

**'THE TORMENT OF OUR POWERLESSNESS': ADDRESSING
INDIGENOUS CONSTITUTIONAL VULNERABILITY
THROUGH THE ULURU STATEMENT'S CALL FOR A FIRST
NATIONS VOICE IN THEIR AFFAIRS**

SHIREEN MORRIS*

This article analyses and explores the Uluru Statement from the Heart's call for a constitutionally guaranteed First Nations voice in their affairs, as constitutional reform intended to address the ongoing problem of Indigenous constitutional vulnerability and powerlessness. It contends that a First Nations voice is a suitable solution: it coheres and aligns with Australian constitutional culture and design which recognises, represents and gives voice to the pre-existing political communities, or constitutional constituencies. The article evaluates, compares and attempts to refine drafting options to give effect to a First Nations constitutional voice, by reference to principles of constitutional suitability, responsiveness to concerns about parliamentary supremacy and legal uncertainty, and assessment of political viability. The article concludes that the proposal for a constitutionally enshrined First Nations voice strikes the right conceptual balance between pragmatism and ambition, for viable yet worthwhile constitutional change. With appropriate constitutional drafting and legislative design, such a proposal offers a 'modest yet profound' way of meaningfully addressing Indigenous constitutional vulnerability, by empowering the First Nations with a voice in their affairs.

I INTRODUCTION

This article analyses and explores the Uluru Statement from the Heart's call for a constitutionally guaranteed First Nations voice in their affairs as constitutional reform intended to address the ongoing problem of Indigenous constitutional vulnerability and powerlessness. It contends that a First Nations voice is a suitable solution: it coheres and aligns with Australian constitutional culture and design, which recognises, represents and gives voice to the pre-existing political communities, or constitutional constituencies. The article

* Shireen Morris is a McKenzie Postdoctoral Fellow at Melbourne University Law School, a Trinity College Academic Fellow and a senior advisor to Cape York Institute.

evaluates, compares and attempts to refine drafting options to give effect to a First Nations constitutional voice, by reference to principles of constitutional suitability, responsiveness to concerns about parliamentary supremacy and legal uncertainty, and assessment of political viability.

Part II provides political background and explains the reforms proposed by the Uluru Statement and the Referendum Council. Part III explores the problem of Indigenous vulnerability in the constitutional relationship between Indigenous peoples and the colonising state. I argue that Indigenous peoples in Australia are a particularly vulnerable constitutional constituency that is largely at the mercy of Parliament and government in decisions made about their rights. This top-down constitutional dynamic leads to entrenched Indigenous powerlessness, repeated policy failures and injustice – a cycle that can only be broken by circuit-breaking, empowering constitutional and structural reform. In Part IV, I characterise the purpose of Indigenous constitutional recognition as constitutional reform to create a fairer power relationship between Indigenous peoples and the state.

In Part V, I make the case for a First Nations constitutional voice as the correct and appropriate constitutional reform solution. By particular reference to federal principles of reciprocity, power-sharing, mutual respect and comity, this Part discusses Australia's constitutional history and culture to demonstrate how the concept of a First Nations constitutional voice especially coheres and aligns with Australian constitutional norms, culture and design. Australia's *Constitution* guarantees the political voices of its historical constitutional constituencies – even the very small ones – creating a process-driven system in which political participation may indeed be the 'right of rights'.¹ The call for a First Nations voice is therefore a neat fit for Australia's *Constitution*. Such reform would recalibrate this constitutional relationship from an unbalanced, top-down dynamic towards a reciprocal partnership dynamic – a shift which, through increased dialogue and consultation, can help prevent both hard racism and soft bigotry in law- and policymaking in Indigenous affairs.

Part VI delves into some constitutional details. From within the broad guidelines recommended by the Referendum Council,² it analyses some drafting proposals to give effect to a constitutionally guaranteed First Nations voice: the Twomey approach,³ the Allens Linklaters approach,⁴ the Mundine approach,⁵ and

1 Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98 *Proceedings of the Aristotelian Society* 307.

2 Referendum Council, 'Final Report of the Referendum Council' (Final Report, Referendum Council, 30 June 2017) ('*Referendum Council Final Report*') 36–9 <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf>.

3 Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (online), 20 May 2015 <<https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>>; see also Anne Twomey, 'An Indigenous Advisory Body: Addressing Concerns about Justiciability and Parliamentary Sovereignty' (2015) 8(19) *Indigenous Law Bulletin* 6.

4 Allens Linklaters, Submission No 97 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Inquiry into Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 30 January 2015 ('*Allens Linklaters Submission*').

the Davis and Dixon approach.⁶ I evaluate the legal and political pros and cons with respect to these approaches, and assess their constitutional suitability, responsiveness to concerns about parliamentary supremacy and legal uncertainty, and political viability. I suggest that a non-justiciable, political process centred constitutional mechanism would best fulfil these criteria. With some refinements, amendments along the lines suggested by Twomey, Mundine and Allens Linklaters are recommended for further exploration. Such clauses would be in keeping with the Referendum Council's recommended approach and would cohere with Australia's *Constitution*. To borrow the words of Julian Leeser MP,⁷ these are the kinds of clauses that 'Griffith, Barton and their colleagues might have drafted, had they turned their minds to it'.⁸

Part VII explores legislative mechanisms that may help give the proposed voice increased authority and political persuasiveness, addressing concerns that a non-justiciable First Nations voice, lacking a veto and High Court enforceability, may be ignored by the state. A constitutionally enshrined voice would carry important authority, derived from its permanent constitutional status. Yet it is also acknowledged that the Uluru Statement and the Referendum Council asked for a voice, not a veto: it is a request to be heard, not a demand to be obeyed. While the nature of a non-binding voice is that advice may be ignored, legislative mechanisms are considered which may further help imbue this voice with political and moral authority.

The article concludes that a constitutionally enshrined First Nations voice strikes the right conceptual balance between pragmatism and ambition, for viable yet worthwhile constitutional change. With appropriate constitutional drafting and legislative design, such a proposal offers a modest yet profound way of meaningfully addressing Indigenous constitutional vulnerability by empowering the First Nations with a voice in their affairs.⁹

5 Warren Mundine, 'Practical Recognition from the Mobs' Perspective: Enabling Our Mobs to Speak for Country' (Options Paper, Uphold & Recognise, 2017).

6 Megan Davis and Rosalind Dixon, 'Constitutional Recognition through a (Justiciable) Duty to Consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation' (2016) 27 *Public Law Review* 255.

7 Julian Leeser has now been appointed co-chair with Senator Patrick Dodson of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

8 Julian Leeser, 'Uphold and Recognise' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016) 78, 87.

9 Greg Craven, 'Noel Pearson's Indigenous Recognition Plan Profound and Practical', *The Australian* (online), 25 May 2015 <<https://www.theaustralian.com.au/opinion/columnists/greg-craven/noel-pearsons-indigenous-recognition-plan-profound-and-practical/news-story/472ff0238ad4f48cd423fdd9f74a9363>>.

II BACKGROUND

The need for an empowered Indigenous voice in Indigenous affairs has a long history in First Nations advocacy.¹⁰ The more recent iteration of the concept, the idea of a constitutionally guaranteed Indigenous advisory body, arose in 2014, when Indigenous leaders engaged with constitutional conservatives to develop common ground in the Indigenous constitutional recognition debate.¹¹ The collaboration arose because the Expert Panel's proposed racial non-discrimination clause had not won the necessary political support for a successful referendum due to concerns about empowering the High Court, creating legal uncertainty and undermining parliamentary supremacy.¹² Indigenous leaders and constitutional experts went in search of an alternative idea that would address such objections while realising Indigenous aspirations for substantive constitutional change over minimalism.¹³

The collaboration gave rise to the alternative proposal for a constitutionally guaranteed Indigenous voice in Indigenous affairs. In 2015, Professor Anne Twomey put forward constitutional drafting that would establish a constitutionally enshrined Indigenous advisory body¹⁴ to empower Indigenous people with a voice in the political process with respect to their affairs, rather than as litigants through the courts.¹⁵ The proposal sought to explicitly address previously expressed concerns in relation to a racial non-discrimination clause:¹⁶ there was no veto, the amendment would be non-justiciable, it would eliminate risk of laws being struck down, and parliamentary supremacy would be totally

10 For a history of this advocacy, see Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples When Making Laws for Indigenous Affairs' (2015) 26 *Public Law Review* 166, 170–3.

11 For more on this engagement with constitutional conservatives, see Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 1, 65–6; Noel Pearson, 'Foreword' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016) ix; Shireen Morris, *Radical Heart: Three Stories Make Us One* (Melbourne University Press, 2018).

12 For an exploration of these objections, 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 *Monash University Law Review* 488.

13 Indigenous advocates have always made it clear that mere symbolism or minimalism will not be acceptable, and that substantive constitutional change is sought. See, eg, HC Coombs Centre, Kirribilli, Sydney 'Statement Presented by Aboriginal and Torres Strait Islander Attendees at a Meeting Held with the Prime Minister and Opposition Leader on Constitutional Recognition' (2015) 8(19) *Indigenous Law Bulletin* 26 ('*Kirribilli Statement*'); see also Natasha Robinson, 'Indigenous Recognition "Must Be Real": Aboriginal Leaders', *The Australian* (online), 6 July 2015 <<https://www.theaustralian.com.au/national-affairs/indigenous/indigenous-recognition-must-be-real-aboriginal-leaders/news-story/38109c55d83277a5dae4f0e91fa11203>>. In the words of Galarrwuy Yunupingu, they have always sought 'serious constitutional reform': Galarrwuy Yunupingu, 'Tradition, Truth & Tomorrow', *The Monthly* (online), 2008 <<https://www.themonthly.com.au/issue/2008/december/1268179150/galarrwuy-yunupingu/tradition-truth-tomorrow>>.

14 Twomey, 'Indigenous Constitutional Recognition', above n 3.

15 See Twomey, 'An Indigenous Advisory Body', above n 3.

16 These concerns are explained in Morris, 'Undemocratic, Uncertain and Politically Unviable?', above n 12.

upheld. The proposed clause would transfer no power to the High Court – instead it would constitutionally empower Indigenous peoples *themselves* to have a fairer say in decisions made about them.

The concept arguably represented a noble compromise, a 'radical centre' solution to Indigenous constitutional recognition.¹⁷ The Indigenous constitutional body proposal was substantive and ambitious yet also constitutionally conservative and pragmatic, described by Professor Greg Craven as modest yet profound.¹⁸ Since first floated, the concept has been built upon and developed, and other Indigenous leaders and constitutional experts have offered their own ideas for constitutionalising a First Nations voice.¹⁹ These options demonstrate that there are a number of ways a First Nations constitutional voice can be achieved.

In May 2017, following a series of First Nations regional dialogues, Indigenous Australians formed an unprecedented national consensus on how they want to be constitutionally recognised. Their consensus was articulated in the historic Uluru Statement from the Heart, which called for a singular constitutional reform: a First Nations voice to be enshrined in the *Constitution*. It also called for a Makarrata Commission, which could be set up in legislation, to oversee First Nations agreement-making with government and truth-telling about history.²⁰ The consensus stepped away from removal of references to 'race' and insertion of symbolic statements into the *Constitution* – thereby rejecting merely symbolic or minimalist forms of constitutional recognition²¹ in favour of substantive and functional constitutional reform to address Indigenous constitutional vulnerability and powerlessness. It also moved away from a racial non-discrimination clause as a means of achieving constitutional empowerment through litigation, which was the predominant solution recommended by past reports.²² As this article argues, the shift in thinking was sensible: the call for a First Nations constitutional voice is deeply in keeping with Australia's constitutional culture and design – more so than the insertion of poetic statements

17 For more on this hunt for the 'radical centre' in Indigenous affairs and constitutional reform, see Noel Pearson, 'White Guilt, Victimhood and the Quest for a Radical Centre' (2007) 16 *Griffith Review* 11; see also Pearson, 'Foreword', above n 11; Shireen Morris, 'The Radical Centre: Constitutional Conservatism and Indigenous Recognition', *ABC* (online), 17 April 2018 <<http://www.abc.net.au/religion/articles/2018/04/17/4831438.htm>>.

18 See Craven, 'Noel Pearson's Indigenous Recognition Plan Profound and Practical', above n 9.

19 See, eg, Mundine, above n 5; Davis and Dixon, above n 6.

20 Referendum Council, 'Uluru Statement from the Heart' (Statement, First Nations National Constitutional Convention, 26 May 2017) ('*Uluru Statement*').

21 For example, minimalist constitutional recognition was proposed by Frank Brennan: Frank Brennan, 'Contours and Prospects for Indigenous Recognition in the Australian Constitution, and Why It Matters' (Speech delivered at the 21st Australasian Institute Judicial Administration Oration in Judicial Administration, Commonwealth Law Courts Building, Melbourne, 16 October 2015); Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015).

22 See Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Report, January 2012) ('*Expert Panel Report*'); see also Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015).

into what is fundamentally a rulebook, and more so than the insertion of a racial non-discrimination clause into Australia's bill-of-rights-free *Constitution*.

