INDIGENOUS AUSTRALIANS AND THE CONSTITUTIONAL PROJECT: THE POLITICS OF DISCRIMINATION AND WHY 'RECOGNITION' IS NOT ENOUGH

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I Introduction

In an interview, the author and Nobel Laureate Toni Morrison was reminded by Charlie Rose about a question that American journalist Bill Moyers had once asked her: 'when are you going to write about white people?'[1] It was a question she cringed at and disapproved of. Charlie Rose revisited this inquiry, partly because he intimated that she had over-reacted and was being perhaps a tad sensitive.[2] He suggested that perhaps she was importing too much into the question. Morrison rehearsed a few responses to the question which she felt was not a curious, incidental question but actually meant: 'when are you going to stop talking about race?'; that is to say, race and the absence of race. Toni Morrison really nailed it for me when she spoke to the importance of words and the power of writing and said something along the lines of: when you are black and you are reading, 'you can feel the address of the narrator over my shoulder talking to someone else; talking to somebody who is white'; you know that you are not the implied reader.

Morrison delighted in her memory of discovering black writers like Chinua Achebe, because for those texts, you as a black person are the implied reader: there is a language, a posture, a parameter, that I or you as a black person could step into and not be concerned, she said, by the white gaze; and that she said is a 'liberating experience'; her liberation. Well, when I heard that,

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1 Transcript 'Toni Morrison Part 2: Dealing with Race in Literature', Moyers & Co, Bill Moyers, March 23 1990, <http://billmoyers.com/content/toni-morrison-part-2/>.

2 Charlie Rose, Interview with Toni Morrison, PBS, 1998, available at <http://www.youtube.com/watch?v=F4vIGvKpT1c>.

I felt it was an apt description of my experience as a law student and as a young lawyer. I found myself quite out of depth in this alien space: the child of the underclass with a single mum, an Aboriginal father who was a railway fettler, an Aboriginal grandfather who lived on Cherbourg mission during the Protection Era. And in Michael Kirby, I found someone, a jurist, who – whether writing judicially or extra-curially – was not talking over my shoulder but was speaking directly to me. And that is why he is so celebrated by generations of law students. And for me, for an Aboriginal student at the University of Queensland Law School, it too was a form of liberation. Here was someone who was talking to me.

And in some ways the notion of the implied reader is an apt one to adopt when explaining the exigency of constitutional recognition from an Indigenous perspective.

In tonight's lecture, I wanted to do two things:

1. First, I want to share with you a story of one community that the Prime Minister's Expert Panel on the Recognition of Aboriginal and Torres Strait Islander people in the *Australian Constitution* ('the Expert Panel') visited: Cherbourg; and then
2. Explain the process and the recommendations of the Panel, in particular the racial non-discrimination clause, that were very much informed and enlivened by our visits to communities like Cherbourg.

II Cherbourg

In 2010, when I was appointed by the Prime Minister to the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander People in the *Constitution*, Cherbourg was identified as an important community to consult and the Expert Panel visited Cherbourg for a community consultation.[3] Cherbourg is an Aboriginal community in South East Queensland established by Salvation Army member William Thompson in 1899 and taken over as a Government Settlement in 1904 under the *Aboriginal Protection Act*,[4] and tribes from all over Queensland and New South Wales were moved here. My great grandmother Lilly was an Aboriginal woman from Warra, halfway between Dalby and Chinchilla. Lilly had many children including Fred my grandfather and Harry his brother who were all removed to Cherbourg from Warra.

3 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (Commonwealth of Australia, January 2012) 211 <http://www recognise.org.au/uploads/assets/html-report/> (hereafter 'Expert Panel Report').

4 *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld).

