ANCHORING *our* COMMITMENT *in the* CONSTITUTION

Finding common ground

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Uphold & Recognise

2020

EXECUTIVE SUMMARY

Anchoring our commitment in the Constitution

INTRODUCTION

Recognising Aboriginal and Torres Strait Islander peoples in the Constitution is a truly nation-building project.

In 2020, we are on the edge of making history and concluding what has been a long and, at times, very difficult process to find a suitable way to recognise those Australians who were here first, but who have not been recognised in our nation's founding document.

In 2017, the Uluru Statement from the Heart called for a First Nations Voice enshrined in the Constitution. This was the first time the Indigenous communities had expressed a consensus position on the way they would like to be recognised in the Constitution.

It was a broad statement that did not prescribe how this reform could be or should be achieved.

Successive prime ministers have ruled out one option that could have given effect to the Statement from the Heart: the constitutional enshrinement of a national Indigenous representative body.

We know Indigenous people have consistently ruled out symbolic recognition, and in an unlikely alliance, symbolic recognition will be opposed by constitutional conservatives too.

Constitutional expert Anne Twomey has put forward a new alternative that would provide a constitutional anchor for Indigenous voices to be heard, without the legal enshrinement of the representative body which has been rejected. It would contain a new obligation, but leaves Parliament and the Government with the flexibility to determine the means by which it is achieved. In this respect, the obligation created by the amendment is more political than legal.

This new amendment meets the aspirations of Aboriginal and Torres Strait Islander peoples for a substantive change to the Constitution.

The purpose of this paper is to find common ground. Now is the time for a final deliberation so we can reach agreement on a constitutional amendment that, as Warren Mundine put it, looks beyond symbolism to Indigenous aspirations for constitutional recognition on the one hand, and mainstream concerns about it on the other.[1]

[1] Mundine, W, Practical recognition from the Mobs' perspective.

Australians cannot allow the opportunity to reach agreement to pass, and to hand this on to yet another generation.

The new amendment put forward by Professor Twomey may still require further refinement, however the intention is to respond to the concerns of the key groups of stakeholders, and initiate a new discussion that could lead to a positive resolution in the life of the 46th Parliament.

We are in a position of strength, having developed, debated, and refined different models over time, as we looked for a proposal that could meet the aspirations of Indigenous Australians; garner the support of the Australian Parliament; create practical change to be endorsed by the Australian people; and finally achieve the aspirations of the 1967 referendum for the advancement of Indigenous peoples.

We can uphold the Constitution and the liberal values that underpin it, and at the same time recognise Indigenous Australians within this very practical document.

The Uluru Statement from the Heart used the analogy of leaving base camp and starting a trek across this vast country. This paper hopes to make a contribution to that journey.

There is a chance to find common ground and find the pathway to a referendum. If we cannot seize this chance, put a question to the Australian people and hold a referendum, the failure will be on all of us.

Constitutional Exclusion

Unlike our Commonwealth counterparts in Canada or New Zealand, Australia did not recognise our Indigenous peoples in our Constitution following colonisation.

Guugu Yimithirr man, and Cape York leader Noel Pearson reflects on this:

> The pre-existence of Indigenous people was again denied at the time of Federation in 1901. The polities that made up the new Commonwealth comprised the original colonial states. The pre-existing indigenous polity was ignored and though its numbers were equal if not more than that of the smaller states, the federal convenience was to ignore the native polity, to not count the natives in the reckoning of the new Commonwealth, and deny the new parliament law-making power in relation to them.

At the time of Federation, each colony was guaranteed equal representation as states in the new compact. The Indigenous peoples went unrecognised and unrepresented, and constitutional provisions ensured Indigenous exclusion.[2]

As a nation, we did not turn our minds to the rights of Indigenous peoples until the 1967 referendum when Australians voted overwhelmingly to end their constitutional exclusion.

[2] Pearson, N (2017) "A Job Half Undone", The Monthly, June 2017 https://www.themonthly.com.au/issue/2017/june/1496239200/noel-pearson/job-half-undone.

While 1967 was a significant watershed moment for our nation, in reality, it only conferred upon Parliament the power to recognise and protect Indigenous rights.[3] It did not guarantee the rights of Indigenous peoples or ensure their fair treatment.[4]

Ending the Constitutional Silence

237 years after Cook claimed Australia for the British, an unexpected opportunity emerged in the midst of the ferocious 2007 election battle. Prime Minister John Howard called on Australians to find room in our national life to formally recognise in our Constitution the special status of Aboriginal and Torres Strait Islander peoples as the first peoples of our nation. Mr Howard spoke of the distinctiveness of Indigenous peoples, and argued for a stronger affirmation of Indigenous identity and culture as a source of dignity, self-esteem, and pride for our nation.[5]

Mr Howard argued there had to be a "fundamental correction to the unbalanced approach to rights and responsibilities" and "a positive affirmation in our Constitution of the unique place of Indigenous Australians" that could be "the cornerstone of a new settlement".[6]

Since 2007, our nation has had six prime ministers and undertaken seven substantial processes of consultation, debate, and discussion on the way Aboriginal and Torres Strait Islander Australians could be recognised in the Constitution (see Appendix A for details). Parliaments led by both Labor prime ministers and Liberal prime ministers have grappled with this issue. Kevin Rudd called for detailed and sensitive consultations, Julia Gillard said this was a "once-in-50-year opportunity", Tony Abbott promised to "sweat blood", Malcolm Turnbull called for poetry to be turned into prose, and Scott Morrison has called for "good faith".

This thirteen-year debate has been necessary in order to reach the consensus we have arrived at, putting us in a strong position in 2020 and making real the possibility of a referendum in the life of the 46th Parliament.

