RECOGNITION *in keeping with the* CONSTITUTION

A worthwhile project

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Uphold & Recognise

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In December 2015, the then Prime Minister, Malcolm Turnbull, and the then Leader of the Opposition, Bill Shorten, appointed a Referendum Council to advise on progress and next steps towards a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution. I was a member of that Council.

On 30 June 2017, the Referendum Council published a Final Report. The Report was made after an extensive, and in some respects novel, process of consultation with Aboriginal and Torres Strait Islander Peoples, involving First Nations Regional Dialogues and a National Constitutional Convention held at Uluru in May 2017.

As appears from the Foreword to the Report, successive Prime Ministers, over more than 40 years, had spoken of the importance of formal recognition of the first peoples of our nation. Work on constitutional recognition of Indigenous Australians had already been undertaken by an Expert Panel, and a Joint Select Committee.

That Indigenous people have a special, and unique, status in the history and the life of the nation is beyond question. That the Constitution is an appropriate place in which to recognise that status is a matter of debate. Opinions also differ on the form that any such constitutional recognition might take.

Having considered a number of proposals that had emerged from previous consideration of the matter, the Referendum Council made a single proposal for constitutional change, based upon a Statement that had resulted from the Uluru Convention. The recommendation was:

> 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. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51(xxvi) [the power to make special laws for the people of any race] and section 122 [the Territories power]. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

In June 2018, a non-profit organisation, Uphold & Recognise, in collaboration with the PM Glynn Institute of Australian Catholic University, published options for discussion as to form of constitutional amendment, and legislation that might give effect to that recommendation.

In November 2018, a Joint Select Committee of the Federal Parliament published a Report on Constitutional Recognition. It made recommendations as to the design and establishment of The Voice.

My present purpose is to address four issues that arise in consideration of the Referendum Council's recommendation. The first is whether the Constitution is an appropriate place for recognition, and, more specifically, this kind of recognition, of the first peoples. In particular, would the proposed Voice impinge upon the supremacy of Parliament? The second is whether the recommendation is inconsistent with the value of equality which informs our laws and legal institutions. The third is whether what is proposed is offensive to currently accepted values because it is racially based. The fourth issue concerns the matter of representation.

THE CONSTITUTION: SOME FORM OF CONSTITUTIONAL RECOGNITION?

The Australian Constitution came into being more than 110 years after the arrival of the First Fleet. It took effect by virtue of an enactment of the United Kingdom Parliament, the *Commonwealth of Australia Constitution Act 1900* (UK) ("the Constitution Act"). It is now itself almost 120 years old. Its origin is about mid-way along a time-line beginning with the arrival of British colonisers. Territorially, that was a modest beginning. The various British colonies that were established by the end of the nineteenth century between them occupied the entire continent, but even at the time of the United Kingdom legislation it was not clear that Western Australia would join the Federation, and it was thought that New Zealand might. Those uncertainties are reflected in the Constitution Act itself. [1]

Although the terms Australia, and Australian, were in use before Federation, the boundaries of what is now the Australian nation do not correspond to those of any political entity that existed before then. Over the course of the nineteenth century Great Britain established a number of colonies in the continent in the process of expanding its Empire; an Empire that lasted until the middle of the twentieth century. That expansion occurred against a background of European rivalry, and was justified in terms of principles developed by European powers. In *Mabo v Queensland (No.2)*,[2] Brennan J said: [3]

> The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by

[1] *The Constitution Act*, sections 3, 6.
[2] [1992] HCA 23; (1992) 175 CLR 1.
[3] At par 33.

occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action.

The term "discovery" offends some modern observers, but Great Britain was declaring and justifying its occupation of this land to its European counterparts, not to the Indigenous inhabitants. As Brennan J pointed out,[4] the term that was used by the common law to describe such occupation was "settlement".

