

# Contours and prospects for Indigenous recognition in the Australian Constitution

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It is a great honour for one who is not a judge to be asked to deliver the AIJA Oration in Judicial Administration. Being the son and grandson of judges and having no prospect of ever being a judge, I am humbled to be at this podium if only briefly this evening under the auspices of the Australasian Institute of Judicial Administration. I join with you in paying respects to the Wurundjeri and Boonerwung peoples of the Kulin nation, the traditional owners of the land on which we meet. In this splendid venue, I join with you in thanking Chief Justice Michael Black who dedicated such energy to ensuring that a court's architecture could speak to people of justice and the rule of law.

As far as I am aware, I have no Aboriginal or Torres Strait Islander heritage. I am not an Indigenous leader. I am an Australian citizen who has spent some time and energy these last 30 years seeking better recognition of the rights and entitlements of Aboriginal and Torres Strait Islander Australians. Having recently published a book entitled *No Small Change: The Road to Recognition for Indigenous Australia*, I will address 'The Contours and Prospects for Indigenous Recognition in the Australian Constitution, and Why It Matters'.

I acknowledge those Aborigines and Torres Strait Islanders who insist that they have never ceded their sovereignty to the rest of us. I join with those Aborigines and Torres Strait Islanders who hope for better days when they are recognised in the Australian Constitution. As an advocate for modest constitutional recognition for Indigenous Australians, I respect those Aborigines and Torres Strait Islanders who question the utility of such recognition. But I do take heart from President Obama's line in his Charleston eulogy for the late Reverend Clementa C. Pinckney: 'Justice grows out of recognition'. Constitutional recognition is a better platform for justice than the constitutional silence which presently marks the Australian Constitution which still employs the outdated notion of 'race'.

It is now more than three years (and three prime ministers ago) since the Expert Panel set up by the Gillard Government reported on how the Constitution might be amended providing recognition of Aboriginal and Torres Strait Islander peoples. That panel reported in January 2012. When I read their report, I have to confess that my heart sank. I thought the panel put forward a comprehensive, but unachievable and unworkable proposal for constitutional change. I came to their report in light of my own experience, having chaired the National Human Rights Consultation for the Rudd Government in 2009. My committee knew that the Australian public were strongly in favour of a Human Rights Act, but we also knew there was next to no chance of the political elites, especially the elected politicians from the major political parties, supporting such a proposal. So we put forward a cascading set of recommendations with various fall-back suggestions for enhanced human rights protection, conceding that these alternative recommendations were no substitute for a Human Rights Act but

insisting that they would be an improvement on the status quo. That has proved to be the case.

Given that there were no fall-back recommendations in the Expert panel report 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' and given that the panel's key recommendation was a non-discrimination clause providing 'The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin', I kept my own counsel until the National Archives invited me to join Professor Megan Davis and Alison Page, two of the Indigenous members of the expert panel, together with Professor Michael Dodson in an ABC broadcast to consider the panel's recommendations on Constitution Day, 9 July 2012. At that time, I said:

You can't just insert one constitutional right in the Constitution without words of limitation for balancing all other rights. And when you are trying to build on the jurisprudence of a 37 year old, 60 page Racial Discrimination Act, you can't just write a one line blank cheque for the judiciary. I think this suggestion from the Expert Panel will need to be abandoned if we are to get to the next base for Indigenous recognition in the Constitution.

Not wanting simply to pour cold water on the Expert Panel's recommendations, I concluded, 'The Expert Panel has given us some great talking points. But there is a lot more work to be done before we settle on a constitutional formula for decent and workable constitutional recognition of Indigenous Australians.' Prime Ministers Gillard, Rudd and Abbott rightly found the key recommendations of the panel to be an instance of expert overreach; none of them endorsed or pursued the recommendations of the panel.

For two years, the Abbott Government seemed to be waiting for some consensus to emerge around the recommendations of the panel. Malcolm Turnbull is yet to show his hand. Progress has been slow. No one thinks it realistic to seek a constitutional amendment during the life of this Parliament. The best to be hoped for is a commitment by all major political parties to an agreed referendum question when going into the next federal election, with the understanding that the new government and the new parliament would proceed to put a referendum to the people, perhaps on Saturday 27 May 2017, the fiftieth anniversary of the successful 1967 referendum.

Prime Minister Abbott said he was committed to completing the Constitution, rather than changing it. That sounded almost like a theological challenge — to complete something without changing it. There will be no amendment to the Constitution unless a broad cross section of Indigenous leaders seek it. It has been in response to Indigenous misgivings about the existing constitutional provisions that our political leaders have been prepared to consider amendments to the Constitution. No referendum will succeed unless the majority of Australians are convinced about the necessity, correctness and certainty of the proposed amendments.

The expert panel was wise when insisting that any proposed amendments:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound.

The co-chairs of the panel, Patrick Dodson and Mark Leibler said, 'The logical next step is to achieve full inclusion of Aboriginal and Torres Strait Islander peoples in the Constitution by recognising their continuing cultures, languages and heritage as an important part of our nation and by removing the out-dated notion of race.'

