Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success

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This article argues that the purpose of constitutional recognition is predominantly practical, rather than just symbolic. The purpose is to positively reform the power relationship between Indigenous peoples and the Australian state, to empower Indigenous peoples and create a more mutally respectful relationship. The article examines the legal and political calculations involved in the main reform options. It explains why a purely symbolic or minimalist model for Indigenous constitutional recognition is likely to lead to referendum failure, and argues that the proposal for a constitutionally mandated Indigenous representative body presents the most viable path to referendum success.

INTRODUCTION

What problem does Indigenous constitutional recognition seek to fix? Is its aim purely symbolic, or does it seek to solve a practical problem? This article argues that characterising the purpose of constitutional recognition as purely symbolic is both substantively incorrect and strategically flawed – it will most likely result in a failed referendum.

If the aim is predominantly practical, as we suggest, then which model presents the best hope for a successful referendum? This article canvases the legal and political calculations involved with the main reform options and explains why a constitutionally mandated Indigenous representative body, while no easy sell, nonetheless poses Australia's best hope of a successful Indigenous recognition referendum.

THE PRELIMINARY PROBLEM OF PURPOSE

Productive debate about Indigenous constitutional recognition must first grapple with the problem of purpose. Discussion about appropriate models tends to remain incoherent unless parties can first agree on the problem being solved. Without clarity on purpose, parallel conversations emerge, each emanating from different starting points. Different streams of logic forge ahead on their own trajectory, rarely converging, and the possibility of consensus is quickly lost.

Two contrasting approaches to the question of purpose have emerged in the constitutional recognition debate: the symbolic approach and the practical approach. While these approaches may be sensibly combined, whichever purpose predominates will significantly impact the reform models argued for and accepted.

1. Symbolic Purpose

Those adopting a predominantly symbolic understanding of purpose tend to view constitutional recognition as an act primarily intended to create an uplifting national moment of reconciliation. The goal is the enactment of a statement of recognition, a poetic acknowledgment that would provide an emotional and moral social impact, but would not implement any practically operational legal, political or institutional reform.

Under this approach, symbolic words would be inserted and outdated references to "race" might be removed from the *Constitution*, but its processes, rules and power dynamics would remain the same. In a sense, the aim is the insertion of a "plaque": an emblematic statement that can be viewed

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with pride, but which contains no moving parts – or no intended moving parts. In essence: *words* of recognition, but "business as usual" in the legal and political *systems* governing Indigenous affairs under the *Constitution*.

The distinction between words and systems is critical. It is the difference between surface and substance, between painting a squeaky bicycle to improve its appearance, and fixing its wheels so that it runs more smoothly.

2. Practical Purpose

The practical approach is more operationally focused. It asserts that the purpose of constitutional recognition is to implement some fairer constitutional rules to legally and politically empower Indigenous peoples: to better protect and recognise Indigenous rights and interests, thereby creating a fairer and more productive working relationship between Indigenous peoples and the Australian state, under the *Constitution*. This approach therefore asserts that constitutional recognition must implement practical constitutional reform: it must set in place some constitutional rights, rules, processes or guarantees to positively recalibrate the power relationship between Indigenous peoples and the Australian Government.

While the moment in history created by the act of constitutional recognition and the achievement of a successful referendum may acquire symbolic meaning for the nation, the potential for a moving national moment does not obscure fundamental purpose: constitutional reform to practically ensure a fairer power relationship.

THE CORRECT APPROACH: THIS IS ABOUT REFORMING A POWER RELATIONSHIP

There are sound reasons for preferring a predominantly practical approach to understanding the purpose of Indigenous constitutional recognition.

1. History of Indigenous Advocacy

An examination of the history of Indigenous advocacy positions constitutional recognition as primarily seeking to solve a practical problem. Indigenous advocates have consistently sought constitutional reform to enable their legal and political empowerment: to permanently guarantee fairer treatment in the political and legal systems of Australia.