Today Cherbourg stands as a proud community of which at the centre of it stands the Ration Shed[5] in the town's cultural precinct which also includes the old Superintendent's office and the old boys' dormitory: 'It was from the Ration Shed that those on the Settlement received rations, primarily flour, sugar and meat and at times rice, oatmeal and sago, in exchange for work undertaken within the Settlement'.[6] The Ration Shed stands as an icon of control and oppression during the Protection era in Australia; an era that history books tell us was a welcome and distinct departure from the brutal violence of the Frontier and was aimed at doing 'something for the fast disappearing races'[7]; at the same time history books tell us it was to prevent contamination of white blood and to exploit Aboriginal labour: 'In 1968 Aboriginal people started to gain more freedom and rations ended in Cherbourg'[8] and for decades the ration shed lay abandoned and decaying. Until during preparations for the celebration of Cherbourg's centenary in 2004:

> Sandra Morgan and her sister Lesley Williams were collecting items for an historic display when they discovered the old ration shed at the bottom of the footy oval – still intact. They decided the building should be preserved and relocated back to the centre of the settlement and adapted as a museum.[9]

And so this community in the south-east of Queensland reclaimed this abandoned ration shed that represented the humiliation and deference of the Protection Era and they transformed it into a powerful symbol that is the centerpiece of their proud, tidy town. And when the Expert Panel visited Cherbourg to conduct our consultations, the community hosted us on the verandah of The Ration Shed: a monument to survival, a defiant statement of resistance and a story of redemption.

In *A Dumping Ground: A History of the Cherbourg Settlement*, Queensland historian Thom Blake wrote in the opening paragraphs:

> In the early months of 1901, as white Australians were under-going their rite of passage into nationhood, another group of Australians were also participating in a rite of passage – but of a different kind. In the Burnett district of south-east Queensland, remnants of the Wakka Wakka tribe were being rounded up and dumped on a reserve on the banks of Barambah Creek. From camps on the fringes of towns and station properties, they had been forced onto an Aboriginal settlement established ostensibly for their care and protection. For the Wakka Wakka, their 'rite of passage' was not into nationhood or independence but into institutionalization and domination. The two rituals were diametrically opposed.[10]

5 The Ration Shed Museum, undated, <http://rationshed.com.au/about-cherbourg/>.
6 Ibid.
7 Thom Blake, *A Dumping Ground: A History of the Cherbourg Settlement* (University of Queensland Press, 2001) xii.
8 The Ration Shed Museum, above n 5.
9 Ibid.
10 Blake, above n 7, xi.

How do you marry these diametrically opposed rituals – the *Constitution* and Aboriginal history – in a way that does not offend what is impermissible hindsight when it comes to race relations and frontier violence in Australia? The symbolism of us – an 'Expert' panel – standing in the winter sun on the verandah of the Ration Shed holding boxes of mini, handbag sized Commonwealth Constitutions, was not lost on us. Understanding these two diametrically opposed rituals – Australia's Federation and the Protection era – is a good way to introduce the work of the Expert Panel and the contemporary project for constitutional recognition.

We know for a fact the *implied* reader of the *Constitution* was not Aboriginal and Torres Strait Islander peoples. (Although given the demonstrated low level of civics knowledge and understanding about the *Constitution* in Australia a good argument can be made that – but for section 128 – the Australian people were not so much the *implied* reader as were the states and the federal Parliament. Even Inglis Clark's due process clause was transformed into an equal rights clause for trade between states!)

In any event the task of the Expert Panel was how to nudge the nation in a direction that would move them enough to countenance a change to a document that is so notoriously rigid, so unchanging, so unremarkable and functional, that unlike many nations of the world, so few of my Australian brothers and sisters know that it exists. And in saying that, it does not mean that this current constitutional project requires us to traverse the politics of race in Australia and pursue a soft agenda as exemplified by the state parliament's approach to recognition plus non-legal effect clause. That is arguably, a type of non-recognition when accounting for the no-legal effect clause (that really defines this trend) and is utterly unnecessary in an ordinary Act of Parliament.

