

# Submission to the Joint Select Committee

Constitutional Recognition of  
Aboriginal and Torres Strait Islander  
Peoples

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## 1 Summary of recommendations

To achieve a successful referendum:

- we need bipartisan and Indigenous support;
- we therefore need a reform proposal that responds to conservative objections, but is also wholeheartedly supported by Indigenous people;
- the proposal therefore cannot be just symbolic, it must also be practical; it must make a real difference to Indigenous peoples' lives and their position within the nation;
- the reforms for Indigenous recognition need not all happen in the Constitution, but could occur at the constitutional, institutional and legislative levels to create a package of reforms that is acceptable to all stakeholders.

We recommend the following package of reforms.

Constitutional reforms:

- Remove s 25 of the Constitution (provision for disqualification of races from voting);
- Amend s 51 (xxvi) of the Constitution (the Race Power) to become a power to make laws with respect to Aboriginal and Torres Strait Islander Peoples;
- Add a new Chapter 1A to the Constitution (establishing an Indigenous body to give Indigenous people a fair voice in Parliament's law making for Indigenous affairs).

Legislative and other reforms:

- Enact a *Declaration* or *Statute of Reconciliation* to set in place high level principles or ethics that should govern Indigenous affairs, the relationship between Indigenous people and the government, and reconciliation into the future; this would contain the symbolic recognition and poetry: recognition of history, culture, languages and heritage;
- Legislation to set up the mechanisms of the Indigenous body established in the Constitution;
- Empowered Communities legislation and related institutional arrangements;
- A language and culture revitalisation agenda.

Political process:

- Indigenous constitutional conventions should be conducted around the nation so that Indigenous Australians can grapple with the political and legal challenges at hand and form a considered view on what constitutional and other reform proposals they support;
- Bipartisan support for this package should be built and maintained.



## 2 Preliminary note

Constitutional recognition of Indigenous peoples needs to be substantive and practical, not just symbolic. Any reforms need to make a real difference to the lived predicament of Indigenous Australians within the nation, otherwise the reforms are not worth undertaking and we should wait for another moment in history when something more meaningful can be achieved.

What does it mean to make a real difference to the Indigenous predicament?

The Constitution failed to protect Indigenous Australians from the unfair mistreatment of the past. We were explicitly excluded from the Constitution on the basis that we were an inferior so-called race. Reform for constitutional recognition therefore needs to address the history of discrimination that our people have suffered under the Constitution and ensure that this past will not be repeated. Constitutional recognition needs to ensure that things in the future are done in a better, fairer way.

The reforms must also address the existential angst our people feel with regard to the precarious position of Indigenous culture, heritage and language within the nation. Constitutional recognition should mean that space is ensured for us to exist both as citizens and peoples. Our people should participate and prosper within the nation as equal citizens and also as vibrant, distinct peoples. So far this space has not been ensured. Our cultures and languages are not recognised as the original Australian cultures and languages. Our heritage does not have the significant place in our national identity that it deserves. There are no practical mechanisms for promoting and revitalising Indigenous cultures and languages. These problems should be addressed, lest we lose that which makes our nation unique in the world.

The appropriate solutions to these problems will be both symbolic and practical. They may be constitutional, or they may be legislative and institutional.

As an Expert Panel member, I advocated strongly for constitutional recognition of Indigenous languages alongside English as a national language. Language is integral to culture, and many nations around the world recognise in their Constitutions and through legislation the importance of Indigenous, minority and national languages. My hope was that constitutional recognition of Indigenous languages would prompt policy responses supporting Indigenous language revitalisation, and a national commitment to ensuring that Indigenous language, culture and heritage remains strong for all Australians to enjoy and share.

