CONSTITUTIONAL REFORM 2013
What are we trying to achieve?

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It appears today that there is multi-party support to recognise the Aboriginal and Torres Strait Islander peoples ('Indigenous peoples', 'Indigenous recognition') as the first peoples of Australia.[1] The dominant contemporary view is that 'governments should act in the best interests only, of Indigenous peoples' and that formal equality was achieved in 1967.[2] This is because the 'yes' case in the 1967 referendum stated that: 'The Commonwealth's object will be to co-operate with the States to ensure that *together we act in the best interests of the Aboriginal people of Australia* [emphasis added]'.[3] This 'yes' case received about 90 per cent of the vote — the highest ever 'yes' vote at an Australia referendum.

The *Australian Constitution* as originally framed provided for the exclusion and the discriminatory treatment of the 'aboriginal race'.[4] These powers were not entirely expunged from the *Constitution* in 1967[5] and Indigenous recognition remains unfinished business for the proposed referendum in 2013 ('2013 referendum') and most probably beyond. There are also, it is posited, some lessons from 1967 for 2013, and these points will be examined here in some detail.

In order to do this, the article will consider the broader issue of the historical treatment of Indigenous peoples under the law, particularly after the 1967 referendum, and will examine some options for constitutional change in 2013 in that context. The article briefly examines the recommendations of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution ('Panel Report')[6] and goes on to propose that if the panel's proposals do not receive the necessary political support for success at a referendum, then Indigenous recognition could, in the longer term, be achieved in stages, and that constitutional recognition should be pursued within a broad strategic framework, discussed below.

This article undertakes to provide a rationale for the recognition — either constitutional or legislative or both — of Indigenous peoples and why this is now legally possible. The article then proposes that 'recognition' should ideally take two broad forms. First, the symbolic constitutional recognition which acknowledges the place of Indigenous peoples as the first inhabitants of this Continent. Second the substantive constitutional provisions that promote equality for Indigenous people and prevent the discrimination and adverse treatment of Indigenous peoples. (Or, if such substantive constitutional change is not politically feasible at this stage, then in the interim through legislation.)

The article also explores the political conditions that resulted in an agreement to hold a referendum in 2013 on Indigenous recognition. It argues that because successful referenda require a double majority, the government's proposed constitutional amendments may not succeed in 2013. Unless cross-party support for the referendum question is achieved[7] 'non-substantive' or minimalist reforms may be the result. Therefore, aiming to achieve symbolic constitutional recognition, the first stage described above, might be the best practical outcome possible in the current political climate. Entrenching substantive changes in the *Constitution*, including non-discrimination, is the further step that must be undertaken at a subsequent referendum when there is political support. In the interim, and while imperfect — because the Commonwealth and states will retain the right to discriminate against Indigenous peoples — the *Constitution* also continues to empower parliament to at least stop the states from doing so and to act for the benefit of Indigenous peoples; arguably this includes providing equal protection for Indigenous citizens. However, the Commonwealth cannot be compelled to act in this manner; until such a prohibition is entrenched in the *Constitution*, this relies upon the goodwill of the majority.

A rationale for recognising Indigenous peoples in the *Constitution*

In the period when the doctrine of terra nullius was still considered good law in Australia, the question of Indigenous recognition was not legally relevant. This is because the legal fiction at the time was that English 'sovereignty was acquired through occupation and control amounting to first possession'[8] of the continent. In 1992, terra nullius was overturned in Australia as common law doctrine[9] and with it, the legal recognition became relevant of Indigenous Australians as the first occupants of the continent. Certainly at common law and in international law, everything else being equal, 'the first possessors of land in time',[10] do have the better right to property as against the rest of the world.[11] Megan Davis, an Indigenous constitutional lawyer and member of the expert panel, suggests that 'recognition' is an inherent right of Indigenous peoples.[12]

The Australian community has not yet formally 'recognised' Indigenous peoples. Notwithstanding this,

REFERENCES

1. *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012), xi. ('Panel Report') The role of the expert panel is briefly examined below. For a detailed examination of the panel's role, see Panel Report, 1-12. The meaning of what might constitute 'Indigenous recognition' is examined at <www.youmeunity.org.au>.

2. Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton (eds), *Australian constitutional perspectives* (CUP, 2003) 180.

3. Commonwealth Electoral Office, 'Referendums to be Held on Saturday, 27th May, 1967, on the proposed laws for the alteration of the Constitution entitled Constitution alteration (Parliament) 1967 and Constitution alteration (Aboriginals) 1967: The arguments FOR and AGAINST' http://images.slsa.sa.gov.au/samemory/ttp/B12030570/B12030570.html, as quoted in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 413 (Kirby J), ('*Hindmarsh Island Bridge Case*').

4. *Australian Constitution* s 51(xxvi), s 127, as appeared in 1901.

5. *Australian Constitution* s 25, s 51(xxvi).

6. For background and membership of the expert panel, see Panel Report, 1-2.

7. Panel Report, 217.

8. *US v The Netherlands* (1928) II RIAA 829. ('*Island of Palmas Case*').

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

10. There are clearly issues of international law and the acquisition of sovereignty issues that intervene to possibly break the chain of ownership. However, as a matter of common law it appears the continued possession of the lands should establish Indigenous peoples as the 'first in time' to possess, use and occupy their lands.

11. The *nemo dat qui non habet* principle.

12. Megan Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6, 6.

The recognition of Indigenous peoples' 'special place' in the modern Australian nation … will only have popular support and result in constitutional and legislative reform if there is political leadership that recognises the 'problem' and transforms public opinion about the need for change.

in the past two centuries Indigenous peoples have made significant strides in terms of the recognition of our humanity and dignity. For example, Indigenous peoples are now recognised as 'people' in the census,[13] are now recognised as Australian citizens[14] and now have the right to vote.[15] On the other hand, we still lag behind with respect to education, employment and health. Davis argues that constitutional recognition may improve these conditions for Indigenous peoples.[16] The recognition of Indigenous peoples' 'special place'[17] in the modern Australian nation, in principle, has cross-party political support. However this view will only have popular support and result in constitutional and legislative reform if there is political leadership that recognises the 'problem' and transforms public opinion about the need for change.

In spite of the Federation founders' anti-'coloured races' views generally,[18] there was a growing realisation in the 1950s that Indigenous Australia was a 'problem' which was not going to simply disappear. Even Arthur Calwell, Australian Labor Party ('ALP') member for Melbourne and White Australia policy advocate, stated that the treatment of Indigenous peoples was an 'eternal shame',[19] prompting a response of 'uneasi[ness]' from the leader of the (conservative) Opposition, Harold Holt, on 'how the true natives of the Continent had been treated'.[20]

Even in the 1890s,[21] as today,[22] there were voices calling for equal protection of the coloured races. Jeremy Webber states usefully in this context that 'written constitutions are poor instruments for defining a county. Countries are always richer and more varied than the bare terms inscribed',[23] and this is a sentiment that remains as true today as it was at the end of the 19th century. Constitutional protections alone cannot help prevent oppression; political, common law or legislative protections are still important means of achieving some of the outcomes we demand.

What would be the 'ideal' referendum outcome?

The first element, encompassing the longer term aim, is to achieve a symbolic and enduring recognition of the special place of Indigenous peoples in the life of the nation — an acknowledgement of our special connection to and our wise custodianship of this land and its waters, with the aim that this form of constitutional recognition remain for posterity as a permanent part of the collective memory of the nation. It was the symbolic aspects in 1967 that have had the greatest beneficial and positive impact in the minds of the public.[24] In time, through intermarriage and the dispersal of the Indigenous population and their progeny, this recognition will touch the lives of an increasing number of Australians.

