More than mere symbolism

Paul Kildea argues constitutional reform demonstrably counteracts Indigenous disadvantage

In the weeks since the Expert Panel reported to the Gillard government on the constitutional recognition of Aboriginal and Torres Strait Islander peoples, there has been a torrent of gloomy predictions from media pundits. Some say the panel's recommendations for reform have overreached and are bound to fail.

This is all very premature. There is a long way to go in this process, and the true measure of the panel's ideas is yet to emerge.

One of the most important questions is whether constitutional recognition is capable of making a difference to the everyday lives of indigenous peoples. Given the massive challenges that indigenous people face in health, education and housing, many Australians will be reluctant to support a costly referendum process unless it can bring about real change.

This is not as straightforward as it seems. The impact of recognition would be felt in a mixture of tangible and intangible ways. Some reforms promise to have a direct impact by countering lawmaking that is racially discriminatory. But other consequences are hard to quantify, coming in the form of enhanced feelings of self-worth and stronger relationships.

Any discussion of the possible benefits of constitutional recognition must begin with the drafting of the Constitution. This is not to skirt whether constitutional reform can bring about real difference. It is to recognise that our founding document has served as an instrument of exclusion and discrimination.

Aboriginal and Torres Strait Islander peoples played very little role in the drafting of the Australian Constitution. There were no indigenous representatives at either of the drafting conventions, and it was only in South Australia that Aboriginal people were permitted to vote for convention delegates.

When the Constitution came into operation on January 1, 1901, it contained just two references to Aboriginal people. One was for the purpose of excluding "the aboriginal race" from the operation of section 51(26) — also known as the "race power" — which gave the Commonwealth Parliament power to make laws with respect to "the people of any race".

The second reference was found in section 127, which provided that "aboriginal natives" were not to be counted in "reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth". The effect was that indigenous people would not be taken into account in determining the size and distribution of Commonwealth electorates.

The making of the Australian Constitution, otherwise a proud national achievement, thus served to reinforce a history of marginalisation and exclusion for indigenous peoples.

A step towards rectifying this was taken at the 1967 referendum. More than 90 per cent of the electorate voted to delete section 127 altogether, and to expand the races power to include Aboriginal people. This last change was made out of a strong public feeling that the Commonwealth was better placed than the States to improve the living standards of indigenous peoples.

The 1967 referendum was a huge achievement, and remains an important touchstone for many Aboriginal and Torres Strait Islander peoples. But it did not erase the possibility of racial discrimination from the Constitution, and also left the constitutional text completely silent on the existence of indigenous peoples. This is now out of step with the constitutions of many other countries — such as Canada, South Africa, Finland and Norway — which have given prominent recognition to their indigenous peoples.

This is where the latest push for constitutional recognition comes in. Some people have described it as dealing with the unfinished business of 1967.

But if this reform is to be successful, the public will need to be convinced that it has contemporary relevance as well as historical significance. How will constitutional recognition affect the lives of indigenous peoples in 2012?

Mick Gooda, the Aboriginal and Torres Strait Islander social justice commissioner, has spoken eloquently about some of the intangible consequences that are likely to flow from constitutional change. He has described constitutional recognition as an opportunity for nation-building and reconciliation. For Gooda, constitutional recognition is a vehicle for increasing indigenous self-worth and resilience, and improving the relationship of indigenous peoples both with governments and the broader Australian community. These effects could also lead to more concrete changes in the lives of indigenous peoples. The Royal Australian and New Zealand College of Psychiatrists has pointed out that a lack of recognition in a nation's constitution has a major impact on an individual's sense of identity and value to the community. It argues that constitutional recognition, far from being symbolic, is a critical step to improving indigenous mental health. Others have made similar arguments in relation to the wider agenda, pointing to the connection between constitutional change and improvements in life expectancy, literacy and numeracy levels, and employment.