The Right to Take Responsibility

We cannot expect the correction between rights and responsibilities that John Howard spoke of to occur unless we ensure that the voices of Indigenous people are heard when decisions are being made about policies that impact them in a special way. This requires governments to shift their thinking. Aboriginal education expert and former co-chair of the Prime Minister's Indigenous Advisory Council, Chris Sarra, termed this as moving from doing things to Indigenous peoples, to doing things with Indigenous peoples.

[3] Ibid.
[4] Ibid.
[5] Howard, J (2007) "The Right Time: Constitutional Recognition for Indigenous Australians", Sydney Institute 11/10/2007.
[6] Ibid.

Noel Pearson's 2003 paper, Our Right to take Responsibility, remains one of the most powerful pieces written about the shift in thinking that is necessary for this correction to take place:

> Self determination is hard work. It's not some utopian formula that can be handed on a silver platter by the United Nations or under some kind of convention, it is actually the practical business of taking charge and taking back responsibility. It is hard work but we have to get on top of our predicaments economically, socially, politically. It is a matter of us taking charge. These things are not just delivered by governments, they are assumed by people who take charge of their lives and take responsibility for their own people and for their own direction.

Pearson asserts that it is not enough for Indigenous people to simply assume this new role, but that governments need to rethink the way they work too:

> Government has got to retreat quite significantly. Government has got to give us the space to take responsibility. Government can enable and support but it must understand that it can only be and that it can only ever be a junior partner in our decision as a people to climb out of our problems . . . We need our people to take charge of our own problems and not see Government as the deliverer of all of the solutions . . . It will be a struggle for control, it will be a struggle for responsibility and the keenest struggles will take place with those agencies that are most intimately involved in the lives of Aboriginal people. The renegotiation of our relationship with government and the retreat of service delivery so that we can develop maximum self-service is a challenge that those who work with Aboriginal communities will also have to confront.

There needs to be a structural change in the relationship to enable political agency to occur. The consensus achieved at Uluru was in large part a recognition of the desire for Indigenous people to take back control, and protect their rights while taking responsibility for their own lives. It is up to governments, and the broader Australian community, to listen to that desire, and enter into a new era built on the rebalancing of this relationship so Indigenous people can truly have the right to take responsibility.

Achieving success at a referendum would be an endorsement of this approach, and constitutional reform would be the new cornerstone Mr Howard rallied for.

Substantive recognition over symbolism

"As a legal document, the Constitution is subject to interpretation by the High Court and, as such, any additional words added will be subjected to legal scrutiny of the sort which will restrict the form of language, the expression of sentiment, and the beauty of the poetry that can be used to describe the history, culture, and enduring significance and contributions of Indigenous people in Australia."[7]

Julian Leeser and Damien Freeman, 2014

[7] Freeman, D. & Leeser, J. (2014) The Australian Declaration of Recognition https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/58f1cf7f03596e9d44c3730d/1492242379665/Freeman_and_Leeser-Declaration.pdf

The purposes of constitutional recognition fall into two categories: symbolic recognition and substantive recognition.[8]

Symbolic recognition includes inserting words into the preamble, but this has been described as simply putting a 'plaque' about Indigenous people into the Constitution as it will not address their structural disempowerment.

Both the Australian people in the 1999 referendum, and Indigenous people through successive processes, have consistently rejected the option of symbolic recognition.

There have been two key proposals for substantive recognition that aim to deal with the structural disempowerment of Indigenous peoples.

First, the 2012 Expert Panel on Recognising Aboriginal and Torres Strait Islander Australians recommended the insertion of a new section 116A into the Constitution to prohibit the Commonwealth, a State, or a Territory from discriminating on the grounds of race, colour, or ethnic or national origin.

The racial non-discrimination clause was not capable of wide support as it would have empowered the High Court, undermined Parliamentary supremacy, and led to the "one clause bill of rights" conservatives had said they would not support.

Second, Cape York Institute proposed the insertion of a new chapter 1A into the Constitution, which would see the establishment of an Indigenous body that Parliament must consult with, and receive advice from, when making laws affecting Indigenous interests.[9] The intention was to "draft a procedural Chapter to the Constitution that is non-justiciable and therefore does not transfer any power to judges, but that creates a real platform for Indigenous people to be heard by and engage with the democratic processes of Parliament".[10]

This became known as the "2015 Twomey model", after constitutional expert Professor Anne Twomey who drafted the amendment.

The 2015 Twomey model would have meant that the Constitution would be amended to require the Parliament to establish the body ("there shall be an Aboriginal and Torres Strait Islander body") and the Constitution would state that the new body's function was "providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples". It also imposed an obligation on the two Houses of Parliament to give "consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples".

[8] Pearson, N. & Morris, S. (2017) "Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success",AustralianLawJournalhttps://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5934dbd437c581fea84dc351/1496636373982/Morris-Pearson-%282017%29-91-ALJ-350.pdf.

[9] Cape York Institute (2015) Supplementary submission to the committee https://capeyorkpartnership.org.au/wp-content/uploads/2018/09/Supplementary-Submission-to-Joint-Select-Committee-January-2015.pdf

[10] Ibid.

Cape York Institute summarises the way the policy debate shifted in 2015:

> The potential for adverse discrimination against Indigenous people can be rectified through a judicially adjudicated racial non-discrimination clause, as was proposed by the Expert Panel . . . [or] it can be rectified politically and procedurally, by guaranteeing that the Indigenous voice is heard in Parliament's democratic processes.[11]

2. FINDING THE COMMON GROUND

Hearing the concerns of conservatives

In responding to the Referendum Council's report in 2017, the Government was concerned that the proposed model for a nationally entrenched body would, in effect, lead to a "third chamber". Mr Turnbull argued that a constitutionally enshrined additional representative assembly which only Indigenous Australians could vote for or serve in was inconsistent with the principle of equal civic rights and "one person one vote".