The second element is a substantive legal power that will permit the Parliament to legislate for the benefit *only* of Indigenous peoples, with the aim of redressing historical and other imbalances. In 1967, as discussed below, the formal changes to the text of the *Constitution* did not always work to the benefit of Indigenous peoples, and the High Court later confirmed that the amended powers could be also used to our detriment.[25] A new circumscribed head of constitutional power might help to create laws and programmes that are beneficial only. This will help to redress the imbalances and gaps between Indigenous and non-Indigenous conditions and achievements, as measured against objective standards.

The broader historical issue of the treatment of Indigenous People

To understand the panel's recommendations, it is important to examine the broader historical background and context in which the recommendations are made. This is because there is a gap between the legal effect and the popular perception of what was achieved in the 1967 referendum.[26] The two constitutional provisions amended in 1967 were the deletion of the exclusion clause in s 51 (xxvi) ('exclusion clause') and the repeal of s 127 which excluded the 'aboriginal race' from the census. The legal and political effects of these amendments are considered here.

The legal effect of the Amendment to s 51(xxvi)

Prior to 1967, s 51(xxvi) (the 'race power') read:

> 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.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

Writing extra-curially Chief Justice French noted that 'the race power was not judicially considered [by the High Court] in the period 1903 to 1982'.[27] The *Koowarta Case*[28] was reported in 1982. He then noted that 'the tension between the *values that gave birth to the power and those which amended it* finds expression in constitutional questions which have been much

13. See discussion below on s 127.

14. *Nationality and Citizenship Act 1948* (Cth).

15. The right to vote was given to Indigenous peoples in various states at various times. In 1962 the *Commonwealth Electoral Act 1918* was amended to provide all Indigenous people with the right to vote in federal elections, irrespective of their state voting rights. Voting in state elections is regulated by the states: *Australian Constitution* s 25.

16. Davis, above n 12.

17. Matthew Sadler, 'Gillard announces indigenous referendum, *Sydney Morning Herald* (Sydney) 8 November 2010 http://news.smh.com.au/breaking-news-national/gillard-announces-indigenous-referendum-20101108-17jtg.html. The Leader of the Opposition, Mr Abbott also supported special recognition for Indigenous Australians: Panel Report, 127, citing Mr Noel Pearson.

18. John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 623.

19. Panel Report, 25, citing Parliamentary Debates.

20. Panel Report, 26, citing Parliamentary Debates.

21. Quick and Garran, above n 18, 623.

22. *Al-Kateb v Godwin* (2004) 219 CLR 562 (Kirby J.); Alice Rolls, 'Avoiding tragedy: Would the decision of the High Court in *Al-Kateb* have been any different if Australia had a Bill of Rights like Victoria?' (2007) 18(2) *Public Law Review* 119.

23. Jeremy Webber, 'Multiculturalism and the Australian Constitution' (2001) 24(3) *UNSW Law Journal* 882, 882.

24. French, above n 2, 180.

25. *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

26. French, above n 2, 180.

27. Ibid.

28. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta Case*').

agitated in recent years'.[29] What His Honour means by 'much agitated' is not entirely clear, however the High Court has heard a number of cases on the amended race power.[30] The reasons put forward for change in 1967 were very different from the reasons for the original adoption of the race power. The High Court's approach to interpreting the amended provision attempts to reflect the original intent of the founders and also the intent of the 1967 reforms.

If the ordinary meaning of a provision is ambiguous or obscure, the task of the court is to give meaning to parliament's intent by 'construing the unexpressed'[31] and in doing so may use extrinsic material, such as the official records of Parliamentary Debates.[32] The approach of the High Court to statutory and constitutional interpretation can range from 'originalism' (a focus upon the text and the original intent of the authors of those words)[33] at one end of the spectrum, to the interpretation of the provision as a 'living force' at the other.[34] In matters of constitutional construction and interpretation, Sir Owen Dixon called for 'strict and complete legalism'.[35] In the Dixonian mould Dawson J rejected the 'living force' approach,[36] while the majority in the *McGinty Case* for example approved this approach, citing the words of Deane J in the *Theophanous Case* when he said that the Constitution should be construed as 'a living force' and not as 'a declaration of the will and intention of men long since dead'.[37]