But I think what the consensus report of the Expert Panel tried to do in its delicately poised treatment of Australian history and recommendations for constitutional alteration, what the *Recognise* campaign is admirably and skillfully trying to do and what we as a nation must try to do, is marry the two rituals in a way that the implied reader is all Australians: that it speaks to all.

So what is the Expert Panel and what did it do?

III The Recognition Project and the Expert Panel

A *Terms of Reference*

In 2010 there was a hung Parliament. In negotiating for power, the Greens and the Independent Rob Oakeshott asked Prime Minister Julia Gillard to move upon the long-held multi-party support for constitutional recognition.[11] The Prime Minister issued Terms of Reference in very late December 2010 and constituted a panel to report to the government within a year on possible options for constitutional change.[12] An Expert Panel to lead a broad national consultation and community engagement program to seek the views of a wide spectrum of the community, including from those who live in rural and regional areas, and to work closely with organisations, such as the Australian Human Rights Commission, the National Congress of Australia's First Peoples and Reconciliation Australia.

In performing this role, the Expert Panel was to have regard to: key issues raised by the community in relation to Indigenous constitutional recognition; the form of constitutional change; approaches to a referendum that were likely to obtain widespread support from political parties and the broader community; and the implications of any proposed changes to the *Constitution* including advice from constitutional law experts.[13] The panel had 18 members with six ex officio members and included Fred Chaney, Mark Leibler, Henry Burmester QC, Graham Bradley, Glenn Ferguson, Noel Pearson, Patrick Dodson and Marcia Langton, as well as Senator Rachel Siewert, Independent Rob Oakeshott and Ken Wyatt.

The Expert Panel agreed on four principles to guide its assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander peoples, namely that each proposal must:

1) contribute to a more unified and reconciled nation;
2) be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
3) be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
4) be technically and legally sound.[14]

11 Expert Panel Report, above n 3, 211.
12 Ibid.
13 Ibid.
14 Ibid xi.

We conducted a public consultation process that involved: the issuing of a Discussion Paper on Options for Constitutional Recognition and a public submissions process, five months of public meetings and events around Australia and, polling and focus groups including consultations with constitutional lawyers and Aboriginal and Torres Strait Islander leaders on the draft recommendations.[15] The final recommendations of the panel were very much based upon the public submissions and the views of the public including at public meetings and events. In addition the Panel was conscious of the fact that we were building upon a foundation that had already been laid down over three decades of reports and recommendations for reform of the *Constitution* in regard to Aboriginal and Torres Strait Islander peoples both substantively and symbolically and that included: the 1983 Senate Standing Committee on Constitutional and Legal Affairs;[16] the 1988 Constitutional Commission;[17] the Social Justice Package arising from the *Mabo* decision;[18] the 1998 *Constitutional Convention*;[19] the Council for Aboriginal Reconciliation in 2000;[20] the 2003 Senate Legal and Constitutional Affairs Committee; the 2008 Australia 2020 Summit[21] etc. What I am emphasising is that the advocacy for recognition and reform, whether it be the race power, an agreement-making power or a symbolic statement of recognition in a preamble, has not been an *indigenous-only* project; it is one that has been shared along the way by Indigenous and non-Indigenous, progressives and conservatives alike.

B *Recommendations*

The culmination of the work of the Expert Panel was a comprehensive report to the Prime Minister and the government that reflected the length and breadth of conversations that had occurred with the Australian people including the Aboriginal and Torres Strait Islander communities. Importantly, this included a chapter devoted to an explanation of why race is a 'biologically and scientifically defunct term' that is 'socially constructed, imprecise,

15 Ibid.

16 Senate Standing Committee on Constitutional and Legal Affairs, *Two hundred years later ...: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people* (AGPS, 1983).

17 Australian Constitutional Commission, *Final Report of the Constitutional Commission* (AGPS, 1998).

18 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1996* (Human Rights and Equal Opportunity Commission, 1997).

19 *Australian Constitutional Convention*, *Report of the Constitutional Convention* (Department of Prime Minister and Cabinet, 1998).

