
'POLITICAL TIMETABLES TRUMP WORKABLE TIMETABLES': INDIGENOUS CONSTITUTIONAL RECOGNITION AND THE TEMPTATION OF SYMBOLISM OVER SUBSTANCE

by Megan Davis

PART I: INTRODUCTION

Three years ago the Prime Minister's Expert Panel ('the Panel') delivered its report on the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. At the beginning of 2015 the substantive model of recognition is no closer to resolution; although this is not as inauspicious as some suggest.¹ Negotiating and designing a constitutional amendment is legally and politically complex. In addition the challenges or 'lacks' identified in the Panel's report are being brought to bear including the lack of civics and Australian history knowledge.

More importantly, however, the Panel's report identified a major stumbling block to the current recognition project: the parallel aspirations of Aboriginal and Torres Strait Islander communities. The panel sought to capture some, although not all, of these aspirations.² Even so, a treaty, once regarded as an unremarkable and inevitable step in framing settler/Indigenous relations, is now regarded as radical. Accordingly the mainstream campaign for recognition necessarily and deliberately fixates on the symbolic aspects of recognition; a written acknowledgement in the Constitution. The benefits of this are indeterminate and it ignores the decades' long political grievances of the group purported to be recognised. These two competing narratives cannot co-exist.

This essay will, in Part II, briefly explain the current status of constitutional reform including a conspectus of emerging challenges, in Part III identify other alternative suggestions for constitutional reform and in concluding in Part IV provide some observations on the road ahead.

PART II: CURRENT STATUS AND SOME CHALLENGES AHEAD

The Expert Panel handed its report to the Prime Minister in January 2012.³ The recommendations were as follows:

1. That section 25 be repealed.
2. That section 51(xxvi) be repealed.
3. 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.

4. That a new 'section 116A' be inserted, along the following lines:
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.
5. That a new 'section 127A' be inserted, along the following lines:
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.

REFINING THE EXPERT PANEL MODEL

The formal work of refining the model has been led by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. The committee has tabled two reports—an interim report in July 2014⁴ and a progress report in October 2014.⁵ The options in the progress report are variations of the panel's recommendations. The most recent progress report had, as its first option, the panel's s 51A and s 116A non-discrimination clause; the second option a qualified head of power and a special measures provision and the third option no statement of recognition and a replacement head of power.⁶

Deletion of s 25 is universally agreed upon. Deletion of s 51 (xxvi) with a replacement head of power appears to be settled although there is a persuasive argument to maintain and amend s 51

(xxvi). The drafting challenge for a replacement head of power, peoples' power—as opposed to a subject matter power—has settled in favour of a peoples' power. This is appropriate because it maintains the scope of the race power and does not fence off future aspirations for the use of such a power.

The recommendations of the Panel have attracted less academic scrutiny than expected, given the novel legal questions and the recommendation for a racial non-discrimination clause.⁷ Given the recent public debate over the amendment to s 18 of the *Racial Discrimination Act 1975* (Cth) ('RDA') and the *National Human Rights Consultation Report*⁸ one would think, at this point, Australian human rights lawyers would be more engaged with the type of reform contemplated by s 116A.

But for a few well-rehearsed objections of conservative constitutional lawyers and legal briefs commissioned by the Joint Committee (raising not insurmountable legal challenges) the primary objection to a non-discrimination clause is political: Australian politicians do not want a bill of rights, Australian politicians do not want their power to legislate to be constrained. While the committee appears interested, as a compromise, in a qualified power, this option is a poor replacement to a stand-alone clause.

THE AMBIGUITY OF THE WORD 'RECOGNITION': WEAK RECOGNITION V STRONG RECOGNITION

The word 'recognition' is vague and abstruse. For mainstream commentators and members of the public not commonly engaged in indigenous affairs, 'recognition', presupposes symbolism; a statement that recognises Aboriginal and Torres Strait Islander peoples as a population, geographically, historically and perhaps some manifestations of their culture, with or without a no legal effect clause.

On the other hand, the Panel—and judging from consultations and public comment most Aboriginal and Torres Strait Islander communities—understand recognition as substantive. On the spectrum of recognition, strong form recognition is aligned with long-held political aspirations expressed through significant statements such as the Yirrkala Bark Petitions.⁹ For this reason some misinterpret Aboriginal and Torres Strait Islander peoples' ambivalence about recognition. The political undertone here is that in the end Indigenous people capitulate, abandon advocacy for strong form recognition and accept weak recognition.

