly, Aboriginal and Torres Strait Islander peoples universally opposed a preamble at the beginning of the Constitution as tokenistic. There was a fear that any preamble would include a 'no legal effect' clause as in the state constitutions of Queensland, NSW, Victoria and South Austalia. The broader Australian community agreed with this sentiment, emphasising that it would be a meaningless exercise to go to the effort of recognition while at the same time saying that it had no effect. Following extensive consultations with some constitutional lawyers, the Expert Panel placed the statement of recognition at the beginning of section 51A, satisfied that such an option met the panel's criteria that it must be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples and be technically and legally sound. It proposed that a new 'section 51A' be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The next recommendation was the insertion of a racial non-discrimination clause to become 'section 116A':

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude 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.

This recommendation was a consequence of the panel's desire to 'recognise' the legacy of racial discrimination in Australia against Aboriginal and Torres Strait Islander peoples. As Expert Panel member and Director of the Cape York Institute, Noel Pearson, argued:

> 'Elimination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past. So extreme was the discrimination against Indigenous people, it initially even denied that we existed. Hence, Indigenous Australians were not recognised. Then, Indigenous people were explicitly excluded in our Constitution. Still today, we are subject to racially targeted laws with no requirement that such laws be beneficial, and no prohibition against adverse discrimination.'[13]

Pearson argues that if the race power was removed (which he strongly advocates), but an anti-racial discrimination clause was not included, Indigenous people would go backwards: 'Whereas if you had an Aboriginal and Torres Strait Islander power and you prohibited discrimination, that's the best result because all Australians regardless of race would be free from racial discrimination.'[14] Although this recommendation was predictably labelled a 'back door' bill of rights by conservative commentators, the panel was not advocating a bill of rights. Section 116A – the non-discrimination clause – was viewed as an integral part of a package of amendments to 'recognise' Aboriginal and Torres Strait Islander peoples in the Constitution. It was intended to bind only the Commonwealth. It was argued that the Commonwealth could too easily subvert Australia's commitment to the principle of racial non-discrimination as reflected in the *Racial Discrimination Act* 1975 (Cth) ('RDA'). More importantly the RDA is accepted in legislation and policy in all Australian jurisdictions. It was argued that constitutionalising the RDA was not a great stretch for the Australian legal system as only the Commonwealth Parliament will have an additional burden placed on it. Submissions to the panel overwhelmingly supported a racial non-discrimination provision and argued in favour of the principle of racial equality. Legally, many submissions insisted there be an allowance for measures to address disadvantage and ameliorate the effects of past discrimination as a necessary aspect of a racial non-discrimination provision. In addition, recognition of the distinct rights of Aboriginal and Torres Strait Islander peoples was a vital part of ensuring equality before the law. Interestingly, this recommendation polled the highest among conservative groups by Newspoll. Indeed, the final Newspoll survey confirmed that, as at 28 October 2011, 80 per cent of respondents were in favour of amending the Constitution so that there is a new guarantee against laws that discriminate on the basis of race, colour or ethnic origin.[15]

The final recommendation was that a new 'section 127A' be inserted, along the following lines[16]:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

This recommendation was in response to the submissions from the community about the importance of language to Aboriginal and Torres Strait Islander communities.[17] In addition it was argued that Aboriginal languages were a direct Australian connection to pre-history and that languages were the common heritage of all Australians and must be protected.

CONCLUSION

The work of the Expert Panel builds on the many reports that have been written over the past 30 years dealing with Indigenous peoples and constitutional reform and acknowledgement. This work includes but is not limited to: the Senate Standing Committee on Constitutional and Legal Affairs, 1983; the Constitutional Commission, 1988; the Social Justice Package, 1992–1995; the Constitutional Convention, 1998; the Council for Aboriginal Reconciliation, 2000; the Senate Legal and Constitutional Affairs Committee, 2003; the Australia 2020 Summit, 2008; the House of Representatives Standing Committee on Legal and Constitutional Affairs, 2008. The Expert Panel has provided the Commonwealth with a comprehensive report with technical recommendations that is the next step in this lengthy history. The way forward involves a campaign towards building community knowledge on the issue of racial discrimination in the Constitution and the importance of recognition of Australia's first peoples. Both sides of politics are currently in support of constitutional reform; although likely the most 'weak' form of 'recognition'. The Australian Constitution is a notoriously difficult constitution to alter; it requires a majority of states and a national majority for it to be changed. The drafters did this so that only the most serious and important of amendments could succeed if they had the support of the Australian people. The task ahead is to convince a majority of states and a majority of people about the significance of 'recognition' and the significance of removing race from the Constitution. If that cannot be achieved then a referendum is unlikely to go ahead. ■

Notes: **1** Aboriginal and Torres Strait Islander Commission ('ATSIC'), *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995); Council for Aboriginal Reconciliation, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Towards Social Justice? An Issues Paper Commencing the Process of Consultation* (ATSIC, 1994); Native Title Social Justice Advisory Committee, Report of the Council for Aboriginal Reconciliation to Federal Parliament, *Walking Together: The First Steps*, 1994; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (Australian Government Publishing, 1996); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice, Vol 1* (ATSIC, 1995); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (Australian Human Rights Commission, 2009) 154, 15 ('*Social Justice Report*'). **2** 'Gillard announces push for referendum on indigenous recognition in constitution', *The Age*, 8 November 2010. **3** Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) xi. <www.recognise.org.au/final-report> **4** *Ibid.* **5** 'A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition' (Discussion Paper, You Me Unity, May 2011). **6** Above n 3, 5. **7** *Ibid*, 7. **8** *Ibid*, 8. **9** *Ibid*, 142. **10** *Ibid*, 144. **11** *Ibid*, 145. **12** *Ibid*,128 **13** Noel Pearson, 'A Letter to the Australian People', submission no 3619, cited at p 176, above n 2. **14** Noel Pearson in Patricia Karvelas, 'Tony Abbott holds race key, says Noel Pearson' (*The Australian* 10/02/2012). **15** Above n 3, 139. **16** *Ibid*, 131. **17** *Ibid*, 126.

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