20 Council for Aboriginal Reconciliation, *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and Commonwealth Parliament* (Commonwealth of Australia, 2000), available at <http://www.austlii.edu.au/au/orgs/car/finalreport/index htm>.

21 Commonwealth, *Australia 2020 Summit: Final Report* (Department of the Prime Minister and Cabinet, 2008) 226.

arbitrary and incapable of definition or scientific demonstration'.[22] The panel felt that 'although the concept of "race" is incapable of scientific definition or demonstration, in Australia (as elsewhere) it persists as a powerful and persistent focus of social identity and exclusion and remains a constitutionally available ground for legislation.'[23]

In addition, prominent among all Aboriginal and Torres Strait Islander communities was the question of sovereignty (whether recognition would foreclose on the unsettled question of Aboriginal sovereignty) and the possibility of an agreement-making power or a treaty in the Constitution. The panel included two chapters on Sovereignty and Agreement-making to reflect those concerns but did not make recommendations based on our methodology that militated against any options unlikely to be supported by an overwhelming majority of Australians from across the political and social spectrums.

1 *Section 25 be repealed*

Recommendation 1: That section 25 be repealed.[24] Section 25 is a provision which contemplates the possibility of State laws disqualifying people of a particular race from voting at State elections.[25] There is multi party support for the deletion of section 25 and universal agreement among commentators that it should be deleted.

2 *Section 51 (xxvi) be repealed*

Recommendation 2: That section 51(xxvi) be repealed.[26] Many of you would recall that in a 1967 referendum, section 51(xxvi) was amended to remove the words '… other than the aboriginal people in any State…'. Until this point, the federal Parliament did not have power to make laws for Aboriginal people in states. The removal of the words 'other than the aboriginal people in any state' conferred upon the federal parliament the power to make laws in this area: that the Parliament shall have power to make laws with respect to the people of any race. And, since 1967, the Commonwealth Parliament has enacted laws pursuant to section 51(xxvi) specifically applicable to Aboriginal and Torres Strait Islander Australians in the areas of cultural heritage, corporations and native title. However, the amended section 51 (xxvi) also presented us with unintended consequences (or intended according to some) and that was that

22 Expert Panel Report, above n 3, 139.
23 Ibid142.
24 Ibid xviii.
25 Ibid 137.
26 Ibid xviii.

the power as expressed did not contain any limitations by which to prevent its adverse application against a people of any race.

The panel was persuaded by the many submissions made to it that there was now a very reasonably established legal basis – as a consequence of High Court jurisprudence – that there is nothing in section 51 (xxvi) to prevent its adverse application against a people of any race. These submissions referred to cases such as *Kartinyeri v Commonwealth*[27] that 'the power may be used to discriminate against or for the benefit of the people of any race'.[28] Rather than amending the race power, the submissions and consequently the panel leaned toward outright deletion and replacement with a new head of power for two reasons: (a) original intent and b) risk of losing Commonwealth legislative competence for making laws for Aboriginal and Torres Strait Islander Peoples.

(a) Original intent

There was overwhelming concern for the unequivocally racist sentiment that is attached to the history of the section 51(xxvi) of which the *Constitutional Convention* debates of the 1890s make very clear and continue to inculcate the section. Australia's first Chief Justice, Sir Samuel Griffith, first proposed the clause for a grant of exclusive legislative power to the Commonwealth people with respect to the affairs of people of any race to whom it is deemed necessary to make special laws not applicable to the general community and that did not extend to authorise legislation with respect to the aboriginal native race in Australia. As noted in the Expert Panel's Report, in 1898, Edmund Barton – Australia's first prime minister and a founding justice of the High Court of Australia – observed that the race power was necessary, so that 'the moment the Commonwealth obtains any legislative power at all it should have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[29] And in arguing against a Commonwealth head of power, the future premier of Western Australia, Sir John Forrest, contended:

> We have made a law that no Asiatic or African alien can get a miner's right or do any gold mining. Does the Convention wish to take away from us, or, at any rate, not to give us, the power to continue to legislate in that direction? ... We also provide that no Asiatic or African alien shall go on our goldfields. These are local matters which I think should not be taken from the control of the state Parliament.[30]

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

28 Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 206.