THE PROBLEM OF HYPERBOLE: UNREALISTIC EXPECTATIONS

During its work in 2011 the Panel adopted a methodology by which it would assess each proposal for reform. One criteria used by the Panel was that it would foster a 'reconciled and unified' nation. While this was appropriate for the panel's work, its amplification for the campaign as a statement of fact—that recognition can deliver a reconciled and unified nation—is problematic. It invites the

question: does this mean that we are not a unified nation now? Thus what does a unified nation look like? Should this be discussed with the Australian people prior to a referendum? Indeed Celeste Liddle has argued that 'indigenous people themselves are not committed to this idea of "unity", nor are numbers of them convinced that it will bring anything of the sort.'¹⁰ Some commentators suggest the notion of 'unity' has strong assimilationist overtones.¹¹

Another exaggerated claim is that the recognition project will complete the Constitution. Constitutions by their very nature are meant to change. Section 128 appears in the Constitution because the drafters envisaged that it could and would be changed by Australians at referendum. Also, Indigenous-settler relations by their very nature have an ongoing character, and recognition in weak or strong form should not constitute a bookend to this relationship. Concern for this animates resistance. A fear commonly expressed by Indigenous people is that Australians will say, post referendum, 'but we recognised you already.' Part of that is the lack of public discussion and political planning about what comes next.

For the state, the current project is about symbolism because 'recognition' is a legacy of the failed 1999 referendum when Australians rejected recognition of any polity in the Constitution. Prime Minister John Howard revitalised symbolic recognition prior to the 2007 election which is why the current project is regarded as Howard's project. His commitment is to symbolic recognition. Symbolism can be powerful. As Dylan Lino argues:

Given the status of written constitutions as symbols of the polity's identity, constitutional amendments recognising marginalised groups may help to render these symbols more inclusive and representative of the polity. Rather than simply expressing the values, beliefs and history of dominant identity groups, the provisions of written constitutions may thereby also come to symbolise a respect for and validation of the perspectives, experiences and identities of subordinated groups.¹²

On the other hand, as Australian historian John Hirst suggests, 'it is antipathetic to the Australian political tradition, which does not look to constitutional provisions to define or constrain policy.'¹³ Lino also argues there are real shortcomings to purely symbolic forms of recognition, 'one problem is that denying ... any substantive constitutional function has (negative) symbolic effects in itself [and symbolism 'obscures'] valid grievances about how power is wielded by the state over Indigenous peoples.'¹⁴ This is why treaty is proxy for power relations and structural reform.

THE DISCOURSE OF 'RACE RELATIONS'

The public narrative oscillates between doomsday predictions if a referendum fails, to hyperbole about national 'unity' and 'reconciliation' if it succeeds. Part of the doomsday rhetoric is the

idea that if the referendum does not receive over 90 per cent like 1967 (or naively if there is a 'No' campaign) then this would be a failure. Put crudely, a win is a win. And a 'no' campaign should not be feared; the freedom to express opposition and to have that opposition funded is an appropriate part of the democratic process.

Another common, dire refrain is that 'race relations' will be set back if the referendum is not held or if a referendum fails. Malcolm Makerras argued that 'to see the proposal go down would be a national disaster.'¹⁵ Rarely is such an assertion accompanied by an assessment of race relations now. Corollary to this is an unquestioned assumption that 'recognition' will automatically improve 'race relations'. If the model were symbolic—a description of who Indigenous peoples' were and are—to suggest an improvement in race relations because of this is speculative not evidence based; especially if such a referendum ignores the legitimate grievances of the polity being recognised 'about how power is wielded by the state.'¹⁶ There is a concern that these kinds of overblown statements about race relations puts pressure on Aboriginal and Torres Strait Islander peoples to accept something for the sake of peace.

THIS IS NOT 1967

Scholars for many decades have written on the mythologising of 1967 referendum; what it represents and what it does not represent.¹⁷ This is a sensible inquiry because of the disappointment post-1967 as it became apparent the government would not readily implement indigenous political aspirations. Very little of the concerns raised by that scholarship—unrealistic expectations of what the law can achieve—appears to have penetrated the debate for recognition.

There are a number of factors setting 1967 apart including the geo-political influences exerted on Australia. The most important factor is that many Aboriginal people lived in reserves; there was compulsory segregation at the time. The physical manifestations of exclusion and inequality were visible to the eye. Today there are not the same physical manifestations of inequality. But for the public spectacle of Aboriginal affairs, so powerfully captured by Professor Marcia Langton in *Trapped in the Aboriginal Reality Show*, for many Australians integration and a burgeoning Indigenous middle class is visible to the eye.¹⁸ Add to that the unpredictable yet levelling influence of social media.

