

A New Democracy

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Imagine a country where Aboriginal and Torres Strait Islander people are recognized as the sovereign owners of lands they have lived on for sixty thousand years or more.

Imagine the freedom to be yourself, culturally, spiritually, linguistically, regardless of your age, gender, colour or ethnic origin.

Imagine a Constitution that enshrines these human rights and upholds all of our international legal obligations.

Imagine a Constitutional prohibition on discrimination on the basis of race, colour, religion, ethnic or national origin.

Imagine a positive mandate in that Constitution to ensure laws are made and programs enacted to end the impoverishment of so many of the First Australians as well as others.

Imagine an Australia where the Indigenous value of *Custodianship* binds all of us to a shared responsibility to care for this land and for one-another.

In this Constitution there would be power and poetry. It would inspire us, expressing our true sense of place, acknowledging the longer timelines of history, defining us and unifying us as Australians.

This is my dream and I hope you have one too. It is a dream of a new Democracy and a constitution that is inclusive of all Australians.

If you can't see that far into the future to a brighter day that some day will come, then you risk settling for the status quo. Maybe you know some of those Australians who don't know the Constitution exists, don't know what's in it or that we have the power to change it for the better?

Even a glance at the Constitution reveals the deep stain of racism and discrimination. It is one of the few constitutions in the world today with negative race powers allowing government to make laws and policy that pointedly trample the rights of Aboriginal and Torres Strait Islander people.

In contrast to the constitutions of most Western democracies Australia's says very little at all about human rights.

Aboriginal and Torres Strait Islander people have long been denied many of the most fundamental human rights including those Australia is obligated to uphold under many international covenants.

So any discussion of a new attempt to belatedly recognize their legal rights as well as the rightful central place of Indigenous Australians as the most ancient founding peoples of the many nations that were here for tens of thousands of years surely must begin with an honest statement of certain facts.

Despite the lie of *terra nullius* Aboriginal and Torres Strait Islander people occupied these lands longer than anyone really knows. Their lands were invaded and many of the settlers used brutal force to take what was never theirs.

To deny the invasion, the massacres and the theft of lands, and I say this with grim irony, would undermine any claim that the Australian Constitution has legitimacy.

The nation constituted by the Australia Constitution Act of 1900, a British Act of Parliament, is founded on the misguided notion of White Supremacy and the equal folly of that tragic concept of conquest. As some Australia judges have noted conquest is a facet of international law used to justify claims by other nations to sovereignty. But having witnessed many of the worst conflicts over the past 45 years I am convinced this ancient belief in conquest is a vestige of our most predatory and barbaric traits as a species.

Yet conquest, of a sort, and extraordinary denial of reality is what has landed us all in this Constitutional mess.

Despite the fact that the original English invader, James Cook, ignored his orders to 'consult with the natives', despite the truth that Aboriginal resistance did occur, that there was no surrender of sovereignty and no negotiation of a treaty, the colonies established a Constitution that looked right through Aboriginal people as if they were not there.

There were just two references to 'natives' in the 1901 Constitution Act and they both tragically excluded Aboriginal and Torres Strait Islander people. They were not even to be counted in the census because given the prevailing racism it was assumed that out among the flora and fauna they were doomed to extinction. The Parliament was prohibited from making laws for the 'natives' but this exclusion did not prevent shameful policies aimed at assimilation and at times acts of genocide.

It was not until the 1967 Referendum that a 92% majority of Australians voted emphatically to allow Aboriginal and Torres Strait Islander people to be counted along with all other citizens and yes the Commonwealth could make laws for them too along with other *races*.

You see the anachronistic, racist and scientifically false notion of a White Australia was built into the Australian Constitution. The race powers are still there today.

Section 25 allows the States if they wish to disenfranchise people on the basis of race. Section 51 (xxvi) allows the federal parliament to pass special laws relating to "the people of any race for whom it is deemed necessary to make special laws."

You can see what this means for Aboriginal people when you look closely at the crushing humiliation of the Northern Territory Intervention, as the Racial Discrimination was suspended again to allow official discrimination, sanctioned by a Prime Minister, an Opposition Leader and almost all members of the federal parliament.

An Aboriginal child born in one those remote communities in 1967 will spend the first fifteen years of life controlled by the new Chief Protectors who dictate fundamental aspects of family life, Cultural life, work, welfare and education from thousands of kilometres away in Canberra. Their genuine right to an equal opportunity for health, education, housing and a decent standard of living has never been honoured in this hollow Constitution.

At the time the Northern Territory Intervention was launched then Prime Minister John Howard declared that he was not concerned with constitutional niceties when the safety of children was at stake. What extraordinary hypocrisy.

The Intervention was a very dangerous Government Big Lie and it shows the tragic flaws in our current Democracy that allows a government to discriminate. Gormless politicians playing to the applause of neo-liberals who want to assimilate Indigenous people pass many laws that clearly do not benefit the First Australians.

When I have consulted Aboriginal and Torres Strait Islander people privately and publicly in many places and many forums around the country, overwhelmingly they speak of their land, the land that owns them, the sovereignty they believe is the essence of their being. Sovereignty may mean many different things to different people but to most Aboriginal and Torres Strait Islander people clearly it means the legal right to control their destiny on their lands and waters. Polling by the National Congress of First Peoples tell us that this deep and abiding sovereignty is clearly foremost on the minds of Indigenous people, along with health and the education of their children.

