

Cape York Institute

Constitutional Reform Expert Panel Submission - September 2011

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A Proposal for Non-discrimination and Indigenous Recognition

Australia's Constitution is completely silent on the prior and continuing existence of Indigenous Australians whose presence in this country pre-dated colonisation and federation. In 1900 our Constitution was "drafted in the spirit of *terra nullis*",¹ as though Indigenous people did not exist or were unimportant.

The time has come for the colonialist fallacy of Indigenous non-existence to be rectified in Australian law at the highest level. The unique cultures and languages of Indigenous Australians must finally be recognised in the Australian Constitution. This must be done to promote inclusion and unity, and to officially step away from our history of exclusion, separatism and racism with regards to Indigenous Australians.

Australia's Constitution contains racially discriminatory provisions that allow governments to pass adversely discriminatory laws on the basis of race. These provisions must be removed and equality before the law ensured through a new general protection against racial discrimination for all Australians. Australia must renew its out-of-date Constitution. We must recognise Indigenous people and ensure that every Australian is treated as equally before the law, regardless of race.

Cape York Institute's Constitutional Reform Project

Cape York Institute has conducted extensive research into Constitutions around the world to investigate the ways in which comparable democracies deal with issues of equality, non-discrimination, Indigenous recognition and recognition of Indigenous cultures and languages. We have also investigated the international framework in which Australia operates to inform our ideas.

Two roundtables were held this year with prominent Australian constitutional lawyers and Indigenous rights experts. We are grateful for the ongoing individual advice and expertise of these experts – in particular Professor George Williams at the Gilbert and Tobin Centre for Public Law at UNSW, Melissa Castan, director of the Castan Centre of Human Rights at Monash University and Danny Gilbert of Gilbert and Tobin lawyers. Our work has proceeded with the ongoing advice, ideas-generation and under the direction of the Institute's director, Mr Noel Pearson.

**"Equality is the basis for democracy.
We are all equal in the eyes of our
creator."**

(Owen Bale, QLD)

**"Every person in this land
deserves the dignity of
equality. My wish is that the
constitution recognizes the
Aboriginal and Torres Strait
people as part of the diverse
culture that makes up the
social fabric of this nation.
Equality for all!"**

(David Rowlands, QLD)

*quotes taken from public
submissions on youmeunity.org.au

¹ Patrick Dodson, Welcoming speech (Speech delivered at the Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993) quoted in B Attwood and A Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed, 2007), pp 146-147.

Cape York Institute's policy on constitutional reform is largely informed by the Institute's close on-the-ground knowledge of the challenges faced by Indigenous communities in Cape York, and the ways in which structural and legal barriers, still informed by out-dated colonial mentalities, continue to inhibit Indigenous development, participation in the real economy, both substantive and formal equality, and Indigenous wellbeing at all levels.

The Institute's welfare reform initiatives focus on Indigenous responsibility and rebuilding social and behavioural norms in Indigenous communities. Indigenous responsibility is of utmost importance in achieving wellbeing. However wellbeing will not be achieved unless Indigenous Australians enjoy equal rights. If Indigenous people, and all Australians, are not guaranteed equality before the law, we feel certain that substantive equality in Australia will not be achieved.

"Whenever I think about our people and our rights, I often reflect on promises that were made to keep us out of the way. This meant that our voice could not be heard ... My recommendation is for the constitution to recognise our cultural heritage as a right which provides the wider Australia with a unique identity in the world."
(Yabbagurri Broan, QLD)

Rights and responsibilities are two complementary and essential components of Indigenous empowerment. Indigenous Australians are still fighting for their "right to take responsibility"² in all aspects of their lives – most notably in their use and management of their land, and in their pathways towards development and wellbeing. Indigenous voices are still not being heard in matters concerning their own affairs. Indigenous Australian empowerment is still obstructed by the challenges of being a powerless, voiceless minority before governments and bureaucracies unaccustomed and uncompelled to listen to what blackfellas have to say.

In our work we are confronted every day with the stark reality that Indigenous Australians still do not enjoy equal rights in comparison with non-Indigenous Australians. We see first-hand the ways in which policies and laws enacted for the supposed benefit of Indigenous Australians often in subtle ways perpetuate disadvantage and discrimination, exacerbate passivity and welfare dependency, and may contribute to rather than help solve the overall problem of Indigenous disadvantage and disempowerment. We hear first-hand how discriminated against and excluded Indigenous Australians still feel.

We have tried, therefore, to formulate what we believe is a permanent structural solution to this ongoing problem – a solution that attempts to address the need for equality before the law and non-discrimination while acknowledging the importance of cultural distinctness and enrichment for Indigenous Australians and Australia as a whole, and importantly, giving Indigenous Australians a voice in our legal system in matters directly affecting them.

This submission explains the reasoning that has led us to conclude that the following proposed reforms would offer the best chance for the realisation of equality, and socio-economic and cultural

² See Noel Pearson, *Up from the mission – selected writings* (2009, Black Inc.), 'Our right to take responsibility', 143-171.

prosperity for Indigenous Australians. It also explains why we think that equality before the law is compatible with recognition of distinct Indigenous identity, and with a constitutional power to address the unique needs of Indigenous Australians, who occupy a distinctive political place in this country that no other group can occupy – the unique place of a colonised and dispossessed people.

We recognise that this paper’s argument may at first appear full of internal contradictions. For example, the need for equality before the law seems to contradict the need for cultural distinctness and diversity; the need for equal treatment before the law seems to contradict the implementation of a section 51 power with respect to Indigenous Australians. We believe, however, that these are not contradictions, but complementary and necessary principles required to facilitate national and Indigenous wellbeing within a fair post-colonial democracy. Noel Pearson has long advocated the quest for what he calls the “radical centre”: the “dialectical synthesis” that is the correct policy position in between competing philosophical ideals, or for example, between the political left and the political right.³ These proposals are, we believe, the radical centre in terms of constitutional reform for Australia.

We firmly believe that the proposed reforms would be of immense benefit to the wellbeing of Indigenous Australians and to the entire nation. These are reforms to promote equality, cultural respect, tolerance, peace, unity and forgiveness.

“I believe that indigenous peoples, those of Aboriginal or Torres Strait Islander descent, should be acknowledged in the constitution. They were the first people to set foot upon this country, and their culture is invaluable to the formation of modern Australia. Every man, woman and child is equal. Please include indigenous peoples in the constitution.”

(Amy Maynard, South Australia)

“If we are going to change the constitution then it makes sense for there to be National holiday which celebrates Indigenous culture. We have holidays for The Queen for a general Australia Day, but if we are talking serious recognition, then I don't see why we are not celebrating Indigenous Day...”

(David Burrell, NSW)

³ Noel Pearson, ‘White guilt, victimhood and the quest for the radical centre’, *Up from the mission – selected writings*, 219-262.

Executive Summary of Recommendations

Remove the Race Power

Section 51(xxvi) of the Constitution, the Race Power, should be removed as it allows adversely discriminatory laws to be passed on the basis of race.

Insert a replacement power to support laws for Aboriginal and Torres Strait Islander peoples

Insert:

Section 51 power to pass laws with respect to: Aboriginal and Torres Strait Islander peoples.

Remove section 25

Section 25 should be removed as it contemplates barring races from voting.

Insert a new general guarantee against racial discrimination

Insert: S 127

No law shall discriminate on the basis of race, colour or ethnicity.

Laws to redress disadvantage, ameliorate the effects of past discrimination, or to recognise or protect the culture, language and identity of any group do not constitute discrimination.

New review requirement for laws with respect to Aboriginal and Torres Strait Islander people

Insert: 127A

Laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, shall be periodically reviewed every ten years or more frequently to assess the effectiveness of the laws in achieving their intended objectives.

In assessing the effectiveness of laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, the views and aspirations of the Aboriginal and Torres Strait Islander people affected by the laws shall be taken into account.

Insert a new Australian languages provision

127B

The national language of the Commonwealth of Australia is English. All Australian citizens shall be provided the opportunity to learn, speak and write English.

The Aboriginal and Torres Strait Islander languages shall be honoured as the original Australian languages, a treasured part of our national heritage.

All Australian citizens shall have the freedom to speak, maintain and transmit the languages of their choice.

Possible preamble (if politically necessary)

We the people of Australia declare in the year 2013: that the Commonwealth of Australia, having come together in the year 1901, is a sovereign indivisible democracy; and a union of our Indigenous Australian cultures, our British and Irish heritage, and the gifts of Australians drawn from many nations, under this Constitution. God bless Australia.

Legislative Reforms*Equal Rights and Responsibilities Commission Act*

A *Rights and Responsibilities Commission Act* should be passed to establish an Equal Rights and Responsibilities Commission whose role would be to monitor and review all laws for Indigenous Australians in accordance with s 127A. The Commission would make regular recommendations to Parliament as to how any Indigenous-specific laws should be improved. Its function would be as a high level, independent research body similar to the Productivity Commission. Review of laws by the Commission would not in any way replace judicial review or the potential for laws to be challenged in the courts. The Commission's role would be to help ensure that the laws:

- adequately reflect the views and aspirations of the Indigenous Australians for whom the laws are intended
- foster independence and empowerment and do not foster passivity or dependence
- are proportionate to the aims of the legislation
- do not unfairly infringe on other individual rights and responsibilities
- are working effectively to address any existing poverty and are not perpetuating poverty or racism
- are enabling Indigenous Australians to enjoy equal rights and equal responsibilities with people in mainstream Australia
- where based on disadvantage, are only valid so long as the disadvantage exists
- are efficient, necessary, and not wasting funds

Languages Act

A *Languages Act* should be passed to establish a new National Indigenous Languages Centre (NILC), to promote English literacy, and to set up processes for regional practical recognition of Indigenous Australian languages. The NILC would:

- research, document and teach Indigenous Australian languages
- map Indigenous language groups, place-names and locations
- recommend practical measures for local Indigenous language recognition to promote Indigenous language use and development

Where local Indigenous language groups would benefit from official recognition of their Indigenous languages, the Act would enable governments to put in place mechanisms to ensure that:

- the Indigenous language is offered in schools and adult education centres in the area
- official documents are available in the language, and interpreters are available in courts
- road signs, place-names and landmarks are translated into the language alongside English

The Equal Rights and Responsibilities Commission would then monitor the effectiveness of language laws to ensure language measures are necessary, effective and in compliance with sections 127 and 127A.

The problem

Of the many problems Australia still faces with regards to Indigenous affairs, two problems are of utmost importance. One, Indigenous Australians still suffer disproportionate levels of poverty in Australia. They do not share in Australia's wealth. Two, Indigenous Australian cultures and languages continue to disappear. They are not shared with or enjoyed by all Australians. Indigenous Australian culture is a suppressed part of our Australian identity.

This is our opportunity to address these problems.

We ask: has the Australian Constitution created a structure which enables Indigenous Australians to achieve socio-economic parity in this country? And has it allowed for Indigenous Australian cultures and languages to prosper, and to be enjoyed by all Australians? The answer to both these questions is no.

Why hasn't the Constitution enabled Indigenous socio-economic and cultural prosperity and equality within Australia? The answer is, because it was not intended to. The Constitution was drafted deliberately excluding and ignoring Indigenous Australians. It was drafted, as Professor Patrick Dodson has argued, "in the spirit of *terra nullius*."⁴

Australia must now attend to these constitutional deficiencies. This is an opportunity to change Australia's approach to Indigenous policy and law. It is also an opportunity to resolve and define the position of Indigenous peoples within Australia and to become what we have been trying to be: "a reconciled indivisible nation."⁵

This is much more than a question of symbolism, though symbols are important.

The allowance of discrimination on the basis of 'race' in our Constitution is the wrong symbol, and it is wrong in practice. It sends out a divisive message, when we do not aim to be a divided Australia. We propose a move away from racial division, to a position of equality and inclusion.

But the changes we propose will also make a practical difference in the lives of Indigenous Australians. Past approaches have not worked to address the problems we identify here. The current race-based approach to Indigenous policy development and elimination of Indigenous poverty is flawed. It was born from a colonial system and has perpetuated colonial myths of Indigenous Australian inferiority, dependency and incapability. It expects little of Indigenous Australians. And low expectations are disempowering.

Past approaches have arguably perpetuated poverty, welfare dependency and passivity among Indigenous Australians, despite (in more recent times) our best intentions. Initial discriminatory protectionist approaches created inequalities and disadvantage. More recent 'special treatment' approaches, informed by ideas of cultural relativism, have sometimes inadvertently further entrenched exclusion and poverty, and in some cases exacerbated dysfunction. For example, modern 'soft' approaches to criminal law where perpetrators of crime are Indigenous have arguably been too lenient towards offenders and not diligent enough in protecting the interests of the victim. Race should not be a basis for leniency before the law. It should ideally not be a basis for differentiation before the law at all, except where there are sound and

⁴ Patrick Dodson, Welcoming speech (Speech delivered at the Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993) quoted in B Attwood and A Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed, 2007), pp 146-147.

⁵ Noel Pearson, *Up from the Mission – selected writings* (2009, Black Inc.)

justified reasons to the contrary, such as amelioration of the effects of past discrimination and dispossession.

We contend that a formal equality before the law approach is the only way to ensure that Indigenous Australians enjoy equal rights and equal responsibilities with people in mainstream Australia. To achieve reconciliation we need to recognise Indigenous Australians and recognise *the inherent equality of all Australians before the law*. Without a presumption of equality, we have nothing against which to judge whether governments' treatment of Indigenous people is fair and just.

Australia has never yet put in place mechanisms or guarantees to ensure the realisation of equal rights and responsibilities for Indigenous Australians. Indigenous Australians have, as Professor Patrick Dodson has correctly observed, for too long been the 'playthings' of politics and political trends.⁶ This is why real progress in Indigenous wellbeing has not thus far been achieved.

It is time for us to agree on the correct principles. If we are serious about substantive equality and equal life outcomes for Indigenous Australians, we must be serious about equal treatment before the law. Likewise, Indigenous Australian cultures and languages must finally be celebrated as an indispensable part of Australian identity. They must be supported to prosper and to be enjoyed by the entire nation, for the benefit of all Australians and indeed the entire world.

The reforms we propose put in place the legal mechanisms that will allow Australia, we think, to work effectively towards socio-economic and cultural prosperity for Indigenous Australians. It is not an overnight fix, but it is a clear pathway based on clear principles of equality. Closing the gap is to be achieved by expecting *more* of Indigenous Australians, not less; by listening to them more, not ignoring them.

We must start by admitting the errors we have made in our history. There has been too much adverse discrimination against Indigenous Australians. More recently, there has been too much 'positive' discrimination with adverse results, driven by white guilt and perpetuating Indigenous Australian victimhood. The "soft bigotry of low expectations" lingers on.

We contend that Australia must be done once and for all with feelings of guilt and national shame over past discriminatory policies and current inadequate outcomes.⁷ Indigenous Australians must now be guaranteed equal rights and equal responsibilities, along with all Australian citizens. Australia's history of Indigenous policy failure must end. The Australian nation must now do everything it can to ensure equality and success.

"I support the first people of what we now call Australia and their right to be recognised. With so much wealth in this land, that their ancestors cared for thousands of years, why are they so discriminated against? Why is there any discrimination at all?"

(Zoe McKinnon, Tasmania)

⁶ Patrick Dodson, 'Laws detrimental to Aborigines will diminish the nation', *The Australian*, 7 April 1998.

⁷ See Noel Pearson, 'While Guilt, victimhood and the quest for a radical centre' 16 (2007) *Griffith Review*.