Inglis Clarke, the primary architect of the Constitution,[38] did not envisage it guiding the country forever, and the founders included referenda as a mechanism for constitutional change.[39] What was important for many of the founders at the turn of the 20th century with respect to race was to curtail the economic threat of the 'inferior races'.[40] According to the records of the Constitutional Debates in the 1890s, the original framers gave scant thought to the position of Indigenous Australians[41] but feared economic competition from the Chinese, Japanese and Afghans,[42] and explicitly articulated a constitutional power that allowed parliament to legislate to their detriment. For Isaacs J, the race power was created to ensure that the *Constitution* would not prevent a white man from the 'cutting of the pig-tail of a Chinaman'.[43] Today, the views of the community with respect to race appear to have changed to oppose detrimental treatment based on race alone. This change of perception is evidenced by the introduction of anti-discrimination legislation.[44]

The removal of the exclusion clause in 1967 provided the Commonwealth with a new head of power to enact legislation with respect to Indigenous peoples. The legal effect is that the power now also permits the Parliament to legislate for 'aboriginal races', including in a discriminatory manner which disadvantages members of that race.[45] Prior to the referendum in 1967, s 51(xxvi) was not used to legislate for any race — 'inferior' or otherwise, and Chief Justice French notes that the power has only been used to create legislation that affects Indigenous races.[46]

However, while many High Court justices have relied on the 'living force' approach generally, only a minority have interpreted 'for' in the race power, as 'for the benefit of' Indigenous people.[47] The majority of the justices have said that 'for' does not require the Parliament to legislate beneficially.[48] That is, even with contemporary laws and attitudes with respect to 'race', the High Court has preferred the intent of the founders to permit detrimental treatment of Indigenous races, and appears to do so despite the post-1967 intent to '*act in the best interests of the Aboriginal people*'.[49]

Even though the 'living force' approach has wide judicial support of the High Court, when determining the meaning of the amended race provision, it still has regard to the founders' intentions, supporting Constitutional interpretations which operate to the detriment of Indigenous peoples.

The legal effect of the repeal of s 127

Second, in the *Constitution* as it was in 1901, s 127 provided broadly that 'aboriginal natives' should not be counted in the census. Justice Gaudron characterised s 127 as a discriminatory provision.[50] In ascertaining the intent of this provision Williams and Brasden noted that the provision was introduced by Sir Samuel Griffith and adopted without debate in Sydney.[51] In examining the reasons for its adoption they postulated that there was a 'hint'[52] of confusion over what was actually being achieved by s 127.[53] While Alfred Deakin had made the link between the census data and the quota for representation in the Commonwealth Parliament,[54] he had also conceded that 'aboriginal populations were too small'[55] to affect the outcome of the House of Representatives elections. Williams and Brasden concluded that the real connection was likely to be the 'link made between the Aboriginal population and representation and expenditure',[56] as the population of South Australia (where some Indigenous people could vote prior to Federation) would contribute significantly less to the Commonwealth if Aborigines were not counted in the census. However not being counted in the human population can have a significant impact on a population and this was probably one of the reasons for its rescission in 1967 which was, in retrospect, both a substantial and a positive symbolic constitutional amendment.[57]

The High Court in the *Kruger Case* overruled the existence of a doctrine of equality,[58] and the *Kartinyeri Case* extended to the Commonwealth Parliament the power lawfully to enact legislation discriminatory against Indigenous peoples.[59] And so, while the 1967 referendum made well-intentioned symbolic changes, the overall legal effect was that the discriminatory attitudes of the *Constitution*'s founders were retained.

