Indigenous recognition: should we change the Constitution?



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In a major 2007 address, former Liberal prime minister John Howard spoke of "the anguish so many Australians feel about the state of Indigenous Australia and the deep yearning in the national psyche for a more positive and unifying approach to Reconciliation."[1]

Mr Howard promised that, if re-elected that year as prime minister, he would hold a referendum to recognise Indigenous Australians in the Constitution. However his government lost office.

After the 2010 election, Labor's power-sharing agreement with the Greens and independents included holding a referendum on indigenous constitutional recognition before or at the 2013 election. However, the proposal was shelved amid fears that lack of community support would see it defeated.[2]

Following his election in 2013, prime minister Tony Abbott said he wanted a referendum to recognise indigenous Australians to be held in May 2017. This would be the 50th anniversary of the 1967 referendum that enabled federal parliament to make laws for indigenous Australians.[3] He wanted time to give the proposal the best chance of success.

What would be the effects of changing the Constitution? Would it end indigenous disadvantage? Or would it be divisive and counterproductive?

Proponents of constitutional recognition claim it would lead to Aborigines and Torres Strait Islander people feeling valued. Others are concerned that it might lead to a parallel legal system complete with brutal ritual initiation, violent payback and "humbugging" – the practice of demanding money from relatives, often violently.

These issues are addressed here in the context of Australian history.

"One people. One destiny."

Six federating colonies came together in 1901 to found Australia. The new nation was remarkable for being born of the common wish of its people, rather than war or revolution.

Australia was then, and remains today, a nation comprised of diverse backgrounds. At Federation, some inhabitants were recent migrants, while others were descendants of the free settlers and convicts who had come to call Australia home.

There were also the indigenous people, Aborigines and Torres Strait Islanders, whose arrival came much earlier – a point which has led to proposals for changes to the Australian Constitution.

It was remarkable that the lead up to Australian Federation evoked strong visions of unity and egalitarianism. Such a vision is perhaps best summarised in the words of Sir Henry Parkes, addressing the 1891 Federal Convention in Sydney: "We seek to break down the barriers which have hitherto divided us... One people. One destiny."[4]

The idea of "one people" reflects a Christian understanding of race. Made in the "image and likeness" of God,[5] the false barrier of race is based on man's limited view of his fellow men. The apostle Paul reaffirmed this understanding when he stated that "[God] made from one man every nation of mankind to live on all the face of the earth … His offspring".[6]

The Bible affirms the idea that we are all ultimately one human race.

In the Old Testament, Job provides one such example. In speaking of his servants, Job rhetorically asks: "Did not he who made me in the womb make them? Did not the same one form us both within our mothers?"[7]

Addressing the racially divided people of Galatia (some Greek, some Jewish) in the New Testament, Paul reminds them that: "There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus".[8]

Aboriginal Australians could vote from the 1850s

When Britain extended its sovereignty to cover the whole Australian continent in 1829, everyone born in Australia automatically became a British subject at birth. This included Aborigines and Torres Strait Islanders – almost a century before the United States treated its native peoples similarly.[9]

Before 1856, no Australian colony had self-government, much less the parliaments known today. When various Australian colonies became self-governing (South Australia in 1856, Victoria in 1857, New South Wales in 1858, and Tasmania in 1896), all adult male British subjects could vote. This included Aborigines – from the outset. Only in Queensland (self-governing from 1859) and Western Australia (1890) were indigenous people at first disenfranchised.[10]

Voting at that time was voluntary. Indeed, compulsory voting was introduced in Australia only in 1924.[11] Before that time many of those entitled to vote, including indigenous Australians, may not have done so.

When South Australia extended franchise to all adult women in 1895, only the second such jurisdiction in the world after New Zealand, this included indigenous women.[12]

When the modern legal concept of Australian citizenship was introduced in 1948 by the *Nationality and Citizenship Act*, it replaced the previous idea of being British subjects. All Australian-born people – including indigenous people – continued to be included.[13]

By comparison, treaties between the United States government and native American tribes often saw the latter groups' land and hunting rights surrendered for resources, payments, and a promised end to further land claims. Only by a court trial in 1879 were native Americans recognised under United States law as people, though still not widely accepted as citizens.[14]

Native Americans sometimes achieved further civil rights by means such as marrying a white or through military service. But it was only in 1924 that the *Indian Citizenship Act* granted full citizens' and electoral rights.[15]

In Australia, all indigenous people could vote at federal level by 1962, regardless of state laws. In 1965 Queensland extended the vote to indigenous people, completing the process of enfranchisement across Australia.[16]

The overwhelming result of the 1967 referendum and the appointment of Neville Bonner AO as Australia's first indigenous federal parliamentarian marked further advances in indigenous recognition and civic participation.