The imperative to occupy the entire continent was strategic as well as economic. It was important for Great Britain to demonstrate to other potential colonisers that the British Empire was in occupation of the whole of what is now Australia. That process of occupation was gradual, and was achieved with varying degrees of intensity. Inexorably, it involved dispossession of the prior inhabitants.

In New South Wales, colonisation and expansion were economically driven by alienation of what were called the waste lands of the Crown. One of the earliest political issues in the colony was the policy to be adopted in the disposal of what had become Crown lands, including the use of the proceeds of such disposal to fund immigration from the British Isles.

Speaking with particular reference to British North America, an English parliamentarian in 1840 famously referred to the colonies as "receptacles for our surplus population".[5] Many Australians, like me, are descended from members of the populations of Scotland and Ireland who came here with the surge in immigration in the middle of the nineteenth century.

The preamble to the Constitution Act recites the agreement of the people of New South Wales, Victoria, South Australia, Queensland and Tasmania to unite in a Federal Commonwealth. It also recites that it was expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions. Those principally in mind were Western Australia and New Zealand. The Constitution itself was set out in section 9 of the Constitution Act.

The Constitution had very little to say on the topic of Indigenous people. In one respect, that may be just as well. The framers of the Constitution, although visionary, were also of their time. If they had ventured some general expression of contemporary views as to the place of Indigenous people in the new body politic, those views might today not meet with general satisfaction. In any event, their objective was the creation of a federal union. Their main concern was with the structural features of that union and, in particular, the allocation of legislative, executive and judicial powers between the new Commonwealth and its constituent elements, the States, as the colonies became.

Like the previous colonies, the Commonwealth was part of the British Empire. To think of the division of power in Australia in 1901 in terms only of some form of competition

[4] At par 34.
[5] John Henry Barrow, *Hansard Parliamentary Debates*, 29 May 29 1840.

between Federal and State authorities is to overlook the continuing importance of the Government of the United Kingdom. Control of such matters as defence and foreign policy remained in Westminster. At the apex of judicial authority was the Privy Council, sitting in London. The Head of State was the Queen of the United Kingdom of Great Britain and Ireland. She was also Empress of India. One of the factors leading to expansion of Federal power as compared to that of the States, over the twentieth century, is that, as the tide of Empire receded, the uncovered territory was occupied mainly by the Commonwealth.

One of the few things the Constitution said about "aboriginal natives" was in section 127, which was removed by a referendum in 1967. That section provided that, in reckoning the numbers of the people of the Commonwealth or of a State, "aboriginal natives" should not be counted. The proposer of the clause, ultimately adopted with minor amendments, was Sir Samuel Griffith.[6] In their brief commentary on the provision in 1901, Quick and Garran[7] gave figures, which they acknowledged to be incomplete, of the estimated numbers both of Aboriginal people and of Maori people. The total Aboriginal numbers were 59,603, rather surprisingly divided between 33,702 males and 25,901 females. The total Maori population was said to be 41,993. As to Aboriginal people, the largest numbers were in South Australia, no doubt mostly in what was then the Northern Territory of South Australia.

Another amendment to the Constitution made in 1967 was to remove from the provision (section 51(xxvi)) which empowered the Federal Parliament to make laws with respect to the people of any race for whom it was deemed necessary to make special laws, a qualification which excluded from the reach of that power "the aboriginal race in any State". The original qualification was aimed at preserving State legislative authority. The removal of the qualification expanded the race power to cover Indigenous people.

Section 25 of the Constitution provided, and still provides, that, for the purposes of setting the number of members of the House of Representatives, which is affected by the population of each State, if by the law of a State persons of a particular race are disqualified from voting, such persons shall not be counted in fixing the numbers in the House of Representatives. Like some other provisions of the Constitution (such as section 74 dealing with appeals to the Privy Council, and section 101 dealing with the Inter-State Commission) that is now a dead letter. There have been calls for its removal, but how that would benefit Indigenous people is difficult to see. In 1901, it was not an expression of racism. It dealt with the effect of certain actual or possible State laws in a sensible fashion. It is now of no practical or legal consequence.

