

History of Constitutional Recognition

ANTAR



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“I think it’s important for the future generations of my family to come, to know that we were formally acknowledged. It’s not about me and what I’m going to get out of it because it’s just been a long, hard, bloody struggle to get the social justice. But this issue is about the proper recognition of the place of our people in our country, in our land, finally.”¹

Pat Turner

The Australian Constitution has, from its inception, not only failed to properly include Aboriginal and Torres Strait Islander peoples, but failed to protect them from legislatively enshrined racism.² What’s more, once the constitutional amendments proposed in the 1967 Referendum were approved, any reference to Aboriginal and Torres Strait Islander peoples was entirely removed from the Constitution.³ This means that there is currently no formal recognition or acknowledgment of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia in the Constitution, no constitutional guarantee of fair treatment or protection from racial discrimination and no permanent safeguard to ensure they have a role in the decision-making that affects their lives and communities. Nor is there any constitutional acknowledgement of the value of their cultures, languages and rights as the First Peoples of the continent.

For as long as the Constitution has been in effect, Aboriginal and Torres Strait Islander peoples have campaigned for greater inclusion, rights-protection and respect.

¹ Speaking at a forum in Tasmania as quoted in Peter Dawson, [‘On Self Determination and Constitutional Recognition’](#), *Indigenous Law Bulletin* Vol 8, Issue 16, (2015): 4.

² Shelley Bielefeld, [‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Exploring the Limits of Benevolent Language’](#) *Indigenous Law Bulletin* Vol 8, Issue 15, (2014): 22-26.

³ Harry Hobbs, [‘The Road to Uluru: Constitutional Recognition and the UN Declaration on the Rights of Indigenous Peoples’](#), *Australian Journal of Politics and History* Volume 66, Number 4 (2020): 619.

A mainstay in this movement has been the repeated call for recognition of First Nations people. But what is meant by recognition, and how does the politics of recognition continue to determine outcomes for Aboriginal and Torres Strait Islander peoples?

Meaning of Recognition

Many things can be meant by the term 'recognition' in the context of Aboriginal and Torres Strait Islander peoples. For some, recognition involves the formal acknowledgement of Aboriginal and Torres Strait Islander individuals as the First Peoples, the original (and continuing) inhabitants and caretakers of the lands and waters on which we live; for others, it involves the granting of formal or legal rights such as those articulated in the UN *Declaration on the Rights of Indigenous People*; others still see recognition as inclusive of a guarantee of fair treatment or the protection from racial discrimination. Ultimately, recognition can be understood as residing on a spectrum of reform that extends from acknowledgement through to concrete and substantive rights.⁴

In the Australian context, constitutional recognition is largely about accepting as valid the claim or title of Aboriginal and Torres Strait Islander peoples to their heritage, their traditional lands and waters, and, most importantly, their right to self-determination.⁵ Despite the many interpretations of the call to be recognised, what ultimately matters are the forms or expressions of recognition that are important to First Nations Peoples and the extent to which that recognition is respected.

Generally, three themes are recurring when we talk about recognition of First Nations Peoples:

1. Respecting First Nations Peoples' right to a direct role in decision making about the issues that affect them (more recently articulated as a Voice)

⁴ Megan Davis and Marcia Langton *It's Our Country : Indigenous Arguments for Meaningful Constitutional Recognition and Reform*, Melbourne University Publishing (2016), 11.

⁵ Benjamin Franklen Gussen, 'A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples', *Melbourne University Law Review* Vol 40 (2017): 872.

2. A guarantee against discrimination by the Parliament (this can also be understood as a guarantee for fair treatment)
3. Acknowledgement of their unique status as First Nations Peoples

Recognition can take place both within and outside the Constitution. In Australia, the Mabo decision was a form of recognition in common law, and the official Apology to Aboriginal and Torres Strait Islander peoples was a form of political recognition.⁶ Still, a significant focus of Australia's debate on recognition has been the possibility – or necessity, according to some – of *constitutional* reform to properly recognise, protect and empower Aboriginal and Torres Strait Islander peoples in Australia's founding document.⁷

Recognition of First Nations Peoples both here in Australia and internationally is sometimes framed or criticised as being a largely symbolic, as opposed to practical, measure. Critics of recognition contrast it with arguably more substantive processes, such as treaty or agreement making, where First Nations sovereignty is centered and recognised.⁸ More recently, recognition is framed not as a weaker or more symbolic alternative to treaty and other substantive measures, but as one important part of a package of reform that includes symbols, legal and political reform, and rights.⁹ More on this later.

