



Constitutional reform: assimilation or self determination

The Australian constitution

The constitution is both a source and a limitation of power. It establishes Federal and State legislatures and limits each government to stay in its own yard. It establishes the High Court to decide disputes between bickering governments. The constitution is the political manifesto of the nation. It is by virtue of the potency of the constitution that recognition of Aboriginal rights must be so carefully approached: crafting a constitution that deals with dispossession, and political and cultural rights for Aboriginal people while acknowledging the real purpose for the existence of the constitution requires some intense deliberation.

The Australian constitution is no human rights document as it “*was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies.*”¹ The constitutional charter for how white people were to govern themselves and others, pay and spend taxes and apply British law, remains the same today as it was in 1901.

The constitution recognises parliament’s rights over people, but not people’s rights. With that background in mind any recognition of Aboriginal people has to deal with power. The beauty of the 1967 referendum was that it dealt precisely with power: its single failing was that instead of power over Aborigines being handed back to Aborigines, the 1967 referendum merely transferred Aborigines from one government to another.

The form of recognition must naturally be advantageous to Aborigines, otherwise there is little point to the exercise. If the constitution is to ‘recognise’ Aboriginal and Torres Strait Islanders then is it the views of a handful of government appointed people or the aspirations of the broader Aboriginal community views who should be listened to?

Take the submission by the Central Australian Aboriginal organisations to the Two Hundred Years Later enquiry where it stated ‘*We have never conceded defeat and will continue to resist this ongoing attempt to subjugate us. The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The settler state has been set up on Aboriginal land. We demand that the colonial settlers who*

¹ Roach v Electoral Commissioner [2007] HCA 43

have seized the land recognise this sovereignty and on that basis negotiate their rights to be there'.²

Australia is vaguely familiar with freedom of speech but the concept of freedom of a people has escaped attention. The National report of the black deaths in custody enquiry concluded that for 200 years Aboriginal people had been dominated to such an extraordinary degree that disadvantage was a product of that domination. The NT intervention laws stigmatise Aboriginals as being unworthy of trust, allows for even more domination over individual and collective choices and makes those Aboriginals affected even more dependent. All this is the result of white people making decision for Aborigines.

Julia Gillard's expert panel left untouched the supremacy of parliaments to decide policy and law on behalf of Aborigines. Effectively, the expert panel legitimises the invasion of Aboriginal lands, with whites having the right to govern and Aborigines the right to be governed. The bottom line for the panel is to promote assimilation. No mention of sovereignty or self determination, the two most important rights Aborigines are entitled to.

The will of the indigenous peoples must prevail. 'Allowing' Aboriginals to decide their fate must be a right, not a privilege to be granted by government. What greater statement could the people of Australia make to Aboriginal people than 'here is your freedom!' Expressing that freedom in the constitution binds the parliaments for it is in the hands of the people of Australia to alter their constitution. It is unrealistic to expect Julia Gillard to apply her mind to these bigger human rights issues while having both eyes fixed on the polls. It is for the people of Australia to place their mark on the type of society they wish to live in and be respected for. Altering the constitution to provide for the freedom of Aboriginals to choose frees the nation of guilt for the past by taking responsibility for the present, and giving Aboriginals and Torres Strait Islanders a future of their choice.

By avoiding the "will of the people" debate, the expert panel made sure the public never gets to deal with the idea of political freedom.

The appropriate constitutional amendment should be, "*Aboriginals and Torres Strait Islanders are sovereign peoples with the right of self determination*".

Those words do three things: first, they acknowledge the sovereign status of the people of Australia before and after invasion. Second, that the indigenous peoples of Australia, like all other peoples of the world, 'freely determine their political status'³. Aborigines choose, not someone else on our behalf. And third, negotiations between government and Aboriginal people are equal.

Political representation for Aboriginals would a matter of choice too: either through an Aboriginal government (the argument that there cannot be two governments in Australia

² cited in Senate Report, AGPS, 1983 at p 10

³ Article 1 of ICCPR, Article 3 of Declaration Rights of Indigenous Peoples

ignores the fact there are six State, two Territory and 560 local governments in addition to the Federal government) or guaranteed seats in the parliaments as is the case in New Zealand.

Land is central to any agreement. One of the Articles in the *Declaration on the Rights of Indigenous Peoples* calls for return of ownership of all traditional lands but where that is not possible, other lands be offered in substitute.

Retention of culture and language would be high priorities. Reinstating authority of the Elders in traditional areas may reinvigorate law and order where confusion now reigns about white law prevailing over traditional law. Lines of demarcation could only be sensibly reached through negotiation, not domination.