Scrutinising a legal instrument of 1901 with a view to identifying material that may offend current standards of political correctness is hardly a useful exercise. Nor is it fair to brand as racist people who were making an honest response to an issue they could not avoid. Those who are disturbed by section 25 of our Constitution would be well advised to avoid reading what

[6] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p. 1201.
[7] At p. 1202.

the American Declaration of Independence had to say about some Native Americans whom the British sought to recruit. But to apply to a revolutionary document of the eighteenth century modern sensibilities would be anachronistic. What is of more interest is what the Declaration of Independence says about equality. That is a matter to which I will return.

The Constitution, which is essentially a structural plan for a federal system of government, is not what would now be called a human rights instrument. This was quite deliberate. Addressing the American Bar Association in August 1942, Sir Owen Dixon said:[8]

> In this country [i.e. America] men have come to regard formal guarantees of life, liberty and property against invasion by government, as indispensable to a free constitution. Bred in this doctrine you may think it strange that in Australia, a democracy if ever there was one, the cherished American practice of placing in the fundamental law guarantees of personal liberty should prove unacceptable to our constitution makers. But so it was. The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power.

It is of some topical interest that he identified, as the one exception to that, a guarantee of religious freedom.

This aspect of the character of the Constitution is the reason many people oppose constitutional recognition in the form of what has been called a "one-line bill of rights" aimed at racial discrimination. It would be incongruous. And its purpose and effect would be to diminish the law-making power of Parliament.

Understanding of, and attitudes towards, Indigenous people developed over time. In defence of our forebears it should be pointed out that British justice, as administered in Australia, was understood to protect all Australians. The famous 1934 case of *Tuckiar v The King*[9] concerned a man who was convicted of the murder of a police officer and sentenced to death. He was said to be an "aboriginal native" who had no previous contact with white people or authorities. This was regarded as a significant factor in his favour, both on the question whether his alleged conduct in spearing the police officer amounted to homicide, and on the question whether, by reason of the conduct of his counsel, he had been deprived of a fair trial. The accused's counsel disclosed in open court that his client had made an admission. There were also potential arguments, not raised at trial, as to whether the spearing occurred in circumstances that involved culpable homicide, and as to whether it might have been manslaughter, not murder. The appeal to the High Court was allowed, and the conviction and sentence quashed. The plurality judgment said:

[8] *Jesting Pilate*, 3rd ed, 2019 at 221.
[9] [1934] HCVA 39; (1934) 52 CLR 335.

> Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to be acquitted from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted.

I have noted above some specific amendments to the Constitution in 1967, but of equal importance for present purposes are major changes, over the course of the twentieth century, in the context in which the Constitution applies; changes to which it was able to adapt. One of those changes was the end of the British Empire. Another was the change in relative influence and authority as between the Commonwealth and the States. Consider, for example, section 94, which contemplates the monthly payment to the States of the surplus revenue of the Commonwealth. It reflects the fact that Commonwealth Government was originally seen by many as, in effect, an agency of the States. As to the federal judiciary, in 1901 there was debate as to whether the High Court should be permanently constituted or should be made up of Acting Justices from the State judiciaries. Appeals from the High Court to the Privy Council and from State Supreme Courts to the Privy Council continued until the 1980s.

As to the increasing power of the Commonwealth relative to that of the States, Windeyer J said in the *Payroll Tax Case*:[10]

> The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time consolidated by war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence on British naval and military power and by a recognition and acceptance of external interests and obligations.

Ultimately, in 1986, the Constitution itself was repatriated. In *Sue v Hill*[11] the High Court held in 1999 that the United Kingdom was a foreign power within the meaning of section 44 of the Constitution. That was consistent with United Kingdom authority, and, as a matter of Australian law, it was the consequence of the *Australia Act 1986*. Development of this kind was said to be intrinsic to the Constitution. The joint judgment,[12] quoted what Story J had said with respect to the United States Constitution:

> The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.

