Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution

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I INTRODUCTION

In the United States (US), a person of the stature and achievements of Andrew Inglis Clark would be cast as a national political hero. This is because, more than a century ago, Clark played a key role in forging the six colonies of this continent into a single nation. He can rightly be regarded as one of the most significant figures in Australia's national story and, along with Prime Minister Joseph Lyons, as one of the most important Tasmanians.

Clark was born in Hobart in 1848, and died 59 years later, soon after Federation.[1] He was a reformer and unabashed champion of democracy. He favoured universal manhood suffrage and a range of other electoral reforms. His many successes included amending the Tasmanian electoral system to introduce a form of proportional representation that is today known as the Hare-Clark system. He was also a believer in the 'natural and fundamental rights of the individual' and was concerned about the tyranny of the majority over minority.[2] Indeed, the *Hobart Mercury* described him as a person who held 'ultra-republication, if not revolutionary ideas'.[3]

Clark's influence is most obvious in regard to the *Australian Constitution*, which brought about the Australian nation in 1901 and continues to shape

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[1] H Reynolds, *Clark, Andrew Inglis (1848-1907)* (first published in hardcopy in 1969) Australian Dictionary of Biography <http://adb.anu.edu.au/biography/clark-andrew-inglis-3211>.

[2] Andrew Inglis Clark, 'Why I am a Democrat', Clark Papers, University of Tasmania Archives, Hobart C4/D3 in Richard Ely (ed), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (Centre for Tasmanian Historical Studies, 2001) 27, 32.

[3] John W Williams, 'Race, Citizenship and the Formation of the *Australian Constitution*: Andrew Inglis Clark and the '14th Amendment' (1996) 42 *Australian Journal of Politics and History* 10, 11.

how the people are governed to this day. Clark served as the Attorney General of Tasmania and was a delegate at the 1891 convention that produced a draft of the *Constitution*. This owed much to an earlier draft prepared by Clark. All but 10 clauses of Clark's version appeared or had a recognisable counterpart in the *Constitution* as finally enacted in 1901.[4] The fact that Australia's system of government is infused with values and principles such as the rule of law and the separation of powers owes much to Clark.

In 1898, Clark was appointed as a justice of the Supreme Court of Tasmania, and in 1903 was included by federal Attorney-General Alfred Deakin in a list of five people to form the inaugural bench of the High Court of Australia.[5] Unfortunately, the federal Parliament reduced the number of judges on the court to three, and Clark lost out to others, including Australia's first Prime Minister Edmund Barton. It was initially unclear whether Barton would relinquish the Prime Ministership to join the court, and so Deakin wrote to Clark to determine whether he would accept the appointment to the court if it were offered. Clark replied that he would, but Barton then decided to take the seat after all. No future opportunity for appointment arose before Clark's death in 1907. Not only did Clark miss out, but so too did Tasmania. No Tasmanian joined the first High Court, nor has any Tasmanian been appointed in the 112 years since the Court was formed.

Despite missing out on High Court appointment, Clark's voice continues to be heard in the High Court and in debates about the *Constitution*. He is one of the very few people of his era who continues to be the subject of quotation and debate among the judges that interpret the *Constitution*. In particular, judges have engaged with his conception of the *Constitution* as a 'living force'. As Clark wrote in 1901:

> [T]he social conditions and the political exigencies of the succeeding generations of every civilized and progressive community will inevitably produce new governmental problems to which the language of the Constitution must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce

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[4] J M Neasey, 'Andrew Inglis Clark Senior and Australian Federation' (1969) 15(2) *Australian Journal of Politics and History* 1, 7–8

[5] Troy Simpson, 'Appointments that might have been' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 23, 23.

> the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.[6]

Clark's metaphor of the *Constitution* as a 'living force' has been invoked by justices of the High Court to support an evolutionary conception of that document, rather than one bound by the intentions of the drafters.[7] A recent example of such an approach, in this case without direct reference to Clark, is the High Court's finding that the word 'marriage' in the *Constitution* includes marriages between people of the same-sex.[8] Such an idea was no doubt heresy in 1901, but a contemporary approach to the *Constitution* enabled the High Court to see that that word had come to mean something different, and additional, more than a century later.