At the moment, 'the out-dated notion of race' appears in two constitutional provisions. Section 25 is a provision which has never been used and never will be. It is modelled on one of the post-Civil War amendments in the US Constitution penalising states which exclude people from voting in state elections on the basis of their race. Everyone is agreed that section 25 could be simply repealed. It is the low hanging fruit of constitutional change. Section 51(26) provides that the Commonwealth Parliament can make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. That section could be replaced with a new power to provide that the Commonwealth Parliament can make laws with respect to 'the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters'.

The art and statesmanship of constitutional change is in matching Indigenous aspirations, constitutional architecture, and public support. In preparation for their meeting with Prime Minister Tony Abbott and the Leader of the Opposition Bill Shorten on 6 July 2015, the 40 Indigenous leaders chosen by government issued a statement after a two day caucus stating:

A minimalist approach, that provides preambular recognition, removes section 25 and moderates the races power [section 51(26)], does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.

The Indigenous leaders said:

There was significant concern expressed that the Constitution as it stands enables current and future parliaments to enact discriminatory measures against Aboriginal and Torres Strait Islander peoples. Any reform option must address this concern.

At this stage, there are several proposals on the table that are aimed at addressing this issue ranging from: a stand alone prohibition of racial discrimination (proposed new section 116A); a new, contained power to make laws for Aboriginal and Torres Strait Islander peoples that does not extend to making adverse discriminatory laws; and a role for a new advisory body established under the Constitution.

So what is the way forward? The key provisions of the Constitution cannot be thrown out of kilter. Our Constitution is still an appendix to an Act of the Imperial Parliament. It is a monarchical, not a republican, Constitution. It does not include a bill of rights. It

prosaically lists the powers of the Commonwealth Parliament. The Imperial Act contains an old worldy preamble; the Constitution contains no preamble.

Ever since John Howard was prime minister, there has been a lot of talk about including a preamble in the Constitution. A preamble usually states the background of why you are legislating or constituting. Any preamble would need to state our main national characteristics and express the key reasons for deciding to constitute and maintain the Australian federation. That would best be done, if and when, Australians decide to become a republic. A preamble to the Constitution would not be limited to statements about Indigenous issues. The urgent need is not for a comprehensive preamble but for an acknowledgment of the assured place of Aboriginal and Torres Strait Islander peoples in our history and as part of our continuing national identity. All Australians could be surer of our distinctive national identity and place in the world if the Constitution were to acknowledge indisputable facts unique to Indigenous Australians. Adapting the language used by the expert panel and adopted unanimously by the Australian parliament in the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013, we could include an Acknowledgment at the commencement of the Constitution along these lines:

We, the people of Australia, recognise that the continent and the islands of Australia were first occupied by Aboriginal and Torres Strait Islander peoples.

We acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

We acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

If the expert panel's recommendation of, and the Indigenous leaders' demand for, a constitutional ban on racial discrimination were to have any prospect of success, we would need to clarify a number of issues. In the absence of a bill of rights, why would the Australian voters contemplate a comprehensive constitutional ban on racial discrimination by the Commonwealth and the states but not a ban on sexual discrimination or discrimination on the basis of sexual orientation or religious belief?

A constitutional ban on racial discrimination is not as simple as it seems. When legislating for native title in 1993 and 1998, the Keating and Howard governments were unable to agree to the demand by Indigenous leaders that all provisions of the Native Title Act be strictly subject to the Racial Discrimination Act. In the Senate, the Democrats and Greens had proposed such an amendment but the major parties, in government and in opposition, agreed to oppose it because of its 'so-called clause busting capacity'. It was essential that the Native Title Act allow both the States and the Commonwealth to validate existing land titles and future approved land use especially on pastoral leases. To provide absolute legal certainty, both the Commonwealth and the States had to be able to validate those titles regardless of the effects of the Racial Discrimination Act. Both the Commonwealth and the States had to be able to legislate and act in a way which was not necessarily completely consistent with the Racial Discrimination Act. That is why section 7 of the Native Title Act provides:

(1) This Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975.

(2) Subsection (1) means only that:

(a) the provisions of the Racial Discrimination Act 1975 apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and

(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the Racial Discrimination Act 1975 if that construction would

remove the ambiguity.

(3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

It has become a fashionable shorthand to claim: 'While the states and territories cannot escape the effect of the Racial Discrimination Act, the Commonwealth can.' The argument then runs that all that is needed is for the same restriction to be applied to the Commonwealth as its legislation applies to the states. With the 1993 and 1998 Native Title Act exercises, it was critical that both the Commonwealth AND the states be able to avoid any ambiguity caused by the Racial Discrimination Act when it came to ensuring the certainty of past titles. It is more correct to state that the Commonwealth Parliament presently can suspend the operation of the Racial Discrimination Act both for itself and for state parliaments. That option would be removed were a non-discrimination clause to be inserted. It is not correct to claim, 'The biggest change with a non-discrimination clause being added to the Constitution is that federal politicians would agree to wear the constraint they have seen fit to apply to State politicians for the past 40 years.' The even bigger change would be to take away the capacity of all parliaments and all executive governments to validate titles and land use with certainty, regardless of the complexity and uncertainty of the common law of native title as it is developed by the courts.

