

---

# CLOSING THE GAP

---

## ON THE CONSTITUTIONAL REFERENDUM

---

by *Melissa Castan*

### INTRODUCTION

On 13 February 2013, the Federal House of Representatives passed the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 ('the Bill') to public acclaim. Upon introduction of the Bill, Minister for Indigenous Affairs, Jenny Macklin, asserted that this will be an 'important step towards recognising Indigenous people in Australia's Constitution' and 'an opportunity for Parliament to show its support and commitment to constitutional recognition of Australia's First Peoples'.<sup>1</sup> In her second reading speech in support of the Bill the Prime Minister Julia Gillard referred to 'the 'great Australian silence' which fell upon our founding document' as 'the unhealed wound that even now lies open at the heart of our national story'.<sup>2</sup> Now we have two years to discuss and debate the question of how to best to promote constitutional recognition of Australia's Indigenous peoples.

The timing of this Bill was not accidental, it passed on the fifth anniversary of the Apology to the Stolen Generations made by then Prime Minister Kevin Rudd. His actions were also widely acclaimed as an acknowledgement of Australia's Indigenous history that was long past due, and of significant value.<sup>3</sup> Although the Apology did not seek to directly address any of the constitutional or legislative deficiencies residual in our legal system, it did hold great symbolic and therapeutic meaning, not only for those Indigenous Australians to whom the Apology was directed, but for the broader Australian community in general.

The 'Recognition Act'<sup>4</sup> is the Federal Government's response to the extensive consultation that took place around Australia, which culminated in the Report of The Expert Panel on Constitutional Recognition of Indigenous Australians, in January 2012.<sup>5</sup> The Panel made five key recommendations for constitutional reform, the most important were to recognise Aboriginal and Torres Strait Islander peoples, to preserve the Australian Government's ability to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples, and to prohibit governments from passing laws which discriminate on the basis of race.

Our Australian Constitution currently fails to safeguard the basic human rights standards that we might take for granted and might assume are recognised and enforced. Our Constitution generally expresses protection for very few fundamental rights and freedoms, even when rights are expressly included, they offer only weak protection because of the limited scope given to those sections by the High Court.<sup>6</sup> Legal omissions and neglect have not only served to exclude Aboriginal and Torres Strait Islander peoples from the history, but also in the real terms and the effect, of the Constitution.<sup>7</sup>

As the Australian Human Rights Commission's Social Justice Commissioner Mick Gooda rightly said:

... if Australians were aware that their Constitution did not protect its citizens from discrimination, the nation would take collective action to bring about reform to enshrine the principles of non-discrimination and equality. We now have an opportunity for the modernisation and reform of our Constitution to reflect the reality of prior Indigenous ownership, custodianship and sovereignty of Australia, as well as recognition of rights of equality, non-discrimination, and culture.<sup>8</sup>

Although the 1967 referendum was considered one of the most 'successful' amendments to the Constitution, it did not adequately address the issues of recognition of Indigenous Australians and their legal and constitutional protection. The ambiguity in the scope of the so called 'races power' and the capacity for the Federal Parliament to pass laws which are not in conformity with Indigenous community wishes, leads to the conclusion that there is inadequate Constitutional recognition or protection for Indigenous peoples of Australia.<sup>9</sup>

In 2010 the Minister for Indigenous Affairs began talks on the process for a recognition referendum.<sup>10</sup> The hung parliament that emerged later that year sealed a deal that saw the process get underway, when the Prime Minister secured the support of the Greens and Independent Members of Parliament to form Government. Coalition policy included a recognition referendum since Prime Minister Howard embraced the idea in 2007.<sup>11</sup> However,

no detail as to the specific reforms was evident from these political promises. So the Prime Minister convened an 'Expert Panel' in 2011, tasked to report on 'the options for constitutional change and approaches to a referendum that would be most likely to obtain widespread support across the Australian community'.<sup>12</sup>

### WHAT THE EXPERT PANEL RECOMMENDED

In January 2012 the Expert Panel made five key recommendations for changing the Constitution. These, in summary, are to:

- Remove Section 25, which recognises that the States can ban people from voting on the basis of their race;
- Delete section 51(xxvi), the so-called 'races power', which can be used to pass laws which discriminate (adversely) on the basis of race;
- Insert a new section 51A, to recognise Aboriginal and Torres Strait Islander peoples and to preserve the Australian Government's ability to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples;
- Adopt a new section 116A, prohibiting governments from passing laws which discriminate on the basis of race; and
- Insert a new section 127A, recognising Aboriginal and Torres Strait Islander languages were this country's first tongues, while confirming that English is Australia's national language.<sup>13</sup>