I also strongly supported and pushed for the inclusion of a racial non-discrimination clause and removal of references to 'race' in the Constitution. I felt, and still feel, that



recognising Indigenous peoples means recognising us *as equals*, and being rid once and for all of the out-dated notion, still embedded in the Constitution, that we are an inferior so-called race. It was the racially discriminatory attitudes of the past that justified our exclusion and non-recognition to begin with: the idea that we were an inferior race justified the non-recognition of our property rights, our entitlement to equal citizenship, and our human rights. Our supposed racial inferiority underpinned the fallacious doctrine of *terra nullius*. We cannot address Indigenous non-recognition without addressing racial discrimination.

The Expert Panel therefore proposed that the racially discriminatory clauses in the Constitution be removed, and a racial non-discrimination clause adopted. My fellow Panel members and I were bolstered in this regard by the public polling conducted at the time which indicated immense public support, across the political spectrum, for removal of the references to race and adoption of a racial non-discrimination clause.

I felt that these substantive changes, particularly the racial non-discrimination clause, were absolutely necessary to make the reform meaningful, worthwhile and acceptable to Indigenous people. Without these important substantive elements, constitutional recognition would be too tokenistic; it would not make a real difference to Indigenous people's lives or the position of Indigenous people within the nation; it would not address the history of racial discrimination that we have suffered under the Constitution. I stand by the Expert Panel's proposals as sound, well-researched and principled recommendations for reform.

The political challenge, however, is not so simple.

Since our work on the Panel, we have contended with the objections of constitutional conservatives to aspects of the Panel's proposals, particularly their objection to a racial non-discrimination clause. The main conservative concern is about activist judges interpreting such a provision, and the potential that this may undermine parliamentary sovereignty. My attempts at convincing constitutional conservatives that such a clause should be included have thus far been unsuccessful. Ultimately, therefore, I have tried to come to terms with and understand these objections to the Panel's proposals. As we know, bipartisan support is crucial for a successful referendum. Without conservative support, a referendum cannot succeed.

The aim of this submission is therefore to discuss an argument for a package of constitutional, institutional and legislative reforms to recognise Indigenous peoples, which I think is capable of winning bipartisan support.



Such a package needs to be acceptable to constitutional conservatives. But it must also genuinely excite Indigenous Australians. This is our national challenge: to find the appropriate synthesis between the competing concerns.

This submission and the ideas canvassed in my recent Quarterly Essay are intended for further discussion and consideration.

Yours sincerely,

Noel Pearson.  
Chairman, Cape York Partnership

### 3 The competing concerns

In this debate two polarised concerns have arisen.

On the one hand, constitutional conservatives are protective of the Constitution as a carefully constructed, practical and pragmatic charter of government. The Australian Constitution includes no bill of rights, nor lofty aspirations.<sup>1</sup> For conservatives, this is the Constitution's greatest strength. Conservatives believe that Parliament is best placed to determine the content and nature of citizens' rights. They are cautious to amend the Constitution in ways that may give the judiciary unwarranted interpretative power. Conservatives fundamentally believe that Parliament should decide matters of human rights, not unelected judges.

On the other hand, the Australian Constitution as it is has not worked well to protect the rights and interests of Indigenous Australians.<sup>2</sup> History has demonstrated that

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<sup>1</sup> Greg Craven, *Conversations with the Constitution: not just a piece of paper* (UNSW Press, 2004), 1-59; Jeffrey Goldsworthy, 'Constitutional cultures, democracy and unwritten principles', (2012) 3 *University of Illinois Law Review* 683, 687; Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia', in *Australian Federation: towards the second century* 151, 151-57 (Gregory Craven ed., 1992); Damien Freeman and Julian Leaser, 'The Australian Declaration of Recognition: capturing the nation's aspirations by recognising Indigenous Australians' (Submission 29).