Since then, Aboriginal participation at federal, state and territory levels has grown substantially. Indigenous people have been elected to all levels of government, symbolising the Australian people's regard for, and solidarity with, our indigenous people.

What did the 1967 referendum achieve?

No proposal for constitutional change could ignore the referendum of 1967 – or the events that preceded it.

Australia Day, 26 January 1938, was something of a watershed for Aboriginal civil rights. On that day, activists held the first "Day of Mourning" to coincide with the sesquicentenary celebrations. The gathering called for indigenous people to be treated equally with other Australians. It heard from noted Aboriginal activists including William Cooper, Jack Patten and William Ferguson.

Addressing the meeting, Aborigines Progressive Association (APA) president Jack Patten said:

"Our purpose in meeting today is to bring home to the white people of Australia the frightful conditions in which the native Aborigines of this continent live... We do not wish to be left behind in Australia's march to progress. We ask for full citizen rights... We do not wish to be herded like cattle and treated as a special class... This is not a matter of race it is a matter of education and opportunity.

"The reason why this conference is called today is so that Aborigines themselves may discuss their problems and try to bring before the notice of the public and of parliament what our grievance is, and how it may be remedied. We ask for ordinary citizen rights and full equality with other Australians."[17]

Within the week, Jack Patten also led a delegation which met with Prime Minister Joseph Lyons, presenting the Prime Minister with a copy of the APA's *10-point Plan for Citizens Rights*. The plan called for Aboriginal affairs to become the Federal Government's domain, anticipating what was to come at the 1967 referendum. It put forward several long-term proposals calling for better opportunity for Aborigines, always framed within the goal of equality with fellow Australians.[18]

These proposals covered areas as diverse as education, wages, welfare, land (for which the APA offered soldier and immigrant land settlement schemes as a model for indigenous agriculture). They also included housing, and contact by Aboriginal public servants to provide "contact with civilisation" for those still living on the land.[19]The outbreak of World War II saw these issues left unresolved.

Postwar, the Commonwealth Parliament legislated for full Aboriginal franchise in 1962 – and then, in 1967, a constitutional referendum was conducted. This referendum is noteworthy as one of Australia's few successful referendums. It achieved a record margin: 90.77 per cent voted for change.[20]

It is important to understand what this referendum did – not only because of frequent misunderstanding – but because proposed constitutional amendments could directly affect these changes.

Before the 1967 referendum, only states had the power to make laws for Aborigines. The referendum changed this by striking out the words "other than the aboriginal people in any State" from section 51(xxvi), extending the Commonwealth's power to legislate.[21]

The referendum also stipulated that census data should include Aborigines. It did this by repealing the Constitution's penultimate section, which read: "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted".[22]



For both the pioneering Aboriginal activists of the 1930s and proponents of the 1967 referendum, the goal was equality for all Australians. A referendum jingle aired at the time broadcast this spirit: "Vote 'yes' for Aborigines, they want to be Australians too."[23]

Since then, a further attempt was made at constitutional change – and it failed.

The 1999 republic referendum put two questions to voters. The first concerned Australia becoming a republic and the second was to introduce a new preamble. Included in the proposed wording was the following statement:

"We the Australian people commit ourselves to this Constitution:

"… honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country…" [24]

In a sense, then, further constitutional change has already been rejected: 60.66 per cent of Australians voted "no" to the new preamble.[25]

Gillard Government commits to constitutional change

In December 2010, the Gillard Government appointed an "Expert Panel" to provide recommendations on constitutional recognition of indigenous Australians. Co-chairman Professor Patrick Dodson explained his view of the Panel's rationale thus:

"Recognition of the first peoples in the Constitution sends a message that Australians value Aborigines, that they are important, that they are respected, and we want to deal with the things that have caused us division and discord in the past."[26]

Professor Dodson's suggestion that indigenous Australians will somehow receive greater value and respect by constitutional change has been rejected by others – including some indigenous people directly affected.

Indigenous lecturer and researcher Dr Anthony Dillon, for example, believes we should leave the Constitution alone and that such "recognition" is irrelevant: "The many thousands of happy, successful Aboriginal people, who are flourishing despite the lack of constitutional recognition of culture, are surely evidence that such recognition is not needed," he said.[27]

This view is no reflection on the general well-being of the indigenous community. But will constitutional change "deal with things" as hoped by Professor Dodson?