At this year's ALP National Conference, there were some indications that Labor would support a constitutional amendment consistent with the Democrat and Green proposals of 1993 and 1998. But let's remember that when returned to government, Labor twice made substantive amendments to John Howard's Native Title Act but dared not touch section 7 which casts the fragile balance between the Native Title Act and the Racial Discrimination Act. Anyone serious about a constitutional ban on racial discrimination should clear the decks by trying to convince both the Coalition parties and Labor to amend the Native Title Act as previously suggested by the minor parties. They would first need to convince the Business Council of Australia, the National Farmers' Federation, and the Minerals Council of Australia to agree to native title amendments which previously were thought to put in doubt future pastoral and mining activities. Without this deck clearing, a constitutional guarantee of non-discrimination would be a clause buster of nuclear proportions. It would put in doubt the legal validity of many mining and pastoral activities. It's just not on. I concede this impossibility despite the fact that I had first proposed such a clause as an option in the 1994 paper for the

Constitutional Centenary Foundation entitled *Securing A Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia*. I argued strongly for such a clause in the 1996 Roma Mitchell Oration. Despite the 1993 Senate debate on the Native Title Bill and the 1995 High Court decision in the Native Title Case, I was in 1996 still open to the possibility of a constitutional ban on racial discrimination. But then came the High Court's Wik decision at the end of 1996 and the 1998 Senate debate on the amendments proposed in the wake of that decision. In the 1995 Native Title Case decision, the High Court had clarified that, contrary to the view of some Labor members, Paul Keating's 1993 native title legislation was not strictly subject to the Racial Discrimination Act. The unexpected 4-3 Wik decision held that native title could co-exist with the rights of a pastoralist on a pastoral lease. How then could the rights of the pastoralist prevail over the rights of the native title holders if there was a conflict of rights, given that the Racial Discrimination Act would operate to ensure that native title rights were not less secure than the pastoralist's rights? The Labor Party in opposition could not see its way clear to joining with the Democrats and the Greens, ensuring that the Native Title Act was made strictly subject to the Racial Discrimination Act. Both the Coalition government and the Labor opposition were convinced that it was essential that the law provide certainty for pastoralists' rights and for all other land titles granted after 1975, regardless of the Racial Discrimination Act. In my opinion, they were right. So a non-discrimination clause is not a possibility at this time. Tony Abbott as prime minister was right to rule it out.

It's time to learn the real lessons which followed the 1967 referendum. That referendum contained proposals which nowadays would be called 'symbolic' rather than 'substantive'. It is my contention that the modest constitutional changes contributed to substantive change. They kick started the changes from terra nullius to land rights, and from assimilation to self-determination. Prime Minister Harold Holt appreciated that a modest referendum carried overwhelmingly provided the political mandate for policy changes. The catalyst for change was the Council for Aboriginal Affairs which he then set up to advise government and to engage daily with public servants and politicians when considering policy and administrative changes. Any modern equivalent would not restrict its membership to 'three wise white men' even of the eminence of Dr HC Coombs, Professor WEH Stanner and Barrie Dexter. Noel Pearson is right to insist that Aboriginal leaders need a place at the table when new policies are being formulated. An Indigenous council is needed to advise government. Coombs, Stanner and Dexter constantly lamented that they lacked a statutory charter setting out their role and responsibilities. Any new council would need a clear legislative mandate. However, I caution against tampering with the constitutional architecture, seeking the immediate inclusion of such a council in the Constitution.

Indigenous representation is always a fraught exercise. Noel Pearson rightly suggests that any Indigenous body be partly elected and partly appointed. At least in the first instance it would be impossible to design a constitutional provision for a Council which was technically and legally sound, being non-justiciable and ensuring the untrammelled sovereignty of parliament.

Noel Pearson and respected academic constitutional lawyers Anne Twomey and Greg Craven have suggested that immediate constitutional inclusion of an Indigenous advisory body is possible satisfying the proviso that all aspects of its operation be non-

justiciable. Professor Twomey, following the contours of the existing constitutional provisions for the now long defunct Interstate Commission, has suggested new clauses for a new Chapter 1A of the Constitution along the following lines:

60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].

(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.

(4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

Given that such a body would be at least partly elected, it is not scaremongering to point out that any elected body with a constitutional role will require judicial oversight at times if only to determine those eligible to vote and those eligible for election in disputed cases. Consider only this not altogether hypothetical question. What if Senator Jacqui Lambie in the future were to seek election to the body, or even while still a senator were to seek to cast a vote for candidates? In her maiden speech last September she said:

I acknowledge and pay my respects to Australia's Aboriginal traditional owners. I share their blood, culture and history through my mother's, Sue Lambie's, family. We trace our history over six generations to celebrated Aboriginal chieftain of the Tasmania east coast, Mannalargenna.