It is in the spirit of Clark's view that the *Constitution* must adapt to the values and beliefs of the time that I selected the topic for this lecture. It concerns the most active debate in Australia today on changing the text of the *Constitution*: that is, whether the document should be amended to recognise the Aboriginal and Torres Strait Islander peoples of this nation. I address this topic by examining, in turn, the drafting of the *Constitution*, its interpretation and operation since 1901 and contemporary proposals for change.

II THE *CONSTITUTION* AS DRAFTED

The *Constitution* was not written as a people's document. It was a compact between the Australian colonies designed to meet, amongst other things, the needs of trade and commerce. As such, the document does not expressly embody the fundamental rights or aspirations of the Australian people. It contains few provisions that are explicitly rights-orientated. According to Lowitja O'Donoghue, a former Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC):

> It says very little about what it is to be Australian. It says practically nothing about how we find ourselves here – save being an amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.[9]

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[6] Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles Maxwell, first published in 1901; Legal Books, 1997 ed) 21.
[7] See, eg, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 174 (Deane J).
[8] *Commonwealth v Australian Capital Territory* (*Same-Sex Marriage Case*) (2013) 250 CLR 441.
[9] Quoted in Frank Brennan, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia* (Constitutional Centenary Foundation, 1994) 18.

The *Constitution* was drafted at two Conventions held in the 1890s. Neither Convention included any women, nor representatives of Australia's Indigenous peoples. In most cases, Aboriginal and Torres Strait people were not qualified to vote for the delegates to the Convention, and played no role in the drafting process. Rather than being treated as equals, they were cast as a 'dying race' not expected to survive British settlement. As a result, they were described as a 'problem' and as a people lacking any future in the nation.[10] It is not surprising then that the *Constitution* as drafted did not reflect their interests or aspirations.

The preamble to the *British Act* that brought about the *Constitution* speaks of the values that underlie the document and the process leading to its creation.[11] It also states that *Constitution* is based upon the support of the people of the colonies. In this way, the document reflects Australia's history of British settlement, but fails to mention the much longer occupation of the continent by Aboriginal and Torres Strait Islander peoples. It is as if their history does not matter, and is not part of the nation's story.

The operative provisions of the *Constitution* presented an additional problem. They provided for the exclusion of Indigenous peoples, and discrimination against them. Section 25 stated that: where a state disqualifies the people of any race from its franchise, the races so excluded could not be counted in the population of the state used to determine the state's representation in the federal Parliament.

This section was proposed by Clark, who adapted the wording from the 14th Amendment to the *US Constitution*.[12] Section 25 has the apparently benign purpose of ensuring that states suffer a reduction in the level of their federal representation when they disqualify people from voting because of their race. Although the section acts as a penalty, it does so by acknowledging that the states may disqualify people from voting due to their race. This reflects the fact that at Federation in 1901, and for decades afterwards, Aboriginal people were denied the vote in federal, Queensland and Western Australian elections.[13] Section 25 recognised this as being an ongoing legal possibility for state elections.

This notion that Aboriginal people might be excluded from the franchised was reinforced by s 127 of the *Constitution*. It stated that: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other

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[10] Megan Davis and George Williams, *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015) 3.
[11] *Commonwealth of Australia Constitution Act* 1900 (Imp), preamble.
[12] See Anne Twomey, 'An Obituary for s 25 of the *Constitution*' (2012) 23 *Public Law Review* 125, 129.
[13] George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed 2014) 135.

part of the Commonwealth, aboriginal natives shall not be counted'. This section was adopted to stop Western Australia and Queensland from using their large Aboriginal populations to gain extra seats in the federal Parliament and a higher share of federal tax revenue.[14] This reflected the view that Aboriginal people should not be counted in determining representation and were not deserving of a share of government income.

Finally, the races power in s 51(xxvi) provided that the Commonwealth Parliament could legislate with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. This section was inserted into the *Constitution* to allow the Commonwealth to discriminate against sections of the community on account of their race. Aboriginal people were not subject to this section. However, this was not because they were to be protected, but because it was thought that the Aboriginal issues were a matter for the States and not the federal government.

