Submission to the Joint Select Committee on

Constitutional Recognition of Aboriginal and

Torres Strait Islander Peoples

By
Dr A. J Wood
Senior Research Fellow and Higher Degree Research Manager National Centre for Indigenous Studies
Australian National University

Constitutional Recognition of Indigenous Peoples

A Wood[1] 20 July 2014

I Introduction

As the founding document of the nation, the Australian Constitution should at a minimum recognise Indigenous people as the first people of the continent. There also appears to be a consensus that the nation should 'go beyond' mere symbolic recognition. The real question is how we achieve this.

To stimulate the process, the *Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* ('the Panel') produced an excellent, informative and comprehensive report ('the Panel Report').[2] The Panel Report includes several recommendations which are discussed and critiqued below.

This submission, which is the written version of a paper presented at the World Indigenous Legal Conference,[3] argues further that in addition to symbolic recognition that there are two main issues that should be addressed in the Constitution: first, that the entrenched constitutional powers of the Parliament to discriminate on the basis of 'race' should be rescinded and secondly, that *inter alia*, racial inequality should be redressed by the recognition of *formal* equality for all Australian citizens and examines and discusses the related issues.

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1 The author is a Senior Research Fellow at the National Centre of Indigenous Studies and teaches at the ANU College of Law. He is a member of the ARC funded National Indigenous Research and Knowledges Network (NIRAKN). He would like to thank Professor Jane Stapleton, Professor Michael Coper, Professor James Stellios, Professor Margaret Thornton, Greg McIntyre SC, Professor Cressida Fforde, Ms Brooke Greenwood, Ms Cosima Hay Mcrae and Ms Laura Sweeney for their insightful comments and advice. All errors and omissions however remain the responsibility of the author.

2 The Report of the Expert Panel, 'Recognising Aboriginal and Torres Strait Islander People in the Constitution', January 2012, 112-115. (Hereinafter 'the Panel Report')

3 World indigenous Legal Conference 2014, 25 – 27 June 2014, Queensland University of Technology, Brisbane.

Philosophical discussion of the questions, of whether constitutional recognition has intrinsic value within Indigenous knowledges or cultures is outside the scope of this submission and is not therefore explicitly considered.[4] On the other hand, constitutional recognition, in a form yet to be determined, must in principle be seen as a desirable outcome for the broader community as it will make the Australian legal system more internally consistent and coherent.

II Critique of the Panel's Recommendations for Constitutional Change

Sections Pertaining to Race

Australia's Constitution has two remaining 'race' provisions. Section 25 outlines the possibility of State laws that disqualify persons of a particular race from voting at State elections. Section 51 (xxvi) (post 1967, the 'amended races power'), allows the Commonwealth to make laws for the people of any race, 'for whom it is deemed necessary to make special laws.' Prior to the 1967 amendments, s 51(xxvi) read:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> (xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws. (Emphasis added).

The clause 'other than the aboriginal race in any State' ('exclusion clause') explicitly prevented the Commonwealth Parliament from making 'laws with respect to aboriginal race in any State' and making laws for Aboriginal people had been an exclusively State issue. Jurisprudence following the 1967 referendum has clearly held that section 51 (xxvi) allows for the enactment of both beneficial and detrimental laws based on 'race'.[5] The troubling

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4 Chris Graham, 'Why Aboriginal Australia should reject constitutional recognition' (11 July 2012) < http://www.crikey.com.au/2012/07/11/why-aboriginal-australia-should-reject-constitutional-recognition/>.

5 *Kartinyeri v Commonwealth*, (1998) 195 CLR 337.

issue from the vantage of this submission is therefore, that while there was a public perception and expectation that equality was being achieved in 1967, that the subsequent jurisprudence clearly demonstrated that the changes in the law did not reflect these expectations.[6] This error must be avoided.

Further, social developments in the recent past with respect to the understanding of what constitutes 'race', recognises that 'race' is socially constructed with no biological basis.[7] Given this, specific constitutional powers to legislate with respect to race appear anachronistic and have no scientific or objective foundation.

Section 25

The Panel referred to s 25 of the Constitution as a 'dead letter' provision[8] and recommended its unconditional repeal.[9] While Twomey rightly argues that s 25 'cannot be regarded as a dead letter' provision, she also notes that it is unlikely to be used.[10] Arcioni notes that '[after 1967] s 25 can be understood as a disincentive against discrimination'.[11] Therefore, while there are some residual benefits to its retention, on balance there were 'no legal risks'[12] and therefore appears to be no real contention that s 25 should be rescinded.

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6 See below n 29.

7 The contemporary understanding of 'race' according to Sarah Pritchard, ' The 'Race' Power in Section 51(xxvi) of the Constitution', 15 *Australian Indigenous Law Review* 2 (2011), 44, 50, is that:

> '[…] the dominant view among biological scientists, anthropologists and social theorists in that the concept of 'race' is socially constructed' imprecise, arbitrary and incapable of definition or scientific demonstration' [Footnote omitted].

According to Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 19: 'the original framers of the constitution *intended* to regulate the activities of people '[merely] of a "race" different from the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc. etc.) mixture derived from the United Kingdom, which formed the main Australian stock'. [Emphasis added]; or according to descriptions collated by Ron Castan, 'Land, memory and reconciliation', (1999) 11 *Without Prejudice* 4, 'they [Aboriginals] are no more than the flora and fauna of the land'. The majority of the founders it appears believed that 'race' was biologically determined and supported concepts such as eugenics.

8 The Panel Report 143.

9 The Panel Report, xviii.

10 Anne Twomey, '*An Obituary for s 25 of the Constitution'* (2012) 23(2) *Public Law Review* 125, 141.

11 Elisa Arcioni '*Excluding Indigenous Australians From 'The People'': A reconsideration of Sections 25 and 127 of the Constitution*', (2012) 40 *Federal Law Review* 3, 313.