Proponents of the body's enshrinement argued these concerns were legally unfounded, but after becoming Prime Minister in 2018, Scott Morrison affirmed Mr Turnbull's position, which had been a decision of the Federal Cabinet (of which Scott Morrison was a member).

In an interview with ABC radio breakfast host, Fran Kelly, Mr Morrison stated, "I don't support a third chamber". Ms Kelly rebuked him and said, "it's not a third chamber they're talking about necessarily, it's a representative body." He replied, "No, it really is. People can dress it up any way they like but I think two chambers is enough . . . the implications of how this works frankly lead to those same conclusions. I share the view that I don't think that's a workable proposal."[12]

In addition to the issues raised above, there were two other principal concerns about the proposal.

Firstly, there were concerns that, by enshrining an Indigenous body in the Constitution, it would enable judicial activism and empower the High Court.

Secondly, opponents of recognition argued against putting race in the Constitution. However, as the former Chief Justice, Murray Gleeson, has pointed out, race already exists in the Constitution and was put there by our founding fathers at the time of Federation. Because of the need to legislate for native title and cultural heritage, the race power cannot simply be removed without inserting a replacement.

[11] Ibid.
[12] Morrison, M (2018), Radio interview with Fran Kelly. 26 September 2018.

Mr Morrison also believes there is "a large gap between where the opposition stands on the form of this and where the government stands . . . [the Labor Party has] very different view as to the manner and form of this to the view of those in the government".

As we seek to find common ground, work must be done across the political aisle to ensure a proposal can pass the Parliament with minimal division.

In 1967 we were counted, in 2017 we seek to be heard

The Aboriginal and Torres Strait Islander communities are not homogenous, and their views on politics and policy are as diverse as those of all other Australians. Considering the diversity of people who attended the National Indigenous Constitutional Convention at Uluru in 2017, it is a remarkable achievement that the Uluru Statement from the Heart was overwhelmingly endorsed by the delegates.

The delegates at Uluru agreed that "with substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood". Far from seeking radical separatist policies, the Statement from the Heart affirms the Constitution, and calls for one new rule to be made which would allow Indigenous people to be heard.

"We seek constitutional reforms to empower our people and take a rightful place in our own country". This is not an extreme form of self-government. The sentiment is very much a call for a strengthening and a deepening of the expression of our nationhood, not a replacement of it.

This position accords with the liberal value of equality. The achievement of which requires a mechanism to enable Indigenous people to take responsibility, and to ensure their voices are heard when decisions are being made about policies that impact them in a special way. If we expect people to take responsibility, there must be a mechanism to hear their voices so they are part of the decision-making process. The Statement argues that in "1967 we were counted, in 2017 we seek to be heard".

Despite the consensus at Uluru, a very small group demanded a sovereign treaty with an independent sovereign treaty commission, and appropriate funds allocated.[13] Palawa man Michael Mansell also advocates for a seventh State that would hand full responsibility to Aboriginal people to run their own state system of government within the Federation. This would include a treaty that required an allocation of Australia's national gross domestic product to be set aside for Indigenous people.[14]

[13] "'We won't sell out our mob': Delegates walk out of Constitutional recognition forum in protest", 25 May 2017 https://www.sbs.com.au/nitv/nitv-news/article/2017/05/25/breaking-delegates-walk-out-constitutional-recognition-forum-protest

[14] Mansell, M (2019,) Interview with CAAMA radio 12/07/2019 https://caama.com.au/news/2019/michael-mansell-explains-why-a-treaty-will-deliver-more-than-the-voice-to-parliament.

These views risk being used to argue there is division on the "Indigenous position". However, the very small minority of dissenting views should not detract from the consensus that has been achieved.

The fact that, in the three years since Uluru, there has not been any other model for substantive recognition put forward makes it clear that the proposal to ensure Indigenous voices are heard is the best way forward.

We also need to keep this so-called division within the Indigenous community in perspective. As Marcia Langton reminds us, "Why is it only white people are permitted to disagree?"[15]

Indeed, we have seen the airing of views right across the political spectrum about the way forward. This includes former Nationals leader Barnaby Joyce advocating for regional senators as a way of increasing Indigenous representation,[16] despite this not forming the official policy of his party, and others rejecting the voice to Parliament by wrongly claiming it would insert race into the Constitution.

Overcoming political tribalism

In his 2019 PM Glynn Lecture, former Archbishop of Canterbury, Rowan Williams, argued that political tribalism is, above all, a shrinkage of the scope of mutual recognition.[17] It is a failure to see the perspective of the other as invested or developed. Moving beyond political tribalism lies a "deeper literacy about our histories, a commitment to identifying the grammar of a common language and the work of negotiating a shared future by looking for solutions that have a degree of durability and credibility, even if they are no one's ideal."

Constitutional recognition of Aboriginal and Torres Strait Islander peoples is a highly complex area where history, politics, policy, and sociology intersect. It requires us to examine the issues more deeply, rather than resorting to political tribalism. At times, it will require us to sit uncomfortably. It requires a willingness to hear the perspectives of others, to suspend judgement, and look for substantive change that will allow all Australians to look forward to the future with optimism.

We must approach these deliberations with goodwill and good intentions, aiming to build a stronger nation – not a different nation. The task is not beyond us if we are truly committed to finding a resolution.

This is part of the good faith process that Mr Morrison aspires to, and, if successful, it can form the true cornerstone of the new settlement that Mr Howard spoke of in 2007.