You will recall that Mr Clyde Mansell, the Chair of Tasmanian Aboriginal Land Council, said that Senator Lambie's claims were 'absolutely outrageous and scandalous': 'They're totally unfounded. There's no evidence that I'm aware of that would justify Jacqui Lambie standing up in the Australian Parliament and making those claims. She didn't have the right.' So could Jacqui Lambie vote for the proposed constitutional entity? That question could ultimately be decided only by a court.

When considering whether to include an Indigenous advisory body in the Constitution, many voters will have an eye to past experience with earlier Aboriginal advisory bodies. In the 1970s, there was the National Aboriginal Consultative Committee (NACC); in the 1980s, the National Aboriginal Conference (NAC); and in the 1990's, the Aboriginal and Torres Strait Islander Commission (ATSIC). Whatever its shortcomings, ATSIC was well resourced with a series of local and regional councils in addition to its national commissioners. The art of national Indigenous representation is matching local indigenous concerns with national policy positions ensuring that there is a two-way

communication between those speaking with a national voice and those working at the grassroots. A national Indigenous body without elected local and regional councils will have its work cut out in maintaining local legitimacy.

When parliamentary committees are considering proposals for legislation, they may be well assisted by receiving submissions from a national Indigenous advisory council. No doubt they will also be attentive to local indigenous groups such as Cape York Partnerships and the various land councils, community councils, and service delivery organisations when considering legislative proposals which impact on local indigenous communities. There will be a need to consider any co-ordinating role which the Indigenous Council might play, in much the same way as ATSIC was able to help convene and resource Indigenous groups in the historic native title debates.

The two major national debates on land rights in which Aborigines have had a place at the table of negotiation have been those native title debates of 1993 and 1998. At a critical time in each debate, the key Aboriginal protagonists fell out with the chief non-Aboriginal politician with whom they were negotiating. In 1993, that politician was Prime Minister Paul Keating and in 1998, in view of Prime Minister John Howard's intransigence and the state of the parties in the Senate, it was Brian Harradine who held the balance of power in the Senate. In neither 1993 nor 1998 was there a perfect answer to what should be the content of native title legislation.

Keating's frustration with the Aboriginal negotiators boiled over in 1993 when he declared that they did not have the maturity to negotiate. The Aboriginal negotiators' frustration with Harradine boiled over in 1998 once Noel Pearson retracted overnight, without coherent reasons, his public endorsement of Harradine's '4-nil penalty shoot-out' with John Howard.

The 1993 native title debate was the first time in Australian parliamentary history that Aborigines had real bargaining chips to bring to the table of political deliberation. The High Court had determined that Aboriginal native title existed in areas undefined, with rights undefined. Any native title which survived until 1975 was thereafter buttressed by the Racial Discrimination Act, ensuring that it could not be treated in a less advantageous way than any other form of land title. Miners and pastoralists wanted certainty when planning future activities on lands which might be subject to native title. It was imperative that government fashion legislation which was seen to be fair to Aborigines as well as to miners and pastoralists. Prime Minister Paul Keating needed to cut a deal with the Aboriginal leaders knowing he could not expect unanimity amongst Aboriginal leaders.

Keating had the good fortune not to control the Senate. If he had controlled the Senate, some Aborigines and their supporters would have had the perception that Keating had cut a deal with a handful of Aboriginal leaders who had gone to water behind closed doors. Not controlling the Senate, Keating had first to negotiate the settlement with Aboriginal leaders who for the first time came in and sat at the Cabinet table cutting a deal. They were the 'A' Team. The deal then had to pass muster in the Senate where Keating had to negotiate with the minor parties who took their riding instructions from another group of Aboriginal leaders — the 'B' team which included sovereignty advocates like Michael Mansell who ultimately endorsed the deal. Without these



complex checks and balances not controlled by the government of the day, Keating would never have won the well deserved adulation for the final outcome.

After Wik, the proposed native title amendments came back to the Senate three times where Brian Harradine had the balance of power. The National Indigenous Working Group and their lawyers dealt secretly with Harradine proposing a compromise to break the logjam. During the second Senate debate Harradine put the compromise to John Howard but Howard was unable to sign off on it because the conservative state premiers in Western Australia and Queensland would not agree. An election was then held in Queensland where Labor won power and where Pauline Hanson's One Nation Party polled well. This provided a double incentive for Howard to come back to the negotiating table because now he had only one conservative state premier standing in the way, and there was no way he would risk a double dissolution election with the One Nation Party poised to do well in the Senate. Harradine seized the moment, delivering on the package proposed by key members of the National Indigenous Working Group and their lawyers who had crafted the key compromise provisions. Harradine negotiated the last phase without indigenous leaders at the table because he was afraid that the horse would bolt were details of the compromise to leak out before John Howard signed on the bottom line. Overnight, key indigenous leaders turned on Harradine. To this day, the perception persists that Harradine sold out the Aborigines. In fact he delivered and improved slightly on what they had previously thought achievable.

