***Justice for Australia’s First Peoples***

 Jeff McMullen

After wandering this world for well over sixty years I say that if you are troubled by the violence you see around us as the 21st Century continues the age old pattern of human conflict and injustice, then take the time to listen to how this country sings to us all, how its untrampled beauty reminds us what it can be to be human, how we all have a choice of being sentient custodians or the worst natural born killer to stalk this planet. The way the First Peoples of Australia see life, each one of us, every man, woman and child, shares a responsibility to contribute to the balance and wellbeing of our living world. In this way all Australians are invited to share in the extraordinary and most ancient cultural inheritance of the world’s oldest unbroken story of human knowledge. Here in this country we also have the world’s oldest multicultural system with hundreds of languages and distinct cultural practices co-existing in one land. This is a foundation of great hope to the world and even the future of our species because we can see in the longer timelines of our history the proof that the many shades of creativity in the human family allow us to see and solve problems in many different ways. Here the First Peoples had to overcome extraordinary challenges such as changes to the land and its creatures after an Ice Age. This human resilience, this adaptability through the millennia, is the wisdom of the elders and it teaches us that the wellbeing of our human family rides on a grasp of responsibility, reason, what I call a common sense concern for the common good, for taking care of one another, not only ourselves…and all of these values and virtues require a strong belief in justice.

I would like you to make this personal. Interrupt me if you need to or ask questions along the way but tonight I want you to think about what justice means to you personally.

We might be startled watching the television coverage from the United States over the past few weeks as people demonstrate in Ferguson, Missouri over the police shooting of yet another unarmed African American man. But do we see what is happening here at home?

If there is the rare event of a riot in Redfern (NSW) following the death of another young Aboriginal boy after a senseless police pursuit, if Palm Island (Queensland) burns after the death of yet another Aboriginal man in the custody of police, or when Aboriginal people march through the streets to protest the discrimination and injustice of the Northern Territory Intervention or the removal of their children, sometimes our nation momentarily is connected to the truth. But do we make this personal/ Do we take action or do we collude with oppression and injustice?

In both of these rich nations we see a terrible poverty and dangerous inequity within. In both affluent nations, the United States and Australia, I am still waiting for the welling of conscience and common sense to acknowledge that what we are seeing is a combination of poverty, racism and injustice that is a terrible threat to the health of our democracies.

If any one of us stands by while injustice is dealt to our fellow human beings, we are colluding with the oppression. This crime of silence runs deep in human history. But we clearly have a choice.

During the Nazi Holocaust it was one of the greatest Australians of the past two centuries, the Aboriginal elder, William Cooper, who in December 1938 led a small group of Aboriginal people to the German Consulate in Melbourne and demanded that they stop the slaughter of Jews. This was just after *Kristallnacht,,* the Night of the Broken Glass,when Hitler’s brown shirts began their terrifying rampage, smashing windows, looting shops and Synagogues and dragging Jewish people off to the Concentration Camps. According to the Holocaust Research Centre in Jerusalem there was no other protest anywhere in the world like William Cooper’s. Here was a man not seen as a citizen in his own Aboriginal land but he raised his voice for other human beings because he believed in justice and the common good.

Are we going to be a member of the human family, a responsible and capable member of a community, where we feel and act knowing that we are connected this way? Or are we comfortably numb or indifferent, consumed by self-interest?

Do we perhaps prefer the neo-liberal mantra of the 21st Century that self-interest is natural or as those Wall Street rogues behind the Global Financial Crisis chortled, ‘greed is good’?

Do we secretly agree with some Aboriginal neo-conservatives like Noel Pearson who suggest that all of this inequity in our backyard will be swept away if Aboriginal people just give up their sense of the communal value system that underpins their Cultures? The neo-liberals want the First Peoples to become acquisitive, to crave private home ownership, the transfer of wealth to their families and a greater pile of material goods? They largely ignore the depths of poverty created by the control and injustice of centuries of oppression and damaging discrimination. To buy the neo-liberal sales pitch Aboriginal people would have to abandon the very strongest of community values that the great Aboriginal leaders such as William Cooper and Vincent Lingiari held so dear.