The text of the Constitution has been amended. Some of its provisions have become redundant. The legal principles governing its interpretation have altered. (In fact, they

[10] *Victoria v The Commonwealth* [1971] HCA 16; 122 CLR 353, at par 5 of his judgment.
[11] [1999] HCA 30; 199 CLR 462.
[12] At [51].

changed substantially during its early years).[13] And, most importantly, the context in which it applies has changed, sometimes in ways that have been transformative.

In one major respect that directly affects Indigenous Australians, the legal context has undergone fundamental developments. I have earlier referred to the decision of the High Court in *Mabo v Queensland (No.2)*. Subsequently there was legislation of the Commonwealth Parliament, in the *Native Title Act 1993*. That change in the way in which Australian law deals with Indigenous dispossession in turn reflected developments in international law, and in social and cultural attitudes within Australia towards Indigenous people.

In addition, it has produced major advances within Indigenous communities, which have had to find ways of adapting to the requirements of consultation, advocacy and decision-making for the purposes of the administration of the native title system.

Behind the broad political acceptance of the need for some form of constitutional recognition of Indigenous people is a readiness to address, with appropriate formality, the historical fact of dispossession and its consequences. If this can be done in the nation's foundational legal instrument, in a manner that is consistent with the nature of that instrument, and that confers substantive benefit upon Indigenous people, then it seems a worthwhile objective.

THIS FORM?

Since the 2017 Report of the Referendum Council there has been a good deal of work, and commentary, on the design of the First Nations Voice called for by the Uluru Convention.

What may not have received sufficient public attention is the process of the Convention itself, and the Regional Dialogues leading up to it. That process is examined in pars 2.256 to 2.270 of the Joint Select Committee Report of November 2018. The process was led by Indigenous members of the Referendum Council, but as it developed I was struck by the following. First, perhaps partly in consequence of the need to address native title issues, it is apparent that there already exist, at regional levels, the bases for representational structures. It is important not to overlook the diversity of Indigenous peoples. What constitutes appropriate representation varies. Second, reports coming back from the dialogues, and the outcome of the Convention itself, revealed a high level, not only of commitment to a form of substantive, and not merely symbolic, recognition but also of pragmatism as to how that might best be achieved. The ultimate preference for the Voice proposal probably surprised some non-Indigenous people with other enthusiasms. Third, the process itself was one of searching for a Voice, and the same will be true of the ongoing design process called for by the Joint Select Committee.

[13] *The Engineers' Case* [1920] HCA 54, (1920) 28 CLR 3.

Whenever mention is made of a proposed referendum for constitutional change the first thing most people think of is the requirement for a double majority in the popular vote, and the consequent high incidence of failure. There is, however, an anterior requirement. Only the Federal Parliament can initiate a referendum. The Federal Parliament has shown little appetite for proposals to limit its own power; and rightly so. Parliamentary supremacy (not sovereignty – there is no such thing in Australia as a sovereign Parliament, and there never has been) is one of the essential safeguards of our liberal democracy. It is unlikely that Parliament will propose a change to the Constitution in aid of Indigenous recognition if the effect of the change will be to curtail its own legislative power.

That appears to have been well understood by the supporters of the Voice. What is proposed is a voice to Parliament, not a voice in Parliament. The recommendation of the Referendum Council deliberately left it to the Parliament to establish the contemplated representative body. The proposals for legislation and constitutional amendment examined in detail in the June 2018 Options for Discussion produced by Uphold and Recognise and the PM Glynn Institute treat the preservation of Parliament's legal supremacy as fundamental, as do most of the other proposals put to the Joint Select Committee. It was Professor Twomey who drafted what I understand to be the original proposed form of amendment. Her proposal demonstrated that a constitutionally entrenched Voice can be achieved without legal derogation from parliamentary supremacy.

