SUBSTANTIVE RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN THE CONSTITUTION

by Matthew Stubbs

INTRODUCTION

The project to secure constitutional recognition of Aboriginal and Torres Strait Islander peoples continues. This piece begins with a survey of progress on symbolic recognition. It then addresses the current national discussion, identifying debates about the nature of recognition, and a range of broader issues for the future. The major focus of the piece is then an analysis of the primary models that are under consideration to achieve substantive recognition of Australia's first peoples in the *Constitution*.

PROGRESS ON SYMBOLIC, STATUTORY RECOGNITION

Recognition of Aboriginal and Torres Strait Islander peoples in the *Constitution* is not the first step in updating Australia's constitutional arrangements to remedy the extraordinary constitutional silence as to the existence and contribution of Australia's first peoples. Recognition in constitutional statutes has already been achieved in five of the states, and symbolic recognition also exists under Commonwealth law.[1]

Commencing with Victoria in 2004,[2] state constitutional recognition progressed to Queensland in 2009,[3] New South Wales in 2010,[4] South Australia in 2013[5] and Western Australia in 2015.[6] The only remaining state is Tasmania, where a parliamentary report in late 2015 recommended 'recognition of Aboriginal people as Tasmania's First People'.[7] On 7 June this year, a draft wording was released for consultation, with submissions due by 29 July.[8] Pending the outcome of that consultation, with apparent multi-party support, it appears likely that the final act of state constitutional recognition will occur in 2016.

Wording similar to that contained in the state constitutions was enacted in the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth). Initially subject to a sunset clause to expire after two years, this was amended in 2015 to now expire after five years, in the hope that the *Constitution* will be amended in the interim.

These recognitions all contain a fundamental statement recognising Aboriginal (and, where appropriate, Torres Strait Islander) peoples as the 'first peoples' of the state (or of Australia). They expressly acknowledge aspects of connection to country: first occupation of, traditional custodianship of, and continuing connection to the land and waters. The majority recognise Aboriginal and Torres Strait Islander cultures, heritage and languages. A minority go further to address the exclusion of Indigenous peoples from past constitutional practices, and one (South Australia) admits to the 'injustice and dispossession' suffered by its Aboriginal peoples. Only one expressly states the motivation that is surely common to all: 'reconciliation'.[9]

Two common features distinguish these statements of recognition from the proposed changes to the *Constitution*. First, they are all purely symbolic—not only do they not contain any provisions offering any new protections of existing rights or creating any new rights or freedoms for Aboriginal and Torres Strait Islander peoples, in all states except Western Australia they are accompanied by an express 'no legal effect' clause.[10] Second, all take the form of ordinary statutory provisions and do not enjoy any form of entrenchment.

Nonetheless, symbolic recognition is important: these constitutional amendments redress the remarkable silence in the constitutive documents of the states about the prior and continuing existence and contribution of Aboriginal and Torres Strait Islander peoples, whose cultural traditions are among the oldest in the world. Moreover, broad progress at this level gives some hope for the difficult task of amending the *Constitution*.

SUBSTANTIVE, NOT MERELY SYMBOLIC, RECOGNITION

Recent developments have highlighted that *recognition* is more than symbolism. As Megan Davis and Marcia Langton AM have recently written: 'Recognition lies on a spectrum of reform that extends from acknowledgement through to concrete and substantive rights.'[11]

Of course, the starting point remains recognition as opposed to silence. As Ken Wyatt AM MP, Chair of the Joint Select Committee on Constitutional Recognition for Aboriginal and Torres Strait Islander Peoples ('the JSC'), explained in the Foreword to the JSC Report of June 2015: 'The absence of Aboriginal and Torres Strait Islander peoples from the *Constitution* makes silent and renders invisible the world's oldest continuing culture.'[12] This silence is more than cosmetic. As Megan Davis and Dylan Lino have explained:

> There is a sense that, beginning with their exclusion from the constitutional drafting process in the late 19th century Aboriginal and Torres Strait Islander people have on the whole been marginalised by both the terms and effect of the *Constitution*.[13]

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But that is only part of the story. Kirstie Parker put it directly: 'Understand this: any reform of the *Constitution* must involve substantive change and lay the foundation for the fair treatment of our peoples.'[14] Noel Pearson elaborated on the 'difference between mere symbolism and a practical reform of practical benefit', explaining:

> Reforms that involve an increase in power—by giving Indigenous peoples an increased voice, participation, authority, or representation in our affairs—or reforms that involve an increase in freedom—by guaranteeing us freedom from discrimination, for example … are reforms worth pursuing. These are reforms worthy of constitutional amendment. A recognition proposition that involves no practical reform, no shift in power and no increase in freedom is a red herring and a false offer. It would amount to beads and trinkets.[15]

Pearson's comments highlight the importance of 'substantive' recognition, and point to its two most likely manifestations—an Indigenous body to advise the federal Parliament, and constitutional protection from discrimination for Aboriginal and Torres Strait Islander peoples.[16] The remainder of this article will examine the most likely models for each.

MODELS FOR CHANGING THE CONSTITUTION

A guide to the potential models is the communiqué released after the meeting of the Referendum Council on 10 May 2016.[17] Indicating that consultations would occur throughout the second half of 2016, the communiqué identified 'proposals that should form the basis of consultation'—which can be grouped into four categories, the first two of which enjoy almost unanimous support across the spectrum of Australian life, while the second two might be more controversial. The expression of the models given below is largely derived from the JSC Report—which, after all, made significant advances in model selection.[18]

ACKNOWLEDGEMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

The form of acknowledgement is likely to closely resemble the core features of the state constitutional provisions examined earlier in this article, as well as the Commonwealth statutory provision. The most prominent example in the JSC Report was as follows:

> **Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
>
> **Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
>
> **Respecting** the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;
>
> **Acknowledging** that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage.[19]

For the most part, this is an uncontroversial proposal, notwithstanding the acknowledged inherent difficulty of changing the *Constitution*.

REMOVAL OF RACE-BASED PROVISIONS OF THE CONSTITUTION THAT PERMIT DISCRIMINATION AGAINST ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Sections 25 and 51(xxvi) of the *Constitution* currently provide as follows:

> **25. Provision as to races disqualified from voting**
>
> For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.
>
> …
>
> **51. Legislative powers of the Parliament**
>
> 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: …

(xxvi) the people of any race for whom it is deemed necessary to make special laws.

The removal from the *Constitution* of these sections, which support discriminatory legislation against Aboriginal and Torres Strait Islander peoples,[20] is widely supported.

INSERTION OF A POWER TO MAKE LAWS WITH RESPECT TO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES, SUBJECT TO A NON-DISCRIMINATION PROVISION

If s 51(xxvi)—the races power—is removed from the *Constitution*, it will need to be replaced with a power to make laws with respect to Aboriginal and Torres Strait Islander peoples (in order to support a variety of existing beneficial legislation, including, for example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)).[21] Various options for such a power have been suggested, and the JSC Report advocated a 'person's power' approach (as opposed to a subject-matter or purposive power approach)—a sensible choice that has been addressed elsewhere.[22]

Some controversy remains among possible corollaries to such a power. One option would be not to include any non-discrimination provision, leaving Aboriginal and Torres Strait Islander peoples subject, as a matter of constitutional law, to adverse discrimination by the parliament at will (the present situation). The other three options are all variants on non-discrimination provisions as a corollary to the proposed power, as follows:

OPTION 1: EXPERT PANEL RECOMMENDATION

51A. Recognition of Aboriginal and Torres Strait Islander Peoples

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.

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.

OPTION 2: JSC REPORT—HENRY BURMESTER, MEGAN DAVIS AND GLENN FERGUSON

80A.

(1) … the Parliament shall, subject to this Constitution, have power to make laws with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.

(2) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

OPTION 3: JSC REPORT—PUBLIC LAW AND POLICY RESEARCH UNIT, UNIVERSITY OF ADELAIDE

60A. Recognition of Aboriginal and Torres Strait Islander Peoples

(1) 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.

(2) A law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples.

As Noel Pearson has explained, any non-discrimination clause risks the objection that it will 'transfer power to the High Court' or 'undermine parliamentary supremacy'.