The 2013 referendum is an opportunity to re-affirm the notion of equality before the law, raised but not achieved in 1967. A real question for the 2013 referendum is: What would need to happen to give legal effect to the doctrine of equality before the law for all Australian citizens? Before addressing this

29. French, above n 2, 180. Emphasis added to show the political effect of the proposed change.

30. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

31. *Cole v Whitfield* 165 CLR 360, 394.

32. *Acts Interpretation Act 1901* (Cth), s 15AB(2)(h). Parliamentary Debates are recorded in Hansard.

33. John Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95, 97.

34. *Theophanous v The Herald and the Weekly Times Limited* 182 CLR 104, 174.

35. Swearing in of Chief Justice Dixon (1952) 85 CLR xi, xiv.

36. *McGinty v Western Australia* (1996) 186 CLR 140, 183 ('*McGinty Case*').

37. *Theophanous v The Herald and the Weekly Times Limited* 182 CLR 104, 174.

38. Ibid, 172.

39. *Australian Constitution* s 128.

40. French, above n 2, 180, 182.

41. Geoffrey Sawyer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 17

42. Williams and Bradsen, above n 33, 112.

43. *Yick Wo v Hopkins* (1886) 188 US 356.

44. *Racial Discrimination Act 1975* (Cth).

45. *Commonwealth v Tasmania* (1983) 158 CLR 1, 110 (Gibbs CJ); *Western Australia v The Commonwealth* (1995) 183 CLR 373, 461.

46. French, above n 2, 185.

47. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 242 (Murphy J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 243 (Brennan J); Gaudron J said there was 'much to commend this view': *Lim v Min for DIMEA* (1992) 176 CLR 1, 56.

48. *Commonwealth v Tasmania* (1983) 158 CLR 1, 110 (Gibbs CJ.)

49. French, above n 2.

50. *Kruger v Commonwealth* (1997) 190 CLR 1, 70.

51. Williams and Bradsen, above n 33, 110.

52. Ibid 110.

Today, the views of the community with respect to race appear to have changed to oppose detrimental treatment based on race alone. This change of perception is evidenced by the introduction of anti-discrimination legislation.

question, the political circumstances surrounding the proposed 2013 referendum are examined, followed by the recommendations of the panel.

A referendum for 2013?

In the last federal election, the very close result meant that the governing ALP had to secure an agreement with the Independents and the Greens and, as a result, made substantial concessions in the process of obtaining a guarantee of their support. In their demands, the Greens secured an undertaking that the government would conduct a constitutional referendum before or at the next general election, proposing to 'recognise Aboriginal and Torres Strait Islander peoples and to replace current racially discriminatory provisions with a racially non-discriminatory provision'.[60] The upshot of this compromise agreement is that the motive for constitutional change is not, in this instance, based on a fundamental or principled desire for Indigenous reconciliation — but for reasons of political expediency. This is likely to impede the cross party support necessary to achieve a double majority vote of 'yes'.

In meeting the terms of their political agreement, the Gillard government appointed the expert panel. Their terms of reference required the panel to consult and report back to the government:[61]

> on the possible options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for each option.

The panel consulted widely with both Indigenous people[62] and the broader community.[63] The various changes are complex, an issue recognised by the panel, which suggests a 'package of proposals' approach to overcome the problems of complexity.[64]

While, since 1967, Australian attitudes with respect to race relations have evolved, a successful referendum in 2013 appears unlikely unless cross-party support for the proposed changes is secured.[65] If failure seems likely, when the referendum questions are formulated, it may still be possible to settle for symbolic recognition alone, deferring the aim of obtaining substantial constitutional change. In the interim, positive change to Indigenous lives could still be achieved through legislation.

The panel's recommendations

The panel recommended the deletion of s 51(xxvi),[66] on the basis that deleting constitutional references to 'race' in s 25 and 51(xxvi) would partially achieve the aim of preventing Parliament from enacting legislation that oppresses Indigenous peoples.[67] This deletion would also remove the Commonwealth's power to legislate for the benefit of the 'aboriginal race' and would likely affect laws that were enacted under this head of power.