A stronger community makes all of us stronger. We shouldn’t pretend that wealth is going to magically trickle down from wealthy elites that benefit most from the exploitation of what really belongs to the Australian people. The wealth of this country is the wealth of Aboriginal land.

The evidence, I am certain, shows that when Aboriginal communities follow the neo-liberal development path, hoping for a trickle of wealth to the poorest people in the land, it is then we see the terrible feuding over who will get the greasy handshake from the government or mining company. It is then we see the divide and conquer tactics by government and corporations, the factional feuding, the brutal competition for a trickle of paltry mining royalties. When we ignore the common good the disunity sets brother against brother, poisoning the real wellbeing of communities every bit as destructively as brutal Government control and enforced social dependence.

Here we can see how this notion of self-interest and acquisitive cravings clearly contrasts with another aspect of being human, altruism and a full understanding that when a community of families moves forward together, then the world of all of these children becomes healthier and more peaceful. A belief in the common good allows us to see that even as individuals we all then benefit as part of that healthier and more peaceful society. At the moment, the Australian nation shows too little interest, let alone empathy, with the First People it hardly knows at all.

On the red dirt streets of the Northern Territory I am so often the oldest man. It has been like this for a very long time because Aboriginal people in many parts of this nation have a life expectancy well below the rest of us. The ABS figures that now speak of a nine or ten year gap in life expectancy are hardly reliable because of the changes in sampling methods and the vast uncertainty when tens of thousands of people may not be recorded in the census. In the Northern Territory there have been various guestimates that as many as seven thousand children were never enrolled for schooling. The First Peoples are so often recorded only in boxes of statistical disadvantage. But we are talking about people here. Many Aboriginal people die way too young from totally preventable diseases and from the long neglected poverty, overcrowding and malnutrition. There is a plague of chronic illness, diabetes, renal failure, strokes, hypertension, cancer and heart disease that cuts many years of life expectancy, as well as true quality of life. In a country ranked by the OECD’s Better Life Index as the ‘happiest’ of all industrialized nations, our poverty within is a glaring injustice. It highlights the truth that over two centuries of politically oppressive policies towards the First People have been damaging and do not ease disadvantage.

This short film clip is from OUR GENERATION, the documentary directed by Damien Curtis and Sinem Sabam. The musician John Butler and I are co-producers. The voices you will hear are brothers and sisters to me and they give voice to the Yolgnu people who from the beginning of the Land Rights Struggle have let the Great White Protectors in Canberra know they would resist all unjust assaults on their human rights. The Northern Territory Intervention of 2007 produced this response. (Play clip)

Despite the expenditure of billions of dollars of taxpayer’s money on a vast bureaucratic intervention aimed at controlling and socially engineering change on the Aboriginal lands, there is no evidence in the Government’s own Closing the Gaps Clearing House website that any of the claimed ‘target issues’ have actually improved since 2007. This is the ‘Tyranny of Experts,’ to use the title of an excellent new book by the New York University economist, William Easterly[[1]](#footnote-1). Big Government and vast bureaucracies of technocrats do not have the knowledge to solve problems at the grassroots level. Eva Cox has assessed this pattern here in Australia and you can read her research in the National Indigenous Times[[2]](#footnote-2) or at UTS’s Jumbunna Indigenous House of Learning. What works are approaches shaped from the grassroots with local partnerships and people moving as an informed community. What always fails is the top down, assimilationist interventions that seek to control and disempower people.

Remember that Prime Minister John Howard declared when launching the NT Intervention that he didn’t care about “the constitutional niceties” when there were children involved. But the Northern Territory Intervention of 2007 was never about protecting children or improving their lives. That was a cynical Big Lie as the Great White Protectors in Canberra clamped a new era of emergency control over 73 remote communities, just as the Chief Protectors had in years gone by. It is seven years after the launch of that federal occupation of Indigenous land but every Australian should now know the truth. The Australian Crimes Commission shattered the lie about there being pedophile rings in every one of those remote communities.