A sacred fire commemorates the 40th anniversary of the Aboriginal tent embassy, Canberra, January 26.
Photo: ALEX ELLINGHAUSEN

The measure of any proposed constitutional reform, though, is in the detail. It is here that the Expert Panel's report is hugely valuable — it sets out a substantive blueprint for reform and serves as a strong foundation for public debate.

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The panel's report makes five recommendations for constitutional amendment. Three fall into the category of reforms whose main contribution will be to deliver the sort of intangible benefits that Mick Gooda has described.

The first is the proposal to repeal section 25. This provision, which contemplates that state Parliaments can disqualify certain people from voting on the basis of their race, is widely derided and is out of place in a modern constitution.

The panel also recommends the removal of the "race power" in section 51(26). Since the 1967 referendum, this power has been used to support positive laws, such as those giving protection to indigenous sacred sites. But there is a feeling that a law-making power framed around the outdated concept of race is inappropriate in a 21st century constitution.

The third recommendation involves the insertion of a new section 127A that would give symbolic recognition to the importance of indigenous languages in Australian life and culture.

In addition, the panel has suggested the insertion of a statement in the body of the Constitution that, among other things, recognises indigenous peoples as the first occupants of Australia, and acknowledges their continuing relationship with traditional lands and waters. This statement is part of a new section 51A, discussed below.

Each of these proposals is aimed at updating the Constitution to reflect contemporary attitudes, and laying the basis for a stronger and more respectful relationship between Aboriginal and Torres Strait Islander peoples and non-indigenous Australians. They are about enhancing individual dignity in a way that could have tangible effects in everyday lives.

The panel's two remaining recommendations are different in that they promise more substantive change, especially to the process of law making.

One involves the insertion of a new section 51A that would give the national Parliament the power to make laws "with respect to Aboriginal and Torres Strait Islander peoples". In effect, this replaces the "race power" with a source of legislative power specific to indigenous peoples.

This is a matter of necessity: if the "race power" were simply removed, certain laws that are supported by it (including native title and heritage protection laws) would have no constitutional basis and the subjects of those laws would revert to the states.

But some controversy has emerged around the panel's decision to include a preamble to section 51A that acknowledges "the need to secure the advancement of Aboriginal and Torres Strait Islander peoples".

This has been widely misunderstood as giving indigenous peoples some form of special treatment in the Constitution. In fact, these words have been included to guard against a possibility the Commonwealth Parliament might use its new legislative power to pass laws detrimental to indigenous peoples. The need to do this arises from a 1998 High Court decision that left open the prospect that the existing "race power" could be used to support beneficial *and* detrimental laws.

The intention of the policy's proposal is therefore far more benign — and practical — than critics have suggested. It is there to remove current constitutional uncertainty by reducing the scope for future parliaments to take away existing rights and entitlements.

For all the attention that section 51A has received, by far the most contentious of the recommendations is the insertion of a new section 116A that would prohibit discrimination on the grounds of "race, colour or ethnic or national origin".

Protection against racial discrimination already exists in national and state legislation, but the panel's proposal would strengthen this protection by giving it constitutional status. It would not apply to positive laws or measures — such as programs that allow for accelerated university entry — that are designed to redress disadvantage.

Notably, the panel's clause would protect all Australians from racial discrimination, although it would have a special significance for Aboriginal and Torres Strait Islander peoples.

The practical effect of this proposal would be in the area of lawmaking. Over the past decade we have seen how straightforward it is for the Commonwealth Parliament to suspend the operation of the Racial Discrimination Act when it suits its policy program. This occurred in relation to both the native title amendments in 1998, and the Northern Territory intervention legislation in 2007.

With a racial discrimination prohibition in place, Parliament could no longer do this. This is not to say that it would have to abandon its policy program altogether. What is more likely is that it would have to take more care in its approach and ensure that its policy aims are

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achieved in ways that do not adversely discriminate on racial grounds.

The passage of the 2007 Northern Territory laws provides a perfect example of why this is needed. Despite being a complex package of five bills, totalling 480 pages, it was debated for only a few hours before being passed by the House of Representatives. There was barely a mention of race discrimination in the parliamentary debates.