Mabo and Wik have provided indigenous Australians with a permanent place at the table of negotiation even when native title only possibly exists. The 1993 and 1998 native title debates were instances of indigenous Australians using the checks and balances of a Senate not controlled by the government of the day, while cultivating public sentiment for a fair go to maximise outcomes. With talk of constitutional recognition, it is sensible to consider Noel Pearson's suggestion of the need for an Indigenous body permanently to advise Parliament. That body, like ATSIC, would provide the funds and the focus to convene diverse Indigenous groups seeking a place at the table of national deliberation on their futures. Since Mabo and Wik, Australian democracy requires Indigenous participation and input whenever their interests are on the line. If Indigenous Australians are not at the table, no deal will win the public satisfaction that we have treated honourably with them.

The grunt work of the Council for Aboriginal Affairs in effecting real change after the 1967 referendum was not the periodic exchanges with members of parliament when considering changes to legislation but the daily engagement with bureaucrats seeking changes to policy and implementation. Any Indigenous Council effecting real change will need the resources to be able to engage daily with Commonwealth and state bureaucracies.

Four decades after the passage of the Northern Territory land rights legislation, and two decades after the first recognition of native titles, there are major policy issues which demand Indigenous participation at the table. Many Aboriginal communities now have title to large areas of land, but they often cry that they are land rich and dirt poor. It is time to review the balance between the security and utility of land. Aborigines want to secure their land base for future generations, but they also want to use the land now in

an economical way which requires the capacity to lease, mortgage and sell some land. Remote communities need to be able to work with government determining their practical life choices, including decisions about which services are affordable in distant sparsely populated locations.

Our Constitution unamended makes no mention of Aborigines and Torres Strait Islanders. It is premised on the out-dated notions of terra nullius and assimilation. It is time to modernise the Constitution, eliminating the out-dated notion of 'race' and including an acknowledgment of the nation's Indigenous heritage and ongoing identity. This is no small change. It is a change which is necessary, correct and certain. Indigenous leaders may want to delay such incremental change, convinced that more substantive change might be achievable in future. That is surely their prerogative. But should they seek constitutional inclusion now, an Acknowledgment and a Commonwealth power to make laws with respect to the matters acknowledged would be a principled, safe way forward to complete our Constitution.

The novel addition of an Indigenous Council to our constitutional architecture would first need to be road tested by setting it up by legislation, refining it, and then if it works, proposing it for inclusion in the Constitution at a later date. The voters will not decide to put such a council in the Constitution untested, sight unseen. Prime Minister Tony Abbott at the conclusion of his week spent in Indigenous communities in the Torres Strait and Cape York in August made it clear that he would not support the immediate inclusion of an Indigenous Council in the Constitution. Neither will Prime Minister Turnbull.

Australians are very cautious about constitutional change. No voter under 56 years of age has ever voted for a successful change to our Constitution. No voter under 69 years of age had the opportunity to vote for the 1967 referendum.

Our indigenous leaders are now at a fork in the road. We await their call. Either we take the short and certain path to Indigenous acknowledgement, scrapping the out-dated notion of race, and recasting the Commonwealth power to make laws with respect to the things acknowledged (and we could do that by May 2017), or we wait longer to take the less certain path to a more distant destination which may include an Indigenous council as part of our constitutional arrangements. That would not be achievable by May 2017.

The prudential decision for our Indigenous leaders is choosing the path at this fork in the road which they prefer as their fresh starting point when they wake on the morning of 28 May 2017. Would they prefer to be working with our present Constitution which does not mention them or an amended Constitution which acknowledges them? The latter is no small change, though it is a very modest change when compared with the ultimate laudatory goals of Indigenous leaders. Not being Indigenous, I respectfully await the decision of our Indigenous leaders. There is no magic in the date, 28 May 2017. The critical issue for immediate determination is whether the Indigenous leaders want to seek an achievable constitutional change during the life of the next Parliament. If they do, it is essential that the amendment and the referendum question be formulated before the next election. If they do not, we can all put the matter on hold happily for at least another five years, and probably another decade or two.

Australia is a more mature and more complex polity than it was at the time of the 1967 referendum. We need to be very attentive to the diversity and (hopefully) emerging consensus of Aboriginal viewpoints. We also need to be attentive to what measures the leaders of our major political parties will be prepared to sponsor during the life of the next parliament, championing those measures in a referendum campaign.

If there is to be a referendum in the life of the next parliament, we need a firm timetable for some key steps in what Aboriginal leaders Patrick Dodson and Noel Pearson describe as 'a diplomatic process'. First, Aboriginal leaders need to hear and report on the constitutional aspirations of their people. The separate Indigenous conferences sought by Indigenous leaders are essential. Second, Messrs Turnbull and Shorten have to indicate which of those aspirations they are prepared to sponsor in the parliament. Third, Aboriginal leaders need to report back on whether they are willing to accept the proposals which the Government and Opposition are prepared to sponsor. If they are not, there will be no point in proceeding further. We will all have to wait for another day, probably if and when Australia moves towards becoming a republic. If there is agreement between our Aboriginal leaders and our elected national leaders, we could then proceed to some form of Constitutional Convention to finalise the question to be put to the people at referendum.

