
What is Constitutional Recognition of Australian First Peoples and would it clash with Treaties?

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Rachel Carbonell: Hello, I'm Rachel Carbonell, welcome to the *Law Report*. Today, Aboriginal actor, activist and former inmate Uncle Jack Charles wins his battle to become a prison visitor.

Jack Charles: Real black fellas oughtn't to be shooting up white powder into their veins because we start to abuse our Aboriginality ourselves, et cetera, our community, our friends, our mothers and fathers, basically our concept of Aboriginality.

Rachel Carbonell: Before we accompany him on his return to jail to mentor prisoners, a referendum to recognise Aboriginal and Torres Strait Islander peoples in our Constitution. It's in the news again, along with fresh argument over the merits or otherwise of an Indigenous treaty or treaties. But what is constitutional recognition? Do we understand what it might actually mean?

Vox pops:

We don't know much about it.

No, I don't know enough about it, I don't think so.

In the Constitution? Oh my goodness, that's a bit big!

I don't know a lot about the Constitution.

Can you start with him?

The Constitution I know doesn't recognise Indigenous peoples.

And I think it's important for us to validate the history of our continent and of our people.

It is acknowledging that the Indigenous people are the first people of this nation.

Rachel Carbonell: In 2012 an expert panel made recommendations on constitutional recognition of Aboriginal and Torres Strait Islander peoples. Last year a joint select committee also delivered a report on the issue. But the debate has evolved further since then. Last week the Referendum Council handed over an interim report based on its consultations with Indigenous people. Today, we ask two Indigenous legal brains to explain what the current proposals for constitutional recognition mean.

First, Tim Goodwin, who is a Victorian barrister and member of the Yuin people of New South Wales.

Tim Goodwin: Yes, it's a hard concept to get your head around. I think it essentially involves two aspects. One is the proper recognition of the history of Aboriginal and Torres Strait Islanders in Australia. Currently our Constitution is completely silent

on Aboriginal people. Before 1967 it had some discriminatory references to Aboriginal people, but since 1967 you will not find the word 'Aboriginal' in our Constitution, and the words 'Torres Strait Islander' has never been in it.

So the fight for constitutional recognition is about our foundational legal document telling the truth. Until the High Court in *Mabo* said that *Terra Nullius* was a legal fiction, our legal system has been built on that entire concept. And so our Constitution was written when that was part of the law of this land, the idea that Aboriginal and Torres Strait Islander peoples weren't here.

Rachel Carbonell: There were some references to Aboriginal people previous to the 1967 referendum, but those references were discriminatory and removed as a result of that referendum.

Tim Goodwin: Yes, exactly. That was a part of a massive amount of energy and positivity around removing the discriminatory references in that Constitution. But what occurred was this vacuum in terms of the positive story of Aboriginal and Torres Strait Islander connection to this country.

Rachel Carbonell: So the first step towards constitutional recognition of Indigenous people is referring to Aboriginal people in some way in the Constitution.

Tim Goodwin: Yes, acknowledging our history, acknowledging our culture and language and acknowledging the importance of that to the Australian landscape. In terms of legal ramifications, I think part of the importance is that Aboriginal and Torres Strait Islander peoples will have a unique place in our legal system. And I think when it comes to interpreting the impact of the Constitution or its application to Aboriginal and Torres Strait Islander peoples, that will have a positive impact on any court's reading of the Constitution associated with Aboriginal and Torres Strait islanders.

Rachel Carbonell: Recognition in the Constitution is viewed as the simplest of the elements that make up potential constitutional recognition. What are the other elements?

Tim Goodwin: Well, this is where I said that there is kind of two parts. You've got the one, the truth telling aspect, ending that great Australian silence. But the second part, and this is where Indigenous people have consistently stated that recognition must also go to issues of racism and discrimination in our Constitution.

There are two primary sections that give life to that institutional racism in our Constitution. One is section 25 which contemplates that a state may ban a person from voting in a state election on the basis of their race. Ultimately by law we all have the right to vote. But still, to have that contemplated in our Constitution I think is a frightening concept and something that most people agree shouldn't be there.

And then the second is that currently our federal legislature has the power under section 51.26 to pass special laws for any race, and our High Court by majority has interpreted that to mean that laws can be passed both for the benefit of and to the detriment of a particular race.

Rachel Carbonell: And so this section is more tricky, isn't it, because, as you say, a lot of people agree that section 25 should just be taken out of the Constitution, but it's not as simple, is it, with section 51.26.

Tim Goodwin: No, because you've got an explicit racial discrimination power for our federal parliament. We are the only country with a written constitution that

expressly allows our parliament to pass negative racially discriminatory laws. The problem is that it is the head of power that we rely on for certain positive laws...

Rachel Carbonell: Such as?