- In 1927 Fred Maynard in NSW, tired of protection policies, wrote to the Premier calling for an Indigenous board to control Indigenous affairs.[1]
- In 1933 King Burraga, seeking greater respect for Indigenous rights, called for representation in Parliament.[2]
- In 1937 William Cooper petitioned King George V for Indigenous representation in Parliament.[3]
- In 1949 Doug Nicholls wrote to the Prime Minister also calling for representation in Parliament.[4]
- In 1963 the Yolngu bark petitions called for better consultation;[5] they asked to be heard before decisions regarding their rights and their land were made.[6]

[1] A history of Aboriginal Sydney, "Australian Aboriginal Progressive Association writes a letter of protest to the NSW Premier" <http://www.historyofaboriginalsydney.edu.au/north-west/australian-aboriginal-progressive-association-writes-letter-protest-nsw-premier>.

[2] Heather Goodall, *Invasion to Embassy: Aboriginal Politics in NSW 1770-1972* (Sydney UP, 2006) 204; see also Bain Attwood and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines' League* (Aboriginal Studies Press, 2004) 36.

[3] Alexander Reilley, "Dedicated Seats in the Federal Parliament for Indigenous Australians" (2001) 2(1) *Balayi: Law, Culture and Colonialsim* 73, 82. The petition was intercepted by the Australian Government and was finally delivered to Queen Elizabeth II in 2014. See Timna Jacks, "Queen accepts petition for Aboriginal rights, 80 years on", *The Age*, 4 October 2014.

[4] Reilley, n 3, 82-83.

[5] Documenting Democracy, Yirrkala Bark Petitions 1963 (Cth) <http://www.foundingdocs.gov.au/item-did-104.html>.

[6] See also Damien Freeman, "Introduction" in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (MUP, 2016) 4-6.

- In 1972 the Larrakia petition called for political representation and a treaty.[7]
- In 1972 the Aboriginal Tent Embassy advocates called for the Northern Territory Parliament to be mostly made up of Indigenous people, for land rights and black control of black affairs.
- In 1979 the National Aboriginal Conference called for representation in Parliament and a Makarrata.[8]
- In 1988 the Barunga Statement presented to Prime Minister Bob Hawke called for, among other initiatives, an Indigenous body to oversee Indigenous affairs and a treaty.[9]
- In 1995 ATSIC called for better political participation and engagement with the political process, including through speaking rights to Parliament.[10]
- In 1995 the Council for Aboriginal Reconciliation also called for representation in parliament and political participation.[11]
- In 2007, Noel Pearson wrote to Prime Minister John Howard regarding constitutional recognition and proposed an Indigenous representative body.[12]
- In 2008 the Yolngu petition to Prime Minister Kevin Rudd called for self-determination and greater Indigenous authority and control in Indigenous affairs.[13]
- In more recent years calls for Indigenous political representation and participation have continued, including through advocacy for:
  - reserved Indigenous seats in Parliament;[14]
  - a 7th Aboriginal State;[15]
  - a national Indigenous representative body;[16]
  - Indigenous calls for fairer treatment have also manifested in advocacy for a new racial non-discrimination guarantee to prevent discriminatory laws and policies.[17]

Indigenous insistence on practical and substantive constitutional recognition has not quelled over time nor yielded to political intransigence. In July 2015, at a meeting with political leaders at Kirribilli House, Indigenous leaders again emphasised that symbolism is not enough.[18] The Referendum

[7] See <http://vrroom.naa.gov.au/print/?ID=19522>.

[8] National Aboriginal Conference, Sub-Committee on the Makarrata, "Makarrata Report", 1979; see also Julie Fenley, "The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981" (2011) 42(3) *Australian Historical Studies* 372.

[9] Council for Aboriginal Reconciliation, Documents of Reconciliation, Attachment A, <http://www.austlii.edu.au/au/orgs/car/docrec/policy/brief/attach.htm>.

[10] ATSIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures*, 4.31: "Representatives of indigenous peoples, including ATSIC, should have legally enforceable speaking rights in legislatures and in Local Government councils on issues relating to indigenous peoples. The Chairperson of ATSIC should be entitled to address the Parliament annually to report on the state of indigenous affairs."