29 Expert Panel Report, above n 3, 15.

30 Ibid.

Forrest also observed that '[i]t is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it but still it is so.'[31] The Expert Panel in its research found that the tenor of the *Convention* debates, revealed a clear intent for laws applying discriminatory controls to 'coloured races' and informed the case for the deletion of the section in its entirety.

(b) Other heads of powers

The Expert Panel identified risks involved in simply deleting section 51(xxvi) outright without replacing it. For example, would Aboriginal and Torres Strait Islander corporations be able to be incorporated under legislation enacted using the corporations power in section 51(xx) of the *Constitution*.[32] Another example is the provision of benefits. Some benefits, such as the Aboriginal Study Assistance Scheme, may continue to be supported under the social security power in section 51(xxiiiA), but this section may not support all measures designed to address Aboriginal and Torres Strait Islander disadvantage.[33] So, the risk of a Commonwealth loss of legislative competence in the absence of the conferral of a new head of power persuaded the Expert Panel to recommend the deletion of the race power and to make a third recommendation for the insertion of a new head of power titled Section 51A.

3 *Insert a new section 51A*

Recommendation 3: section 51A: This new legislative power has in effect two parts:

1 a statement of recognition as introductory words to a new head of power;
2 new head of legislative power replacing s 51 (xxvi).[34]

This recommendation is an important one because the popular belief that recognition in a preamble is what this project is about is not accurate. Why will there be no preamble? We know that the *Australian Constitution* does not contain a preamble, although there is a preamble to the Imperial *Commonwealth of Australia Constitution Act 1900* (Imp), by which the Parliament at Westminster enacted the Constitution in 1900. We know that the first eight clauses of the Act, referred to as the 'covering clauses', contain

31 Ibid 16.
32 Ibid 147.
33 Ibid.
34 Ibid xviii.

mainly introductory, explanatory and consequential provisions. The ninth clause contains the *Australian Constitution*. The Expert Panel decided against placing a statement of recognition in the preamble to the *Imperial Act* because it was the 'orthodox view' that s 128 of the *Constitution* cannot be used to amend the Preamble to the *Commonwealth of Australia Constitution Act*.

In addition, the panel was persuaded by submissions including a comprehensive submission by Professor Anne Twomey, of the challenges/problems with placing a Preamble at the beginning of the *Australian Constitution* contained in the ninth clause.[35] As I indicated before, this is an important finding of the Expert Panel because the idea of recognition in a Preamble to the Constitution is where the current project sits in terms of the political and popular imagination. It is a hang-over from the 1999 referendum.

Yet during our consultations around Australia we found that those Australians who had turned their mind to this question had thought about the experience of 1999 and were eager to avoid the travails associated with that Preamble (of which my literary hero Les Murray I think was unfairly impugned). Of course one such challenge would be that many, many groups would also want to be, and rightly so, included in such a preamble. After all we are a nation that has had waves and waves of migration and there are many groups that make up who we are as Australians. However our terms of reference confined us to consider options for Indigenous recognition and therefore we were keen to avoid the experience of 1999 by opening that up.

(a) No legal effect clause

Another consideration here is the issue of the no-legal effect clause. This issue arose during the consultations because of the States' trend toward recognition: Victoria, Queensland, New South Wales and South Australia have all moved to amend their preambles to recognise Aboriginal and Torres Strait Islander peoples. Queensland's Preamble, by way of example, recognises: 'The Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and ancient and enduring cultures, which deepen and enrich the life of our community'. In addition, section 3A of the Act provides that in acknowledging Aboriginal and Torres Strait Islander peoples, the Parliament does not create in any person any legal right, or give rise to any civil cause of action or affect the interpretation of the *Queensland Constitution* or any other law in force in Queensland.