[15] Langton, M., "Pearson's Proposal for indigneous recognition deserves consolidation" https://capeyorkpartnership.org.au/constitutional-recognition/pearsons-proposals-for-indigenous-recognition-deserve-consideration-macia-langton/

[16] "Barnaby Joyce 'apologises' for calling Indigenous voice a third chamber of parliament", 18 July 2019 https://www.theguardian.com/australia-news/2019/jul/18/barnaby-joyce-apologises-for-calling-indigenous-voice-a-third-chamber-of-parliament.

[17] Williams, R (2019), Overcoming political tribalism, Third PM Glynn lecture https://www.abc.net.au/religion/rowan-williams-overcoming-political-tribalism/11566242.

There must be three components to the new covenant if these reforms are to succeed:

1. Co-design of the entities that will represent Indigenous people and ensure their voices are heard using a bottom-up approach. There must be an emphasis on regional governance models, and Parliament will provide for the creation of these entities;
2. Interface between the entities to ensure the voices are heard by the Commonwealth, and how these voices will be heard. The means of achieving the interface will be established by an act of Parliament;
3. Amendment of the Constitution to create a political obligation for the Commonwealth to hear Indigenous voices, rather than a legal obligation. Such an amendment needs to be based on the common ground between Indigenous aspirations and a conservative-led Government which has rejected the constitutional enshrinement of a national body.

Indigenous Australians will not accept the entities and the interface in statute without a guarantee in the Constitution that the future will be different from the past.

3. CO-DESIGN OF THE ENTITIES

"We have always supported giving Indigenous people more of a say at a local level. We support the process of co-design of the voice . . . we support constitutional recognition but maintain our reservations about a voice. We prefer to establish local bodies in the first instance and then build on a successful model to inform a regional, and then a national, governance model. So this is a ground-up process".

Scott Morrison, Prime Minister of Australia, 6 December 2018

Ground-up approach

The prevailing model at the time of the Uluru Statement from the Heart was a top-down approach. However, shortly before the Uluru conference, Warren Mundine put forward a ground-up approach in his paper, Practical Recognition from the Mobs' Perspective: Enabling our mobs to speak for country. Mr Mundine argued that local bodies could "realise the ambition of Indigenous Australians for self-determination and the mainstream ambition that Indigenous Australians take responsibility for improving their welfare."

In rejecting the constitutionally entrenched national body, Mr Turnbull said that the Government remained committed to finding effective ways to develop stronger local voices and empowerment of local people, as "people who ask for a voice feel voiceless or feel like they're not being heard."[18]

[18] Turnbull, M (2017), Response to Referendum Council https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition.

Mr Morrison then initiated the co-design process with a strong focus on the ground-up approach advocated by Mr Mundine and endorsed by Mr Turnbull.

Co-design processes

The Morrison Government initiated the current co-design process in response to the key recommendation from the 2018 Joint Select Committee on Constitutional Recognition. The report recommended that a co-design process was needed in order to achieve a design for the voice proposal that best suited the needs and aspirations of Aboriginal and Torres Strait Islander peoples. The Morrison Government has recognised Indigenous peoples' longstanding desire to have greater involvement in the issues that affect them. Therefore, the process of co-design will determine options to improve local and regional decision-making and a national voice.[19]

The Terms of Reference for each of the three co-design groups explicitly state that "making recommendations as a Group through this co-design process on constitutional recognition, including the referendum question or when a referendum should be held" is out of scope. It is understandable that the Prime Minister is tasking the three co-design groups to focus on the detail of how the entities will work, rather than the way these entities will relate to the Constitution.

However, Indigenous people have been clear that the voices must not be in statute alone, and must be guaranteed in some way by the Constitution. The Government must recouple these two inextricably linked streams of work.

Design principles to ensure success

There are many different ways these entities can be designed, and an examination of the previous reports into constitutional recognition provides a lot of guidance to avoid reinventing the wheel. The previous monograph in this series, Hearing Indigenous Voices, describes six attributes of authenticity that could also assist the co-design working groups in shaping their views.

The co-design interim report should start to shape two key documents that can be further refined. The first document is the rulebook that provides a process for developing the entities and the way disputes will be resolved. The second document should provide detailed framework(s) that can be adopted and adapted based on our knowledge of what is effective in developing legitimate representative voices within communities.

For the co-designed entities to succeed, they need absolute clarity of purpose. If the purpose and mission of these new entities is poorly defined, they risk scope creep and their ability to

[19] Australian Government (2020), Senior Advisory Group Terms of Reference https://www.niaa.gov.au/sites/default/files/publications/senior-advisory-group-tor_0.pdf.

create change on the ground will be limited. To achieve this, the co-design process needs to examine the principles and methods used in collective impact.

The two most critical issues that will determine whether these entities are successful is that Indigenous people have confidence in the entities to represent their interests fairly, and that the entities are connected to the decision-makers within the Commonwealth. We need to keep this in perspective, as these new entities cannot and will not solve everything, but are an important way for Indigenous people to take responsibility by having their voices heard when decisions are being made about policies that impact them in a special way.

For the co-design process to be successful, there also needs to be an adjustment in the way governments do business. As we have seen with the Empowered Communities sites, the business of government has not shifted enough to deal with this devolved way of working and decision-making. Commonwealth power has not been delegated to those who are tasked with making decisions.

4. INTERFACE BETWEEN CO-DESIGNED INDIGENOUS ENTITIES AND THE COMMONWEALTH

Separate to the co-design process, there needs to be an understanding of how these entities will interface with the Commonwealth so their advice can be sought, offered, and heard with full transparency and accountability for all involved.

Ian McGill, former managing partner at Allens law firm, suggests the forum for hearing the voices of Indigenous peoples should be a statutory joint standing committee of the Parliament, called the Parliamentary Joint Standing Committee for Aboriginal and Torres Strait Islander Peoples.