Here then is the first great dilemma in the current approach to Constitutional recognition of Aboriginal and Torres Strait Islander people. The consensus paper prepared by the government appointed panel of experts makes it perfectly clear that sovereignty is not going to be included in any referendum proposal for Constitutional recognition and change.

One of the members of the expert panel, Noel Pearson, is quoted as saying that apart from being unachievable, “full-blown sovereignty” may not be necessary and that “local indigenous sovereignty” could exist internally within a nation state “provided that the fullest rights of self-determination are accorded.”

Given that the present policy towards Indigenous Australians is that crushing assimilation described euphemistically as modernization or renovation of Culture, and given the astonishing undermining of Aboriginal authority through the Intervention and the ten year extension known as the *STRONGER FUTURES* legislation, the “fullest rights of self-determination” sadly seem lifetimes away.

This is where Australia lags behind the rest of the world. The United States Government has more than 350 treaties with Native Americans. American courts have upheld Indigenous sovereignty repeatedly and affirmed the right of the First Nations to self-government. Importantly evidence gathered by many decades of the Harvard Project on American Indian Economic Development led by Professors Stephen Cornell and Joe Kalt shows emphatically that sovereignty, control of their destiny, is the real key to development.

The only Indigenous people in the world who have equal life expectancy with the rest of their fellow citizens are the Sami spread across Norway, Finland and Sweden. All three of these countries have Sami parliaments and Norway’s constitution recognises the country as bi-Cultural, a guarantee that the government will consult and negotiate with Sami to maintain their distinct language and Culture.

Such positive recognition and progress by other First Nations shows up the limitations of the Australian approach and the negative restraints imposed by a political reality, a grudging willingness to make symbolic change perhaps but real doubt about how far the politicians or the people will go.

Whatever happened to the belief in a Treaty or legal compact with Aboriginal and Torres Strait Islander people to address their sovereignty and so much of this nation's unfinished business?

The expert panel clearly states that it saw its brief as coming up with recommendations that contribute to a more "unified and reconciled nation, and be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums. In addition they had to benefit and accord with the wishes of Aboriginal and Torres Strait Islander peoples, and be technically and legally sound." Specifically the experts wanted a clear expression of support from a majority of Aboriginal and Torres Strait Islander people for any statement of recognition.

But in truth, the panel of experts has inadvertently or intentionally reinforced the political reality that recognizing Aboriginal sovereignty is not going to happen and nor is any legal compact or treaty that would in a meaningful way encapsulate land rights.

The panel notes that these are issues of great concern for future discussion.

What the panel is offering all Australians now are five strong recommendations that nonetheless clearly do not meet the priorities for action by the very people the changes are intended to benefit.

I believe this presents a grave threat to any chance of unity on constitutional change.

Australia has only ever held 44 referendums and just 8 have been carried. Here is the measure of our constitutional conservatism and of just how our nation has been held back by the timidity and lack of leadership by our elected politicians.

It is 36 years since Australians made any change to our Constitution. The last time we could ever find the two-thirds majority of voters in a majority of states was for a referendum in 1977 that required federal judges to retire at 70.

A retired Judge I hugely respect, former High Court Justice Michael Kirby, has summed up the situation we are now facing, understanding the record and noting the importance of recognizing the rights of Aboriginal and Torres Strait Islander people.

"Constitutionally speaking," Michael Kirby said, "we are still basically White Australia, however much we boast that we have changed."

Well you have had months to mull over the expert panel's five recommendations, what are the prospects that they will change the racism and the discrimination?

The first recommendation to erase forever Section 25 of the Constitution would prevent the States from ever taking away the right to vote based on race.

The second recommendation to remove Section 51 (xxvi) would eliminate the negative race power that has been used to make laws that harm the rights of Aboriginal and Torres Strait Islander people.

The third recommendation is for a new power that would give the federal parliament power to pass laws that benefit Indigenous Australians. This new section would also set out a clear statement of recognition of the prior occupancy of the continent and the ongoing relationship with land and waters. Echoing the Sami Constitutional recognition, there is also a proposal in this section to require the government to secure the

advancement of Aboriginal and Torres Strait Islander peoples. This may or may not give more of the right kind of support to programs that could bring equality in health, education, employment and life expectancy.

The fourth recommendation is the one that I believe is the most urgently needed because it addresses so many burning injustices right now. It would prohibit the Commonwealth, States and Territories from discriminating on the basis of race, colour, ethnic or national origin. Disappointingly, gender has not been included in this list. Why not emphasize that important human right while we are engaged in this effort to improve our Constitution?

Finally, in their fifth recommendation, the expert panel seeks a language provision that states that English is the national language but also affirms Aboriginal and Torres Strait Islanders languages as part of our national heritage.

It is up to you, my brothers and sisters, to raise your voice wherever and whenever you can to let the Aboriginal voice ring out loud and clear.

I have shared my dreams with you and I will walk with you.

I am certain that more than words in any document what this nation needs most is a change of heart.