12 The Panel Report, 143.

Section 51(xxvi)

The Expert Panel also recommended the conditional repeal of s 51(xxvi),[13] subject to the inclusion of s 51A (discussed below).[14] Historically, in the 1960s, the government supported the repeal of s 51(xxvi),[15] but its repeal was not placed before Parliament.[16] The 1988 Constitutional Commission also agreed that it was inappropriate to retain s 51(xxvi).[17]

To date Parliament has used 51(xxvi) to discriminate only against Aboriginal people.[18] However, as demonstrated by its use even in the 21st Century, Parliament is likely to use this power as long as it remains in the Constitution and given this history, Indigenous people would be quite unwise to trust or place reliance on Parliament or the other institutions to use this power (or the substantive part of s 51A[19]), to their objectively defined benefit only.

The Panel noted 'the reliance, among other powers, on s 51(xxvi)'[20] for the enactment of legislation, including native title legislation. The Court in the *Native Title Case* however did not discount s 51(xxix), the external affairs power, as a valid head of power to support the *Native Title Act*.[21] Further, Justice Stephen noted that such legislation could in cases constitute 'special measures' in the meaning of the RDA[22] and the preamble of *Native Title Act* confirms His Honour's view.[23] The rescission, without the inclusion of s 51A, may not therefore be fatal to every piece of 'beneficial' legislation created under s

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13 The Panel considered the proposals for the (unconditional) repeal of s 51(xxvi) but deferred to 'a large majority who supported change': The Panel Report, xiv.
14 The Panel report, 144.
15 For the text of s 51(xxvi) see above p 5.
16 John Gardiner-Garden, The 1967 referendum: history and myths, Research brief (Australia. Parliamentary Library); 2006-7, no. 11), 9.
17 Constitutional Commission, *The Final Report of the Constitutional Commission,* (Canberra, AGPS, 1988) Vol. 1, 54. The Constitutional Commission however recommended the addition of a constitutional power with respect to Aboriginal and Torres Strait Islander people as did the Expert panel.
18 Robert French, 'The Race Power: A Constitutional Chimera' in eds., H.P. Lee and George Winterton 'Australian constitutional perspectives' 180, 185.
19 See below n 35
20 The Panel Report, 33.
21 *Western Australia v Commonwealth* (1995) 183 CLR 373, [95]-[103]. (*Native Title Case*).
22 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 210 (Stephen J). The Preamble of the *Native Title Act 1993* (Cth) states that the law is intended to be a special measure in the meaning of Section 8 of the RDA.
23 *The Native Title Act (1993)* Preamble.

51(xxvi). In any event, native title vests in traditional owners not because they happen to be of a particular 'race' —which in the High Court's view they clearly are not[24] — but *inter alia* on a fact that their ancestors were prior beneficial owners and occupiers of the colonised lands.[25] Consequently a reliance on the races power to support such legislation appears to be inappropriate as a matter of fact.

The proposed s 51A does not foreshadow the 'saving' of detrimental legislation.[26] There are clearly, therefore, likely to be some practical effects associated with the rescission of s 51(xxvi) even with a replacement power.[27] If the panel is right, all detrimental legislation — vis-à-vis Indigenous people— enacted under s 51(xxvi) arguably should fail when s 51(xxvi) is replaced by s 51A.[28]

Importantly in 1967, when the races power was extended to 'aboriginal natives', the courts embraced all shades of the meaning of 'race' imputed to this word by the founding fathers, and which in turn has been used to discriminate against Indigenous people. Maintaining Parliament's power to make laws with respect to 'race' will not therefore change the *status quo*. Supporting this view, Karvelas cites Patrick Dodson, co-chair of the Expert Panel, who admitted that 'legislation such as that establishing the Northern Territory Intervention, which was characterised as beneficial by Parliament, would not be affected [by the Panel's recommendations]',[29] thus effecting little, if any, substantive change.

The presence of s 51(xxvi) in the Constitution (or a new s 51A), and notwithstanding s 116A(2), permits Parliament to continue to act in a manner that is detrimental to Indigenous people.[30] This oversight of failing to correctly determine the scope of Constitutional change was made in 1967[31] by extending the races power, rather

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24 *Commonwealth v Tasmania* (1983) 158 CLR 273. ('*Tasmanian Dam Case*).
25 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 45, Blackstone as cited by Brennan J.
26 See below, the proposed s 116A(2).
27 The Panel Report 145-149.
28 See also discussion accompanying n 59.
29 Patricia Karvelas, 'Historic Constitution vote over indigenous recognition facing hurdles' The Australian, 20 January 2012. <http://www.theaustralian.com.au/national-affairs/policy/historic-constitution-vote-over-indigenous-recognition-facing-hurdles/story-fn9hm1pm-1226248879375>.
30 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [29] (Gaudron J).
31 Justice Gaudron characterised s 127 as a discriminatory provision: , *Kruger v Commonwealth* 190

than narrowing the scope of its operation, and this mistake should not be repeated at the next referendum. To this end, expunging of the word 'race' from the Constitution, while not reintroducing the word or concept through a new provisions, must arguably, analogically remove the concept from the applicable jurisprudence, and will no longer be good law for the purposes prospective constitutional and statutory interpretation.

The repeal of (both s 25 and) s 51(xxvi) appear to have the endorsement of the legal profession[32] — and if the 'intent' of the public in the 1967 referendum with respect to 51(xxvi) is considered — the public.[33]

Panel Recommended Inclusions

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

CLR 1, 70. but nonetheless that the 1967 referendum amendments were 'minimalist.': *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361 (Gaudron J).

32 Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 35.