The Uluru Statement represented a historic, unprecedented moment in the ongoing struggle of Indigenous peoples for substantive constitutional recognition and empowerment. The Indigenous advocacy of the past has tended to emanate from particular regions and First Nations:²³ never before has a national Indigenous consensus position been achieved. Though seven delegates walked out of the Uluru convention citing a preference for 'sovereign treaties',²⁴ the consensus position was powerful. It reflected views expressed at every dialogue, each of which advocated a First Nations voice as the preferred constitutional reform.²⁵

The subsequent Referendum Council report supported the Uluru Statement's call for an Indigenous constitutional voice in their affairs, not only because it was the only constitutional reform backed by Indigenous consensus, but also because it was the most popular reform advocated in submissions from the broader public.²⁶ The Referendum Council recommended a constitutionally guaranteed Indigenous advisory body, with legislated processes and functions such as advising on the operation of sections 51(xxvi) and 122 of the *Constitution* – powers that have been used to enact Indigenous-specific laws. The report also called for the enactment of an extra-constitutional declaration to give effect to the symbolic statements of recognition, bringing together the three parts of Australia – the Indigenous, the British and the multicultural – in a unifying and inspiring way.²⁷

On 26 October 2017, the Turnbull Government rejected the call for a First Nations constitutional voice.²⁸ The Government expressed misplaced concerns that the proposal was a breach of the civic principle of equality,²⁹ erroneously

23 For a history of the advocacy, see Morris, 'The Argument for a Constitutional Procedure', above n 10, 170–3.

24 Claudianna Blanco, "'We Won't Sell Out Our Mob": Delegates Walk Out of Constitutional Recognition Forum in Protest', *NITV News* (online), 25 May 2017 <<https://www.sbs.com.au/nitv/nitv-news/article/2017/05/25/breaking-delegates-walk-out-constitutional-recognition-forum-protest>>.

25 *Referendum Council Final Report*, above n 2, 9–16.

26 *Ibid* 33–5.

27 *Ibid* 2.

28 Malcolm Turnbull, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, 26 October 2017).

29 This claim is incorrect. Arguably there is no principle of equality in Australia's constitutional arrangements. The High Court has declined to infer a principle of equality from Australia's *Constitution* because of discriminatory clauses and history: see *Leeth v Commonwealth* (1992) 174 CLR 455; *Kruger v Commonwealth* (1997) 190 CLR 1; Sarah Joseph, 'Kruger v Commonwealth: Constitutional Rights and the Stolen Generations' (1998) 24 *Monash University Law Review* 486, 491–2. And, as will be shown later in this article, Australia's federal democratic arrangements do not equally weigh each individual vote. For example, Tasmanians get a greater proportional say in the Senate than Victorians due to the operation of section 7 which guarantees the States equal representation in the Senate. As Dylan Lino explains, refuting the equality objection, '[t]he inconvenient truth for this line of argument is that our constitutional system is founded upon a fractured body politic, one in which multiple political communities are constitutionally recognised. It is called federalism': Dylan Lino, 'The Uluru Statement: Towards Federalism with First Nations' on *Australian Public Law* (13 June 2017) <<https://auspublaw.org/2017/06/towards-federalism-with-first-nations/>>; see also Dylan Lino, 'Towards Indigenous-Settler Federalism' (2017) 28 *Public Law Review* 118.

described the Voice to Parliament proposal as a 'third chamber of Parliament',³⁰ and contended that Australians would not support the proposal at a referendum. Independent polling contradicted the claim. A 2017 Omnipoll showed 60.7 per cent of Australians would vote 'yes' to the voice proposal³¹ and a February Newspoll showed 57 per cent support – despite the sustained Government negativity undermining the proposal.³² Notwithstanding the Government's rejection, both Indigenous and non-Indigenous Australians continue to push for the Uluru Statement.³³

III INDIGENOUS CONSTITUTIONAL VULNERABILITY

Indigenous peoples in Australia occupy a position of vulnerability that is unlike any other group. This is so for three broad reasons. First, their unique constitutional relationship with the colonising state which places them in a particularly powerless position; second, their extreme minority status in Australia which leads to the increased vulnerability of legislated protections of Indigenous rights; and third, their extreme social and economic disadvantage which exacerbates and perpetuates disempowerment. These three factors combined mean that Indigenous peoples are uniquely vulnerable to abuse of their rights by Australian governments – whether the mistreatment is well-meaning and inadvertent, or malevolent and intentional.

Fineman explains that vulnerability is a 'characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual'.³⁴ In examining mechanisms to address Indigenous constitutional vulnerability, however, complexities of

30 This claim was also incorrect, as no 'third chamber of Parliament' was proposed by the Referendum Council. The proposed Indigenous advisory body would be external to Parliament, would have no veto powers, no power to make laws, and would be set up by Parliament, with powers and functions determined by Parliament. No reform to the Houses of Parliament was proposed.

31 Calla Wahlquist, 'Most Australians Would Support Indigenous Voice to Parliament Plan that Turnbull Rejected', *The Guardian* (online), 30 October 2017 <<https://www.theguardian.com/australia-news/2017/oct/30/most-australians-support-indigenous-voice-to-parliament-plan-that-turnbull-rejected>>.

32 Simon Benson, 'Bill Shorten Raising Voice a Winner with Voters: Newspoll', *The Australian* (online), 20 February 2018 <<https://www.theaustralian.com.au/national-affairs/indigenous/bill-shorten-raising-voice-a-winner-with-voters-newspoll/news-story/3d6ee299780b7ac6901df9ccdfa16cc5>>.

33 For example, a petition run by Professor Fiona Stanley has gathered thousands of signatures: Australian Council of Social Service, *Joint Statement: A Call to the Prime Minister and Australian Parliament* <<https://www.acoss.org.au/supportfirstnations/>>. The proposal is gathering support across the political spectrum: even right-wing radio host, Alan Jones, agreed with former Labor Prime Minister, Kevin Rudd, on the merits of the proposed Indigenous voice: see Neil McMahon, 'Q&A Recap: Old Foes Alan Jones and Kevin Rudd Finally Find Common Ground', *The Sydney Morning Herald* (online), 31 October 2017 <<https://www.smh.com.au/entertainment/tv-and-radio/qa-recap-old-foes-alan-jones-and-kevin-rudd-finally-find-common-ground-20171031-gzbebw1.html>>.

34 Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251, 255; For more on the complexities associated with the relational nature of vulnerability, see Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056, 1059–60.

terminology must be acknowledged. Some argue that characterising populations as vulnerable, even for the purposes of affirmative measures, is an oversimplistic and vague generalisation that does not adequately account for individual differences and may thus be perceived as patronising or condescending.³⁵ Identifying vulnerable groups for the purposes of pursuing justice and equality may risk ‘sustaining the very exclusion and inequality it aims to redress’ by ‘stigmatizing, essentializing, and stereotyping’ the population in question.³⁶ This speaks to the necessity of constitutional reform that places Indigenous peoples themselves in an assertive and empowered position, as influential decision-makers and active participants in the laws and policies made by the state about them. Because vulnerability ‘is known to trigger both care and abuse’,³⁷ in relationships with the state it can also give rise to the hazy ebb and flow between paternalistic ‘protection’ and abusive discrimination. This is evident in the complex history of Australian Indigenous affairs policy, where too often Indigenous peoples and rights have become the ‘playthings’ of the latest political trends.³⁸

Accepting the downsides and complexity of the terminology, therefore, I here use the terms ‘vulnerability’ and ‘powerlessness’ with respect to Indigenous peoples primarily in a structural, institutional and constitutional sense,³⁹ acknowledging that there are many Indigenous individuals who may not be personally any more vulnerable than the next person. Indeed, some Indigenous people occupy positions of power and some sit in positions whereby they wield

35 See the brief discussion in Mary Neal, ‘Not Gods but Animals: Human Dignity and Vulnerable Subjecthood’ (2012) 33 *Liverpool Law Review* 177, 185–6.

36 Peroni and Timmer, above n 34, 1057. In Australia, a similar concern has been raised in relation to use of the word ‘advancement’ in any new constitutional amendment recognising Indigenous peoples (for example a new section 51A as recommended by the Expert Panel). Some argue the word is condescending: it defines Indigenous people in terms of *disadvantage*, using ‘deficit language’ to highlight socio-economic hardship which it is hoped will be one day overcome (and should therefore not be conceptually enshrined in the *Constitution*). Similarly, it might imply that Indigenous people are backward and need to be advanced. Indeed, much historical discrimination has occurred under government policies enacted in the name of Indigenous ‘advancement’: see Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Island Peoples, Parliament of Australia, *Progress Report* (2013) 15 [2.52]; see also Anne Twomey, ‘A Revised Proposal for Indigenous Constitutional Recognition’ (2014) 36 *Sydney Law Review* 381, 395; Jon Altman, ‘Will Constitutional Recognition Advance Australia Fair?’, *Crikey* (online), 10 February 2012 <<https://www.crikey.com.au/2012/02/10/will-constitutional-recognition-advance-australia-fair/>>.

37 Peroni and Timmer, above n 34, 1059; see also Ann V Murphy, ‘“Reality Check”: Rethinking the Ethics of Vulnerability’ in Renée J Heberle and Victoria Grace (eds), *Theorizing Sexual Violence* (Routledge, 2009) 55.

38 See Patrick Dodson, ‘Laws Detrimental to Aborigines will Diminish the Nation’, *The Australian*, 7 April 1998. Noel Pearson has also described Indigenous affairs in Australia as a pendulum, swinging from one political extreme to the other: Noel Pearson, ‘Next Step Is for Australia to Leave Race Behind’, *The Australian* (online), 25 May 2013 <<https://www.theaustralian.com.au/national-affairs/in-depth/next-step-is-for-australia-to-leave-race-behind/news-story/f9acee8f859d79f8f3fac2b374d1300a?sv=e89e395a3fd6276953f15a2507ad899c>>.

39 For a discussion of institutional and structural vulnerability, see Fineman, above n 34.

state power.⁴⁰ My intention, however, is to describe the vulnerable Indigenous 'constitutional constituency' – a group of citizens whose special constitutional relationship with the colonising state places them, and their rights, in a particularly vulnerable position. This article discusses the nature of that vulnerability and considers the best ways to address it.

A A Uniquely Vulnerable Constitutional Constituency

Indigenous constitutional vulnerability is unique because Indigenous peoples are a distinct constitutional constituency with a special relationship with the state. No other group in Australia was dispossessed by British settlement. No other group was especially excluded by the constitutional arrangements of 1901.⁴¹ No other group is subject to a special constitutional power which Parliament uses exclusively to make laws – both positive and adverse⁴² – about their rights (notably, the race power, section 51(xxvi), has only ever been used in relation to Indigenous peoples).⁴³ And no other group has special rights and interests, recognised in legislation and common law, arising out of this unique constitutional relationship and history (eg, native title rights and Indigenous heritage protection laws).

Indigenous constitutional vulnerability is historically, politically and legally evident. It is visible in the history of discrimination and dispossession Indigenous peoples have suffered at the hands of the state, including unofficial policies of frontier killing of Indigenous people,⁴⁴ official policies which included the forced removal of Indigenous people into protective missions,⁴⁵ as well as laws and

40 For example, Indigenous Members of Parliament Ken Wyatt, Linda Burney, Patrick Dodson and Malarndirri McCarthy can be said to wield state power, subject to the demands of their respective political parties.

41 See removed section 127 and amended section 51(xxvi) of the *Australian Constitution*.

42 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 dealt with whether the *Hindmarsh Island Bridge Act 1997* (Cth) validly repealed provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which was enacted under section 51(xxvi) to protect Indigenous sacred sites. The High Court majority held that the subsequent Act was valid and repealed the Indigenous heritage rights previously legislatively recognised, because the plenary power conferred under section 51(xxvi) included the power to repeal laws enacted, despite the 1967 amendments. The decision demonstrated that the race power can probably be used for adversely racially discriminatory laws and confirmed that the 1967 reform of the race power to include Indigenous peoples within its ambit did not alter the power's discriminatory capacity. See also Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 199–208; George Williams, 'Thawing the Frozen Continent' (2008) 19 *Griffith Review* 11, 25. For a reflection on why Kirby J understood the 1967 amendments as limiting the race power, see Michael Kirby, 'First Australians, Law and the High Court of Australia' (Speech delivered at the Wentworth Lecture, 11 June 2010) 3–6.

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

44 See Rosalind Kidd, *The Way We Civilise: Aboriginal Affairs – The Untold Story* (University of Queensland Press, 2005). Noel Pearson also writes of the attempted genocide of Indigenous Tasmanians: Pearson, 'A Rightful Place', above n 11, 16–23.

45 Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Report, April 1997).

policies denying Indigenous people equal voting rights⁴⁶ and equal wages,⁴⁷ dictating who they could marry and controlling where they could live,⁴⁸ and denying their property rights.⁴⁹ This vulnerability is further evident in the text and operation of removed, amended and remaining constitutional clauses that enable discrimination against Indigenous peoples,⁵⁰ as well as in the absence of any positive constitutional protections or recognition of Indigenous rights and interests.

It is also evident in the laws,⁵¹ policies and case law⁵² that flow from this constitutional situation, which demonstrate the extreme vulnerability of Indigenous peoples, rights and interests in the Australian legal and political system.

B Vulnerability of Legislated Indigenous Rights Protections

Such laws and policies are able to occur because Parliament is supreme in this constitutional relationship. Absent constitutional protection, legislated protections of Indigenous rights can be repealed or amended, either expressly or impliedly by later inconsistent Acts.⁵³ While Parliament can use its power to legislatively recognise Indigenous rights, it can also legislate them away.⁵⁴

46 See, eg, the *Elections Act 1885* (Qld), section 6 of which provided that '[n]o aboriginal native of Australia, India, China or of the South Sea Islands shall be entitled to be entered on the roll except in respect of a freehold qualification'. Section 26 of the *Constitution Act 1899* (WA) provided that '[n]o aboriginal native of Australia, Asia, or Africa, or person of the half-blood, shall be entitled to be registered, except in respect of a freehold qualification'. Section 16 of the *Electoral Code 1896* (SA) provided that '[i]n the Northern Territory, immigrants under "The Indian Immigration Act, 1882," and all persons, except natural born British subjects and Europeans or Americans naturalised as British subjects, are disqualified from voting'.

