2014 ESSAY WINNER: 'CONSTITUTIONALLY SPEAKING WE ARE STILL BASICALLY WHITE AUSTRALIA, HOWEVER MUCH WE BOAST THAT WE HAVE CHANGED', SAYS FORMER HIGH COURT JUSTICE MICHAEL KIRBY. DO YOU AGREE? DOES THE CONSTITUTION NEED TO BE CHANGED? IF SO, HOW?

by Esther Pearson

INTRODUCTION

In the last 20 years, the doctrine of terra nullius has been rejected,[1] the *Native Title Act 1993* (Cth) introduced, the Aboriginal and Torres Strait Islander Commission established, and an official apology to victims of the Stolen Generations issued. However, constitutionally speaking, Australia is still 'White Australia'. In its current form, the Australian Constitution fails to recognise Aboriginal and Torres Strait Islanders, and legitimises adverse discrimination against Indigenous Australians. The first section of this paper explains these constitutional deficiencies. In the second section, the symbolic and practical reasons for amending the Constitution to remedy these deficiencies are considered. The final section proposes three categories of amendments, being the repeal of the 'race' provisions and enactment of a more constrained 'races' power, the introduction of a non-discrimination principle, and a statement recognising Indigenous Australians.

A CONSTITUTIONALLY 'WHITE' AUSTRALIA

The Australian Constitution is very much a product of its time. Drafted in the 1890s, an era in which racial discrimination was rife in Australia, it blatantly marginalised and discriminated against races considered to be 'inferior'.[2] Included in the Constitution was a 'races' power enshrined in s 51(xxvi), which provided that the Commonwealth had the power to legislate 'for the people of any race, *other than the Aboriginal race in any State*, for whom it is deemed necessary to make special laws'. This clearly reflects the unequal position of Aboriginal and Torres Strait Islander peoples in the eyes of the law at the time the Constitution was drafted. The Constitution also provided in section 127 that 'Aboriginal natives' were not to be counted in 'reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth'. Fortunately, a referendum held in 1967 removed section 127, as well as the words 'other than the Aboriginal race in any State' (italicised above) from the 'races' power.[3]

However, despite the success of this referendum, the Constitution continues to contain mechanisms for discriminating against Aboriginal and Torres Strait Islander peoples, and fails to recognise the important place of Indigenous peoples in Australian society. Section 25 provides that if a State law disqualifies members of any race from voting at the State's elections, persons of that race resident in the State are not to be counted when reckoning the number of people of the State or Commonwealth. While this section is now redundant, it nonetheless entrenches racially discriminatory attitudes in Australia's founding document.

Meanwhile, the existence of the 'races' power in the Constitution keeps alive the possibility of the Federal Parliament enacting laws that adversely discriminate against people of 'any race'. The power has been construed by the High Court as authorising the creation of laws that discriminate for, *and against*, people of different racial backgrounds.[4] In *Kartinyeri v Commonwealth*, the High Court deemed the *Hindmarsh Island Bridge Act 1997* (Cth) ('*Bridge Act*') to have been validly enacted under s 51(xxvi), despite that it removed the construction site of the Hindmarsh Island bridge, a site that was sacred to the local Aboriginal people, from the protection of the *Heritage Protection Act 1984* (Cth).[5] The High Court was divided on the reasons for this decision, with Brennan CJ and McHugh J upholding the validity of the law as a partial repeal of the validly enacted *Heritage Protection Act 1984* (Cth),[6] and Gummow and Hayne JJ deeming s 51(xxvi) to support laws, such as the *Bridge Act*, that impose a disadvantage on racial groups. According to Michael Kirby, it is the continued presence of this provision in the Constitution that means, constitutionally speaking, Australia is still 'White Australia'.

WHY CHANGE?

Consultations carried out by, and submissions to, the Expert Panel on the Constitutional Recognition of Indigenous Australians, empanelled in November 2010, reflect the strong sentiment that change is needed.[7] Fundamentally, change is needed to recognise Aboriginal and Torres Strait Islanders peoples as the first peoples of Australia, and acknowledge the importance of Indigenous peoples to Australia's cultural heritage. As proclaimed by Bulgun Wurra man, Harold Ludwick, 'If the Constitution was the birth certificate of Australia, we're missing half the family'.[8] Change is

needed to ensure Australia's Constitution reflects the true reality of Australian society at Federation, and honours Australia's First Peoples, their values, culture, and heritage.