By today's standards, the reasoning behind s 51(xxvi) was racist. Edmund Barton, the Leader of the 1897-1898 Convention, later Australia's first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[15] In summarising the effect of s 51(xxvi), John Quick and Robert Garran, writing in 1901, stated that:

> It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.[16]

Not every framer supported this outcome. Clark argued for another clause in the *Constitution* that could have blunted the effect of this power.[17] His proposed the addition of a clause 110 would have provided:

> The citizens of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all privileges and

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[14] Davis and Williams, above n 10, 17.
[15] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 27 January 1898, 228-9 (Edmund Barton).
[16] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, first published 1901; Legal Books, 1995 ed) 622.
[17] See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed 2013) 65-6.

> immunities of citizens of the Commonwealth in the several states; and a state shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.[18]

Clark argued for the revision by quoting Justice Cooley of Michigan:

> the security of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power.[19]

Clause 110 would have provided recognition of Australian citizenship, and could have prevented federal and state Parliaments from discriminating on the basis of race. It was this possibility that led to the rejection of the clause by the other framers. They were concerned for example that Clark's clause would override Western Australian laws under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field'.[20] Legislation discriminating on the basis of race was common in the Australian colonies at this time. Clark himself had been a proponent of such a law. In 1881, he brought about legislation through the Tasmanian Parliament which imposed a £10 poll tax payable by the ship master for every Chinese person carried.[21]

Clark's clause 110, which might have done away with such discrimination, was replaced instead with what became s 117 of the *Constitution*, which merely prevents discrimination on the basis of state residence. In supporting this outcome, Sir John Forrest, Premier of Western Australia, summed up the mood of the 1897-1898 Convention when he stated:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.[22]

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[18] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne 8 Februrary 1898, 667 (Joseph Carruthers).

[19] 'Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia', quoted in John Williams, '"With Eyes Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23 *Federal Law Review* 149, 177.

[20] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne 8 February 1898, 665 (Sir John Forrest).

[21] *Chinese Immigration Act 1887* (Tas) s 4.

[22] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne 8 February 1898, 666 (Sir John Forrest).

In formulating the words of s 117, Henry Higgins, one of the early members of the High Court, argued that it 'would allow Sir John Forrest … to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race'.[23] In this and other respects, the result was a *Constitution* in which the concept of race, and indeed racial discrimination, was prevalent.

III THE *CONSTITUTION* SINCE FEDERATION

Given the drafting history of the *Constitution*, it is not surprising that legislation enacted by the new Commonwealth Parliament was premised upon racially discriminatory policies. The *Immigration Restriction Act 1901* (Cth) for example prohibited the immigration into Australia of any person who, when asked by an officer, was unable to 'write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer'.[24] This was the means by which the White Australia policy was implemented.

Of more significance to Aboriginal people was legislation that denied them the right to vote in federal elections. The scope of the federal franchise was determined after Federation by the *Commonwealth Franchise Act 1902* (Cth). That Act extended the federal franchise to women, and it had been proposed that the Bill also extend the franchise to Aborigines. However, this was strongly resisted and was finally defeated. Among its opponents was Isaac Isaacs, subsequently Chief Justice of the High Court and Australia's first Australian Governor-General, who thought Aborigines 'have not the intelligence, interest or capacity' to vote.[25]

As finally enacted, s 4 of the *Commonwealth Franchise Act* denied the voting rights of the 'aboriginal native[s] of Australia'. It took until 1962 to amend the *Commonwealth Electoral Act 1918* (Cth) to extend universal adult suffrage to Aboriginal people. Even then, full equality at federal elections did not occur until 1983, when the Act was amended to make enrolment for and voting in federal elections compulsory for

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[23] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne 3 March 1898, 1801 (Henry Higgins).
[24] *Immigration Restriction Act 1901* (Cth) s 3(a).
[25] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 April 1902, 11979 (Isaac Isaacs).

Indigenous people, as it had been for other Australians since 1912 for enrolment and 1924 for voting.[26]

In 1967, a proposal was put to the Australian people in a referendum to strike out the words 'other than the aboriginal race in any State' in s 51(xxvi) and delete s 127 entirely. The people overwhelmingly voted 'Yes', with the proposal supported in every State and nationally by over 90 per cent of Australians. Out of the 44 referendum proposals put to Australian people since 1901, this is the highest 'Yes' vote so far achieved.