33 The Panel Report 146; See also the Newspoll survey results reproduced in the Panel Report: 88.

The Panel recommended the (conditional) rescission of s 51(xxvi), subject to the simultaneous substitution of s 51A, which would create a (new) head of power for Parliament to make laws 'with respect' to Indigenous people'.[34] Section 51A contains a symbolic element and a substantive element (above in italics).[35]

The symbolic element of s 51A contains its own preambular or introductory text importing Indigenous recognition ('preambular text').[36] The 43rd Parliament adopted the 2013 *ATSI Recognition Act* which contains a statement of recognition in its preamble, which closely resembles the proposed preambular text of 51A. The 2013 *ATSI Recognition Act* however omitted the phrase 'acknowledging the need to seek advancement […]' as recommended in 51A.[37] The Parliamentary Joint Committee on Human Rights queried this omission.[38] The contrary argument is that the word 'advancement' may in cases be viewed as also entrenching a negative deficit model.[39] Professor Davies, a member of the Expert Panel, however, persuasively argues for the retention of the word 'advancement' in the preambular text.[40]

The Panel's preambular text does not however include the word custodianship as raised by some submissions,[41] or (or perhaps more controversially) sovereignty.[42] A purely symbolic statement, with no legal effect, can be more generous and gracious in its symbolic

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34 The Panel Report 173, and further, the provision is subject to a close nexus with the proposed s 116A, particularly s 116A(2).

35 The Panel Report, 117.

36 The Panel Report, 117.

37 See text of s 51A above.

38 Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Report 1 2013 (6 February (2013), 1.

39 See also: Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Progress report, June 2013, 15, which notes that:

> Professors George Williams, Anne Twomey and Frank Brennan, and then Generation One CEO, Mr Warren Mundine, had been critical of the Expert Panel's use of the word 'advancement' in its preamble to the proposed section 51A […]

<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/~/media/wopapub/senate/committee/jscatsi_ctte/report/report.ashx>.

40 Megan Davis, '*Where to next for Indigenous constitutional recognition*?', (n.d), National Archives of Australia, <http://constitutionday.wordpress.com/where-to-next-for-indigenous-constitutional-recognition-by-professor-megan-davis-2/>.

41 The Panel Report, 122 - 126.

42 The Panel Report 205-212.

content. The non-justiciable parts of the proposed recognition statement should therefore be enhanced, be made a little more generous and gracious that appears in the *2013 Recognition Act*, and should principally be formulated by poets rather than by lawyers.

There were also arguments made in favour of 'limiting' the preambular text to one particular section of the Constitution, and hence not 'privileging' Indigenous people only by recognition (and consequently by implication 'ignoring everyone else').[43] This objection was rightly and forcefully rejected by the by Prime Minister Mr Abbott (when he was the opposition leader).[44]

According to Twomey, the inclusion of s 51A could nonetheless mean that there are 'two preambles' in the Constitution, which she posits may cause problems for interpretation,[45] a view supported by some in the legal profession[46] and is an issue to which the Panel turned its mind.[47] Twomey's analysis concludes that s 51A might face significant obstacles in court.[48]

Arguably, an advantage of s 51A (together with the recommended repeal of s 51(xxvi) and s 25), is that the word 'race', although perhaps not the concept, is expunged from the Constitution. If Professor Sawer is right, this will benefit non-White races other than Indigenous people in Australia.[49] On the other hand, Justice Gaudron reasonably stated that 'the language and the syntax' of s 51(xxvi) did not limit the power to beneficial use,[50] reasoning analogously that, notwithstanding s 116A(2), can arguably be applied to

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43 The Panel Report, 120.

44 The Panel Report, 127.

45 Anne Twomey, 'Constitutional Recognition of Indigenous Australians in a Preamble' *Constitutional Reform Unit Sydney Law School*, Report No 2, 2011, < http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf>.

46 The Panel Report, 117-118.

47 The Panel Report, xiii.

48 Anne Twomey, 'The Race Power – Its Replacement and Interpretation', 40 *Federal Law Review* 3, 313, 442.

49 According to Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 19: the original framers of the constitution *intended to regulate* the activities of people 'of a "race" different from the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc. etc.) mixture derived from the United Kingdom, which formed the main Australian stock'.

50 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [29] (Gaudron J).

the *substantive* part of s 51A[51] resulting in a similar conclusion. At best, the substantive part of s 51A entrenches a negative image of the Indigenous community as it fits in with the deficit model of deeming a 'special' status to help 'uplift' this 'backward' community,[52] and is a further 'backward' legal step even as compared with the 1967 changes.

This is because the intent of s 51A is to give Parliament a new more specific power over Indigenous people *only*, and will make Indigenous people the only group for which laws may be made on the basis, in fact if not in name, of their 'race'; and is a legal position that is worse than it was at federation or in 1967. Contemporary views on race, as related to discrimination, have changed quite significantly since federation; the notion of racial superiority has receded and is now a minority view in Australia. However the recent *Herald and Weekly times Cases* (*HWT Cases)*[53] which were followed by government statements in support of propositions, was couched as 'free speech with few exceptions'.[54] The *HWT Cases* included the newspaper's strong defence in court, of again[55] using 'blackness' or degree of colour, as a possible test for indigineity.[56] While official government policy now discourages discrimination on the basis of colour or national origin,[57]

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51 See above discussion at n 33. Note that the preambular text explicitly is worded to have no legal effect and therefore cannot reasonably be said to moderate the legal effect of the substantive part of 51A.

52 The JSCATSI Report, 10 cites Professor Anne Twomey who welcomed the removal of the word 'advancement' for its implication of 'backwardness' or for being 'insufficiently advanced'

53 *Eatock v Bolt* [2011] FCA 1103 ; *Eatock v Bolt (No 2)* [2011] FCA 1180 ('*HWT Cases'*).

54 Chris Merritt '*Attorney-General George Brandis's first task: repeal 'Bolt laws' in name of free speech'* The Australian, (8 November 2013).

55 *Official Report of the Debates of the Australian Federal Convention*, Melbourne 8 February 1898, 669 (Sir Isaac Isaacs).

56 *Eatock v Bolt* [2011] FCA. The Federal government's support for this notion is also arguably present as evident in its current Bill to rescind or substantially amend s 18C of the RDA, the legal ground on which the Aboriginal plaintiffs founded their case against the defendants in *Eatock and Bolt*:
http://www.theaustralian.com.au/business/legal-affairs/attorney-general-george-brandiss-first-task-repeal-bolt-laws-in-name-of-free-speech/story-e6frg97x-1226755431421#sthash.kKuyYI1b .dpuf
However, while a detailed discussion of this issue is outside the scope of this submission, if the Expert Panel's recommendation of the inclusion of a constitutional prohibition against racial discrimination is included (see discussion on S 116A below) this amendment (if passed) will most likely be less harmful to minorities.