Poverty

Indigenous Australians still suffer unfair levels of poverty and disempowerment in Australia. They suffer lower life expectancy, higher infant mortality, lower education outcomes, higher suicide, self-harm and domestic violence rates, and higher unemployment. More than half of the Indigenous population receives most of their income from government welfare.⁸

In 2011, Melbourne was deemed the world's most liveable city by the Economist Intelligence Unit, with 4 of Australia's capital cities appearing in the top ten.⁹ In the latest 2010 edition of the UN's annual International Human Development Indicators (HDI) publication, Australia ranked as the second most liveable country in the world, only marginally behind Norway and substantially ahead of America in third.¹⁰ This was based on a range of criterion that are normatively assessed, including mean years of education, life expectancy, poverty, inequality, and so on. While Australia's standing in nearly all of these fields is admirable, similar findings with respect to the Australian Indigenous community are comparably dismal.

Australian Aboriginal and Torres Strait Islander communities' health, education and prosperity figures show huge levels of disparity from those of the entire Australian community. They are also significantly poorer than the figures of the Indigenous communities of Canada, New Zealand and the United States.¹¹ This is a serious blight on Australia's international reputation, but more importantly it is a mar on our own cultural, moral and legal integrity, and shows a serious malfunction of our society as a whole.

The graphs below show how far behind Indigenous Australians remain compared to Indigenous groups around the world in terms of development and wellbeing.



⁸ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators Report 2007* (Productivity Commission, Canberra 2007) 3.54.

⁹ Economist Intelligence Unit, www.eiu.com

¹⁰ Human Development Index, <http://hdr.undp.org/en/statistics/>

¹¹ Cooke, Mitrou, Lawrence, Guimond, Beavon, *Indigenous well-being in four countries: An application of the UNDP's Human Development Index to Indigenous in Australia, Canada, New Zealand and the United States*, 2007.

<http://www.deepdyve.com/lp/pubmed-central/indigenous-well-being-in-four-countries-an-application-of-the-un-dp-s-x0MDu3yDBp>

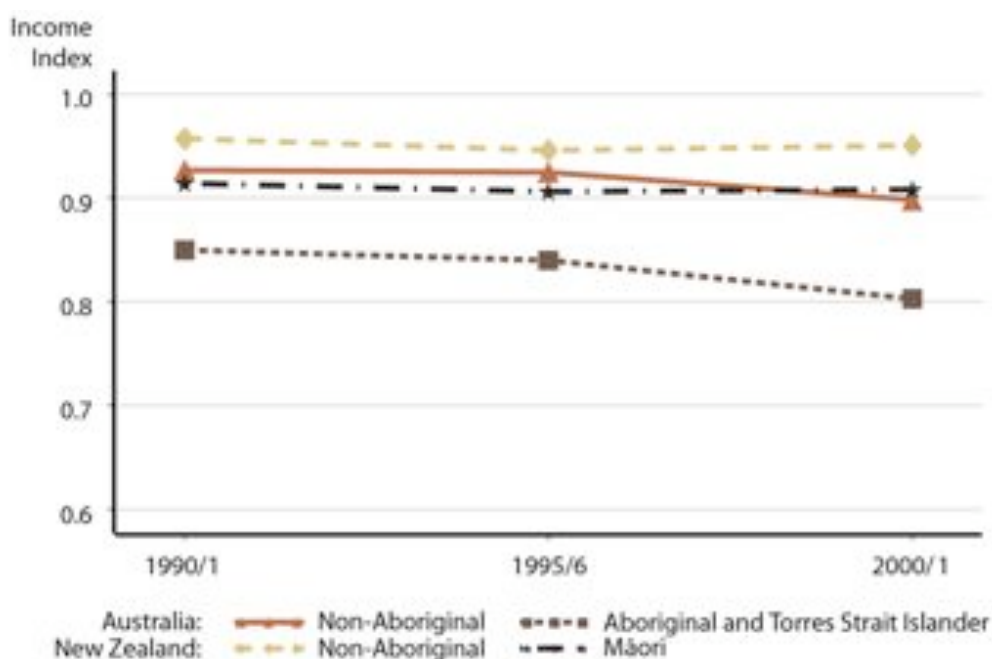
¹² *Ibid.*

Life expectancy at birth¹³

Table 3: Life expectancy at birth, years (Life expectancy index score)

	Australia Non-Aboriginal	Aboriginal and Torres Strait Islander	Aboriginal-Non-Aboriginal Gap
1990/1	80.2 (.920)	59.6 (.577)	20.6 (.343)
1995/6	81.4 (.939)	59.4 (.573)	22.0 (.366)
2000/1	82.8 (.964)	59.6 (.576)	23.2 (.388)
	Canada Non-Aboriginal	Canadian Aboriginal (Registered Indian)	Gap
1990/1	77.9 (.882)	70.6 (.760)	7.3 (.122)
1995/6	78.5 (.892)	72.2 (.787)	6.3 (.105)
2000/1	78.7 (.895)	72.9 (.798)	5.8 (.097)
	New Zealand Non-Aboriginal	Māori	Gap
1990/1 ²	76.4 (.856)	67.7 (.712)	8.7 (.144)
1995/6	78.0 (.883)	69.4 (.741)	8.6 (.142)
2000/1	79.6 (.910)	71.1 (.769)	8.5 (.141)
	United States Non-Aboriginal	American Indian and Alaska Native	Gap
1990/1	75.4 (.841)	70.2 (.753)	5.2 (.088)
1995/6	76.2 (.854)	71.1 (.768)	5.1 (.086)
2000/1	76.6 (.859)	70.6 (.760)	6.0 (.099)

Income Index¹⁴



¹³ Cooke, Mitrou, Lawrence, Guimond, Beavon, *Indigenous well-being in four countries: An application of the UNDP's Human Development Index to Indigenous in Australia, Canada, New Zealand and the United States*, 2007.

<http://www.deepdyve.com/lp/pubmed-central/indigenous-well-being-in-four-countries-an-application-of-the-un-dp-s-x0MDu3yDBp>

¹⁴ *Ibid.*

Despite the variety of Indigenous-specific laws and policies aimed at addressing Indigenous poverty, there is confusion around which laws are helping and empowering Indigenous people, and which laws are entrenching passivity and dependence. Some laws may in reality amount to unfair treatment. Some policies and programs are a waste of time and money.

Indigenous-specific law is sourced in the Race Power, historically a colonial tool to control and exclude the inferior races.¹⁵ Australia's approach to Indigenous policy therefore rests on a fundamental flaw.

The confusion is exacerbated by the absence of constitutional protection against racial discrimination, and the absence of any presumption of equality before the law. Indigenous Australians are subject to racially-targeted laws and policies without any constitutional requirement that policies be in the pursuit of equality, for 'advancement' or for 'benefit'.

But even if there were such a constitutional clarification of the Race Power, the practical meaning of what constitutes advancement or benefit is equally vague. Is CDEP a legitimate benefit? Or is it actually a hindrance to development and independence? Are the masses of government expenditure directed toward service delivery actually working to remedy Indigenous poverty? Or are some policies entrenching passivity and dependence? Who is keeping track? Who decides what benefit or advancement means? Do Indigenous Australians themselves get a say? Are we getting closer to our ultimate aim? And when will 'special treatment' no longer be required?

Our experience has been that, even where governments believe special laws for Aboriginal people have been made in our best interests, those very measures have only perpetuated the perception of our people as second class citizens, subject to an ongoing cycle of paternalistic and discriminatory policy practices.

(Mrs Doreen Eaton, Yamatji Marlpa Aboriginal Corporation)

We argue that, often, racially targeted laws have inadvertently diminished Indigenous equal rights and perpetuated passivity, welfare dependency and consequently, oppression.

Native Title has given communal, inalienable land to Indigenous

Australians, but it has not given individual private ownership or strong economic rights. Thus it often seems to prevent participation in the real economy, rather than encourage it. Indigenous Australians are not empowered with the economic ownership rights we have in mainstream society. And, Indigenous Australians are not given a say in how they want to manage their land, the law imposes this. CDEP has provided 'gammon' government-funded work in remote Indigenous communities, and has arguably therefore discouraged real employment. 'Soft' approaches to law enforcement and prosecution in Indigenous areas has resulted in lack of safety and an unfair treatment of the victims of crime.

Currently there are no processes in place to manage the ambiguity inherent in the Race Power in an accountable way. And, there are no agreed principles by which we can assess whether measures for Indigenous Australians are actually working. The wellbeing and development of Indigenous Australians is still, as it has been since colonisation, at the mercy of Australian political fluctuations.¹⁶

¹⁵ George Williams, 'Race vote should offer protection all round', Sydney Morning Herald, 27 September 2011.

¹⁶ Marcia Langton, 'The Australian federalism and race: the special cases of Queensland and the Northern Territory'.

Cultural loss

There is also a significant risk that Indigenous Australians will become as culturally impoverished as they are socio-economically. Australia is losing its Indigenous Australian cultures and languages. As Western market forces bear down on traditional Indigenous ways of life, cultural assimilation is often the result.

Before colonisation there were 250 distinct Indigenous Australian languages, and 600 dialects.¹⁷ Most of these are no longer spoken.¹⁸ Indigenous Australia has been described as “a linguistic graveyard”.¹⁹ While approximately 100 Indigenous languages still exist in some form,²⁰ 90% are near extinction.²¹ Only 18 remaining languages are still spoken at all generations within a community.²² The 2009 Social Justice Report predicts that “without intervention the language knowledge will cease to exist in the next 10 to 30 years.”²³ There is little government action to slow this steady decline.

Exclusion and victimhood

Then there is the question of recognition itself. How will constitutional reform alter the national psyche? How will it affect the psychologies of Indigenous individuals? Consultations with Indigenous people have indicated that Indigenous Australians feel excluded from the Australian nation. They feel that they do not belong. We have also heard Indigenous Australians confide that they feel as though white Australians hate them. These findings should be a cause of great sadness for the nation.

Our challenge now is to move from exclusion to inclusion. The Australian nation must extend this positive message to Indigenous Australians.

I am a woman of the older generation... I was brought up in a time when except for seeing the odd picture of an Aboriginal person in a history book, I did not know anything about them or their culture. I have seen many changes... the Stolen Generation where we were told that Aboriginal Children were better off with white families because they were not looked after, these policies were atrocious. I lived through the referendum that gave Aboriginal people the opportunity to vote as a whole, and I have seen the then Prime Minister Rudd's Apology to the Aboriginal People which to my mind was so necessary.... to see Indigenous Constitutional Recognition come to fruition in my time will make me extremely happy and proud that Australia has "grown up" and recognises the invaluable human resource this country has in its Aboriginal people... THE RIGHT TIME IS NOW. I want every Aboriginal man, woman and child including my grandchildren to be proud of who they are and have full equal rights to citizenship, which they haven't got yet, the referendum was just the beginning.

(Mavis Symonds, NSW)

¹⁷ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 57.

¹⁸ *Ibid.*

¹⁹ Suzanne Romaine, ‘Preserving endangered languages’ 1 (1-2) (2007) *Language and Linguistics Compass* 115, 121.

²⁰ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 58.

²¹ Suzanne Romaine, ‘Preserving endangered languages’ 1 (1-2) (2007) *Language and Linguistics Compass* 115, 121.

²² Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 58.

²³ *Ibid.*

The development problem

We contend that the only path to closing the gap is for Indigenous Australians to become active agents in their own development pathways. This section contextualises Indigenous poverty as a development problem that can only be solved by reversing the disenfranchisement of Indigenous responsibility and empowerment.

As Indigenous Canadian author Calvin Helin asserts, “The responsibility for getting out of the welfare trap rests, first and foremost, squarely on the shoulders of indigenous people themselves.”²⁴ Until we allow Indigenous Australians to take responsibility for their own lives, development and equality will not be achieved.

This is a fundamental shift from all Indigenous policies of the past. Indigenous policies to date have been premised upon exclusionary and hierarchical conceptions of ‘race’. They proceed from historical assumptions of Indigenous inferiority and incapability. These assumptions have convinced governments that Indigenous Australians are incapable, and in many cases, convinced Indigenous Australians themselves.

The Indigenous development challenge is at the core of Australia’s struggle to ‘close the gap’. Closing the gap in the current political climate refers to the long-term task of eliminating the socio-economic disparities that still markedly exist between Indigenous Australians and non-Indigenous Australians, with a particular focus on life expectancy, education outcomes, infant mortality and employment, as important indicators of prosperity and wellbeing.

But real wellbeing is that and much more.

Pre-colonial development history

We have moved beyond the colonial assumption that the Indigenous development predicament is a result of innate biological or genetic inadequacies peculiar to Indigenous people or the darker-skinned ‘races’. The Darwinian approach which characterises blacks as a less evolved species, or as the elusive ‘missing link’ between modern humanity and our ape-kingdom origins, has been discredited as a racist colonial device used to justify domination and enslavement.²⁵

The belief in the sub-humanity of Indigenous people underpinned the colonial idea of *terra nullius*. *Terra nullius* worked to justify the denial that Indigenous people existed, and the denial of Indigenous people as human beings entitled to human rights. These ideas have since been rejected.

The Indigenous development challenge now, therefore, must proceed from an honest analysis of the historical, cultural, social and legal factors that impede Indigenous development. These factors do not include the facile assumption that Indigenous people are stupid, inferior or incapable. There are no ‘fundamental deficiencies’ in Indigenous people themselves.²⁶ Such assumptions are self-defeating,

“...The Australian Constitution was written during and after the popularising of "Social Darwinism" theory, which was used as an unjustifiable excuse for the appalling levels of racism displayed within Australia and which also led to protectionist "white supremacy" attitudes and also the "white Australia" policy. This terrible and unfortunate legacy still lingers in Australia and the constitution desperately needs to be re-written to recognise and respect the values of ALL Australians.”

(Constitutional reform public submission)

²⁴ Calvin Helin, *Dances with Dependency – out of poverty through self-reliance* (2008, Ravenscrest Publishing) 167.

²⁵ Jared Diamond, *Guns, Germs and Steel – the fates of human societies* (2005, WW Norton and Company), 298.

²⁶ *Ibid.*

condescending and untrue.²⁷ They have led to ineffective policies that still inhibit Indigenous responsibility and empowerment today.

When the British colonised Australia, the resident Indigenous people were predominantly hunter-gatherers. As writers such as Diamond and Blaut have shown, the disparities in Indigenous development as compared to European were, at that moment in time, the result of a mixture of circumstances including geography and environment.²⁸ The nomadic hunter-gatherer lifestyle was, it is now understood, a 'sensible adaptation' to the given conditions of the Australian landscape.²⁹ It had nothing to do with Indigenous inferiority, stupidity, naivety or laziness, as was the predominant colonial view.

Equally, Europeans did not create the wealth and development Australia enjoys today out of the raw materials native to Australia, driven by some superior talent or penchant for productivity. Rather, as Diamond explains, English colonists imported into Australia from Europe and other parts of the world, all the elements of a "literate, food producing, industrial democracy."³⁰

Blaut argues that the fact of colonisation was also an integral factor in European development. Wealth was generated from resources and riches taken from the colonies and free or cheap labour provided by the people in conquered countries.³¹ By the time they reached Australia, the British had accumulated wealth from America, India, the Caribbean and Africa. The British arrived as a mighty force, and irreversibly altered the lives of Indigenous Australians.

Colonial contact

The British brought new weapons, technology, new clothes, new food, alcohol, and disease. They brought new domestic animals, new crops and agricultural methods. They brought with them the English language and Christianity, English law, with its notions of parliamentary sovereignty, the rule of law and representative democracy. Indigenous Australians were suddenly confronted with Western modernity. The new economic opportunity that Australia offered, realised through introduced processes of Western liberalism, went on to attract immigrants from all over the world.