The essential differences between the three options are a matter of scope:

	Applies to laws which:	Applies to laws passed by:
Option 1	'discriminate on the grounds of race, colour or ethnic or national origin'	'The Commonwealth, a State or a Territory'
Option 2	'discriminate against … Aboriginal and Torres Strait Islander peoples'	The Commonwealth only
Option 3	'discriminate adversely against Aboriginal and Torres Strait Islander peoples'	'the Commonwealth, a State or a Territory'

The practical danger inherent in Option 1 is clear—any provision that affects more than just Aboriginal and Torres Strait Islander peoples might be cast as overreaching in public debates surrounding an eventual referendum proposal. Among the other two, I have argued that:

> [t]he University of Adelaide model … better responds to the historical experience of Aboriginal and Torres Strait Islander peoples and their unique place as Australia's first peoples and nations, but is less pragmatic: the JSC found 'the intent … admirable' but worried 'it may prove contentious'.[23]

The real choice is likely to be between one of Options 2 or 3, or no non-discrimination clause at all. As Noel Pearson has explained, any non-discrimination clause risks the objection that it will 'transfer

power to the High Court' or 'undermine parliamentary supremacy'.[24] Senator Patrick Dodson has similarly noted that:

> Governments do not like it when the validity of the laws they pass are challenged in the High Court, and any reform believed to shift power from elected politicians to unelected judges will likely face resistance.[25]

These observations clearly identify the risk, but failing to include a constitutional protection against discrimination would short-change Aboriginal and Torres Strait Islander peoples, who, as Ken Wyatt has stated 'will accept nothing less than a protection from racial discrimination in the *Constitution*'.[26] Patrick Dodson explains why:

> Aboriginal and Torres Strait Islander peoples have little cause to trust governments and the democratic parliamentary process . . . Successive governments, both federal and state, have eroded rather than protected our rights.[27]

Without a non-discrimination clause, most Aboriginal and Torres Strait Islander people are unlikely to support constitutional change. Whatever the objections to transferring power from parliament to the High Court, or the concerns about the potential effectiveness of High Court enforcement of a non-discrimination clause,[28] substantive recognition must offer protections to Indigenous people. A constitutional non-discrimination clause is the best way to achieve this. However, because of concerns about public acceptance of a non-discrimination clause, a proposal to increase and formalise Indigenous influence on the parliament has emerged as a possible alternative mechanism for securing some protection for Aboriginal and Torres Strait Islander peoples.[29]

CREATION OF AN ABORIGINAL AND TORRES STRAIT ISLANDER BODY TO ADVISE THE PARLIAMENT ON INDIGENOUS ISSUES

Noel Pearson has been the primary advocate of what he has described as 'a constitutional guarantee of Indigenous participation and consultation in the political processes',[30] which would arise from the creation of an Aboriginal and Torres Strait Islander body which can advise and seek to influence the actions of the parliament.

Anne Twomey has proposed the following model:

> **60A.**
>
> (1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name], 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.[31]

It is notorious that Aboriginal and Torres Strait Islander people have been members of federal Parliament on only a handful of occasions, and that Indigenous voices have frequently been ignored by politicians. In this context, the advisory body is intended to 'guarantee Indigenous people a better say in the nation's democratic processes with respect to Indigenous affairs'.[32]

Of course, an advisory body is just that—advisory only. Compliance with even the obligation to 'give consideration' to its views would be non-justiciable.[33] These are inherent weaknesses. Michael Mansell has argued that: 'Relying purely on moral persuasion and rational argument, matters politicians usually ignore, the proposal is not a strong one.'[34] Indeed, an Indigenous advisory body may well suffer similar weaknesses to other bodies that can merely advise the parliament, such as parliamentary committees or statutory officers such as the ombudsman.[35]

However, as Cheryl Saunders AO has noted, there are examples of purely advisory bodies such as the Administrative Review Council having 'considerable influence'.[36] Moreover, the potential influence of the collective views of an institutionalised body of respected Aboriginal and Torres Strait Islander leaders upon parliament's processes should not be discounted. As Anne Twomey has argued, an advisory body would offer 'an active, rather than a passive, form of recognition' by giving Indigenous people 'a direct voice into Parliament in relation to the matters that affect them', thereby creating 'a form of living recognition'.[37] This might, as Melissa Castan and Megan Davis have put,[38] also offer hope for meeting Australia's international obligations to ensure self-determination for Aboriginal and Torres Strait Islander peoples. An Indigenous advisory body as a complementary measure, to operate alongside a constitutional non-discrimination clause, is worthy of serious consideration.