Former ALP national president, now government indigenous affairs adviser, Warren Mundine has said of constitutional change: "I feel strongly about this – it's a hundred steps too far. I'm opposing it and I'll campaign against it."[28]

Prominent indigenous leader Noel Pearson has recognised that concern over future High Court interpretation could see "constitutional conservatives" oppose amendments. Mr Pearson fears this would lead to a "mealy-mouthed, miserable and minimalist" result and has supported calls for a non-constitutional "document of recognition", created by referendum.[29]

Commenting on the raft of views held, University of New South Wales law professor George Williams, a supporter of constitutional change, noted that: "To proceed, the move will not only require strong backing from the community and politicians, but from Aboriginal people. No referendum to recognise them in the constitution should be put without their clear support."[30]

Following public consultation, the Expert Panel compiled a report of options for constitutional change which it provided to the Federal Government in January 2012.

The Commonwealth Parliament set up an inquiry in November 2012, tasked with further examining the Expert Panel's recommendations. Parliament also passed the temporary *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*, anticipating a future referendum on Aboriginal recognition and related issues.

What are the proposals?

Some of the Expert Panel's proposals are straightforward; others are not. Similarly, some proposals have received support from the parliamentary inquiry; others have not.

One simple proposal would see section 25 of the Constitution repealed. This section reads:

"For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted."[31]

In other words: if a state disqualified Aborigines from voting at state level, the Commonwealth would not count their population towards electorate entitlement. Electorates are distributed proportionally between states according to population – unlike the Senate seats, of which each state is entitled to twelve.

While this section may appear discriminatory, the Constitution had to accommodate the reality that in 1901 some states did not allow Aborigines to vote. This was despite all Aborigines being British subjects. The reason may have been due, at least partly, to the practicalities of life in the colonies.

At that time, many indigenous people lived traditional lives in remote areas – far removed from towns and settlements. Few spoke English, and transport and communications were rudimentary by modern standards. Given that voting was optional and few indigenous people would have voted, what became a practice was ultimately formalised in legislation.

In 1959, the federal Joint Committee on Constitutional Review recognised the practical impediments at Federation to full participation of indigenous people in voting. Its report found that:

"[a]t Federation, the available means of communication made it almost impossible to obtain an accurate count of the aboriginal population of a State. Some difficulty will continue to be experienced in counting the number of aborigines who do not live in proximity to settlements but the means of communication and available sources of contact with aborigines of nomadic habit have improved so much since Federation that the Committee believes that there are no longer insuperable barriers to the carrying out of a satisfactory census of the aboriginal population of the States."[32]

Gradually, the issues that caused the situation at Federation were overcome. The presence of section 25 in the Australian Constitution served as an incentive to repeal race-based voting laws at state level, because an increased census count would lead to greater parliamentary representation.

Since all states now allow indigenous people to vote, section 25 is redundant – as are many other constitutional sections. Whether redundancy alone warrants a referendum is another question.

Another proposal would see indigenous languages recognised in the Constitution.

This poses immediate questions, especially as there is currently no constitutional recognition of any language. English serves as Australia's official language by default. Placing any language in the Constitution without a clear purpose would leave such a section open to court interpretation and potentially unintended effects.

This is problematic when considering the sheer number (hundreds) of indigenous languages, not to mention their differing status (ranging from actively spoken, to endangered, to extinct).

While respecting indigenous heritage, there is great value in uniting Australians through a common language. The parliamentary committee rejected the proposal to recognise indigenous languages.



Recognition: what does it mean?

The proposal with by far the greatest future implications is for constitutional recognition of Aboriginal and Torres Strait Islanders. Different forms of wording have been proposed to this end, though each raises further issues.

Several proposed amendments would preserve the Commonwealth Parliament's ability to legislate for Aboriginal and Torres Strait Islander affairs, coupled with a preamble of recognition and provisions against racial discrimination. The latter provisions are problematic, especially given that questions of discrimination, disadvantage and benefit would likely become the domain of the courts, rather than the government or parliament of the day.

Professor Anne Twomey, Director of the Constitutional Reform Unit at the University of Sydney summarises this result, saying: "Controversy will hang on the fact that it would ultimately be a matter for a court to decide what was, or was not, for the advancement of Indigenous Australians (although, no doubt, it would give a degree of deference to the view of the parliament). On the whole, Australians have proved most reluctant to shift such assessments from the parliaments to the courts."[33]

Professor Twomey also notes that insertion of constitutional anti-discrimination provisions would cover only race, but not other forms of discrimination:

"Some are also likely to argue that if an anti-discrimination provision is to be included in the Constitution, then it should not just be directed at race but also at discrimination against women and other groups. Back in the 1890s when s 25 of the Constitution was drafted, it penalised States that enacted racially discriminatory voting laws, but did not penalise States that excluded women from voting, despite the far greater disparity in voting numbers that this caused. To perpetuate the privileging of anti-racial discrimination measures over anti-sex discrimination measures in the twenty-first century would seem inappropriate to some."[34]

It is important for consistency – let alone the clarity of any constitutional referendum proposals – that the issue of discrimination should remain the domain of legislation, not the Constitution.