Initial contact with the more developed British world irrevocably changed the environment in which Indigenous Australians had to survive. Indigenous people, previously accustomed to working hard for minimal food sources, having to hunt for meat, travel, and gather to collect plant food, were gradually bombarded with the surplus and comparative decadence of British culture. Colonising governments and missionaries began to use food hand-outs to befriend and entice Indigenous groups into learning about Christianity, or in humanitarian gestures. The invisible cost of accepting hand-outs could not have been foreseen by Indigenous people themselves, nor perhaps by those delivering the rations. But this was the beginning of welfare dependency.

The hunter-gatherer lifestyle was dramatically and conclusively interrupted. Colonial contact, as occurred all over the world, changed what survival meant for Indigenous people. This remains true today.

²⁷ *Ibid*, 19, 300.

²⁸ *Ibid*, 450.

²⁹ *Ibid*, 309.

³⁰ *Ibid*, 321.

³¹ J.M. Blaut, *The Colonisers model of the world – geographical diffusionism and Eurocentric history* (1993, The Guilford Press), 153.

Having disallowed traditional modes of Indigenous survival through a history of appropriation of land and forcible removal, how are Indigenous people today to survive? Must they assimilate, and lose their tradition, culture and identity altogether? Should they be cut off from the modern world to pursue a frozen-in-time hunter-gather lifestyle on homelands recovered through Native Title? Or is there some appropriate middle road? What is the best way for Indigenous people to prosper independently in this predominantly white-man's world, without becoming overwhelmed by Western vices, and without losing treasured Indigenous cultures, languages and identities?

We have come to a point in history where the right approach must be decided.

Despite the many political phases that have seen dramatic shifts in Australia's approach to Indigenous policy and development, none of these approaches have achieved the correct balance – a balance that respects unique Indigenous culture and identity, while allowing for full and equal participation in the opportunities and benefits of Australia's Western liberal economy.

Assimilation versus separatism

Past policies have gone from one extreme to another. In the assimilation era, success in developing Australia meant denial of Indigenous practice, conversion to Christianity, and adoption of Western culture.³² But such assimilationist policies were not successful in ensuring Indigenous wellbeing. They proceeded from a denial of Indigenous identity.

Wellbeing means more than socio-economic stability and prosperity. And admittedly, in the mission days of unequal and stolen wages, socio-economic prosperity was also far from achieved. In Queensland in particular, under the guise of 'development' and

'protection', Indigenous people were severely discriminated against by the state government. The result was widespread impoverishment and even starvation.³³ Mistreatment and removal significantly harmed the lives and culture of many Indigenous Australians.³⁴

We cannot call ourselves a civilised and modern nation if we do not offer equity to all people who live here. The abuses committed against Aboriginal people, the original people of this land, should not continue in the form of discrimination. End the inequality NOW! (Jann Gilbert, NSW)

The colonised, assimilated person, as Memmi describes, wears a mask. He lives a lie and is oppressed. In Australia, an Indigenous person who must suppress his culture in order to realise socio-economic prosperity, is not free.³⁵ He is subjugated in his own land and in his own skin, denied by the nation that should rightly be his home. True freedom means not only freedom from poverty. It means the freedom to express and maintain your cultural identity without discrimination. It means freedom to be yourself.

The onset of the 60's and 70's, the rights-driven era, saw new respect for cultural difference. 1967 removed the explicit exclusion of Indigenous people from Australia's Constitution. But the land rights era post-*Mabo* arguably swung too far in the opposite direction – the direction of cultural relativism and collectivism at the expense of individual rights and individual equality, driven by a misguided interpretation of 'self-determination' as mere separatism and collective treatment of Indigenous Australians – what Peter Sutton

³² See Bryan Keon-Cohen QC, *Mabo in the Courts* (Chancery Bold, 2011), 31.

³³ Marcia Langton, 'The Australian federalism and race: the special cases of Queensland and the Northern Territory'.

³⁴ *Ibid.*

³⁵ Albert Memmi, *The coloniser and the colonised* (Earthscan 2003).

describes as “racially defined political autonomy” taking precedence over vulnerable individuals’ rights to “wellbeing and safety”.³⁶

The Indigenous policies of our current era can be construed in some ways as a reaction to this relativism of the past. The current movement seems to be one of ‘practical reconciliation’, ‘closing the gap’, and more recently, ‘Indigenous responsibility’ and ‘welfare reform’.

All these political trends can be said to have been successful in certain aspects and ineffective in others.

Assimilation and protectionism implemented integration at the expense of Indigenous culture, identity, families and Indigenous equal rights. The self-government era was effective in securing separate identities and land, but ineffective in addressing poverty, respecting individual rights, allowing economic participation, and maintaining social norms, law and order and community safety. All the while, alcohol abuse and welfare dependency began to infect all corners of Indigenous experience, generation to generation. These destructive influences still stand in the way of Indigenous wellbeing at all levels.

While welfare reform, our most recent innovation, has been successful in taking the small steps towards reinstating social norms, promoting education and championing Indigenous responsibility, it has arguably not done enough to prevent cultural loss and extinction of Indigenous languages.

And still, the question of equal rights and equality before the law remains unanswered. How can we expect equality in life outcomes for Indigenous people, if we do not ensure they are treated equally before the law? How can we expect Indigenous people to behave with responsibility, when we deny them equal rights? Indigenous Australians still do not have equal opportunities in Australia. Until equality before the law is the over-riding presumption, Indigenous Australians will still not truly be given a ‘fair go’.

We contend that cultural recognition and equality are wholly compatible. Indeed, we contend that they are two sides of the same coin, tied together just as rights are tied to responsibilities. Colonisation has almost wiped out Indigenous cultures and languages. Indigenous Australians have historically been denied the equal opportunities to practice their cultures freely. Remedying this is part of remedying the effects of past discrimination – part of ensuring equal opportunities and equal rights.

The recognition problem³⁷

The Expert Panel’s terms of reference refer to Indigenous constitutional ‘recognition’. But what does recognition of Indigenous people actually mean?

“To the Panel - I acknowledge and respect the vision of a nation that recognises the culture and history of Aboriginal and Torres Strait Islander peoples, values their participation and provides equal life chances for all. Thank you, for this opportunity to put right the “wrongs of the past.”

(Lis Mortimer, NSW)

Arguably recognition means acknowledgement of distinct identity and existence. Historically, Indigenous people have been systematically excluded or ignored

³⁶ Peter Sutton, *The politics of suffering – Indigenous Australia and the end of the liberal consensus* (Melbourne University Press, 2009), 10.

³⁷ This section is taken from Shireen Morris, ‘Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary’, forthcoming publication in the *Indigenous Law Bulletin*, 2011.

in Australia's Constitution. The Constitution is our founding document. It is the supreme source of law in Australia and "sets the rules by which Australia is governed."³⁸ However its drafting is still infused with the racist and colonialist attitudes of 1900.³⁹ Despite the 1967 referendum, our Constitution remains a relic of institutionalised racism, inappropriate to Australia's values.

The 1967 referendum removed the explicit exclusion of Indigenous people from the Constitution. It amended of the exclusionary wording of the s51 (xxvi) 'Race Power', thereby including Indigenous people within its scope. It also removed s127 of the Constitution which was a provision disqualifying Indigenous people from being counted in the official Census. But the 1967 reforms did not include any positive mention of the Indigenous history preceding colonisation and federation.

Ironically, the 1967 referendum turned explicit exclusion of Indigenous people into a constitutional silence, perpetuating a myth of Indigenous non-existence comparable to the colonial mindset of earlier times. This non-mention of the prior and continuing existence of, ownership and occupation by Indigenous people can be seen as akin to an institutionalised assertion of *terra nullius*.⁴⁰

Terra nullius was wrong because it denied that Indigenous people existed, or asserted that Indigenous people lacked the social and political organisation to warrant equal treatment or recognition. It rendered Indigenous people politically and legally invisible, to suit the colonial objectives of domination and dispossession of land.⁴¹ The *Mabo* decision overturned the presumption of *terra nullius* as a fallacy in Australia.⁴² It is therefore important that Australia's Constitution is modernised to align with our social, political and legal values.

It seems ridiculous that this has never occurred before now. As an immigrant Australian I want to see my adopted country acknowledge and recognise this nation's indigenous people. It's time to do what we can together to right so many wrongs from the past.

(Nicola Ruddle, QLD)

The desired future

We have briefly discussed our two most pressing problems in Indigenous affairs. First, Indigenous Australians still suffer unfair levels of poverty in Australia. Second, Indigenous Australian cultures and languages are disappearing. A subsidiary point is that there is no mention of Indigenous existence in the Constitution at all. This is akin an institutionalised assertion of *terra nullius*, and a false representation of our national history and the circumstances in which our federation was created. These are the problems we need to address. We move now to our vision. What is our desired future?

Our vision is this.

We want the gap to be closed. We want Indigenous Australians to achieve wellbeing. Wellbeing means social, economic and cultural prosperity. We want Australia as a country to achieve wellbeing. Australia should be socially, economically and culturally prosperous.

³⁸ George Williams and David Hume, *People Power – the history of the referendum in Australia* (2010, UNSW Press) 10.

³⁹ George Williams, 'Thawing the frozen continent' (2007) *Griffith Review* 13, 26.

⁴⁰ 'Terra Nullius' means land inhabited by no one, or inhabited by people without political or social organisation. See 'Terra Nullius', Encyclopaedic Australian Legal Dictionary (Lexisnexis Australia, 2004).

⁴¹ 'Terra Nullius', Encyclopaedic Australian Legal Dictionary (Lexisnexis Australia, 2004).

⁴² *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

We want Indigenous Australian cultures and languages to be enjoyed by all Australians, and the entire world. We want them to live and develop as modern cultures and languages.

We want all Australians to enjoy equality before the law, equal rights and equal responsibilities. We want to truly be able to say that Australia is a nation that denounces and guards against racism. We want a reconciled indivisible Australia that will ensure stability and peace for future generations.

We want a Constitution that will serve all Australians well into the future. It should be good for another millennium.

We want the final solution to the “Indigenous problem”. We do not want to have to revisit the issue of constitutional reform for Indigenous Australians again.

Finding the development solution – equal rights and equal responsibilities

The Indigenous development challenge is a quest for Indigenous, and national, wellbeing. Here, we have defined it as social, economic and cultural stability and prosperity. It means that every individual in Australia should be free and secure in their identity within a diverse and unified nation.

In achieving wellbeing for Indigenous Australians, economic development and cultural development are both necessary. One without the other is unacceptable. Indigenous Australians must be free from poverty *and* they must not lose their cultures. Money and culture are equally important.

In our Western liberal society, money means empowerment and participation. But non-material questions of identity and heritage are equally important. Knowing one’s culture is respected and accepted, even celebrated, is how we feel worthwhile and included as human beings.

It is a shameful and inexcusable stigma on Australia that Aboriginal and Torres Strait Islander peoples are not mentioned in our national constitution as the first Australians; and that the Australian constitution still permits racial discrimination, making Australia the only country with a constitution that allows for discrimination against its Indigenous peoples based on their race.

(Margaret West, NSW)

How do other groups achieve wellbeing in Australia?

Contrary to the views of Gary Johns and others,⁴³ Indigenous people, like all human beings, deserve both cultural richness and socio-economic parity. The difficult question is whether Indigenous culture is impeding Indigenous Australians from achieving socio-economic success in the mainstream. This question is not an easy one, but it must be investigated honestly. It must also be put into context. Many other non-Western, non-British cultures immigrate to Australia and achieve socio-economic prosperity without losing their distinct cultural identities. What is the difference with Indigenous people?

The difference, arguably, is about equal rights, individual choice and empowerment.

When immigrants migrate to Australia they generally do so of their own volition, with their own plans, dreams and aspirations, and are able to pursue their plans freely with equality under Australian law. Taking a

⁴³Gary Johns, *Aboriginal Self-determination – the whiteman’s dream* (Connor Court Publishing, 2011), 76.

bird's eye historical view, Indigenous hunter-gatherer lifestyle was, by comparison, unexpectedly interrupted. The cultural clash with Western domination was phenomenal and almost fatal. For many generations, Indigenous Australians were not afforded equal rights and have not enjoyed equality before the law. They were explicitly excluded. A variety of laws and policies were at work to keep them down. Arguably, Indigenous Australians are still subject to unequal treatment before the law. An Indigenous Australian today is not afforded equal rights in the same way that an immigrant, or a child of an immigrant is.

Similarly, when immigrants arrive they are free to pursue their *cultural* development. They have not suffered, as Indigenous people historically have, laws against the use of their languages, forced assimilation, forced removal, destruction of family units, and missionisation in Australia. They have not suffered land loss in Australia, and thus loss of their most important economic assets, and the links to their traditional ways of life at the hands of Australian governments. Additionally, they are generally not subject to racially targeted laws by Australian governments under the Race Power. While the Race Power was initially aimed at immigrants, these days it is only used for Indigenous Australians. These racially-targeted laws have arguably often impaired Indigenous rights and responsibilities, both historically and in recent times. They have also perpetuated beliefs about Indigenous inferiority and incapability that have had massive adverse impacts on Indigenous Australians.

If the child of an immigrant born in Australia inherits property that their family owns in Australia, that person inherits a fee simple, a full fungible property right. This property right aids the person's participation in the real economy. The property right can be used any way the person likes. It can be mortgaged or sold, or kept for the person's children as a family asset. It is that person's choice what he or she does with the asset. Australian law allocates free choice to the child of the immigrant.

If an Indigenous Australian inherits property from his or her family under the special land law created for Indigenous Australians – Native Title – he or she essentially inherits a dead asset (in economic terms). That person gets an inalienable, communal, non-economic, non-fungible property right. It does not aid participation in the real economy because it cannot be sold or mortgaged. Economic use rights are extremely limited and complicated. That person's free choice as to how use his or her asset is explicitly restricted by the Australian law. While the child of an immigrant is afforded equal rights before the law, the child of an Indigenous Australian is not. It is little surprise, therefore, that there are many Indigenous Australians surviving on welfare in remote Indigenous homelands.

Such is the result of the perverse logic of many Indigenous-specific laws.

In Native Title the logic is this: we will give you land, but we will give it to you in what we (governments and law-makers) deem is a 'culturally appropriate' way. Because your culture mandates that you are hunter-gathers with no desire to develop, we will give you 'berry-picking rights'.⁴⁴ We will give you communal title because your culture is communal. It will be inalienable because you don't own land, land owns you. Your land ownership is defined by your 'spiritual connection'. In the modern context this mostly means: you want to hunt, fish and hang out on welfare.

There is no acknowledgement, it seems, that *all* our cultures are communal cultures, probably even to this day. We are all members of communities. All our cultures had or have spiritual relationships to land and

⁴⁴ Noel Pearson, 'Promise of Mabo not yet realised', *The Australian*, 29 May 2010.

nature. All our people were once hunter-gatherers. And yet Australian law does not enforce this history upon the rest of our futures. Why?

We have grappled with this question a lot. We think the reason is racism and colonialism. These ideas about natives and their relationships to land were perpetuated by colonialists all over the world, because they worked to deny the natives full property rights. It was a good way to facilitate domination and exploitation of land. Colonisers are renown for developing theories that suit their interests. Blaut explains the argument precisely:

“One such theory was the postulate that non-Europeans have not developed concepts of private property in important material resources such as land. The theory asserted that private property emerged from ancient European roots... that other civilisations, lacking this history (and by implication, lacking mental and cultural qualities associated with this history), remained at a stage of evolution in which true individual ownership could not be fully conceptualised... In fact, the theory was developed mainly by lawyers and administrators in the European colonial offices and corporations, and had one very concrete purpose: to establish a legal basis for expropriating land from colonised peoples, on the fiction that the colonised had no property rights to this land because they had no *concept* of property rights in land.”⁴⁵

The question we now must ask in relation to achieving equality in the present day is this. What happens, in this logic, to an Indigenous individual’s free choice? We can never expect Indigenous Australians to prosper and pursue equality if they are not given the free choice to do so.