The structure, composition and functions of the proposed representative body would be determined, and susceptible to change, by legislation of the Federal Parliament. What would appear in the Constitution would be the minimum requirements necessary to guarantee its continued existence and its essential characteristics.

There is nothing new about the idea of a body to represent Indigenous people. In par 2.301 of its Final Report the Joint Select Committee said that it had considered 21 examples of past, current, or proposed advisory or representative structures, which could inform the design of the Voice. It is difficult to see any objection in principle to the creation of a body to advise Parliament about proposed laws relating to Indigenous affairs, and specifically about special laws enacted under the race power which, in its practical operation, is now a power to make laws about Indigenous people. If such a body can be designed to the satisfaction both of Parliament and of Indigenous people, then, logically, the question is whether such a body should be given constitutional status, as an appropriate form of Indigenous recognition.

A related issue that has been debated is whether any referendum should precede, or follow, the creation of the proposed representative body. I do not wish to intrude upon the various arguments and submissions canvassed by the Joint Select Committee. However, I think it very likely that Australians, and Parliament itself, would want to see what the body looks like, and hear what the Voice sounds like, before they vote on it.

I accept that there is nothing inherently impossible about providing in the Constitution for an institution before its form is determined. As noted earlier, although the High Court of Australia was provided for in the Constitution, two years later people were still arguing about what form it should take, and it was not established until 1903, with the first Prime Minister as one of its members. Preceding the Constitution, there was tension about the High Court's proposed relationship with the Privy Council. What was ultimately provided about that (in section 74) was one of the few respects in which the United Kingdom Government intervened to override the proposals that came from the colonies. Nevertheless, I doubt this is an issue which can be resolved satisfactorily at a purely conceptual level.

As a practical matter, the process of design proposed by the Joint Select Committee will produce an outcome only if the Indigenous people who contribute to the process have already achieved, and demonstrated to the Australian public, a substantial level of representational competence. The process itself will display Indigenous representation and decision-making in action. Australians are unlikely to support constitutional change unless there is a substantial degree of Indigenous consensus in favour of the proposed change. Establishing and demonstrating that consensus, to Parliament and to the general public, will itself provide a preview of the representative body that will follow. Establishing the legitimacy of the proposed representative body to speak for Indigenous people will be an essential part of the design process.

A point that has been fairly made is that, if the proposed body is to have representative legitimacy, then its own make-up will give rise to political issues and contest within the Indigenous community. Why that is a bad thing is not clear to me. Political action is the mechanism by which our own representative bodies are normally constituted, and through which they function.

Nobody underestimates the complexities of designing a body that fairly represents Aboriginal and Torres Strait Islander people, but I am not sure anybody suggests it is not worth trying, and there are now a number of specific proposals on the table.

The Referendum Council's proposal as to one of the specific functions of the representative body was that it should monitor the use of the heads of power in sections 51(xxvi) and 122 of the Constitution.

Section 51(xxvi) empowers the Commonwealth Parliament to make laws with respect to the people of any race for whom it is deemed necessary to make special laws. By a referendum in 1967, in which there was an overwhelming majority for change, that provision was amended so that it now covers special laws with respect to Aboriginal people. Laws enacted under that power are not limited to laws that everyone regards as beneficial to the people in question. The races that were in contemplation in 1901 were not Aboriginal people, and the proposed laws in contemplation were not necessarily to the advantage of the people of those

races. Whether a particular law is beneficial to some group in the community is frequently contestable, and is for Parliament to decide. Not only was the 1967 amendment widely applauded as removing a form of discrimination against Indigenous people; in practice the power to make special laws of the kind in contemplation is now exercised as a power primarily concerned with Aboriginal people. Because so many Indigenous people live in the Northern Territory, the race power is supplemented by the Territories power in section 122. At this stage in our nation's history and development what other race is likely to be the subject of special laws enacted by the Commonwealth Parliament?