This emergency was a crisis manipulated by Government to control the Aboriginal people and their lands. It ignored the recommendations of countless health, education and welfare assessments at the local level that clearly set out the way to take people with you by listening, learning and including them always in the local programs. Instead we have seen a disastrous social engineering experiment aimed at pressuring the homelands people towards growth towns. The latest facet of this punitive approach is the recommendation in the NT to abandon secondary education on the homelands and require children to attend boarding schools in the so-called hub towns.

Abandoning a secondary education for Australian children within a reasonable distance of their homes is another gross injustice discriminating unfairly against one section of our population.

The current assault on local Aboriginal organizations has been accompanied by relentless pressure to tie all funding for essential human services to the surrender of control of the land. Aboriginal communities are told that if they want essential funding for house improvements they must sign leases for a century or half a century.

Former Prime Minister, Malcolm Fraser and former Chief Justice of the Family Court, Alastair Nicholson, are among many experienced and hugely respected legal minds who have stated unequivocally that surrendering your land under a 99 year lease is tantamount to losing control of it forever. The poker game is constantly changing but the intention is always the same. Deny self-determination, deny sovereignty, deny Aboriginal control of their own destiny. Changes to the Aboriginal Land Rights Act also promote the neo liberal plan of having select corporations run life in these places, breaking the authority of Traditional Owners and even the Aboriginal Lands Councils. This is the pattern of control we are now moving towards with only half a dozen ideologically chosen corporations targeted for regional funding. It’s a power game and a land grab as clear as any we have seen in this country.

As Henry Reynolds has written so frequently and eloquently, virtually all Australian Government policy towards Indigenous people has this throbbing pulse of assimilation and control. It is crushing and it fuels the obliteration of human life.

Clearly the policy of control and assimilation is having a catastrophic impact on Aboriginal life. The Northern Territory Intervention without doubt is the most damaging policy aimed at Aboriginal people since Government policy created the Stolen Generations.

I have had many distraught phone calls at all hours and face to face conversations as Aboriginal parents share the loss of one of their children who has taken his or her own life. A 16-year-old girl goes to her bedroom and leaves a note saying how she cannot be in this world anymore. A son breaks his mother’s heart because as a teacher she thought she had raised her children to be strong and to handle the racism and injustice they must deal with all the time. They ask my family to help buy a wooden box to bury their child. We cry together. There are no words to deal with such terrible loss and it is happening at a frightening rate.

Even just twenty years ago Indigenous suicides were around the same rate as for all Australians. In the Northern Territory the percentage of all age Indigenous suicide has increased from 5% of total suicides in 1991 to 50% of the total in 2010.

The most alarming increase, however, is among young Indigenous people aged 10 to 24. Indigenous youth suicide in the Northern Territory has increased from 10% of the total in 1991 to 80% of the total in 2010. In January 2013 the Australian Human Rights Commission reported a 160% increase in the rate of Indigenous youth suicide and a more than five-fold increase in self-harm during the years of the Northern Territory Intervention.

Cases of child neglect are also mounting rapidly. Currently one third of the 40,000

Australian children living in out of family care are Indigenous children. The Australian governments had agreed that any children removed from family would be placed with extended family, knowing the crucial role this plays in a child’s mental and physical wellbeing. But instead the social system is in crisis and many Aboriginal children are now torn from their families and Culture at a growing rate that is indeed creating a further Stolen Generation. Again I say, we cannot collude with this injustice. The overwhelming scientific evidence from the world’s leading social scientists is that the best approach is to stabilize the family in crisis and keep children within that extended family sphere. Wider removal sets up the historic pattern of the cross generational trauma that has haunted so many First Nations around the world. We need to pressure government to strengthen support for responsible community organizations that can ease this pain and collapse at the community level. History demonstrates that the tyranny of experts, especially the Great White Protectors, cannot achieve a lasting improvement in Aboriginal wellbeing.

