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## A Colour-blind Constitution

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Many years ago at university I was lamenting the never-ending march of left-wing politics and policies, and how numbers and demographics seemed to be on “their” side. I had just left a politics tutorial at Melbourne University and was feeling bruised at the abuse hurled at me because I dared not agree with the proposal for the Prime Minister to say sorry to Indigenous Australians. I was the only one in the class with that view.

Even though my arguments were based on reason and compassion, the tutor instead pointed out that “as a privileged wealthy white man” I had benefited enormously from Aboriginal dispossession and should even “personally apologise”. It was irrelevant to him that I was an immigrant from Ireland, arriving in 1988, long after dispossession and, unlike most of them, went to a government school in Melbourne, becoming the first in my family to attend university. But that identity did not suit the

narrative. To him and the class, I was not an individual. I was a group. I was a race. I was what he labelled me.

I needed cheering up. This was not what I thought university would be. It was not a battle of ideas. It seemed to skip over the nuances of life and individuality, stopping at broad groupings of race, class and sexuality. I started to worry about the sort of world we were building.

I sought therapy from my good friends Ben Davies and Michael Gilmour. They said: “we have the perfect prescription for you. You need a weekend of soundness. You need to come to The Samuel Griffith Society.” I asked what that was. They replied: “it is a room full of patriots and the soundest people in the country. Trust us. You will love it. And, more importantly, you will feel much better.” They were right.

## **Recognition and identity politics**

Before delving into the substance of the Final Report of the Recognition Council, I want to reflect on wider issues surrounding the fashion of identity politics. I say, “fashion”, because I find it curious that it is only now that we must review the supposed inherent racism in our public statues, after unrelated stories made news in the United States. Did no one on the left notice them in the decades before? Why have two local councils in Victoria only *now* sought to cancel citizenship ceremonies on Australia Day? And what do the recent disturbing events in Charlottesville have to do with proposals to recognise Indigenous Australians in the Constitution of Australia? Well, they have something to say, unfortunately.

Brendan O'Neill spoke at the 2016 Conference in Adelaide. He spoke passionately about free speech. But something he wrote only two weeks ago caught my attention and took me back to a tutorial at Melbourne University in the late 1990s. He wrote:

The events in Charlottesville are the logical consequence of the politics of identity. One of the nastiest trends in Western politics in recent years has been the relentless racialisation of public life and political debate. Everyone has been forced, often against their will, into a racial box. It's all 'Dear White People', checking white privilege, the problem of Old White Men, black lives matter, white lives matter, Asian lives matter, racial re-education on campus, warnings against 'cultural appropriation', [...]. We're bombarded with the message that we're racial creatures, that our biology and history shape us, that our skin colour determines our privilege levels, our outlook. The predictable, poisonous end result has been the return of racial thinking, the rebirth of the racial imagination. And anyone who tries to opt out of this utterly nasty business, anyone who says 'I'm colourblind, I don't judge people by race', is rounded upon. Apparently it is white privilege to say 'I don't think about race'. If you want to be thought of as a good person, you must think racially – a complete reversal of how things were just 20 or 30 years ago. And people wonder why white nationalism is growing. It would be amazing if it wasn't. Over and over the cultural elite says, 'You are white, you are a white man, everything you think and do is an expression of whiteness, your identity is white, that is your race and your history, admit it, own it', and some people have turned around and said: 'Okay.'<sup>1</sup>

Identity politics is more than just unfair and counter to our Western values and traditions of liberty and individualism. It risks opening a Pandora's box. And it is capable of being shockingly destructive to our democracy and to our society.

The substantive radical reforms proposed by the Recognition Council in effect seek to give identity politics a dangerous shot of status and legitimacy. They seek to insert race into the heart of our most important democratic document, the Constitution.

### **The Final Report of the Recognition Council**

In this address, I will give a brief overview and critique of the recommendations of the Final Report of the Recognition Council, concluding that there is merit in minimalist constitutional reform that removes race from the Constitution. But I do not suggest such minimalist reform should happen now. The priority should be in seeing these democratically offensive proposals unambiguously defeated.