Every other culture in Australia is allowed to manage the land they own however they wish. But Indigenous Australians are generally not afforded this choice. They are still, as they always were, told what to do and how to do it. Indigenous responsibility is still denied and individual rights ignored in favour of collectivist assumptions.

Indigenous *irresponsibility* is thus exacerbated and perpetuated.

Modern day leftists would often argue that we shouldn’t give Indigenous Australians full and equal property rights, because their land should be preserved for future generations. In other words, they cannot be trusted to make this choice for themselves. They will make the wrong decisions. They will make mistakes. They will lose their land. It is therefore for their own good that we restrict Indigenous Australians’ property rights.

This logic ignores the fact that with equal rights come equal responsibilities. And with real responsibility, comes risk. Being a real owner requires the ability to manage that risk. This is not say we should freehold the lot, throw Indigenous Australians in the deep end and watch the market swallow everything up. No. What we are asking is: where is the choice? Why shouldn’t Indigenous Australians themselves decide on the combinations of communal and individual, alienable and inalienable tenures that suit them for their land? When will we allow Indigenous Australians the right to take equal responsibility? In *Gerhardy v Brown*, Justice Wilson commented:

⁴⁵ J.M. Blaut, *The Coloniser’s Model of the World – geographical diffusionism and Eurocentric history* (1993, The Guildford Press), 25.

“The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that a people exercise and enjoy equally with others their human rights and fundamental freedoms. Apartheid destroys that possibility.”⁴⁶

The assumption has been that if Indigenous Australians do want to enjoy equal rights and fundamental freedoms, in property rights and in other arenas, they must leave their homelands. They must somehow save up money and buy a block of freehold outside their Native Title area – because they cannot own individual property within it. The current approach offers no middle ground. We have economic apartheid.

This must change. It is wrong to keep applying the coloniser’s logic, both in land law and across all Indigenous policy.

The problems we are facing today are perhaps unsurprising. The Race Power, and the policies it has inspired, were born in a colonial time and are infused with colonial values. It is no surprise therefore that Indigenous policy has erroneously proceeded from generalised assumptions of Indigenous inferiority, incapability, and separateness, with a racist premise at its source. Confronting the Race Power involves confronting our deepest assumptions with regards to Indigenous affairs. Once we confront them, the next brave step is to admit that these assumptions are incorrect.

The incorrect assumption that Indigenous Australians are inferior and thus dependant has created widespread welfare dependency. We have spent generations excluding Indigenous people and telling them, through our laws and policies, that they are unequal, incapable and irresponsible. Is it any surprise that lack of confidence, lack of initiative, passivity and fear are still crippling Indigenous communities today? This mentality must change. Change must be compelled from the top down, as well as in the hearts of Indigenous Australians themselves.

Here we propose that Australia must become a world leader in rising to the Indigenous development challenge. We propose that constitutional and legislative reform put in place the mechanisms to allow for development, realisation of equal Indigenous rights and responsibilities, as well as cultural prosperity.

Thus far, Australia has not provided the legal framework to allow this to happen. Indigenous Australians have never been allowed to take an active role in determining their own development pathways.

Rather, Indigenous Australians have been fighting a system geared against their economic participation and geared against their cultural development. In some ways, the effects of this system on Indigenous Australians have been inevitable. For this was a colonialist system. As such, colonial racism still flows inadvertently through all our Indigenous laws and policies, seeping down from the very top of our legal system and poisoning the way in which everything grows. Most Australians, of course, are immune to its effects. This poison does not tend to affect the white majorities. Nonetheless in our complacency it lingers on, thwarting Indigenous and Australian wellbeing, as long as we allow it.

“I believe a modification to the Constitution should be made to reflect the modern values Australia's population now holds; we should embrace the multicultural diversity that we have.” (Sydney Tang, NSW)

⁴⁶ *Gerhardy v Brown* (1985) 57 LR 472, 552.

Separating cultural development from economic development

Remnant racism is not the only thing holding Indigenous Australians back. As noted, in Australia both British settlers and generations of immigrants have forged successful lives by following the liberal development path. Successful cultures across the world pursue economic prosperity through capitalist means. These cultures, despite having grown from ancient spiritual beliefs equally rooted to their hunter-gatherer origins and close connections to the land, just like Indigenous Australian people, find a way to reconcile their cultures with the imperatives of liberal capitalism. They find a way to engage with other cultures, and the world at large, and not only to engage, but to compete. Competition is at the core of all development. The development challenge is therefore also a challenge presented by the imperatives of globalisation. Indigenous people cannot cut themselves off from the rest of the world. They must embrace it and be embraced by it. Australian law must allow them the freedom to do this.

But while Indigenous Australians must find a way to reconcile their cultures with modern imperatives, they must find a way, nonetheless, to maintain cultures and pursue cultural development in order to achieve total wellbeing. Noel Pearson wrote:

“There can be no policy for development that is not founded on the three key articles of liberal philosophy: self-interest, choice and private property. There is no closing the gap without Adam Smith. It has been necessary to forcefully advocate these liberal principles because the belief that indigenous Australia is an exceptional case is widespread. There is no separate development path for indigenous Australia.... (But) if the engine of self-interest is cranked up, if the incentives structure is right, if people exercise choice, if the institution of private property is well developed, if there is social democrat provisioning of opportunity -- our lives will still be unfulfilled. What we human beings really want to do are things like studying the Bible and Talmud in the original Hebrew, Greek and Aramaic, or maintain Aboriginal Australian languages in order to uphold week-long song cycles such as those of the Yolngu in Arnhem Land.”⁴⁷

Our challenge in pursuing constitutional and legislative reform to ensure both the well-being of Indigenous Australians and the Australian nation is to support Indigenous Australians in finding a way to maintain but reconcile their traditional cultures with the modern Western liberal imperatives required to succeed in a capitalist market.

And we must be realistic. Some elements of traditional Indigenous lifestyles will need to adapt if people are to achieve socio-economic success in the mainstream economy. Discussing the parallel developmental challenge faced by African Americans, Dinesh D’Souza wrote in *The End of Racism*:

“The supreme challenge faced by African Americans is the one that Booker T. Washington outlined almost a century ago: the mission of building the civilizational resources of a people whose culture is frequently unsuited to the requirements of the modern world.”⁴⁸

D’Souza argues, controversially perhaps, that black Americans will need to reject some cultural attributes and embrace mainstream cultural norms more conducive to success in the mainstream economy. Indigenous Australians may similarly need to select which elements of culture work for them. For socio-economic prosperity and success, they may have to let go some aspects of their cultures in preference for some

⁴⁷ Noel Pearson, ‘Conservatism too is relevant to our culture’, *The Weekend Australian*, 31 July 2010.

⁴⁸ Dinesh D’Souza, *The End of Racism* (1995, The Free Press), 554.

pragmatically chosen mainstream behaviours conducive to success in the mainstream. This is what D'Souza perhaps inappropriately terms 'white culture' or 'Asian culture' in the American context.⁴⁹ What he means is that some cultures are better suited to success in a Western capitalist environment. The stereotypes are well-known in Australia too. Indian and Asian students are renowned for their work ethic – they study hard and dominate academically. Jewish families are equally exalted for their savvy business prowess.

Stereotypes aside however, Indigenous people may need to adopt the productive elements of economically successful cultures and incorporate these behavioural traits into their own adapted culture. Hard work will be unavoidable. The Jews, Indians and Chinese generally remain culturally distinct in Australia, but they seem to know how to work hard and succeed in a "white-man's" world. Importantly, Indigenous people must be supported to figure this path out for themselves, and in their own way. Cultural loss should be avoided. Socio-economic failure is equally unacceptable. Indigenous Australians need to maintain modern forms of their languages and cultures, while succeeding in the Western economic world.⁵⁰

The Meiji moment

Noel Pearson has described the important moment at which the Japanese managed to separate their ancient culture from the imperatives of capitalism. This 'Meiji' moment in the history of various peoples happened in vastly different ways. In the case of the British, it evolved as liberal capitalism developed. In the case of the Jews, they were making accommodations between their orthodoxy and their dealings with Gentiles in the marketplace over a long period. Sometimes there was a steady social and cultural evolution, and sometimes it was a conscious political and cultural realisation and decision.

But unlike other peoples who have contended with the challenge of development and cultural determination, and unlike immigrants to Australia, Indigenous Australians have been never been allowed to self-determine their answer to the challenge.

Through discrimination they were prevented from access to development. Following this, the welfare era did not allow Indigenous Australians to self-determine their own reconciliation between development and culture, because welfare is choice without consequence, choice without responsibility: therefore not a real choice.

The choices that Indigenous Australians might be said to have made (I want to maintain my traditional cultures but I still want to have all the vices of the Europeans, I want passive welfare to enable us to maintain our traditional lifestyles) were and are not real acts of self-determination.

Indigenous Australians must now be empowered to take charge of their own development. The case for a constitutional 'Meiji' moment in time is clear. Without it, self-determination is the welfare version. And in terms of cultural determination, at every turn Indigenous Australians harbour the fear of assimilation. The virulent but sometimes subtle antipathy of white Australians to the existential claims of Indigenous Australians understandably is the source of the Indigenous Australian anxiety.

We need a constitutional imprimatur for the development formula and for the cultural existence formula. Nothing short of this will provide the needed clarity.

⁴⁹ *Ibid*, xxvi.

⁵⁰ Noel Pearson, 'Conservatism too is relevant to our culture', *The Weekend Australian*, 31 July 2010.

Conclusion – reconciling traditional culture with modern imperatives

Western liberal economy has arrived in Australia. It is not going away. Cultural characteristics aside, there is indeed no closing the gap in Australia without Adam Smith.⁵¹ The path of liberal development and economic participation is the only successful and viable path, regardless of culture or ethnic background. This is a universally true paradigm.

If Indigenous people are not afforded equal rights and equal responsibilities, free from remnants of institutionalised racism and policy mindsets that perpetuate the dependence and passivity begun in colonial times, socio-economic parity will never be realised. We must provide Indigenous Australians with equal opportunities if they are to have a chance at success.

Likewise, if Indigenous languages and cultures are not saved from complete extinction, Indigenous and national wellbeing will never be achieved. Our aim, we must remember, is a reconciled indivisible nation in which Indigenous Australians, and all Australians, are socially, economically and culturally prosperous.

We argue that the only way to achieving this aim, a method which has not yet been pursued in Australia (much to the dismay of the rest of the world) is one of formal equality before the law, under strict accountability. The only solution is equal rights. And importantly, with equal rights comes equal responsibilities.

If Indigenous people are truly given equality before the law and equal opportunities to pursue socio-economic success and cultural determination, if all remnants of racist structural barriers are removed, then the Australian nation will have done its job.

Indigenous wellbeing is then the responsibility of every Indigenous individual.

Removal of Racism

Removal of structural barriers⁵²

Eliminating ‘race’ and racism from Australian law is an essential part of removing structural barriers to Indigenous Australian development. As we have argued, the inclusion of ‘race’ in our Constitution is a product of colonial exclusion of Indigenous people and the ‘inferior’ races. It has perpetuated colonial myths about Indigenous incapability.

The causes of disadvantage, dysfunction and disempowerment in Indigenous communities are both behavioural and structural.⁵³ As Noel Pearson explains, Indigenous people suffer both inherited trauma, the after-effects of past discriminatory policies, dispossession and colonisation, and personal trauma, referring to the current individualised suffering arising from dysfunctional environments and pervasive addictions both caused and exacerbated by passive welfare dependency.⁵⁴ While immediate personal traumas must continue to be addressed immediately, removal of the remnants of institutionalised racism is part of the overall solution to Indigenous disadvantage.⁵⁵ Structural barriers to Indigenous advancement and wellbeing

⁵¹ Noel Pearson, ‘Conservatism too is relevant to our culture’, *The Weekend Australian*, 31 July 2010.

⁵² This section is taken from Shireen Morris, ‘Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary’, forthcoming publication in the *Indigenous Law Bulletin*, 2011.

⁵³ Noel Pearson, *Up from the mission – selected writings* (2009, Black Inc.), 163-165.

⁵⁴ *Ibid.*

⁵⁵ Cape York Institute for Policy and Leadership, ‘From Hand Out to Hand Up, Cape York Welfare Reform Project’ (2007), 17.

must be removed if Indigenous Australians are to achieve socio-economic and cultural prosperity in parity with other Australians.⁵⁶

Welfare reform strategies aim to enhance individual and family responsibility and rebuild social norms.⁵⁷ Responsibility-building programs like this are essential. But equal rights and equality before the law are also essential in tackling disadvantage. Structural barriers must be addressed because they impede attempts to confront behavioural problems in Indigenous communities, and they make policies targeting behaviour less effective.⁵⁸ As long as our legal system gives Parliament an unchecked power to pass racially discriminatory laws, there will never be true equality in Australia. Being a small minority, democratic checks and balances alone have proven to be ineffective in protecting Indigenous Australians from adverse discrimination.⁵⁹ Only constitutional amendment will resolve this.

The Race Power⁶⁰

Section 51(xxvi) of the Constitution provides Parliament with the power to make laws relating to “the people of any race for whom it is deemed necessary to make special laws.”⁶¹ The provision contains no requirement that these laws be beneficial. In fact, courts have confirmed that the Race Power can probably be used for beneficial or adverse use.⁶²

In the modern context, the Race Power is generally used for laws aimed at Indigenous Australians. This was not always the case. The Race Power was intended to pass discriminatory laws against ‘alien races’,⁶³ particularly to exclude “Asiatic or African aliens” from the goldfields and to easily control “undesirable immigrants”⁶⁴ such as Chinese, Indian, Afghan and Japanese settlers and workers.⁶⁵ The racism embedded in colonial attitudes of the time was not restricted to Indigenous people.⁶⁶ Initially, Indigenous people were excluded from the Race Power’s operation, either because it was widely believed that Indigenous people were a dying race⁶⁷ whose future was inconsequential, or because they were the responsibility of the states.⁶⁸

“The Australian Constitution is not a fair Constitution and was written by people who were racist.”

(Mhyrlyn Hanson-Wallis, Tasmania)

Professor George Williams explains that the Race Power “was deliberately inserted into the Constitution to allow the Commonwealth to discriminate against sections of the community on account of their race.”⁶⁹ The

⁵⁶ See Noel Pearson, *Up from the mission – selected writings* (2009, Black Inc.), ‘Our right to take responsibility’, 143-171.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Noel Pearson, ‘A structure for empowerment’ (The Weekend Australian) 16-17 June 2007.

⁶⁰ This section is taken from Shireen Morris, ‘Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary’, forthcoming publication in the *Indigenous Law Bulletin*, 2011.

⁶¹ *Commonwealth of Australia Constitution Act*, s 51(xxvi).

⁶² *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 376; As George Williams explained, in the *Hindmarsh Island Bridge Case*, the court was actually “split on whether the races power can still be used to discriminate against Indigenous or other peoples. This fundamental question remains unresolved,” George Williams, ‘Thawing the frozen continent’ (2007) *Griffith Review* 13, 27.

⁶³ Bain Attwood and Andrew Markus, *The 1967 Referendum – race, power and the Australian Constitution* (Aboriginal Studies Press 2007), 2.

⁶⁴ Constitution Convention Debates, Hansard 3-1 1898.

⁶⁵ *Final Report of the Constitutional Commission, summary* (Australian Government Publishing Service, 1988), 54; see also Law Council of Australia, ‘Constitutional recognition of Indigenous Australians – discussion paper’ 2011, 20.

⁶⁶ Justin Malbon, ‘The Race Power Under the Australian Constitution: Altered Meanings’ (1999) 21(1) *Sydney Law Review* 80, 79.

⁶⁷ Bain Attwood and Andrew Markus, *The 1967 Referendum – race, power and the Australian Constitution* (Aboriginal Studies Press 2007), 1.

