

FOR ALL OF US

An opportunity to unite our nation,
hear Aboriginal and
Torres Strait Islander voices,
and affirm the Australian Constitution

'We need recognition, we need empowerment
and we need an embrace of our culture.

If we can get those three things right, we can chart a better future
towards closing the gap on disadvantage and honouring the rightful
place of the original peoples.

Recognition, empowerment and cultural embrace.

This culture is for all of us'

NOEL PEARSON, LAUNCH OF 'UPHOLDING THE BIG IDEAS', 2018

OUR SHARED JOURNEY

For over a decade there has been discussion and debate on the way Indigenous people should be recognised in the Australian Constitution.

A constitutional mechanism to hear Indigenous voices can remedy past injustices and enable Indigenous advancement to occur, while still upholding the Constitution.

LIBERTY, FREEDOM AND DIGNITY

The Liberal Party of Australia is dedicated to 'political liberty and the freedom and dignity of man'.

In 1886, William Barak, a Woirurrung man living on an Aboriginal reserve under the Aborigines Protection Act, called for such liberty, freedom and dignity. He challenged the Victorian Government, saying, 'we should be free like the white population. . . We Blacks of Aboriginal Blood wish to have now freedom for all our life time.' Yet his voice was ignored.

Since colonisation, governments have made laws about the way Indigenous people can live their lives. History is full of examples where even the most well-intentioned laws have resulted in extreme forms of control over Indigenous people which removed their voices and their freedom.

Freedom, and the dignity that comes with it, has not been granted to Indigenous people in the past. They have called for their voices to be heard so they can have the freedom to take responsibility for their own affairs.

LOOKING BACK

Since the Referendum in 1967, the Commonwealth has had the power to make laws about Indigenous people. While health, education, and employment outcomes are improving, we are not making enough progress to close the gap and realise the advancement envisaged in 1967. One factor in this lack of progress has been the absence of any enduring structure that ensures Indigenous people are heard when policies and laws are made about them.

THE FOUNDING FATHERS' APPROACH

The Constitution is the source of government power and legal order, and establishes the institutions of the nation. It sets out the rules that give governments power, but also provides restraints on that power.

When Indigenous leaders met at Uluru for the First Nations National Constitutional Convention in 2017, they called for one additional rule. This rule would ensure Indigenous voices are heard when decisions are being made about them.

At the time of Federation, our founding fathers did not turn their minds to the question of how Indigenous voices would be heard within the new Commonwealth. As Julian Leaser observed, however, had they thought to include Indigenous people, they might have inserted a practical mechanism to hear Indigenous voices when they were formulating the Constitution. The proposal to hear Indigenous voices fits with the types of clauses designed by our founding fathers, as it neither disturbs the supremacy of Parliament nor interferes with the federal balance of powers.

THE 1967 REFERENDUM'S APPROACH

Until 1967, the two references to Aboriginal people in the Australian Constitution were for their exclusion. This exclusion was contained in the so-called 'race power' of section 51(xxvi) and section 127 which determined the way the population was counted. In proposing the 1967 referendum, Prime Minister Harold Holt informed the Parliament that the 'widest measure of agreement with respect to Aboriginal advancement' would be pursued with the States.

Australian people voted overwhelmingly in a referendum to end the constitutional exclusion of Aboriginal people, recording a 90.77% 'yes' vote. This change allowed the Commonwealth to make special laws for Indigenous peoples through the race power, and to include Aboriginal people in the census.

In 1998, the High Court accepted the Commonwealth's argument in the *Hindmarsh Island Bridge case* that there are no limits to the race power and it may in fact be used to positive or negative effect.

In 1967, when Indigenous people were included in the ambit of the race power, it was intended that only positive measures could be applied at the national level to help address the disadvantages they faced. However, this has not always been the case.

A NEW APPROACH IS NECESSARY

It is especially important to hear Indigenous voices when laws are being made under section 51(xxvi) (the race power) which includes cultural heritage and native title, as well as section 122 (the territories power) which disproportionately impacts Aboriginal people given around one third of people living in the Northern Territory are Indigenous.

Indigenous people have had voices in the past that have expressed views on the use of the race power, the territories power and on Indigenous affairs more broadly. However, these bodies have existed and been disbanded depending on the government of the day. The Federal Council for the Advancement of Aborigines and Torres Strait Islanders was defunded in 1978. The Aboriginal and Torres Strait Islander Commission was abolished in 2004. The National Congress of Australia's First Peoples was defunded in the 2014.

Structured decision making processes, anchored by the Constitution, would end the haphazard approach of governments, where views are often sought through ad hoc means, and often under the banner of 'consultation' where the process lacks clarity, rigour, and transparency, and also has no regard for customary law or cultural appropriateness. As Rachel Perkins explains in her 2019 Boyer Lectures:

'The cycle of consultation, construction and destruction of these bodies has caused bad governance, loss of corporate knowledge and sporadic policy development which has failed to service both Indigenous people and the government. Importantly, it has also led to disarray in the administration of government programs.'

LOOKING FORWARD

We need to ensure that there are formal structures in place to enable Indigenous people's views to be formally sought and properly considered, given that the Commonwealth must retain the ability to make laws about Indigenous affairs.

ANCHORING INDIGENOUS VOICES WITHOUT CHANGING PARLIAMENT

The Uluru Statement's proposal for a guarantee that Indigenous voices will be heard is a modest and fair way of addressing the current lack of formal structures.