It is important to note that while there is currently no formal recognition of Aboriginal and Torres Strait Islander peoples in Australia's Federal Constitution, there has been recognition in our sub-national Constitutions; namely, in Victoria (2004), New South Wales (2010), Queensland (2010), South Australia (2013), Western Australia (2015) and Tasmania (2016).

Constitutional recognition – a history

Calls for constitutional recognition of First Nations Peoples in Australia are not new. David Unaipon called for increased Indigenous autonomy and

⁶ https://referendumcouncil.org.au/sites/default/files/2016-12/referendum_council_discussion_paper.pdf, 6.

⁷ Harry Hobbs, '[Constitutional recognition and reform: developing an inclusive Australian citizenship through treaty](#)', Australian Journal of Political Science Vol 53 (2018): 176.

⁸ For more on sovereignty, see [Sovereignty Factsheet](#)

⁹ Davis and Langton, 'It's our Country', 12.

representation in 1926. In 1963, the Yirrkala bark petitions were signed by the 12 leaders of the Yolngu clans of Arnhem Land, calling for recognition of Indigenous people in Australian law. More recent examples of action and initiatives towards constitutional recognition, both Government and non-government led, are in fact too plentiful to comprehensively name. What follows is a selection:

In 1995, the Aboriginal and Torres Strait Islander Commission (ATSIC) called for constitutional recognition, stating in their report that constitutional reform was not only a priority but overwhelmingly supported by the people.¹⁰

In 1999, symbolic recognition of Aboriginal and Torres Strait Islander peoples in the preamble of the Constitution was put to a referendum alongside the higher profile question of becoming a republic. The *Constitution Alteration (Preamble) 1999* proposed a whole new preamble which included that the Australian people commit to *'honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'*.¹¹ The referendum was unsuccessful.

During the 2007 election, both the Coalition and Labor parties promised to support a new preamble to the Constitution to recognise Aboriginal and Torres Strait Islander peoples. In October of that year, then Prime Minister John Howard promised that if re-elected, he would initiate a referendum to formally recognise Aboriginal and Torres Strait Islander peoples in the Constitution in the form of a new Statement of Reconciliation incorporated into the Preamble.¹² Then Labor Party leader Kevin Rudd offered bipartisan support. By the end of that year, Kevin Rudd was sworn in as Prime Minister.

¹⁰ Natassia Chrysanthos, '[What is the Uluru Statement from the Heart?](#)' *Sydney Morning Herald*, May 27 2019.

¹¹ Pauline Downing, '[Constitutional recognition of Indigenous people](#)', *Parliament of Australia*, 23 November 2010.

¹² '[The right time: constitutional recognition for Indigenous Australians](#)', transcript, address to the Sydney Institute, Sofitel Wentworth Hotel, Sydney, 11 October 2007.

In 2008, following Kevin Rudd's delivery of the National Apology to the Stolen Generations in which he referred to the need to work on constitutional recognition,¹³ the final report of the 'Australia 2020' summit recommended that strong rights and formal national recognition of Aboriginal and Torres Strait Islander peoples be inserted into the constitution proper, and not just as an introduction or preamble.¹⁴ The report stated that a constitutional amendment must encompass Aboriginal and Torres Strait Islander world views, recognise Aboriginal and Torres Strait Islander peoples, and establish a new relationship between government and Aboriginal and Torres Strait Islander peoples based on mutual respect.¹⁵

In December 2010, the Expert Panel on Constitutional Recognition of Indigenous Australians was established and tasked with reporting to the Government on possible options for constitutional change to give effect to constitutional recognition for First Nations peoples. Their final report, published in January 2012, recommended that a new 'section 51A' entitled 'Recognition of Aboriginal and Torres Strait Islander peoples' be inserted into the Constitution. This new section would recognise *'that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples'*; acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples and acknowledge the need to secure the advancement of Aboriginal and Torres Strait Islander peoples.¹⁶ Further, the report recommended the insertion of a new languages provision, 'section 127A' entitled 'Recognition of languages' to acknowledge that the Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage.¹⁷

¹³ [Apology to Australia's Indigenous Peoples](#), speech, *House of Representatives*, Hansard, 13 February 2008, p. 167.