THE PROBLEM OF IMPATIENCE

Of the infrequent media coverage of the recognition project it is mostly about timing. This reflects an impatience for the referendum to occur because "recognition" is regarded as simple and merely confirming a fact: uncontroversial and inevitable. Most speculation on the model reflexively dismisses substantive recognition as ambitious or a bridge too far. The basis for this is the historical

record: referendums only succeed with bipartisan support. For the political class this means the only thing that matters is what the major parties agree on.

Prime Minister Tony Abbott stated during his 2014 Neville Bonner Oration, 'we should be prepared to consider and refine any proposal for some time because it is so much better to get this right than to rush it.'¹⁹ The Prime Minister is correct to be cautious. This is constitutional reform. The gravity of the task demands attentiveness to the model.

The impatience for a referendum is, as Fred Chaney has observed, quintessentially Australian in the field of Aboriginal and Torres Strait Islander affairs: 'political timetables trump workable timetables.'²⁰ This potentially renders the project top-down; political elites determine the limits of what Australians will tolerate.

The views of Aboriginal and Torres Strait Islander peoples are not as visible, and as a community, not as impatient.²¹ For an inquisitive media, Indigenous concern, anxiety and resistance about "recognition" should invite greater scrutiny. The more nuanced reporting is done by Indigenous media who report on both the Recognise campaign and the complexity of responses to recognition.

COMMONWEALTH, STATE AND TERRITORY POLICY: A COUNTER NARRATIVE

Since its election the Commonwealth has overhauled its policy approach to Aboriginal and Torres Strait Islander peoples' affairs. It has introduced a new Indigenous Advancement Strategy. This has caused confusion and anxiety in the community. In addition, Western Australia has announced a decision to close remote communities. It argues it is doing this because the Commonwealth will no longer fund particular services in these communities.

Mick Gooda has described this situation in the following way, 'we are now witnessing one of the largest scale 'upheavals' of Aboriginal and Torres Strait Islander affairs.'²² Fred Chaney argues that the recognition project will be hampered by the Commonwealth policy approach.²³ A recent Freedom Summit in Alice Springs reveals that Chaney may be right. There is a problem with the narrative of 'recognition' apropos contemporary chaotic and discursive public policy across the federation.

PART III: OTHER IDEAS FOR REFORM RECOGNITION IN LEGISLATION: CREATING A 'DEFINING MOMENT'

Damien Freeman and Julian Leeser have suggested that recognition—in the symbolic sense—be provided in legislation in an Australian Declaration of Recognition. They challenge the assumption that 'recognition' can only occur by way of inserting

a statement in the Constitution.²⁴ This proposal would mean a legislative Declaration of Recognition be passed by all State and Territory Parliaments and the Commonwealth Parliament at the same time. This is designed to ensure that the process has ‘maximum popular participation.’²⁵

Freeman and Leaser argue that the advantage of this approach is that it is not a constitutional document and therefore not subject to the limitations of interpretation by the High Court. They argue it is ‘liberated from legal technicalities and can express broader and more poetic sentiments about Australia’s past and its aspirations for the future.’²⁶ As Dylan Lino argues of symbolic statements of recognition, ‘there is nothing particularly constitutional about them. Having no effect on the distribution of public power within the Australian legal order, such reforms focus entirely on the non-constitutional symbolic function of written constitutions.’²⁷

Second, Freeman and Leaser argue it is derived from ‘popular creation’, not top down and therefore has more potential for cultural transformation because it is adopted through political participation.²⁸ They argue that following on from the adoption of the Australian Declaration of Recognition, an appropriate ceremony can be held where the Declaration is formally adopted in addition to enactment by Parliaments. This would create an anniversary of the adoption each year to be known as ‘Declaration Day, a celebration of Indigenous heritage and culture, would complement the existing calendar of public holidays which acknowledge the important influences on the development of Australia as a nation.’²⁹

The legislative approach is compelling. It avoids concerns that recognition in the Constitution of only Aboriginal and Torres Strait Islander peoples is singling out one group for “special treatment”.³⁰ It would create a defining moment in a way that a Commonwealth referendum cannot. Given a number of states have symbolic recognition in their constitutions—subject to a no-legal effect clause—this would be uncontroversial.