57 Racial non-discrimination policies are necessary for the Australian Immigration programme which relies now on countries such as China and India for both business and skilled migrants. Racism against Indigenous people however, while indirectly benefiting from the protection afforded to coloured migration outcomes, arguably has no direct economic impact and is therefore not treated with the same degree of vigilance. See for example:
ABC News, 'Thousands protest against Indian student attacks', 1 June 2009.
<http://www.abc.net.au/news/2009-05-31/thousands-protest-against-indian-student-

racism against Indigenous people still remains entrenched in certain segments of the community.[58] Section 51A could also serve to entrench existing *de facto* and *de jure* 'race' based legal barriers present in the jurisprudence.

The issue of self-determination of Indigenous people, while subjectively important to many Indigenous people,[59] is not an immediately relevant factor *per se* for the recognition referendum.[60] However, entrenching s 51A might in the longer term, arguably, further act against the notion of Indigenous self-determination as it places almost complete reliance on Parliament to act in their best interests, and which arguably will work against increasing Indigenous agency and self-reliance.

The Panel also posited that s 51A was necessary for 'saving' existing legislation already enacted under the s 51(xxvi) head of power. Even if the Panel is right, s 51A [subject to s 116A(2)] should only allow the 'saving' of *beneficial* legislation – whatever that might mean. Further, unless otherwise explicitly specified, Parliament's assessment of what constitutes a 'beneficial' provision largely is bound to be subjective, limiting the practical effect of s 116A(2). The following examples illustrate the difficulties of characterisation.

Clearly 'detrimental' legislation such as the *Hindmarsh Island Bridge Act (Cth) 1997* should no longer be valid under s 51 A. On the other hand, s 51A might in practice also permit the saving of legislation which might be beneficial, according to Parliament, but on the other hand, viewed as both beneficial and discriminatory among different groups of

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attacks/1699888>.
In the context of racism against Indian students the Australian PM said 'I want to reiterate my statement before Parliament on Tuesday that the Australian Government will not tolerate victimisation and violence against international students.': Australian Department of Foreign Affair and Trade;
<http://www.india.highcommission.gov.au/ndli/pa092009.html>.

58 Ruby Hamad, 'McGuire ape gaffe exposes Australian tolerance as myth', Eureka Street Vol.23, No 10, 30 May 2013.
< http://www.eurekastreet.com.au/article.aspx?aeid=36497>.

59 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) [1.18].

60 Constitutional change requires the affirmative vote of the majority. The minority (and small) Indigenous population cannot therefore directly affect the majority vote required under the Constitution: *Australian Constitution* s 128.

Indigenous people. That is, the legislation associated with the Northern Territory Intervention (NTI) where many (but not all) Aboriginal people felt humiliated and shamed,[61] should no longer be valid but is likely to survive.[62] Further, even the *Native Title Act*, which denied the Yorta Yorta of its traditional lands, because their culture, under this Act, was said to have been washed away by the tides of history,[63] should also no longer be valid under s 51A because of this detrimental and unjust treatment of the Yorta Yorta. Thus, Parliament's intention of 'saving' beneficial legislation will need to ensure the protection only legislation that is *objectively* beneficial. Generally however, the substitution of one racially discriminatory constitutional provision for another is not therefore something the majority should endorse.

Further, even the notion that a model Parliament, always working for Indigenous people in its best most nurturing of approaches, must be given entrenched power to help Indigenous people in this 'deficit model' until the magnanimous 'people' decide otherwise in another future referendum, is a sickening thought. It is an insufferable form of paternalism in the guise of 'saving' legislation and should be rejected by Australians as not in keeping with its contemporary values!

AIATSIS has endorsed the inclusion of s 51A provided that the proposed s 116A is also included (see below).[64] Others such as *Recognise* suggest that the Report recommendations should only be used as a starting point.[65] While the intent of the Panel's proposals appear positive, experience shows that the extension and grant of special powers to Parliament separately, over one segment of the population only, is unwise indeed. Thus,

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61 NTER Review Board, *Report of the NTER Review Board,* [3.1], Australian Government NTER Review October 2008 <http://www.nterreview.gov.au/docs/report_nter_review/ch3.htm>.

62 See above n . 29.

63 *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; Paul Finn, *'Mabo*: Into the Future: Native Title Jurisprudence', 8(2) Indigenous Law Bulletin 5, 8..

64 AIATSIS Submission to JSCATSI, 2. AIATSIS is the pre-eminent body in Australia with respect to Indigenous issues and its views are therefore cited in this submission. <http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=jscatsi_ctte/consultation/index.htm>.

65 <http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=jscatsi_ctte/consultation/index.htm>.

the *entrenchment* of a special, potentially discriminatory power such as s 51A is unnecessary and likely to prove greatly disadvantageous to Indigenous people *only*.

Justice Kirby writing extra-curially noted that as long as they exist in the Constitution, that 'racist provisions […] risk being used'[66]. For most Indigenous people this is not so much a 'risk' as a certainty. Given the Court's fidelity to the text and the history of the Constitution, s 51A arguably could otherwise negate or even defeat the benefits of removing the word and notion of race from the other substantive provisions of the Constitution. That is, s 51A will represent and carry over the historical attitudes and legacy with respect to 'race'. Further, important issues such the recognition of Indigenous people should not be held hostage to ensuring the validity of a few pieces of legislation, no matter what their import.[67]

The changes to the races power can be summarised as follows: At federation Parliament had specific constitutional power to legislate against non-White races, other than the 'aboriginal race'. In 1967 this power was extended to allow Parliament to legislate for *all* coloured races *including* the 'aboriginal race'. The s 51A 'package', proposes denying Parliament the constitutional power to legislate for coloured races *other than* the 'aboriginal race'. This is clearly a retrograde step.