Tim Goodwin: Aboriginal and Torres Strait Islander Heritage Act, arguably the Native Title Act, although there is a little bit of contention about that, and other similar laws or laws that we may want in the future.

Rachel Carbonell: So what are the potential solutions in relation to how you change that section of the Constitution in line with recognition?

Tim Goodwin: So the key ones that have really been floating around the most are the expert panel's idea that you replace the racist power with a specific Aboriginal and Torres Strait Islander peoples power, but you ensure that that power can only be used for positive discrimination rather than negative discrimination. The way that the expert panel thought that you did that is to have a very broad ban on racial discrimination with a special measures exception, very similar to what you have in most discrimination law as a separate section in the Constitution.

When the joint select committee of parliament who was looking into constitutional recognition had a look at this idea, one, they said, well, you could do the expert panel's idea, just have a broad ban. The second idea was you have a ban but only regarding the use of the power for Aboriginal and Torres Strait Islander peoples. So you have a ban regarding the use of the power and say that it can't be negatively discriminatory. Or two, you have a broad ban but only for the benefit of Aboriginal and Torres Strait Islanders. So it essentially says that no law can be passed, whatever the head of power, that negatively discriminates against Aboriginal and Torres Strait Islanders.

Rachel Carbonell: Are the proposals around how you might go about changing section 51.26 the most controversial element of the proposed changes in relation to Indigenous recognition in the Constitution?

Tim Goodwin: Yes, I think working on the basis that you are for constitutional recognition, and not all people are and some reject it outright, either because they are constitutional conservatives and don't believe in constitutional change or because they don't believe that constitutional change will make an impact or is enough. But going on the basis that reform is required, what you do with a racist power is the most contentious aspect.

Rachel Carbonell: There is a lot of discussion going on in the Australian community at a grassroots level and at a political level about Indigenous recognition in the Constitution. There are also some serious misgivings about it too, aren't there.

Tim Goodwin: There is genuine and understandable cynicism from Aboriginal people about something positive being able to be done in our Constitution, that the Australian people would vote yes for a referendum or that it would make massive amounts of change. I'm not going to sit here and say constitutional reform will give all of our mob a job or mean that we will all go to school or mean that we will stop being incarcerated to an overwhelming extent, but the nation building exercises that we have to undertake will assist us to get better at that work.

Rachel Carbonell: Victorian barrister Tim Goodwin, who is also a supporter of the Recognise campaign.

But that's not all that is being considered. Megan Davis is a Professor of Law at the Indigenous Law Centre at the University of New South Wales.

Megan Davis: There is a Referendum Council, of which I am a member, who is going through the process of consulting with Aboriginal and Torres Strait Islander peoples about what recognition means to them. There is some anxiety about this process. That is to say, people would like the recognition to be something that is useful and is pragmatic, that may make a difference on the ground.

The leadership at the Kirribilli meeting last year were concerned that the recognition that would be agreed to by the two major parties was one that is symbolic recognition, meaning a statement of fact, a statement of recognition that Aboriginal and Torres Strait Islander people were here and continue to live here with their culture. That was seen as a threshold too low. That is to say, a view that they don't have the kinds of formal structures in place to properly and adequately participate in Australia's liberal democracy. As a consequence of that, the Referendum Council has been set up.

Rachel Carbonell: And what are some of the ideas that have come up throughout that process in terms of what constitutional recognition would look like legally in terms of amendments to the Constitution?

Megan Davis: There have been suggestions from a number of different people about what might be appropriate recognition. The first Aboriginal Senior Counsel or silk, Tony McAvoy, has a proposal for the creation of an assembly of first nations, which would provide a voice for the first nations of the country in the democratic life of the state. A similar model from the Cape York Institute has proposed the creation of a constitutionally entrenched body that, again, affords Aboriginal and Torres Strait Islander people a kind of procedural mechanism by which they can participate in Australia's democratic life in a more active way than they participate at the moment. That proposal is aimed at being more active players in the democratic life of Australia.

Rachel Carbonell: You mean policy legislation, decisions that are made by government of whatever persuasion over time.

Megan Davis: Yes, so the kind of democratic decision-making that constitutes the life of the Australian state, so yes, it's about improving the quality of the decisions that are being made about the lives of Indigenous people because what we are hearing, certainly from the past 10 years but certainly through this process, is that Aboriginal and Torres Strait Islander people feel like they aren't consulted or able to participate in the design of policy and laws that impact their lives, and you can see that playing out each year in relation to the Closing the Gap statistics for example.

I think it was the Australian Human Rights Commission, Social Justice Commission and Mick Gooda, or at least the former one, who said we are living in the greatest upheaval ever in Australian law and policy as it relates to Aboriginal and Torres Strait Islander people. Laws and policies are more likely to work if there is local buy-in, if there's ownership, and that builds legitimacy around government structures and laws and policies that are imposed upon Aboriginal and Torres Strait Islander people because...well, they're not imposed, are they, if people are participating in that solution.