A DUTY TO CONSULT

Another proposal—a Parliamentary duty to consult—has been suggested. In the 2014 HC Nugget Coombs oration, Marion Scrymgour suggested a ‘special advisory body made up of Indigenous representatives’ that would have input into government decisions affecting Aboriginal people.³¹ In a recent Quarterly Essay³² Aboriginal lawyer Noel Pearson argued that effective recognition means giving Indigenous peoples a better say in the democratic processes with respect to Aboriginal and Torres Strait Islander affairs.

Drawing on Article 18 and Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*, Pearson is advocating a duty of the Commonwealth Parliament to consult

Indigenous communities on legislative matters that affect their lives.³³ The proposed duty is not a veto and defers to parliamentary sovereignty. The model would require the Prime Minister to table in the Parliament a newly established Indigenous body’s advice on any particular legislation. However the Parliament is not compelled to alter the legislation to take into account the body’s view. The proposal is non-justiciable.

While some may regard this as falling on the weak end of the recognition spectrum because Parliament is not compelled to amend the legislation, the tabling of the advice provides a public ventilation of the affected communities’ views and it also creates a formal, publicly accessible repository or record of the Parliament’s dealings with the body. In this way we develop a clearer picture of whether the Federal Government listens to Aboriginal and Torres Strait Islander views. The record suggests very rarely. Unlike now, we will know what communities are thinking because they will be asked and their views will be tabled. According to Pearson:

A procedural mechanism like this – guaranteeing the Indigenous voice in Indigenous affairs – could be a more democratic solution to the racial discrimination problem. This could be a uniquely Australian solution to the problem of past discrimination against Indigenous peoples.³⁴

Professor Greg Craven has argued that this proposal would mean the current parliamentary and policy debates will be ‘routinely informed and enriched by indigenous counsel on indigenous matters ... Government would be empowered, not disempowered, by timely and wise counsel on laws affecting matters such as land, language and lore.’³⁵

ABORIGINAL CONSTITUTIONAL CONVENTIONS

Conventions are commonly suggested as a way of manufacturing popular involvement. The National Congress of Australia’s First Peoples, Noel Pearson, Pat Dodson and others have suggested conducting Aboriginal conventions around Australia. These conventions are required because communities need to grapple with the ‘political and legal challenges at hand’ and ‘form a considered view on what constitutional and other reform proposals they support.’³⁶ Again this is a persuasive idea for a number of reasons. Reform cannot be top down it must be bottom up. The Panel’s recommendations came from extensive consultation Australia-wide and included representatives of the popularly elected National Congress of Australia’s First Peoples. The current Committee process is driven by parliamentarians. If the referendum question deviated from the Panel’s recommendations, the Congress has indicated that the community must be consulted again.

PART IV: CONCLUSION

This paper has provided an overview of where constitutional recognition is currently situated at the beginning of 2015. There is faint public awareness of the recognition project that waxes

and wanes. Support is prominent in the corporate sector; one can speculate that is due to Reconciliation Australia's focus on the corporate sector and Reconciliation Action Plans, but is yet to receive popular traction. Without a substantive amendment it is unlikely to get the support of Aboriginal and Torres Strait Islander peoples. Yet according to a poll commissioned by Recognise there are 63 per cent of Australians now ready to vote 'Yes' in a referendum, regardless of a model, so perhaps some of the challenges raised here are insignificant.

As 2015 commences the Western Australian government will close, without adequate consultation, remote Indigenous communities. The Commonwealth also announced, after Parliament rose for 2014, controversially punitive amendments to the Remote Jobs and Community Program, without adequate consultation. The proclivity for parliaments in Australia to single out Indigenous communities for special and adverse treatment and the failure to take into consideration the views of Aboriginal and Torres Strait Islander peoples explains why proposals for a racial non-discrimination clause or an advisory body influencing Parliament are so compelling. Indigenous peoples lack a presence in Australian democracy.

There is a discontinuity between recognising the Indigenous polity in the Constitution and simultaneously implementing policies aimed at neutralising its distinctiveness. As uncertainty and anxiety manifests in Indigenous communities because of the mercurial policy environment—with many communities eschewing 'recognition' as a distraction—there has been a curious and somewhat ironic reversal of logic from the Howard-era practical reconciliation agenda: it is Aboriginal and Torres Strait Islander peoples' championing real, concrete and 'practical' change and the politicians, journalists, corporate leaders who are tending toward symbolism.