[11] CAR called for "recognition and empowerment" through incorporation of the ATSIC chairperson as a "full member of the Ministerial Council" on Indigenous affairs, noting a widespread view among Indigenous Australians that "the structures of governments … do not provide adequately for Indigenous peoples to exercise legal powers over matters that were of concern to them nor influence major decision-making processes": Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians, a Submission to the Commonwealth Government* (1995) 35-45.

[12] Pearson argued, "There's got to be some kind of structure in which we interface with government": *Lateline*, "Noel Pearson discusses the issues faced by Indigenous communities", 26 June 2007, <http://www.abc.net.au/lateline/content/2007/s1962844.htm>. See also Noel Pearson, "A structure for empowerment", *The Australian*, 16-17 June 2007.

[13] Galarrwuy Yunupingu, "Truth, Tradition and Tomorrow", *The Monthly*, 2008.

[14] For example, Mischa Schubert, "Indigenous want reserved seats in Parliament: Congress", *The Age*, 31 July 2011.

[15] Michael Mansell, "Self-determination through an Aboriginal 7th State of Australia: an Australian Provisional Government model", 30 July 2014.

[16] See Tony McAvoy SC's proposal for a First Nations Assembly; see also Noel Pearson, *A Rightful Place: Race, Recognition and a More Complete Commonwealth* (Black Inc, Quarterly Essay 55, 2014) 65.

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

[18] See Natasha Robinson, "Indigenous Recognition 'Must Be Real': Aboriginal Leaders", *The Australian*, 6 July 2015.

Council's First Nations regional dialogues are also confirming that Indigenous people across the country will reject and even campaign against a minimalist or purely symbolic recognition model.[19]

Importantly, Indigenous advocates have articulated the need for *constitutional* recognition and reform, because only the *Constitution* is capable of providing enduring and stable protection of rights. As Galarrwuy Yunupingu explained in 1998: "If our Indigenous rights were recognised in the *Constitution*, it would not be so easy for governments to change the laws all the time, and wipe out our rights."[20]

2. The Constitution is a Practical Rulebook

In arguing for constitutional recognition as the means to achieve practical Indigenous empowerment in the legal and political system, Indigenous advocates have understood correctly the purpose and nature of the *Constitution*. The *Constitution* is the document that lies at the heart of the "torment of powerlessness"[21] besetting Indigenous peoples in their relationship with successive Australian governments.

Constitutions bind governments to the rule of law through qualifying and legitimising the exercise of government and parliamentary power over its citizens. By restraining the arbitrary exercise of power, constitutions protect citizens' rights and freedoms. Australia's *Constitution* is the rulebook of our system of government: it sets out rules articulating and overseeing the important power relationships in our nation. It is a power-sharing compact which distributes legal and political power across the constituent parts of the Federation. Federal mechanisms, together with democratic processes, operate as restraints on the abuse of power. As Professor Cheryl Saunders explains, lacking a federal bill of rights, "Australia relies on institutional mechanisms for rights protection".[22] The *Constitution* sets up institutional checks and balances which require compromise and negotiation, compelling a culture of "mutual respect" and reciprocity between constituencies. In the words of Callinan J:

> The whole *Constitution* is founded upon notions of comity, comity between the States which replaced the former colonies, comity between the Commonwealth as a polity and each of the States as a polity, and comity between the Imperial power, the Commonwealth and the States. … Federations compel comity, that is to say mutual respect and deference in allocated areas.[23]

Mutual respect, power-sharing and comity are constitutional principles informing all important national power relationships, except one: the relationship between Indigenous peoples and the Australian state. Indigenous peoples are the omitted constitutional constituency.

Indigenous peoples were omitted as negotiating parties to the constitutional compact. They could not negotiate themselves specific representation or a say in political decisions made about their affairs. They could not negotiate any guarantee of equal treatment. No rules to ensure mutual respect or comity in relation to Indigenous peoples were implemented. Rather, the *Constitution* included (and still includes) clauses which specifically allow and promote racial discrimination (ss 25, 51(xxvi) and the removed s 127). Many discriminatory laws and policies have flowed from the *Constitution*, most in relation to Indigenous people.