¹⁴ [Australia 2020 Summit Final Report](#) (2008), 224.

¹⁵ *Ibid*, 231.

¹⁶ [Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution](#), Report of the Expert Panel (January 2012), 133.

¹⁷ *Ibid*, 133.

Following the Expert Panel report, in September 2012 the Federal Government announced that it would push back its plans for a referendum by two or three years, claiming a lack of public support.¹⁸

In November 2012, the Aboriginal and Torres Strait Islander Peoples Recognition Bill was introduced to Parliament as an attempt to show support for the principles of the Expert Panel's recommendations and 'as a step in a process towards overdue constitutional recognition of Australia's indigenous [sic] people'.¹⁹ Its purpose was twofold; firstly, to articulate the Parliament's recognition of Aboriginal and Torres Strait Islanders as the original inhabitants of Australia, and also their ongoing connection with their traditional land and waters, cultures, languages and heritage. Secondly, the Bill provided for the establishment of a review to assess the readiness of the Australian public to support a referendum giving constitutional recognition to Aboriginal and Torres Strait Islander people, and the preferred form of these proposed constitutional changes.²⁰

In February 2013, the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) was passed and funding was provided to Reconciliation Australia for the establishment of the Recognise campaign to build community support.²¹ The Recognise campaign partnered with more than 180 organisations until it was abandoned in August 2017 after significant opposition.

In 2015, the first Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established to inquire into steps that could be taken to progress towards a successful referendum on constitutional recognition. In its final report, the Committee stated that "it is time to remedy the injustice of exclusion and recognise in our founding document the significant contribution of Aboriginal and Torres Strait Islander

¹⁸ Simon Cullen, '[Referendum on Indigenous recognition postponed](#)' *ABC News*, 20 September 2012.

¹⁹ [Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012](#), *Parliament of Australia*.

²⁰ [Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012](#)

²¹ [Recognise](#)

peoples to a modern Australia”.²² They further stated that constitutional recognition could not take the minimalist approach of symbolic acknowledgement or the mere removal of racist sections and that “Aboriginal and Torres Strait Islander peoples will accept nothing less than a protection from racial discrimination in the Constitution”.²³

December 2015 saw the establishment of a 16-member Referendum Council tasked with taking the next steps towards achieving constitutional recognition of First Peoples. In October 2016, after extensive public consultations, the Council released its Discussion Paper which outlined the key proposals as a package for reform.²⁴ They included:

- a. a statement of recognition acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians;
- b. removal of the Race Power, section 51 (xxvi) from the Constitution;
- c. inserting a constitutional prohibition against racial discrimination into the Constitution;
- d. providing for an Indigenous voice to Parliament, including the right to be consulted on legislation and policy that affect Aboriginal and Torres Strait Islander peoples; and
- e. removal of Section 25 from the Constitution.

Between December 2016 and May 2017, the Referendum Council held a series of invitation-only Regional Dialogues with First Nations people around the country. The purpose was to reach broad agreement on whether and, if so, how, to ‘recognise’ Aboriginal and Torres Strait Islander peoples in the Australian Constitution.²⁵ The Council worked in partnership with a host organisation at each location in an effort to ensure the local community would be appropriately represented in the process.²⁶ Seven delegates walked out of

²² [Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Final Report](#), v.

²³ *Ibid*, vi.

²⁴ [Referendum Council Discussion Paper October 2016](#)

²⁵ [Referendum Council Dialogues](#)

²⁶ *ibid*

the talks, saying their concerns about loss of sovereignty and their desire for a formal guarantee of a treaty process instead of constitutional recognition were not being heard, and claiming the Regional Dialogue process did not allow for open discussion and debate.²⁷

In May 2017, the priorities and outcomes from each of the First Nations Dialogues were reported to a First Nations Convention at Uluru, where 250 Aboriginal and Torres Strait Islander people 'from all points of the southern sky' gathered on Anangu Country. Here they issued an invitation to the Australian people in the form of the Uluru Statement from the Heart, calling yet again for meaningful reform to the Australian Constitution. The Uluru Statement calls for proper constitutional recognition in the form of a First Nations Voice to Parliament, enshrined in the Constitution, together with a process of treaty or agreement making and truth telling.²⁸ The Voice was conceived of as an independent advisory body made up of Aboriginal Torres Strait Islander people, chosen by local communities. Above all, representatives of the Statement declared that constitutional recognition must bring about tangible change in their communities.²⁹

The constitutionally enshrined Voice model was novel in the Australian context, as it was presented without further amendments to the problematic sections of the Constitution.