47 See Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006); *Bligh v State of Queensland* [1996] HREOCA 28.

48 The Protection Acts empowered appointed protectors and boards to control many day-to-day aspects of Indigenous people's lives: see, eg, *Aborigines Protection Act 1886* (WA); *Aborigines Protection Act 1869* (Vic); *Aboriginals Preservation and Protection Act 1939* (Qld).

49 See full discussion in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').

50 See removed section 127, amended section 51(xxvi) and remaining section 25 of the *Constitution*.

51 For example, the *Northern Territory Emergency Response Act 2007* (Cth) provided in section 132:

(1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.

(2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.

(3) In this section, a reference to any acts done includes a reference to any failure to do an act.

In 2009, operation of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') was reinstated: *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) sch 1 item 2.

52 For example, in *Maloney v The Queen* (2013) 252 CLR 168, the Indigenous litigants argued that 'Alcohol Management Plans' were not a valid special measure because they had not been implemented with proper consultation, but the High Court held that consultation is not a legal requirement of a special measure under Australian law.

53 See Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 *Federal Law Review* 57; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010).

54 See Darryl Cronin, 'Trapped by History: Democracy, Human Rights and Justice for Indigenous People in Australia' (2017) 23 *Australian Journal of Human Rights* 220.

For example, although the *Racial Discrimination Act* ('*RDA*') has provided important protections of Indigenous rights, without a constitutional guarantee of racial non-discrimination, the Commonwealth is not bound by the *RDA*.⁵⁵ The *RDA* has been suspended three times in recent decades – each time only in relation to Indigenous people.⁵⁶ Further, the allowance of special measures under the *RDA*,⁵⁷ while practically necessary to enable affirmative action and measures to address Indigenous disadvantage or recognise distinct Indigenous rights, can also enable laws which purport to advance Indigenous rights but which in fact may introduce adversely discriminatory measures⁵⁸ with which the Indigenous people subject to those measures may not agree.⁵⁹ Without a constitutional guarantee, the *RDA* provides tenuous protection of Indigenous rights. Another example is the legislative vulnerability of native title rights. After the historic *Mabo* case,⁶⁰ the *Native Title Act 1993* (Cth) ('*NTA*') recognised native title in legislation and thus provided important recognition of Indigenous property rights. But in 1998, former Prime Minister John Howard watered down native title rights under his Wik Ten Point Plan.⁶¹

That Indigenous rights can be easily disregarded by Parliament is a direct result of the constitutional vulnerability of Indigenous peoples and rights. This

55 See George Winterton, 'Can the Commonwealth Enact "Manner and Form" Legislation?' (1980) 11(2) *Federal Law Review* 167, 168.

56 The *Hindmarsh Island Bridge Act 1997* (Cth) displaced the application of the *RDA*; *Native Title Amendment Act 1998* (Cth) s 7; *Northern Territory Emergency Response Act 2007* (Cth) s 132.

57 Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*') provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination ...

In Australia, the *RDA* explicitly allows for 'special measures' in section 8.

58 For more on the vulnerability of Indigenous rights and the subjectivity of special measures under the *RDA*, see Cronin, above n 54, 230–5.

59 The High Court in *Maloney v The Queen* (2013) 252 CLR 168 found that consultation and consent are not legal requirements of special measures under the *RDA*. However, in *R v Maloney* (2014) 252 CLR 168, 186, French CJ noted that:

[I]t should be accepted, as a matter of common sense, that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure. That is particularly so where ... the measure ... involves the imposition on the affected community of a restriction on some aspect of the freedoms otherwise enjoyed by its members.

60 *Mabo* (1992) 175 CLR 1. The *Mabo* decision overturned some persisting discrimination in Australian property law by legally recognising that Indigenous people can hold native title to land under their traditional laws and customs where that title was not extinguished by the Crown.

61 This was subsequent to the 1996 case of *Wik Peoples v Queensland* (1996) 187 CLR 1, which held that native title rights were not extinguished by pastoral leases and that native title rights could coexist with the rights of pastoralist leaseholders; *Native Title Amendment Act 1998* (Cth) s 7; see also Paul Keating, 'The 10-Point Plan That Undid the Good Done on Native Title', *The Sydney Morning Herald* (online), 1 June 2011 <<https://www.smh.com.au/politics/federal/the-10-point-plan-that-undid-the-good-done-on-native-title-20110531-1feec.html>>.

speaks to a problem inherent within the constitutional relationship and can only be addressed through empowering constitutional reform.⁶²

C The 1967 Referendum Did Not Fix the Vulnerability Problem

Indigenous peoples occupy a position of extreme vulnerability relative to the might of the state, which holds largely unfettered constitutional power to make decisions about them. The 1967 ‘Aboriginals’ referendum⁶³ was Australia’s most successful referendum, passing with a 90.77 per cent ‘yes’ vote,⁶⁴ but it did not address Indigenous constitutional vulnerability – it confirmed it.

Prior to 1967, insofar as Indigenous people were mentioned in the *Constitution*, it was to exclude them. Section 127 excluded Indigenous people from being counted in the official census for voting purposes. They were also initially excluded from the operation of section 51(xxvi), the race power.⁶⁵ The 1967 referendum removed the explicit exclusions of Indigenous people from the *Constitution*, including deleting the exclusion of Indigenous people from the race power, thus conferring upon the Commonwealth the power and discretion to legislate for the management and recognition of Indigenous rights and interests. While this power was not used for many years,⁶⁶ it eventually enabled the Commonwealth to enact Indigenous-specific laws which afforded legislative recognition to some Indigenous rights.⁶⁷ The 1967 reforms did not, however, implement any positive constitutional protection of Indigenous rights or interests, leaving open the possibility, as described above, that the Commonwealth could still enact discriminatory laws winding back Indigenous rights.⁶⁸

The 1967 amendments failed to solve the key problem of Indigenous constitutional vulnerability. The reforms maintained and reinforced the top-down power dynamic. The referendum gave Parliament the power to legislate with respect to Indigenous rights, but it did not empower Indigenous peoples with a fair say in the exercise of that power. Thus, as the Uluru Statement advocates, ‘[i]n 1967 we were counted, in 2017 we seek to be heard’.⁶⁹

Notably, the race power is not the only problem in this respect. Other Commonwealth powers can also be used to discriminate in an Indigenous-

62 As Harry Hobbs explains, ‘As Australia’s existing constitutional and political framework disempowers Aboriginal and Torres Strait Islander peoples, reform of those institutions is the primary vehicle through which their aspirations may be realised’: Harry Hobbs, ‘Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty,’ (2018) 53 *Australian Journal of Political Science* 176, 176.

63 *Constitution Alteration (Aboriginals) 1967* (Cth).

64 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) 151.

65 Similarly, section 25 contemplates, though also deters, the possibility of barring races from voting.

66 See chronology in Paul Kildea, ‘The Bill of Rights Debate in Australian Political Culture’ (2003) 9(1) *Australian Journal of Human Rights* 65, 67–9.

67 Sarah Pritchard, ‘The “Race” Power in Section 51(xxvi) of the Constitution’ (2011) 15(2) *Australian Indigenous Law Review* 44, 52–3.

68 Cronin explains, ‘under this power the Commonwealth Government can potentially pass laws that are detrimental to Indigenous people. In that regard the Referendum did not solve the problems of Indigenous inequality nor protect Indigenous rights’: Cronin above n 54, 225.

69 *Uluru Statement*, above n 20.

specific way. The Northern Territory intervention,⁷⁰ which many felt was discriminatory, was likely reliant on section 122 of the *Constitution*.⁷¹

D Democratic Disempowerment: The 'Elephant and the Mouse' Problem

Indigenous constitutional vulnerability is exacerbated by the relative size of the Indigenous population. Indigenous people make up only three per cent of Australians, which means they are an extreme minority, more so than other Indigenous populations in comparable democracies.⁷² Indigenous people are therefore particularly democratically disempowered and face difficulty being heard in parliamentary majoritarian decisions made about their unique minority rights and interests – which increases the potential for political decisions to disregard their rights. This dynamic has been described by Noel Pearson as the 'elephant and the mouse problem which characterises Indigenous affairs'.⁷³

Because of their extreme minority status, Indigenous people have little democratic sway and are thus especially vulnerable to state abuse of their rights. Additionally, the *Constitution* affords Indigenous people no specific protections to which they can appeal through the courts when their rights are disregarded by Parliament, nor any mechanisms to specifically influence the making of laws and policies about their rights – apart from normal election processes. As a three per cent minority, Indigenous Australians have a limited capacity to influence policy and lawmaking through ordinary democratic processes. And when elected to Parliament, Indigenous people, like all politicians, are duty bound to represent the interests of all Australians who voted for them and their political parties.

While Australia's *Constitution* is founded in federal principles that ensure the historical constitutional constituencies a fair say, the Indigenous constituency went unrecognised in the compact of 1901. Accordingly, the *Constitution* makes no provision for Indigenous voices to be specifically heard, even on matters directly concerning their interests. Yet the *Constitution* does provide constitutional mechanisms for other minority 'mice' to be heard by the might of the majority: section 7 guarantees even the smallest former colonies – like Tasmania – an equal voice in the Senate. There are more Indigenous Australians

70 *Northern Territory Emergency Response Act 2007* (Cth).

71 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 405 (Kirby J); see also Sean Brennan, 'Wurridjal v Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2009) 33 *Melbourne University Law Review* 957; Brooke Greenwood, 'The Commonwealth Government's Northern Territory Emergency Response Act: Some Constitutional Issues' (2009) V *Cross Sections: The Bruce Hall Academic Journal* 21. The Referendum Council's recommendation that the Voice to Parliament supervise both sections 51(xxvi) and 122 is therefore logical: *Referendum Council Final Report*, above n 2, 2.

72 For example, in New Zealand, Māori people are around 15 per cent of the population: see Stats NZ, *How is Our Māori Population Changing?* (17 November 2015) <http://archive.stats.govt.nz/browse_for_stats/people_and_communities/maori/maori-population-article-2015.aspx>.

73 See Noel Pearson, 'Time to Bring Us into the Nation through Constitutional Recognition', *The Australian* (online), 13 September 2014 <<https://www.theaustralian.com.au/opinion/columnists/noel-pearson/time-to-bring-us-into-the-nation-through-constitutional-recognition/news-story/624b19f117e0bbb9c756fefdf7905bf9>>.

than Tasmanians.⁷⁴ If Tasmanians should be constitutionally guaranteed a voice in their affairs, arguably Indigenous peoples should be constitutionally guaranteed a voice in theirs too.

E Social and Economic Vulnerability

Ongoing Indigenous constitutional vulnerability helped create and perpetuate Indigenous social and economic disadvantage. Indigenous people experience worse outcomes in life expectancy, incarceration, suicide, family violence, employment and education than other Australians.⁷⁵ This day-to-day vulnerability arising from extreme disadvantage is caused, exacerbated and perpetuated by Indigenous constitutional vulnerability. Constitutional vulnerability (lack of constitutional restraints on abuse of Indigenous rights) enabled and allowed dispossession and discrimination against Indigenous peoples⁷⁶ – factors which helped create current disadvantage.⁷⁷ Reciprocally, an extremely vulnerable population (both in terms of socio-economic disadvantage and population size) may find it more difficult to influence positive policy change, let alone constitutional reform. Indigenous people, due to their extreme disadvantage, are also more likely to be subject to special government interventions intended to address that disadvantage. This means there is greater scope for injustice and harm caused by state interventions – whether inadvertent or intended.

74 In 2017, the Tasmanian population was 519 166: Population Australia, *Population of Tasmania 2018* <<http://www.population.net.au/population-of-tasmania/>>. The 2016 Census reported the Indigenous population as 649 200: Australian Bureau of Statistics, *Census: Aboriginal and Torres Strait Islander Population* (27 June 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/MediaReleasesByCatalogue/02D50FAA9987D6B7CA25814800087E03?OpenDocument>>.

75 See Department of the Prime Minister and Cabinet, Parliament of Australia, *Closing the Gap: Prime Minister's Report 2018* (2018).

76 The relationship between systemic or structural vulnerability and day-to-day social and economic vulnerability is complex and multifaceted. As the Human Rights Commission explained, discussing inequality in health outcomes:

Indigenous peoples are not merely 'disadvantaged citizens'. The poverty and inequality that they experience is a contemporary reflection of their historical treatment as peoples. The inequality in health status that they continue to experience can be linked to systemic discrimination.

Darren Dick on behalf of Tom Calma, 'Social Determinants and the Health of Indigenous Peoples in Australia – A Human Rights Based Approach' (Speech delivered at the International Symposium on the Social Determinants of Indigenous Health, Adelaide, 29–30 April 2007).

77 For a nuanced discussion of the complexities in the relationship between Indigenous disempowerment and Indigenous disadvantage, see Don Weatherburn, 'Disadvantage, Disempowerment and Indigenous Over-Representation in Prison' (Report, Children's Court Section 16 Meeting, October 2014) 8–10. Weatherburn explains:

The problems facing Indigenous Australians were not and are not the result of blocked social opportunity. They are the aftermath of successive assaults (eg colonisation and dispossession, the spread of alcohol and drug abuse, the forced removal of Indigenous children, loss of employment in the rural economy) on their traditional way of life.

At 10. While historical discrimination and dispossession may not be proximate causes of Indigenous offending and incarceration, it is acknowledged that these are historical and contextual causes, whereby past discrimination helped lead to present disadvantage.