Given that the *Constitution* is a practical rulebook dealing in legal and political power, and given that Indigenous peoples, as demonstrated in the previous section, have consistently sought reform of this rulebook to enable their empowerment – the prolific assertion that Indigenous constitutional recognition seeks only to serve a symbolic, rather than a practical, purpose must be seriously questioned. We firmly agree with constitutional conservatives: the *Constitution* is a practical and pragmatic rulebook and charter of government. It is not necessarily the place for symbolic statements,

[19] Jeremy Clarke and Jill Gallagher, "Why Indigenous Australians will reject a minimalist referendum question", *Sydney Morning Herald*, 20 March 2017.

[20] See Galarrwuy Yunupingu, Vincent Lingiari Memorial Lecture, Darwin, 20 August 1998.

[21] WEH Stanner, "Durmugam: a Nagomeri" in *The Dreaming and Other Essays* (Black Inc, Agenda, 2009) 44.

[22] Cheryl Saunders, "The Australian Constitution and Our Rights" in *Future Justice* (Future Leaders, 2010) 117.

[23] *New South Wales v Commonwealth* (2006) 229 CLR 1, 322.

poetry and aspirations, which some experts warn could lead to unintended legal consequences when interpreted by the judiciary.[24] The *Constitution* is, however, the place for practical rules – rules to ensure the fair distribution of power. Any Indigenous recognition in the *Constitution* should align with this purpose – otherwise there is no point altering the *Constitution* at all.

3. Australian Voters are Practical People

For any successful Indigenous recognition referendum, there are four main political hurdles that must be overcome. The first is getting Indigenous Australian support – an Indigenous recognition referendum that Indigenous people do not support would be unconscionable. As noted above, Indigenous people have made it exceedingly clear that they want recognition to entail practical and substantive reform. The second hurdle is getting the Commonwealth Government of the day to support and initiate the constitutional amendment bill – practically speaking this requires the support of the Prime Minister and his party room. The third hurdle is getting the absolute majority approval in both Houses of Parliament.[25] The fourth is getting the approval of the Australian people via a double majority referendum, as required by s 128. Australians are extremely cautious about constitutional reform. Only 8 out of 44 referenda put to the people thus far have succeeded.[26]

The history of constitutional reform in Australia demonstrates that Australians are practical people. They will vote "yes" to fix a practical problem – like giving the Commonwealth the power to deliver social services, to address State debts, or to fix the retirement age of judges. They have never voted "yes" just to insert a symbolic statement.

The 1967 referendum is often incorrectly couched as a symbolic referendum. It was a symbolic campaign, but in fact it involved substantive legal reform to important power relationships. It conferred upon the Commonwealth the power to legislate for Indigenous affairs, a governance area previously left to the States, and removed s 127 which previously prevented Indigenous people from being counted in the Census for the purposes of voting.[27] The referendum arguably left the job half done, however. It gave the Commonwealth a new power with respect to Indigenous people, by removing the exclusion of Indigenous people from s 51(xxvi), the Race Power, but it did not implement any constitutional rules to ensure a relationship of mutual respect or comity in the exercise of that power. Nor did it guarantee that this power, or other powers, would only be used for non-discriminatory purposes.

Nonetheless, 1967 was a practical referendum solving a practical problem – it gave the Commonwealth a necessary power to deal with Indigenous affairs. Consequently, it was Australia's most successful referendum, winning over 90% of the vote. Consider, by contrast, the 1999 referendum which attempted to insert a new preamble into the *Constitution*, recognising Indigenous peoples and articulating other Australian values, as pushed by former Prime Minister John Howard. This proposal was intended to have symbolic effect only – it even included a "no legal effect" clause. The referendum failed. A purely symbolic Indigenous recognition referendum would likely also fail.