The Panel made five recommendations for constitutional change.[68] As well as the deletion of s 25 and s 51(xxvi), they suggested the inclusion of three new sections — s 51A, s 116A and s 127A. The federal government is not bound by the recommendations of the Panel and can adopt all, some, or none of them.

One of the proposed changes is linked, for example, to the repeal of s 51(xxvi) and the inclusion of the proposed 51A.[69] Section 51A contains 'preambular' texts which recognise, respect and acknowledge[70] Indigenous occupation of the continent. A preamble is part of the *Constitution*.[71] The inclusion of s 51A would mean that there are 'two preambles' in the *Constitution*, which Twomey reasonably posits may cause problems for interpretation.[72]

Even if this change were made the states would still retain plenary powers to make special laws, including detrimental laws, with respect to Indigenous peoples.[73] To avoid this problem, the states could amend their Constitutions to prevent discrimination on the basis of race. If the repeal of s 51(xxvi) fails at a referendum, the states could refer their plenary power on 'race' to the Commonwealth[74] thus preventing the states from enacting racially discriminatory laws. This 'mirror' arrangement,[75] where the states could act in a supervisory capacity, could help to minimise, although perhaps not entirely eliminate, this danger as the Commonwealth would still retain the power to make detrimental laws 'for' Indigenous peoples.

The panel recommended the deletion of s 25 which requires states to exclude, for the purposes of s 24, people of any race disqualified from voting, and its repeal is not controversial as it is a 'dead letter' provision.[76] The repeal of s 25 alone, without other positive inclusions, could be seen as mere 'spring cleaning', but in practice could be the only common ground between the political parties. If successful, the repeal of s 25 and s 51(xxvi) together would remove the word 'race' from the *Constitution*.[77]

53. Ibid 112.

54. *Australian Constitution* s 24(i).

55. Williams and Bradsen, above n 33, 110.

56. Ibid.

57. *World Heritage Properties Conservation Act 1983* (Cth) relevant sections; *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Native Title Act 1993* (Cth); and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

58. *Kruger v Commonwealth* (1997) 190 CLR 1, 70.

59. *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

60. Panel Report, xvii.

61. Terms of Reference: Expert Panel December 2010.

http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/recognition-respect/expert-panel-terms-of-reference.

62. Discussion of results, see Panel Report, 9, 76 and Chapter 3.

63. Discussion of results, see Panel Report, 8 and Chapter 3.

64. Panel Report, xix.

65. It is often stated that only 8 out of 44 proposals for amendment have achieved the requisite double majority.

66. Panel Report, 137-156.

67. The deletion of s 25, also a provision with respect to 'race' is not controversial and does not appear to have any flow-on effects.

68. Panel Report, xviii.

69. Panel Report, 151.

70. Panel Report, xviii.

71. *Wacando v Commonwealth of Australia and the State of Queensland* (1981) 148 CLR 1, 23 (Mason J); Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184, 193.

72. Anne Twomey, 'Constitutional Recognition of Indigenous Australians in a Preamble' (Constitutional Reform Unit Sydney Law School, Report No 2, 2011)

http://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf.

73. This was clearly the Founders' intent and the states' powers were not altered in 1967 by the grant of concurrent power to the Commonwealth in this respect.

The panel recommended the inclusion of s 116A which would prohibit discrimination on the grounds of 'race, colour or ethnic or national origin' but not on other grounds such as gender or religion. This proposal is problematic, not least because 'race' is itself a contested notion. If successfully adopted, however, this provision could provide substantive entrenched protection on these grounds.