Indigenous vulnerability experienced by individuals and communities in day-to-day life is therefore closely connected to Indigenous constitutional vulnerability. This vulnerability is cyclical, systemic and embedded, resulting not only in discrimination and injustice, but in policies and laws that are not as effective as they could be in addressing disadvantage, because Indigenous people are not structurally positioned to influence and improve laws and policies intended to assist them. The effect is entrenched structural and systemic disempowerment that can seem intractable, causing Indigenous people to feel unheard and unable to take responsibility in decisions made about their lives. 'This is the torment of our powerlessness,' laments the Uluru Statement from the Heart.

The Uluru Statement calls for a structural circuit breaker. 'These dimensions of our crisis tell plainly the structural nature of our problem,' it states, and calls for constitutional and structural reform to effect a fundamental paradigm shift. The assertion is that Indigenous vulnerability must not only be addressed through policies, programs and services; it must be addressed constitutionally and structurally, for Indigenous disadvantage carries a constitutional and structural dimension. The Uluru Statement's call for a constitutionally guaranteed First Nations voice in their affairs is thus a call for constitutional empowerment – a circuit-breaking solution to Indigenous constitutional vulnerability and powerlessness.

IV THE CHALLENGE: ADDRESSING AN UNFAIR POWER RELATIONSHIP

The Uluru Statement's proposal for a First Nations constitutional voice in their affairs would address the problem of Indigenous constitutional vulnerability, which is the proper objective of Indigenous constitutional recognition. The purpose of constitutional recognition is best described as practical and structural in nature, rather than merely symbolic.⁷⁸ It seeks to reform an unfair power relationship: the relationship between Indigenous peoples and the colonising state. This relational argument proceeds from the understanding, explained in the previous section, that Indigenous peoples are a

78 Indigenous people have consistently called for substantive constitutional reform over mere symbolic mention. For a history of this advocacy, see Morris, 'The Argument for a Constitutional Procedure', above n 10, 170–3. Dylan Lino also explains how the work of the Expert Panel broadened the recognition debate from mere symbolism to focussing on substantive constitutional reform: see Dylan Lino, 'What is Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples?' (2016) 8(24) *Indigenous Law Bulletin* 3, 3–4.

legitimately distinct ‘constitutional entity’,⁷⁹ or constitutional constituency,⁸⁰ within Australia’s plural legal order.⁸¹

Australia’s federal *Constitution* shares authority and power between the Commonwealth and the States as recognition of shared sovereignty.⁸² However, the sovereign status of Indigenous peoples was discriminatorily denied by colonising forces and Indigenous peoples’ status as a legitimate constitutional constituency similarly went unrecognised.⁸³ Had things been fairer, the *Constitution* might also have embodied a union with the colonised: Indigenous peoples might have been treated as equals and been allowed to negotiate the terms of their inclusion in the new nation, rather than having those terms oppressively imposed upon them.

Indigenous constitutional recognition seeks to remedy the unfair treatment of Indigenous peoples prior to and at federation, as well as the injustices that have flowed from that initial discrimination, by setting in place fairer terms for Indigenous inclusion and participation in the future.⁸⁴ This practical approach to constitutional recognition is 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.⁸⁵

79 E T Durie, ‘Justice, Biculturalism and the Politics of Law’ in Margaret Wilson and Anna Yeatman (eds), *Justice & Identity: Antipodean Practices* (Allen & Unwin, 1995) 33, 33–4.

80 Benedict Kingsbury, ‘Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law’ (2002) 52 *Toronto Law Journal* 101, 106.

81 Hawkes notes that ‘federalism can accommodate multiple identities and loyalties within a state, as well as different “levels” of government, some with shared sovereignty. In Australia, for example, both the Commonwealth and state governments are sovereign within their respective spheres of jurisdiction’: David C Hawkes, ‘Indigenous Peoples: Self-Government and Intergovernmental Relations’ (2002) 53(167) *International Social Science Journal* 153, 154. See also Alexander Reilley, ‘A Constitutional Framework for Indigenous Governance’ (2006) 28 *Sydney Law Review* 403, 404; John Griffiths, ‘What is Legal Pluralism’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 1; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

82 As Professor James Stellios describes, the *Constitution* was ‘an agreement among sovereign powers to give up some of their power to a new central body, but preserving their sovereignty over what they retained’: James Stellios, *Zines’s the High Court and the Constitution* (Federation Press, 6th ed, 2015) 1.

83 Professor Mick Dodson explains: ‘We were not asked to send representatives to engage in the negotiations of how power would be distributed and order maintained’: Mick Dodson, ‘The Continuing Relevance of the *Constitution* for Indigenous Peoples’ (Speech delivered at the National Archives of Australia, Canberra, 13 July 2008).

84 See Kingsbury, above n 80, 123; Patrick Macklem, ‘Distributing Sovereignty: Indian Nations and Equality of Peoples’ (1993) 45 *Stanford Law Review* 1311, 1329; Duncan Ivison, *Postcolonial Liberalism* (Cambridge University Press, 2002) 16–18.

85 Shireen Morris and Noel Pearson, ‘Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success’ (2017) 91 *Australian Law Journal* 350, 351. This article provides a more in-depth discussion and provides evidence for why Indigenous constitutional recognition is best construed as having a practical, rather than a symbolic, purpose.

The purpose of constitutional recognition is therefore best understood as the rectification of past wrongs in the relationship, and the implementation of structural reforms to prevent future wrongs. As Noel Pearson argues, '[o]ur people have lived through the discrimination of the past. We have a legitimate anxiety that the past not be repeated, and that measures be put in place to ensure things are done in a better way'.⁸⁶ Pearson's comments resonate with John Rawls' argument that justice can require an institutional guarantee of reciprocity – an assurance that the same rules will apply to all and that justice will be extended fairly to all citizens. This can require hypothetical consideration of the terms that might have been initially agreed between rational individuals who are free and equal.⁸⁷ The argument can be extended, particularly in a federal context,⁸⁸ to encompass recognition of Indigenous groups within a liberal democracy,⁸⁹ and provides a basis for understanding the unfairness of Australia's federal constitutional arrangements with respect to Indigenous peoples.

Professor Kirsty Gover, like Rawls, emphasises the hypothetical initial situation, or original state, to inform her understanding of the purpose of Indigenous recognition:

The exchange between tribes and States in these settings is largely reparative, in the broad sense of the term: recognition is designed to repair a relationship ... [i]n State-tribal relations, reparative recognition aims to reconstruct intergovernmental and intercommunity relationships of the kind that would have been in place, had all the parties conducted themselves justly and in good faith from first contact.⁹⁰

Prior to 1901, the colonies negotiated as free and equal parties and agreed to their inclusion in the constitutional compact on equal terms, with guaranteed equal representation of their pre-existing political communities in the compact. But during the constitutional convention debates, Indigenous peoples were largely regarded by the drafters of the *Constitution* as a 'dying race' and an inferior people.⁹¹ They were excluded from negotiations and accordingly excluded by the terms of the produced *Constitution*, creating the Indigenous constitutional vulnerability that persists today.

Given the past discriminatory denial of Indigenous rights, presided over by the *Constitution*, it is understandable that the Uluru Statement requests a constitutional assurance of increased reciprocity and fairness in the Indigenous

86 Pearson, 'A Rightful Place', above n 11, 65 (emphasis in original).

87 Thus, Rawls suggests 'certain principles of justice are justified because they would be agreed to in an initial situation of equality': John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 21. See also John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 15–18; John Rawls, *Political Liberalism* (Columbia University Press, 2005).

88 See also Lino, 'Towards Indigenous-Settler Federalism', above n 29.

89 See generally Ivison, above n 84; Charles Taylor, 'Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995); Tully, above n 81.

90 Kirsty Gover, *Tribal Constitutionalism: States, Tribes and the Governance of Membership* (Oxford University Press, 2010) 17.

91 Justin Malbon, 'The Race Power under the Australian Constitution: Altered Meanings' (1999) 21 *Sydney Law Review* 80, 91, quoting Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 18; Michael Kirby, 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent' (2012) 15 *Southern Cross University Law Review* 3, 14.

relationship with the state. Had the parties dealt with each other as free and equal actors prior to 1901, similar (or perhaps stronger) terms for Indigenous representation and political participation in their affairs might already be in place. This is the challenge of Indigenous constitutional recognition: to correct the original omission and exclusion of Indigenous peoples in 1901 and create a fairer relationship.

V AN APPROPRIATE SOLUTION: THE CASE FOR A FIRST NATIONS VOICE IN THE *CONSTITUTION*

The Uluru Statement provided a pragmatic and intelligent answer to the challenge of Indigenous constitutional vulnerability. The call for a constitutional voice fits neatly and coherently with Australian constitutional culture, history and design. It is a logical response to the longstanding problem of Indigenous constitutional powerlessness under Australia's uniquely process-driven constitutional arrangements. The *Constitution*, in a fundamental sense, is all about voices.

A A First Nations Voice Fits with Australian Constitutional Culture, History and Design

In creating the *Constitution*, the parties agreed on the best ways to regulate fair future relations. They agreed the political process should take primacy over judicially adjudicated rights clauses⁹² and chose to protect citizens' rights predominantly through democratic procedures and federal power sharing.⁹³ As Professor Cheryl Saunders explains, 'Australia relies on institutional mechanisms for rights protection'.⁹⁴ The power-sharing arrangements of federalism and the procedural requirements of representative democracy operate as procedural restraints on the abuse of power. Federalism sets up a 'checks and balances' system⁹⁵ in which the Senate, as the house of review, tempers the power of the House of Representatives.⁹⁶

In setting up this reciprocal arrangement, the *Constitution* recognises and represents the geographical, historical and political identities of the former colonies, ensuring that even the most minimally populated States are guaranteed

92 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 196–9; Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' [2012] *University of Illinois Law Review* 683, 685–8; Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Greg Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 151, 151–7.

93 Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 38–42.

94 Cheryl Saunders, 'The Australian Constitution and Our Rights' in Helen Sykes (ed), *Future Justice* (Future Leaders, 2010) 117, 117.

95 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

96 Cheryl Saunders, 'The Constitutional, Legal and Institutional Foundations of Australian Federalism' in Robert Carling (ed), *Where to for Australian Federalism?* (Centre for Independent Studies, 2008) 15, 18.

an equal voice in the Senate.⁹⁷ It thus ensures their regional interests are always heard by central powers. The *Constitution* creates a balanced web of political restraints and competing interests to ensure a tempering of majoritarian rule by recognised minority voices.⁹⁸ Despite a scarcity of rights clauses, the *Constitution* can be said to politically and procedurally protect citizens' rights through democratic processes and institutional mechanisms, rather than the courts. Arguably, Australia's bill-of-rights-free *Constitution* reflects a Waldronian respect for parliamentary supremacy, by positioning political participation as the 'right of rights'.⁹⁹

In doing so, the *Constitution* protects the identity, survival and self-determination of its smallest and most vulnerable colonial parties, by recognising and representing their voices. The longevity of these pre-existing political communities, or constitutional constituencies, is constitutionally recognised and guaranteed. Indeed, their continued political survival was a condition of their inclusion. The *Constitution* is thus a consensual agreement much like a treaty,¹⁰⁰ which allowed the parties to coalesce into a common union while retaining appropriate levels of autonomy and authority over their affairs.

The mandated sharing of power under the *Australian Constitution* compels a culture of 'mutual respect' between the constituent parts of the Federation.¹⁰¹ As Callinan J explains:

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.¹⁰²

As noted, however, Indigenous peoples were not party to the compact, and the constitutional culture of mutual respect and comity did not extend to them. As a result, there is no Indigenous constitutional check on government and parliamentary power within Australia's democratic federalism that protects Indigenous rights. The Indigenous constitutional voice is missing from Australia's constitutional machinery, which includes neither political and procedural nor judicially adjudicated protections of Indigenous rights and interests. Lack of constitutional recognition in this respect is an omission with tangible consequences for Indigenous political survival as peoples, in a nation in which they are an extreme, highly disadvantaged and vulnerable minority. While

97 Section 7 of the *Constitution* requires 'equal representation' of each 'Original State'.

98 J A La Nauze, 'The Inter-State Commission' (1937) 9(1) *Australian Quarterly* 48, 48–9.

99 Waldron, above n 1.

100 As Professor Nicholas Aroney explains, drawing on Quick and Garran, '[t]he "primary and fundamental" meaning of federalism ... is the idea of a federal compact between the states ... the focus is on the *foedus*, treaty or covenant by which several independent states agree to form a common political system while retaining their separate identities': Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 4, citing John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, revised ed, 1976) 332–42.

101 Michelle Evans, 'Rethinking the Federal Balance: How Federal Theory Supports States' Rights' (2010) 1 *The Western Australian Jurist* 14, 16.

102 Ibid, quoting *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1, 322 ('Workchoices').

the *Constitution* can be said to recognise and guarantee the political survival of the former colonies as distinct, self-governing States, the *Constitution* can equally be said to encourage the Indigenous polity to quietly disappear. Though the *Constitution* is a power-sharing compact that is all about voices, it entrenches for Indigenous peoples a position of perpetual powerlessness.

The Uluru Statement's call for a First Nations constitutional voice is a request to belatedly correct the unjust omission of the Indigenous voice from Australia's constitutional compact, to make the relationship fairer. The request fits with the nature and style of the *Australian Constitution*, which guarantees the voices of the historical political communities, or constitutional constituencies – even the very small ones. It also aligns with Australia's process-driven, rather than bill of rights-focussed, constitutional culture.