A prohibition on racial discrimination would not have stopped the intervention proceeding. But it would have forced Parliament to reconcile the intervention laws with the general principle of non-discrimination. In practice, this would have required politicians to consult more widely with affected communities, and make a more genuine attempt to justify the laws as measures for redressing disadvantage.

In 2012, when there is such strong community opposition to racial discrimination, it makes sense for our lawmaking process to be guided in this way. And it would bring the Australian Constitution into line with those of Canada, South Africa and India, where constitutional guarantees against racial discrimination are commonplace.

Of course, if we push ahead with constitutional recognition we need to be sure the wording matches our intentions.

This is why some lawyers have queried the term "advancement", wondering whether it is too vague; others wonder how the power to make laws for indigenous advancement will interact with the non-discrimination clause.

A few commentators have interpreted this difference of opinion as evidence the panel's more substantive proposals are unworkable and should be abandoned. But the debate about wording is part of the constitutional reform process. In fact, debate is essential to ensuring that lingering problems can be addressed, and that any amendments are legally and technically sound. Rather than close-off options from the very start, the better approach is to allow experts and the general public to subject them to deep scrutiny.

In thinking about what difference constitutional change might make, it may help to recall the legacy of the 1967 referendum. Even though the constitutional amendments were modest, Aboriginal and Torres Strait Islander peoples continue to look back on that day with a sense of pride and achievement.

The latest push for constitutional recognition has the potential to have an even bigger impact. Not only could it be a moment of nation-building and reconciliation, but there is scope for the constitutional changes to go further than the 1967 amendments in making a real difference in people's lives.

If only for this reason, we should put aside the gloomy predictions and give the expert panel's recommendations the detailed debate and analysis they deserve.

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Mediterranean master

Amanda Foreman on the British Empire in Europe's southern sea

Today, when we think of the Mediterranean, it isn't sun-bleached buckets and spades that spring to mind but "PIGS" whose snouts have been too long in the trough: Portugal, Italy, Greece and Spain.

These four debt-ridden countries threaten to descend into unimaginable chaos, dragging the rest of the European Union with them. In Britain, the hope is that financial contagion will halt at the English Channel.

To anyone with a sense of history, it is deeply ironic that the country that has had the greatest influence on Mediterranean affairs for the past two centuries is seeking immunity from the region. *Blue-Water Empire: The British in the Mediterranean since 1800* is an important corrective to current historical amnesia. Non-academic readers may find Robert Holland's latest volume heavy going, but it will remain the definitive account of Anglo-Mediterranean history for years to come.

The history of the Mediterranean is far older, of course, than the British interlude that occupies Holland's book. Its roots go back to the dawn of civilisation. Before ancient Rome, there was ancient Greece. Before ancient Greece, there was ancient Egypt and, before that, the empires of the Sumerians and Akkadians. A measly 200 years compared to 3500 looks somewhat trifling, especially if one takes in the Arab and Ottoman empires that dominated the Mediterranean for almost a millennium.

On the other hand, as Holland argues, the modern Mediterranean is a fairly recent geopolitical construction that needs to be understood on its own terms: "If there has in modern times been a predominant instrument for integrating the Mediterranean as a single theatre, it was the British … It was the British presence … and the stability it provided, which made the region what an eminent historian in 1904 encapsulated as the 'keyboard of Europe'."

Britain's toehold in the Mediterranean began by chance rather than design, after Spain ceded the Rock of Gibraltar under the Treaty of Utrecht in 1713. The possession initially caused little excitement in Britain. Its importance lay more in the fact the Spanish were keen to get it back, rather than in any trade, mineral or strategic advantage it offered.