Following the issuing of the Statement and its subsequent initial rejection by the then Turnbull Coalition government, in March 2018 a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was appointed. The Committee was tasked with inquiring into and reporting on matters relating to constitutional change, including the proposal for the establishment of a First Nations Voice. Their final report recognised that the Statement from the Heart was a major turning point in the constitutional

²⁷ See Calla Wahlquist, '[Uluru talks: delegates walk out due to sovereignty and treaty fears](#)', *The Guardian*, 25 May 2017; Claudianna Blanco, '[We won't sell out our mob](#)', *NITV*, 25 May 2017. See also Les Coe, '[Why I Walked Out of the Referendum Council's National Constitutional Convention at Uluru \(Yulara\)](#)', 30 June 2017.

²⁸ [Uluru Statement from the Heart](#)

²⁹ Dan Butler, '[Constitutional recognition has a long history. How did we get here?](#)' *NITV*, 25 January 2023.

recognition debate as it introduced a new central element, the Voice.³⁰ The report clearly stated that the Voice, co-designed with the government by Aboriginal and Torres Strait Islander peoples for Aboriginal and Torres Strait Islander peoples right across the nation, should become a reality.³¹

Building on this recommendation from the 2018 Joint Select Committee on Constitutional Recognition, in July 2021, Marcia Langton and Tom Calma co-authored the Final Report to the Australian Government on the Indigenous Voice Co-Design Process following a significant four-month public consultation process which engaged more than 9,400 people and organisations.³² The Final Report outlines an Indigenous Voice made up of two parts that work together – Local and Regional Voices and a National Voice – to provide a way for First Nations Australians to have a greater say on the design, development and implementation of policies and programs that affect them.³³ The report concluded that “hearing the advice and perspectives of Aboriginal and Torres Strait Islander peoples and listening to their views would see improved outcomes, more effective, productive and fairer laws, policies and programs”.³⁴ The report further stated that an Indigenous Voice must be an integrated system in which Aboriginal and Torres Strait Islander peoples’ perspectives are appropriately heard at all levels.³⁵

On 21 May 2022, Prime Minister-elect Anthony Albanese recommitted to the implementation of the Uluru Statement from the Heart in full, starting with the establishment of a Voice to Parliament, in his Election night victory speech. On 29 September 2022, the Referendum Working Group and the Referendum Engagement Group held their first meetings in Canberra to work toward next steps to a referendum to enshrine an Aboriginal and Torres Strait Islander Voice in the Constitution.

³⁰ [Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples Final Report](#), vii. November 2018.

³¹ *Ibid*, viii.

³² [Indigenous Voice Co-design Process](#), Australian Government.

³³ *ibid*

³⁴ [Indigenous Voice Co-design Process Final Report](#), July 2021, 15.

³⁵ *ibid*, 12.

On 23 March 2023, the Albanese government announced the draft wording of the question that will be put to the Australian people in a referendum later this year. Once it is passed by Parliament, the wording will read:

'A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

Do you approve this proposed alteration?'

A week later on 30 March 2023, a bill entitled *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* was introduced and read. The bill proposes an alteration to the Constitution to recognise First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice to make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.

That same day, the Senate and House of Representatives agreed to the establishment of a Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum. The Committee was appointed to inquire into and report on the provisions of the bill introduced by the Government to be submitted to a referendum on the Aboriginal and Torres Strait Islander Voice.³⁶

The referendum will likely be held in October 2023 on the issue of constitutional recognition of Aboriginal and Torres Strait Islander peoples through the establishment of an Aboriginal and Torres Strait Islander Voice. Unlike the 1999 referendum, this proposal for constitutional recognition involves structural – not just symbolic – reform. In this way, constitutional recognition takes the form of the Voice, a First Nations elected representative body which ensures that Aboriginal and Torres Strait Islander peoples have a seat at the table when it comes to decision-making that impacts their communities and lives.