To avoid the frustration of shattered expectations, all participants in the process need to remember that Australians have only ever approved eight referenda. Two related to the Commonwealth taking over state debts. Two related to the mode of election of senators. One related to voters in the ACT and the Northern Territory being able to vote in referenda. One related to the retirement age of federal judges. Only two related to expanding Commonwealth power: after World War II, the voters agreed to the Commonwealth Parliament being able to legislate for pensions and social security; and in 1967, the voters agreed to remove the adverse references to Aborigines so that the Commonwealth Parliament could make laws for them.

In recent times, there have been expressions of disquiet about the unforeseen consequences from two of the eight successful referenda carried in Australia. When delivering last year's Garfield Barwick Lecture, retired Chief Justice Murray Gleeson observed:

In 1977, the Australian Constitution was amended so as to require federal judges, including members of the High Court, to leave at the age of 70. On balance, I support the idea of a compulsory retiring age for judges, but I think it was a mistake to fix the age of 70 in the Constitution, which is notoriously difficult to amend. It would be better left to parliament to fix by legislation, as in the Australian states. That way parliament could respond to changing demographic and social circumstances.

Aboriginal disquiet about the unintended consequences of the 1967 referendum started to be expressed when the Commonwealth Parliament passed the Hindmarsh Island Bridge Act which was enacted by the Howard Government in 1997 to avoid the need for further inquiries into claims that the building of the bridge would interfere with the sacred sites of some of the Aboriginal women traditional owners of the area who chose not to disclose all their knowledge about sacred sites. Justice Jane Mathews had conducted a reputable inquiry and reported to government that though there was

evidence that 'may well make the area a "significant Aboriginal area", there is insufficient material from which the Minister could be satisfied that the building of the Hindmarsh Island Bridge would desecrate this area according to these traditions'. Though the Labor Party opposed the Hindmarsh Island Bridge Bill in the absence of an amendment rendering it subject to the Racial Discrimination Act, Labor did not oppose the building of the bridge. Labor's shadow minister Daryl Melham told Parliament:

Let us be clear about one thing. I took advice to the shadow cabinet back in September that said there was no impediment to the Hindmarsh Island Bridge being built if the federal government and the South Australian state government wanted to build it. That is what I took to the shadow cabinet in September. That is on the public record. What we have had since is a debate about procedure, a debate about process.

The Howard government passed the legislation because there had already been two Commonwealth inquiries into the women's claims and the government wanted certainty that the bridge could proceed without additional expenditure on another inquiry. When the High Court upheld the validity of the Hindmarsh Island Bridge Act, some Indigenous leaders expressed further disquiet that the Commonwealth Parliament by virtue of the 1967 referendum was given power to make laws adverse to the interests of Aborigines and not just for their benefit. That's precisely why Sir Robert Menzies did not favour the amendment to section 51(26) when he was Prime Minister.

Billy Snedden, the attorney-general in the Menzies Government, had submitted to cabinet a proposal for an amendment consistent with the position being put by Aboriginal groups and their supporters. He told Cabinet, 'I think the public believes that the underlying words in section 51(26) amount to discrimination. I do not personally accept that in truth they are: indeed, I think that their inclusion in the section constitutes a protection rather than a discrimination. But I think we must have regard to the electors' view of the matter.'

Aware that the Labor opposition was wanting to propose an amendment to Section 51(26), Prime Minister Menzies told parliament that it was curious to regard it as a discriminatory provision: 'In truth, the contrary is the fact.' He said that the unamended Section 51(26) could not work adverse discrimination upon Aborigines. Being a constitutional lawyer, he offered this analysis:

The words are a protection against discrimination by the Commonwealth Parliament in respect of Aborigines. The power granted is one which enables the Parliament to make special laws, that is discriminatory laws in relation to other races — special laws that would relate to them and not to other people. The people of the Aboriginal race are specifically excluded from this power. There can be in relation to them no valid laws which would treat them as people outside the normal scope of the law, as people who do not enjoy benefits and sustain burdens in common with other citizens of Australia.

Professor Geoffrey Sawer, who was Australia's leading academic constitutional lawyer at the time, gave what Chief Justice French has described as a 'prophetic warning' when he said, 'Having regard to the dubious origins of the section, and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete

repeal of the section would seem preferable to any amendment intended to extend its possible benefit to Aborigines.' In the end, the Menzies Government did not proceed with any referendum proposal. With 2015 hindsight, many would now concede that Menzies was right. The inclusion of Aborigines within Section 51(26) permits the Commonwealth Parliament to make whatever laws it sees fit for Aborigines, whether benign or adverse. The time has come to repeal section 51(26) and to replace it with a power to make laws with respect to the things acknowledged in the proposed Acknowledgement to be placed at the commencement of the Constitution, or else with a power to make laws 'with respect to Aborigines and Torres Strait Islanders'. But it needs to be acknowledged that there is no absolutely secure way of ensuring that laws are made only for the benefit of Aborigines. That is a matter for Parliament. That's why it is so important that we have more Indigenous representation in our Parliament. It has been reassuring to have a parliamentary joint committee on Indigenous recognition co-chaired by Ken Wyatt and Senator Nova Peris from either side of the aisle. And now Jacqui Lambie in the Senate has been joined by the Liberal National Party's Jo Lindgren, whose grandfather was a brother of the late Senator Neville Bonner, our first Aboriginal member of the Commonwealth Parliament, and who in her maiden speech said, 'In particular, I acknowledge the Mununjali and Jagera clans, with whom I identify and have a family connection.'