<sup>2</sup> Noel Pearson, 'The reward for public life is public progress: an appreciation of the public life of E.G. Whitlam' Gough Whitlam Oration, Riverside Theatre, Parramatta, Sydney, Wednesday 13 November 2013; Marcia Langton, 'Indigenous exceptionalism and the constitutional race power', Melbourne Writers' Festival, BMW Edge Theatre, Melbourne, 26 August 2012; Megan Davis, 'A Narrative of Exclusion: Indigenous Rights in Australia' (2007) 14(3) *Human Rights Defender*, at





Parliaments are not good at listening to Indigenous people. Unrestrained majoritarianism has not worked to protect Australia's most disadvantaged minority. In many ways, the founding fathers singled out Indigenous people as a group that should be excluded from the benefits of equal citizenship on the basis that we were an inferior so-called 'race'. Our Constitution has thus presided over much discrimination against and mistreatment of Indigenous peoples.<sup>3</sup>

This is what Indigenous people want rectified. We want the Constitution to acknowledge, protect and respect Indigenous rights and interests, so that we are no longer trampled by the unrestrained will of the majority. Yet constitutional conservatives oppose rights clauses in the Constitution.

How can we find a synthesis or compromise between these two competing and largely polarised concerns?

### **3.1 Conservative objections**

For constitutional conservatives, the Panel's proposals to amend the Constitution could not be supported because they included sweeping rights clauses and abstract statements, designed to protect Indigenous interests, but that would create uncertainty by giving too much interpretative power to judges and derogating from parliamentary sovereignty. Common objections to aspects of the Expert Panel's proposals, particularly from conservative commentators have been as follows.

Objections to s 116A, racial non-discrimination clause:

- It is a 'one clause bill of rights'<sup>4</sup>
- It will enable unelected judges to decide what is discriminatory and what is not, and these types of decisions should be left to elected representatives<sup>5</sup>

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16–18; Shireen Morris, 'Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary' (2011) 7(26) *Indigenous law bulletin* 7.

<sup>3</sup> See also Marcia Langton, 'Get rid of race to stop racism', *The Australian*, 31 August 2012; Patrick Dodson, 'Too tolerant of ugly racism' *The Age*, 31 January 2012; Dan Harrison, 'Dodson shows support for constitutional ban on racial discrimination', *Sydney Morning Herald*, 12 July 2012; Patricia Karvelas, 'Pearson puts case for constitutional race clauses to be cut', *The Australian*, 10 December 2011; Noel Pearson, 'A Letter to the Australian People', submission no 3619 to the Expert Panel; Larissa Behrendt, *Achieving social justice: Indigenous rights and Australia's future* (Federation Press).

<sup>4</sup> Dan Harrison, 'Dodson shows support for constitutional ban on racial discrimination', *Sydney Morning Herald*, 12 July 2012; Greg Craven, 'Keep the constitutional change simple', *Australian Financial Review*, 6 February 2012; Greg Craven, 'The con-cons constitutional conundrum', *The Australian*, 19 February 2014.



- It leaves the judiciary to decide moral and political questions, and is therefore undemocratic<sup>6</sup>
- It is uncertainly worded; the special measures sub-clause is uncertain and may not cover Native Title<sup>7</sup>
- This is not appropriate to have in the Constitution – the Australian Constitution is not an appropriate vehicle for rights and values.<sup>8</sup>

Objections to s 127A, languages provision:

- This is not appropriate to have in the Constitution<sup>9</sup>
- This is uncertainly worded and may have unforeseen legal and policy implications when argued out in the courts<sup>10</sup>
- These ideas would be better situated in legislation.

Objections to s 51A, Indigenous peoples power and recognition clause:

- The recognition should be in a Preamble, not in the body of the Constitution<sup>11</sup> (though some disagree and say a self-contained clause is a smart idea as it limits judges using the clause to interpret the rest of the Constitution – this was also the Panel’s reasoning)<sup>12</sup>
- The word ‘advancement’ is legally uncertain;<sup>13</sup> it is also condescending and paternalistic in its implications; it entrenches the notion of Indigenous disadvantage, is out-dated and should not be used<sup>14</sup>

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<sup>5</sup> Patricia Karvelas ‘Historic Constitution vote over Indigenous recognition facing hurdles’, *The Australian*, 20 January 2012; James Allan, ‘Constitutional fiddling brings inherent danger’, *The Australian*, 9 December 2011; Greg Craven, ‘Keep the constitutional change simple’, *Australian Financial Review*, 6 February 2012.