4. Indigenous Disempowerment Requires Urgent Practical Reform of the Systems Governing Indigenous Affairs

The fourth and perhaps most compelling reason supporting a practical approach to constitutional recognition is that the Indigenous affairs system is in desperate need of practical, structural and systemic reform. Australian governments spend $34 billion a year in the name of Indigenous

[24] See eg Julian Leeser, "Uphold and Recognise" in Freeman and Morris, n 6.

[25] Williams and Hume explain: "Proposals to change Australia's Constitution are often made, but very few are ever put to the people at a referendum. One bottleneck has been the difficulty of first securing the support of the federal Parliament." There have been 137 constitutional reform bills introduced, but only 44 have been put to referendum: George Williams and David Hume, *People Power: the History and Future of the Referendum in Australia* (UNSW Press, 2010) 89.

[26] For the track record, see Australian Electoral Commission, Referendum Dates and Results, <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

[27] *Constitution Alteration (Aboriginals) 1967*.

Australians, if not directly on them. Progress and outcomes do not reflect this expenditure. In some areas, notably incarceration rates, child removal and suicide, outcomes are worsening. The system is not working to produce good results.

More often than not, when government interventions are pursued to tackle such problems, Indigenous people are dissatisfied with the results, complaining either that policies are discriminatory, developed and implemented without adequate consultation, or are top-down and imposed rather than devised in genuine collaboration with Indigenous people. Australia needs to improve the way it does business in Indigenous affairs if it is to achieve significantly better outcomes. Australian governments need to find fairer and more productive ways of working together with Indigenous people to achieve change. The opportunity for structural and systemic reform presented by an Indigenous constitutional recognition referendum must therefore not be squandered – it must implement much needed practical, systemic reform.

5. Incrementalist Arguments in Favour of Symbolism are Strategically Misguided

Supporters of the symbolic approach, however, tend to assert that symbolism is an important end in itself. They can usually be divided into two categories.

First, there are those who believe symbolism is enough because systemic, operational reform is not needed. They feel the legal and political system governing Indigenous affairs already works well. Secondly, there are those who believe systemic reform is important and required to achieve justice and better outcomes in Indigenous affairs, but they also believe (a) that substantive constitutional and systemic reform is not currently politically achievable, and (b) that a symbolic moment alone is worthwhile because it will help foster more positive attitudes towards Indigenous peoples, so that structural reform can be achieved at a later date.

The former category of symbolists we hope will be re-thinking their positions by considering the arguments above. The latter category we shall refer to as Incrementalists. Incrementalists often basically agree that structural reform is needed – their penchant for symbolism in the first instance is a form of political calculation. The Incrementalist pursues a strategy of seeking symbolic change first (because she believes, mistakenly, that this is achievable) in order to change the social and political culture for the better, so that substantive constitutional reforms of practical legal and political benefit to Indigenous peoples might be successfully pursued later.

The Incrementalist, however, makes an incorrect political calculation. For once an Indigenous recognition referendum is successfully achieved, even if it is purely symbolic in nature, politicians (and likely Australians at large) will view the issue as resolved, and the political momentum for any further constitutional reform in relation to Indigenous rights will dissipate, unlikely to ever return. If the referendum fails, however, the impetus for change would remain alive for later resolution – as it did after the failed attempt in 1999 to insert a new preamble to the *Constitution*.

Indigenous advocates were mistaken in accepting former Prime Minister Kevin Rudd's symbolic Apology for the Stolen Generations, without any compensation for harms done. Many believed they could accept the Apology, then discuss compensation with politicians down the track. As it played out, all political will to discuss compensation disappeared after the Apology was delivered. The politicians reaped the rewards for their seemingly generous gesture, and no compensation has yet been paid to Indigenous people. This was a strategic miscalculation that Indigenous advocates would be unwise to repeat with respect to constitutional recognition.

WHY A PURELY SYMBOLIC REFERENDUM WILL FAIL

The concerted push – mostly by politicians – for a purely symbolic Indigenous recognition referendum is misguided. It will be stridently opposed on three powerful fronts:

1. It would be opposed by the majority of Indigenous people, who continue to make clear that they seek practical reform to empower Indigenous people – not just a symbolic statement with no operational effect.