As previously noted, I have proposed an amendment of section 51(26) so that the Commonwealth Parliament will have power to make laws with respect to:

- the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters.

In the alternative, in an attempt to limit the scope of the Commonwealth parliament's power to benign purposes, and in line with the fallback request of the Indigenous leaders for 'a new, contained power to make laws for Aboriginal and Torres Strait Islander peoples that does not extend to making adverse discriminatory laws' I suggest that any forthcoming Constitutional Convention consider an amendment of section 51(26) so that the Commonwealth Parliament will have power to make laws with respect to:

- the preservation, protection and enhancement of the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters.

Three of the eight successful referenda were steered to success by Bob Ellicott when he was Attorney-General in 1977. He advises that to have any prospect of success a referendum question 'should have become broadly acceptable to the Australian people as a result of broad consultation and the provision of information to the public as to its purpose and effect'. He cautions that the question also 'should contain no element of possible substantial confusion on legal or other grounds'.

Though there has been much talk about 'minimal' and 'symbolic' change versus 'substantial' or 'real' change, we all need to remember that there is no such thing as only a small constitutional change in the Australian Commonwealth with its constitutional sclerosis. The lesson from 1967 is that a modest change, carried overwhelmingly by the

Australian people provides the impetus for change. The institution of a body like the Council for Aboriginal Affairs (1967-1976), which this time would be constituted by Aboriginal and Torres Strait Islander representatives with a statutory charter, would be the catalyst for change.

Being a non-Indigenous Australian, I will do all I can as a citizen to help set the contours for a successful referendum of acknowledgment and for more considered assessment of additional measures such as Noel Pearson's Indigenous Constitutional Council.

My chief fear is that we will end up with no amendment to the Constitution during the life of the next parliament and that the matter will not come around again until the country revisits the republic and/or the bill of rights debate. I think the Australian Constitution should at least mention Aborigines, and the sooner the better. I think some recognition in the Constitution is a better starting point for long-term reform than no recognition.

No prime minister has offered to amend the Constitution substantively in favour of Aborigines in terms proposed by the 2012 Expert Panel — not even Paul Keating at the peak of his powers and at the peak of his engagement with Aboriginal Australia in 1993. There is now the prospect of constitutional recognition which is being classed as minimalist and symbolic.

The indigenous leadership is saying they want more than these symbolic/minimalist changes, or some variant on them. They split presently into 2 camps: those wanting a non-discrimination clause and those wanting the insertion of an Aboriginal body into the Constitution. These substantive changes are more complex, less certain, and more amending of the structure of the Constitution than all previous amendments carried since World War II. Given the post facto criticism of the 1967 referendum result and Menzies' correct forecasting of the problem at the time, conservatives will be even more scrupulous this time around insisting that any measure be adequately certain and workable.

There is no way that lawyers will be able to convince the Australian public that there is certainty about the ambit and application of a non-discrimination clause. Professors George Williams and Megan Davis are right to concede the uncertainty which a non-discrimination clause would create in relation to some law or policy such as the federal intervention:

It cannot be said with certainty what the outcome would have been. This is because the Constitution is interpreted by the High Court, and not by governments or parliaments. Only the seven judges of that court could determine whether any part of the intervention might be struck down for inconsistency with section 116A. In effect, the judges would act as independent arbiters, thereby providing an avenue for a person to challenge any law that they believe discriminates against them on one of the prohibited grounds. The intervention would be a difficult case, in part because High Court judges would be reluctant to second-guess judgments made by Parliament about how best to address a major problem of sexual abuse.

There is no coherent jurisprudence developed by the High Court when it comes to contested policy measures such as restrictions on alcohol in Aboriginal communities. In *Maloney v The Queen*, all judges wrote separate judgments in a case dealing with grog restrictions on Palm Island. The High Court in *Maloney's Case* made it clear that the key provisions of the Racial Discrimination Act do not use the term 'discrimination' nor the verb 'discriminate'. The key provisions refer to rights which are listed in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Racial Discrimination Act does not include a general right not to be discriminated against. What is the likely jurisprudence to emerge from the High Court were there to be a constitutional right not to be discriminated against? This jurisprudence would emerge only after some years with the High Court scrutinising laws such as border protection measures and the dual citizenship laws. In short, every hot button policy issue would be ripe for High Court consideration under a non-discrimination clause.