Such a reform would cohere with the fundamental purpose of the *Constitution*, as a rulebook and compact that governs important national power relationships – arguably more so than other constitutional recognition models. Scholars such as Jeffrey Goldsworthy¹⁰³ and Sir Anthony Mason¹⁰⁴ have characterised the *Australian Constitution* as primarily a basic, structural rulebook. Others describe it as a practical and pragmatic charter of government.¹⁰⁵ The *Constitution* may not, therefore, be the appropriate place for symbolic statements and ambiguous expressions of values and aspirations – but it is the place for rules, processes and representative mechanisms: particularly rules and processes that guarantee that the voices of pre-existing political communities will be heard.

B The Importance of a Constitutional Guarantee

If Australia's *Constitution* is a structural rulebook, it is also a uniquely enduring rulebook. Constitutional rules are more binding than ordinary legislative rules; they are enduring rules to guide and manage government behaviour over time. The harder a constitution is to change, the more this is true. Australia's *Constitution* is one of the hardest to change in the world.

Australia's constitutional rules are perhaps better understood as intergenerational promises: they were promises from the founders to the future.¹⁰⁶

103 Goldsworthy, 'Constitutional Cultures', above n 92, 687–8.

104 Sir Anthony Mason, 'The *Australian Constitution* in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 8.

105 See generally Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016); see also Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 134.

106 Note that Martin Luther King Jr in his advocacy for civil rights in the United States of America also characterised the *United States Constitution* as a 'promissory note':

When the architects of our Republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men – yes, black men as well as white men – would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness.

Martin Luther King Jr, 'I Have a Dream ...' (Speech delivered at the March on Washington, Lincoln Memorial, Washington DC, 28 August 1963).

In an important sense, the Australian 'future,' and the stability and prosperity most Australians tend to enjoy, demonstrates the success of a well-designed rulebook for Australian government, which has mostly been successful in protecting the rights and freedoms of Australian citizens.¹⁰⁷ Equally, the rules in relation to Indigenous peoples, or perhaps more accurately, the lack of fair rules and the lack of positive constitutional promises with respect to them, has yielded corresponding outcomes for that group.

It is understandable that Indigenous people want their voices guaranteed in the *Constitution*, just like the former colonies wanted their voices guaranteed. The *Constitution* addresses important national power relationships. Only the *Constitution* can guarantee fairer future treatment, because only the *Constitution* curtails parliamentary power. Indigenous advocates have for decades sought constitutionally stable protection of their rights and interests because governments are often untrustworthy and unreliable in matters of Indigenous rights.¹⁰⁸ The search for a stable and enduring guarantee is thus at the heart of advocacy for Indigenous constitutional recognition,¹⁰⁹ and drives the call for a *constitutionally enshrined* voice, because only the *Constitution* is capable of providing enduring and stable protection of rights. A constitutional guarantee presents a more decisive and long-term solution to Indigenous constitutional vulnerability than mere legislation, which, as discussed, can be easily changed, abolished or watered down.

A constitutional guarantee addresses the vulnerability of a merely legislated institutional voice. Indigenous people are right to be vigilant about this. The Aboriginal and Torres Strait Islander Commission ('ATSIC') was a

107 As Saunders observes:

Australia is fortunate in the stability and efficiency of its democracy and the commitment of its institutions to the rule of law. The Australian legal and political system also stems from a tradition that accepts that the rights of individuals should be respected by the state. As a result, so far, the Australian approach to rights protection has worked reasonably well. By international standards, Australia has a good human rights record. Australia is regularly ranked highly in international assessments of the most desirable places in which to live.

Saunders, 'The Australian Constitution', above n 94, 118.

108 Yunupingu, in 1998, explained the importance of the legal and political stability provided by the *Australian Constitution* in addressing the constitutional vulnerability of Indigenous rights:

Our Yolgnu law is more like your Balanda Constitution than Balanda legislation or statutory law. It doesn't change at the whim of short-term political expediency. It protects the principles which go to make up the very essence of who we are and how we should manage the most precious things about our culture and our society. Changing it is a very serious business ... 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.

Galarrwuy Yunupingu, 'We Know These Things to be True' (Speech delivered at the Third Vincent Lingiari Memorial Lecture, Darwin, 20 August 1998). 'Balanda' means European/western.

109 As Professor Patrick Dodson articulated in 1999:

It may be a harsh thing to say, but many actions of Australian Governments have given Aboriginal people little faith in the promises Governments make in relation to protecting and defending the rights of Indigenous Australians. That is why we need a formal Agreement that recognises and guarantees the rights of Indigenous Australians within the *Australian Constitution*.

Patrick Dodson, 'Until the Chains are Broken' (Speech delivered at the Fourth Vincent Lingiari Memorial Lecture, Darwin, 8 September 1999).

representative body implemented under a Labor government, then abolished under the Liberal Howard government.¹¹⁰ The easy axing of ATSIC demonstrates why it is important that any new Indigenous body is underpinned by a constitutional guarantee. The body should not be abolished the moment there are difficulties. When there are corrupt or incompetent politicians in Parliament, no one seriously calls for the institution of Parliament to be abolished.¹¹¹ Indigenous institutions, like any institutions, must be adapted and improved over time: legislative flexibility in the details, processes and design of the body will allow for this evolution, but a constitutional guarantee provides stability and longevity.¹¹² A body with constitutional status would be intended as a permanent part of Australia's constitutional and institutional arrangements – guaranteeing that Indigenous peoples will always have a voice in their affairs.

C Empowering Indigenous People to Address Both the Hard Racism and the Soft Bigotry

One of the ongoing challenges in Indigenous affairs is discerning fair policy from unfair policy: who decides? Sometimes governments with good intentions, seeking to alleviate Indigenous disadvantage and suffering, nonetheless enact policies and laws that Indigenous people argue are discriminatory and unjust, or which are ineffective.¹¹³ Other times, particularly historically, governments are deliberately discriminatory.¹¹⁴

A constitutionally empowered Indigenous voice in their affairs is an intelligent and nuanced solution to this subjectivity problem: it provides a way of combatting not only the hard racism of prejudiced policy, but also the well-meaning, benevolent policy that may be inadvertently discriminatory, paternalistic or simply ineffective. This latter type of policy can be infused with what Noel Pearson, borrowing the phrase coined by George W Bush, describes

110 Will Sanders, 'ATSIC's Achievements and Strengths: Implications for Institutional Reform' (Research Publication, Centre for Aboriginal Economic Policy Research, August 2004). It may also be appropriate to take lessons from the design of Congress, but given that Congress is a private corporation rather than a public institution, it is not explored here. But see Sam Muir, 'A New Representative Body for Aboriginal and Torres Strait Islander People: Just One Step' (2010) 14(1) *Australian Indigenous Law Review* 86.

111 As Sanders argues, '[t]o get rid of ATSIC as a way of pushing aside a particular chairperson is like abolishing Parliament to push aside a particular Prime Minister': Sanders, above n 110, 6.

112 As Pearson has noted with respect to ATSIC, government bureaucracies and other industries were also responsible for ATSIC's deficiencies: Noel Pearson, 'Recent Indigenous Policy Failures Can't Be Pinned on Aborigines', *The Australian* (online), 15 June 2013 <<https://www.theaustralian.com.au/opinion/columnists/recent-indigenous-policy-failures-cant-be-pinned-on-aborigines/story-e6frg786-1226664090788?sv=dd1889d10033c9e92849d47b969521ff>>.

113 For example, the Northern Territory intervention was implemented by government to address the challenge of child sexual abuse in Indigenous communities in the Northern Territory. But it initially suspended the *RDA*, and many Indigenous people complained it was discriminatory and argued the 'top down' approach was flawed: see Sara Everingham, 'Northern Territory Emergency Response: Views on "Intervention" Differ 10 Years on', *ABC News* (online), 21 June 2017 <<http://www.abc.net.au/news/2017-06-21/northern-territory-intervention-flawed-indigenous-nt-scullion/8637034>>.

114 See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, where the Queensland government enacted a policy to prevent Indigenous people from buying land, which was subsequently struck down by the High Court as a breach of the *RDA*.

as 'the soft bigotry of low expectations'. The appropriate constitutional reform will empower *Indigenous peoples themselves* to combat, and hopefully prevent, both kinds of oppressive and unjust policy through empowered, active and vocal engagement with the state.

Guaranteeing Indigenous peoples a voice in political decision making about their affairs appears a sensible way to achieve this, for Indigenous people themselves are best placed to decipher good Indigenous policy from bad. Indeed, they are arguably better placed to do so than either politicians in Parliament, or judges in the High Court. The Indigenous constitutional voice solution is innovative in this regard, because it proposes a way of addressing Indigenous constitutional vulnerability that does not rely on judicially-adjudicated rights clauses.¹¹⁵ Rather, it seeks more active and empowered involvement in the political process.

Indigenous constitutional vulnerability gives rise to an ethical duty to reform the constitutional relationship to ensure it is fairer than in the past, in order to prevent not only hard racism but also soft bigotry, and to improve policy-making and outcomes. The Uluru Statement proposes a sensible answer to this challenge.

VI ASSESSING OPTIONS FOR CONSTITUTIONAL AMENDMENTS¹¹⁶

In the lead up to the Uluru Statement and the Referendum Council's report, a number of draft constitutional amendments were put forward by Indigenous leaders and constitutional experts to progress discussion of a constitutionally guaranteed Indigenous voice in Indigenous affairs.¹¹⁷ This section briefly outlines the Referendum Council's directional recommendations for constitutional drafting,¹¹⁸ and then explores those drafting options. It assesses them against principles of constitutional suitability, responsiveness to concerns about parliamentary supremacy and legal uncertainty, and political viability, and attempts to refine the drafting according to these principles where possible.

A The Referendum Council's Recommendations

With respect to constitutional reform, the Referendum Council recommended:

115 For further discussion of this proposal as an alternative to judicially adjudicated solutions, see Morris, 'The Argument for a Constitutional Procedure', above n 10, 169–70.

116 Discussion of reserved Indigenous seats in Parliament or a separate Aboriginal seventh state, as proposed by Indigenous lawyer Michael Mansell, is omitted here, as Mansell argues these reforms would not require constitutional change. My focus here is on different types of constitutional guarantees and constitutional mechanisms to address the problem of Indigenous constitutional vulnerability, particularly within the frame of the Referendum Council's and the Uluru Statement's broad directions. Non-constitutional solutions are therefore not considered in this article. However, see Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016).

117 See Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', above n 3; *Allens Linklaters Submission*, above n 4; Mundine, above n 5; Davis and Dixon, above n 6.

118 *Referendum Council Final Report*, above n 2.

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) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.¹¹⁹

The Referendum Council explained that Parliament would formulate the precise form of the constitutional amendment, noting the importance of continued Indigenous agreement and consultation on such details going forward. The Council also set out some constitutional principles that should guide the drafting of the constitutional amendment to give effect to a First Nations voice.

First, the proposed body should be set up in legislation enacted by Parliament. Legislation should set out the details, processes and design, including ‘how the body is to be given an appropriately representative character and how it can properly and most usefully discharge its advisory functions’.¹²⁰ Such details need not be included in the *Constitution*.

Second, the Council was clear that the body should not have ‘any kind of veto power’¹²¹ – it is intended to be advisory in nature and cannot offer binding advice. The Referendum Council further stated the proposed voice must not ‘interfere with parliamentary supremacy’ and would therefore ‘not be justiciable’.¹²²

Third, it was suggested that the constitutional amendment should describe ‘the function of the body and its relationship to the parliamentary process’, noting that ‘[t]he concept of providing advice on certain matters requires definition of the relevant matters’.¹²³ Thus, the Council acknowledged that it ‘would not be realistic’ for the body:

to provide advice on all matters ‘affecting’ Aboriginal and Torres Strait Islander peoples because most laws of general application affect such peoples. On the other hand, it may be too narrow to limit the subject matters to laws with respect to Aboriginal and Torres Strait Islander peoples because some laws of general application have particular impact on or significance to such peoples.¹²⁴

It was therefore proposed that a balance must be struck, with the focus being on laws and policies directed at, or significantly or especially impacting, Indigenous people.

Fourth, the Council noted that in recommending a constitutional voice, it was taking on board political objections to a racial non-discrimination clause, as proposed by previous reports.¹²⁵ It noted that the preference for a constitutional voice:

119 Ibid 2.

120 Ibid 36.

121 Ibid.

122 Ibid 38.

123 Ibid 36.

124 Ibid 36.

125 These objections are explained in Morris, ‘Undemocratic, Uncertain and Politically Unviable?’, above n 12.

took account of the objections raised against the alternative substantive constitutional amendment option: the insertion of some form of non-discrimination protection into the *Constitution*. The objections to a non-discrimination provision which would render parliamentary legislation justiciable under the jurisdiction of the High Court, may be appropriate or inappropriate – but that is not the point. The point is that such a non-discrimination provision has strong objections and objectors, which the Council believes will see it fail at a referendum.

The choice of an institutional alternative – a Voice to the Parliament – is therefore a highly reasonable proposal, put forward at Uluru and supported by our Council.¹²⁶

The Referendum Council's reasoning and justifications provide broad principles by which constitutional drafting should be assessed. The constitutional drafting giving effect to a First Nations voice should be responsive to previously articulated concerns about parliamentary supremacy and legal uncertainty (by not constituting a veto, by being non-justiciable, and by leaving body details to Parliament), so that it can broadly be considered politically viable. To this, I would add a further, though intimately related, lens through which to evaluate constitutional suitability: any drafting should cohere and align with Australian constitutional culture and design. The following sections evaluate, and in some cases attempt to refine, options for constitutional drafting with these issues in mind.