<sup>6</sup> See for example James Allan, ‘Constitutional fiddling brings inherent danger’, *The Australian*, 9 December 2011;

<sup>7</sup> For example Anne Twomey, ‘Indigenous recognition explained: the issues, risks and options’, (2012) *Constitutional reform unit, University of Sydney Law School*.

<sup>8</sup> See Damien Freeman and Julian Leaser, ‘The Australian Declaration of Recognition: capturing the nation’s aspirations by recognising Indigenous Australians’ (Submission 29).

<sup>9</sup> See Damien Freeman and Julian Leaser, ‘The Australian Declaration of Recognition: capturing the nation’s aspirations by recognising Indigenous Australians’ (Submission 29).

<sup>10</sup> James Allan, ‘Constitutional fiddling brings inherent danger’, *The Australian*, 9 December 2011.

<sup>11</sup> Greg Craven, ‘Keep the constitutional change simple’, *Australian Financial Review*, 6 February 2012.

<sup>12</sup> See Joint Select Committee Interim report; Anne Twomey, ‘A revised proposal for Indigenous recognition’ 36 (2014) *Sydney Law Review* 381, 406-408.

<sup>13</sup> See Sean Brennan, ‘Submission on content of a referendum package’, (2011) submission to the Expert Panel, 7; George Brandis comments in Commonwealth of Australia, Official Committee Hansard, ‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples – roundtable discussion’, Sydney, Tuesday 30<sup>th</sup> April 2013, for example pg 19, 22; Warren Mundine’s comments in Stuart Rintoul, ‘Race power opens pandora’s box’, *The Australian*, 22 December 2011.





- Indigenous relationships to land should not be confined to ‘traditional’.

General objections:

- How will these reforms make a practical difference to Indigenous people? How will they tackle poverty, unemployment, alcohol abuse, child abuse etc?<sup>15</sup>
- The principles and ideas the Panel were articulating were valuable and noble, but the Constitution is not the place for them; the Constitution is a minimalist charter of government, not a vehicle for rights, morals or aspirations<sup>16</sup> – we should look to legislation.
- Some conservatives have argued that a legislated Act, or symbolic document or declaration of recognition and reconciliation would be preferable.<sup>17</sup>
- Yet other conservatives have argued that only the most minimalist and purely symbolic preamble, stating the historical fact of prior Indigenous occupation, would be an acceptable form of Indigenous recognition.<sup>18</sup>

### 3.2 Indigenous objectives

In their strong aversion to activist judges, constitutional conservatives tend to forget the history that has driven this conversation about constitutional recognition. We take on board these conservative concerns. But conservatives in turn need to understand the Indigenous position.

Our people lived through the discrimination of the past. We have a legitimate anxiety that the past not be repeated, and that measures be put in place to ensure *things are done in a better way*. If conservatives assert that a racial non-discrimination clause is not the answer to this problem – then what is a better solution?

For Indigenous people, constitutional recognition is about achieving stable, constitutional protection of Indigenous rights and interests that is shielded from short

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<sup>14</sup> Note Peter Dawson’s comments in Commonwealth of Australia, Official Committee Hansard, ‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples – roundtable discussion’, Sydney, Tuesday 30<sup>th</sup> April 2013, for example pg 15.

<sup>15</sup> See Gary Johns, ‘Recognise What?’ (2014) essays against constitutional recognition.

<sup>16</sup> Damien Freeman and Julian Leeser, ‘The Australian Declaration of Recognition: capturing the nation’s aspirations by recognising Indigenous Australians’ (Submission 29).