Mr McGill's paper, entitled, A way for the Commonwealth to hear the voices of Aboriginal and Torres Strait Islander peoples – a model anchored in our Constitution, and summarised in the June 2020 issue of the Australian Law Journal, provides the governance and political architecture necessary to give effect to the model of ground-up entities and ensure the local voices are heard by the Federal Parliament in an appropriate way.

Mr McGill's work builds on the previously published paper in this series, Hearing Indigenous Voices, which provided two detailed proposals for the machinery required in the 'Speaking for Country option' and the 'Advisory Council option'.

It refines the 'Speaking for Country' option, so there are three parts to the Indigenous entities: local representative bodies, larger regional bodies, and a small national affiliation that becomes the conduit to the Parliamentary Committee.

- A Recognition Authority would approve the local regions, and oversee the establishment of the local representative bodies.
- Local representative bodies would then join or affiliate to form a larger regional body.
- Regional bodies would have the policy infrastructure and resources to assist local bodies to help shape Commonwealth legislative or executive action. These regional bodies, either in isolation or through affiliation, would have the legislative right to act as a conduit for advice.
- A national affiliation that would exist largely for administrative ease, to ensure the committee has a conduit that operates at a level that enables the new entities to work in harmony with the Parliamentary system, but which sources its authority from the ground up.
- The Parliamentary Joint Standing Committee provides a sensible way to connect the Indigenous entities with the Commonwealth to ensure the voices of Indigenous peoples are heard in a meaningful way by the Executive and the Parliament.

Mr McGill argues for a Parliamentary Committee as the committee system is well established, and already provides important checks and balances that challenge the dominance of the Executive. The Committee system is recognised by section 49 of the Constitution, but it is clear it is under the full control of the Parliament, so any of its intra-mural activities would be non-justiciable.

Committees contribute to Australia's democratic system and responsible government, allow for community participation, and improve accountability of the Executive, and improve the creation and administration of Commonwealth programs.

Specifically, a Joint Standing Committee has several attractive features. It would exist for the life of the Parliament with new members appointed immediately following an election; it is made up of, and can speak to, both the House of Representative and the Senate; and it provides a level of certainty of process and permanence through statute.

Government policy originates in the Executive, who are elected to govern, to set the policy agenda, propose new laws and administer existing laws. Yet the 2018 Parliamentary Joint Select Committee found that previous bodies did not have a close relationship with the Executive, which is the major decision-making forum for the government. Former Chief Executive of the Aboriginal and Torres Strait Islander Commission, Patricia Turner, agreed the Commission's engagement was typically with the Minister for Indigenous Affairs, and there was only one meeting with the Cabinet that she could recall in her four years serving at the Commission. It is important that the new entities, through the national affiliation, can engage with the Executive, as well as the Parliament.

The key advantage of this type of interface is that it takes away the ad-hoc nature of the consultation and engagement that typically occurs, and rebalances the relationship so Indigenous people can take responsibility.

One of the key features of any reforms attempted in Indigenous affairs has been the failure of the Commonwealth to properly embed these reforms into their administrative arrangements and business processes. When reforms have failed, it was because they were not connected to governmental decision-making forums, with clear and transparent processes, and appropriate accountability mechanisms for all stakeholders. Mr McGill explains that the work of the Joint Committee would be considered a proceeding in Parliament, therefore members of the national affiliation appearing in Joint Committee will have both the protections and obligations offered under the Parliamentary Privileges Act 1997 (Cth) under the standing orders of both Houses. This should ensure its workings are held to the current high standards of Parliamentary business, that people act with integrity and honesty, but have some protections from liability in defamation in respect of evidence given or matters discussed in the committee.

5. ANCHORING OUR COMMITMENT IN THE CONSTITUTION: UNITING ON COMMON GROUND

The proposal to hear Indigenous voices fits with our liberal democracy as it does not seek to limit the laws that should be made. Rather, it aims to give voice to the people who are the subject of those laws. This does not confer special rights, it only ensures fair treatment in our democratic processes.

Julian Leeser eloquently articulated the parameters for conservative support for constitutional recognition to the Samuel Griffith Society: "any package of reforms worth considering must be consistent with Australia's constitutional architecture" and it "should not affect the Crown, the Federation, the sovereignty of Parliament, or create a bill of rights."[20]

Tony Abbott argued constitutional recognition will be "a victory for Aboriginal people and will be the culmination of a long, long, long fight for justice. To succeed, though, it will also have to be a victory for all Australians: a vindication of our magnanimity as a nation whose Constitution will finally belong to all of us".

The 2012 Expert Panel's recommendation for a prohibition on discrimination was rightly ruled out as it would have empowered the High Court.

Instead, the proposal to hear Indigenous voices through a ground-up approach addresses the problem politically and procedurally, by increasing Indigenous participation in Parliament's democratic processes and ensuring that Indigenous views are better heard by Parliament when it makes laws and policies for Indigenous affairs.[21]

[20] Leeser, J. (2015), "Competing Proposals for Recognition: An Evaluation", Proceedings of the Samual GriffithSocietyVol.27https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d8743419 2026554f91076/1553827654973/Vol27chap11.pdf.

The 2015 Twomey model was one way to achieve this, but the constitutional entrenchment of an advisory body has been ruled out by successive prime ministers. As we saw in the 1999 republic debate, having the Prime Minister opposing a reform makes it near impossible to gain the double majority required for success, therefore, we must put forward a model that speaks to the aspirations of the Statement from the Heart but which is acceptable to the Prime Minister and the Parliament.

We need an amendment that can provide the "constitutionally entrenched, legislatively controlled" capacity for Indigenous people to have input into the making of laws that impact them, as Murray Gleeson stated in his monograph in this series, Recognition in Keeping with the Constitution.

Any constitutional amendment must be substantive as Indigenous people have ruled out symbolic recognition. They seek a guarantee that the future will be better than the past.