Furthermore, we need to ask our political leaders why Australia persists with a failed American model of industrial imprisonment, the business of building prisons as the core response to the increasing incarceration of the First Peoples.

Australia has about 31,000 people in prison and almost 8,000 are Indigenous people. In the Northern Territory Aboriginal prisoners make up about 84% and in Western Australia about 40% but the main response is to just go on building more prisons.

If you haven’t seen the film, UTOPIA, as yet, you should order it online and follow John Pilger’s investigation of the lack of justice in some cases he first highlighted about thirty years ago. One Western Australian government official described that state’s prison policy as the “racking and stacking” of these human beings.

The death of the Aboriginal man, Mr Ward, cooked to death in the back of a prison transport van, is only one of so many such injustices. This tragic case is highlighted in Liz Jackson’s powerful FOUR CORNERS investigation as well as through John Pilger’s interrogation of the bureaucrat and the system that allowed this to occur.

Why haven’t we learned from the failure of America’s industrial prison business. Almost 3 million Americans are imprisoned, 1% of the total population, and nearly 8 million are before the criminal justice system, but this punitive approach makes no headway on reducing crime and violence in that society.

Instead of allowing the tyranny of technocrats to continue this business of imprisonment we need to take control over the destiny of Aboriginal people out of the hands of government and support the empowerment of community leaders, workers and organizations who always have the ultimate responsibility of dealing with the mess when the status quo approach fails.

To break the cycle of crime and imprisonment we need to see much more serious and sustained investment in supporting the community efforts, the education, the night patrolling, the sobering up houses and the many little helping hands for people who are in desperate need of support. They don’t need ‘missionaries, madmen or misfits’ meddling with their fundamental human right to dignity but they do need empathy, understanding and support. When men and women are on their way to prison, especially the young, they need expert legal aid and other support but the Abbott Government is slashing that assistance. These people will also need support when they are thrust back onto the mean streets in this cold-hearted era. Community support requires investment but it brings far more progress than investing in incarceration. Restorative justice and diversionary programs of many kinds have varying levels of success, but they do outperform the harsh, brutalizing failure of the status quo.

I always try to remember that adage, ‘walk in the other man’s shoes’. To achieve justice ultimately we must address what First Nations people tell us is of gravest importance.

So many times Aboriginal people have heard promises. Only a few years ago many were greatly moved by the sincere words of the National Apology to the Stolen Generations. But very little has changed for the better for Aboriginal people after so many of those promises or as a consequence of English law. To close that space between us it is more than mere words and English legal concepts that Aboriginal people are seeking. For each one of us recognition must be written in the head and the heart in a form that implicitly conveys the truth that this is an Aboriginal land, a land of the First Peoples.

Imagine a country where the First Peoples are recognized as the sovereign owners of lands they have lived on for sixty thousand years or more.

Imagine the freedom to be yourself, culturally, spiritually, linguistically, regardless of your age, gender, colour or ethnic origin.

Imagine a Constitution that enshrines these human rights and upholds all of our international legal obligations.

Imagine a Constitutional prohibition on discrimination on the basis of race, colour, religion, gender or national origin.

Imagine a positive mandate in that Constitution to ensure laws are made and programs enacted to end the impoverishment of so many of the First Australians as well as others.

Imagine an Australia where the Indigenous value of *Custodianship* binds all of us to a shared responsibility to care for this land and for one-another.

In this Constitution there would be power, principle and poetry. It would inspire us, expressing our true sense of place, acknowledging the longer timelines of history, defining us and unifying us as Australians.

This is my dream and I hope you have one too, a dream of a revitalized, genuine Democracy and an Australian Constitution that is inclusive of all Australians.

If you can’t see that far into the future to a brighter day that some day will come, then you risk settling for the status quo. Do you want that? Maybe you will talk with some of those Australians who don’t know the Constitution exists or as opinion polling indicates some of those who confuse the Australian Constitution with the American Declaration of Independence?