These recommendations emerged from a detailed and wide ranging consultative process, spanning the continent, it included the views of Indigenous community members, representative organisations, individuals, constitutional experts and political representatives.<sup>14</sup> This kind of consultation, and indeed the recommendations themselves, are consistent with the UN Declaration on the Rights of Indigenous Peoples, to which Australia has stated its commitment.<sup>15</sup> However, by the end of 2012 the Government (and many others) formed the view that there was insufficient momentum and support for a referendum, at least in the short time frame of the electoral cycle, which would bring the current Parliament to a close by the end of 2013, if not earlier. In order not to lose the valuable work of the Expert Panel, the Government introduced the Bill to provide:

an opportunity for Parliament to show its support and commitment to constitutional recognition of Australia's First Peoples... [and to] also help raise awareness of the importance of constitutional change in the community.<sup>16</sup>

### WHAT THE RECOGNITION ACT WILL DO

The legislation was introduced not merely to recognise Indigenous Australians' place in our constitutional past,

present and future, it is also framed as a basis to build up popular support needed for a referendum in order to alter our Constitution.

There have been concerns expressed that this brief and unorthodox statute might merely be a stalling tactic, or only a weak placebo for real constitutional reform. However a closer look at the Bill demonstrates it is another step forward in the reconciliation process, and shows some positive signs for continuing our constitutional reform processes.

The Bill is unusually short, with only 5 sections; its preamble is nearly as long as its two substantive sections. The preamble (which draws upon one of the recommendations of the Expert Panel) states that:

The Aboriginal and Torres Strait Islander peoples were the first inhabitants of Australia. The Parliament is committed to placing before the Australian people at a referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples.<sup>17</sup>

The Preamble goes on to acknowledge the important work of the Expert Panel, and its proposals for constitutional change. It also states that further engagement is needed to build the support necessary for a successful constitutional amendment (which under section 128 of the Constitution requires the approval of a majority of voters in a majority of states).

The first operative section of the Bill is section 3, which recognises that Australia was 'first occupied' by Aboriginal and Torres Strait Islander People, acknowledges the 'continuing relationship' of Indigenous people with 'their lands and waters' and 'acknowledges and respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples'.

The second operative provision is section 4, which requires the responsible Minister to review the Expert Panels' proposals, as well as other proposals, and assess the level of community support for constitutional reform.

The third important point is the provision in section 5 for a two year sunset clause in order to put in place 'a clear timeframe to build towards change and ensures the focus remains on the ultimate goal of constitutional recognition'.

There are some positive signs in this Bill: it recognises, albeit weakly, the history, culture, languages and heritage of Indigenous Australians, (but it in no way protects Indigenous Australians' rights and relationships to land,

language and culture). The Bill puts in place some plans to review and reconsider the process of constitutional reform, and passage of the Bill through the lower house was celebrated with bipartisan support and the involvement of Indigenous and non-Indigenous representatives; the work of the Expert Panel was also acknowledged.

Whilst these are positive, albeit scant steps forward, it is disappointing that this Bill does not really engage with any of the suggestions expressed either by the Expert Panel or others.<sup>18</sup> In her initial press release, the only reference Minister Macklin made to the recommendations of the Panel was that:

The Australian Government agrees with the findings of the Expert Panel that a referendum should be held at a time when it has the most chance of success. The Minister did make note of the key Expert Panel recommendations in her statement to the House of Representatives the day before the bill was introduced.<sup>19</sup>

#### WHAT THE JOINT SELECT COMMITTEE SAID

At the same time as the Bill was introduced, a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established, and set the task of considering the Bill, 'with a view to securing strong multi-party support for the passage of the Bill through Parliament'.<sup>20</sup> By January 2013 the Committee concluded its review of the Bill, and recommended that the Bill be passed.<sup>21</sup>

The Committee considered a number of issues arising out of the Bill, and the concerns brought to its attention by those who made submissions. These submissions focused very closely on the work and recommendations of the Expert Panel, and a number of them pointed to inadequacies in the Bill.

For example, it was brought to the attention of the Committee that

...the bill shows signs of losing connection with the most important aspect of recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. That recognition needs to deal with the fact that the Constitution was drafted on a premise of racism, essentially.<sup>22</sup>

The Committee endorsed the Expert Panel's view that the removal of racial discrimination from the Constitution is an important component of any constitutional recognition of Aboriginal and Torres Strait Islander peoples, and acknowledged the submissions that had sought stronger emphasis on the relationship between racism and the need for recognition.