Change is also needed to realign the Constitution with Australia's modern-day identity as a responsible member of the international community, and a nation that prioritises equality and fairness.[9] The continued inclusion of s 25, and current formulation of the 'races' power, breaches Australia's obligations under the *International Convention for the Elimination of Racial Discrimination* ('*ICERD*') to take steps to eradicate racial discrimination, and prevents Australia's Constitution from reflecting the values that now form an integral part of the Australian identity.[10]

The movement for change is not just driven by symbolic reasons. Addressing the discriminatory provisions in the Constitution, and enacting principles of non-discrimination, would go a long way towards eliminating racial discrimination against Aboriginal and Torres Strait Islander peoples, which, in turn, would support the realisation of socio-economic equality for Indigenous peoples.[11] The recognition of Indigenous Australians is also likely to contribute to an enhanced sense of belonging and self-worth for Aboriginal and Torres Strait Islander peoples, having a positive impact on Indigenous mental health.[12] In light of the rise in suicide and mental health problems among Indigenous Australians, the importance of this impact should not be understated.

WHAT CHANGE?

A wide variety of reforms have been proposed to address the deficiencies of the Constitution with respect to Indigenous peoples.[13] This paper will consider three of the more significant and far-reaching categories of reform, being the redress of the 'race' provisions, the insertion of a non-discrimination provision, and the inclusion of a statement of recognition.

THE 'RACE' PROVISIONS

There is firstly a need to address the 'race' provisions in the Constitution, being ss 25 and 51(xxvi). There is a strong case for simply repealing s 25. The provision is out-dated and unnecessary, and its repeal would help bring the Constitution in line with contemporary Australian values of equality and fairness, as well as uphold Australia's obligations under the *ICERD*.[14] There is unequivocal support for the removal of the section amongst the public, parliamentary figures and committees, and other Indigenous and non-Indigenous organisations.[15] Consequently, repealing section 25 would be a simple and achievable way of addressing the Constitution's discriminatory undertones.

There are similarly cogent reasons for repealing the 'races' power in s 51(xxvi). As discussed, the power licenses adverse discrimination against Indigenous peoples, and repealing the provision would contain the power of the Federal Parliament to enact laws that discriminate against Indigenous peoples.[16] This would also accord with contemporary Australian values, and Australia's obligations under international law.[17] However, simply repealing the 'races' power would be problematic, as there would no longer be power in the Constitution for the Commonwealth to make beneficial laws concerning Indigenous affairs and laws regulating the treatment of Indigenous peoples by the states.[18] Repealing the provision would also impact upon the validity of existing legislation enacted under the power.[19] Consequently, there is a need to devise a new provision that would support laws relating to Indigenous affairs.

As proposed by the Expert Panel, a new head of power for the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples, which clarifies that the power does not extend to the making of laws that discriminate against Indigenous peoples, may be enshrined in a new s 51A.[20] Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, has expressed concerns that the creation of a power that enables laws to be made exclusively in favour of Indigenous peoples may not receive majority support at a referendum, as it may be perceived as singling out Indigenous peoples for beneficial treatment.[21] However, with the assistance of a well-resourced and co-ordinated campaign to build awareness that a head of power with respect to Indigenous peoples would not be intended to benefit Indigenous peoples because of their race, but because of their special status as Australia's First Peoples, sufficient support may be garnered for this provision to be approved at referendum.[22]

Debate also surrounds how the provision should be framed to qualify the beneficial nature of the power. The Expert Panel recommended a preamble to the proposed s 51A that would acknowledge 'the need to secure the advancement of Aboriginal and Torres Strait Islander peoples'.[23] However, as suggested in submissions by Professor Anne Twomey and the Australian Human Rights Commission, the term 'advancement' might be seen to inappropriately imply that Indigenous peoples are 'backwards'.[24] In addition, the term, as used in the *ICERD* to qualify the nature of 'special measures' as those taken for the 'sole purpose of securing adequate advancement' of a racial group, means improving the position of a racial group such that the group may exercise their rights equally with other groups, and authorises measures that limit the rights of the group if necessary to achieve this end.[25] The High Court has also endorsed this interpretation.[26] Consequently, Rosalind Dixon and George Williams suggest that s 51A should

authorise the creation of laws with respect to 'Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them'.[27] This would avoid difficulties with the interpretation of 'advancement'. It would also provide a strong guarantee against laws that discriminate negatively against Indigenous peoples, preventing the passage of laws such as the *Native Title Amendment Act 1998* (Cth), which suspends the *Racial Discrimination Act 1975* (Cth) where intention to override Native Title rights is clear, and the overtly discriminatory Northern Territory Emergency Response legislation.[28]

Nonetheless, such a provision would not prevent the enactment of discriminatory laws by states and territories, or by the Commonwealth under other sections of the Constitution. Further, as indicated by the judgment of Brennan CJ and McHugh J in *Kartinyeri*, it would not guard against statutes that repeal beneficial legislation on a discriminatory basis, if the beneficial legislation was validly enacted under the 'races' power.[29] To avoid this, the Constitution should include an overarching guarantee against racial discrimination.