Further, Australian governments are seeking to 'close the gaps' with respect to Indigenous disadvantage. Without understating the many difficulties,[68] however one would reasonably assume that these 'gaps' will therefore be all closed in a finite period of time. Indigenous resilience, persistence and good grace have reversed many of the disabilities of the past and have done so at a remarkable rate. Thus, Indigenous people should achieve parity on important social, health and economic indices in the not so distant future. Thus, if

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66 Michael Kirby, 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent' Law Council of Australia Discussion forum on Constitutional Change: Recognition or Substantive Rights' Old Parliament house Canberra 22 July 2011.

67 Scholars such as Professor George Williams oppose the complete rescission of the race (without the introduction of a new power) albeit for a different reason: The panel Report, 138.

68 See for example Don Weatherburn, 'Arresting Incarceration: Pathways out of Indigenous imprisonment', (ASP, Canberra 2014), 2-10.

s 51A is accepted at the next referendum, it would, at best, reasonably only be *necessary* for this finite period of time. Therefore, given the difficulties of constitutional change, removing and undoing the effects of this subversive provision down the track is also likely to prove difficult when this very temporary and limited purpose — and which in any event measures which could probably be achieved under the 'special measures' provisions of the RDA[69] —has been exhausted. That is, s 51A will continue to be a burden around Indigenous necks for a long time to come.

The preambuilar text of s 51A retains the notion of an 'aboriginal race', but this is purely symbolic and should have no legal effect.[70] On the other hand, retaining the notion of 'race' in a substantive provision, given past experience as selectively cited above, therefore, is according to Kirby J,[71] to invite the possibility of oppression and therefore should not be adopted.

Thus, do Indigenous people have any real practical or more appealing alternatives to supporting s 51(xxvi) or s 51A head of power? This submission posits that the answer is 'yes' and the proposition is argued below. This submission strongly posits that the substantive part of s 51A should not be adopted.

Section 116A Prohibition of racial discrimination

> (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
>
> (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

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69 See discussion at n 20.
70 The Panel Report, 110-116, esp. 113.
71 See above n 65.

The proposed s 116A is a substantive rights creating provision for *all*, not just Indigenous, people[72] and should in principle be supported. If adopted, the substantive provision will entrench anti-discrimination on the four listed grounds.

Section 116A does not, by omission, prohibit other grounds of discrimination. This phrase is similar but not identical to the wording in the RDA and CERD.[73] As a law of general application however s 116 may fall outside the Panel's terms of reference[74] but should not fail on this technical ground alone. However, the Explanatory Memorandum to the 2012 ATSI Recognition Bill notes that the then Government remained committed *only* to the elimination of racial discrimination.[75] The Prime Minister Mr Abbott referred to the provision as a 'one clause Bill of Rights' and did not support its inclusion in the Constitution.[76] This provision does not therefore appear to enjoy the necessary cross-party support.

In effect s 116A is a general provision which protects all races, but permits an exception (and in conjunction with s 51A arguably for Indigenous people *only)*, which can be disadvantageous to Indigenous people. AIATSIS has broadly endorsed the inclusion of 116A.[77] Section 116A entrenches the values of the RDA, but its key function in the context of the Panel Report appears primarily to negate the detrimental application of s 51A, and this 'protection' in effect requires Indigenous people to trust the Parliament and other state institutions that have failed them on many occasions. While supporting s 116A in principle, this submission argues below that the substantive aim of 116A could also be achieved

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72 A discussion of *The Australian Constitution* s 51(xix), the alien's power is outside the scope of this submission.

73 S. 1(1) *Racial Discrimination Act 1975* (Cth), (RDA) and *International Convention on the Elimination of All forms of Racial Discrimination,* opened for signature, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), art 5 (CERD) use the terms 'race, colour, descent or national or ethnic origin' as a single phrase, a phrase that occurs more than once in these instruments.

74 The Panel Report, 3.

75 Explanatory Memorandum, Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012.

76 <http://www.abc.net.au/pm/content/2012/s3411592.htm>.

77 AIATSIS Submission to JSCATSI, 2. <http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=jscatsi_ctte/consultation/index.htm>.

through the broader constitutional recognition of formal equality before the law for all citizens as discussed below.

Section 127A Recognition of languages

> (1) The national language of the Commonwealth of Australia is English.
>
> (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

A century after Federation, Indigenous people, their languages and law still do not have formal, including constitutional, recognition. The Panel's recommendation on language does not however, entirely remedy this situation as s 127A(2) appears to be aspirational.

The first sub-section of the proposed s 127A establishes English as *the* national language thus entrenching what is it's already 'undisputed position'.[78] By omission, this entrenchment is at the expense of Indigenous (and other) languages. Section 127A can seriously damage the preservation of Indigenous languages, as a constitutional provision entrenching English can be used to impose English *only* — as the national language — in schools and other institutions in Indigenous communities. Subsection (1) privileges English, is outside the Panel's terms of reference and is unnecessary to achieve Indigenous recognition.

The Panel's aim of recognising Indigenous languages in the current non-binding form[79] is achieved in the preambular text of s 51A. Although s 127A(2) goes further and recognises Indigenous languages as the original languages of the Continent and part of the national heritage,[80] nonetheless creates no positive rights. If this text explicitly is necessary, then it should be included with the preambular text in s 51A [which currently only mentions 'respect' for Indigenous languages]. AIATSIS supports the adoption of s 127A.[81]

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78 The Panel Report, 131.
79 The Panel Report, 132.
80 The Panel Report, 132.
81 AIATSIS Submission to JSCATSI, 3.

Notwithstanding its popular appeal to English speakers, the subject matter of s 127A as a whole is not related to Indigenous recognition, muddies the central referendum issue, and on balance should not be adopted.