In our constitutional development we have arrived at the situation in which the Constitution confers on the Parliament a power to make special laws for the people of a certain race, and that power, supplemented by the Territories power, is used in practice as a power to make special laws for Indigenous people. A proposal that the Constitution should provide for Parliament to design, establish, and determine from time to time the make-up and operations of a body to represent Indigenous people, with a specific function of advising about the exercise of that power, hardly seems revolutionary. To the Referendum Council it seemed an appropriate form of recognition of the nation's Indigenous people.

It has the merit that it is substantive, and not merely ornamental. It is not aimed at assuaging the sensibilities of some non-Indigenous people. It would give Indigenous people a constitutionally entrenched, but legislatively controlled, capacity to have an input into the making of laws about Indigenous people or Indigenous affairs.

It is widely accepted that constitutional recognition of Indigenous people is fitting, and long overdue. Since the Constitution now makes people the potential objects of special laws by reason of their Indigenous status, the Referendum Council considered that an appropriate form of recognition of such people would be to provide them with a Voice to Parliament.

EQUALITY

An objection that has been made to the proposal is that to make special constitutional provision for the establishment of a body to advise Parliament about the needs and concerns of one particular group of Australians, namely Indigenous people, would be divisive, and inconsistent with the value of equality that informs our democracy.

Equality is a word with two different connotations.

The authors of the American Declaration of Independence said it was self-evident that men were created equal, and that they were endowed by their Creator with inalienable rights, one of which was liberty. Some of the signatories to that Declaration owned slaves.

Their proposition about equality was obviously a moral proposition, rather than a factual observation. As a moral proposition most of us would agree with it, although nowadays some people would be made to feel uncomfortable by the identification of the will of the Creator as its source.

As a proposition of fact, based on observation of the human condition, an assertion that all people are equal is manifestly untrue. To use the language of George Orwell, all people are equal, but some people are more equal than others.

If the proposition is inverted, to treat people as grammatical objects rather than subjects, it is a valid principle that all people should be treated equally. There is, however, a difference between a general principle and an inflexible rule. I referred earlier to a speech given by Sir Owen Dixon in 1942. At the time he was a member of the High Court of Australia. He was also an Australian diplomat based in Washington. This seems hard to reconcile with the general principle of the separation of executive and judicial powers of which he was a leading exponent. What was going on? The answer is: war. The general principle was not an inflexible rule, and it yielded to the exigencies of the time. 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.

Equality can be an elusive concept. To say that the Constitution treats all Australians equally sounds reassuring, but is it true? Consider the example of representation in Parliament. Under the Constitution, about half a million Tasmanians are represented by the same number of Senators as about seven and a half million people of New South Wales. Is that equality? Or is it inequality? It is both, but, more to the point, it is Federalism. Under the Constitution, the Parliament may make special laws concerning the people of any race which, in practice, means Indigenous people. Does the Constitution treat Indigenous people in the same way as everyone else? Hardly. The race power, by its very existence, calls into question the assumption of equality. At present, by virtue of a widely applauded amendment made last century, the Constitution empowers the Federal Parliament to make special laws about Indigenous people. That is an important power that has been exercised on several occasions; sometimes controversially. One reason the power is important is that Federal law overrides inconsistent State law. How does it offend some principle of equality now to provide that, in recognition of the unique position of Indigenous people in the nation's history, Parliament shall establish a representative body which has a particular function of giving advice about such laws?

It has been suggested that it is divisive to treat Indigenous people in a special way. The division between Indigenous people and others in this land was made in 1788. It was not made by the Indigenous people. The race power in the Constitution is now used in practice to make special laws for them. The object of the proposal is to provide a response to the consequences of that division.

For many, government should concern itself with material and economic matters, not contestable ethical issues. On that level, the case for special treatment of indigenous people can be summarized in a sentence from the judgment of Brennan J in *Mabo v Queensland (No 2)*:[14]

> Their dispossession underwrote the development of the nation.