<sup>17</sup> Damien Freeman and Julian Leeser, ‘The Australian Declaration of Recognition: capturing the nation’s aspirations by recognising Indigenous Australians’ (Submission 29); Greg Craven, ‘Throw of the right number of sandbags and Indigenous recognition might float’, *The Australian*, 23 August 2014; Greg Craven, ‘We need to work out how Indigenous voices can be heard’, *The Australian*, 13 September 2014.

<sup>18</sup> Gary Johns, ‘History yes, culture no’, *The Australian*, 8 October 2013.



term political fluctuations. This is what the Indigenous movement for constitutional recognition has always been about, since the William Cooper petition in the 1930's, calling for reserved seats in Parliament, and the Yolngu bark petitions in 1963 calling for constitutional recognition of their land rights.

Constitutional recognition for Indigenous people has never been just about symbolism.<sup>19</sup> It is about finishing the 'unfinished business' and agreeing upon, and solidifying, the rights and principles that should form the basis of a fairer future relationship between Indigenous people and the government, under the Constitution. This is why the Expert Panel rightly proposed a reform package that included substantive rights protection that would benefit Indigenous people in a real way.

## 4 The political challenge: finding the right synthesis

Professor Greg Craven correctly framed the national challenge. Consensus needs to be found between two critical but currently polarised groups: Indigenous people and the 'con cons' (constitutional conservatives).<sup>20</sup>

The challenge is to find a way to marry the two competing narratives or principles that have arisen in this debate, and to find the correct synthesis between these two concerns:

- 1) Conservatives want to maintain the integrity of the Constitution as a practical and pragmatic charter of government; they do not want to undermine parliamentary sovereignty by giving more power to judges through 'rights' clauses or abstract phrases being added to the Constitution.
- 2) Indigenous people have always been looking for secure and stable protection of their rights and interests that is shielded from short term political fluctuations.

We therefore need to answer:

- How do we respond to conservative objections to the Panel's proposals, while ensuring we can, in good faith, tell Indigenous people that "these reforms will improve the Indigenous situation in Australia"?

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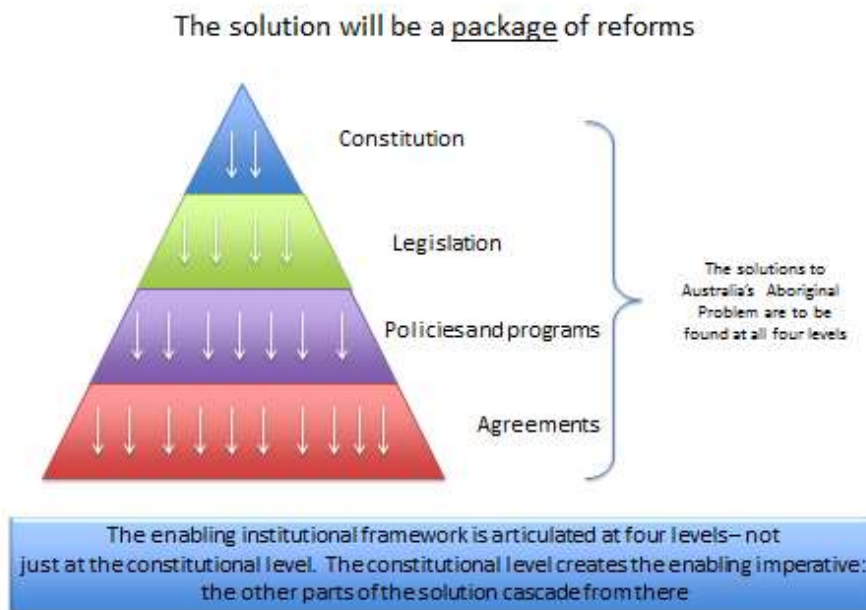
<sup>19</sup> See Final Report of the *Act of Recognition* Review Panel (2014), 24.