Rachel Carbonell: What are some of the other ideas that are being thrown around in terms of what Indigenous constitutional recognition might look like in the form of certain amendments to the Constitution?

Megan Davis: So if we park the actual substantive amendments, what they are, there have been suggestions about placement, to put all of the proposed changes to the Constitution, whatever they might be, into a new chapter in the Constitution, for example, that the chapter would be something that in and of itself is an act of recognition. So the suggestion for a new chapter has been, you know, quite a popular one among lawyers and others in terms of this reform.

Rachel Carbonell: Megan Davis, Referendum Council member and Professor of Law at the University of New South Wales.

Rachel Carbonell with you on the *Law Report*, clarifying some of the ideas around recognition of Australian first peoples in our Constitution.

Extended consultation means the referendum will no longer take place next year on the 50th anniversary of the 1967 referendum. As that dialogue continues, the long-running debate over the pros and cons of an Indigenous treaty or treaties has also re-emerged.

Conservative political players like former Prime Ministers John Howard and Tony Abbott have expressed their dismay at the idea.

John Howard: I'm appalled at talk about treaties, I think that will be so divisive and it will fail. The Australian public will not be attracted to the idea of a country trying to make a treaty with itself.

Tony Abbott: One of the problems with the treaty is that it will completely derail the attempts to get Aboriginal people properly acknowledged in our Constitution.

Rachel Carbonell: Opposition leader Bill Shorten says he is open to treaty talks.

Bill Shorten: If Aboriginal Australia says they want to talk about arrangements post constitutional recognition, I'm willing to listen.

Rachel Carbonell: But are the two concepts-constitutional recognition and treaties-mutually exclusive? Victorian barrister Tim Goodwin:

Tim Goodwin: There is this idea that it's an either/or model, that constitutional recognition is our only political fight to be had, and that if we focus all our energies on that, others will be stopped. So, for example, the movement for a treaty or treaties in this country. Now, there's nothing about the legal proposals that have been put forward that would stop a treaty or treaties being negotiated today. And in fact there are processes going on to negotiate treaties. And arguably we already have a number of treaties negotiated through the Native Title process. So I think a lot of Aboriginal people fear the potential for constitutional recognition to take something away, when in fact I think it would broaden our political ability to fight for what we want to fight for.

Rachel Carbonell: It's not just Aboriginal people that fear that there is a conflict between Indigenous recognition and other progress in the form of a treaty or treaties. That's a view that has been put at a very high political level too.

Tim Goodwin: Our politicians may not be able to concentrate on two things at one time, but I think Aboriginal people are able to. And so I think we can progress all of those issues. I don't think that they are mutually exclusive at all. There is nothing

about the changes to our Constitution that would negatively impact on the negotiation of treaties.

Some Aboriginal people don't believe in the legitimacy of our Constitution at all, so to change it would just be useless. For me, what that position essentially ignores is that no matter our philosophical feelings about the Constitution, it ultimately is the legal foundation for the country. The fact that we have a country here is based on its constitutional framework. And so better for us to have that framework acknowledge our unique position and ensure that that constitutional system cannot be used to pass racially discriminatory laws against us than to debate philosophically about its very existence. It is not going anywhere.

So to that extent, a change to our Constitution is a necessary part of the puzzle that we have to put together regarding how this nation deals with Aboriginal and Torres Strait Islander peoples. That puzzle includes pieces associated with treaty or treaties to reframe the relationship between government and Aboriginal and Torres Strait Islander peoples.

Rachel Carbonell: At its simplest then, what is an Indigenous treaty?

Tim Goodwin: This is part of the issue, that you can't simply define it. And it will differ for various Indigenous peoples, and it should. But ultimately it does go back to a negotiated settlement really, this is where most indigenous treaties around the world are about, between the government of a country and its indigenous peoples regarding how power will be shared between them, associated with self-determination and how that looks in practice in a particular country. That's essentially what most treaties do.

Rachel Carbonell: One of the legal concepts that comes up a lot in relation to discussion of Indigenous treaties is Indigenous sovereignty. What is that?

Tim Goodwin: Well, it's hard to define. And I'll have an idea and another Aboriginal person will have an idea what they mean. Sovereignty, when Aboriginal people define it, is more of a political than a legal concept. It's a political concept associated with how we run our own affairs and what power we might have vis-à-vis the government. And so that's why a treaty or treaties is connected to the idea of sovereignty, because they are agreements that essentially set out the parameters of Aboriginal sovereignty.

Rachel Carbonell: As Tim Goodwin himself says, not everyone will agree with his interpretation of all of these issues.