



Opinion by Centre  
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# Recognition of Indigenous Australians in the Constitution

When former Prime Minister Kevin Rudd opened Parliament with an apology to the stolen generations, his actions were widely acclaimed as an acknowledgement of Australia's Indigenous history that was long past due, and of significant value; it was a step in remedying what WEH Stanner in 1968 called the 'great Australian silence' over Indigenous history. Although the Apology did not seek to directly address any of the constitutional or legislative deficiencies in our legal system, it did hold great symbolic and therapeutic meaning, not only for those Indigenous Australians to whom the Apology was directed, but for the broader Australian community. Now, the usually slow orbit for constitutional reform has presented the opportunity for a long overdue referendum on meaningful constitutional recognition of Indigenous Australians.

Our Constitution currently fails to safeguard the basic human rights standards that we might (mistakenly) assume are recognised and enforced. The federal Constitution expressly protects few fundamental rights and freedoms, even those that are stipulated have been interpreted narrowly by the High Court. Aboriginal and Torres Strait Islander people have suffered from this neglect, and been excluded in the history, the terms and the effect of the Constitution.

We now have an opportunity to modernise and reform our Constitution to reflect the reality of prior Indigenous ownership, custodianship and sovereignty of Australia, and to recognise rights of equality, non-discrimination, and culture. Although the 1967 referendum (which enabled the Commonwealth to make "special laws" for Indigenous people and mandated that they be included in the census), is considered one of the most 'successful' amendments to the Constitution, it did not adequately address the issues of recognition of Indigenous Australians and their legal and constitutional protection. What changes should we now embrace? It is important to find the right balance between identifying appropriate constitutional reform, and communicating the importance and necessity of reform to the wider Australian community. To remedy the injustices and omissions of the past, the 'recognition referendum' should include a number of reforms, however with that comes the risk of community and political division on the content and impact of the proposed changes.

To start with, a new preamble to the Constitution is needed. It should embrace the true history and the special culture of Indigenous Australians, and their unique contribution to Australia. The constitutions of Victoria, NSW and Queensland have already successfully been altered to include similar acknowledgement.

Also, section 25, now an antiquated, redundant and racist section (dealing with the procedural matters where particular races are excluded from voting), reflects past discrimination against Indigenous peoples' rights to vote. It should be deleted, but doing so will make no particularly great change to the ways the Commonwealth parliament makes laws regarding Indigenous Australians.

At the other end of the reform spectrum would be amendments to include specific constitutional protection of Indigenous rights, designated Indigenous seats in parliament, a guarantee of 'free prior and informed consent', or a guarantee of self-determination. The protections adopted by Canada are often raised as an example.

The inclusion of specific Indigenous rights in the Australian Constitution would be appropriate and would strengthen the validity and integrity of our constitutional system.

Section 51(xxvi), which enables the Commonwealth to make "special laws" affecting particular races, must be deleted and replaced by a positive grant of power to make laws for Aboriginal and Torres Strait Islander people.

To ensure the Commonwealth makes only 'beneficial' laws, there must be a constitutional prohibition on racial discrimination inserted. Many Constitutions contain such guarantees, and this would be consistent with Australia's international commitments under the Convention on the Elimination of Racial Discrimination (CERD), and other human rights treaties. A general 'equality clause' is a desirable inclusion in a Constitution that seriously lacks human rights standards. Such a clause could guarantee 'equal treatment before and under the law, and equal protection and benefit of the law without discrimination' as found in many comparable nations' constitutions. However this goes further than recognising Australia's Indigenous people, and so may struggle to be approved at referendum. A more focused 'anti-discrimination' clause, specifically prohibiting racial discrimination in the terms Australia has already adopted in the Racial Discrimination Act 1975 (Cth) or the CERD should be adopted. Such a 'non-racial discrimination' clause should also provide that the Commonwealth and the states are still able to make laws that redress disadvantage, or are protective of Indigenous culture, language and identity. This would allow laws that address strategies promoting substantive (not just formal) measures of equality, and that recognise the special place of Australian Indigenous culture. It also would be consistent with Australia's obligation to protect Indigenous culture under Article 27 of the International Covenant on Civil and Political Rights (Australia signed onto this in 1980) and the UN Declaration on the Rights of Indigenous People (we endorsed this in 2009).

The Commonwealth (and the states) also should be empowered to make legally enforceable agreements with Indigenous communities. Agreements are currently being made all around Australia, such as Indigenous Law Use Agreements, Native Title determinations, land rights grants as well as many other forms. This agreement making power might ultimately also apply to a Treaty, or negotiated settlement agreement, which recognises the distinct rights of Australian Indigenous people, and sets in place national standards. Such an agreement is only realistic if there is widespread community momentum in favour of embarking on the process; however enshrining an agreement making power in the Constitution (in a section modelled on s 105A in state agreements) would permit the Commonwealth to make such a comprehensive agreement without recourse to a second referendum.

Now that the twin orbits of political and public sentiment may finally have coalesced, and the opportunity to recognise the special place of Indigenous people in our constitutional and legal framework has arrived, let's not allow arguments about imperfect timing or political timidity to eclipse the 'constitutional moment'; coherent and concrete changes to our governing legal instrument are now overdue.

**Discussion papers and other materials on the debate on constitutional recognition of Indigenous Australians can be found at [www.youmeunity.com.au](http://www.youmeunity.com.au)**