<sup>20</sup> Greg Craven, 'The con cons constitutional conundrum', *The Australian*, 19 February 2014.

- How do we provide a sensible solution to the racial discrimination problem, while maintaining parliamentary sovereignty and without handing power to judges?
- If a racial non-discrimination clause in the Constitution is not the answer – what is a better solution?

## 4.1 The solution will be a package

We have come to realise that the solutions to the challenges above need not all happen in the Constitution. Rather, the solutions could happen at the appropriate levels of the constitutional, legislative, policy and agreements pyramid to form a national package of reforms effecting Indigenous constitutional recognition. The constitutional reforms would create the ‘hooks’ off which legislative and other reforms can hang.



## 5 Argument for reform

Indigenous Australians occupy a unique position within the Australian nation, historically, politically and legally different to other citizens. Indigenous people are the only group that was displaced and dispossessed by British settlement. We were uniquely discriminated against and excluded by the constitutional arrangements of 1901. We are the only group requiring contemporary legislative responses to these problems.



We, more than any other group, have suffered under the racially discriminatory attitudes still embedded in the Constitution. The discrimination of the past had real impacts on our people. We were denied equal citizenship. We were denied the vote. We lost many of our property rights. We were prevented from practicing our cultures and languages. We were often prevented from living where we chose, and marrying freely. We were denied equal wages. We were excluded from the real economy. Indigenous peoples have had a unique and peculiarly disempowered relationship with Australian governments under the Constitution. This relationship thus far has been mostly dysfunctional, and characterised by discrimination and exclusion.

In the present day we do have a vote and we are citizens. It is unlikely that such blatant and adverse discrimination will occur again. But in the contemporary era, after the rapid decline in the Indigenous population following British settlement, Indigenous peoples have become an extreme minority. Constituting only 3% of the population, Indigenous people hardly get a fair say in Parliament, even on matters directly concerning us. With the Constitution offering us no protection, majoritarianism alone has been largely ineffective in protecting Indigenous rights and interests. Arguably this is why the racial discrimination of the past has occurred: because Parliaments have rarely been good at listening to Indigenous people.

Part of the challenge of constitutional recognition is therefore to find a just solution to the 'elephant and mouse' problem (the 3% mouse versus the 97% elephant) that characterises Indigenous affairs in Australia. Because we do not have the numbers to influence the parliamentary responses to our unique status nor the responses addressing our unique history of discrimination, the solutions to these problems occur largely without Indigenous input. We have little sway over parliamentary will. When policy responses and new legislation is put forward in Indigenous affairs, it is true that we can lobby, act as advisors, protest, or try to have a say in the media. But there are no formal or guaranteed processes to give us a fair say. Our real, practical influence on the power of Parliament is often minimal.

Is this a constitutional problem?

Yes. The Constitution, as Freeman and Leaser assert, is a practical and pragmatic charter of government.<sup>21</sup> It is a procedural rule book which sets out important national power relationships, like that between the Commonwealth and the States. The

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<sup>21</sup> Damien Freeman and Julian Leaser, 'The Australian Declaration of Recognition: capturing the nation's aspirations by recognising Indigenous Australians' (Submission 29).



Constitution is the instrument which creates our federation and ensures that the minority States are protected from the tyranny of the majority. The Constitution even ensures that each State has the same number of Senators, despite vast difference in population numbers.<sup>22</sup> The founding fathers hardly adhered to strict majoritarianism in constructing our federation.

But because of the racism of the era, Indigenous people were excluded not only from equal citizenship as individuals, we were also – unlike the states – not recognised as peoples or polities warranting any constitutional protection from the tyranny of the majority within the democratic federal system. While sparsely populated States deserved an equal say in Parliament through the Senate, no accommodation was made for Indigenous peoples’ interests to be heard within the system. As a result, the relationship between the Indigenous minority and the government majority has been unjust. Much discrimination against Indigenous people was able to occur.