The 1967 referendum was an important turning point in the place of Aboriginal people within the Australian legal structure. Nonetheless, in legal terms, the result was mixed. The vote deleted discriminatory references to Aboriginal people, but inserted nothing in their place. As a result, rather than recognising Indigenous people, the referendum left a silence at the heart of the *Constitution* when it came to the people and their place in the nation. The referendum also failed to deal with clauses in the *Constitution* that permit racial discrimination. Section 25 was left untouched, while the races power was retained, now in a form that extended to Aboriginal people. In effect, the racially discriminatory underpinnings of s 51(xxvi) were extended to them, but without any textual indication that the power could be applied only for their benefit. The result today is that Australia is the only democratic nation in the world with a *Constitution* that authorises its national parliament to discriminate on the basis of race.

The scope of the races power was considered by the High Court in *Hindmarsh Island Bridge Case*.[27] The case related to the claim by the Ngarrindjeri women in South Australia that an area should be protected from development under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The Howard government sought to head off this claim by having Parliament enact the *Hindmarsh Island Bridge Act 1997* (Cth), which amended the *Aboriginal and Torres Strait Islander Heritage Protection Act* so that it no longer applied to 'the Hindmarsh Island bridge area' and thus prevented any further possible claim by the Ngarrindjeri women.

The Ngarrindjeri women responded by bringing an action in the High Court challenging the validity of the *Hindmarsh Island Bridge Act*. They argued that the Act could not be passed under the races power because that power extends only to laws for the benefit of a particular race, and

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[26] Australian Electoral Commission, *Compulsory Voting* (18 May 2011) <http://www.aec.gov.au/voting/Compulsory_Voting.htm>.

[27] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case'*). The author appeared as counsel in this case.

cannot be used to impose a detriment on the people of a race. In response, the Commonwealth argued that there are no limits to the races power, that is, provided that the law affixes a consequence based upon race, it is not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Commonwealth Solicitor-General, Gavan Griffith, suggested that the races power 'is infused with a power of adverse operation'.[28] He also acknowledged 'the direct racist content of this provision' in the sense of 'a capacity for adverse operation'.[29]

The challenge failed, with four judges addressing the scope of the power. Gummow and Hayne JJ found that the use of 'race' as a criterion is inherently discriminatory, and thus that it may extend to laws that impact negatively upon a race. By contrast, Gaudron and Kirby JJ indicated that, in the words of the latter, the power 'does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race)'.[30] The overall effect of the judgments was inconclusive. The Court split 2:2 on the scope of the races power, with a further two justices not deciding. It thus failed to resolve the issue of whether the Commonwealth possesses the power under the *Constitution* to enact laws that discriminate against Indigenous peoples on the basis of their race.

IV PROPOSALS FOR CHANGE

Aboriginal and Torres Strait Islander peoples have long argued for change to Australia's system of public law, including reforms such as through a treaty, recognition of their sovereignty and constitutional recognition.[31] They have done so not because of abstract concerns about the state of the law, but because of their experience in living in a nation that has practised discrimination against them. They have been denied the vote, had their children removed, been prevented from marrying, told where they could live and had their wages confiscated.[32] The federal and state laws that brought about these actions were possible because of a national constitutional structure that does not recognise the existence of Aboriginal and Torres Strait Islander peoples, and permits discrimination against them and others on the basis of race.

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[28] *Kartinyeri v Commonwealth* A29/1997 [1998] HCATrans 13 (5 February 1998).
[29] Ibid.
[30] *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 411.
[31] See Davis and Williams, above n 10.
[32] Ibid 2.