A NON-DISCRIMINATION PROVISION

The recognition of Aboriginal and Torres Strait Islander peoples in the Constitution would be incomplete without a guarantee against racial discrimination. As recommended by the Expert Panel, this may be framed as a prohibition against legislative or executive action by the Commonwealth, states and territories, under which the real, supposed or imputed race, colour or ethnic or national origin of any person forms the basis for differential treatment.[30] However, it would be necessary for such a provision to include an exception for laws that discriminate positively in favour of a racial group, such as laws that protect the culture, languages and heritage of Indigenous peoples.[31]

The inclusion of a non-discrimination provision in the Constitution would ensure Australia's highest law mirrors the Australian values of equality and fairness, and would be consistent with Australia's responsibilities under the *ICERD*.[32] Importantly, it would also provide strong protection for Aboriginal and Torres Strait Islander peoples against discriminatory state and territory laws, as well as laws that discriminate against Indigenous peoples enacted under constitutional provisions other than the proposed s 51A.[33] This would guard against laws such as the *Aboriginal Ordinance 1918* (NT) contested in *Kruger v Commonwealth*, which was passed under s 122 of the Constitution and legitimised the removal of Indigenous children from their parents and the mandatory detention of Indigenous peoples on supposed 'welfare' grounds.[34] A non-discriminatory provision would also protect Indigenous peoples from statutes that repeal beneficial legislation on distinctions of race, such as the *Heritage Protection Act 1984* (Cth) challenged in *Kartinyeri*.[35] Given public opinion research reflects strong support for a non-discrimination provision, this would be a beneficial and achievable way of redressing the deficiencies of the Constitution with respect to Indigenous peoples.[36]

A STATEMENT OF RECOGNITION

Fundamentally, the Constitution should include a statement recognising Indigenous peoples as the First Peoples of Australia, their continuing relationship with traditional lands and waters, and their cultures, languages and heritage. It has been suggested that this statement take the form of a preamble at the beginning of the Constitution.[37] However, the insertion of such a preamble may have unforeseen consequences for the interpretation of the substantive provisions of the Constitution. To remedy this, the option of a non-justiciability clause, providing that any statement of recognition is to have no legal effect on the meaning of other provisions of the Constitution, has been considered.[38] This was the approach adopted in the 1999 referendum for a preamble recognising, amongst other things, Indigenous peoples and their kinship with their lands.[39] However, according to Michael Kirby, this approach was '[s]imply another instance of words, which come cheap', undermining the critical purpose of including a statement of recognition of increasing the sense of belonging and self-worth of Indigenous peoples.[40] Further, the insertion of a general preamble at the beginning of the Constitution would be likely to invite calls for the recognition of other interests in the preamble, hindering the negotiation of a preamble likely to receive majority support at a referendum in the near future.

Consequently, it would be preferable to tie a preambular statement of recognition to the proposed s 51A.[41] This would avoid the uncertainty surrounding how a general preamble could alter the meaning of other provisions, and drawn-out debates about what other matters should be included in a preamble. It would also ensure the statement of recognition is not perceived as 'tokenistic', but is directly associated with substantive change to the power of the Commonwealth to legislate with respect to Aboriginal and Torres Strait Islander peoples.[42] While some have argued that recognising Indigenous people in the Constitution would be divisive, and unlikely to attract majority support at a referendum, the results of an Auspoll survey conducted in August 2014 indicated that 61 per cent of respondents were in favour of a statement recognising the unique position of Aboriginal and Torres Strait Islander peoples, a proportion that can be augmented through a comprehensive education campaign in the lead up to a referendum.[43] This being the case, attaching a preambular statement to a new s 51A would be a meaningful and viable way of giving Indigenous peoples the recognition they deserve.

CONCLUSION

As stated by Michael Kirby, constitutionally speaking, Australia is still very much 'White Australia'. There are compelling reasons to change Australia's Constitution by repealing the 'race' provisions and enacting a 'races' power legitimising the enactment of beneficial laws only, introducing a non-discrimination provision, and inserting a statement recognising Aboriginal and Torres Strait Islander peoples. There is a stirring awareness amongst the Australian people that change is needed. With the aid of a properly resourced and co-ordinated education campaign, this awareness can be built on and mobilised to produce Australia's first successful referendum in 37 years, marking the shift from a constitutionally 'White Australia', to a nation that embraces and recognises its First Peoples in its highest law.