John Stone's address gives a broader historical context, so I will turn immediately to the Final Report.

The Final Report by the Recognition Council was released to the public in July 2017. It contained only two recommendations. The first is to hold a referendum to amend the Constitution to provide for an Aboriginal and Torres Strait Islander representative body that has an indigenous "voice" to the Commonwealth Parliament.

The body and this voice would have its functions and composition established through ordinary legislation, would be charged with monitoring the use of heads of power under sections 51(xxvi) and 122, and would recognise the status of Aboriginal and Torres Strait Islanders as Australia's "first peoples". Further details of the powers, responsibilities, function and composition of the proposed voice are not provided; instead, the Recognition Council recommends that these matters be examined through further consultation.

The Recognition Council's second recommendation concerned extra-constitutional recognition of indigenous

Australians through a statutory “Declaration of Recognition”, ideally passed simultaneously by the various Australian parliaments. This declaration, it recommends, should bring together our national story, including Indigenous history, British institutions, and multicultural unity.

Finally, the Recognition Council briefly examined two additional matters raised in the Uluru Statement but sitting outside its scope for recommendations: the creation of a Makarratta Commission supervising “agreement-making” – in other words, treaties, and facilitating the process of “truth telling” – a reconciliation process.

It is apparent from the Recognition Council’s recommendations and report that a sharp departure from the anticipated trajectory of indigenous recognition of indigenous Australians in the Constitution has occurred. With delivery of the Uluru Statement at the First Nations National Constitutional Convention in May 2017, the Recognition Council concluded that indigenous Australians demanded substantive rather than symbolic constitutional reform. The Recognition Council went on to argue that, unless indigenous Australians support a proposed constitutional reform, there is “no practical purpose” in suggesting it.<sup>2</sup>

Desire amongst indigenous Australians for substantive constitutional reform may be supported by the Recognition Council’s recommendations; however, both the indigenous and non-indigenous community are left with unanswered questions about the proposed voice’s place within our democratic and parliamentary processes.

How such a departure occurred after many years of supposed good will, as well as numerous consultations, detailed reports from earlier panels and committees, and tens of millions of dollars in taxpayer money may also be rightly asked.

It also leaves us in the curious position where the Recognition Council argues that indigenous Australians have advocated for the retention of race-based powers in our Constitution.

### **Unqualified endorsement**

These outstanding questions, however, have not prevented many amongst the media, social and political elites from fully endorsing the Recognition Council's recommendations. Remarkably, they have done so without details of what the proposed voice would look like or analysis of its implications. It is a reminder of a now infamous Sky News interview between David Speers and Bill Shorten in 2012. Not knowing what Prime Minister Julia Gillard, who was in Turkey at the time, had said on the topic (being Peter Slipper), Bill Shorten chose nevertheless to agree unreservedly with it. The exchange went as follows:

Bill Shorten: "I haven't seen what she's said, but let me say I support what it is she said."

David Speers: "Hang on, you haven't seen what she said?"

Mr Shorten nodded: "But I support what my Prime Minister said."

When Mr Speers asked him for his personal view, Bill Shorten replied: "My view is what the Prime Minister's view is."

David Speers: "Surely you must have your own view on this."

Bill Shorten: "No, when you ask me if I've got a view on this, it's such a general question, it invites me to go to lots of places."

Bill Shorten: "I'm sure she's right," he concluded.<sup>3</sup>

This is the level of constitutional analysis many political leaders are providing. And maybe, by now, we have come to expect it. But it is also the level of analysis being given by institutions that should know better – including many respected legal institutions, legal academics, legal councils and corporate bodies. It seems that whatever the Recognition Council recommended, they would be all in. Even better, if Stan Grant was in, so were they!

More worryingly, relatively few have qualified their endorsement with reservations over retention of race-based powers in the Constitution.

So where did the supposed “consensus” for minimalist change go? How have we ended up with such a radical departure from previous reports?