Clearly a major challenge to meaningful discussion of Constitutional change is that so many Australians don’t know what is in the document or that we have the power to change it for the better. On the encouraging side, polling done for the *Recognize* movement as well as comments by over a million voters on the ABC’s federal election *Compass* have indicated that a clear majority of Australians, 70% or more, supports some form of recognition that Aboriginal and Torres Strait Islander people were the first inhabitants of this land.

This seems an extremely minimalist statement of the obvious. If that were the full extent of the change it would merely follow the pattern of other acts of recognition by some State parliaments in preambles that have symbolic value but usually add non-justiciable clauses to make them of little consequence in establishing rights and ending discrimination. These state expressions of recognition have done nothing to improve the wellbeing of the First Peoples or to change the oppression they experience.

We do not have a clear indication at this stage of the degree of reform Tony Abbott’s Government is willing to recommend. We have three recommendations issued in July 2014 from an interim report by the special parliamentary committee composed of representatives of the major political parties and led by Aboriginal members Ken Wyatt (Liberal) and Senator Nova Peris (ALP). Significantly, this interim parliamentary report drops two of the five recommendations made earlier by the so called, ‘expert committee’ to Prime Minister Julia Gillard back in 2012. Disappointedly, but perhaps predictably, the parliamentary committee has backed away from calls for a strong anti-discrimination clause to be inserted in the Constitution.

We need to look at history and understand the political context surrounding all referenda. To be approved the referendum question requires a YES vote by a double majority. A majority of voters across the nation and a majority of people in a majority of states are required to change the Constitution. Given our innate constitutional conservatism this has happened only 8 times in 44 referendums.

It must also be stressed that many Australians have little understanding of how the Constitution and federal legislation are used to oppress Indigenous people through discrimination, disempowerment and denial of fundamental human rights. I listened with locals in Katherine NT to Professor Mick Dodson’s reflections on what he has gleaned from numerous encounters with Indigenous leaders around the world and also the perspective from his time at Harvard University. When you look back from overseas on how our Governments respond to United Nations criticism on breaches of human rights you can see that our Constitution allows Australia to evade its full international human rights responsibilities. This becomes clear when we look closely at the document that is meant to define us as a nation.

A through reading of the Constitution reveals the deep stain of racism and discrimination. It is one of the few constitutions in the world with potentially negative ‘race powers’ allowing governments to make laws and policy that trample the rights of Aboriginal and Torres Strait Islander people.

It is because the Australian Constitution says very little at all about human rights that Aboriginal and Torres Strait Islander people have long been denied the right to shelter, health, education, employment, and expression of their own Cultures and languages. These days you barely hear mention of the fundamental Indigenous right to self-determination. The Australian Constitution gives no legal force to these foundational Indigenous rights and so what is missing now in the relationship between black and white Australians is a basis for trust.

Without trust the space between us is a dangerous void. It is the gap we need to close first before any of those other gaps in life expectancy, education, housing and employment can be closed.

Instead of trust, there is a very old pattern of treachery in Australia’s relationship with its Indigenous people. Every time a promise is made, a new law passed or a hand held out in friendship, we seem to betray any good intentions.

Australia took such a long time to recognize Aboriginal people were even here but soon after we abandoned them to second-class citizenship. We may have stopped classing Aboriginal people as flora and fauna but we forgot that they were human when we removed their children from their families. It took Australia almost two centuries to recognize any form of Native Title but as fast as we could we unpicked the Wik and Mabo High Court judgements and appealed against the Native Title settlements. We treated Aboriginal people as lowly domestic servants and then quibbled over their stolen wages. We paid lip service to the right of Indigenous people to speak their languages and pursue their ancient Cultures but relentlessly for at least two decades government policy and so much Australian media have created a war, the Culture War, waged relentlessly against the value of Indigenous Culture.

As one of the great champions of excellence in Indigenous education, Dr Chris Sarra puts it, there is one prevailing narrative in which “Western influence is seen as progressive and good, and the enemy is Culture and tradition.”

