



Australian
National
University



FIRST NATIONS GOVERNANCE FORUM

2-4 JULY 2018

THE STORY SO FAR

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The forum

There is a simple question before our nation:

What place should our First Nations hold in the structures that define the modern Australian state?

This question is important for all Australians. The answer tells us the type of society we want to be. It is also a question with a complicated history and no easy answer.

Australia's journey to this point is unique, but Australia is not alone in asking this question. Many countries have considered the place of First Nations within their legal frameworks. These countries provide important lessons we can draw upon as we consider Australia's unique circumstances.

Nor are we the first within Australia to pose this question.

Many have gone before us – from parliamentary committees and expert panels to individuals and groups. They have laid rich groundwork for us to follow, but the business is unfinished. We can reflect on how far we have come, and how far we have to go.

Most Australians believe the First Nations people, culture and place in this land should be celebrated as a unique aspect of the modern nation state. The difficulties have been how we do this.

The purpose of the First Nations Governance Forum is to rekindle the debate with respect to the place of First Nations peoples in the imagination of contemporary Australia. This forum is designed to help our nation take an important step forward in answering this morally simple but critical question.

The next step in this evolving story is to give some content to how recognition can best be achieved within the broad confines of the law and our society. In doing so, we must confront a fundamental truth - under the current Constitution Indigenous Australians do not enjoy racial equality.

The Forum is not intended to be an endpoint, but another step in the journey and a foundation for the future. It recognises that this question is for all Australians, but that it has special meaning and importance for First Nations people. And it recognises that the answer ultimately lies not in another government report, but in the voices of all Australians. Through the conversation at this Forum we intend to create the momentum needed to complete this aspect of unfinished national business. Our hope and expectation is that we can move beyond our past and begin working to provide a better future for all Australians.

Our historical context

Australia is privileged to be home to some of the oldest continuing cultures on earth. For tens of thousands of years, the peoples of our First Nations were custodians of the land that 24 million Australians now call home. Australia was a land of many nations, each with its laws,

traditions, art, culture and spirituality. More than 300 languages were spoken across the continent, and civilisation flourished. This unique history should be a source of pride and celebration for modern Australia. Yet more than 117 years after the establishment of Australia's founding document, the place of our First Nations within our legal structures remains unresolved.

European colonisation has defined Australia's modern history.

European colonisation affected many First Nations in many places. Each has its own story. In Australia, British colonisation, under the doctrine of terra nullius, denied the laws of First Nations peoples and their prior ownership of the land. At no point did the many First Nations of the Australian continent cede sovereignty to their lands or over their laws. Battles were fought and lives lost. Australia is, in this respect, a conquered nation rather than a 'settled' one.

The creation of the Australian Constitution in 1901 established a single governing structure for a new country.

The Constitution effectively excluded Indigenous people from taking part in Australia's governance and specifically excluded them from being counted in the human population. More broadly, there existed powers designed to promote a 'white Australia', based on a false social premise that had no grounding in science. These powers, primarily directed at the management of immigration but also

applied to Indigenous Australians, have had an enduringly negative impact on the peoples of our First Nations. In that period, Indigenous voices – those of our First Nations - played no role in determining the future of the land for which they were traditional custodians.

Australia has moved a long way from this past.

In 1967, a successful referendum removed the restriction preventing Indigenous people from being counted as part of the population, and removed specific references to 'aboriginal' people. In 1983 and 1984 legislation was passed protecting sites of cultural significance to Indigenous people. In the 1992 Mabo case, the High Court recognised collective native title rights flowing from indigenous law and custom, striking down the "fiction" of terra nullius. Government responded quickly passing the Native Title Act in 1993. In 1990 a representative statutory commission (now disbanded) was established to provide Indigenous people with a stronger voice in the processes of government affecting their lives. Indigenous people have been elected as representatives of the broader Australian community in most jurisdictions and have come together to form organisations to give voice and empower our First Nations, such as The National Congress of First Peoples.

These changes and others, while important, do not provide the positive place for Indigenous people in Australia's legal structures that many in the Australian community seek.