Yet there was and is something about the rock — once known as one of the pillars of Hercules — that has made it one of the most fought-over islands in modern history. In the past 500 years the peninsula has been besieged 14 times. The longest and most famous of these is the great siege of Gibraltar (1779 to 1783), which pitted a mere 5000 British troops against a combined Franco-Spanish force of 40,000 men. Cleverly turning the rocky formations of Gibraltar to his advantage, the governor, General George Augustus Eliott, tunnelled deep into the hills in order to place his artillery out of the enemy's reach. No amount of innovation, however, could prevent the ravages of malnutrition on his men, who endured starvation rations for two years until 31 transport ships broke through the siege in October 1782. The Franco-Spanish fleet hung about for a few months longer, until the end of the American War of Independence led to peace negotiations between Britain and its European rivals. Spain agreed to leave Gibraltar in British hands in return for Minorca and a continued presence in the West Indies.

British warships confront the French at the Battle of the Nile, off the coast of Egypt, 1798. Britain, under Horatio Nelson was victorious. Painting by Thomas Whitcombe (1763-1824). Photo: STAPLETON COLLECTION, CROBIS

Yet even after this stunning victory, the idea of a British empire in the Mediterranean would have struck most as improbable.

It was the Napoleonic wars that brought home to London the strategic significance of the region. This time it was Malta, another much disputed rock, that forced the British to reassess their priorities as a trading nation. Napoleon's occupation of Holland, which gave him dominance of the Scheldt River and the Narrow Seas, also threatened Britain's access to the Cape of Good Hope, as well as its route to India. As one speaker in Parliament put it: "We are at war for Malta, but not for Malta only, but for Egypt, and not for Egypt only, but for India, but not for India only, for the integrity of the British Empire and the cause of justice, good faith and freedom all over the world."

From such lofty sentiments came a not-so-lofty but always strategic enhancement of Britain's presence in the Mediterranean. During the rest of the 19th century, Corfu, the Ionian Islands, Cyprus, Egypt and Palestine fell at various times under British dominion. France also spread its wings, taking Algeria in 1830 and Tunisia in 1881. Morocco came under its purview in 1912, while Italy grabbed Libya from the Ottoman empire in 1911.

The peoples under British rule were never that grateful for the honour, as William Gladstone complained after his short stint as extraordinary Lord high commissioner for the Ionian Islands in 1858 to 1859. His pessimism about modern Greece was shared across the political spectrum. Far from seeing Greece, as Byron had, as the cradle and future of liberty, one senior minister in 1865 predicted that "so rude and primitive a state as Greece" would, in the end, "split up into little communities, each with an interest and policy of their own".

But there was, as Holland notes, "a durable equilibrium" in the Mediterranean throughout most of the 19th century, which was underpinned by expanding British trade with southern Europe and the imperial fortress garrisoned with thousands of soldiers in Gibraltar, Malta and Corfu. Cautiously protected by Britain, Italy gradually became unified without too much bloodshed or upheaval. The Russians were squeezed back from the eastern approaches to the Mediterranean, and Habsburgs from the north.

Inescapable British influence. Gibraltar street scene, 2000. Photo: AFP

It was another siege, that of Malta between 1940 and 1942, which marked the end of the Mediterranean as a key strategic region in geopolitics. At that point, Malta — which endured more air raids than any other place in the war — was the last holdout for the Allies attacking Axis supply lines to North Africa. For two years there was a terrible battle of attrition — a kind of naval Verdun — as the Allies struggled to keep the Nazis from seizing control of Egypt, the Suez Canal and the precious Middle East oilfields. After the war, the entire island was collectively awarded the George Cross for demonstrating such extraordinary endurance under fire.

Yet since 1945, the British imprint on the Mediterranean has faded as swiftly as any beach castle built in the sand. As Holland concedes, "since the rise of the two superpowers, the United States and the Soviet Union, for whom the region was purely a supplementary theatre for their own mutual contests, the Mediterranean [has] relapsed into something less than the sum of its parts". Were it not for *Blue-Water Empire* confronting the reader, it would be hard to imagine that the "keyboard of Europe" once played old England's tune. As Shelley wrote: "Nothing beside remains. Round the decay/Of that colossal wreck, boundless and bare/The lone and level sands stretch far away."

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Sun, sand and sieges, Blue-Water Empire: the British in the Mediterranean since 1800, Robert Holland, Allen Lane.

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