If it were fair to regard Indigenous people as merely one of the many minority groups that can be identified in the complex pattern of our social structure – and a very small group at that – then it would be reasonable to leave them to make their own way as contesting participants in the ordinary democratic process. But that would take dispossession to its logical, and unattractive, conclusion.

RACE

The history of the twentieth century demonstrated the evil of racism, and race itself is a concept based on insecure conceptual foundations. It does not follow, however, that the term is unmentionable, or that any governmental action predicated upon race must be wrong. It has a firm footing in the Constitution.

There are Federal laws which are generally accepted as beneficial to Indigenous people that have been based on the race power and very few people want to see them undone. There are others whose benefits have been doubted. That is a political issue. For the reasons given above, I would not accept that the Constitution's references to race are morally objectionable.

In whatever country is under consideration, being Indigenous could be regarded as a matter of history, or geography, or ethnicity. This may be unlikely to matter to the Indigenous people themselves. If, as our leaders often say, we have among us a group of people who have a special place in our history, and we are satisfied they deserve a certain form of recognition on that account, it would be driving ideology to an extreme to decline them that recognition because they form what could be regarded, and is regarded by the Constitution itself, as a racial group.

REPRESENTATION

A substantial issue concerns the design of a representative body that will be suitable both to the Parliament and to Indigenous people. If this can be achieved it will serve an important

[14] At [82].

national objective, and would form the basis of appropriate substantive recognition of Indigenous people.

Representation cuts both ways. When a lawyer represents a client in court, the client receives the benefit of the lawyer's advocacy, but the court also is meant to receive a corresponding benefit. That benefit lies not only in the enhancement of the court's capacity to make a just decision but also in the efficiency of the decision-making process. The client is bound by the conduct of the advocate, and it is only on this basis that the court can go about its business effectively. A body that has the capacity to speak to the Parliament on behalf of Indigenous people should be of advantage to Parliament and, through it, the nation. But it will also, in a practical way, bind Indigenous people.

I have already referred to the diversity of Indigenous people. There will be a relationship between the breadth of the remit of the proposed body and its acceptability to Indigenous people, and to Parliament, as truly representative. That is commonplace in any arrangement of agency. Balancing the desire for a strong Voice with the need for that Voice to be representative will be a major part of the design process.

A voice to parliament and an advantage to the nation

In this paper, Murray Gleeson explains why proposals to implement the Uluru Statement From the Heart's call for an Indigenous Voice to Parliament are not only a worthwhile project, but one that is consistent with the nature of the Constitution and the values that underpin it. In doing so, he responds to several key criticisms of the project. In particular, he demonstrates that proposals that have been developed would not undermine the supremacy of Parliament and would not offend against the principle of equality that underpins Australian democracy. He concludes that "A body that has the capacity to speak to the Parliament on behalf of Indigenous people should be of advantage to Parliament and, through it, the nation. But it will also, in a practical way, bind Indigenous people."

The Hon. A. M. Gleeson AC QC served as the fifteenth Chief Justice and Lieutenant Governor of New South Wales (1988–1998) and the eleventh Chief Justice of Australia (1998-2008). Since 2008, he has served as a non-permanent judge of the Court of Final Appeal of the Special Administrative Region of Hong Kong. In 2015, he was appointed to the Referendum Council by the Prime Minister, the Hon. Malcolm Turnbull MP, and the Leader of the Opposition, the Hon. Bill Shorten MP.

Uphold & Recognise collaborated with the PM Glynn Institute, Australian Catholic University's public policy think-tank, and the Uluru Statement From the Heart Education Project to host a legal symposium at the Sydney offices of Gilbert + Tobin on 18 July 2019 at which Mr Gleeson delivered this paper. It is published with their generous support.

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:

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*
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7 *Makarrata*
8 *A Fuller Declaration of Australia's Nationhood*
9 *Recognition in keeping with the Constitution*

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