Parliament's Response to the Panel Report

The Panel was tasked with recommending proposals for Indigenous constitutional recognition[82] by considering a range of factors including the likelihood of obtaining 'widespread support' for a referendum.[83] Unlike similar bodies in the past, the Panel included several senior Indigenous people with expertise in legal processes.[84] Many Indigenous people and groups had both the means and the necessary skills, and made informed and substantial submissions.[85] The strategically appointed Panel produced a broadly consultative document that captures relevant contemporary legal and societal issues including issues such as Australia not being terra nullius before settlement,[86] and specific issues such as a Treaty and Sovereignty.[87] The Panel's recommendations on the other hand were quite constrained by its terms of reference.[88]

These relevant issues have affected the Panel's recommendations. The resulting complex recommendations are therefore reasonable and reflect both the difficult nature of the issues involved and the intensive and broad nature of the consultations undertaken by the Panel. Consequently however, the Panel's proposals, unfortunately, do not translate into easily understandable referendum questions. Referendum questions should be relatively easily explained and understood. This is because all referenda in Australia

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82 The Panel Report, iii.
83 The Panel Report, 3. 4-10, 65-78.
84 *Official Report of the Debates of the Australian Federal Convention*, Melbourne 8 February 1898; Royal Commission on the Constitution*, Minutes of Evidence (1929).* Australian Constitutional Convention 1998 (Senator Neville Bonner noted that only 6 Indigenous representatives were present although this Convention discussed the possibility the 'honouring' of Indigenous Australians in a possible new preamble: "First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–99 (Research Paper 16 1999–2000)": Australian Parliament House).
85 Panel Report, List of Submissions.
86 The Panel Report, 73.
87 The Panel report 49 -107.
88 The Panel Report, 3.

require significant popular support. Thus the chance of 'success', that is gaining the requisite double majority,[89] is enhanced if the question is easy to understand *and* appeals to the sensibilities of the majority.

Thus the recognition referendum which was originally scheduled for September 2013[90] was sensibly postponed with multi-party support.[91] Consequently, Parliament appointed a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (JSCATSI) in November 2012 to[92]:

> […] inquire into and report on steps that can be taken to progress towards a successful referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Following a series of consultations, JSCATSI recommended the adoption of the *2013 ATSI Recognition Act.* This Act requires the Minister for Indigenous Affairs ('the Minister') to 'cause a review to commence within 12 months after the commencement' of the *2013 Recognition Act*, and sets out both the parameters[93] and reporting dates for the review.[94] Consequently, the Minister has appointed a new joint select committee, as required under the legislation, and which is required to report by June 2015.[95]

This '[Ministerial] review'[96] shall 'consider proposals for constitutional change'[97] including the work of both the Panel[98] and Reconciliation Australia.[99] The Explanatory Memorandum to the 2012 ATSI Recognition Bill notes in this regard however, that the 'Bill

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89 *The Australian Constitution,* s 128.

90 J Gillard, B Brown & others, [Agreement to Form Government], the Australian Greens and the Australian Labor Party ('the Parties') – agreement signed on 1 September 2010, 2. <http://greens.org.au/sites/greens.org.au/files/Final%20Agreement%20_ALP_GRNS.pdf>.

91 Kirsty Magarey & John Gardiner-Garden Aboriginal and Torres Strait Islander Recognition Bill 2012, Bills Digest No 74 2012-2013, 11 February 2013, 10. < http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs>.

92 *Journals of the Senate*, 28 November 2012, 3470-74.

93 *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth). s 4(2)

94 *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth). s 4(3)

95 'On 2 December 2013, the Parliament agreed to establish this committee in the 44th Parliament' < http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Committee_Membership>.

96 *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth), s 4(1).

97 *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth), s 4(2)(b).

98 *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth), s 4(2)(b)(i).

99 *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth), s 4(2)(b)(ii).

does not restrict the scope of future issues for debate'.[100] The postponed referendum will be held on a date to be recommended by the Minister.[101]

The postponement of the 2013 referendum however suggests that even formal constitutional recognition is proving to be difficult to achieve. Further, the Panel only proposed (significant but) relatively minor substantial amendments with respect to Indigenous people and arguably indicates that substantial or 'true' recognition in the Constitution related to the recognition of Indigenous law, culture and civilisation in their fullest sense is a step too far for the community at present. Such broader and truer, more comprehensive recognition[102] must therefore be left for a later opportunity.

Nonetheless, and not lest for the difficulties in amending the Constitution, it is vital to ensure that nothing that is incorporated at the recognition referendum will impede or derail the slow trajectory towards the ultimate comprehensive recognition of Indigenous prior occupation, civilisation, laws and spiritualties.[103]

III Suggestions for Moving Forward

In her second reading of the 2012 ATSI Recognition Bill the then Minister said that the Constitution should reflect 'our country's fundamental belief in the importance of equality by removing all reference to race.'[104] This is a position consistent with Australia's international obligations[105] and one that is strongly advocated in this submission. Perhaps the only way to end the impact of founders' intentions on 'white supremacy' and 'race' from persisting in the Constitution, is to rescind the remaining 'race' provisions, to not add

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100 Explanatory Memorandum, Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012. The JSCATSI Report confirms this position, 11.

101 *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth). s 4(1) ('2013 Recognition Act')

102 *Recognition of Aboriginal Customary Laws* (ALRC Report 31) 12 June 1986.

103 It is argued below that some of the Panel's recommendations fall into this category.

104 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2013, 1124.

105 *International Covenant on Civil and Political Rights*, opened for signature, 16 December 1966, 999 UNTS 171(entered into force 23 March 1976), art 26; CERD art 1(1); *United Nations Declaration on the Rights of Indigenous Peoples* GA/RES/61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295, UNGAOR (13 September 2007) art 2.

any new 'race' provisions,[106] and for Parliament to affirm formal constitutional racial equality of citizens, thus neutralising the founders' intentions on 'race'.