Williams and Davis rightly concede the additional uncertainty which would be created by a constitutional non-discrimination clause saying that 'the form of protection contained in section 116A is narrower than what already exists in federal law in the form of the Racial Discrimination Act.' It might be narrower, but then again it might be broader. Who knows? How long would it take for the High Court to develop the jurisprudence of narrowed or widened constitutional protection from discrimination over against the existing legislative protection? Why bother engaging in such a protracted constitutional exercise for such doubtful gains, including a confused lack of symmetry between constitutional non-discrimination and legislative non-discrimination?

In light of the concern expressed by Indigenous leaders that 'current and future parliaments (are able) to enact discriminatory measures against Aboriginal and Torres Strait Islander peoples', and given that their option of 'a stand alone prohibition of racial discrimination' is not a possibility, I suggest an amendment to the Acts Interpretation Act specifying that all future Commonwealth legislation is subject to the Racial Discrimination Act except when the later statute specifies that it is to prevail. I suggest an amendment in these terms:

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In interpreting a provision of an Act, the interpretation that would best achieve consistency with sections 9 and 10 of the Racial Discrimination ACT 1975 is to be preferred to each other interpretation, unless the Act specifies that sections 9 and 10 of the Racial Discrimination ACT 1975 are not to be considered when interpreting a provision of the Act.

When considering the prospects of an Aboriginal body (the Pearson counter-proposal to the non-discrimination clause), I continue to be troubled by the mistrust of Australians about any new body of any sort being put into the Constitution. The Productivity Commission has a proven track record in providing advice to government and parliament. But Australian voters would be naturally suspicious of any proposal to place the Productivity Commission into the Constitution. If an Aboriginal body were to be added, there would need to be certainty about its composition and mandate, including its relationship to the National Congress of Australia's First Peoples, and including

aspects which would render it more likely to succeed long term in this role than ATSIC. If it were to maintain even the local legitimacy of ATSIC, the constitutional body would need to be serviced by elected local and regional councils. It would also be necessary for us to be able to imagine how the constitutional body would value-add to legislative deliberation.

There are major problems with each of the substantive constitutional add-ons suggested by Aboriginal leaders. As prime minister, Tony Abbott appreciated that neither had any chance of adoption by referendum during the life of the next parliament.

Justice grows out of recognition where Aborigines and Torres Strait Islanders have a place at the table of public deliberation whenever the State is contemplating laws or measures applicable only to them. Those laws and measures always need to have due regard for Indigenous cultures, languages, and heritage, and the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters. Such recognition is now provided in all State Constitutions except those of Western Australia and Tasmania. A Tasmanian parliamentary committee is presently considering proposals for such recognition. Recently the Western Australia Legislative Assembly embraced the proposal for recognition put by Indigenous member for the Kimberley, Josie Farrer who commenced her speech in the Gidja language. Moving the Constitution Amendment (Recognition of Aboriginal People) Bill 2015, she told Parliament:

Despite all our differences, I believe that Western Australian people — in fact, all Australian people — understand better than anyone the value of mutual recognition, acknowledgement and respect. Members heard my life story today from different members, but when I was growing up, I lived in the shadow of this policy that was implemented in 1889. My grandparents told me how people were treated back then, how they were treated when I came along and how I was treated as a child. This is an opportunity for all Western Australians and all members of Parliament to acknowledge what has happened in the past. However, we also need to stride forward. In my second reading speech, I called on members to grab this opportunity for us to stride into the future, not to shuffle forward with eyes closed to the truths of the past. I stated that this is the chance to come together as a Parliament and as a community in a sincere, mature and heartfelt spirit of reconciliation. I said earlier this year that true reconciliation means bold action, brave people and meaningful dialogue. I also challenge members to not be afraid and not be timid, just be magnificent. Today I thank all members for refusing to be timid and being magnificent in supporting this bill. I would like to thank everyone here today who is listening. It has been a truly wonderful day listening to all the stories from different members. I hope that, as a Parliament, we can all work together in the future for our Indigenous people and our country.

The preamble of the Western Australia Constitution will now conclude with this paragraph:

And whereas the Parliament resolves to acknowledge the Aboriginal people as the First People of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia.



Such an acknowledgement and such a commitment provides the recognition which is the prelude to procedural and substantive justice — giving to each their due in the polity, espousing the place of all citizens especially those like Ken Wyatt, Nova Peris, Jacqui Lambie and Jo Lindgren who proudly claim an Indigenous heritage and represent all Australians in our Parliament. While making no claim to speak for Indigenous Australians, I do claim that I, like all Australians, have a place at the table seeking to articulate the contours and prospects for Indigenous recognition in the Australian Constitution, while also suggesting why it matters to all of us. The lesson of 1967 is that no change is merely symbolic. Even the most modest constitutional change will contribute to substantive change, according procedural and substantive justice to the First Australians and all who claim their cultures, languages and heritage and their continuing relationship with their traditional lands and waters.

*Fr Brennan is a Jesuit priest, professor of law at the Australian Catholic University, and adjunct professor at the Australian Centre for Christianity and Culture, as well as the College of Law and the National Centre for Indigenous Studies at the Australian National University. You can listen to audio of this speech on Fr Brennan's [SoundCloud here](#).*