The problem is not limited to the law. It is been recognised that Australia's legal structure contributes to a broader range of concerns. Research on subjects such as the social determinants of health shows how discrimination, disadvantage and exclusion can have a major, negative, impact on mental and physical health. It is hard to underestimate the emotional and other costs of being cast as an outsider in your own land. Experts have recognised this. For example, the Royal Australian and New Zealand College of Psychiatrists has said:

> The lack of acknowledgement of a people's existence in a country's Constitution has a major impact on their sense of identity and value within the community, and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people. There is an association with socioeconomic disadvantage and subsequent higher rates of mental illness, physical illness and incarceration.[33]

This is an issue not just for the federal *Constitution*, but also for those of the states. Indeed, it is at the state level that change began. Victoria was the first to move, adding the following text in 2004 to its *Constitution Act 1975* (Vic):

> 1A Recognition of Aboriginal people
>
> (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
>
> (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—
>
> > (a) have a unique status as the descendants of Australia's first people; and
> >
> > (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
> >
> > (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.
>
> (3) The Parliament does not intend by this section—
>
> > (a) to create in any person any legal right or give rise to any civil cause of action; or
> >
> > (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

[33] Royal Australian and New Zealand College of Psychiatrists, 'Mental Health Benefits in Constitutional Recognition of Indigenous Australians' (Media Release, 25 May 2011).

This section comes after the existing preamble, which recites things such as the creation of the self-governing colony of Victoria in 1854.

Similar statements of recognition have since been added to the constitutions of Queensland,[34] New South Wales[35] and South Australia.[36] A Bill to achieve this has also been introduced into the Western Australian Parliament.[37] It was the subject of a report in 2015 by a committee of that Parliament, which unanimously recommended in favour of making the change.[38] Tasmania has yet to advance as far, although an inquiry into the issue by the Standing Committee on Community Development of the Tasmanian Parliament is underway.[39]

At the federal level, the question of how to amend the *Constitution* has been examined by two lengthy processes. The first, an Expert Panel on Constitutional Recognition of Indigenous Australians comprising community leaders and representatives from all major parties, conducted Australia-wide consultations in 2011. Its report was made public early in 2012.[40] The second process was conducted by the Joint Select Committee on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples of the federal Parliament. It again consulted with experts and the community, reporting in June 2015.[41] Further consultation has been promised. The historic meeting in July 2015 of 40 Aboriginal leaders with former Prime Minister Tony Abbott and leader of the opposition, Bill Shorten, produced a commitment by the government to conduct community conferences across the nation, with the possibility that this might be followed by a national constitutional convention.[42]

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[34] *Constitution of Queensland 2001* (Qld), preamble, s 3A.
[35] *Constitution Act 1902* (NSW) s 2.
[36] *Constitution Act 1934* (SA) s 2.
[37] Constitution Amendment (Recognition of Aboriginal People) Bill 2014 (WA).
[38] Joint Select Committee on Aboriginal Constitutional Recognition, Western Australian Parliament, *Towards a True and Lasting Reconciliation Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia* (March 2015).
[39] Parliament of Tasmania, *House of Assembly: Standing Committee on Community Development* (2010) <http://www.parliament.tas.gov.au/ctee/House/HAComDev.htm>.
[40] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) i.
[41] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (June 2015).
[42] Ben Worsley, 'Indigenous referendum: Australians invited to join community conferences on recognition vote', *ABC News (online),* 6 July 2015 <http://www.abc.net.au/news/2015-07-06/australia-big-enough-for-indigenous-referendum-says-abbott/6598144>.

The processes conducted to date have been consistent in identifying strong community support for change, as well as the type of changes that need to be made to the *Constitution*. It has been found that any referendum should be put to the people in a package incorporating at least the following three general elements:

> 1. The insertion of positive, symbolic acknowledgement of Aboriginal and Torres Strait Islander peoples;
>
> 2. The deletion of the race provisions in ss 25 and 51(xxvi); and
>
> 3. The replacement of the races power with a new provision granting the Commonwealth Parliament the power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples', with this power constrained so that it cannot be used to enact laws that discriminate on the basis of race.[43]

The first two elements are uncontentious. Debate centres upon the third, including as to the wording of any new power and whether, or in what way, it should be limited. Constitutional limits upon the making of laws that discriminate on the basis of race is a standard feature in other nations, but less familiar in Australia given the nation's status as the only democracy without some form of national bill of rights. As a result, the idea of entrenching racial discrimination protection in the *Constitution* has attracted strong political opposition from conservative politicians. Former Prime Minister Tony Abbott, for example, rejected the idea as a 'one-clause Bill of Rights'.[44]

On the other hand, the idea has popular support. A survey conducted by the National Congress of Australia's First Peoples of its membership, which is drawn from the Aboriginal and Torres Strait Islander community and their peak organisations from across Australia, found that 97 per cent favoured an amendment to the *Constitution* that would prohibit racial discrimination or provide a guarantee of equality.[45] Support for such change is also strong in the wider community, with independent polling conducted by the Expert Panel on Constitutional Recognition of Indigenous Australians finding that 80 to 90 per cent of respondents

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[43] See, eg, the recommendations contained in Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012).