So on one hand the Committee 'believes that the issue of racial discrimination goes to the heart of the broader question of constitutional recognition of Aboriginal and Torres Strait Islander peoples', on the other it also accepted that the Bill:

is only one step toward constitutional change, and is not intended to prescribe what should or should not be included in the proposal for constitutional change that is ultimately put to the Australian people at a referendum.<sup>23</sup>

The Greens Senator, Rachel Siewart, specifically referred to this issue and noted that:

the final model that is put to a referendum should address the legacy of racial discrimination and enable the federal government to legally act to meet its commitments under both Close the Gap and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>24</sup>

A number of submissions were also critical of the lack of detail as to the steps towards a referendum, and concern was expressed that the recognition referendum could 'fall off the radar', or be quietly deferred for two years, and momentum could run down as the sunset clause creeps closer.<sup>25</sup> The Committee referred to its own review mechanisms, and the other processes put in place (such as the 'Recognise' peoples' movement)<sup>26</sup> as signals that momentum is expected to build, rather than dwindle away. But the Committee also pre-empted the public support for fundamental change with its statement that:

While the committee does not seek to limit the scope of public discussion, it nevertheless considers that only a relatively modest proposal is capable of engendering the bipartisan consensus which is a pre-requisite to success.<sup>27</sup>

It is profoundly disappointing that the Committee took the step of preempting the public understanding and motivation for constitutional recognition of Indigenous people, and adopted a position supporting a 'modest proposal'. Public campaigns for parliamentary reform can generate both social change and political traction; arguably national attitudes towards recognition of Indigenous legal rights have shifted positively at two key points, the 1967 referendum and the national Apology. The Recognition Act could be another key moment, and significant reform could take place.

If bipartisan political support can be maintained, if the review process is robust and if public sentiment gains some momentum, then the opportunity to recognise the special and essential place of Indigenous people in our constitutional and legal framework has arrived; we can look forward to a referendum in the not too distant future.



We should grasp the historic opportunity to remedy our constitutional deficit, close the referendum gap and fully recognise Indigenous Australians in our fundamental legal document.

*Melissa Castan is a Deputy Director at the Castan Centre for Human Rights Law, and she teaches law at Monash University. She researches in Indigenous legal rights and constitutional law. Parts of this article are based upon 'Closing the Referendum Gap' on the Castan Centre blog at <<http://castancentre.com/2012/11/28/closing-the-referendum-gap/>>.*

- 1 Jenny Macklin, 'Aboriginal and Torres Strait Islanders Peoples Recognition Bill', (Media Release, 28 November 2012).
- 2 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2012, *Second Reading Speech - Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* (Julia Gillard).
- 3 Both Prime Ministers made reference to the 'great Australian silence' in Australia's orthodox history of its Indigenous people, a term coined by William Edward Hanley Stanner in the 1968 Australian Broadcasting Commission *Boyer lectures*.
- 4 This name has been used widely in reference to the impending Act.
- 5 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (Canberra, 2012) <<http://www.youmeunity.org.au/final-report>>.
- 6 See Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 2009) ch 11.
- 7 *Ibid*, ch 14.
- 8 Mick Gooda, 'Constitutional reform: Creating a nation for all of us' (Australian Human Rights Commission, 2011) 16.
- 9 I outlined these briefly in 'Recognising Indigenous Peoples rights and the Australian Constitution' (2011) 7(25) *Indigenous Law Bulletin* 12. See also Marcia Langton, 'Indigenous Exceptionalism and the Constitutional 'Race Power'' (2013) *Space, Place Culture* 1-19; and Megan Davis, 'Indigenous rights and the constitution: making the case for constitutional reform' (2008) 7(6) *Indigenous Law Bulletin* 8.
- 10 Natasha Robinson and Lex Hall, 'Jenny Macklin vows to consider Indigenous recognition in Constitution', *The Australian*, 9 August 2010.
- 11 Recognise, *Some Background* (Recognise, 2013) <<http://www.recognise.org.au/why/some-background>>.
- 12 Expert Panel, above n 5.
- 13 The full recommendations are outlined in the Expert Panel Report, above n 5, xviii.
- 14 Expert Panel Report, above n 5, 242-63.
- 15 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/RES/61/295 (13 September 2007) (hereafter 'UNDRIP'); Jenny Macklin, *United Nations Declaration on the Rights of Indigenous Peoples* (Statement, 3 April 2009).
- 16 Jenny Macklin, *Aboriginal and Torres Strait Islanders Peoples Recognition Bill* (Media Release, 28 November 2012).
- 17 *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012*, Preamble.
- 18 There has been extensive legal commentary on the various proposals for constitutional recognition of Indigenous Australia,

for instance by Professor George Williams, the Law Council of Australia, Professor Megan Davis, and the Cape York Institute. Many more submissions and suggestions can be found at the (Recognise website <<http://www.recognise.org.au>> and the UNSW Indigenous Law Centre page <<http://www.ilc.unsw.edu.au/research/constitutional-reform-and-indigenous-peoples>>.

- 19 Jenny Macklin, above n 16.
- 20 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* (Report, 30 January 2013) 1.
- 21 *Ibid* 22.
- 22 *Ibid* 7-8.
- 23 *Ibid* 9.
- 24 *Ibid* 26.
- 25 *Ibid* 14.
- 26 Recognise <[www.recognise.org.au](http://www.recognise.org.au)>.
- 27 Joint Select Committee, above n 18, 14.

Kathy Maringka