Any discussion of a new attempt to belatedly recognize the legal rights of Indigenous Australians and their rightful central place as the most ancient founders of the many social structures and systems of law that have been here for tens of thousands of years surely must begin with a recognition of this long pattern of injustice and oppression. As a nation we need to accept an honest statement of certain facts. These facts give us an accurate measure of the degree of exclusion, both historical and contemporary, a clear indication of the lack of recognition of Indigenous Australians.

Put yourselves in the shoes of an Indigenous Australian. Instead of beginning the story with the arrival of Europeans let us, for a change, consider the longer timelines of history. Let us start the story at the beginning.

Despite the lie of *terra nullius,* Aboriginal and Torres Strait Islander people have occupied these lands longer than anyone really knows, for at least 60,000 years is the current consensus but perhaps, as Professor Mike Archer once argued at the Australian Museum, it is 80,000 years of human occupation. We can only be sure that before European people even existed Aboriginal clans were evolving into some of the most adaptive and resilient the world has ever known.

We can also be certain that these Aboriginal lands were invaded, from James Cook’s initial hostile gunshots to the arrival of other ships manned by marines. The pattern of settlement was frequently brutal. The English took what was never theirs.

To deny the invasion and the many massacres linked to the theft of lands, and I say this with grim irony, of course would undermine any claim that the Australian Constitution has to even a contested sense of legitimacy.

This nation, constituted by the Australia Constitution Act of 1900, a British Act of Parliament, is founded on the misguided notion of White Supremacy and the equal folly of the concept of conquest. As several Australia judges have noted conquest is a facet of international law frequently used to justify claims by nations to sovereignty over lands they have seized. Having witnessed some thirty of the worst conflicts over the past 45 years including three genocides almost beyond belief, I am convinced that this ancient belief in conquest is not only a vestige of our most predatory traits as a species but in the end it threatens the term of our species on this earth.

Yet conquest of a sort, along with an extraordinary denial of the truth of the Aboriginal presence here, is what has landed us all in this Constitutional mess.

Despite the fact that the original English invader, James Cook, ignored his orders to ‘consult with the natives’, despite the truth that Aboriginal resistance did occur, that there was no surrender of sovereignty and no negotiation of a treaty, the colonies and the ‘Mother Country’ eventually established a Constitution that looked right through Aboriginal people as if they were not here.

Common sense and simple observation told everyone that the great south land was widely settled. By some estimates there were up to 700,000 Aboriginal people here when the Europeans arrived, a population peak that Indigenous Australians are once more steadily approaching after more than two centuries. To achieve the country-wide occupation and the obliteration of the Aboriginal way of life in so many places, it was deemed necessary to reduce the First People of this land to irrelevance.

Usually the British utilized some laws from the lands that they conquered but in the case of Indigenous people the invaders treated them with such disdain that there was no real interest in Aboriginal law. English law was imposed on Aboriginal people. Even after Federation there was still a complete denial of the existence of a traditional law that had been here for tens of thousands of years before any city existed in Europe, before the ancient Greeks debated democracy or the Egyptians built the pyramids. The disdain for the knowledge and law of the First Peoples is at the heart of our national denial and on going delusion.

In the 1901 Constitution Act there were just two references to ‘natives’. Both tragically aimed to exclude Aboriginal and Torres Strait Islander people from the life of the nation. The ‘natives’ were not even to be counted in the census because given the prevailing racism it was assumed that out amidst the flora and fauna they were doomed to extinction. The Parliament was prohibited from making laws for the ‘natives’ but this exclusion did not prevent shameful policies aimed at assimilation and at times acts of genocide.

It was not until the 1967 Referendum, after many decades of campaigning by the Aboriginal Rights Movement, that an extraordinary 90.77% majority of Australians voted emphatically to allow Aboriginal and Torres Strait Islander people to be counted in the census along with all other citizens. Yes, we voters said, the Commonwealth also could make laws for Aboriginal people.