CONCLUSION

The process of state symbolic constitutional recognition of Aboriginal and Torres Strait Islander peoples approaches completion, and non-entrenched statutory symbolic recognition also exists under Commonwealth law. Changing the *Constitution* through the more arduous process of a referendum remains a work in progress.

The selection of a model for change is more than a matter of drafting, and the arduousness of the task is more than just the result of the requirements of s 128 of the *Constitution*—what Fred Chaney AO has called 'the tyranny of a referendum and the danger posed by the double majority requirement'.[39] Choosing a model requires the resolution of fundamental debates: over 'substantive' as opposed to merely symbolic recognition; over the appropriate institution to which to entrust the protection of Aboriginal and Torres Strait Islander peoples' interests; and over the even larger questions of self-determination, treaty or sovereignty.

The fundamental question of what 'recognition' of Aboriginal and Torres Strait Islander peoples in the *Constitution* means thus remains open. In two respects, clear answers can be given. First, purely symbolic recognition will not be acceptable to the majority of Indigenous Australians—recognition must be substantive, or it is not worth having. Second, recognition (in the sense used in this article) is a project about the *Constitution* as a constitutive national document; it neither advances nor hinders broader entitlements to self-determination, advocacy for treaty settlements, or claims to sovereignty.[40] There is no contradiction in Eddie Cubillo's statement: 'I support constitutional reform as well as treaty and sovereignty.'[41] Broader issues may be discussed as well, and may even displace constitutional change,[42] but the focus of this article has been purely constitutional.[43]

To the key remaining question as to whether substantive recognition should ultimately rest on the High Court or on an Indigenous body advising the parliament: it may be that the best answer is 'both'. Although each option has its strengths and weaknesses, there is no reason not to implement both—giving a voice in law-making, and some constitutional protection, to Aboriginal and Torres Strait Islander Australians. Only time will tell whether substantive recognition of Aboriginal and Torres Strait Islander peoples in the *Constitution* is successful and can achieve these noble aspirations.

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1 See, eg, Matthew Stubbs, '2016: The Year of 'Substantive' Progress on Constitutional Recognition for Aboriginal and Torres Strait Islander Peoples?' *Australian Public Law* (5 February 2016) <https://auspublaw.org/2016/2/2016-the-year-of-substantive-progress/>.

2 *Constitution Act 1975* (Vic) s 1A.

3 *Constitution of Queensland 2001* (Qld) preamble.

4 *Constitution Act 1902* (NSW) s 2.

5 *Constitution Act 1934* (SA) s 2. See, eg, Matthew Stubbs, 'Legal Recognition of Aboriginal and Torres Strait Islander Peoples' (2013) 35 *Law Society Bulletin* 14.

6 *Constitution Act 1889* (WA) preamble.

7 House of Assembly Standing Committee on Community Development, Parliament of Tasmania, *Inquiry into the Constitutional Recognition of Aboriginal People as Tasmania's First People* (2015) 7.

8 See Department of Premier and Cabinet, *Constitutional Recognition of Tasmanian Aboriginal People* (2016) Tasmanian Government <http://www.dpac.tas.gov.au/divisions/policy/constitutional_recognition_of_tasmanian_aboriginal_people>.

9 *Constitution Act 1889* (WA) preamble.

10 *Constitution Act 1902* (NSW) s 2(3); *Constitution of Queensland 2001* (Qld) s 3A; *Constitution Act 1934* (SA) s 2(3); *Constitution Act 1975* (Vic) s 1A(3).

11 Megan Davis and Marcia Langton, 'Introduction' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 12, 13.

12 Joint Select Committee on Constitutional Recognition for Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015) ('The JSC Report') v; Matthew Stubbs, 'Refining the Model for Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (2015) 26 *Public Law Review* 150.

13 Megan Davis and Dylan Lino, 'Constitutional Reform and Indigenous Peoples' (2010) 7 *Indigenous Law Bulletin* 3, 3.

14 Kirstie Parker, 'Building a New, Better Legacy' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016), 93, 97.

15 Noel Pearson, 'There's No Such Thing as Minimal Recognition—There is Only Recognition' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016), 150, 153.