³⁶ [Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum](#)

Constitutional recognition – the significance

“Our inclusion, within our founding document, means a great deal, to me at least. I believe it would in part lift the historical burden that sits like a heavy skin across our nation.”³⁷

Rachel Perkins

As we have seen, multiple attempts have been made toward recognition of Aboriginal and Torres Strait Islander peoples both within and beyond the Australian Constitution. While some efforts have succeeded, most have failed. Over the years, the form which recognition should take has shifted considerably to favour constitutional recognition, with increasing emphasis on the need for structural reform that is going to make substantive change for First Nations individuals and communities on the ground.

With so many failed or incomplete attempts at constitutional recognition, it begs the question: why persist? Why is constitutional recognition of First Peoples important, and what are the expected implications?

While there are arguably as many answers to those questions as there are people voting in the referendum, we can understand the significance of constitutional recognition in terms of five broad areas:

1. Stable protection of rights

Recognition of Aboriginal and Torres Strait Islander peoples that is enshrined in the Constitution is, above all, about achieving protection of First Nations rights and interests in a way that shields them from short term political fluctuations.³⁸

³⁷ [‘Rachel Perkins speaks out on the need to stand up for Aboriginal Australians’](#), *Sydney Morning Herald*, December 12 2014.

³⁸ [Cape York Submission to the Joint Select Committee Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples](#) October 2014, 9.

The Constitution is where binding and enduring guarantees can be made that are not subject to changes in political leadership, budget or the shifting priorities of policymakers.³⁹

Cobble Cobble lawyer and academic Professor Megan Davis has observed that:

“In Australia, Indigenous interests have been accommodated in the most temporary way, by statute. What the State gives, the State can take away, as has happened with the ATSIC, the Racial Discrimination Act and native title.”⁴⁰

Given this history of abolishing or defunding previous bodies designed to represent Aboriginal and Torres Strait Islander peoples interests – the most recent example being the National Congress of Australia’s First Peoples which was defunded completely in 2019 – it is understandable that many Aboriginal and Torres Strait Islander peoples seek protection and recognition in a more stable and enduring form. In this sense, constitutional reform is the most solemn and binding form of legal protection available in Australia.⁴¹

“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.”⁴²

Galarrwuy Yunupingu

2. Shifting the power balance

Shireen Morris and Guugu Yimithirr activist Noel Pearson argue that the purpose of constitutional recognition is predominantly practical, rather than just symbolic. More specifically, they claim that the purpose of constitutional recognition is to positively reform the power relationship between Indigenous

³⁹ [Referendum Council Discussion Paper](#), October 2016, 6.

⁴⁰ Megan Davis, ‘A woman’s place...’ *Griffith Review* 156, (2009): 157.

⁴¹ Dawson, ‘On Self Determination’, 4.

⁴² See Galarrwuy Yunupingu, Vincent Lingiari Memorial Lecture, Darwin, 20 August 1998

peoples and the Australian state, to empower Indigenous peoples and create a more mutually respectful relationship.⁴³

Viewed this way, constitutional recognition must set in place some constitutional rights or processes “to positively recalibrate the power relationship” between First Nations Peoples and the Australian Government.⁴⁴

But what does it mean to recalibrate a power relationship? Put simply, it is a recognition of the structural barriers that First Nations people experience in their interactions with the settler colonial state and a commitment to reorganising or shifting these grossly uneven power relations.

Since colonial invasion, First Nations Peoples have been subjected to, and consistently resisting, oppressive structures of domination. The logic which underpinned the violence of invasion and dispossession – that is, the logic of elimination⁴⁵ – continues today in largely structural and cultural forms.

As a result, Aboriginal and Torres Strait Islander peoples face significant and unique challenges. Proportionally, they are the most incarcerated people on the planet, with Aboriginal and Torres Strait Islander adults constituting 27 percent of the national prison population despite making up only two-three percent of the national population.⁴⁶ Their children are alienated from their families at unprecedented rates, with Aboriginal and Torres Strait Islander children making up 37 percent of the total out-of-home care population despite constituting only six percent of the total population of children in Australia. Aboriginal and Torres Strait Islander children are almost ten times more likely to be removed from their families than non-Indigenous children.⁴⁷ Further, First Nations people face continual attacks on and appropriation of their cultural heritage, lands and sacred sites. Current cultural heritage legislation not only entrenches a power

⁴³ Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success', *91 Australian Law Journal* (2017): 350.