[44] Patricia Karvelas, 'Historic Constitution Vote over Indigenous Recognition Facing Hurdles', *The Australian* (online), 20 January 2012, <www.theaustralian.com.au/national-affairs/policy/historic- constitution-vote-over-indigenous-recognition-facing-hurdles/story-fn9hm1pm-1226248879375>.

[45] National Congress of Australia's First Peoples, *Statement to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 7 September 2011, <nationalcongress.com.au/wp-content/uploads/2011/09/CongressStatementtoExpertPanel.pdf>.

favoured amending the *Constitution* to insert a general guarantee against laws that discriminate on the basis of race, colour or ethnic origin. Indeed, it is fair to say that some form of racial discrimination protection is the single most popular part of the package of reforms that might constitute a recognition referendum.

The division of opinion between political leaders and the community remains a significant stumbling block on the path to a successful referendum. As yet, no process has been set down for resolving the disagreement. This has produced uncertainty and has allowed the debate to drift. One result of this has been the emergence of a new idea for constitutional recognition. Cape York Aboriginal leader Noel Pearson has argued that instead of protecting against racial discrimination, the *Constitution* should be amended to provide Indigenous peoples with a voice in the lawmaking process.[46] His idea is to insert text into the *Constitution* creating a body of Indigenous peoples to advise the federal Parliament on the making of laws.[47] The idea has merit, and is worthy of consideration, but as yet has not attracted broad popular or political support. This reflects the fact that it suffers from a number of problems that have yet to be remedied.

The effectiveness and influence of institutions within Australia's system of government can depend upon the powers to be exercised by that body. When it comes to shaping the state of the law on contentious matters of social and economic policy, such powers can be decisive. In this case, it is proposed only to:

> [C]reate an Indigenous body to advise and consult with Parliament on matters affecting Indigenous interests. While the body's advice would not be binding, Parliament should be constitutionally required to consult with and consider the advice of the Indigenous body when debating proposed laws.[48]

It is questionable whether, in the absence of any determinative powers, such advice or consultation will have much effect on the making of laws by the federal Parliament. In particular, it is hard to see how the advice of Aboriginal people will be sufficient to overcome the demonstrated willingness of the federal Parliament to enact laws to their detriment. It is notable that such laws have been enacted even over the vocal opposition

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[46] Cape York Institute, *Supplementary Submission to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (January 2015) <http://capeyorkpartnership.org.au/wp-content/uploads/2015/02/Supplementary-Submission-to-Joint-Select-Committee-January-2015.pdf>.
[47] Ibid.
[48] Ibid 4.

of Indigenous peoples. Examples include laws for native title and the Northern Territory intervention that suspended the operation of the *Racial Discrimination Act 1975* (Cth).[49]

The problem for Indigenous peoples is not only that parliamentarians have been willing to ignore them in the past, but that political parties can gain popularity in the broader electorate by being seen to act contrary to the wishes of minorities such as asylum seekers and Indigenous peoples. There may thus be a political upside for a government seen to act contrary to the advice of the body. It is hard to see how the body could overcome this dynamic.

In any event, the advisory body is misdirected in terms of where it might have the most impact. The record of a range of bodies in Australia and internationally within Westminster systems reveals the reluctance of governments to change course once a bill is within Parliament. This is because governments do everything they can to avoid altering their substantive policy position once a bill is in Parliament. To do so is to be seen to back down, and hence to suffer a political defeat. Governments avoid this by enforcing party discipline so as to impose the desired outcome. In this case, there is no reason to expect that a government would be any more willing to back down from its position based upon the view of an advisory body of Indigenous people. If a government was to change course, it would more likely be because its policy faces defeat at the hands of a hostile Senate. Of course, it is possible that the position of a majority of the Senate might coincide with that of the Indigenous advisory body, but this could not be relied upon.