⁶⁸ Michael Kirby, ‘Constitutional law and Indigenous Australians: challenge for a parched continent’, paper delivered at Law Council of Australia forum, ‘Constitutional change: recognition or substantive rights?’, 22 July 2011, 19.

⁶⁹ George Williams, ‘The races power and the 1967 referendum’ (2007) 11 (SE) *Australian Indigenous Law Review*, 8.

Power is therefore “inherently discriminatory.”⁷⁰ Michael Kirby says the Race Power “reflects nineteenth century concepts of racial superiority and paternalistic interventions for ‘the natives’”...(and) is a relic of colonial thinking.”⁷¹

The existence of the Race Power in the Australian Constitution, without any protection against adverse discrimination, is incompatible with our values and our obligations to eliminate racial discrimination.

As the 1988 Constitutional Commission Report stated:

“It is inappropriate to retain section 51(xxvi) because the purposes for which, historically, it was inserted no longer apply to this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based.”⁷²

The existence of s 25, a “provision as to races disqualified from voting”, further demonstrates our need for constitutional modernisation.

What is the relevance of ‘race’?⁷³

Laws which apply to specific races are problematic in a society that strives to be democratic, free and equal. The application of laws to specific races of people also poses practical and philosophical problems given the mixed cosmopolitan nature of Australia’s post-colonial society. The concept of race is difficult to accurately define. Is it to be ascertained purely through physical characteristics, even though these actually vary within races more than between? Today, the notion of race has mostly been discredited. As Human Rights Equal Opportunity Commission (‘HREOC’) explained:

“...there is only one race - the human race. The overwhelming weight of authority proves that as a scientific and anthropological matter, the notion that people can be definitively categorized and classified into different races is a myth. The mapping of the human genome provides irrefutable proof of this fact. Race is a social construct, frequently used for political means.”⁷⁴

Importantly, the notion of race as a biological reality provides the very premise for racism itself. Dinesh D’Souza writes that “racism is an ideology of intellectual or moral superiority based on the biological characteristics of race... in order to be a racist, you must first believe in the existence of biologically distinguishable groups or race.”⁷⁵

Of course, while classifications according to race may be scientifically dubious, they still exist as a social and political construct. Thus racial discrimination based on the social construct, as our colonial history and its repercussions have shown us, also exists – the reality of which is all too familiar to Indigenous Australians.

⁷⁰ Ibid 8.

⁷¹ Michael Kirby, ‘Constitutional law and Indigenous Australians: challenge for a parched continent’, paper delivered at Law Council of Australia forum, ‘Constitutional change: recognition or substantive rights?’, 22 July 2011, 20.

⁷² *Final Report of the Constitutional Commission, summary* (Australian Government Publishing Service, 1988), 54.

⁷³ This section is taken from Shireen Morris, ‘Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary’, forthcoming publication in the *Indigenous Law Bulletin*, 2011.

⁷⁴ HREOC, ‘Combating Racism in Australia – Discussion paper for the World conference against Racism,’ http://www.hreoc.gov.au/racial_discrimination/consultations/national_consultations/combating_racism.html [accessed December 2010].

⁷⁵ Dinesh D’Souza, *The End of Racism* (1995, The Free Press), 27-28.

While race may not exist, many would argue that racism is alive and well.⁷⁶ Measures to redress past discrimination and laws protecting individuals against racial discrimination are still as important as ever.

Historically, policies of colonisation and invasion were based on discrimination and categorisation of people into different racial groups which exhibited, it was argued, different and inferior characteristics, traits and capabilities, which in turn justified domination and appropriation of their land by Western forces.⁷⁷ This is arguably reflected today in policies that bypass Indigenous responsibility and exacerbate Indigenous dependence and passivity.⁷⁸ Now this type of thinking is supposedly unacceptable. But until we achieve reform to eliminate allowances of colonial-born racism in Australian law, this separatist thinking will continue to influence law and policy, particularly in Indigenous affairs. This type of thinking has been immensely harmful to Indigenous Australians.

“I personally believe that although racism isn't quite as open and expressed, being an aboriginal youth I can honestly say that there is still subtle racism throughout today's society. Walk into a supermarket, Target, shopping in general and whether you're dressed with a good appearance you will still feel uncomfortable in the sense that you notice workers tend to head down the same aisles as you wherever that may be. People will either look at you like you're dirt or be rude in general for no apparent reason.”

(Terry Atkinson, Victoria)

Proposed reforms

- Remove section 25
- Remove section 51(xxvi) the 'Race Power'
- Insert the following:

S 127

No law shall discriminate on the basis of race, colour or ethnicity.

Laws to redress disadvantage, ameliorate the effects of past discrimination, or to recognise or protect the culture, language and identity of any group do not constitute discrimination.

New S 51 (xxvi)

Section 51 power to pass laws with respect to: Aboriginal and Torres Strait Islander peoples.

⁷⁶ See Michael Kirby, 'Constitutional law and Indigenous Australians: challenge for a parched continent', paper delivered at Law Council of Australia forum, 'Constitutional change: recognition or substantive rights?' 22 July 2011, 17.

⁷⁷ J.M. Blaut, *The coloniser's model of the world – geographical diffusionism and Eurocentric history* (1993, The Guilford Press), 23.

⁷⁸ Noel Pearson, 'A structure for empowerment' (The Weekend Australian) 16-17 June 2007.

127A

Laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, shall be periodically reviewed every ten years or more frequently to assess the effectiveness of the laws in achieving their intended objectives.

In assessing the effectiveness of laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, the views and aspirations of the Aboriginal and Torres Strait Islander people affected by the laws shall be taken into account.

Australia needs to reformulate its approach to Indigenous affairs. Currently our legal approach is based on the colonial concept of 'race', without any entrenched guidelines as to how this racially-targeted treatment should be tempered. We have argued that this approach has been flawed. The correct approach must proceed from a presumption of the inherent equality of all human beings, regardless of race.

Constitutional reform must remove the discriminatory structural barriers that are impeding realisation of Indigenous equal rights, socio-economic parity and cultural prosperity. Effective constitutional reform should therefore remove the Race Power and section 25 from the Constitution, include Indigenous recognition, and insert a new non-discrimination guarantee for all Australians that allows for positive laws to rectify the effects of past discrimination.

The Race Power should no longer be the source of Indigenous specific laws and policies, because of its potential for adverse discrimination and its inherently negative colonial attitude towards Indigenous Australians and other races, as discussed. Rather, the new source of power to support any necessary laws for Aboriginal and Torres Strait Islander peoples would, under the proposed changes, now be subject to principles of equality before the law and non-discrimination as per the new sections 127 and 127A.

Under 127A, any targeted measures for Indigenous Australians must be periodically reviewed to ensure the measures are effective in achieving their aims, in addressing disadvantage, ameliorating the effects of past discrimination, and in enabling equal rights. Similarly, in assessing whether laws for Indigenous people are effective, the views and aspirations of Indigenous people themselves must be taken into account.

A narrow allocation of 'benefit' or 'advancement' for Indigenous Australians alone as part of a new s 51 power to pass laws for Aboriginal and Torres Strait Islander people will not do. It should not be up to governments to decide what is for the 'benefit' or 'advancement' of Indigenous Australians. We must propel a fundamental shift away from this approach. Instead, Indigenous Australians themselves must now become active agents in their own development pathways.

We cannot have a Constitution that assumes Indigenous Australians will be in need of top-down policies addressing their 'historic disadvantage' forever more. The s 51 power for Indigenous Australians must not therefore be intrinsically associated with disadvantage. We must not assume that the disadvantage is innate to Indigenous Australians, or that it is insurmountable or somehow permanent. We must not constitutionally entrench Indigenous Australians into the bottom of the social ladder.

A constitutional provision enabling special laws to address ‘historic disadvantage’ and allowing for the ‘advancement’ of Indigenous Australians has the potential to further entrench a national mindset which accepts, expects and thus perpetuates Indigenous disadvantage and exclusion. This mindset must change.

Instead of expecting Indigenous passivity with laws enacted for their ‘advancement’ or ‘benefit’, we should expect Indigenous agency, empowerment and success.

References to addressing disadvantage must therefore remain general, as part of a general non-discrimination provision. The power for Indigenous Australians must stand alone. Similarly, the non-discrimination protection must also remain general in its application– it must benefit and protect all Australians equally, and importantly it must not imply or indicate that disadvantages which may need to be redressed in themselves arise from race. We must avoid perpetuating this fallacy.

It is to be remembered that these constitutional changes, if implemented, are not temporary fixes or political fads. This is the Constitution. It needs to be good for all time.

We say enough of laws for the supposed ‘benefit’ of Indigenous Australians, but which do not allow Indigenous Australian individuals to become engaged decision-makers in their own lives. Enough of low expectations. We must proceed from a presumption of inherent equality. Equality must be for all Australians, including Indigenous Australians. Indigenous Australians must be enabled to help themselves, in a truly equal playing field, with truly equal opportunities. It is imperative we get the logic right.

“I fully support the constitutional change, as an Aboriginal woman of this country where my ancestors of central Australia have lived for thousands of years before the invasion and the constitution was written up, I believe the time is right. We are entitled to the same treatment awarded to the Non-Aboriginal people so having the change in the constitution in regards to discrimination based on race and having people in power to determine our lives needs to be stopped. It’s an insult to our fellow Aboriginal Australians to be excluded still now in the 21st Century, let us show Australian people we mean business and no longer want to be treated like second hand citizens.”

(Expert panel public submission)

Other examples of non-discrimination provisions

General non-discrimination provisions similar to those we propose here are a standard feature of Constitutions around the world. The allowance for positive measures to redress disadvantage and ameliorate the effects of past discrimination is an equally typical aspect of non-discrimination provisions world-wide.⁷⁹ The approach is confirmed by Article 1(4) of CERD.⁸⁰

By way of example, the Canadian Constitution provides in section 15:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

⁷⁹ George Williams, ‘Recognising Indigenous peoples in the Australian Constitution: what the changes should say and how the referendum can be won’, (2011) 5(1) *Native Title Research Unit: Land, Rights, Laws, Issues of Native Title*, 9.

⁸⁰ CERD Article 1(4) states: “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The South African Constitution similarly states in section 9:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Australia's own Victorian Charter of Rights provides in section 8:

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

There is little that is revolutionary about what we propose here. Rather, these reforms would simply bring Australia into line with the approach of modern democracies around the world.

Confronting the logic

Of course, there is a perceived logical paradox between the principles of non-discrimination and equality, and the need for a specific power to make laws for Indigenous Australians in particular. Likewise there may also be a perceived contradiction between non-discrimination ideals and recognition of distinct Indigenous cultures and languages. It is realised that this logical conundrum creates a level of intellectual discomfort, and rightly so.

Equality before the law is an imperative goal. To have all people equal under the law is wholly desirable, as is removing the Race Power from its current function in the Constitution, which allows adverse discrimination.

However, the fact remains that there are particular demographics within Australian society that irrefutably need some assistance to reach a level of opportunity that is on par with other Australians. Indigenous Australians are unlike any other groups in Australia. They have been dispossessed of their land and have suffering extensive discrimination in the name of colonisation. A specific federal power is therefore required to facilitate laws like Native Title, to ameliorate the effects of past discrimination and dispossession. This is a practical necessity.

What we argue, however, is that these targeted laws for Indigenous people must be held accountable and must be made to abide by principles of non-discrimination. Such laws must not be adversely discriminatory. We also advocate that any targeted laws be held to account to ensure they are effective in achieving their

aims. We do not want tax-payer's money to be wasted on ineffective initiatives that do more harm than good. Measures to redress disadvantage should only operate so long as the disadvantage exists.

While the proposition that we require entrenched non-discrimination protection in our Constitution, yet we also require a specific power to make laws for Indigenous people and entrenched recognition of Indigenous peoples' cultures and languages, is not as neat and tidy as we would perhaps like – it is nonetheless the reality. It is also the standard reality of many former colonies.

Equality before the law is compatible with recognition of distinct Indigenous rights because of the unique historical position of Indigenous peoples within the context of colonised or settled States. Indeed, recognition of Indigenous rights, to ameliorate the effects of colonisation, discrimination and the near obliteration of Indigenous peoples that occurred in making way for settling forces, is a *necessary part* of ensuring equality, both substantive and formal.

When the settlement of an entire nation has proceeded from the denial and dispossession of its Indigenous peoples, the only way forward towards equality is to actively address this dispossession and past discrimination in law. Therefore, laws to redress Indigenous dispossession, discrimination and cultural loss are as practically necessary as the general protections to ensure that adverse discrimination can never happen again, to any human being.

Conclusion – reform for non-discrimination and equality⁸¹

Australia should no longer be seen to be condoning racial discrimination. Our Constitution should be modernised to ensure equal rights and responsibilities, equality before the law and equal opportunities for all Australians. This is because every Australian deserves a 'fair go', regardless of ethnicity or descent. This is also the only path towards substantive equality and Indigenous development.

We must recognise Australia's Indigenous people in our Constitution. But it would be illogical to do this without also fixing the parts of the Constitution that allow racist laws to be passed not only against Indigenous people, but against any racial group in Australia.

Recognition is required for reconciliation. This means mutual cultural respect and acknowledgement of pre-existing and continuing rights. But equality is required if we are to close the gap. We must put in place a new rational and systematic approach to Indigenous disadvantage and all Indigenous policy. This must ensure a new paradigm of formal equality, incorporating vigilant review of targeted laws and tracking of progress towards our ultimate aim – substantive equality and equal rights for all Australians.

Indigenous Australians who are socially, economically and culturally prosperous can be a reality in Australia. Constitutional reform must set in place the mechanisms that allow Australia to achieve this aim.

Ensuring equal rights and equal responsibilities

In 2007 Noel Pearson wrote:

“There is an urgency in our concern to tackle the behavioural dimension of our problems. But just because we admit that our problems are behavioural, that does not mean that we do not believe

⁸¹ This section is taken from Shireen Morris, 'Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary', forthcoming publication in the *Indigenous Law Bulletin*, 2011.

there are also structural barriers to indigenous progress. The principal structural problem faced by indigenous people concerns our power relationship with the rest of Australian society through its structures of government: judicial, legislative and executive. Australian democracy just does not work to enable the solution of our problems.

Democratic participation in the existing judicial, legislative and executive institutions of governance in Australia is the only means available to indigenous Australians to achieve and exercise power.

But do the existing mechanisms of democratic participation by such a small minority, who are unique in that they are indigenous to the country, and whose socioeconomic circumstances are so egregiously out of step with the rest of the country, work to ensure my people enjoy the same expectations of life as their fellow citizens?

No, they do not.”⁸²

Noel Pearson proposes the following idea as a solution to this problem. He argued that we need to “focus on the interface between indigenous people and governments, state and federal, and construct mechanisms that ensure equality between them.”⁸³ He explained:

“Partnerships between grossly unequal partners are not real partnerships; rather, they are master-servant, boss-client relationships. If consultation and not negotiation is the principal official means of transaction between the parties, then there is not a true partnership. Rather, there is one party with the power to act unilaterally and one that is subject to that power.

There has never been a serious attempt to focus on the institutional interface between indigenous people and governments in Australia. To construct an interface that creates greater parity and mutual accountability (and true shared responsibility) would require governments to agree to limitations on their existing powers and prerogatives and to make accountability a two-way street rather than the existing one-way street. It would also require governments to be bound not just by policy commitment but by law.”⁸⁴

Here we propose that a new Equal Rights and Responsibilities Commission be established to manage the interface between Indigenous Australians and governments intending to pass laws for their benefit.

A new Commission

We propose that every Indigenous-targeted law must be filtered through this new Commission. The role of the Commission would be to ensure the validity of the Indigenous-targeted laws in accordance with the new constitutional non-discrimination provision, to fulfil the constitutional requirement for review, assessing and reporting on whether Indigenous-specific laws are effective, and to ensure that the views and aspirations of Indigenous Australians are taken into account in assessing effectiveness.