These type of arrangements could be written up in a document authorised by the the APG constitutional amendment. The document might be a treaty. The constitutional amendment would authorise self determination, in turn providing for the Commonwealth and the indigenous peoples to sign an agreement.

Self determination is controversial but there is no doubt it applies to indigenous groups in Australia. Not only does the Declaration on Indigenous Peoples say so but so too does the ICCPR- all peoples have the right to self determination.

The Canadian Supreme Court has ruled about *when* self determination applies: '*a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire (such as Australia breaking from Britain); where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part*'.⁴ (my emphasis)

For what it is worth, asked to recommend how best to recognise indigenous peoples in the constitution, the panel recommended four changes:

First, *that the indigenous peoples 'occupied' the continent and continue to connect with traditional lands. This acknowledgement to be placed in the body of the constitution instead of in the preamble.*

The placing of such vague words in the body of the constitution does not create any rights capable of being sued on, nor does it compel parliaments to act in the interests of Aboriginal people. The use of 'occupation' instead of ownership and sovereignty is a put down of Aboriginal people and a defeatist attitude.

The second recommendation was to exclude any reference to race in the existing s51 but put race back in a new section! Somehow the panel believed its approach would stop anti-Aboriginal laws. Their proposal is naïve. Under other powers of the constitution any parliament can change a law for the good of a race to a bad law, as was the case of the Hindmarsh Bridge case where protection for heritage given under *Aboriginal and TSI Interim*

⁴ Reference re Secession of Quebec, [1998] 2 SCR 217

Protection Act was taken away by an amendment. Secondly, the High Court has ruled that whether something is a positive or negative race law is up to the parliament that makes it, not the constitution or the courts.

The third recommendation was to delete s25 that allows States to control voters based on race. It has never been used and would be struck down by a contrary Commonwealth law if a State ever tried to use it. And given States want every aboriginal vote available, there is no incentive to use the power. The removal of s25 might make Julia Gillard look good but it will do nothing for Aboriginal people.

The fourth and most controversial recommendation was to make English the national language.

It is one thing to note the greater use of English than Aboriginal in Australia. It is quite another to promote the superiority of the language of one race over that of another. The call stinks of racism. It is our right to maintain our languages against assimilation. The expert panel's suggestion comes from a completely antiquated mind-set, but also counter to all the international instruments protecting indigenous languages which Australia is signatory to, but consistently breaches. It will serve to legitimise the long standing lack of adequate action from Australian governments to try to save Aboriginal languages.

In just over 200 years Australian Aboriginal languages have suffered the largest and most rapid loss known worldwide. Of the original 250 languages, over 200 are no longer spoken and only 18 are now spoken by people in all age groups - as Australia's own Human Rights Commissioner told the United Nations in 2010. At this rate all Aboriginal languages could be estimated to be dead in 10 to 30 years.

What message does this statement by the Expert Panel give to Aborigines desperately struggling for decades to maintain and revive our languages, woefully under-resourced by government which still provides barely more than half of the amounts submitted for, and in the face of policies which increasingly subsume Aboriginal languages and other aspects of culture as just one element of "Australia's traditions and heritage"?

Mick Gooda works for the Human Rights Commission. How he can maintain the integrity of his office while endorsing English language prevails over Aboriginal is difficult to imagine.

Prime Minister Julia Gillard only agreed to the constitutional recognition because the Greens forced her to.

Given her bad polls Julia Gillard may find constitutional reform a good distraction from her poor record on Aboriginal affairs. But to ask her to lead the debate when she could not sell wheat to a chook farm is hopeless. Her performance in Canberra over Tent Embassy protests did little to change opinion on her abilities as a leader, or her attitude towards Aborigines.

Looking cowed and weak, Julia Gillard's handling of race issues went downhill from the time her security dragged her to her car. Not once did she later acknowledge that Aboriginal people had every reason to be angry. Instead she praised her security, implying Aborigines

were to be feared. She unnecessarily promoted the views of the usual suspects like Warren Mundine and Gooda illustrating how she is willing to divide Aborigines for her own gain. Her lack of understanding or compassion means Aborigines won't trust her to lead constitutional reform. By the way, burning of the Australian flag is not illegal and the High Court would strike down a prosecution for burning a piece of coloured rag as a constitutional guaranteed freedom of speech⁵.

As if to completely seal the issue, Julia Gillard's expert panel member Mick Gooda rushed to condemn Aboriginal protestors in order to ingratiate himself with the Prime Minister. In that single foolish moment, Mick Gooda killed the constitutional changes he sought.

Michael Mansell,

Secretary

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⁵ per Brennan CJ in *Levy v Victoria* [1997] HCA 31