B A Constitutionally Guaranteed Indigenous Advisory Body: A Non-justiciable Guarantee

The Referendum Council is correct that, in order to properly take on board parliamentary supremacy and legal uncertainty concerns, the constitutional amendment for a First Nations voice should not establish a veto and should be drafted to be non-justiciable. Non-justiciable constitutional clauses generally arise in relation to the internal workings of Parliament, and mean that Parliament is immune to judicial review in respect of its internal procedures and choices to exercise its powers. This is what makes constitutional clauses relating to 'proposed laws' non-justiciable. Non-justiciability is a way of recognising 'the primacy of the political process and the subsidiary role of the judiciary',¹²⁷ thus avoiding the uncertainty of judicial interpretation. It is a way of respecting parliamentary supremacy and the separation of powers.

In the Indigenous constitutional recognition debate, the concern to avoid legal uncertainty and maintain parliamentary supremacy has regularly been expressed through the inclusion of 'no legal effect clauses' in state constitutions that have recognised Indigenous peoples in preambles or specific clauses.¹²⁸

126 *Referendum Council Final Report*, above n 2, 38.

127 Henry Burmester, 'Locus Standi in Constitutional Litigation' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company, 1992) 148, 178.

128 For example, the *Constitution Act 1975* (Vic) recognises Indigenous peoples in section 1A. Section 1A(3) provides, '[t]he Parliament does not intend by this section – (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria'. The *Constitution Act 1902* (NSW) recognises Indigenous peoples in section 2. Section 2(3) provides, '[n]othing in this section creates any legal right or liability, or gives rise

However it has been previously established that ‘no legal effect’ clauses would not be supported by Indigenous people,¹²⁹ and there is no need for such a clause. There are non-justiciable provisions in the federal *Constitution*¹³⁰ which can be emulated. These clauses do not include explicit ‘non-justiciable’ or ‘no legal effect’ specifications, but are nonetheless generally treated by the High Court as non-justiciable.¹³¹ Both the drafters of the *Constitution*¹³² and the High Court have treated these sections as non-justiciable¹³³ because the provisions refer to ‘proposed laws’, indicating that they are internal rules to govern Parliament’s lawmaking processes.¹³⁴ The High Court stays out of such matters, because the judiciary’s role is to deal ‘with what is law rather than proposals to make law’.¹³⁵ The non-justiciability of such clauses reflects the fact that, in the words of McTiernan J, ‘Parliament is master in its own household’.¹³⁶

In 2015, Professor Anne Twomey intelligently emulated such existing non-justiciable constitutional clauses to develop constitutional drafting to give effect to the proposal for a constitutionally mandated Indigenous body to advise

to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales’. The *Constitution of Queensland 2001* (Qld) recognises Indigenous peoples in its preamble, and provides a ‘no legal effect clause’ in relation to the preamble in section 3A. The *Constitution Act 1934* (SA) recognises Indigenous peoples in section 2. Section 2(3) provides a ‘no legal effect’ clause. Western Australia and Tasmania are the only States to have recognised Indigenous peoples in the preambles to their Constitutions without a ‘no legal effect’ clause: see *Constitution Act 1889* (WA); *Constitution Act 1934* (Tas).

129 *Expert Panel Report*, above n 22, 113–15.

130 See, eg, ss 53–4, 56.

131 See Twomey, ‘An Indigenous Advisory Body’, above n 3.

132 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, 473 (Edmund Barton).

133 The non-justiciable character of section 53 was discussed in *Osborne v Commonwealth* (1911) 12 CLR 321, 336, 339 (Griffith CJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also Gabrielle Appleby and Adam Webster, ‘Parliament’s Role in Constitutional Interpretation’ (2013) 37 *Melbourne University Law Review* 255, 272; James A Thomson, ‘The Judicial Branch: Non-justiciability and the Australian Constitution’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 56, 57.

134 With respect to section 53, Griffith CJ explained:

[Sections] 53 and 54 deal with ‘proposed laws’ – that is, Bills or projects of law still under consideration and not assented to – and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law.

Osborne v Commonwealth (1911) 12 CLR 321, 336; see also *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

135 See Glenn Worthington, ‘How Far Do Sections 53 and 56 of the *Australian Constitution* Secure a Financial Initiative of the Executive?’ (Parliamentary Studies Paper 12, Australian National University) 4.

136 *Victoria v Commonwealth* (1975) 134 CLR 83, 138. However, Barwick CJ, discussing section 57, stated ‘[t]he Court, in my opinion, not only has the power but, when approached by a litigant with a proper interest so to do, has the duty to examine whether or not the law-making process prescribed by the *Constitution* has been followed’: at 118. See Kirsty Magarey, ‘Alcopops Makes the House See Double: “The Proposed Law” in Section 57 of the *Constitution*’ (Research Paper No 32, Parliamentary Library, Parliament of Australia, 2009).

Parliament on laws and policies with respect to Indigenous affairs.¹³⁷ Twomey's proposed new Chapter 1A of the *Constitution* would read:

60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

(2) The Parliament shall, subject to this *Constitution*, have power to make laws with respect to the composition, roles, powers and procedures of the [body].

(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.

(4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.¹³⁸

In Twomey's amendment, section 60A(1) would require Parliament to establish an Indigenous body through legislation. An enabling Act would set up the mechanisms for how its representatives are to be chosen, the body's powers, functions and processes. Section 60A(1) gives the body its main function: 'providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples'.¹³⁹ The proposed draft thus constitutionally empowers the body to advise both the Parliament and the Executive – enabling Indigenous input into both law and policymaking.

While section 60A(4) spells out only Parliament's constitutional obligation to consider the body's advice with respect to proposed laws in the Parliament, section 60A(1) would also give the body constitutional authority to advise the Executive. Legislation or internal parliamentary practice could set in place further processes, timelines and procedures for the body to engage with government on Indigenous policy development, and these processes would in an important sense be underpinned by the constitutional right of the body to provide its views.

The tabling of the advice is an important element in Twomey's draft constitutional procedure, which speaks to the Referendum Council's point about the importance of the engagement and advice function in the *Constitution*: it provides the formal mechanism for engagement between the Indigenous body and the Parliament. As Twomey explains, ensuring the advice is tabled:

provides a permanent public record of that advice; it gives the advice the status of a privileged document... and it provides a direct channel from the Indigenous body into the parliament, providing a constitutional means for Aboriginal people and Torres Strait Islanders to have a voice in parliamentary proceedings concerning their affairs.¹⁴⁰

Once tabled, the Houses of Parliament would have a constitutional duty under section 60A(4) to consider the advice in the debating of proposed laws

137 Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', above n 3.

138 Ibid.

139 Ibid.

140 Ibid.

with respect to Aboriginal and Torres Strait Islander peoples, but this obligation would be non-justiciable.¹⁴¹

Twomey's amendment is distinctive because it is deliberately drafted to provide a non-justiciable constitutional guarantee of the Indigenous voice in Indigenous affairs,¹⁴² thus aligning with the Referendum Council's principles. The amendment cleverly uses the language of 'proposed laws', which indicates the clause is to be adjudicated and enforced by Parliament, not the High Court. This is because the High Court is constitutionally empowered to adjudicate with respect to enacted laws, not proposed laws, under the principle of the separation of powers.

Twomey explains that, though the requirement for Parliament to consider advice is non-justiciable, it would operate as a 'political and moral obligation upon members of parliament to fulfil their constitutional role in giving consideration to such advice, but it would be for the houses, not the courts, to ensure that this obligation is met'.¹⁴³ I would go further than this: the obligation would be a constitutional requirement. It would not be justiciable, because Parliament is immune to review of its internal procedures. But Parliament would be bound by the law of the *Constitution* to fulfil this requirement, and the requirement would be enforced and adjudicated by Parliament, rather than the judiciary.

Importantly, the procedure is designed so that it cannot delay Parliament if no advice is received from the body, '[h]ence, the responsibility is on the Indigenous body to provide advice if it wants it considered. Failure to provide advice cannot hold up the process'.¹⁴⁴ This is important, because it means that the procedure cannot operate as a veto by inaction. This means this amendment is fully respectful of parliamentary supremacy, in line with the strong parliamentary supremacy established by the *Constitution*. It cannot be considered a radical proposed change, and aligns with the Referendum Council's intention in this regard.

Twomey's proposed section 60A(2) also delegates power to Parliament to legislate for the composition and design of the Indigenous body, rather than articulating such details in the *Constitution*:

It is not appropriate to set out in the *Constitution* the detail of how such a body is to be chosen. Just as the *Constitution* leaves it substantially to legislation to determine how members of parliament are elected and the powers and procedures of the parliament, so too this amendment would leave such matters to the

141 For a full discussion of Twomey's drafting and the issue of non-justiciability, see Morris, 'The Argument for a Constitutional Procedure', above n 10, 179–83.

142 Twomey, 'An Indigenous Advisory Body', above n 3. It should be noted here that there is a difference between the potential for constitutional justiciability discussed in this chapter, which can result in laws being struck down by the court, thus giving rise to concerns about parliamentary supremacy, and justiciability arising under legislation created by Parliament, which does not give rise to laws being invalidated by the courts, and thus does not create legal uncertainty in the same way – Parliament remains in charge of the justiciability. It is thus up to Parliament the extent to which it wishes to manage the justiciability arising under the legislation setting up the body.

143 Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', above n 3.

144 Ibid.

parliament to determine, in collaboration with Aboriginal and Torres Strait Islander people.¹⁴⁵

This too is in line with the Referendum Council's broad direction that it is not appropriate to put all the details of the proposed body in the *Constitution*. As Professor Rosalind Dixon has noted, such deferral is common in Australia's constitutional law which leaves many institutional and democratic matters to Parliament, and this too shows respect for the supremacy of Parliament.¹⁴⁶ The design and method of election of the body are matters Indigenous Australians should decide and negotiate with Parliament if the proposal is taken further. Further details of the body can then be articulated in legislation, ultimately subject to parliamentary will.

Twomey's proposal is balanced because it empowers Indigenous peoples with a constitutional voice, without the downsides and legal uncertainty created by justiciable, High Court adjudicated guarantees. This avoids the risk of laws being struck down, which is often cited as a concern for parliamentarians anxious to retain their power in this constitutional relationship.¹⁴⁷ It also strikes a balance between the need for legislative flexibility in body design, and the Indigenous desire for the security and stability of a constitutional guarantee – the Twomey approach provides both.

The approach is also balanced in its handling of the issue of scope – what matters the body can advise on – in line with the Referendum Council's suggested approach. Section 60A(1) provides that the body may advise on matters 'relating to' Indigenous peoples – creating a broad scope – so the body would need to use discretion on which matters it wishes to advise on. This broad scope is justifiable because there is no veto and the mechanism cannot delay Parliament: if there is no advice provided, nothing need be tabled and there is nothing for parliamentarians to consider. Further, parliamentarians, under section 60A(4), must only consider advice on matters that are 'with respect to' Indigenous peoples, which seems to indicate a very narrow range of issues under section 51(xxvi). This provides a narrow obligation to consider advice 'with respect to' Indigenous peoples, and additionally, the obligation is non-justiciable.¹⁴⁸

An obvious reality of this proposal, of course, is that, because there is no veto, the advice can be ignored by the state. This accords with the Referendum Council's direction which, in my view, is justifiable. It is unlikely that a veto would be practically workable, let alone politically accepted: a constitutionalised veto would be opposed by many on the grounds that it undermines parliamentary supremacy. It could also be considered an abdication of parliamentary

145 Ibid.

146 Rosalind Dixon, 'Let's Give Indigenous People a Voice in Parliament', *The Australian* (online), 21 July 2017 <<http://www.theaustralian.com.au/business/legal-affairs/lets-give-indigenous-people-a-voice-in-parliament/news-story/87aa6750f1f4ba5a29d9715ee115c781>>.

147 See the full discussion of objections to a racial non-discrimination clause as proposed by the Expert Panel in Morris, 'Undemocratic, Uncertain and Politically Unviable?', above n 12.

148 Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', above n 3.

sovereignty.¹⁴⁹ As noted, the purpose of this proposal is a noble compromise. As the Referendum Council notes, it is intended to achieve Indigenous aspirations as articulated in the Uluru Statement, but also to address concerns about parliamentary supremacy and legal uncertainty. Thus, the aim should be an authoritative but non-binding Indigenous voice in democratic decisions about Indigenous rights and interests. After all, the Uluru Statement is a request to be heard, not a demand to command. It asks for a voice, not a veto. As Miller explains, though the

discursive commitment provided by ‘consultation and cooperation’ is weaker than ‘free, prior and informed consent,’ particularly because it lacks a consensual element ... This may be justified to some extent in order to promote efficiency with respect to practical decision-making.¹⁵⁰

It would be arguably unworkable to give the three per cent Indigenous minority a constitutional veto over the decisions of the majority.¹⁵¹

Likewise, the reality of this non-justiciable constitutional amendment is that there would be no recourse to the High Court where it was felt that advice was not properly considered by Parliament, or if the advice is rejected.¹⁵² Nonetheless, a constitutional voice would carry special authority,¹⁵³ and there is a variety of mechanisms, examined further below, that can be built legislatively into the design and processes of the body that can enhance its impact and effectiveness in influencing policy decisions.

On balance, Twomey’s proposal for a constitutionally guaranteed Indigenous advisory body provides a modest and constitutionally conservative way of achieving the Uluru Statement’s aspirations for constitutional recognition that aligns with the Referendum Council’s broad guidelines. It is an amendment that coheres with Australia’s political process driven constitutional culture and accords with Australia’s strong parliamentary supremacy. It is thus likely politically viable.