The referendum of 1967, while shifting away from the ‘non-recognition’ of Indigenous people in the Australian Constitution, did not deliver equality – contrary to what many Australians believe. Mechanisms to provide an Indigenous ‘voice’ in the governance of our nation have proved ephemeral. There is still no enduring compact that recognises our past and defines how Australia’s First Nations and its broader community intend to move into the future together.

The fact these issues remain does not spring from lack of consideration, discussion or debate.

In 1988, during the bicentenary of European settlement, the Prime Minister called for a treaty in response to the Barunga Statement. In 1999 a referendum asked, as part of a broader debate on becoming a republic, whether to add a preamble to our Constitution to recognise Indigenous peoples. Both propositions failed. In 2000 the Council for Reconciliation again recommended that the Constitution recognise Aboriginal and Torres Strait Islander people as the First Peoples of Australia. In 2012 an expert panel provided a comprehensive report recommending changes to the Constitution to recognise Aboriginal and Torres Strait Islander people and remove remaining powers enabling racial discrimination. In 2017 Indigenous leaders issued the Uluru Statement from the Heart calling for constitutional recognition, Indigenous voice and Makarrata (a compact symbolising the restoration of peace). And today the Australian Parliament is starting a new effort towards achieving

recognition while some state governments are pursuing agreements with their Indigenous populations.

Surveys suggest strong public support for constitutional recognition of Indigenous people as the original custodians of the land. A survey conducted for the 2012 expert panel found a significant majority of people supported recognition. Multi-party support has also generally existed for the recognition of our First Nations in the Constitution, if not for the full range of action sought in the Barunga and Uluru Statements.

Despite this, the momentum for change has not translated into action.

There is an unfortunate tendency for governments to ‘kick the can down the road’ rather than prioritise the substantive effort needed to effect change. There is concern that debate around Constitutional change would be hard to manage and might result in a fracturing rather than a uniting of the nation. There has also been a tendency to conflate and confuse the settling of the place of Indigenous people within our legal structures with the design, delivery and control of services.

While it is easy and sometimes appropriate to criticise governments, many of these concerns are valid.

Constitutional and governance reform is hard. It requires time, sustained effort and political courage. There are strongly differing views on what the precise nature of any change should be, both within

the Indigenous community and beyond. There are differing views on the relative priority of governance issues, economic development and the delivery of services. All are important and both deserve serious consideration. Some in the community, as is their right, advocate propositions that are unlikely to receive broad-based public support and could be used to create division.

The debate around the legal place of our First Nations also bears the heavy weight of both history and aspiration.

Many people think that settling the question about the legal place of Indigenous Australians is a means to a different end. Some see it as the way to address the wrongs of our national history, both recent and colonial. Others see it as the key to ameliorating the unacceptable levels of disadvantage faced by Indigenous people. Both views set expectations too high for what legal change can achieve. Creating a place for our First Nations in the legal structures that define our nation will erase neither the past nor current levels of disadvantage. But it could and should create a pathway towards a better future.

The challenge

The 2017 Uluru Statement outlined a vision for changes to our Constitution and for a way in which the voice of First Nation peoples could be heard by the Australian Parliament.

This statement provides an important contribution to the conversation about the place of our First Nations in the

legal structures of our country. It defines an important aspiration and should be recognised as coming from the hearts of those who created it. The three main elements of the statement – recognition, voice and Makarrata – clearly define the issues on which Australia must decide in settling the place of our First Nations in our country's legal framework.

The Uluru Statement is not the only path Australia can take, and it remains a long way from expressing the view of the Australian community as a whole. However, leaving aside the Uluru Statement and starting again, as some may advocate, would be a mistake.

Instead, we should be exploring the issues it raises positively and constructively. This will help us better understand the broader options available and the choices we need to make. In doing so, we should heed our past and our knowledge of what has been achieved in other nations.

No one should pretend that the next steps will be easy. Issues will continue to arise and challenging conversations must be had. Changing the legal structures which define how we are governed deserve the most careful consideration. And ultimately, any proposal needs to be embraced across Australia.