2. It would be opposed by constitutional conservatives, who correctly view the *Constitution* as a practical rulebook, and not the appropriate place for uncertain symbolic language which may yield unintended consequences when interpreted by the High Court. Constitutional conservatives have run many well organised and successful "no" campaigns in the past, defeating many attempted referendums. They would do so again in order to uphold the *Constitution* and prevent constitutional uncertainty or the transfer of power to the High Court.
3. Given likely opposition from Indigenous advocates and constitutional conservatives, and given the proclivity of voters to favour practical action over empty symbolism, the Australian people would most likely also vote "no" to a purely symbolic amendment. This result would, in our view, be a deserved and just result.

For these reasons, the idea that a purely symbolic recognition referendum would yield an easy win is a flawed approach. Opposition from Indigenous people and constitutional conservatives together would create a powerful coalition that would likely defeat the referendum.

There is an important analogy in this respect with the failed Republic referendum. During this campaign, the direct electionists joined forces with the monarchists to successfully oppose constitutional reform for Australia to become a republic. The alliance demonstrated the way in which people who might ordinarily disagree with each other can unite against a common enemy in the context of a referendum campaign.

In the recognition debate, constitutional symbolism would become the common enemy Indigenous advocates and constitutional conservatives. A purely symbolic constitutional change would animate an alliance between Indigenous people seeking substantive reform over decorative words, and constitutional conservatives seeking to uphold the *Constitution* and protect it from uncertainty. With the right model, however, these two groups could unite as passionate advocates for constitutional recognition.

The Incrementalist argument that a symbolic referendum should be pursued because it will succeed, and because it will lead to practical constitutional reform in years to come, is incorrect. For the reasons explained above, a purely symbolic referendum is likely to be unsuccessful. If by chance it is successful, however, it is more likely to destroy future chances of substantive constitutional reform to empower Indigenous peoples, than improve them.

TWO PRACTICAL APPROACHES TO CONSTITUTIONAL RECOGNITION

We have sought to establish that constitutional recognition should be understood as having a predominantly practical purpose. The next step is to ascertain the best way of achieving positive, practical reform to the power relationship between Indigenous peoples and the Australian state, under the *Constitution*. This involves an assessment of the politics. It is not enough to present a legally sound proposal. Any proposal must also be politically viable and capable of succeeding at a double majority referendum. It is possible, however, to have both: legal soundness and political viability.

A purely symbolic proposal would be both legally unsound (it would likely yield unintended legal consequences arising from judicial interpretation of uncertain symbolic words) as well as politically unviable (as explained above, it would be "pincered" by Indigenous people on one hand and constitutional conservatives on the other, which would likely result in rejection by the Australian people at large).

So what are the practical constitutional recognition models on the table, and are they legally sound as well as politically viable? There are two options in this regard:
(1) the Expert Panel: a judicial approach; and
(2) an Indigenous representative body: a political and participatory approach.

1. The Expert Panel Approach

In 2012, the Expert Panel proposed a racial non-discrimination clause as the key practical constitutional reform. Such a clause would prohibit discriminatory laws and policies and would sit alongside other symbolic recognition clauses. The approach was one of practical reform combined with symbolic statements in the *Constitution*.

A racial non-discrimination clause would practically shift two important power relationships under the *Constitution*. It would empower Indigenous peoples and other subjects of discrimination, by enabling them to go to the High Court to try to get discriminatory laws and policies struck down. It would also empower the High Court to strike down Parliament's laws where they are found in breach of the clause. These would be significant, practical shifts, with ongoing operation.

The proposal for a racial non-discrimination clause has not yet won the political consensus necessary for a referendum. The unviability of this proposal was confirmed when Joint Select Committee Chairman and Liberal MP, Ken Wyatt, after recommending three variations of a racial non-discrimination clause in the Committee's Final Report,[28] a few weeks later publicly stated that such a clause was unlikely to succeed at referendum because it was already being opposed in his own party.[29] Given that bipartisan support is considered a necessary prerequisite for referendum success, it would seem that this proposal has reached a political dead end.