16 See also, Patrick Dodson, 'Navigating a Path towards Meaningful Change and Reconciliation' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016), 164, 164–5.

17 Referendum Council on Constitutional Recognition for Aboriginal and Torres Strait Islander Peoples, 'Communiqué', (Department of the Prime Minister and Cabinet, 10 May 2016).

18 See, eg, Stubbs, above n 12, 150–2, 154.

19 *The JSC Report*, above n 12, xiv-xv, 26–7, 30–31.

20 As to *Australian Constitution* s 51(xxvi), see *Kartinyeri v Commonwealth* (1998) 195 CLR 337; as to *Australian Constitution* s 25, see Dylan Lino and Megan Davis, 'Speaking Ill of the Dead: A Comment on s 25 of the Constitution' (2012) 23 *Public Law Review* 231; see also, Anne Twomey, 'An Obituary for s 25 of the Constitution' (2012) 23 *Public Law Review* 125.

21 See, Asmi Wood, 'Constitutional Recognition: A Case for Less is More' in Davis and Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 100, 108.

22 Stubbs, above n 12, 151–2; see also, Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 83; Anne Twomey, 'The Race Power: Its Replacement and Interpretation' (2012) 40 *Federal Law Review* 413; Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36 *Sydney Law Review* 381.

23 Stubbs, above n 12, 152.

24 Pearson, above n 15, 158. See also, 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.

25 Dodson, above n 16, 168.

26 *The JSC Report*, above n 12, vi. See also, Eddie Cubillo, 'The Opportunity and the Challenge of Constitutional Recognition' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016), 64, 67.

27 Dodson, above n 16, 168.

28 See, eg, Michael Mansell, 'Is the Constitution a Better Tool than Simple Legislation to Advance the Cause of Aboriginal Peoples? in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016), 135, 139–41.

29 See, eg, Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition' *The Conversation* (online), 20 May 2015 <http://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038> ('Putting Words to the Tune'); 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; Gabrielle Appleby, 'An Indigenous Advisory Body: Some Questions of Design' (2015) 8 *Indigenous Law Bulletin* 3; Anne Twomey, 'An Indigenous Advisory Body: Addressing the Concerns about Justiciability and Parliamentary Sovereignty' (2015) 8 *Indigenous Law Bulletin* 6 ('Addressing the Concerns'); Megan Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise Through Democratic Participation' (2015) 8 *Indigenous Law Bulletin* 10; Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8 *Indigenous Law Bulletin* 15; Cheryl Saunders, 'Indigenous Constitutional Recognition: The Concept of Consultation' (2015) 8 *Indigenous Law Bulletin* 19; Fergal Davis, 'The Problem of Authority and the Proposal for an Indigenous Advisory Body' (2015) 8 *Indigenous Law Bulletin* 23.

30 Pearson, above n 15, 159.

31 Twomey, 'Addressing the Concerns', above n 29, 7; Twomey, 'Putting words to the tune', above n 29.

32 *The JSC Report*, above n 12, 34 quoting Cape York Institute, Submission No 38.2 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Parliament of Australia* (January 2015) 4.

33 Twomey, 'Addressing the Concerns', above n 29, 7–9; Morris, above n 29, 179–83.

34 Mansell, above n 28, 142–3; see also Morris, above n 29, 191–2.

35 See, for example, Fergal Davis, above n 29, 24.

36 Saunders, above n 29, 19.

37 Twomey, 'Addressing the Concerns', above n 29, 9.

38 Castan, above n 29; Megan Davis, 'The Point of View of Self-Determination', above n 29. See also: Morris, above n 29, 173–9.

39 Fred Chaney, 'Foreword' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 6, 9.

40 Dodson, above n 16, 165–6. See also, Megan Davis, 'Constitutional Recognition does not Foreclose on Aboriginal Sovereignty' (2012) 8 *Indigenous Law Bulletin* 12.

41 Cubillo, above n 26, 70.

42 See, eg, many of the contributions in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016).

43 Of course, there are commentators who regard any of the forms of constitutional change presently under consideration as insufficient. Notably, Michael Mansell has described these as 'cheap conscience cleansing' for the settler population in Mansell, above n 28, 135..

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