Today there is a moral imperative to ensure that the relationship between Indigenous peoples and the Australian government, under the Constitution, is just and fair, rather than characterised by racial discrimination and exclusion as has historically been the case.<sup>23</sup> If we accept that the Constitution is a practical rule book governing national power relationships, then we should also accept that there is one very important, national power relationship that is clearly not addressed in the Constitution.

Arguably, the rulebook should be amended to make provision for Indigenous people to be heard in Indigenous affairs. After all, if unelected judges should not decide what is in the interests of Indigenous people, then who should decide? Surely Indigenous people themselves should get a say.

Perhaps we can find a way of ensuring that Indigenous people get a fair say in laws and policies made *about us*, without compromising the supremacy of Parliament. Perhaps we could consider creating a mechanism to ensure that Indigenous people can take more responsibility for our own lives, *within the democratic institutions already established*, and without handing power to judges.

We don’t want separatism: we want inclusion on a fair basis. We want to be inside the decision-making tent. We want our voices to be heard in political decisions made

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<sup>22</sup> See Chris Mitchell, ‘Towards a national settlement’, *The Australian*, 17 September 2014.

<sup>23</sup> Damien Freeman, ‘Addressing Aboriginal disadvantage: that’s what I call a defining moment’, *The Australian*, 6 September 2014.





about us. A procedural mechanism like this – guaranteeing the Indigenous voice in Indigenous affairs – could be a more democratic solution to the racial discrimination problem.

This could be a uniquely Australian solution to the problem of past discrimination against Indigenous peoples; the problem of the unheard 3% minority within the democratic nation state.

This would not be reserved seats, like in New Zealand. It would not be a racial non-discrimination clause, for ours, as conservatives insist, is not the ‘bill of rights’ style Constitution of the USA. It is not separate Parliaments. It is not a veto.

Rather, the procedural amendment could create a moral and political imperative for governments to negotiate with the Indigenous body regarding laws and policies for Indigenous affairs.

This could be a uniquely Australian solution, a democratic and procedural solution, to ensure that Indigenous people forever more get a fair say in Indigenous affairs.

## **6 Possible reform package**

Constitutional recognition could therefore include removal of the race clauses, insertion of a replacement power to enable to Commonwealth Parliament to pass necessary laws with respect to Indigenous peoples, and incorporation of a procedural requirement that Indigenous peoples get a fair say in laws and policies made about us, perhaps in a new Chapter 1A, establishing a new Indigenous body to effect this purpose.

If the Constitution is amended in these ways, then the symbolic recognition of history and heritage, the rich poetry, the statement of values, principles and aspirations, could happen in a Declaration or Statute of Reconciliation, outside the Constitution, as some have suggested.

This package of reforms can also include new institutional arrangements to put into effect the constitutional and legislative reforms.

The proposed package of reforms could therefore be as follows.

Constitutional reforms:

- Remove s 25 of the Constitution (provision for disqualification of races from voting)





- Amend s 51 (xxvi) of the Constitution (the Race Power) to become a power to make laws with respect to Aboriginal and Torres Strait Islander Peoples;
- Add a new Chapter 1A to the Constitution (establishing an Indigenous body to give Indigenous people a voice in Parliament's law making in Indigenous affairs)

Legislative and other reforms:

- Enact a *Declaration* or *Statute of Reconciliation* to set in place some high level principles or ethics that should govern Indigenous affairs, the relationship between Indigenous people and the government, and reconciliation into the future; this would contain the symbolic recognition and poetry: recognition of history, culture, languages and heritage;
- Legislation to set up the mechanisms of the Indigenous body;
- Empowered Communities legislation and related institutional arrangements;
- A language and culture revitalisation agenda.

## **6.1 A constitutionalised Indigenous body, plus other reforms**

The Constitution could be amended by inserting a new Chapter 1A, to ensure that Indigenous people are given fair a say in their own affairs. The new Chapter could establish an Indigenous body to advise Parliament on matters relating to Indigenous peoples. This could be a procedural amendment, in keeping with the nature of the Constitution as a practical and pragmatic charter of government; a rule book which manages important national power relationships and establishes a federal framework which tempers the tyranny of the majority.