It was not the first time in Australia's history that the push for a racial non-discrimination protection was politically defeated before it was put to the people. Liberal MP Billy Wentworth also proposed such a clause prior to the 1967 referendum,[30] but it did not become part of the referendum proposal for similar reasons: concerns about parliamentary supremacy and empowering the High Court to strike down Parliament's laws.[31] Indeed, all previous attempts to curtail Parliament's power through the implementation of new constitutional rights clauses or restraints have failed when put to referendum. Australia so far has not succeeded in implementing a legislated federal bill of rights, let alone any new constitutional rights clause.

The proposal for a racial non-discrimination clause is certainly a practical proposal that would legally empower Indigenous peoples. It may well be legally sound proposal (though bill of rights opponents disagree). It cannot, however, be described as a politically viable proposal.[32]

2. The Indigenous Representative Body Approach

In contrast to a judicial solution (a racial non-discrimination clause, or variations thereof) which enlivens concerns about parliamentary supremacy and empowering the High Court, a representative and participatory solution may present a more politically viable way forward.[33]

As an alternative to a new constitutional rights clause, we have argued for a constitutionally mandated Indigenous representative body, empowered to advise Parliament and the Executive on laws and policies in relation to Indigenous affairs.[34] Rather than empowering Indigenous people to go to the High Court to challenge discriminatory laws already enacted, this approach would ensure Indigenous political involvement and participation right at the start, when relevant laws and policies are being devised and enacted – hopefully preventing discrimination. The Indigenous body proposal thus

[28] Joint Select Committee, *Final Report* (2015), Recommendation 5.

[29] Natasha Robinson, "Ken Wyatt: time to get a move on with constitutional recognition", *The Australian*, 10 July 2015.

[30] Expert Panel Report, n 17, 30.

[31] John Gardiner-Garden, "The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum", Department of the Parliamentary Library, Background Paper No 11, 1996-1967.

[32] For a full discussion of objections to a racial non-discrimination clause, see Shireen Morris, "Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition" (2014) 40 Mon LR 488.

[33] The proposal for an Indigenous representative body in the *Constitution* is explored in Shireen Morris, "The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs" (2015) 26 PLR 166.

[34] For more on this proposal see Cheryl Saunders, "Indigenous Constitutional Recognition: the Concept of Consultation" (2015) 8(19) *Indigenous Law Bulletin* 19; Anne Twomey, "An Indigenous advisory body: addressing concerns about justiciability and parliamentary sovereignty" (2015) 8(19) *Indigenous Law Bulletin 6*; Fergal Davis, "The Problem of Authority and the Proposal for an Indigenous Advisory Body" (2015) 8(19) *Indigenous Law Bulletin* 23; Megan Davis, "Indigenous Constitutional Recognition from the Point of View of Self-Determination and its Exercise through Democratic Participation" (2015) 8(19) *Indigenous Law Bulletin* 10; Melissa Castan, "Indigenous Recognition, Self-Determination and an Indigenous Representative Body" (2015) 8(19) *Indigenous Law Bulletin* 15.

presents a political, preventative and proactive approach, rather than a reactive and litigious approach. It has been described by some Indigenous advocates as a "sword", whereas a racial non-discrimination guarantee would be a "shield". As such, it is a mechanism which is preferred by some who argue for the need "to be proactive, not reactive and defensive".[35] Indeed, political participation, in contrast to perpetual litigation, creates an increased sense of Indigenous peoples as self-determining political actors in the governance systems of the nation – which is for many an attractive and empowering prospect.