The panel recommended the inclusion of s 127A(1) which entrenches the 'undisputed position' of English as the national language. Section 127A(2) recognises Indigenous languages as the original languages of the continent, as part of the national heritage. This recommendation recognises the importance of indigenous language and is symbolically useful although it does not create a right to language,[78] as s 127A(2) will have no legal effect.[79] This recognition of Indigenous languages might be more effectively achieved in the Preamble, without further privileging the English language, and making s 127A unnecessary. It might even be harmful to Indigenous interests if governments sought to rely on that provision to prevent the use, teaching or support for other languages, including Indigenous languages.

Before 1967, the effective exclusion of Indigenous access to university education meant that there were no Indigenous legal voices in the period leading up to the 1967 referendum. The presence of Indigenous legal contributions in 1967, such as through an 'Expert Panel', might have prevented or at least foreshadowed the problems of extending the Commonwealth's power to discriminate against Indigenous peoples. The inclusion of prominent Indigenous people, including lawyers, in the present expert panel offers some comfort to many Indigenous people. The indigenous members of the panel have helped to highlight both the strengths and weaknesses of constitutional referendum proposals. As a result, Indigenous and non-Indigenous people are more likely to be better informed about the likely effects of any changes arising from the 2013 referendum.

Conclusion

The racially demeaning aspects of the *Australian Constitution* originate in fear — fear of racial dilution, fear of economic competition and fear of the future. The majority of the founders gave little thought to the impact of the *Constitution*'s effect on Indigenous peoples for whom 'smoothing the pillow of a dying race' [80] was the kindest act of compassion they could muster. Their fears, the perennial ones of racial contamination and economic competition remain latent today, and present politicians have continued to stir-up these age old worries.

Other founders, such as Sir Josiah Symon and Henry Higgins, attempted to argue that some level of care towards Indigenous people should be reflected in the *Constitution*, but they were sadly in the minority and their views on Indigenous peoples did not hold sway. One hundred years on, and seeing that the Federation founders' belief in the impending eradication of Indigenous peoples was premature, it is time to revive the sentiments of the more enlightened founders. To this end, the founders foresaw the need for constitutional change and provided a mechanism to do this.

Public goodwill towards Indigenous peoples has resulted in positive benefits. However, the constitutional changes in 1967 resulted in a greater power for federal parliament to oppress, a power that was exercised by both sides of politics in a manner that has been detrimental of Indigenous peoples' interests. Once bitten twice shy, as the old saying goes and Indigenous people should be careful about 'victories' that may at best do nothing and at worst have the potential to reverse hard-won gains.

The political climate is likely to favour symbolic change for the 2013 referendum. This article has argued that this symbolism is good and useful if it will recognise the wealth of Indigenous cultures, recognise and take pride in our successful custodianship of this land and its waters, and recognise the richness of our languages, cultures and spiritualties. These are good outcomes for posterity. So in answer to the question 'What are we trying to achieve in 2013?', this article concludes that the nation should aim for generous symbolic constitutional recognition for Indigenous peoples for the long-term good of the nation, coupled with broader legal measures that will help create substantive equality and help reduce Indigenous disadvantage in the short to medium term. We need changes that entrench substantive equality, non-discrimination and beneficial treatment only, of Indigenous (and other) peoples. But for these changes we may need to wait for another day.

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74. *Australian Constitution* s 51(xxxvii). The problems of investing federal courts of jurisdiction arising under state laws are acknowledged: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. The desired outcome could however arguably be achieved in a similar manner, as was the mirror legislation scheme for the Corporations Law.

75. Robert French, 'The Referral of State Powers' (2003) 31(1) *University of Western Australian Law Review* 19, 22.

76. That is, while s 25 permits the states to enact racially discriminatory legislation, the *Racial Discrimination Act 1975* (Cth) and s 109 of the *Australian Constitution* will likely make such laws invalid.

77. Panel Report, 131.

78. Panel Report, 132.

79. Panel Report, 132.

80. Justin Malbon, 'The Race Power under the Australian *Constitution*: Altered meanings' (1999) 21(1) *Sydney Law Review* 80, 86 <http://www.austlii.edu.au/au/journals/SydLRev/1999/3.html>