The majority of delegates participating in the Constitutional Convention debates ensured that 'equality before the law' clause was *not* enshrined in the Constitution.[107] The founding fathers debated many issues related this clause, from the differential imposition of poll taxes between 'citizens' of the various states,[108] or absentee taxes,[109] to probate duties.[110] However, the majority of the delegates wanted to be able to distinguish between and to allow the law to be applied differentially between 'these [coloured] people and ordinary Europeans.'[111]

Creating formal racial equality in the Constitution could therefore be characterised as a fundamental change from the position of white supremacy. These views were held and espoused by the majority of the framers of the Constitution, as evident in the provisions on race and the Constitutional Conventions. It should be noted however that the original head of power covered all coloured people *except* Indigenous people.[112] Therefore, implying or creating equality for Indigenous people should arguably be an easier step, than is creating equality for the other coloured 'races'. Further, this is not a revolutionary change in practice. Women for example have been considered formally equal for some time but few people would disagree that substantive equality with respect to women is yet to be achieved.

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106 The Panel Report, xviii: 116A

107 *Official Report of the Debates of the Australian Federal Convention*, Melbourne 8 February 1898, 664.

> Clause 110-A state shall not make or enforce any law abridging any privilege or immunity of citizens of other states of the Commonwealth, nor shall a state deny to any person within its jurisdiction the equal protection of the laws.

See also: James Stellios, 'The Federal Judicature: Chapter III of the Constitution, Commentary and cases' (Chatswood, LexisNexis, 2010), 275.

108 *Official Report of the Debates of the Australian Federal Convention* , Melbourne 8 February 1898, 671 (Mr Wise).

109 *Official Report of the Debates of the Australian Federal Convention* , Melbourne 8 February 1898, 671 (Mr Reid).

110 *Official Report of the Debates of the Australian Federal Convention* , Melbourne 8 February 1898, 671 (Mr Wise).

111 *Official Report of the Debates of the Australian Federal Convention* , Melbourne 8 February 1898, 669 (Sir Isaac Isaacs).

112 *The Australian Constitution* s 51(xxvi) as it was in 1901.

While the evolutionary impact on the Constitution for the mere existence of a change mechanism should not be overstated, the fact remains that the founders did see the need and accepted that the Constitution will require amendment. This submission argues that society should use this concession to bring the Constitution into line with cherished contemporary values such as the basic equality of members of human family even when it conflicts with the intent of the founders.

To this end, both the Executive and the Parliament have acceptance the notion of formal racial equality (*for the majority*[113]) as is evidenced in the ratification of the *Convention Against Racial Discrimination*, its incorporation into domestic law as the *RDA* and which is now part of the common law.[114] Section 10 of the RDA provides for equality under the law. This RDA 'right' can, and has been, suspended or overridden by Parliament (for Indigenous people).[115] In Bartlett's view, Indigenous people (but not the other 'races') are 'denied equality before the law.'[116] They are at present denied constitutional equality.

Further, along this trajectory of the gradual acceptance of equality, in June 1992 in the *Leeth Case*,[117] Justices Deane and Toohey evinced a *doctrine of underlying equality* in the Constitution (albeit then subject to the exceptions of the aliens' power and the *amended* races power). Their honours said:[118]

> Nonetheless, and putting to one side the position of the Crown, and some past anomalies, notably, discriminatory treatment of women, the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government

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113 Robert French, 'The Race Power: A Constitutional Chimera' in eds., H.P. Lee and George Winterton 'Australian constitutional perspectives' 180, 185.

114 See below at text accompanying n 111.

115 *Wurridjal v Commonwealth* (2009) 237 CLR 309; *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

116 Richard Bartlett, 'Native title in Australia', (Sydney, LexixNexis, 2004, 2nd ed), 63.

117 174 CLR 455, 486 ('*Leeth Case'*).

118 *Leeth v Commonwealth* (1992) 174 CLR 455, 486. (Emphasis added).

However, their reading of the 'administration of justice' was difficult to sustain while the Constitution explicitly permitted the Parliament to discriminate against coloured races under s 51(xxvi) [and analogously under s 51A]. Notwithstanding Toohey J's 'unrepentant adherence to *Leeth'*[119] the majority of the Court in the *Stolen Generation Case*, held that the Constitution did not support the implication of a doctrine of legal equality.[120]

The majority position in the *Stolen Generation Case* is defensible particularly from an originalist perspective,[121] or the 'minimalist' amendments of 1967.[122] The majority position in the *Stolen Generation Case* was clear in the High Court, highlighted particularly by Griffith QC's allusion to Nazi laws in his submissions.[123] The consequence of this history is that the Constitution 'as is' clearly permits differential treatment on the basis of 'race' and Parliament has exercised this power to make such discriminatory laws based on the races power.

However, the successful rescission of the 'race' provisions in the Constitution will, it is argued, demonstrate a fundamentally different principle; that the people and the Parliament no longer wish to legitimate and permit racially discriminatory laws for any 'race'. A presumption of the constitutional equality of citizens would then arguably become possible, by implication particularly if Parliament stated clearly and unambiguously that its intention was to create formal racial equality for all citizens through the rescission of these 'race' provisions. While future Parliaments clearly cannot be bound by these statements, the rescission of the 'race' provisions, this allows the High Court to use

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119 Tony Blackshield and George Williams '*Australian Constitutional Law and theory Commentary and Materials*' (Sydney, Federation Press 3th ed 2006), 1284.

119 *Leeth v Commonwealth* (1992) 174 CLR 455, 486. (Emphasis added).

120 *Kruger v Commonwealth* (1997) 190 CLR 1, 70.

121 *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J); Leslie Zines 'Interpretation of the Constitution', in Eds. Suzanne Corcoran & Stephen Bottomley 'Interpreting Statutes' (Sydney, Federation Press, 2005), 64, 66; Tony Blackshield and George Williams '*Australian constitutional Law and theory Commentary and Materials*' (Sydney, Federation Press 3rd ed 2002), 326.

122 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 354, (Gaudron J).

123 *Kartinyeri v Commonwealth* (1998) 195 CLR 337. Transcript of 5 February 1998. Grifith QC's response to Kirby J. Cited in Tony Blackshield and George Williams '*Australian constitutional Law and theory Commentary and Materials*' (Sydney, Federation Press 5th ed 2010), 985.

Parliament's intentions to resurrect Deane and Toohey JJ's minority position in *Leeth* and declare the existence of an implied right to equality before the law for *all* 'races' [with an exception with respect to aliens remaining for s 51(xix) [124]].