Implications of separate rights for Aborigines

Returning to the preamble of the proposed section 51A, both alternatives include the words "recognising the continuing cultures". Several commentators have raised concerns about the possible misinterpretation and abuse of these words. Warren Mundine, for example, has stated his "massive concern" at opening a "Pandora's box" which could see protection for traditional customs such as child brides.[35]

When 50-year-old Arnhem Land man Jackie Pascoe Jamilmira subjected a 15-year-old girl to violent beating and sexual assault in 2002, he was charged with unlawful intercourse with a minor. He defended his actions by appealing to traditional custom. Since she had been promised at birth as his future wife, he was merely asserting his traditional rights as her husband.[36] Constitutional recognition of indigenous cultures could give legal protection to such examples of child sexual abuse.

Former MP and minister Gary Johns has covered similar concerns as contributor and editor of his book *Recognise What?*[37]

In the book's introduction, Mr Johns references the *Recognise* campaign and the constitutional creation of "separate and special rights for Aborigines ... on the basis that Aborigines are assumed to have a unique culture". He then adds: "This may be so, but the historical record reveals that while the Aboriginal culture may include admirable aspects, it also includes a number of less than attractive beliefs and practices."[38]

Some beliefs and practices raised by Mr Johns and other contributors include: "demand sharing" or "humbugging" of resources,[39] ritual initiation involving genital mutilation,[40] and traditional systems of violent "payback".[41] The implication is that courts could well find, in time, that traditional law survives in parallel with Australian common and statutory law – echoing the concerns of Professor Twomey.

The theory of parallel legal rights has already led to bizarre claims regarding Aboriginal sovereignty. Putting aside calls for a "treaty" between Aboriginal and other Australians – on which basis some have opposed recognition in "the white man's

Constitution"[42] – several people have even attempted to "opt out" of Australian law.

In April 2015, the story broke of Murrumu Walubara Yidindji – formerly SBS political correspondent Jeremy Geia. Murrumu had renounced his Australian citizenship and declared an area in northern Queensland larger than Hong Kong to be sovereign Yidindji territory. He apparently returned his passport and driver's licence and drives a car with Yidindji number plates.

Apart from gaining considerable media coverage, Murrumu's actions garnered support from sympathetic quarters. Trevor Tim, for example, of the Indigenous Radio Service said that: "As a sovereign man, his law, the law of the land, the first law of the land, is on top of the Crown law. Murrumu understands that and Murrumu is running with that."[43]

Tom Calma, co-chairman of Reconciliation Australian and former Australian Human Rights Commissioner, asserted that: "If Murrumu and others want to go down that track of identifying as separate sovereign nations, so be it, that's their right."[44]

Dr Anthony Dillon has raised the prospect of a "lawyer's picnic" and an accentuation of "the us-vs-them divide" if Aboriginal law receives constitutional privilege.[45] This is a prescient fear given the case of Murrumu and others like him.

Another proposed form of recognition would keep the Commonwealth's ability to legislate for Aboriginal and Torres Strait Islander peoples, but remove the ability to legislate for any other race. Aside from potentially unintended legislative results, such a change would also represent an extraordinary reversal of the motivation for the 1967 referendum: equality for all Australians.

Conclusion

Any future steps to advance the well-being of Aborigines and Torres Strait Islanders should build on and honour the firm foundations of the past. The Australian Constitution, in particular, should be retained as the country's primary governing rule book. It should not be used for aspirational statements, no matter how well-intentioned.

If a well-meaning, but ultimately misguided attempt to alter Australia's Constitution were successful, it would not benefit the interests of those it claims to advance. Indeed, Australia's indigenous peoples risk having their future decided by courts, rather than by publicly accountable policymakers – and having less than desirable aspects of the past possibly given force of law.

This direction flies in the face of Sir Henry Parkes' vision of "one people, one destiny", the pioneering work of the Aboriginal "Day of Mourning" activists, and the sentiment and outcome of the 1967 referendum. These events evoke the egalitarianism for which Australians are so well known – and by which we should seek tangible results for Aboriginal and Torres Strait Islander people.

Preserving a spirit of goodwill, seeking to overcome past divisions, and recognising in each other the "image and likeness" of God, Australians will be able to "break down the barriers which have hitherto divided us."[46]

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