35 Ibid 110.

Section 2 of New South Wales's *Constitution*, the *Constitution Act 1902* (NSW), reads:

> (1) Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State's first people and nations.
>
> (2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
>
> (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
>
> (b) have made and continue to make a unique and lasting contribution to the identity of the State.
>
> (3) Nothing in this section creates any legal right or liability, or gives rise 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 value of a 'symbolic gesture of reconciliation' is significant. And a Preamble can act as a powerful instrument of change so I do not want to undervalue the achievement of the states in securing recognition plus a no-legal effect clause. As an exercise in the expression of collective beliefs, a Preamble can represent the transformative potential of words because of what we just explored with Toni Morrison: the implied reader.

But what was striking from our conversations as we travelled around Australia, and particularly from the Aboriginal and Torres Strait Islander peoples, was that a Preamble was almost universally not desired, especially if it contained a no-legal effect clause frequently disparaged as tokenistic. As one Australian put it to us within a community consultation: 'what is the use of doing it, if you are going to say it has no effect?' On the basis of this sentiment from the Australian people we placed the statement of recognition at the beginning of this new s 51A.

The new 'section 51A' was to read, along the following lines:

> **Section 51A Recognition of Aboriginal and Torres Strait Islander peoples**
>
> (1) Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
>
> (2) Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
>
> (3) Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

(4) Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

(5) 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 peoples.[36]

4 *Insertion of a new section 116A: Prohibition of a racial discrimination*

Recommendation four: Our fourth recommendation was for a prohibition of racial discrimination to be known as 'section 116A':

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.[37]

I will return to this in a moment because I wanted to end on it.

5 *Insertion of a new section 127A: Recognition of languages*

Recommendation five: And finally recommendation 5: That a new 'section 127A' be inserted, along the following lines:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.[38]

C *Racial non-discrimination*

I wanted to conclude by returning to recommendation 4 – a racial non-discrimination clause because one of the responses to this was that we had overreached our mandate and that a racial non-discrimination provision was not relevant to the notion of 'recognition'. The word 'recognition' used in the Terms of Reference for the Expert Panel was adopted by the government and not the Expert Panel; it was no doubt partly something that was a hang-over from the 1999 referendum and in part mirrored the language or sentiment of multi-party election platforms leading into the 2010 federal election, and it

36 Ibid xviii.
37 Ibid.
38 Ibid.

echoed the fashion in State Parliaments of the recognition of Aboriginal and Torres Strait Islander Peoples in state Constitutions.

Regardless, 'recognition' is the language that has been used and the language we need to work with. One of the challenges of the word 'recognition' is that, unlike the word 'reform' for example, it requires us to engage in not so technical arguments; even though that is what this project is about. It requires us to engage with primarily emotion and sentiment: what is it to recognise someone or recognise a 'peoples'?

And that is why I started with the story of Cherbourg first. The view of the panel is that a racial non-discrimination clause is an integral part of a package of amendments to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. Australia is already committed to the principle of racial non-discrimination as reflected in the *Racial Discrimination Act 1975* (Cth). It is accepted in legislation and policy in all Australian jurisdictions. Constitutional lawyers submitted to the panel that discrimination is a very familiar concept for the courts, and so applying it in a new context isn't a great stretch and is also contained in many constitutions around the world. In addition, there is also a wealth of overseas jurisprudence and international law on this issue, on which the courts can draw. It was noted that the clause will primarily place the additional burden on the Commonwealth Parliament and that was a popular idea in the community.

Of course that alone does not neutralise Australian exceptionalism when it comes to 'rights', given that exceptionalism is regarded today as being a virtue and an argument in its own right. But the fact is that the submissions to the Panel overwhelmingly supported a racial non-discrimination provision and it was our job to reflect what the community was thinking. Noel Pearson argued it best when he said, partly in response to this critique, that:

> Elimination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past. So extreme was the discrimination against Indigenous people, it initially even denied that we existed. Hence, Indigenous Australians were not recognised. Then, Indigenous people were explicitly excluded in our Constitution. Still today, we are subject to racially targeted laws with no requirement that such laws be beneficial, and no prohibition against adverse discrimination.