⁴⁴ *Ibid*, 351.

⁴⁵ For more on settler colonialism's 'logic of elimination' see Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' *Journal of Genocide Research* (2006): 387.

⁴⁶ [Disproportionate incarceration rate](#), *Australian Law Reform Commission*, 9 January 2018.

⁴⁷ [Family Matters Report 2020](#), *SNAICC - National Voice for our Children*, November 17 2020.

imbalance that restricts their ability to adequately control and protect their heritage with the power of free and informed consent but in fact legalises the destruction of First Nations sacred sites.⁴⁸

What these statistics point to is not a deficit or inadequacy amongst First Nations communities in Australia, but the ongoing effects of intergenerational trauma together with a persistent system of structural racism that pervades Australian systems of health care, policing, criminal justice, education, law and policy. Together with the fact that there is currently no formal recognition of Aboriginal and Torres Strait Islander peoples in our nation's founding document, nor any independent, nationally representative body with the purpose of providing informed advice on behalf of Aboriginal and Torres Strait Islander peoples to the Parliament and the executive government of the Commonwealth, we begin to get a clearer picture of what the Uluru Statement from the Heart called 'the torment of our powerlessness'.⁴⁹

The Constitution as the rulebook for the nation is about power. Recognition of Aboriginal and Torres Strait Islander peoples within this rulebook is a move toward more equitable power relations with the First Nations who constituted sovereign political communities on these lands for at least 60,000 years.

3. Impact on individual and community health

Constitutional recognition has long reaching effects not just in terms of protection and power relations, but also on the very real health outcomes of First Nations people and communities. Health can and should be understood here in an expansive sense, radiating out from the physical health of the individual to include emotional, mental and spiritual health, and even to community and public health.

Research has proven strong links between poorer health outcomes and certain socio-economic realities such as poverty, inadequate housing, lower income

⁴⁸ [Cultural Heritage Protection Background Paper](#), ANTAR, (2022): 10.

⁴⁹ [Uluru Statement from the Heart](#)

and barriers to education.⁵⁰ Aboriginal and Torres Strait Islander peoples continue to die far earlier and experience a higher burden of disease and disability than other Australians.⁵¹

Many Aboriginal and Torres Strait Islander people also experience social exclusion, racial discrimination and intergenerational effects of the loss of land, culture and language; these factors are known as the social and cultural determinants of health.⁵²

Constitutional recognition, particularly in the form of an Aboriginal and Torres Strait Islander Voice to Parliament, would enable the health care system to develop better policy and practice to meet the health and cultural needs of Aboriginal and Torres Strait Islander people.⁵³ It would also provide the basis for a better social contract where both First Nations and non-Indigenous people can work out shared solutions to both common and unique problems.⁵⁴

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) cites research stating that the loss of traditional lands after the arrival of European settlers in Australia and the ongoing, associated spiritual and cultural dispossession experienced by Aboriginal and Torres Strait Islander peoples has had a disruptive effect and led to increased mental illness and other complications, contributing to much lower than average health and wellbeing outcomes.⁵⁵

RANZCP has clearly stated that meaningful and substantive constitutional recognition has the capacity to support the mental health, self-esteem and human rights of Aboriginal and Torres Strait Islander peoples.⁵⁶

⁵⁰ [‘Social determinants of health’](#), Australia’s Health 2016. *Australian Institute of Health and Welfare*.

⁵¹ [Lowitja Institute Media Release](#) 21 February 2023.

⁵² Lowitja Institute, [‘Why constitutional recognition of Aboriginal and Torres Strait Islander peoples matters for health’](#).

⁵³ *ibid*

⁵⁴ *ibid*

⁵⁵ Darren Garvey, [‘A review of the social and emotional wellbeing of Indigenous Australian peoples - considerations, challenges and opportunities’](#), *Australian Indigenous Health Bulletin*, 2008.

⁵⁶ [Recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution](#), The Royal Australian and New Zealand College of Psychiatrists, March 2023.

4. Constitutional recognition as part of a package of substantive reforms

Constitutional recognition is also important in terms of its implications for other meaningful reforms that have long been called for by First Nations activists – increased representation, treaty or agreement-making, truth telling and the recognition and resurgence of language and culture.