Esther Pearson is a final year law student from the University of Adelaide. Her interests include native title, human rights and anti-discrimination law.

1 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2 George Williams, 'Recognising Indigenous Peoples in the Australian Constitution' (Volume 5, Issue Paper No. 1, Native Title Research Unit, September 2011) 3; *Official Report of the National Australasian Convention Debates*, Melbourne, 1898, 228-9 (Sir Edmund Barton).

3 Hilary Charlesworth and Andrea Durbach, 'Equality for Indigenous Peoples in the Australian Constitution' (2011) 15(2) *Australian Indigenous Law Review* 64, 64.

4 Robert French, 'The Race Power: A Constitutional Chimera' in George Winteron (ed.) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 206.

5 (1998) 195 CLR 337 ('*Kartinyeri*').

6 *Kartinyeri* [49] (Brennan CJ and McHugh J).

7 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) 65-8 ('Expert Panel Report').

8 *Recognition in Cape York* (Recognise, 2014) 0:05.

9 'A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition' (Discussion Paper, about Aboriginal and Torres Strait Islander Constitutional Recognition' (Discussion Paper, You Me Unity, May 2011) 13.

10 Ibid 8; Charlesworth and Durbach, above n 3, 71.

11 Shireen Morris, 'Indigenous Constitutional Recognition, Non-Discrimination and Equality Before the Law: Why Reform is Necessary' (2011) 7(26) *Indigenous Law Bulletin* 7, 9.

12 Expert Panel Report, above n 7, 67.

13 Megan Davis and Dylan Lino, 'Constitutional Reform and Indigenous Peoples' (2010) 7(19) *Indigenous Law Bulletin* 3, 3-4.

14 Charlesworth and Durbach, above n 3, 71.

15 Expert Panel Report, above n 7, 86; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (July 2014) 7; John Anderson, Tanya Hosch and Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (September 2014) 20 ('Final Report').

16 Sean Brennan, 'Constitutional Reform and its Relationship to Land Justice' (Volume 5, Issue Paper No. 2, Native Title Research Unit, October 2011) 36.

17 Expert Panel Report, above n 7, 83.

18 Brennan, above n 16, 6.

19 Expert Panel Report, above n 7, 83.

20 Ibid 153.

21 Evidence to Joint Select Committee on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Redfern, 30 April 2013, 12-13 (Mick Gooda).

22 Williams, above n 2, 8; French, above n 4, 208. Note also that the Newspoll survey conducted in October 2011 indicated that 61% of respondents supported a new head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

23 Expert Panel Report, above n 7, 153.

24 Anne Twomey, Submission 1132 to the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, p.3; Evidence to Joint Select Committee on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Sydney, 22 January 2013, 28 (Gillian Triggs).

25 Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36(3) *Sydney Law Review*, 14.

26 See *Maloney v Queensland* (2013) 298 ALR 308.

27 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 83, 88.

28 Including the *Northern Territory National Emergency Response Act 2007* (Cth), the *Families, Community Services and Indigenous Affairs Amendment (Northern Territory National Emergency Response) Bill 2007* (Cth), and the *Social Security and Other Legislation Amendment (Welfare Reform) Act 2007* (Cth).

29 *Kartinyeri* 358.

30 Expert Panel, above n 7, 171.

31 Ibid 172.

32 Melissa Castan, 'Constitutional Deficiencies in the Protection of Indigenous Rights: Reforming the 'Races Power' (2011) 7(25) *Indigenous Law Bulletin* 12, 15.

33 Brennan, above n 16, 6.

34 (1997) 190 CLR 1.

35 Melissa Castan, Castan Centre for Human Rights Law, Submission 3554 to the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, September 2011, 4.

36 The Newspoll survey conducted in October 2011 found that 90% of respondents supported the insertion of a non-discrimination provision.

37 Anne Twomey, 'The Preamble and Indigenous Recognition' (2011) 15(2) *Australian Indigenous Law Report* 4, 10.

38 Williams, above n 1, 3; Expert Panel Report, above n 7, 115.

39 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) 277.

40 The Honourable Michael Kirby, 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent', (Speech delivered at the Law Council of Australia Discussion Forum, Old Parliament House, Canberra, 22 July 2011).

41 Expert Panel Report, above n 7, 117.

42 Twomey, above n 37, 17.

43 Final Report, above n 15, 27.