You cannot separate this recognition project and the recommendations of the Expert Panel from the history of this country, the stories that Australians have to tell. We had conservative members who were not at all sympathetic to a racial non-discrimination clause who were moved by stories like Cherbourg

to support it. The consensus in the report and these recommendations is no mean feat, can I tell you. It in itself was a journey toward reconciliation for those involved. These recommendations were not made lightly.

We rehearsed endlessly what the automated response will be from those who may be predictably and publicly opposed to 'rights' and that played out on cue – 'back door' bill of rights or a 'one clause' bill of rights – and will continue to play out. And that is not to diminish the genuine and legitimate concerns they have about inserting 'rights' into the *Constitution* whether it be judicial activism or the impact upon other heads of power. But the report is filled with the voices of ordinary Australians making a contribution, having a go at something our leaders have so far, failed to do: engaging with the very difficult question of race and our racist history.

Our news polling showed 80 per cent of Australians at the end of the process supported a non-discrimination clause;[39] no other recommendation of the Panel received such overwhelming support. This is probably because it is intuitive to most Australians: the notion that we should be equal before the law and no-one should be discriminated against on the basis of their race. And in the non-discrimination clause containing a special measures provision, Australians also understood intuitively the notion that in some cases, there are people in our community who need additional assistance to get to the same level of capability as other Australians and this is embedded in our commitment to universal health care, the welfare system and affordable state housing.

IV Conclusion

Not everyone can visit places like Cherbourg and not everyone is interested in doing so. And so it was that we, as an Expert Panel, discovered there was a thirst out there in the community for more knowledge about Aboriginal history; more knowledge about the history of reserves like Cherbourg and the Protection Era. There was a hesitance or a caution on the part of those who felt they did not know enough about Aboriginal people to voice an opinion, or become involved; they were not silent because they were racist or disengaged but they earnestly did not know how to enter the discussion. It is not that people wanted to feel guilty or to apologise but to understand where Aboriginal people were coming from. We captured that sentiment in the final report of the Expert Panel: a palpable universal sentiment in black and white Australia that they needed to know more about Australian history, not just military feats and defeats, but all facets of Australian history including our successive waves of

39 Ibid 91.

successful migration as well as the White Australia Policy. There were people who did not know about the White Australia Policy, there were people who did not know about the Frontier Wars or Stolen Wages and many that did not know of the Protection era: which is a great pity because it does provide some explanation for the lack of intergenerational wealth and intergenerational trauma. Not an excuse for behaviour today but an explanation.

In addition, there were people who felt strongly that they grew up on this land, were born to this country and saw Aboriginal culture and Aboriginal history as something that was the common inheritance of all Australians. And many Aboriginal people agreed with that. They want Australians to learn more about the culture and learn some of the languages. Of course there were Aboriginal people who did not support that notion but, all in all, people were open and frank and generous and public in their opinions about racism in Australia and the place of Aboriginal and Torres Strait Islander people in the story of this country.

For Australians to learn about that history, to know that history, is not to diminish who we are or to adopt a black armband view of history. The nature of our democracy is that in the so-called 'culture wars', the pendulum simply swings back and forth each decade as each new government dictates the way that history will be viewed; and then it swings back. To the victor goes the spoils: that is the rule in our democracy. But I do urge you, if you have not already, to visit Cherbourg and the Ration Shed; it is one of the most beautiful and difficult monuments to Australian history. Here you have a community that has reclaimed its history and made the Ration Shed – the site of so much humiliation and anger and pain – the centrepiece of its town. If this mob in Cherbourg can do it, with grace, and humour and gravitas why cannot we do it as Australians? And this is the challenge that lies ahead for us.