C Omitting the Tabling of Advice Function

A similar, through ostensibly simpler, constitutional approach was put forward by Allens Linklaters, which proposed drafting along the following lines:

There shall be a First Peoples Council established by Parliament and with such powers as may be determined by Parliament from time to time. Parliament shall

149 Jeffrey Goldsworthy explains that the transfer of decision-making authority to another body would be a breach of parliamentary sovereignty since ‘by forbidding Parliament to enact law without the approval of an external body – namely, the electorate – it plainly limits its substantive authority’: Jeffrey Goldsworthy, ‘Abdicating and Limiting Parliament’s Sovereignty’ (2006) 17 *King’s College Law Journal* 255, 279.

150 Russell A Miller, ‘Collective Discursive Democracy as the Indigenous Right to Self-Determination’ (2006) 31 *American Indian Law Review* 341, 371.

151 Even where such political decisions appear only to affect Indigenous interests, the vast majority of such decisions are about resources and land – and so involve competing interests.

152 This is pointed out by Davis and Dixon, above n 6, and discussed further below.

153 Fergal Davis, ‘The Problem of Authority and the Proposal for an Indigenous Advisory Body’ (2015) 8(19) *Indigenous Law Bulletin* 23.

consult with and seek advice from the First Peoples Council on legislation relating to Aboriginal and Torres Strait Islander peoples.¹⁵⁴

This drafting would create a constitutional obligation on Parliament to 'consult with and seek advice from' the body on legislation relating to Indigenous peoples. One difference with the Twomey approach is that this version does not mention the Executive, and so does not require consultation on policy, which may be a weakness – though this can also be articulated in legislation and would develop in practice.¹⁵⁵

The drafting is also less sophisticated than Twomey's approach in its consideration and implementation of non-justiciability. While the Allens Linklaters submission intends that 'the power to advise and consult, and the extent and nature of that interaction with the legislative branch would be determined by the Parliament' and the 'precise remit and the mechanics of its operation must be outlined by the legislature',¹⁵⁶ this is not necessarily clear in the proposed constitutional drafting. On the text, it is uncertain whether the obligation to consult would be justiciable. There is no use of 'proposed laws', unlike the Twomey approach, and so the High Court may not interpret this as a non-justiciable clause. It is not clear that Parliament is to determine the consultation procedures, so this may also be left open for judicial intervention by the High Court in interpreting what 'advise and consult' means in practice. It is also unclear whether legislation could be invalidated if the Parliament is found by the High Court to have failed to consult. And the High Court may also be left to resolve which matters are 'relating to' Indigenous people or not, to clarify when the duty to consult arises.

The Allens Linklaters submission states that its proposal is aimed at adhering to the policy intent of the drafting as articulated by Cape York Institute.¹⁵⁷ This means respecting parliamentary supremacy and eliminating legal uncertainty. The drafting can be improved to better fulfil its stated aims, by amending it to read as follows:

There shall be a First Peoples Council established by Parliament to advise Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander peoples, under procedures to be determined by Parliament, and with such powers, processes and functions as may be determined by Parliament.

Such a revised amendment would be non-justiciable due to its focus on 'proposed laws', thus avoiding the risk of laws being struck down by the High Court due to failure to consult, and better upholding parliamentary supremacy. Yet it would still constitutionally empower Indigenous peoples with a voice in

154 *Allens Linklaters Submission*, above n 4, 5.

155 This criticism was inaccurately raised by Professor George Williams in relation to Twomey's amendment, which empowers the body to advise the Executive as well as Parliament, but is applicable to the Allens Linklaters amendment: George Williams, 'Pearson Proposal at Odds with Reality', *The Sydney Morning Herald* (online), 14 June 2015 <<https://www.smh.com.au/opinion/pearson-proposal-at-odds-with-reality-20150614-ghngc3.html>>.

156 *Allens Linklaters Submission*, above n 4, 18.

157 *Ibid* 17–18, citing Cape York Institute, Submission No 38 to Joint Select Committee, *Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, October 2014, 15–16.

their affairs in a significant and meaningful way, as requested by the Uluru Statement. The revised version also refers to advising the Executive, which would constitutionally empower Indigenous input into policies as well as laws. The addition of ‘under procedures to be determined by Parliament’ clarifies that Parliament must articulate the rules and processes for consultation and advice, as well as the issue of scope of advice.

While the Allens Linklaters approach is perhaps more modest than the Twomey amendment because it omits requirements for tabling advice or a specific obligation for parliamentarians to consider advice, it may be politically attractive for its comparative simplicity. With the refinements suggested, it would fulfill the Referendum Council’s guidelines and is an amendment that coheres with Australia’s process-driven constitutional culture and strong parliamentary supremacy.

D Constitutionally Recognising Local First Nations Bodies

In 2017, in the lead up to the Uluru convention, Indigenous leader Warren Mundine made a proposal for constitutionally recognising local bodies rather than a national body, drawing upon Twomey’s work.¹⁵⁸ Mundine’s intent was to put forward examples of constitutional guarantees to require Parliament to establish local Indigenous bodies, rather than a national body. Mundine argues that the focus on local First Nations better aligns with how the First Nations culturally recognise and organise themselves. It is also more in step with the principle of subsidiarity and the idea that local people should have a say over their local matters – a concept infused within Australia’s federal constitutional culture.¹⁵⁹ Mundine’s first suggested amendment would read as follows:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (1) Aboriginal and Torres Strait Islander heritage, cultures and languages and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; and
- (2) the establishment, composition, roles, powers and procedures of local Aboriginal and Torres Strait Islander bodies which shall be established to manage and utilize native title lands and waters and other lands and sites, preserve local cultures and languages and advance the welfare of the local Aboriginal or Torres Strait Islander peoples.¹⁶⁰

Leaving to one side Mundine’s proposed characterisation of the Indigenous head of power,¹⁶¹ this proposal is an interesting flipping of the idea of a First Nations constitutional voice – it instead focusses on local voices.

158 Mundine, above n 5, 12.

159 For more on subsidiarity and federalism, see Nicholas Aroney, ‘Subsidiarity: European Lessons for Australia’s Federal Balance’ (2011) 39 *Federal Law Review* 213.

160 Ibid.

161 Amendment of the race power was not endorsed at the Uluru convention and is not advocated here. Also, it may be unwise for the power to be narrowed in this way, as it could lead to legal uncertainty. For more on characterisation of the power, see Twomey, ‘A Revised Proposal for Indigenous Recognition’, above n 36.

The use of 'shall' in subsection (2) would constitutionally require Parliament to establish the local First Nations bodies. It also determines some of their functions: to manage native title land, preserve culture and language, and advance Indigenous welfare – and these constitutional functions could be added to in legislation. There is no constitutionally mandated engagement or expressly stated advisory role to Parliament, which may be a weakness – the Referendum Council indicated such engagement was important. However, the wording can be tweaked to accommodate this.

Mundine also proposes a more modest approach that completely leaves Parliament to decide what functions to give these bodies and retains a broader plenary power for Indigenous affairs. This version reads:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: Aboriginal and Torres Strait Islander affairs, and the Parliament shall establish bodies for each of the Aboriginal and Torres Strait Islander peoples, the composition, roles, powers and procedures of which bodies shall be determined by the Parliament.¹⁶²

Again, through the use of 'shall', this version would require Parliament to establish the local bodies, but there is no constitutionally mandated engagement or expressly stated advisory role to Parliament. Arguably this may make sense, given the focus is on local bodies. It would not make sense for local bodies across the country to all individually advise Parliament (unless, for example, a particular law or policy was locally focussed).¹⁶³ However there may be ways to tweak the drafting to refer to an advice function, which the Referendum Council noted was important, while leaving Parliament to determine the appropriate mechanisms for this advice to filter through and be delivered in an efficient and workable way.

Again, leaving aside the issue of the characterisation of the replacement Indigenous affairs power, several comments can be made regarding the provisions requiring Parliament to establish local Indigenous bodies to give them authority and responsibility over their local affairs. Firstly, the idea of any Indigenous constitutional voice being focussed on local First Nations, being 'bottom up, not top down', and representing grass roots, local voices, is an idea that resonated in all the First Nations dialogues.¹⁶⁴ Notably, however, this is predominantly a legislative design question: Twomey's constitutional amendment could also refer to a national Indigenous advisory body that is drawn from and focusses on local First Nations voices – if the body is legislated in this way. Mundine's approach is interesting because it takes the constitutional focus to the local. This may be desirable, if Indigenous people and politicians prefer this approach.¹⁶⁵

162 Ibid.

163 For example, where a law or policy is directed at a particular region, it would make sense for the design of this body to enable those local First Nations to provide advice on the law or policy.

164 See Cape York Institute for Policy and Leadership, 'A First Nations Voice in the Constitution: Design Issues' (Report, June 2017) 9–12 ('*CYI Design Issues Report*').

165 Note that the *CYI Design Issues Report* argued that, whatever constitutional guarantee is adopted, the legislative design should focus on empowering First Nations local voices: see *ibid.*

One element missing in Mundine's proposals is an explicit constitutional requirement for First Nations engagement with Parliament on Indigenous affairs. On one view, this may not matter, as Indigenous people and Parliament may wish to leave this to be articulated in legislation, rather than in the *Constitution* as in Twomey's version. On the other hand, if the engagement with Parliament and government is considered important enough to be expressly required or at least indicated in the *Constitution*, as the Referendum Council suggests, Mundine's proposals can be adjusted to include this.

Another consideration is non-justiciability. It would appear that Mundine's proposals would be non-justiciable, because Parliament cannot practically speaking be compelled to legislate an institution.¹⁶⁶ But non-justiciability can be confirmed through use of the 'proposed laws' device, along with the clarification that these local bodies would have an important role in engaging with Parliament and government with respect to their affairs. The amendments could thus be adjusted to read as follows:

There shall be local First Nations bodies, with such composition, roles, powers and functions as may be determined by Parliament, and which shall include the functions of managing and utilising native title lands and waters and other lands and sites, preserving local First Nations languages, advancing the welfare of the local Aboriginal or Torres Strait Islander peoples, and advising Parliament and the Executive on proposed laws and other issues relating to these matters, under procedures to be determined by Parliament.

This version has the benefit of constitutionally clarifying the scope of any advice given, which, as the Referendum Council notes, is sometimes raised as a concern (though this scope issue can also be addressed in the legislation): advice can be for land and sacred sites, culture and language, and Indigenous welfare. The words 'under procedures to be determined by Parliament' clarify that Parliament can legislate to set out appropriate mechanisms for advice on laws and policies to be given. An appropriate system¹⁶⁷ can be established for engagement with the various levels of government and Parliament in the Federation.

Similarly, the more modest version could read:

There shall be local bodies for each of the Aboriginal and Torres Strait Islander peoples, the composition, roles and powers of which bodies shall be determined by the Parliament, and which shall include procedures for Aboriginal and Torres

166 The example of the Inter-State Commission should be noted here. The *Constitution* under section 101 compels Parliament to establish the Commission using the word 'shall', but no Commission has existed for most of Australia's history. As Coper explains, 'the peremptory command in s 101 ... that there "shall be" an Inter-State Commission is not self-executing and no doubt is unenforceable, at least to bring a non-existent Commission into being'. While section 101 obliges the Commonwealth Parliament to create the Commission, standing issues prevent a private individual from holding the Parliament to account to this requirement: Michael Coper, 'The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission' (1989) 63 *Australian Law Journal* 731, 733, 738. According to Cremean, while section 101 obliges the Commonwealth Parliament to create the Commission, standing issues prevent a private individual from holding the Parliament to account to this requirement: Damien J Cremean, 'The Inter-State Commission: Rethinking the Wheat Case' (2009) 83 *Australian Law Journal* 765, 772. For more on the Inter-State Commission, see Morris, 'The Argument for a Constitutional Procedure', above n 10, 186–9.

167 Perhaps a collegiate system.

Strait Islander peoples to provide advice to Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander affairs.

Although this version of the drafting is simpler and thus perhaps more desirable, it omits clarification of the scope of the advice to matters relating to land, culture and welfare. In other respects, this version, like Mundine's more complex example, would also fulfil the stated criteria: it would be non-justiciable, there would be no veto, relevant details would be legislated by Parliament. Thus, it respects parliamentary supremacy and minimises legal uncertainty. These clauses also provide a constitutional guarantee and recognition for local First Nations bodies, in a way that may align with expressed Indigenous preferences for local voices being heard. The adjusted Mundine proposals would be another way of achieving the aspirations of the Uluru Statement in a way that coheres with Australia's process-driven constitutional culture and strong parliamentary supremacy. Arguably these approaches would also be politically viable.

E A Justiciable Duty to Consult

Professors Megan Davis and Rosalind Dixon have critiqued the Twomey model's deliberate non-justiciability, arguing it may be too weak. Davis and Dixon contend that '[t]he problem with this procedural "solution" to the current impasse in constitutional recognition debates is that it is designed to be non-justiciable; the Parliament can ignore the advice and ATSI peoples have no recourse'.¹⁶⁸ The concern identified is valid: advice can be ignored because no veto is proposed. The proposed non-justiciable guarantees are constitutionally modest solutions to the problem of Indigenous constitutional vulnerability and powerlessness. They are responses that aim to recalibrate the constitutional relationship, but they do not overturn the relationship completely. The constitutional relationship would necessarily remain unbalanced – though it will have shifted from a purely top-down dynamic, towards more of a reciprocal partnership dynamic where consultation and engagement is constitutionally mandated. This is a constitutionally modest yet profound proposal, intended to be a politically viable, noble compromise that balances the need to maintain parliamentary supremacy with the call for greater Indigenous empowerment in their affairs.