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- 1 See Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (Australian Human Rights Commission, 2014) 36; See also Australians for Native Title and Reconciliation ('ANTAR'), 'NGOs: clear path to a referendum held no later than 2016 is needed, racial nondiscrimination must stay' (Media Statement, 17 October 2014) <http://antar.org.au/sites/default/files/ngos-clear_path_to_a_referendum_is_needed_racial_non-discrimination_must_stay.pdf>.
- 2 The final report contained a chapter on Treaty and a chapter on Sovereignty which were the primary issues raised by Aboriginal and Torres Strait Islanders during consultations across Australia.
- 3 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).
- 4 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Interim Report (2014).
 - 5 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Progress Report (2014).
 - 6 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 1, xviii.
 - 7 For academic analysis see, for eg the work of Anne Twomey, Alex Reilly and George Williams and Ros Dixon.
 - 8 National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009.
 - 9 See, eg 'Yirrkala Bark Petitions' or 'Larrakia Petitions' reproduced by Bain Attwood, *Rights for Aborigines* (Allen & Unwin, 2003).
 - 10 Celeste Liddle, quoted in Guy Rundle, 'Clivosaurus: The politics of Clive Palmer' (2014) 56 *Quarterly Essay* 90.
 - 11 Henry Reynolds, quoted in Guy Rundle, 'Clivosaurus: The politics of Clive Palmer' (2014) 56 *Quarterly Essay* 95-100; Fred Chaney, quoted in Guy Rundle, 'Clivosaurus: The politics of Clive Palmer' (2014) 56 *Quarterly Essay* 110-113.
 - 12 Dylan Lino, 'Written Constitutions and the Politics of Recognition: Symbolism and Substance' (Paper presented at World Congress of Constitutional Law, University of Oslo, 16-20 June) 2.
 - 13 John Hirst, quoted in Guy Rundle, 'Clivosaurus: The politics of Clive Palmer' (2014) 56 *Quarterly Essay* 94.
 - 14 Dylan Lino, above n 11, 6.
 - 15 Malcolm Makerras, 'Case for Aboriginal referendum muddled', *Sydney Morning Herald*, 10 December 2014.
 - 16 Dylan Lino, above n 11, 2.
 - 17 See eg John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997)
 - 18 Marcia Langton, 'Trapped in the Aboriginal Reality Show' (2008) 19 *Griffith Review* 143.
 - 19 Tony Abbott, 'Neville Bonner Oration' (Speech delivered at the Australians for Constitutional Monarchy Conference, Sydney, 28 November 2014) <<http://www.pm.gov.au/media/2014-11-28/neville-bonner-oration-0>>.
 - 20 Fred Chaney, 'Is Australia big enough for reconciliation?' (Speech delivered at the ANU Reconciliation Lecture, Canberra, 1 December 2014) <http://ncis.anu.edu.au/_lib/doc/reconciliation_lecture/2014_fred_chaney_transcript.pdf>.
 - 21 ABC Radio National, 'Recognition referendum date discussed, but is it important?', *The World Today*, Friday 12 December 2014 (Patrick Dodson) <<http://www.abc.net.au/worldtoday/content/2014/s4147675.htm?site=indigenous&topic=latest>>.
 - 22 Mick Gooda, above n 1, 11.
 - 23 Fred Chaney, above n 20, 5.
 - 24 Damien Freeman and Julian Leaser, *The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians* (2014) Damien Freeman, 4 <<http://damienfreeman.com/wp-content/uploads/2014/11/DTF-14.pdf>>.
 - 25 Ibid 3.
 - 26 Ibid 5.
 - 27 Dylan Lino, above n 11, 2.
 - 28 Freeman and Leaser, above n 24, 10.
 - 29 Ibid 11.
 - 30 Ibid.
 - 31 Marion Scrymgour, 'Looking Back & Looking Forward – After The Intervention' (Speech delivered at the 7th Nugget Coombs Memorial Lecture, Charles Darwin University, 8 October 2014) <<http://blogs.crikey.com.au/northern/2014/10/12/marion-scrymgour-on-stronger-futures-and-constitutional-reform/>>.
 - 32 Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2004) 55 *Quarterly Essay*.
 - 33 Cape York Institute, Submission No 38 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, October 2014, 12.
 - 34 Ibid 14.
 - 35 Greg Craven, 'We need to work out how indigenous voices can be heard', *The Australian*, 13 September 2014.
 - 36 Cape York Institute, above n 33, 3.