There is in particular a perceived dichotomy between constitutional recognition and treaty.⁵⁷ Some First Nations activists worry that constitutional recognition will preclude or distract from the important work of agreement making and co-governance or shared sovereignty. But constitutional recognition can also be seen as the first part of a package of reforms that includes treaty, truth telling and protection of language and cultural heritage.

In this view, before you can meaningfully initiate treaties or agreements, you must have a First Nations representative body with whom the State can negotiate. It makes sense for this representative body — for example, in the form of a Voice to Parliament that is informed by diverse local communities — to be constitutionally enshrined and underpinned by a constitutional guarantee. In this sense, achieving constitutional recognition is an important stepping stone towards other key reforms in the relationship between Aboriginal and Torres Strait Islander people and the State.

Without a change to the foundational rules of the State – that is, the Constitution – treaties negotiated between it and sovereign First Nations peoples remain at risk of being a negotiation between foundationally unequal entities, producing agreements that fail to reflect inter-sovereign respect and power sharing.⁵⁸ Voice establishes the power for Treaty, and Treaty establishes the safekeeping of Truth.⁵⁹

⁵⁷ Morris, '[Indigenous Constitutional Recognition and the Search for Common Ground](#)'. *Cape York Partnership*, December 12 2016.

⁵⁸ Sana Nakata, '[On Voice, and finding a place to start](#)'. *Indigenous Constitutional Law*. 3 March 2021.

⁵⁹ Gabrielle Appleby and Eddie Synot, '[The Voice: what is it, where did it come from, and what can it achieve?](#)' *UNSW Sydney*, 29 March 2023.

5. Taking their rightful place

Noel Pearson asks one clarifying question: is there a proper and rightful place for the original peoples of Australia in the nation created from and on their ancestral lands?⁶⁰

Phrased this way, the significance of constitutional recognition is abundantly clear. As Torres Strait Islander professor Sana Nakata argues, there is one condition necessary to realise a Voice that cannot be silenced: constitutional enshrinement.⁶¹ This sense of writing First Nations Peoples into the Australian Constitution is one of righting a wrong; it goes beyond symbolic inclusion, and even in some sense beyond empowering substantive practical change, to speak to something more fundamental and foundational: an ethical imperative we have as a nation to do what is right. We cannot right the wrongs of the past, but we can in some small sense begin again in a more respectful relationship with First Nations people. That is our collective moral duty.

And the answer to Pearson's question is unequivocally 'yes'. There is a proper and rightful place for the original peoples of Australia in the nation built quite literally on their ancestral lands, and they continue to occupy this rightful place as they have since time immemorial. The question now is, will we – the rest of the nation, the 97 percent – step into *our* rightful place and amend the Constitution to properly recognise and reflect this fact?

Sell-out or stepping stone? Exploring the limitations of constitutional recognition

While the significance and implications of constitutional recognition are well established and supported by many, it is also true that any examination of constitutional recognition must take critical First Nations concerns seriously.⁶²

⁶⁰ Noel Pearson, 'A rightful place: Race, Recognition and a More Complete Commonwealth.' *Quarterly Essay*, no. 55 (2014): 7.

⁶¹ 'On Voice'.

⁶² Harry Hobbs, 'The Road to Uluru: Constitutional Recognition and the UN Declaration on the Rights of Indigenous Peoples.' *Australian Journal of Politics and History*. Volume 66, Number 4 (2020): 615.

The aforementioned long and so far largely unsuccessful history of constitutional recognition in Australia points to some deeper questions: are formal recognition projects even capable of recognising and making space for First Nations expressions of self-determination, sovereignty and self-governance? What are the limitations to a politics of recognition? And does constitutional recognition ultimately reinforce the power of the settler colonial State?