If there is scope for an advisory group to make an impact, it is not likely at the parliamentary stage. It is at the stage at which laws are drafted and policy developed, that is, within the executive. This is why governments have set up advisory bodies at this level of government. However, such bodies would not likely be put in the *Constitution* because they need to be flexible and adaptable to the processes and needs of the government of the day. A body at this level will also typically operate behind closed doors, as that maximises its chances of bringing about changes in policy.

The proposal for an advisory body has been put as an alternative to including protection in the *Constitution* against racial discrimination. However, as an advisory body, it could not offer anything akin to such protection. It would retain the prospect that racially-discriminate laws could be enacted. This is hardly a saleable proposition at a referendum. It is open to the charge that Australians will be voting to support the

[49] *Native Title Amendment Act 1998* (Cth); *Northern Territory National Emergency Response Act 2007* (Cth).

continued power of the federal Parliament to discriminate on the basis of race.

These problems with the advisory body might be overcome by developing the model further. In particular, we need to move beyond the notion that an advisory body and racial discrimination protection are mutually exclusive. In fact, the best model may involve aspects of both of these. Whether or not there is an advisory body, any new power to make laws for Indigenous peoples must still be constrained by words that indicate that, for example, it cannot be used to enact laws that discriminate adversely against them.

I support a freedom from racial discrimination being inserted into the *Constitution* to protect all Australians. An example of this is the proposed s 116A drafted by the Expert Panel on Constitutional Recognition of Indigenous Australians. It would provide in part that: '[t]he Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin'.[50] However, acknowledging conservative objections to that section, it is important to note that compromise options exist.

The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has suggested a more modest outcome. It has proposed words of limitation (that a law may not 'discriminate adversely against' Indigenous peoples) within the replacement to the races power itself, rather than a freestanding guarantee.[51] This has the effect of quarantining the scope of the protection from racial discrimination so that it only protects Indigenous peoples, and would remove many of the concerns conservatives have about this reform. Without some form of change of this kind, I do not see this referendum as being viable.

An advantage of including modest racial discrimination protection is that it would improve the operation of the advisory body. The body would have something in the *Constitution* to advise on, that is, whether a law made by Parliament might be seen as discriminating adversely against Aboriginal people. It would give the body a meaningful role, and Parliament would be minded to listen to the body on this question given the possibility that the issue might be tested in the High Court. This also reflects the experience overseas of advisory bodies. Where they are

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[50] Expert Panel on Constitutional Recognition of Indigenous Australians, Australian Government, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012), xviii.

[51] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (June 2015), xv.

effective, it is because they can advise within the context of a legal framework that recognises Indigenous rights, through a constitution, treaty or otherwise. It is hard enough for an advisory body to be effective with such things, let alone in the context of Australia's legal framework, which contains nothing of this kind.

V CONCLUSION

Australia has debated the constitutional recognition of Aboriginal and Torres Strait Islander people for many years. At some point, the people will be asked to decide whether to actually make the change. They will do so by voting at a referendum, which under s 128 of the *Constitution* will succeed if a national majority of Australians and a majority of Australians voting in a majority of States vote 'Yes'. In this process, the votes of Tasmanians will be crucial. Tasmania is the nation's bellwether state when it comes to referendums.

Since 1901, Australia has held 44 referendums to change the *Constitution*, and only eight have passed.[52] Of the states, Tasmania has been the most reluctant to vote 'Yes'. It has voted 'No' more times than any other state, and indeed the outcome in Tasmania represents the best predictor of overall success. Out of 44 occasions, only in the 1910 and 1951 referendums, when Tasmanians voted 'Yes' but the referendum failed, did the State's vote not match the outcome of the referendum.[53] Significantly, no referendum has succeeded without Tasmanians supporting the change. It can only be hoped that at some future time a meaningful and worthwhile change to the *Constitution* is agreed upon, and that Tasmanians, along with the rest of the community, are able in the spirit of Clark to vote 'Yes' to recognising Indigenous peoples in the *Constitution*.

[52] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).
[53] Ibid 99.