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. The proposal respects and upholds the supremacy of the Parliament and entails no veto rights over the Parliament's decisions.

In light of the unique place of Indigenous people in the Australian story, and the particular forms of deprivation and disempowerment that they have uniquely suffered following European settlement, it is a fair requirement. Placing such a requirement in the Constitution will ensure there are structured decision making processes now, and in the future. A Constitutional anchor will ensure these structures endure beyond political cycles, and give all Australians a guarantee we will move forward with certainty.

RECOGNITION ISN'T RACIST AND DOESN'T UNDERMINE EQUALITY

Commentator, author and former political adviser, Chris Kenny has argued that:

'In an ideal world, race would not be an issue . . . we hope and legislate for colour-blind societies . . . however, race is a factor in human relations and we had better be adult enough to deal with it . . . You would have to be willfully ignorant to pretend racial prejudice and disadvantage are not among the most telling flaws in our own nation — particularly, dramatically and demonstrably when it comes to indigenous Australians.'

Some opponents of recognition argue against inserting race in the Constitution. Murray Gleeson addresses this in his paper, *Recognition in keeping with the Constitution*, arguing that by its very existence, the race power calls into question the assumption of equality. That is, race already exists in the Constitution.

Australians are not being asked to introduce race into the Constitution, but to address the fact that for over a century the Constitution has permitted racial distinctions without any enduring structure to hear the voices who continue to be the subject of those distinctions.

The gap between Indigenous Australians and all others has not been closed, despite the efforts of many over decades. Murray Gleeson reminds us ‘there are many situations in which we regard it as proper to treat some people differently from others, especially if it is necessary to do so in order to remedy some injustice’.

INDIGENOUS PEOPLES HAVE UNIQUE AND SPECIAL STATUS

Beyond race, Murray Gleeson has concluded ‘That Indigenous people have a special, and unique, status in the history and the life of the nation is beyond question’.

To argue that Indigenous people should simply strive for greater representation in the Parliament ignores reality. While Members of Parliament can advocate for certain causes, they are required to represent their entire electorates, and typically align themselves to a political party. Improving representation in the Parliament is necessary, but it does not solve the structural disempowerment Indigenous people face.

THE IMPACT OF BEING HEARD

The proposal to involve people in the decisions that impact them is not revolutionary. There are many examples where having a voice has enabled Indigenous people to take responsibility and achieve strong outcomes. One such example is the alcohol restrictions in Fitzroy Valley communities in Western Australia.

In 2007, the Fitzroy Valley communities had reached crisis point. There was a funeral more than once per week (55 in total), 13 of which were from suicides. The Coroner determined there was a very high correlation between deaths by self-harm and alcohol and cannabis. Tragically, children were being born with Fetal Alcohol Spectrum Disorder (FASD) due to high rates of alcohol consumption during pregnancy.

The community developed and implemented a bottom-up model to take responsibility, with the government listening to their voices. Community leader June Oscar summarised the situation:

‘It is a story of colonisation; the threat of losing our cultural authority to manage our societies; and the despair that has come from that disempowerment. ... [but] I want to tell a different story. It is about how Aboriginal people can be the authors of our stories and not passive and powerless subjects in stories told and written by others. The start of the journey has depended on the leadership of the Aboriginal community but the journey from this point on will largely be shaped by a partnership that we can create and build with governments’.

As a result of the partnership between the government and the community, alcohol related crime and alcohol related hospital admissions all reduced.

HEARING INDIGENOUS VOICES

After a decade of necessary, though sometimes difficult debate, Australia is now within reach of taking the last and most important few steps in this very long journey to recognise Indigenous people in our Constitution.

The Uluru Statement from the Heart is an invitation to all Australians to come together for a better future, and make substantive constitutional change and structural reform a reality.

In 1967 we joined together as a nation to ensure Indigenous people were counted in the census, and we now have the opportunity to answer Indigenous peoples' impassioned plea to be heard.

A FAIR PROPOSAL

Murray Gleeson has described the proposal to hear Indigenous voices as a way to create a 'constitutionally entrenched, legislatively controlled' capacity for Indigenous people to have input in the making of laws that impact them.

The Government has ruled out one model for hearing the voices, which would have seen a national body enshrined in the Constitution. The challenge is to finalise the detail of the voice proposal through the Government's co-design process, and concurrently determine how to anchor our commitment to hearing Indigenous voices in the Constitution.

We can forge a new path that meets Indigenous people's desire to be part of the decision-making process so their views are properly heard when decisions are being made about them, and, at the same time, protect the supremacy of the Parliament.

‘There are no extra rights being proposed or conferred.

The idea is to make sure indigenous Australians have a voice, non-binding at that, in those aspects of our national affairs that directly impact on them.

It is the least we might consider if we had settled this continent recently and looked to coalesce around a new constitution.

It is a national settlement free of discriminatory rights, free of unintended constitutional consequences, and that ensures indigenous leaders can have a practical influence on government policies to redress disadvantage.’

CHRIS KENNY, *THE FORGOTTEN PEOPLE*

‘Aboriginal and Torres Strait Island Australians – love this country.

How could it be otherwise?

There is no other country for us to love other than this one. It’s ours and we demand a fair place within it.

We demand after 65,000 years that the events of the last 200 do not erase the old Australia that was ours and we demand that the old Australia live within the new one.’

NOEL PEARSON, LAUNCH OF ‘UPHOLDING THE BIG IDEAS’ 2018

 UPHOLD &
RECOGNISE

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