

Making the case for constitutional reform

Alice Taylor

Recent discussions on whether or not to amend the Australian Constitution to ‘recognise’ Aboriginal and Torres Strait Islander peoples are important and long overdue for many Indigenous and non-Indigenous Australians. Federation in 1901 meant the loss of rights and freedoms for Indigenous Australians when the Constitution was made. Today, even after the changes brought about by the 1967 referendum, Australia is still the only democratic nation in the world with a Constitution with clauses that authorise discrimination on the basis of race (Davis & William 2015). Indeed, sub-section 51 of the Constitution allows the Commonwealth to make laws for the people of any race for whom they deem necessary, and section 25 allows the Commonwealth to disqualify individuals from voting because of their race. These disgraceful aspects of the Constitution have allowed such negative and damaging interferences in Indigenous Communities as the Howard government’s ‘Northern Territory Intervention’. Like Davis, I believe it is unacceptable for Australia as a modern liberal democracy to have a ‘race power’ in the Constitution (Davis 2008, p. 8), and so to eradicate that inequity, there must be a Constitutional amendment as well as a treaty put in place.

A symbolic constitutional amendment, such as recognising Aboriginal and Torres Strait Islander Peoples in the preamble to the Constitution, will create no legal rights and will therefore be fairly ineffective, although interestingly many non-Indigenous Australians support this idea. Davis argues that this is because people would not have to change or give anything up if this was to happen. Thus, to many non-Indigenous Australians, “the idea of apologising to Indigenous peoples or recognising Indigenous peoples in the preamble can only be done as long as it doesn’t ‘detract’ from the dominant historical narrative and mythologies of Australia” (Davis 2008, pp. 6-7).

I argue that a legal change in the Constitution, rather than a symbolic one, is necessary if we want to balance current constitutional inequities. In 2012, former Prime Minister Julia Gillard’s Expert Panel on Constitutional Recognition of Indigenous Australians released a report recommending how to recognise Indigenous Australians in the Constitution. Some recommendations were that section 25 and 51 be repealed, and that a new ‘section 116A’ be inserted, disallowing the Commonwealth, State or Territory governments from discriminating on the grounds of race, colour, or ethnic or national origin, although exempting laws which are made for the purposes of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group (Report on Recognising Aboriginal and Torres Strait Islander Peoples in



Copyright 2018 by the author. This is an Open Access article distributed under the terms of the Creative Commons Attribution 4.0 Unported (CC BY 4.0) License (<https://creativecommons.org/licenses/by/4.0/>), allowing third parties to copy and redistribute the material in any medium or format and to remix, transform, and build upon the material for any purpose, even commercially, provided the original work is properly cited and states its license.

***NEW: Emerging scholars in Australian Indigenous Studies* is a Student Journal from UTS ePRESS showcasing outstanding student works.**

the Constitution). These changes would be a sufficient, legislative start to equalising Australia. The additional agreement of a treaty would strengthen this. A treaty may include resolutions for the Stolen Generations, land rights, prohibition of racial discrimination, and many other agreements. A treaty should have occurred with the landing of First Fleet, and so today, with Australia being the only Commonwealth nation without a treaty, it is an opportunity for non-Indigenous Australians to rectify past actions, and would be the first of many steps needed to move forward in unity with Aboriginal and Torres Strait Islander Peoples.

References

Davis, M. 2008, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform', *Indigenous Law Bulletin*, vol. 7, no. 6, pp. 6-8.

Davis, M. & Williams, G. 2015, *Everything you Need to Know About the Referendum to Recognise Indigenous Australians*, NewSouth Publishing, Sydney.

Expert Panel 2012, Report on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, viewed 2 June 2016

https://www.pmc.gov.au/sites/default/files/publications/Recognising-Aboriginal-and-Torres-Strait-Islander-Peoples-in-the-constitution-report-of-the-expert-panel_0.pdfAustralian constitution



© 2018 by the author. This article is distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by-nd/4.0/>).