Since the dismantling of apartheid in South Africa, racial equality can arguably now also be viewed as an international norm, arguably, perhaps even a customary norm and in any event is a notion from which Australia as a good international citizen should not resile. There is also now a broad social acceptance of the notion of 'the equality of races' by the general Australian community, and this is a significant and notable change from 1901. Contemporary Australia espouses the goals of substantive freedoms and human rights for the *majority* both domestically and in international forums.[125] It must also surely, at least aspirationally, aim to extend both formal and substantive equality to *all* its own citizens.

The (then) Minister did well in flagging 'equality' as an aim for the next referendum, thus going well beyond what has explicitly been recommended by the recent reports,[126] and was also supported as a general proposition by the Constitutional Commission in 1988.[127] Recall further, that the strong *popular* presumption of the equality of races was apparently an outcome of the 1967 referendum. Unfortunately this presumption is not currently reflected in the jurisprudence.[128] The Panel also evinced a mood by the majority of the people for a guarantee of equality in the constitution,[129] and is reflected in 'Australian values' such as 'a fair go for all'. There is therefore a strong

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124 *Leeth v Commonwealth* (1992) 174 CLR 455, 486.

125 The ratification and the domestic incorporation of instruments such as the following is evidence of Australia's commitment to these values. *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976; *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

126 See text accompanying n 98 above .

127 Sir Maurice Byers, 'Final report of the Constitutional Commission 1988',(Canberra: Australian Government Publishing Service, 1988), Parliamentary paper ; nos. 229 (v.1), 230 (v.2), Vol 1, [9.438] (proposed sections 124G (1) and (2)).

128 John Chesterman, 'Civil rights: How Indigenous Australians Won formal Equality', (St Lucia, UQP, 2005), 3.

129 The Panel Report 89-92.

popular mandate for 'equality before the law' and 'the people' should not settle for formalising anything less at this referendum and to vote 'Yes' for the '[future implicit] recognition of equality for all citizens'.

Social recognition of racial equality will make a significant practical difference to the everyday lives of Indigenous people. However, legal change is also crucial if 'equality' is to be defended at law and as is likely, inevitably, to be necessary in at least some instances. A Constitution guaranteeing formal equality will in time enable the lawful, practical, social steps necessary for the acceptance of Indigenous people, culture, laws and civilisation to gradually find its rightful place in the life of the nation.

There are likely to be broad and perhaps even significant legal, social and political implications if 'equality' is implied in the Constitution. However, the real question is whether an advanced, industrial and modern economy such as Australia can be seen to be, other than fair and equitable as between her citizens, or to continue to allow inequality to be entrenched and Nazi type discrimination to be lawfully.

IV Conclusion

The 1967 referendum shows that the 'people' and the law must be clear and of one mind as to the legal effect of what is being proposed and endorsed at referendum. Symbolic change is important, necessary and this is the positive message of the 1967 referendum. However, a lesson for the recognition referendum is that the gap between popular perception and the practical legal effect of the adopted changes must be eliminated or at least be minimised.

This submission argues for the inclusion of both symbolic and substantive elements in the act of recognition of Indigenous people: (a) the removal of the 'race' provisions leading to an implied constitutional recognition of racial equality and (b) a broad, more positive symbolic constitutional recognition of Indigenous people as the first people of the continent, including a positive characterisation of Indigenous ways, custodianship and connection to land.

In doing this, the nation would make a powerful statement of the *complete rejection* of the '*values that gave birth to the [race] power*'.[130] Such change would also help to give effect to minority view in the *Leeth Case* which evinced a (latent) constitutional doctrine of equality before the law for *all* Australian citizens.

For 'recognition', Parliament should simultaneously ensure a generous symbolic statement of recognition of Aboriginal prior custodianship, including recognition of Indigenous people as the carers and custodians of the Continent, who have lived with its animals and plants for aeons, who have done so in a unique partnership for over 60,000 years and which represents the oldest continuous living civilisation on this planet. A symbolically powerful statement is extremely unlikely to be interpreted broadly in a 'rights creating' fashion by the Court. Parliament by its clear words could ensure that this preambular text was not intended to create positive rights, a concern that was expressed by the Government, when in Opposition.[131] No doubt the thought has crossed other minds.

On the other hand, 'near enough' is not, in the long term, anywhere near good enough. Constitutional reform is complex and there are well-known difficulties in amending the Constitution. It is therefore imperative to remember that these changes, positive or otherwise, will endure. Synchronising the legal position and contemporary community values will allow Australia to be at peace with itself, and to allow its other wonderful characteristics to be projected both domestically and internationally without this ugly and enduring racist blot drawing constant attention to itself or by being used by Australia's detractors, to embarrass her on the international plane.

Australian society is and remains perhaps a truer reflection of the intention of the type of egalitarian and anti-feudal society envisioned by the founders in its *best* sense. Rescinding the 'race' provisions from the Constitution will support and enhance this

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130 Robert French, 'The Race Power: A Constitutional Chimera' in eds., H.P. Lee and George Winterton 'Australian constitutional perspectives', 180, 185. (Emphasis added).

131 Brendan Trembath, 'Panel reports to Government on Indigenous constitutional change', ABC Radio National PM Programme 19 January 2012. <http://www.abc.net.au/pm/content/2012/s3411592.htm>.

egalitarian ethic. This submission argued that positive change can be achieved by people voting to '*Remove RACE from the Constitution and to entrench equality for all Australian citizens*'.

And finally: *Is Australia Ready to Constitutionally Recognise Indigenous Peoples as Equals?* At present the answer is, most likely, 'Not Yet'.[132] However, the positive and affirmative support for this proposition from the major political parties and a popular campaign supporting this simple message '*Remove RACE from the Constitution and entrench equality for all Australian citizens*', will most likely result in the vast majority, as they did in 1967, voting 'yes',[133] delivering the requisite double majority and thus long overdue recognition.

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132 The Panel Report, 264 (citing the Urbis Report).

133 The Panel Report, 264 (citing the Urbis Report).