In this regard, researching the views, input and agreement of Indigenous Australians with respect to particular laws and measures for their benefit will be an important part of the Commission’s role. This aligns with principles under international law that state that community agreement is an important factor in

⁸² Noel Pearson, ‘A structure for empowerment’ (The Weekend Australian) 16-17 June 2007.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

assessing the validity of any special measure.⁸⁵ This, we propose, is how to empower Indigenous Australians to take a more equal and active role in their own development pathways.

The Commission should operate on the principles that service delivery must not create passivity,⁸⁶ dependence or separatism, but must foster independence, and empowered and equal participation. The ultimate aim must be for the disadvantaged groups' rights and responsibilities to become equal to those in mainstream Australia, that as capabilities improve service delivery and special measures based on disadvantage should decrease. Additionally, any racially targeted laws should be proportionate and should not infringe on other individual rights and responsibilities.

The Commission would make recommendations to Parliament as to how the laws should be changed or improved to better achieve their aims, how they might better enable equal enjoyment of rights, or whether they should be repealed if they are needs-based and no longer necessary because socio-economic equality has been achieved. This review mechanism would add an important layer of independent protection and scrutiny for Indigenous groups, in addition to the potential for judicial challenge.

The new Commission should enhance accountability with regards to all special measures and racially-targeted laws. It should ensure that tax-payer money is no longer wasted on ineffective Indigenous development policies that do not work, or that exacerbate poverty or discrimination. The Commission should be a 'watch-dog' for equality before the law and closing the gap and should track progress towards our ultimate aims of eliminating inequality. This includes ensuring that Indigenous Australians do not receive unfair preferences over and above other Australians, unless this is justified – special laws to ameliorate disadvantage should only be valid so long as the disadvantage exists.

The Commission should be an independent research and policy body, similar to the Productivity Commission, ensuring that Australia achieves and maintains formal equality before the law and succeeds in obtaining reasonable levels of socio-economic parity and cultural richness for Indigenous Australians.

Arguments for agreement-making⁸⁷

We propose that a constitutional review requirement for all Indigenous-specific laws, which takes into account the views and aspirations of the Indigenous people for whom the law is intended, would be a sufficient way of giving Indigenous Australians a voice in the wider political arena, without creating separatism. However, alternative stronger models for agreement-making have often been proposed.

It has been argued that a broader entrenched agreement-making power could be beneficial, especially if it operated to give agreements negotiated constitutional force.⁸⁸ The Expert Panel on constitutional recognition of Indigenous Australians posed the addition of an agreement-making power as one of its ideas for reform.⁸⁹ The Law Council also listed agreement-making as one of its reform options.⁹⁰ It has been suggested that such a power could be modelled on section 37 of the Canadian Constitution, which provides a

⁸⁵ CERD, General Recommendation No. 23, 'Indigenous Peoples', 18/08/97 [4(d)].

⁸⁶ See Noel Pearson, *Up from the mission – selected writings* (2009, Black Inc.), 151, problems with passive welfare.

⁸⁷ This section is largely taken from Shireen Morris, 'Agreement-making: the need for democratic principles, individual rights, and equal opportunities in Indigenous Australia' (2011) 36(3) *Alternative Law Journal*, 187 – 193.

⁸⁸ Sean Brennan, Larissa Behrendt, Lisa Strelin, George Williams, *Treaty* (The Federation Press, 2005) 138.

⁸⁹ Expert Panel on Constitutional Recognition of Indigenous Australians, Australian Government, 'A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition' (May 2011), 19.

⁹⁰ Law Council of Australia, 'Constitutional Recognition of Indigenous Australians discussion paper' (2011), 16.

commitment to regular constitutional conferences or other processes to discuss Indigenous rights.⁹¹ Or, a provision based on section 105A of the Constitution would give the government power to make agreements with Indigenous people, with the enforceability of the agreements depending on the wording of this provision.

But it is pertinent to ask whether, in a society based on equality, Indigenous people as one group within society should have a special power to make constitutionally-binding agreements with the government. Of course, some non-binding agreement-making already operates today, for example in the form of Indigenous Land Use Agreements under Native Title law.⁹² But constitutional entrenchment is another matter.

The New Zealand example shows us that treaties and agreements can be effective in equalising the status of Indigenous people, though the Waitangi Treaty is not formally incorporated into New Zealand's Constitution. Its legal status is ambiguous because it is only enforceable to the extent it has been incorporated into legislation.⁹³ The Waitangi Treaty has however been described as having "quasi-constitutional" force in its extensive impact on law and policy in New Zealand.⁹⁴ A similar approach to agreement-making in Australia may be helpful in shifting attitudes and affording Indigenous people more leverage in their affairs. Because of their extreme minority status as discussed, Indigenous people lack a voice in the wider Australian context.⁹⁵ A constitutional agreement-making power could enable Indigenous Australians to become more actively involved in formulating policies to combat Indigenous disadvantage and poverty, and also help ensure that they have a more proactive say in laws regarding Indigenous rights.

But why should Indigenous people have special agreement-making rights? White majorities are not usually consulted regarding laws made about them, except through their democratic vote. But Indigenous-specific laws, being race-based laws, must be conceptualised differently as allowable exceptions to the non-discrimination rule in limited circumstances. Some form of agreement should be required because such laws are racially targeted, to protect citizens from adverse discrimination.

The broader discussion of agreement-making for a specific group such as Indigenous people raises interesting power questions for governing States. The question perhaps can be boiled down to one of sovereignty. Should Indigenous people 'self-govern' or not?

The question of sovereignty⁹⁶

There is an argument that if sovereignty was not legally ceded at colonisation, then there could be some imperative or justification for Indigenous communities to truly self-govern today.⁹⁷ In this context, a constitutional agreement-making power, giving force to agreements which depending on wording could have constitutional backing, may perhaps seem justifiable. But sovereignty, as was confirmed in the *Mabo* decision and as an observable matter of pragmatic fact, has been ceded to the colonising forces. As French CJ noted, the *Mabo* decision confirmed that when the Crown acquired the Australian colonies, it also acquired sovereignty of the land.⁹⁸ That is why the Crown in exercising its sovereignty is able to extinguish

⁹¹ *Ibid.*

⁹² Sean Brennan, Larissa Behrendt, Lisa Strelin, George Williams, *Treaty* (The Federation Press, 2005) 11.

⁹³ Mark Barrett, 'the Treaty of Waitangi and Social Policy', *New Zealand Ministry of Justice*, 5.

⁹⁴ Sean Brennan, Larissa Behrendt, Lisa Strelin, George Williams, *Treaty* (The Federation Press, 2005) 139.

⁹⁵ Noel Pearson, 'A structure for empowerment' (The Weekend Australian) 16-17 June 2007.

⁹⁶ This section is largely taken from Shireen Morris, 'Agreement-making: the need for democratic principles, individual rights, and equal opportunities in Indigenous Australia' (2011) 36(3) *Alternative Law Journal*, 187 – 193.

⁹⁷ Sean Brennan, Larissa Behrendt, Lisa Strelin, George Williams, *Treaty* (The Federation Press, 2005), 72.

⁹⁸ *Mabo v Queensland [No 2]* 175 CLR 1, 64.

Native Title.⁹⁹ Conversely, Native Title was also constructed so as to recognise some form of continuing Indigenous authority to self-govern, as *Mabo* also describes Indigenous traditional laws and customs surviving colonisation.¹⁰⁰ Nonetheless, the common quip that “these white fellas are probably not going away” rings true. The positive and pragmatic way to progress now is to pursue a policy of empowered participation and equality which respects cultural identity and distinctness, but avoids simple separatism. For this reason, a more limited, softer agreement requirement applicable to Indigenous people where subject to Indigenous-specific laws seems preferable. The requirement of agreement is an important part of ensuring that any Indigenous-specific laws are in fact enabling equal rights and responsibilities.

Separatist structures should be avoided, except to ameliorate the effects of past discrimination and colonisation, or to properly address disadvantage in accordance with non-discrimination principles. A soft review and agreement-making requirement inserted into the Australian Constitution as part of the requirements surrounding Indigenous-specific law would help change attitudes to create a more empowering and independence-fostering approach to Indigenous policy.

Communal versus individual rights¹⁰¹

The concept of agreement-making between groups tends to treat individuals collectively. While Indigenous group rights do exist at international law, collective rights can be problematic in their competition with individual rights that may not be afforded vigilant protection under the collective cultural regime. As Megan Davis notes, “in international law, ‘culture’ frequently trumps women’s rights in a way that wouldn’t be tolerated in other areas.”¹⁰² There is a risk therefore that agreement-making by Indigenous leaders on behalf of Indigenous people could be detrimental to individual rights.

There is also the question of group membership. How is membership of an ethnic group to be ascertained? And what if an Indigenous person does not *want* to have decisions affecting their rights made on their behalf, especially on the basis of his membership of a racial group? Thomas’ distinction between an ethnic and a civic nation is useful. He argues that in a civic nation, “a person’s deepest attachments can be chosen, not inherited,” while “ethnic nations restrict people to the identities to which they are born.”¹⁰³ Arguably, Australia is best described as a civic nation and should remain so.

The problem of individual rights being subsumed into the collective is evident in Australia’s current approach to the law of Indigenous affairs, and particularly in Native Title and Indigenous land law where individual land ownership rights are not recognised. However this need not be our approach to constitutional reform. The discussion about constitutional reform and Indigenous recognition presents Australia with an important opportunity to logically and honestly review our current practices in Indigenous affairs. Lack of respect for individual interests and democratic principles in Indigenous law and policy is an aspect we should self-consciously address. The proposed review and agreement reform must be part of a new, more efficient and more transparent system which embodies principles of equality before the law, employs best practice policy-making, and implements policy based on principles of individual, rather than solely communal or collective rights and responsibilities.

⁹⁹ French CJ, ‘Native Title – a constitutional shift?’ (Melbourne Law School, 24 March 2009).

¹⁰⁰ Sean Brennan, Larissa Behrendt, Lisa Strelin, George Williams, *Treaty* (The Federation Press, 2005) 77.

¹⁰¹ This section is largely taken from Shireen Morris, ‘Agreement-making: the need for democratic principles, individual rights, and equal opportunities in Indigenous Australia’ (2011) 36(3) *Alternative Law Journal*, 187 – 193.

¹⁰² Megan Davis, ‘International human rights law, woman’s rights and the Intervention’ (2009) 7 (10) *Indigenous Law Bulletin*, 1.

¹⁰³ Brook Thomas, ‘Civic multiculturalism and the myth of liberal consent: a comparative analysis’ 1(3) (2001) *The New Centennial Review* 1, 6.

Agreement-making to empower Indigenous Australians¹⁰⁴

Some form of agreement-making is likely the only way to equalise the imbalance of power so that Indigenous Australians have a fair chance at negotiating Indigenous-targeted policies that appropriately address the unique challenges of a colonised and dispossessed people. Those within disadvantaged communities are arguably best placed to understand the distinctive challenges faced by those communities. If formulated in the right way such a mechanism would help Indigenous people to take greater responsibility in their own 'special measures' development pathway.

Indigenous people themselves should be empowered to negotiate the best ways to close the socio-economic gap, rather than passively accepting government policies which are delivered for their supposed benefit, but which often in actual fact fail to deliver acceptable results, or perversely work to perpetuate racism and disadvantage.

History would indicate that top-down strategies to alleviate poverty in Indigenous communities are not as effective as strategies whereby Indigenous people are empowered and in control of their own development strategy.¹⁰⁵ An agreement-making model should ensure mutual responsibility both on the side of government and Indigenous people. It should represent a distinct move away from passive delivery of services without active Indigenous engagement at the policy-making level. The model should also respect the rights of Indigenous individuals. The policies and legislative changes negotiated should allow for greater economic freedom in Indigenous communities, and should cover all policy areas, including education, health, housing, welfare and importantly, land. In designing the agreement-making structure there is a need to avoid creating the same problems that have been evident in the communal land rights system under Native Title law and state Aboriginal land acts. This structure must not treat people collectively. Individual voices must not be lost in the communal. Individual equal rights are integral to addressing poverty. Regular review of Indigenous-specific laws and investigation of community aspirations for land by a new Commission should help instigate improvement in this area. The Commission should review and suggest appropriate reform for all Indigenous-specific laws to ensure that individuals' equal rights are being realised.

But the Commission itself should also ensure that the community views it collects, or the representative structure it employs, adequately respect individual rights and freedoms, and do not also make the mistake of treating Indigenous people in a generalised and collectivist way. Indigenous individuals must be democratically represented to ensure fairness.

The need for accountability¹⁰⁶

In mainstream society, agreements made on behalf of people are done only after individuals have given, or are legally presumed to have given, their authority for a person or party to act or speak on their behalf. People vote in a political party or prime minister to speak on behalf of the nation. Employees in an organisation sign up to a contract, and directors make decisions which may affect their lives. But the

¹⁰⁴ This section is largely taken from Shireen Morris, 'Agreement-making: the need for democratic principles, individual rights, and equal opportunities in Indigenous Australia' (2011) 36(3) *Alternative Law Journal*, 187 – 193.

¹⁰⁵ Responding to the Intervention, the Human Rights Council suggested that Australia "redesign measures in direct consultation with the Indigenous peoples concerned, in order to ensure that they are consistent with the RDA and the ICCPR." This participatory approach, responding to needs identified by Indigenous people themselves and enhancing their own development initiatives, was promoted in Rodolfo Stavenhagen's 2007 HRC report on the human rights of Indigenous peoples. Importantly he stated that "no project should be imposed from outside," United Nations Human Rights Council, Report of the Special Rapporteur, Rodolfo Stavenhagen, 'Situation of human rights and fundamental freedoms of indigenous people,' 15 November 2007, 219.

¹⁰⁶ This section is largely taken from Shireen Morris, 'Agreement-making: the need for democratic principles, individual rights, and equal opportunities in Indigenous Australia' (2011) 36(3) *Alternative Law Journal*, 187 – 193.

employees still have a choice whether to join the company, and whether to leave if bad decisions are being made. Likewise, shareholders can vote at the General Meeting, and they can sell their shares if they are unhappy with the company's performance.

Currently, if an Indigenous person is discontented with the way their remote community leaders are speaking on their behalf, or running the land on which they live, they usually do not have a vote, because communal leaders generally lead by birth-right. Where council members are voted in, bribes are common and transparency is low. In general, if people are unhappy, they can "vote with their feet" as Helin explains, describing the "mass exodus" of Native Americans from Indigenous reserves, when people become tired of the corruption and lack of accountability in their Indigenous communal leadership.¹⁰⁷ Australia should aim to do better than this. It is not acceptable that those who wish to enjoy individual rights in an environment of equality must leave their homelands in order to access the benefits of mainstream democracy.

What Helin describes in Native American reserves are wasteful and corrupt communal systems where chiefs are not accountable to the people they represent, but answer only to Ministers. Funds are wasted and resulting poverty, discontentment and aggression are directed within the community in manifestations of "lateral violence" and dysfunctionality.¹⁰⁸ Helin explains:

"Band Councils (were) gatekeepers for the only wealth coming into communities... a natural tension has been created between those in government and their community members. This technique of colonisation was employed by the British Empire throughout the world and served the brilliant purpose of distracting populations that might cause trouble externally by redirecting that aggression internally... Instead of striking out at those responsible for oppression, people long rendered powerless, strike out at each other."¹⁰⁹

The description here is analogous to the situation in some Indigenous Australian communities where social dysfunction is often high. As Mick Gooda described recently:

"...native title processes also provide a platform where previously latent conflicts ... can be played out, native title situations can exacerbate the potential for lateral violence within our communities... All of us who are involved in native title claims or agreement-making know that at every step of the process, the requirement to legitimise our claims and our birth rights creates conflict and tension within our communities, and effectively results in lateral violence."¹¹⁰

He asks the pertinent question: "How do we stop policies that are supposed to empower us, from destroying us?"¹¹¹

Communal systems arguably do not work for those inside them, except perhaps for those at the top of such structures who have a vested interest in maintaining the status quo. The imposition of communal systems has, however, worked well historically for those wishing to colonise, oppress or dispossess Indigenous

¹⁰⁷ Calvin Helin, *Dances with Dependency – out of poverty through self-reliance*, 149-152.