### **A “consensus” for recognition?**

This requires a brief fly through from 2007 to the present day. Despite the inherent difficulties in approaching constitutional referenda in Australia on any subject matter, indigenous recognition in the Constitution has supposedly garnered broad in-principle support throughout the community and political spectrum. Some may refer to this as the “Canberra consensus” (credit to James Paterson and John Roskam) – a consensus that should be questioned. And perhaps it is the same sort of consensus that occurred in that Melbourne University tutorial? Who wants to be left out on their own? Who wants to be labelled as uncaring or insensitive? It is simply easier to go along with the group – whatever that is.

Former Prime Minister John Howard’s commitment to minimalist constitutional recognition amid the 2007 federal election campaign cemented the topic into recent political debate, and precipitated bipartisan support during the following Parliament. With the formation in 2010 of the Expert Panel on

Constitutional Recognition of Indigenous Australians, tangible progression appeared achievable by the 50th anniversary of the 1967 referendum which removed exclusion of “aboriginal natives” from the Census (section 127); and also removed a prohibition on Commonwealth power to make laws about the “aboriginal race in any State” (section 51(xxvi)). To maximise its chances for success, the Expert Panel adopted four guiding principles its proposals must support:

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

It is worth remembering these principles, as some of them are obviously capable of being internally inconsistent. At some stage a choice has to be made. I will return to these aspects below.

The Expert Panel’s Final Report was published in January 2012 and set out seven ideas within three key themes. Amongst these ideas were both symbolic and substantive proposals for indigenous recognition, and substantive proposals regarding equality and non-discrimination.

Significantly, the Expert Panel concluded that there was a strong case to remove those sections of the Constitution which could be used to discriminate against Australians on the basis of race. Section 25 was specifically identified as a “racially discriminatory provision”, with 97.5 percent of submissions supporting its repeal.<sup>5</sup> Encouragingly, early and strong support was found for the concept of “Race Has No Place” in the

Constitution, a timely publication of the Institute of Public Affairs, advocating minimalist reform that simply removed references to race from the Constitution.<sup>6</sup>

In concrete terms, the Expert Panel recommended the repeal of sections 25 and 51(xxvi),<sup>7</sup> along with inclusion of a language provision with section 127A as symbolic measures.<sup>8</sup> It also recommended, however, insertion of a symbolic preamble, a statement of recognition, coupled with a substantive new head of power through section 51A,<sup>9</sup> and a prohibition of racial discrimination through section 116A.<sup>10</sup>

The Expert Panel's report was followed in June 2015 by the Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. The Joint Select Committee's Final Report mirrored the Expert Panel in its recommendation that the parallel inclusion of a statement of recognition and repeal of sections 25 and 51(xxvi) would be powerful symbolic acts. It also recommended retention of a persons power specific to Indigenous Australians, coupled with a racial discrimination prohibition as substantive measures.<sup>11</sup>

When examining the reports of the Expert Panel and the Joint Select Committee, consistent themes are found in their reasoning and their community consultation. It is apparent that the continued existence of powers based on race in the Constitution was seen as remarkable, unacceptable, and embarrassing to many Australians. Proposals for constitutional recognition of indigenous Australians were diverse, with each hinging on whether recognition should be purely symbolic, include substantive powers, or combine both. Retention of constitutional powers based on race that could be used to discriminate against a group of Australians – any Australians – was roundly rejected. These powers were identified as the

historical source of many grievances of indigenous Australians and violated the principle of equality before the law.

In contrast, the Recognition Council's Final Report dismissed the rationale behind the symbolic and substantive removal of race from the Constitution, and advocated retention of race-based powers through both commentary in its Final Report and omissions from its recommendations. In its own words, the Recognition Council has weighted the wishes of the indigenous community over the other three guiding principles, representing a clear departure from the process and reconciliation priorities of the Expert Panel and Joint Select Committee. They have made a choice on those principles.

Constitutional statements or declarations of recognition, which had earlier been seen as essential, were rejected on the basis they may affect future assertions of indigenous sovereignty. One could be confused as to whether the Recognition Council's recommendations are focussed on supporting indigenous constitutional recognition or enabling future activism. In rejecting symbolic measures, such as the repeal of sections 25 and 51(xxvi), the Recognition Council dismissively referred to section 25 as a "dead letter" whose removal would provide "no substantive" benefit to indigenous Australians.<sup>12</sup> This ignores the overwhelming and consistent support for removal of section 25, and its potential application to any Australian.