Yellowknives Dene political theorist Glen Coulthard puts forward a compelling argument that projects such as constitutional recognition buy into a liberal politics of recognition that do not “throw into question the background legal, political, and economic framework of the colonial relationship itself”.⁶³ Similarly, Tanganeald, Meintangk and Boandik Professor of Law Irene Watson has cautioned against state recognition projects as “inevitably reinstat[ing] colonial law” and leaving Indigenous peoples “subservient to the rules of the state”.⁶⁴

Rather than imagining recognition to be the philosophical and institutional remedy to dispossession and violence,⁶⁵ these critical interrogations ask us to consider whether projects of recognition simply accommodate First Nations claims into the existing legal and political apparatus of the settler State, thus reinforcing its power.⁶⁶ Scholars such as Shelley Bielefeld and Jodi Byrd view projects of constitutional recognition through the lens of benevolent language and seductive recognitions, arguing that narratives of benevolence have been an essential aspect of colonial exertions of power over First Nations people since the earliest days of colonisation and serve to maintain state hegemony.⁶⁷

⁶³ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, 2014), 41.

⁶⁴ Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Abingdon, 2015), 2, 91.

⁶⁵ Audra Simpson, [‘The ruse of consent and the anatomy of ‘refusal’: cases from indigenous North America and Australia’](#), *Postcolonial Studies* Vol 20 (2017): 18.

⁶⁶ Coulthard, ‘Red Skin’, 3.

⁶⁷ For more on the limitations of seductive recognition and benevolence, see Shelley Bielefeld, ‘Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Exploring the Limits of Benevolent Language’ *Indigenous Law Bulletin* (2014) and Jodi A. Byrd. *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011).

These views are reflected in the critical stances of ‘everyday’ Aboriginal and Torres Strait Islander peoples who are sceptical of government-led processes and view the Constitution as a fundamentally colonial document which upholds a violent and inequitable status quo.⁶⁸ Darumbal and South Sea Islander journalist Amy McQuire writes:

“...the Constitution will never not be racist, just as Australia as it stands will never not be racist: it is a settler-colony whose every process is built upon white supremacy – the processes change and shift, but they still work towards the fundamental goal of the settler-colonialism, which is the elimination of Aboriginal people from Aboriginal lands.”⁶⁹

Committing to recognising, respecting and amplifying the unique position and views of Aboriginal and Torres Strait Islander peoples – both in our Constitution and elsewhere – must not silence the voices of those First Nations peoples who question or disagree with the project of constitutional recognition. Rather, it means listening to these at times unsettling perspectives and granting them the same careful consideration and attention as the many reports, committees and initiatives have given the proposals for constitutional recognition over the years.

As Munanjahli and South Sea Islander academic Chelsea Watego reminds us, “you can sell something while acknowledging its limitations”.⁷⁰

Constitutional recognition - the future

The history, and in fact future, of constitutional recognition in Australia demands that we move forward in respectful and reciprocal ways with

⁶⁸ See, for example, [Nayuka Gorrie's article](#). See also: Lynda June Coe, ‘[Structural Reform – dissent is not a mandate for disrespect](#)’, *IndigenousX*, 6 May 2022, Nat Cromb, ‘[So whose Voice is it anyway?](#)’ *IndigenousX*, 17 August 2022 and Amy McQuire, ‘[Voting on ‘The Voice’: Will it fight racist violence?](#)’ *Substack*, 5 January 2023.

⁶⁹ McQuire, ‘Voting on ‘The Voice’.

⁷⁰ [Chelsea Watego Twitter post, 27 April 2022](#).

Aboriginal and Torres Strait Islander peoples. In considering a First Nations Voice to Parliament as a form of constitutional recognition, we must listen to and reflect on what those voices have been telling us for generations, even when they appear to disagree.

Megan Davis and Marcia Langton articulate the future of constitutional recognition as being linked to a challenge that Australia must address; that is, “for Australia to hear what it is that Aboriginal and Torres Strait Islander peoples are saying about what recovery and reconciliation means to them”.⁷¹

The Australian Constitution has, from its inception, failed to meaningfully include and recognise Aboriginal and Torres Strait Islander peoples. As we consider a vote to change this for the future, it is crucial that we acknowledge and learn from the complicated history of constitutional recognition in Australia. Constitutional recognition of First Nations Peoples, if and when it arrives, will not be a “slam-dunk guarantee that all our hopes and aspirations for the future will be realised”.⁷² It is, however, an important step forward and the right place to start.

⁷¹ Megan Davis and Marcia Langton, *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform*. Melbourne: Melbourne University Publishing (2016), 14.

⁷² Nakata, 'On Voice'.

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With thanks:

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**ANTAR is proud to acknowledge and pay our respects
to First Nations Peoples as the traditional owners
of the lands on which we work across the continent.**

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