If carefully drafted, this Chapter could in effect be non-justiciable – just as many procedural parts of the Constitution are considered internal, procedural instructions to Parliament, and are therefore treated as non-justiciable. If this new Chapter is constructed so that it is properly procedural in nature, it would not transfer any power to judges. Our legal consultations indicate that drafting a handsome, yet non-justiciable, procedural Chapter, is an achievable task.

Similarly, the procedure in the new Chapter could be drafted such that the advice of the Indigenous body is highly persuasive and authoritative, but not binding on Parliament. It would not constitute a veto over Parliament's law making. It would therefore not derogate from parliamentary sovereignty in any way. It need not create an unwieldy bureaucracy; rather, it would enhance Indigenous participation in democracy. This proposed structure is about democracy, not bureaucracy.



Properly drafted, constructed and run, this new constitutional body could represent a significant and exciting reform that would provide Indigenous people an important and guaranteed platform to be heard within the formal mechanisms of Parliament. This could create the machinery for a constructive partnership and set the basis for a fairer relationship into the future.

How the body is constituted is a matter for further deliberation, and would be established in legislation. We recommend that it be constituted by a small number of respected Indigenous leaders made up of a mix of popular representatives, directly elected by Indigenous people, and appointed Indigenous leaders. The aim would be to have a balanced body made up of authoritative Indigenous leaders and experts, that would provide a persuasive and politically and morally powerful voice in Parliament.

Importantly, this body, established in the Constitution, could become part of the institutional framework within the machinery of government for all time. But it is only part of the practical legislative and institutional framework that should be implemented as part of the constitutional recognition agenda.

As noted, this new body could complement, and work in conjunction with, a symbolic Declaration or Statute of Reconciliation, setting out the high level principles and ethics of reconciliation, as well as the Empowered Communities structural reforms that are currently in development. The operation of this body would also be enriched by a comprehensive national language and culture revitalisation agenda, that should be implemented through legislation.

While the Empowered Communities work is already underway with the leadership of Indigenous leaders from eight regions around Australia, Indigenous people must now do the hard thinking to conceptualise what an appropriate national language and cultural agenda might look like. In this challenge, we urge Indigenous people to look to the New Zealand example of successful biculturalism. In New Zealand, Maori is an official national language, established in legislation; there are processes for bicultural naming of places and historic sites; and Maori culture is celebrated as the national heritage. We now should ask: what is an appropriate Indigenous culture and language revitalisation agenda for Australia?

Together, these constitutional, institutional and legislative reforms could make up a multi-faceted and highly practical package of reforms for Indigenous recognition.



## **6.2 Political process towards a successful referendum**

There must be bipartisan support for any constitutional reform proposals, and it is hoped that there will be unanimous support for the reforms in Parliament. Crucially, there must also be Indigenous support.

We recommend that Indigenous constitutional conventions are held around the nation over the next several months, so that Indigenous people can properly grapple with the conservative objections to the Panel's recommendations, and decide what revised proposals they would support.

The conventions could be run by an Indigenous Council made up of the Indigenous leaders of the Expert Panel, the Joint Select Committee, and the Indigenous members of Parliament. Once Indigenous consensus on the right reforms is established through this Council, the proposals should be given to the Prime Minister and Parliament. The Prime Minister should negotiate with the Council to settle a final form of words and package of reforms. The Prime Minister should then present a final package of reforms to Parliament.

It should be noted that any referendum bill must be given Royal Assent 2-6 months before the proposed referendum date. This needs to be taken into account once a referendum date is settled. Time must be allowed for the Indigenous conventions to occur, for negotiations between the Indigenous Council and the Prime Minister, and for the bill to be debated and pass through Parliament.