By stating that: "[i]t is the Recognition Council's view that there is no practical purpose to suggesting changes to the Constitution unless they are what Aboriginal and Torres Strait Islander peoples want", the Recognition Council showed it has discarded the goal of contributing towards a "more unified and reconciled nation". We are left with the conclusion that the Recognition Council has advocated retention of race in the Constitution if it supports or, at least, does not inhibit, indigenous Australians' goals.

This is remarkable.

### **Costs, consultations and optional responsibilities**

If we put aside the potential costs in popular support to recognition (and, indeed, reconciliation) caused by the Recognition Council's recommendations, we can examine its actual cost to the taxpayer and the process that led to its conclusions.

There is one aspect of the Recognition Council's processes that stands out. The Recognition Council placed far greater weight on the second guiding principle, "be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples", than either the Expert Panel or the Joint Select Committee. The Recognition Council referred to the Expert Panel's extensive Australia-wide consultations as "not designed with a view to securing a representative view from Aboriginal and Torres Strait Islander peoples".<sup>13</sup> This conclusion is questionable but was used to justify the Recognition Council's embarkation on a consultative process that limited the influence of "broader community consultation" to focus, instead, on the 12 First Nations Regional Dialogues and the National Constitutional Convention at Uluru.

These regional dialogues, however, were far from transparent. Dialogues saw a maximum 100 invitees with 60 percent of positions allocated to indigenous representatives, 20 percent to community organisations, and the remaining 20 percent to "key individuals".<sup>14</sup> Whilst the Recognition Council claims this was the "most proportionately significant consultation process that has ever been undertaken with First Nations,"<sup>15</sup> the selection of invitees lacked transparency and resulted in what can be described as a framework for activism rather than pragmatic cross-sectional community consultation.

The Recognition Council completed this consultation process with substantial Commonwealth funding. During Senate Estimates it was reported that the Recognition Council's budget was \$9.5 million over 2015-2016 and 2016-2017. The Recognition Council's funding is only one element of the campaign for indigenous recognition, however. Recognition Australia, which ran the innovative "Recognise" campaign, received \$30.73 million in Commonwealth funding over the five years to 30 June 2017.<sup>16</sup> It is impossible to quantify the broader taxpayer funds spent on recognition through, for example, wider indigenous and community programs or, indeed, the extensive advocacy our public broadcasters have undertaken.

We may not be able to put a final figure on taxpayers' financial support for the indigenous recognition campaign. But if armed only with the \$40 million dollar figure from direct funding over the past five years, the public should be concerned that it arguably paid to see the Recognition Council place us further from achieving indigenous recognition in the Constitution than we were in 2010. If that money was designed to advance the consensus of recognition – it failed dramatically.

### **An indigenous "voice"**

I would like to conclude by specifically addressing and appraising the proposal for an indigenous "voice". The proposal is to provide for an indigenous voice to the Parliament in the Constitution, but to enact its powers, functions, representative character and procedures through legislation. The Recognition Council has made clear it considers the body should not have any kind of veto power over the Parliament,<sup>17</sup> and that the voice would be non-justiciable.<sup>18</sup>

At this point it is important to note that much like extra-constitutional recognition, there is nothing preventing an indigenous voice being established in the absence of

constitutional reform. The Recognition Council's advocacy in this regard is contradictory: it argues only constitutional reform creating a voice offers the dignity and recognition that indigenous Australians have campaigned for, but recognition statements or declarations may only be extra-constitutional. Constitutional entrenchment would prevent a repetition of ATSIC's creation and abolition.

In the absence of details we can identify that the proposal would create a constitutionally-entrenched indigenous representative body that provides "advice" to the Parliament regarding matters affecting indigenous Australians, it creates an obligation for the Parliament to legislate – and to maintain legislation – for such a body, and it creates a body that would be unique in Australian law.

This is significant for several reasons.

First, few positive obligations are found in the Constitution, and Parliament has not fully exercised its responsibilities towards the existing examples.<sup>19</sup> This is certain not to be the case with an indigenous voice.