While some propose that the body should have veto powers, our proposal is for the body's advice to be non-binding in order to be compatible with parliamentary supremacy and to be politically viable. Therefore there would be no guarantee that Parliament will follow the body's advice, just as there are no guarantees the High Court will agree with Indigenous litigants when interpreting a racial non-discrimination clause. But the procedural and political solution would provide constitutional rules and processes for ongoing formal engagement, negotiation and dialogue – mutual respect and comity – between Indigenous peoples and the Parliament. Even where advice is ignored, the body would still be there, part of the constitutional framework of the nation, arguing its case for reform. It would provide a constitutional platform for Indigenous empowerment.

Is this proposal politically viable? It is substantive and practical reform, ambitious in character – the kind of representative and consultative institution that Indigenous advocates have sought for many decades. It could therefore potentially win Indigenous support.

Yet it was also designed in collaboration with cautious constitutional conservatives, specifically to address their concerns and to uphold the *Constitution*. The proposal is therefore drafted to be non-justiciable to avoid empowering the High Court.[36] It avoids the uncertainty of symbolic constitutional language (it opts for a Declaration outside the *Constitution* instead of inserting symbolic language into the *Constitution*).[37] The proposal thus fully addresses concerns about parliamentary supremacy and legal uncertainty. Having emerged as a "noble compromise" with conservatives, it is a highly pragmatic proposal which should therefore, in theory, be able to garner their support. Indeed, some influential conservatives (both constitutional and ordinary) have spoken up in support of an Indigenous body in the *Constitution*.[38]

At the same time, however, the proposal is ambitious: it constitutionally guarantees Indigenous people a permanent voice in their affairs, and could therefore also attract support from Indigenous people and progressives. The proposal for a constitutionally mandated indigenous body is the only proposal which is both ambitious and pragmatic. It is also the only proposal for substantive and practical constitutional recognition which is both legally sound as well as potentially politically viable.

CONCLUSION

All this by no means guarantees success. The Prime Minister, his party room, the Parliament and the Australian people are still largely unknown hurdles. One thing, however, is clear: Indigenous people and constitutional conservatives as broad groups, and pending further consultation, can in theory both be brought onto the "yes" team in relation to the proposal for an Indigenous constitutional body. This is the only proposal for which this is the case.

By contrast, a purely symbolic proposal would propel both groups to become opponents: it would be "pincered" between Indigenous advocates on the one hand, and constitutional conservatives on the other, leading to likely referendum defeat at the hands of a powerful if unexpected alliance – just as occurred with the Republic referendum. Australia must heed the lessons of the failed Republic referendum in 1999, just as we must heed to lessons of the failed preamble in relation to pure symbolism. The *Constitution* is not the place for symbolic words; it is the place for practical reform.

[35] Aboriginal Provisional Government, Press Release, 8 July 2015.

[36] For a full explanation see Morris, n 33.

[37] See generally, Freeman and Morris, n 6.

[38] See Jeff Kennett, "As a nation, we need to be reconciled", *Herald Sun*, 8 June 2016; see generally, contributors in Freeman and Morris, n 6.

Similarly, while a racial non-discrimination clause would likely attract Indigenous support because of its substantive nature, it would also galvanise the resistance of bill of rights opponents (a significant and influential proportion of the population). It is therefore unlikely to win bipartisan support.

Accordingly, the Indigenous representative body approach is the most likely path to a successful referendum. It is not a sure path: it will undoubtedly be uphill, uncertain and difficult. It will require concerted effort and perseverance from Indigenous leaders and politicians across the spectrum to get it over the line. But it offers the best hope of success. To prematurely dismiss the referendum's best hope in favour of pure symbolism, on the misguided political calculation that pure symbolism will yield an easy win at the polls, would be gravely naive strategic error.

Australia now has an opportunity to achieve meaningful reform by creating a constitutional platform for Indigenous empowerment and ensuring a fairer relationship between Indigenous peoples and the Australian state. The Indigenous body proposal would provide a mechanism enabling the constitutional principles of mutual respect and comity to be extended to Australia's constitutional relationship with Indigenous peoples.

Pragmatism without ambition (pure symbolism) will fail. Ambition untempered by pragmatism (like the Expert Panel's proposals) will also fail. Whether Australia's national leaders have it in them to be both pragmatic yet ambitious remains to be seen.