In highlighting the risks associated with this constitutional modesty, Davis and Dixon identify three possibilities for how Twomey's tabling of advice procedure may work in practice – spanning optimistic to pessimistic potentials. One, that 'executive practice could quite quickly establish an informal political norm or understanding that the government must follow the advice of the committee, or at least offer a clear public justification for declining to do so', which gradually may 'then even harden into something like a true constitutional

168 Davis and Dixon, above n 6, 258.

convention'.¹⁶⁹ This would be the best outcome. Alternatively, they raise the concern that:

government might disregard the advice of the committee in early cases, and that this might then create an informal understanding that true attention to the advice of such a committee is purely *optional* for Parliament, and not required as part of a commitment to consultation with and the empowerment of Indigenous Australians in processes of democratic self-government.¹⁷⁰

This would be a poor outcome. As a response to this latter concern, Davis and Dixon propose a justiciable Indigenous consultation guarantee in the *Constitution*, to ensure Indigenous voices are heard in political decisions made about them. They tentatively propose a clause that would provide recourse the High Court, along the following lines:

In exercising its power to make laws under s 51(xxxvi), and in all other cases in which laws have a significant or disproportionate impact on Indigenous peoples, the Commonwealth Parliament shall consult with Indigenous peoples in good faith, and through appropriate procedures.¹⁷¹

They go on to explain that this constitutional amendment:

could provide a legal basis for Indigenous Australians to challenge the legislation ultimately enacted by Parliament before the High Court: it would be open to Indigenous Australians under such a model to argue that the entrenchment requirement required Parliament to *justify* a decision not to follow the advice of the body it had created to fill its duty of consultation, based on some kind of norm of reasonableness or proportionality. Once legislation was enacted, and there was a relevant constitutional 'matter', the failure to follow appropriate procedures for consultation could itself also provide a potentially powerful basis for affected ATSI peoples to challenge the validity of relevant legislation.¹⁷²

This proposed amendment would provide a way of achieving a constitutionally guaranteed Indigenous voice in Indigenous affairs, as the Uluru Statement requests. It would suffer, however, from detracting factors relating to undermining of parliamentary supremacy and creation of legal uncertainty, and it therefore raises problems with regards to practical implementation and political viability.

First, the proposed amendment does not respond to the legal uncertainty and parliamentary supremacy objections that were raised in relation to a racial non-discrimination clause, as proposed by the Expert Panel. This amendment is susceptible to the same criticisms: it would transfer power to the High Court and would likely enable the High Court to strike down Parliament's laws, potentially leading to legal uncertainty and abdicating parliamentary supremacy. It therefore does not move the debate towards the establishment of greater common ground, as the Referendum Council suggests should be the aim. Rather, it re-enlivens the original core disagreement with respect to further empowering the High Court at the expense of parliamentary supremacy, leaving this concern unresolved. While

169 Ibid.

170 Ibid (emphasis in original).

171 Ibid 262. Note that in the article section 51(xxxvi) is cited, but I presume this is an error that should read section 51(xxvi).

172 Davis and Dixon, above n 6, 259 (emphasis in original).

the reality of judicial intervention is embraced in the Davis and Dixon proposal, this means it may not be politically workable.

Second, the proposed amendment would not only enable this kind of ordinary constitutional justiciability, it may give rise to the possibility of a new kind: a procedural veto by inaction. Failure to consult as per the amendment (including the refusal of Indigenous people to be consulted) may render section 51(xxvi) unexercisable, and would also potentially render many other powers unexercisable too, where they are used in a way that significantly or disproportionately impacts Indigenous peoples, as the clause requires. This could be a wide and uncertain potential veto, in contradiction to the Referendum Council's guideline.¹⁷³ This may be extremely empowering for Indigenous people, but would also place a significant potential fetter on parliamentary supremacy, giving rise to potentially extensive legal uncertainty. As noted by the authors, it would also broadly empower the High Court to invalidate legislation that is enacted in breach of the required procedure.¹⁷⁴

It should also be noted there is broad indeterminacy under this approach as to what exactly compliance with this clause would mean. Where Twomey's approach sets out a precise tabling procedure so that compliance is constitutionally clear and adds non-justiciability as an added safeguard against legal uncertainty, the justiciable approach would leave Parliament and the Executive to determine consultation procedures but would also presumably empower the High Court to determine whether those procedures, and the execution of those procedures, are in good faith and appropriate. This could lead to extensive litigation and legal uncertainty regarding whether the requirement has been fulfilled. Thus, while the proposed clause would give effect to the Uluru Statement's call for a constitutional voice, it does not align with the Referendum Council's suggested approach and is unlikely to be politically viable. This clause would significantly shift the constitutional power relationship by strongly empowering Indigenous people through the courts – but for this reason it may not align with Australia's bill-of-rights-free constitutional culture and design, which arguably places political participation as the procedural 'right of rights' – a right that is primarily borne out in the political realm, rather than through the courts. The approach mandates consultation, but it does not address concerns about parliamentary supremacy and legal uncertainty.

Because the Davis and Dixon proposal is intended to be justiciable, I will not attempt to refine it here, as my attempts would fundamentally alter the intent of the proposal. The Twomey approach, along with the revised Mundine approaches, are constitutionally safer and more modest options that align both with the principles stated by the Referendum Council and with Australian constitutional culture. These proposals should now be further explored and refined.

173 Notably this article was published before the *Referendum Council Final Report*, as is the case for all these proposals.

174 Davis and Dixon, above n 6, 259.

VII LEGISLATIVE MECHANISMS TO ENHANCE IMPACT

Davis and Dixon make an important point about the risk that a First Nations constitutional voice could at times be ignored – a reality that must be honestly considered. This should be a persuasive and authoritative voice; it should operate through moral and political force; but it should not be a veto. It must strike the appropriate balance.

It is likely that any non-binding advisory body will at times be ignored. This is a model based on the idea of dialogue and conversation – not dictatorship. While the proposal should address Indigenous constitutional vulnerability by empowering Indigenous people to be heard in their affairs – a significant improvement on the status quo – it would not overturn the relationship completely. This is justifiable, however, because giving the three per cent minority a veto, even in specifically Indigenous matters, would be arguably incompatible with democratic principles – for all Indigenous matters involve competing claims for resources and rights. It would likely be unworkable in a democracy to give the three per cent minority a veto over the 97 per cent represented by Parliament. A non-binding constitutional voice can be considered a noble compromise, however. It is a proposal that, properly implemented and designed, would be safe yet paradigm-shifting; modest yet profound.

At the constitutional level, a procedural duty for Parliament to consult with and consider the advice of an Indigenous body before enacting laws with respect to Indigenous matters would carry constitutional authority in the same ways that other noted non-justiciable sections carry authority, despite non-justiciability, as part of Australia's constitutional law. However, there are practical ways of enhancing the effective operation of the procedure and the authority of the body. Further, legislative mechanisms could be considered to enhance the authority and effectiveness of the First Nations voice.

For example, the enabling legislation, subject to political will, could specify that the body should be given other functions in addition to its constitutionally articulated role or roles. The body should not just be reactive to Parliament's proposals for laws or policies; it should be proactive with its own proposals for reform for parliamentary and government consideration. This can be established in the legislation if desired. Advice should be public to help create political pressure and public accountability. Similarly, to assist political force and public attention on the Indigenous body's advice, representatives could be authorised to address Parliament, answer questions from Parliament with respect to advice¹⁷⁵ and observe the proceedings in Parliament. It is likely that this would be a matter

175 As Indigenous advocates have argued in the past:

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.

Aboriginal and Torres Strait Islander Commission, 'Review of the Operation of the *Aboriginal and Torres Strait Islander Commission Act 1989*: Report to the Minister for Aboriginal Torres Strait Islander Affairs' (Report, February 1998) [4.31].

of privilege to be dealt with under section 49 of the *Constitution*, which enables Parliament to enact House Rules and standing orders. Parliament could enact House Rules to enable Indigenous representatives to address Parliament. The rules could set out the particular circumstances and processes to allow this to occur, including the seeking of leave from the Speaker or the Minister for Indigenous Affairs or other relevant requirements.

In the past, international dignitaries and heads of state have been invited by the Speaker onto the floor of the House to address Parliament. The House of Representatives Practice reports indicate that, in 1951, a delegation from the United Kingdom House of Commons was invited to address the House.¹⁷⁶ An Indigenous constitutional voice of the kind proposed would mean a significant reform of the procedural relationship between Indigenous peoples and the Australian Parliament. This shift should also be appropriately reflected in legislation, House Rules and parliamentary custom. If it is acceptable for dignitaries of foreign nations to be invited to address the House, then perhaps it could also be acceptable for the formal representatives of Australia's First Nations to address the House regarding relevant matters.

John Chesterman further argues that where the Parliament does not follow the Indigenous representative body's advice on proposed laws, the responsible Minister should have to state why the Parliament is proceeding contrary to the body's recommendations.¹⁷⁷ The Parliament in legislation or in its House Rules could also require itself to state the approval or disapproval of the body in the preamble to relevant Indigenous Acts. These would be forms of 'self-embracing' procedural restraints of the kind Professor Goldsworthy argues are compatible with parliamentary sovereignty, because they specify the ways in which Parliament must exercise its power, rather than imposing substantive limits on that power.¹⁷⁸ These types of self-imposed rules and procedures could increase public scrutiny and political pressure on Parliament to give the body's advice appropriate weight; however, their implementation obviously relies on political will.

In this respect, it should also be remembered that the new constitutional voice will need to be approved by the Australian people at a referendum.¹⁷⁹ If the

176 B C Wright (ed), *House of Representatives Practice* (Department of the House of Representatives, 6th ed, 2012) 116.

177 John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67 *Australian Journal of Public Administration* 419, 424. For an in-depth discussion on the ways in which Parliament can require itself to heed legislated procedures in the making of some laws, see Wright (ed), above n 176, ch 8. For example, under section 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), a Joint Select Committee is required to consider bills for human rights compatibility, and this is compatible with parliamentary sovereignty.

178 Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 151, 175–6.

179 As Dr Fergal Davis argues:

A consultative body of Indigenous Australians would offer non-binding advice. At the same time it could wield political authority. The people, through a referendum, would have established the consultative body. It would derive some authority from that fact alone. It could use its position as an institution of the constitution to demand an explanation whenever government seeks to ignore one of its reports.

referendum is successful, this would create a significant political imperative for Parliament to follow the constitutional procedure in the spirit it is intended because it has been inserted and endorsed by the people.¹⁸⁰ The procedure would be articulated in the *Constitution*, the nation's highest law. Even though advice would not be binding, the proposed constitutional procedure would be an important improvement on the current situation, which provides no constitutional procedures or rules whatsoever requiring Parliament to hear or consult with Indigenous people before passing laws about them.

VIII CONCLUSION

Indigenous constitutional vulnerability is a problem that has real life consequences for Indigenous peoples. It is a problem that we as a nation have an ethical duty to address. This requires constitutional reform. Constitutional change is difficult, however. Any proposal going forward should address relevant previously expressed concerns about parliamentary supremacy and legal uncertainty and should cohere and align with Australian constitutional culture. If it does these things, with a bit of goodwill and hard work, the reform may yet be politically viable.

Australia's *Constitution* recognises and represents the voices of the pre-existing political communities or constitutional constituencies – even the very small ones. Given that the *Constitution* confers upon Parliament a necessary power to make laws with respect to Indigenous affairs, it should also guarantee Indigenous peoples a fairer say in the exercise of that power, and other powers enacted in relation to Indigenous rights. This would shift the constitutional relationship between Indigenous peoples and the colonising state from a purely top-down power dynamic, towards a reciprocal partnership dynamic, while stopping short of a veto. Such a reform would be modest yet profound in nature, and would recalibrate this constitutional relationship to ensure that it is fairer than in the past.

This article has shown that the Uluru Statement's historic call for a First Nations constitutional voice in their affairs can be achieved in ways that uphold parliamentary supremacy, eliminate legal uncertainty, and align with Australia's process driven, federal constitutional culture and design. I have argued that constitutional approaches along the lines suggested by Twomey, Mundine and the Allens Linklaters model, with refinement as necessary, could each form the basis of modest and constitutionally conservative amendments that fulfil the Uluru Statement's call for a First Nations voice in their affairs, while addressing the principles the Referendum Council has outlined as important.

Fergal Davis, 'Noel Pearson's Proposal Could Deliver Real Authority for Indigenous Australia', *The Guardian* (online), 14 April 2015 <<https://www.theguardian.com/commentisfree/2015/apr/14/noel-pearsons-proposal-could-deliver-real-authority-for-indigenous-australia>>.

180 It is true, however, that not all constitutional clauses have been respectfully followed. For a discussion of how this voice would be different, see Morris, 'The Argument for a Constitutional Procedure', above n 10, 186–9.

Indeed, as Julian Leeser MP has described in relation to Twomey's draft amendment, these are the kinds of clauses that 'Griffith, Barton and their colleagues might have drafted, had they turned their minds to it'.¹⁸¹ They fit neatly with Australia's strong parliamentary supremacy and our process-driven federal democracy, which lacks a bill of rights but is all about voices. These are modest and workable approaches that should now be discussed and developed to progress Indigenous constitutional recognition in the spirit of collaboration and open-mindedness. Constitutional lawyers must now turn their minds to this task, as the founders should have prior to 1901.

The call for a non-binding Indigenous voice in Indigenous affairs is, at its heart, intended to balance competing concerns. A constitutionally enshrined First Nations voice strikes the right conceptual balance between pragmatism and ambition, for viable yet worthwhile constitutional change to be achieved. With appropriate constitutional drafting, this offers a way of meaningfully addressing Indigenous constitutional vulnerability by empowering the First Nations with a voice in their affairs. There is more work to be done and debate to be had, but this proposal sets us on the right path to reconciliation and justice.

181 Leeser, above n 8, 87.