Secondly, a constitutionally-entrenched indigenous voice to the Parliament would not be analogous to any Commonwealth statutory body, and would require consideration and adjustment of administrative and constitutional law surrounding, for example, its operation, funding and accountability.

Thirdly, this body would provide a representative function to Parliament based on the sole criterion of indigeneity, with the corollary question of how and by whom indigeneity is determined.

Fourthly, functional questions including how advice would be tabled, the temporal relationship between the body's advice and Parliament's procedures, the duty of Parliament or the

Executive Government to consider the advice, and the scope of matters affecting indigenous Australians all remain outstanding.

Finally, it should not need to be said, but Indigenous Australians do have a voice in the Parliament – the Parliament itself. It is as much theirs as anyone else's.

The Recognition Council's only express recommendation for constitutional reform sees the indigenous voice monitoring heads of power that have traditionally affected Indigenous Australians.

Despite the Recognition Council's claims that the indigenous voice would be non-justiciable, this will probably be limited to its advice or advocacy within the Parliament. The first area vulnerable to legal challenge is the Parliament's obligation to create the body and its power to amend its legislation. Difficulties could well arise through obligations for constitutional entrenchment and the political deadlock seen in recent Parliaments. Lapsing or expiring legislation would be out of the question lest the High Court strike down offending temporal provisions, and a relationship between Parliament's duties towards the voice and future amendments to legislation will probably arise through either parliamentary convention or a legal challenge.

Beyond questions of its operation, we are brought to the political and activist risks of an indigenous voice to the Parliament. The voice may not be created with an express legal veto, but it will wield a de facto political veto over many matters of policy and large portions of the indigenous community. This is important because it divides Australians into categories – into identities: those with and without parliamentary representation through the body. As Senator James Paterson argued, a constitutionally entrenched body with a representative function based on race violates the "important principle of equality before the law".<sup>20</sup> It also flies in the face of the Expert Panel's second

principle of “contribut[ing] to a more unified and reconciled nation”, as the symbolism of removing race from the Constitution is important for all Australians, not just the indigenous community.

## **Conclusion**

The trajectory for indigenous recognition through constitutional reform has been unexpectedly and radically altered by the Recognition Council.

The Recognition Council’s decision was wrong and should be rejected for several reasons.

First, the widespread support of the Australian community for race to be excluded from the Constitution should be respected and encouraged – even if the indigenous community (to the extent that it is capable of being properly captured in one voice) disagrees.

Secondly, sections 25 and 51(xxvi) may be applied to any group or groups of Australians deemed necessary, making this a matter for the entire Australian community, not only Indigenous Australians.

Finally, the retention of race in the Constitution places underlying democratic values and rights in conflict with the supreme law of the land. With the majority of our fundamental freedoms expressed in the common law and protected through the principle of legality, the inclusion of constitutional provisions that expressly undermine equality before the law is a contradiction and inimical to our status as a liberal democracy. Race should not have any role in the Constitution. To paraphrase the Joint Select Committee, advocacy for its retention is remarkable.

Many things happened in my life after that tutorial class.

I had the privilege of witnessing young brave Australians do dangerous things in war and in our name. Some have subsequently and tragically joined the 102 000 names on our national war memorial.

The Constitution of Australia is no more for them than it is for indigenous Australians, or anyone else.

Because it is for all of us, equally.

No one has special status – on service, on race, or anything else.

I find that beautiful. And worth fighting for.

## Endnotes

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5. Ibid., 138.
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7. Ibid., 142 and 144.
8. Ibid., 133.
9. Ibid., 150.
10. Ibid., 173.
11. Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Final Report, June 2015, 22.
12. Referendum Council, Final Report, 30 June 2017, 12
13. Ibid., 36.
14. Ibid., 10.
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16. Commonwealth, Finance and Public Administration Legislation Committee, Senate, 3 March 2017, 51 (Dean Smith).
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20. Senator James Patterson, “Our Constitution already gives First Nations a say”, *The Australian* (online) 2 June 2017. Retrieved from:  
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