Sufficient status

"We are talking about sufficient status in the Constitution to empower the Parliament to legislate the creation of the voice that will not impede the parliamentary process . . . we will accept parliamentary supremacy in a way that provided the necessary status that would define recognition".

Noel Pearson, 2014

Recently, Anne Twomey has suggested inserting the following words as a new section of the Constitution:

> The Commonwealth shall make provision for Aboriginal and Torres Strait Islander peoples to be heard by the Commonwealth regarding proposed laws and other matters with respect to Aboriginal and Torres Strait Islander affairs, and the Parliament may make laws to give effect to this provision.

The constitutionally enshrined model drafted by Professor Twomey in 2015 aimed to provide a "political, preventative and proactive approach, rather than a reactive and litigious approach".[22] Her new drafting does not deviate from that intention, and provides the "sufficient status" Mr Pearson spoke of, which could achieve the aspirations of the Uluru Statement from the Heart while accepting parliamentary supremacy.

Arrernte and Kalkadoon woman Rachel Perkins forcefully argued in her Boyer Lectures that a referendum would provide the moral weight that comes with the majority of Australians backing an idea. If this amendment succeeded at a referendum, it would contain a new

[21] Cape York Institute supplementary submission, supra.
[22] PearsonandMorrishttps://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5934dbd437c581fea84dc351/1496636373982/Morris-Pearson-%282017%29-91-ALJ-350.pdf.

obligation, but one that leaves the Parliament and the Government with the flexibility to determine the means by which it is achieved. In this respect, the obligation created by this amendment is more political than legal.

This new amendment is a good balance of the four principles for a successful referendum proposal in that it will:

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

Permanency without justiciability

While the 2015 Twomey model would be non-justiciable, the revised amendment put forward by Professor Twomey in 2020 is a stronger option. Professor Twomey has developed a new amendment that creates a political obligation to hear the voices of Indigenous peoples rather than a legal obligation.

The 2020 Twomey model creates what is known as a 'duty of imperfect obligation'. This means that there is a duty to conform with the obligation, but it is a duty that is not enforceable at law. Instead, it is a political or moral duty that is enforceable by the will of the people. The vote of the people in the referendum will provide the evidence of the will of the people, which can then be reinforced through their electoral rejection of any political party that seeks to thwart the will of the people and breach the Constitution.

By stating that Indigenous peoples are "to be heard by the Commonwealth" rather than the "Parliament" or the "Executive", this gives the maximum flexibility in designing how the voices will be heard. The obligation is imposed upon 'the Commonwealth', as a polity to act, rather than the Parliament or the Executive specifically being required to exercise the power.

The words "The Commonwealth shall" provide the permanent constitutional obligation that Indigenous people have asked for, but the discretion as to how to give effect to this permanency is completely up to the Commonwealth. The Constitution therefore mandates that the Commonwealth must make the provision to be heard, without entrenching an Indigenous advisory body as the way to achieve that. In this regard, the obligation is political and not legal. Anne Twomey confirms this as an obligation that would be a constitutional duty and a political obligation, but not a legally enforceable one.

Mutual respect

"Reaching of a point in time whereby Indigenous Australians and our identities, our cultures, our languages, our histories and our dignity as resilient peoples are afforded the same degree of respect as other cultures . . . we are tired of being too often referred to, treated and considered as peoples whose cultures, languages, beliefs and histories are somehow inferior or secondary to others . . . in seeking this parity of esteem I believe we Indigenous Australians do not wish to deny, denigrate or usurp the cultures of others or to takeover the world. We simply seek to establish our rightful place in the nation and globally – we seek genuine mutual regard for the integrity and dignity of our ways of knowing, our ways of thinking, our ways of doing and who we are."[23]

Russell Taylor AM, 2017

Warren Mundine asserts that recognition "must not be framed around the way others have looked at us, but how we look at ourselves; it must not be about recognising a race of people, but about recognising First Nations of our country and the mobs to which each of us still belongs".[24]

The new Twomey amendment would accelerate the "parity of esteem" as Kamilaroi man and public sector executive Russell Taylor describes it. For the first time, in a positive sense, our Constitution would formally recognise "Aboriginal and Torres Strait Islander peoples" as peoples who need and deserve to be heard by the Commonwealth.

This elevates the status of Aboriginal and Torres Strait Islander peoples, and captures the dignity that Indigenous peoples have long sought. It allows them to be recognised as peoples whose voices should be heard. There is nothing illiberal about a constitutional duty of imperfect obligation to hear Indigenous voices.

6. CONTRIBUTION TO NATION-BUILDING

The year 2020 has taken an unexpected turn both at home and abroad. We are in the midst of an economic and health crisis and adjustments are being made to the way we live. As we recover from the pandemic, and deal with the ensuing economic issues, there is a window to hold a referendum that might seek to amplify the social cohesiveness that pulled us through the pandemic so successfully. Australians are generous and caring. Through bushfires, global pandemics, and economic crisis, our uniquely Australian values show us to be a mature

[23] Taylor, R., "Indigenous Constitutional Recognition: The 1967 Referendum and Today", Papers on Parliament no.68https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/Papers_on_Parliament_68/Indigenous_Constitutional_Recognition_The_1967_Referendum_and_Today.

[24] Mundine, W., Practical Recognition from the Mobs' Perspective.

nation capable of dealing with difficult issues and doing so with courage and empathy for our fellow citizen.

This same spirit will help us complete the unfinished business of our founding fathers, and recognise our Aboriginal and Torres Strait Islander peoples in our Constitution.

In the paper in this series, The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians, Damien Freeman and Julian Leeser proposed a new Australian Declaration of Recognition as the best way of addressing the cultural issues while avoiding legal technicalities.[25]

The second (largely unknown) recommendation from the 2017 Referendum Council was for an extra-constitutional Declaration of Recognition that could be enacted by legislation as a symbolic statement to unify Australians.