¹⁰⁸ *Ibid*, 152.

¹⁰⁹ *Ibid*, 152-3.

¹¹⁰ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, AIATSIS Native Title Conference Keynote address, 'Our relationships in native title: starting the conversation', (Australian Human Rights Commission, Brisbane, 2 June 2011), 7.

¹¹¹ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, AIATSIS Native Title Conference Keynote address, 'Our relationships in native title: starting the conversation', (Australian Human Rights Commission, Brisbane, 2 June 2011), 8.

people. Treating racial groups collectively has always worked in favour of the oppressors. In classic divide and conquer style, our imposed Indigenous land law, by separating traditional owners from other displaced Indigenous people on the basis of ethnicity, family-line, and descent, and indeed by subjecting Indigenous people to a different and inferior system of property rights, has subsequently created a feudalistic class system within Indigenous communities, and has arguably worked to keep Indigenous people separate and subjugated in Australia. Contemporary Indigenous land law can be thus still be read as a colonialist tool to disempower and divide Indigenous people.

While it is true that the Australian government was a colonising force, disempowerment of Indigenous people must not be the aim of a modern Australian government and society committed to reconciliation and closing the gap. Our aim instead must be to avoid continuing the unintended consequences of Native Title law, and to properly reconcile the damage caused by dispossession and disempowerment through implementation of equal rights, equal choice and equal responsibility.¹¹² This is the true aim of special measures and we must be committed to this aim.

Conclusion – figuring out the details¹¹³

We must therefore consider the following questions. If we are to have Indigenous representative bodies as part of a new agreement-making mechanism, how are the Indigenous leaders to be selected? Will they be voted in by Indigenous people? How can they be voted out? How can we develop governance structures to guard against corruption and incompetence? How can we ensure that the standards of accountability and transparency are equal to those standards leaders are held to in the mainstream?

As noted, separatist collective rights can be detrimental to the individual rights of vulnerable people who may not have a voice within the group – for example women and children. In the criminal law jurisdiction, the mentality which prefers communal cultural rights over individual rights has led in some cases to a legal attitude that prefers the rights of the perpetrator over the rights of the victim, arguably due to an incorrect emphasis on customary law.¹¹⁴ This is the approach we need to guard against.

Any constitutional agreement-making must be implemented with clear democratic principles and strong governance and accountability structures to protect individual rights. Indigenous governance structures should be as transparent on the Indigenous side as those we aim for in the mainstream. Australia should guard against overlooking the rights of vulnerable individuals in favour of collective group rights.

Languages Recognition

As discussed, in achieving Indigenous total wellbeing, cultural prosperity is as important as socio-economic prosperity. Maintenance and enjoyment of culture is important for Indigenous happiness and health outcomes. Language is often described as being the key to culture. Languages provide concrete, tangible banks of traditional knowledge that government policies can help promote, protect and develop. We propose that both English and Indigenous Australian languages be recognized in

“The Australian Indigenous culture is a living culture, not some abstract historical culture, that needs to be recognised in our Constitution now.”

(Expert panel public submission)

¹¹² See Noel Pearson, *Up from the mission – selected writings* (Black Inc, 2009) ‘Our right to take responsibility’, 143-171.

¹¹³ This section is largely taken from Shireen Morris, ‘Agreement-making: the need for democratic principles, individual rights, and equal opportunities in Indigenous Australia’ (2011) 36(3) *Alternative Law Journal*, 187 – 193.

¹¹⁴ Helen Hughes, *Lands of Shame* (Centre for Independent Studies, 2007), 28-29.

the Constitution and supported by legislative reform to protect and revitalise Indigenous languages and promote English literacy. We propose this language provision also confirm the right of all Australians to freely use, learn and transmit the languages of their choice.

Language rather than culture

Language recognition is more conducive to definition and more practically implementable than ‘cultural’ recognition. Culture is a notoriously hazy concept which, through arguably incorrect references to ‘traditional law and custom’¹¹⁵ in Australian law, has become legally muddled with problematic formulations of Indigenous land rights. Notions of cultural relativism have arguably been incorrectly and discriminatorily used to justify the current legal construction of Native Title, which allocates inflexibly inalienable and communal property rights to Indigenous people and imposes unreasonable burdens of proof, requiring Indigenous people to prove uninterrupted practice of the traditional law and custom practiced at colonisation, in order to prove their Native Title.¹¹⁶ The notion of culture has thus been applied to withhold from Indigenous people real ownership and economic rights to their land and to make native title rights unnecessarily inaccessible. We must avoid entrenching these problematic legal constructions of Indigenous ‘culture’ into the Constitution, unless in an entirely symbolic way. We must also avoid unintended associations with recognition of customary law. For these reasons, it is preferable to separate the notions of culture and language when it comes to constitutional protection and recognition.

Language rights as recognition

Paulston argues that “one objective of language rights for a nondominant ethnic group is the recognition of that group’s existence,”¹¹⁷ and that language rights are important in terms of identity and social mobility.¹¹⁸ Language provides the system of knowledge by which culture operates, and by which individuals know the world and themselves.

The OSCE¹¹⁹ High Commissioner stated:

“Linguistic rights are the quintessence of minority rights... (If) one had to single out just one minority right, it would have to be the right to use one’s own language. This right is... the fundamental right to express and further develop one’s personal identity, but it is also the precondition for the proper enjoyment of other minority rights.”¹²⁰

Language recognition is an essential part of recognition of Indigenous identity and existence.

The right philosophy

Any specific laws for the recognition of Indigenous languages must be reconciled with the ‘equality before the law’ principle. The following reform proposal, incorporating both constitutional and legislative reform, has been developed with political viability in mind. Any constitutional amendment requires a majority of people in a majority of states to approve the reform.¹²¹ This proposal suggests recognition of Indigenous

¹¹⁵ *Native Title Act 1993* s 223(1).

¹¹⁶ *Yorta Yorta v Victoria* (2002) 194 ALR 538, 544.

¹¹⁷ Christina Bratt Paulston, ‘Language policies and language rights’ 26 (1997) *Annual Review of Anthropology* 73, 75.

¹¹⁸ *Ibid.*, 76.

¹¹⁹ Organisation for Security and Cooperation in Europe.

¹²⁰ Knut Vollebaek, ‘Linguistic rights in the work of the High Commissioner for National Minorities: new and old challenged in promoting comprehensive security’ address to Conference on Linguistic Rights of National Minorities: Ten years after the Oslo Recommendations and beyond (Oslo, 18 June 2008), 2.

¹²¹ *Commonwealth of Australia Constitution Act 1901*, s 128.

languages as Australian languages in the Constitution, implementation of practical supportive measures for Indigenous languages at the local level, and acknowledgment of the importance of English literacy and proficiency for all Australians. The proposed reforms incorporate recognition of English as a national language, to make this reform appealing to the majority of Australians, and because English literacy is essential for participation in the life of the nation.

Importantly, the proposed laws and processes should operate in a way that is not premised upon membership of a racial or ethnic group. Indigenous language revitalisation should operate as a benefit not restricted to Indigenous people, but for all Australians.

Moral obligation

Australia has a moral obligation to protect Indigenous languages from extinction. Processes of colonisation, land appropriation, interruption of traditional hunter-gatherer lifestyles, forced assimilation and Christian conversion have all helped weaken Indigenous languages and cultural traditions. Pearson observes that “the choking of Aboriginal culture and language did not end with the abolition of so-called protection in the 1960s: government support for Australia’s native languages is still minimal.”¹²²

Similarly, poor education outcomes mean that Indigenous children often struggle to become proficient in their traditional language and also remain illiterate in English.¹²³ The proposed reform package seeks to promote the importance of Indigenous minority languages, but also the importance of language proficiency and diversity in general. The need for good English literacy in minority language groups is therefore also emphasised.

While Gary Johns argues that there is no obligation on the part of the dominant language group to preserve Indigenous languages, because it is only English that is essential for livelihood,¹²⁴ Pearson’s view is that “the government has a formal responsibility to preserve the cultural diversity native to the territory of a sovereign state.”¹²⁵ He writes:

“Today, vulnerable ethnic groups face a stark dilemma: peoples that do not achieve independence or autonomy or some other kind of constitutional recognition, or at least develop a very strong ideological determination to secure their cultural survival, are likely to lose their distinctness and become assimilated.”¹²⁶

Maintaining culture and language also means ensuring socio-economic prosperity. Culture will not flourish if the people themselves are not healthy and free from poverty. As Pearson advocates, factors such as health and employment affect a person’s ability to retain and transmit culture.¹²⁷

Minority language rights in a liberal democracy

Minority rights are necessary because often, democracy is not an adequate safeguard for minority interests. Holt and Packer argue that it is “the task of the democratic State to provide the framework within which

¹²² Noel Pearson, *Radical Hope – education and equality in Australia* (Blank Inc., 2011), 92.

¹²³ *Ibid*, 74-75.

¹²⁴ Gary Johns, *Aboriginal Self-determination – the whiteman’s dream* (Connor Court Publishing, 2011), 64.

¹²⁵ Noel Pearson, *Radical Hope – education and equality in Australia* (Blank Inc., 2011), 86.

¹²⁶ *Ibid*, 87.

¹²⁷ *Ibid*, 89.

each individual can be free to maintain and develop his or her identity..."¹²⁸ The State has a duty to implement an 'even-handed' approach to competing claims of culture and identity, "ensuring equal respect for all."¹²⁹

It is noted that no democracy is ever truly neutral – the Australian government chooses English as its de facto official language in all its laws, official documents, education and most media. Romaine observes that 'no-language' policies advocated by democracies are often in actual fact no-minority-language policies: "Proponents of what is often termed 'benign neglect' ignore the fact that minorities experience disadvantage that majority members do not face."¹³⁰ Indeed, some form of minority language rights may be essential for equal participation in democratic life. As May argues:

"While continuing to uphold the importance of citizenship and individual rights... a greater accommodation of minority languages and cultures within the nation-state provides a more just representation of the (at times differing) interests of all its citizens."¹³¹

From a pragmatic perspective, proper recognition for minorities can also contribute to State stability and peace. The OSCE High Commissioner on National Minorities stated that "a minority that has the opportunity to fully develop its identity is more likely to remain loyal to the State than a minority who is denied its identity."¹³² Vollebaek argues that "the prevention of inter-ethnic conflict goes hand in hand with the establishment of an adequate system of protection for linguistic rights," noting however that extreme nationalism, by minorities as well as majorities, should be guarded against.¹³³ He urges that governments can win the trust and support of minorities by protecting linguistic rights.¹³⁴ Linguistic rights may therefore be a "political necessity".¹³⁵

Paulston observes that language rights are important because "their existence usually reveals past and present injustice or exploitation against the weak in the world."¹³⁶ Thus, language rights can be seen as part of a nation's obligation to provide equal access to democracy and equal opportunities, which may include 'special measures' to address existing disadvantage and ameliorate the effects of past discrimination. This position is supported by international law.

Non-discrimination

Article 1(4) of CERD¹³⁷ provides that 'special measures' are allowed for the purpose of addressing the disadvantage of certain groups and ensuring equal enjoyment of rights. While it contains no explicit mention of language, the document defines 'racial discrimination' broadly. CERD places obligations on governments to take action to eliminate discrimination, which includes recognising and respecting Indigenous "culture,

¹²⁸ Sally Holt and John Packer, 'OSCE developments and linguistic minorities' 3(2) (2001) *International Journal on Multicultural Societies* 99, 101.

¹²⁹ *Ibid.*

¹³⁰ Suzanne Romaine, 'The impact of language policy on endangered languages' 4(2) (2002) *International Journal on Multicultural Societies*, 7.

¹³¹ Stephen May, *Language and Minority Rights – ethnicity, nationalism and the politics of language* (Routledge, 2008), 17.

¹³² Sally Holt and John Packer, 'OSCE developments and linguistic minorities' 3(2) (2001) *International Journal on Multicultural Societies* 99, 102.

¹³³ Knut Vollebaek, 'Linguistic rights in the work of the High Commissioner for National Minorities: new and old challenged in promoting comprehensive security' address to Conference on Linguistic Rights of National Minorities: Ten years after the Oslo Recommendations and beyond (Oslo, 18 June 2008), 3.

¹³⁴ *Ibid.*

¹³⁵ Stephen May, *Language and Minority Rights – ethnicity, nationalism and the politics of language* (Routledge, 2008), 17.

¹³⁶ Christina Bratt Paulston, 'Language policies and language rights' 26 (1997) *Annual Review of Anthropology* 73, 83.

¹³⁷ Convention for the Elimination of all forms of Racial Discrimination.

history, language and way of life...”¹³⁸ Special recognition of Indigenous languages is therefore justifiable and necessary at international law.

De Varennes explains:

“...the state could be obligated to assist indigenous people in “correcting” past injustices and practices with amount to “cultural” genocide. The weakness of some indigenous languages, particularly in North America and Australia, is due to assimilationist state policies, often enforced brutally or at least against the will of indigenous people...”¹³⁹

Protection of minority languages can thus be seen as necessary to ameliorate the effects of past discriminatory practices.

In general, language rights at international law can be conceived as part of the State’s obligation to enable equal enjoyment of rights. But making language rights non-restrictive and not based on a person’s colour, race or lineage is important in effecting non-discrimination principles.

The approach to minority cultures in Europe is one of ‘integrational diversity’. This means “the simultaneous maintenance of different identities and the promotion of social integration,” based on the principle of non-discrimination.¹⁴⁰ This would seem a good model for Australia to follow.

On top of the human rights protections afforded to minorities, it is established at international law that Indigenous people deserve special recognition by virtue of their Indigeneity.

One practical response to the argument that the government should help develop Indigenous languages may be that there is no need for such measures, because Indigenous languages in Australia are already so depleted, that these facilities would be wasted. This however is a circular argument – we should not provide support because Indigenous languages are weak, because we have not provided support in the past. International law suggests that nation states have an obligation not only to provide access and usage rights for Indigenous and minority language groups, but to provide developmental support, including positive measures to revitalise Indigenous languages and ameliorate past discriminatory practices.

How do other countries protect minority language rights?

What follows is a brief overview of language rights internationally.

Section 30 and 31 of the 1996 South African Constitution are constructed similarly to Article 27 of the ICCPR, setting out rights to minority language use. South Africa’s Constitution declares 11 official languages. Several unofficial languages are also recognised at the legislative level. Section 6 of the Constitution provides that “recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.” The provision also prescribes that government bodies must monitor official language use, and sets up a South African Language Board, to “promote, and create conditions for, the development and use of all official languages; the Khoi, Nama and San languages; and sign language ; and promote and ensure respect

¹³⁸ General Recommendation No. 23: *Indigenous Peoples* : 18/08/1997. *Gen. Rec. No. 23. (General Comments)*.

¹³⁹ Fernand de Varennes, ‘Indigenous Peoples and Language’ 2(1) (1995) *Murdoch University Electronic Journal of Law*, 12.

¹⁴⁰ Sally Holt and John Packer, ‘OSCE developments and linguistic minorities’ 3(2) (2001) *International Journal on Multicultural Societies* 99, 102.

for all languages commonly used by communities in South Africa...” South Africa’s Constitution is widely regarded as exemplary.

Section 343 of India’s Constitution proclaims Hindi the official language, with English for official use. Chapter II sets out processes for recognition of regional languages. Section 347 provides:

“...the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.”

Arguably, this is an appropriately flexible and pragmatic approach for recognition of regional minority languages. Schedule 8 of India’s Constitution lists 22 officially recognised regional languages. According to the Official Languages Resolution 1968, the government now bears a positive obligation with respect to these languages:

“... in the interest of the educational and cultural advancement of the country ... concerted measures should be taken ... for the coordinated development of all these languages, alongside Hindi so that they grow rapidly in richness and become effective means of communicating modern knowledge...”¹⁴¹

These provisions confirm the contention that States have positive obligations to ensure minority and Indigenous language support and development in the modern context.

International Acts and policies

The European Charter for Regional and Minority Languages adopted in 1992 helped confirm thinking about minority language rights in Europe. The progressive trend in this area of policy can be seen in many European countries. In the UK, Irish, Ulster Scots, Scottish Gaelic, Scots, Welsh and Cornish are recognised regional languages. In the UK’s initial periodic report to the Charter it outlined a number of legislative measures facilitating use of regional languages. These included the Welsh Language Act 1993 and the Education (Scotland) Act 1980, among others.¹⁴²

In 1969 Norway passed legislation to ensure the right of Sami children to learn their Indigenous language.¹⁴³ In 1992 the Norwegian Primary School Act provided that children in Sami districts have the right to be taught in Sami, and that children in non-Sami areas can also demand Sami instruction if there are at least 3 pupils at a school.¹⁴⁴ The Finnish Parliament has also adopted a Sami Language Act.¹⁴⁵ Swedish policy also appears to be moving towards “societal multi-lingualism”.¹⁴⁶ In the 90’s, Sweden granted educational language rights to 5 recognised national minority languages: Sami, Meankieli, Finnish, Romani and Yiddish.¹⁴⁷ Similarly, committees on Sami language have operated in Sweden since 1974.¹⁴⁸

¹⁴¹ The Official Language Resolution 1968, [Localization of Languages for eGovernance and RTIA](http://localization.wordpress.com/2006/10/25/the-official-language-resolution-1968/), <http://localization.wordpress.com/2006/10/25/the-official-language-resolution-1968/> [accessed 1 July 2011].

¹⁴² Initial periodical report from the United Kingdom, ‘The European Charter for Regional or Minority Languages.

¹⁴³ Fernand de Varennes, ‘Indigenous Peoples and Language’ 2(1) (1995) *Murdoch University Electronic Journal of Law*, 6.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, 13.

¹⁴⁶ Francis Hult, ‘Planning for multilingualism and minority language rights in Sweden’ 3 (2004) *Language Policy* 181, 181.

¹⁴⁷ *Ibid.*, 186.

¹⁴⁸ *Ibid.*, 191.

In 1978 Hawaiian was recognised as an official language in Hawaii and a language reinvigoration program was established.¹⁴⁹ By 1992 the Native American Languages Act was passed to “ensure the survival and continuing vitality of Native American languages.”¹⁵⁰

In the 1960's Mexico implemented a policy emphasising early literacy education in the native language, plus teaching Spanish as a second language.¹⁵¹ By 1992 the Mexican Constitution was amended to protect development of Indigenous languages and culture.¹⁵²

Closer to home, New Zealand courts have confirmed that the Maori language is to be considered a “valued Maori treasure” as per the provisions of the Waitangi Treaty, and Maori was made an official language in 1987.¹⁵³ Writers argue that this has led to reassertion of Maori language and culture after a long history of colonisation and disempowerment.¹⁵⁴ Now, it is reported that “many places in New Zealand have both Maori and English names and local governments...display all information in bilingual formats. School also reflect diversity of language...”¹⁵⁵ The Education Act 1989 also provides that schools must take reasonable steps to provide Indigenous language learning when parents request it.¹⁵⁶ Reportedly, the number of Maori speakers had subsequently increased.¹⁵⁷

...From my own experience and what I have learnt working very closely with the Nyungar people in my area have found that the greatest issue facing aboriginal kids is a lack of pride in their personal identity which is largely derived from our cultural identity. Recently we ran a camp, where we had an elder tell us the story of creation and many other parts of Nyungar Lore. I found this was extremely powerful, and I will never look at the world the same again, he told us of all the significant land marks, and their stories. These stories are awe inspiring and beautiful.....so amazing that regardless of a person's background, they will understand more about their humanity than ever before.....these are stories of humanity and began being written before man left Africa 75,000 years ago. These stories and the descriptions of our land and country teach us where we fit into the whole picture, they teach us that we are strong, that we must take care of our responsibilities to the land, to our children and also to our ancestors, and how this is all inter connected..... I have felt that connection, and it has changed my perception forever.....all this from the words of an old man.....who talked for hours; which felt like seconds.....and although I had never heard it before, I can remember it all, powerful..... Please recognize Aboriginal people and most importantly the culture, it is too valuable to lose, we are all now part of the stories, including the white man.....

(Mark Hardwick, WA)

¹⁴⁹ Suzanne Romaine, ‘The impact of language policy on endangered languages 4(2) (2002) *International Journal on Multicultural Societies*, 11.

¹⁵⁰ Fernand de Varennes, ‘Indigenous Peoples and Language’ 2(1) (1995) *Murdoch University Electronic Journal of Law*, 8.

¹⁵¹ Fernand de Varennes, ‘Indigenous Peoples and Language’ 2(1) (1995) *Murdoch University Electronic Journal of Law*, 5.

¹⁵² *Ibid*, 6.

¹⁵³ Fernand de Varennes, ‘Indigenous Peoples and Language’ 2(1) (1995) *Murdoch University Electronic Journal of Law*, 8.

¹⁵⁴ Nancy Hornberger, ‘Language policy, language education, language rights: Indigenous, immigrant and international perspectives’ 27 (1998) *Language in Society* 439, 451.

¹⁵⁵ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 76.

¹⁵⁶ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 76.

¹⁵⁷ *Ibid*, 77.

Proposed approach for Australia

While many of the international approaches outlined above appear impressive, the practical success of policies is harder to assess. South Africa, despite its striking constitutional language protection, has been criticised for inadequate policy implementation because of incoherent institutional structures and the impotence of the South African Language Board.¹⁵⁸ Getting the supporting structures, enabling processes and review mechanisms right is essential.

Australia should recognise both English and Indigenous languages in its Constitution in a new section 127B, as well as confirm the right of all people to freely use the languages of their choice. Confirming this freedom is important, not only to give this reform widespread appeal, but to mark a clear shift from discriminatory assimilationist policies of the past which prohibited Indigenous Australians from using their traditional languages, and resulted in widespread language and cultural loss.

127B

The national language of the Commonwealth of Australia is English. All Australian citizens shall be provided the opportunity to learn, speak and write English.

The Aboriginal and Torres Strait Islander languages shall be honoured as the original Australian languages, a treasured part of our national heritage.

All Australian citizens shall have the freedom to speak, maintain and transmit the languages of their choice.

In addition to the proposed constitutional amendment, legislative reform is required to allow for practical implementation of policies to support Indigenous languages. The government should pass a *Languages Act*. This Act would have the purpose of promoting the English language in Australia, and promoting language learning and bilingualism for all Australians; promoting English literacy for all, especially English language learning for those for whom English is not a first language or those with literacy difficulties (for example Indigenous people and immigrants); establishing processes for official recognition of Indigenous Australian languages; mapping Indigenous language groups and place-names alongside contemporary place-names; and establishing a National Indigenous Languages Centre (NILC) to research, document and teach Indigenous languages, as suggested by the government's 2009 Indigenous languages policy.¹⁵⁹ The Act could also establish a national Indigenous Languages Week to celebrate, honour and promote Indigenous Australian languages, as they have in New Zealand.¹⁶⁰

Local recognition of Indigenous languages would mean that the language would be offered in local schools, adult language education centres could be set up, road signs and place-names would be translated into the language with English alongside, official documents would be available in the languages, as well as interpreters available for courts.

The new Equal Rights and Responsibilities Commission would then need to monitor and review the language measures to ensure they are effective, necessary, enabling equal enjoyment of rights and responsibilities, and so on, in accordance with proposed constitutional sections 127 and 127A. Flexibility and reviewability

¹⁵⁸ Anne-Marie Beukes, 'Language policy incongruity and African languages in postapartheid South Africa' 40(1) (2009) *Language Matters*, 35, 44.

¹⁵⁹ Jenny Macklin and Peter Garret, 'New national approach to preserve Indigenous languages' (9 August 2009).

¹⁶⁰ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 'Chapter 3: The perilous state of Indigenous languages in Australia', 77.

are important. Vollebaek notes that “all parties should acknowledge that effective linguistic policies... cannot be set in stone and are not for ever; they must be continually reviewed and adapted in order to maintain the right balance.”¹⁶¹

Funding and federal cooperation

The 2009 National Approach to Indigenous languages did not include a funding increase.¹⁶² The approach proposed here should be accompanied by an adequate increase in funding if it is to be effective. Similarly, since education policies are so important and these are mostly run by the states, it is crucial that the new initiatives have state cooperation. Where appropriate, the Commonwealth government should provide the funds for States to implement the required policies. A “combined national, state and territory” approach is required.¹⁶³

The Social Justice Report 2009 states that Australia lacks a coordinated approach to Indigenous language maintenance, and noted the lack of reliable research.¹⁶⁴ The proposed reform package, through involvement of the NILC and a coordinated approach with set national and state procedures under the Languages Act, should strive to address this problem.

... I would love to see the Aboriginal people presented in a good light to other Australians and would also benefit greatly from learning the native language of my region- Noongar. I think all people should be more exposed to the language in particular the names of places.
(Therese Duirs, WA)

Conclusion – reform for cultural and language revitalisation

Tony Abbott has expressed support for the idea of government funding of Indigenous culture. He has argued that, “because it is unique to our country, support for Aboriginal culture is a responsibility Australian government in a way that support for other minority cultures clearly is not.”¹⁶⁵

The loss of Indigenous languages in Australia would be a “loss for all Australians.”¹⁶⁶ AIATSIS contends that “official and binding recognition of Australia’s Indigenous languages would raise the level of understanding about Indigenous languages in the wider community, and would act as a brake on ill-considered policy moves...”¹⁶⁷ Australia’s constitutional reform should include recognition of distinct Indigenous identity and provide the impetus for that identity and heritage to continue. Reform should therefore include acknowledgement of Indigenous languages as Australian languages. Language movements have been shown to be successful when they become a national responsibility.¹⁶⁸ Constitutional and legislative measures are required if Indigenous language extinction is to be prevented.

¹⁶¹ Knut Vollebaek, ‘Linguistic rights in the work of the High Commissioner for National Minorities: new and old challenged in promoting comprehensive security’ address to Conference on Linguistic Rights of National Minorities: Ten years after the Oslo Recommendations and beyond (Oslo, 18 June 2008), 3.

¹⁶² Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 59.

¹⁶³ *Ibid*, 72.

¹⁶⁴ *Ibid*.

¹⁶⁵ Noel Pearson, *Radical Hope – education and equality in Australia* (Blank Inc., 2011), 166.

¹⁶⁶ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 58.

¹⁶⁷ Jane Simpson, Jo Caffery, and Patrick McConvell, ‘Gaps in Australia’s Indigenous Language Policy: Dismantling bilingual education in the Northern Territory’ 24 (2009) *AIATSIS Discussion Paper*, 38.

¹⁶⁸ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 75.

But Romaine notes that “nowhere have language movements succeeded if they relied on the school or state to carry the primary burden of maintenance or revival.”¹⁶⁹ As Pearson urges:

“The more esoteric and less economically relevant these cultures and languages are to the imperatives of the modern, global world, the more serious the people must be in order to retain their own culture and language.”¹⁷⁰

Indigenous Australians need to become serious about revitalising their languages.

If it can be said that equality and equal rights is necessary for closing the gap, then recognition of distinct identity and existence is necessary for reconciliation. This dual aspect to Indigenous minority success in Australian society is why emphasis on language preservation and development is a worthy goal. English literacy is as important as Indigenous language revitalisation. But in terms of closing the gap and reconciliation, economic success is not the only thing that is important. Cultural distinctness and vitality is also valuable. This does not mean that all aspects of Indigenous traditional culture must be practised by modern individuals. Indigenous people should have the knowledge and linguistic skills to pick and choose, to live fulfilling and culturally rich lives, and to participate wholly in the mainstream economy and national life.

Conclusion

Australia needs to remove section 25 and the Race Power from its Constitution, and insert instead a power to make laws to Aboriginal and Torres Strait Islander people in accordance with a new general non-discrimination provision and a review requirement which gives voice to Indigenous Australians in the review of all Indigenous-specific laws, to be inserted as the new sections 127 and 127A in the Australian Constitution. We also advocate for constitutional recognition of Indigenous Australian languages alongside English, and confirmation of the right of all people to use and transmit the languages of their choice, in 127B. These reforms, we believe, represent the correct “radical centre” for constitutional reform to enable Indigenous Australians to achieve socio-economic and cultural prosperity.

A new preamble recognising Indigenous Australians should only be pursued if this is necessary to generate popular support for a successful referendum. We firmly believe that this preamble should make mention of Indigenous Australians, and other groups within Australia, in order to generate popular support. It would be preferable if this preamble made mention of 2013, being the year the reforms are enacted, to remind voters that this is about modernisation of our Constitution, and about moving ahead into a new and better era.

Proposed constitutional reforms

Remove the Race Power

Section 51(xxvi) of the Constitution, the Race Power, should be removed as it allows for laws to be passed on the basis of race, whether these laws are beneficial or adverse.

¹⁶⁹ Suzanne Romaine, ‘Preserving endangered languages’ 1 (1-2) (2007) *Language and Linguistics Compass* 115, 125.

¹⁷⁰ Noel Pearson, *Radical Hope – education and equality in Australia* (Blank Inc., 2011), 14.

Insert a replacement power to support laws for Aboriginal and Torres Strait Islander peoples

Insert:

Section 51 power to pass laws with respect to: Aboriginal and Torres Strait Islander peoples.

Remove section 25

Section 25 should be removed as it contemplates barring races from voting.

Insert a new general guarantee against racial discrimination

This reform must benefit all Australians; therefore we propose the inclusion of a general guarantee against racial discrimination to entrench principles of equality before the law. A new constitutional guarantee should be created to protect all Australians from adverse discrimination on the basis of race.

Insert: S 127

No law shall discriminate on the basis of race, colour or ethnicity.

Laws to redress disadvantage, ameliorate the effects of past discrimination, or to recognise or protect the culture, language and identity of any group do not constitute discrimination.

New review requirement for all laws with respect to Aboriginal and Torres Strait Islander people

Insert: 127A

Laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, shall be periodically reviewed every ten years or more frequently to assess the effectiveness of the laws in achieving their intended objectives.

In assessing the effectiveness of laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, the views and aspirations of the Aboriginal and Torres Strait Islander people affected by the laws shall be taken into account.

Insert a new Australian Languages provision

127B

The national language of the Commonwealth of Australia is English. All Australian citizens shall be provided the opportunity to learn, speak and write English.

The Aboriginal and Torres Strait Islander languages shall be honoured as the original Australian languages, a treasured part of our national heritage.

All Australian citizens shall have the freedom to speak, maintain and transmit the languages of their choice.

Preamble (if politically required)

If it is found that a preamble is required to generate popular support, a suitable form of words might read:

We the people of Australia declare in the year 2013: that the Commonwealth of Australia, having come together in the year 1901, is a sovereign indivisible democracy; and a union of our Indigenous Australian cultures, our British and Irish heritage, and the gifts of Australians drawn from many nations, under this Constitution. God bless Australia.

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