The Referendum Council stated:

> The Declaration should bring together the three parts of our Australian story: our ancient First Peoples' heritage and culture, our British institutions, and our multicultural unity. It should be legislated by all Australian Parliaments, on the same day, either in the lead up to or on the same day as the referendum establishing the First Peoples' Voice to Parliament, as an expression of national unity and reconciliation.

A Fuller Declaration of Australia's Nationhood provided two options for how this recommendation might be implemented in practice. Tim Wilson's draft Declaration in the Forgotten People is an excellent starting point (see Appendix D for his suggestion).

When refusing to say sorry to the stolen generations, Mr Howard criticised symbolic statements alone as gestures that let too many people off the hook without "grappling in a serious, sustained way with the real practical dimensions of indigenous affairs."[26] However, if there were to be a package that includes both symbolic and substantive change, we can grapple with the very real issues impacting Indigenous Australians in a way that will benefit the wider community too.

At a time when our nation has shown social cohesion that is the envy of the world, we should be ready to start to articulate the values that underpin this harmony in a positive statement that will endure for future generations.

A package that includes the suggested amendment to the Constitution, as well as the extra-constitutional Declaration of Recognition, could provide a lasting symbolic and substantive legacy we can all be proud of.

[25] Freeman, D. & Leeser, J. (2014) The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians, 2014.
[26] Howard, supra.

7. CONCLUSION

Fundamentally, a referendum to recognise Aboriginal and Torres Strait Islander peoples will create a new covenant, in which we promise the future will be better than the past. If we are not prepared to make that promise, then we are misleading ourselves and our fellow Australian.

If we can agree to an amendment that meets the aspirations of Indigenous people – that is their desire to be recognised and a guarantee that they will be heard – within the parameters of a liberal democratic polity, we can certainly progress to a referendum. The new amendment put forward by Anne Twomey can provide a middle ground that respects the view that a new obligation needs to be imposed on the Commonwealth by the Australian people voting to amend the Constitution, but that this must be done in a way that is not illiberal and that does not enshrine an Indigenous body in the Constitution.

The new settlement that John Howard spoke of in 2007 requires more than just changes to the machinery of government – changes that parliamentarians can swiftly reverse through the stroke of a pen. The relationship must be underpinned by a structural shift that will create equality of opportunity, not by making one section of the community superior to another or conferring special privileges, but by ensuring the relationship is fair, respectful, and balanced.

Noel Pearson posed a significant question to the Australian people in 2014. He called on all of us to consider the question he claims has been unanswered after two centuries:

> Is there a proper and rightful place for the original peoples of Australia in the nation created from their ancestral lands?[27]

We should have great faith in the Australian people that when they are given the chance to vote in favour of this more complete expression of our nationhood, that we can positively answer Mr Pearson's question at the ballot box.

[27] Pearson, N (2014) A Rightful Place Quarterly Essay 55.

Appendices

APPENDIX A

List of consultation processes on Constitutional Recognition since 2011

1. Expert Panel on Recognising Aboriginal and Torres Strait Islander Australians chaired by Professor Patrick Dodson and Mark Leibler AC reported to Prime Minister Julia Gillard MP, 16 January 2012

2. Final report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel by John Anderson AO, Tanya Hosch and Richard Eccles to Prime Minister Tony Abbott MP, 9 September 2014

3. Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples chaired by Ken Wyatt AM MP and Senator Nova Peris reported to Prime Minister Tony Abbott MP, 25 June 2015

4. Aboriginal and Torres Strait Islander leaders meet at Kirribilli House with Prime Minister Tony Abbott and Opposition Leader Bill Shorten, 6 July 2015. Indigenous leaders issued a statemament that:

   · "Any reform must involve substantive changes to the Australian Constitution"

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

5. Referendum Council chaired by Pat Anderson AO and Mark Leibler AC reported to Prime Minister Malcolm Turnbull MP and Opposition Leader Bill Shorten MP in June 2017 (the Council's processes included the National Indigenous Constitutional Convention which resulted in the Uluru Statement from the Heart), recommending:

   · "That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament"

   · "That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians".

6. Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 chaired by Senator Patrick Dodson and Julian Leeser MP reported to Prime Minister Scott Morrison MP, November 2018, recommending that:

   · "The Australian Government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples". The co-design process should "consider national, regional and local elements of The Voice and how they interconnect…. outline and discuss possible options for the local, regional, and national elements of The Voice, including the structure, membership, functions, and operation of The Voice, but with a principal focus on the local bodies and regional bodies and their design and implementation"

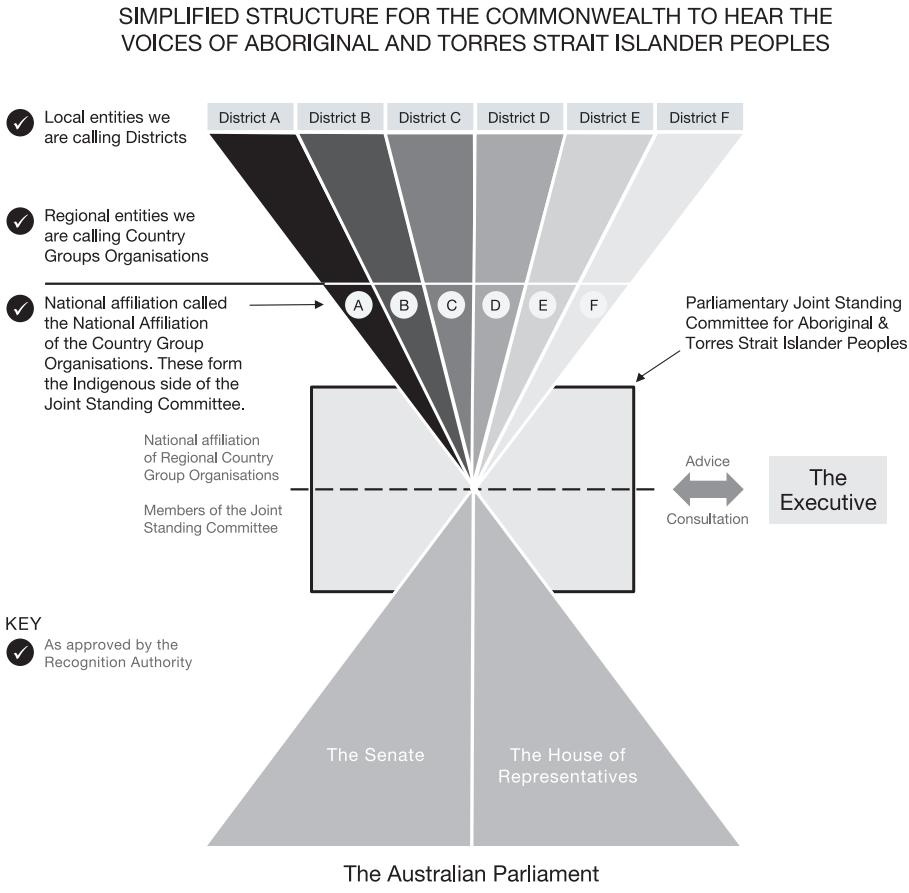
   · "following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice"

7. Co-design process chaired by Professor Tom Calma AO and Professor Marcia Langton AO due to report to Prime Minister Scott Morrison MP in late 2020

APPENDIX B

Ian McGill's suggestion for interface

Ian McGill's proposal for a mechanism for an interface between the co-designed Indigenous voices and the Commonwealth was published in the June 2020 issue of the Australian Law Review and is summarized in the diagram below.



APPENDIX C

Anne Twomey's suggestions for amendment

In 2015, Anne Twomey published the following suggestion for an amendment to the Constitution in The Conversation:

> 60A. (1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name], 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.

In 2020, Professor Twomey wrote another article for The Conversation in which she made two further suggestions, the first of which was as follows:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: –
>
> . . .
>
> (xxvi) Aboriginal and Torres Strait Islander affairs; and in relation thereto, the interaction between Aboriginal and Torres Strait Islander peoples and the Parliament and Government of the Commonwealth.

Professor Twomey's second suggestion in her 2020 article for The Conversation reads as follows:

> 127. The Commonwealth shall make provision for Aboriginal and Torres Strait Islander peoples to be heard by the Commonwealth regarding proposed laws and other matters with respect to Aboriginal and Torres Strait Islander affairs, and the Parliament may make laws to give effect to this provision.

APPENDIX D

Tim Wilson's suggestion for a declaration

Tim Wilson published the following suggestion for a declaration of recognition in his 2016 chapter in The Forgotten People: liberal and conservative approaches to recognising indigenous peoples:

An Australian Declaration of Unity

With this pledge we recognise we are all Australians,

Aboriginal and Torres Strait Islander peoples,
Whose heritage, culture and language we cherish and enduring
connection to land and waters we respect,

The first European settlers that followed,
Whose institutions and traditions we preserve,

The generations of migrants from across the seas,
Who come to contribute to our shared future,

Built on a liberal democracy that binds us as equals,
With mutual respect and responsibility for each other
For a free, fair, just and united Australia for all.

We pledge our loyalty to Australia.

Kerry Pinkstone served as Senior Adviser on Social Policy in the Office of the Prime Minister between 2015 and 2018, during the premiership of the Hon. Malcolm Turnbull MP. She is currently a Visiting Fellow at the PM Glynn Institute (Australian Catholic University's public policy think-tank). From 2003 until 2009, she served as an adviser to various members of the Howard Ministry. For the next five years, she served as manager of strategic engagement and director of policy and research at GenerationOne – the Mindaroo Foundation's initiative to close the gap in employment outcomes between Indigenous and non-Indigenous Australians – before returning to the Department of the Prime Minister and Cabinet as a special adviser on Indigenous employment in 2015.

Finding common ground on constitutional recognition

In this paper, Kerry Pinkstone begins a conversation that aims to find common ground. She proposes an approach to constitutional recognition of Indigenous peoples that identifies common ground between the position in the Uluru Statement and the Government's response. She argues that it is possible to have a constitutional amendment to create a political obligation to hear Indigenous voices without enshrining in the Constitution a representative assembly based on race. Such an approach would address Indigenous aspirations by providing a guarantee that Indigenous voices would be heard by the Commonwealth. At the same time, it would address the concerns of classical liberals that all Australians should have the same constitutional rights and the concerns of constitutional conservatives that the supremacy of Parliament should not be undermined.

UPHOLD & RECOGNISE is a non-profit organisation committed to its charter for upholding the Australian Constitution and recognising Indigenous Australians.

This pamphlet forms part of the Uphold & Recognise Monograph Series, which includes papers by a range of authors including Julian Leeser MP, Warren Mundine AO, and the Hon. Murray Gleeson AC QC:

1 The Australian Declaration of Recognition
2 Practical Recognition from the Mobs' Perspective
3 Claiming the Common Ground for Recognition
4 This Whispering in Our Hearts
5 Journey from the Heart
6 Hearing Indigenous Voices
7 Makarrata
8 A Fuller Declaration of Australia's Nationhood
9 Recognition in keeping with the Constitution
10 Anchoring our Commitment in the Constitution

For more information, or to download a copy of any of these, visit www.upholdandrecognise.com