It was the first referendum I voted in and working at that time as a young reporter covering the street protests and the campaigning by the Rights Movement, I am certain that most Australians believed that what we were voting for was a legal measure of equality. No one I know envisaged that the Commonwealth would use this power to make laws that clearly harmed and discriminated against Aboriginal people.

It is a wretched truth that the hopefulness of the 1967 Referendum was never carried forward by political leadership or by the popular will. This was one of the greatest opportunities lost that could have moved this nation towards genuine greatness as perhaps the most equal and unified on earth.

Instead, for another half a century we have been mired in the mud of a racist Constitution. We have been stuck with a Constitution that is anachronistic in that it is based on false concepts of European supremacy, concepts that gained much attention in Charles Darwin’s day but have long been totally discredited by modern science.

Let me state this very bluntly. The Australian Constitution is clearly racist because it is built on the false notion of a *White Australia*n ascendancy. The race powers are deeply repulsive and eternally threatening to Indigenous people but they should be equally repugnant to us all.

I say to you that this is not *my* Constitution and I doubt it is truly *yours* because most of us do not want to live with official racism and discrimination.

While we may debate the historical reasons for the racism in the Constitution, the tone and the intentions, there is no denying that explicit race powers remain in certain Sections.

For example, Section 25 allows States to disenfranchise people on the basis of race and sets out the consequences. Before Federation, Queensland and Western Australia passed laws explicitly barring Aboriginal people from voting. After Federation, most young Aboriginal people who arrived at the voting age were still not able to vote in their own land. Although Section 25 has been generally regarded as not likely to be used now because the offending States would lose a degree of political representation in the Federal parliament, this is the kind of constitutional stain created by racism that should be erased once and for all. But let’s not get swept away by this cleaning up of an anachronistic clause. It hasn’t been used in 114 years and even if it were today it would be challenged and struck down as contravening the *Racial Discrimination Act* of 1975.

 Section 51 (xxvi) of the Constitution allows the federal parliament to pass laws relating to “the people of any race for whom it is deemed necessary to make special laws.” The intention of this section, some argue, was to allow the Parliament to legislate for the advancement of Aboriginal people but in practice what this means so often for Aboriginal people is not consultation and more political oppression. The most shameful recent example is the crushing humiliation of the Northern Territory Emergency Response Act of 2007. A Prime Minister, an Opposition Leader and almost all members of the federal parliament voted to support this 21st Century act of official discrimination against Aboriginal people. They sent in Army troops, federal police and bureaucrats to take over life in 73 remote Aboriginal communities.

Just three times since the introduction of the Racial Discrimination Act in 1975 have any Australians lost the protection against discrimination. Each time it has been Aboriginal people who have been targeted for official discrimination, dressed up as ‘special measures’. Without giving their required prior informed consent, this is clearly oppression of Aboriginal people.

As I consult Aboriginal and Torres Strait Islander people privately and publicly in many places and many forums around the country, overwhelmingly they speak of their land as “***the land that owns them***”. This sense of sovereignty is the animist essence of their being.

Sovereignty may mean many things to different people but to most Indigenous people clearly it means the legal right to control their destiny on their lands and waters. This is at the heart of Aboriginal law. Before leaders ever spoke of “Land Rights” this deep belief in belonging to the land was the most meaningful expression of the Aboriginal sense of time and place. It’s Aboriginal land, always was, always will be.

Whatever would make any politician think that Aboriginal people would give up this attachment to land? To take an Aboriginal person away from country is to tear out a part of their mind.

Polling by the National Congress of First Peoples on Constitutional recognition tell us that this deep and abiding belief in sovereignty is still foremost on the minds of Indigenous people, along with the health and education of their children.

Here then is the first dilemma in the current approach to Constitutional recognition of Aboriginal and Torres Strait Islander people. The consensus paper prepared by the government appointed panel makes it perfectly clear that sovereignty is not going to be included in any referendum proposal for Constitutional recognition and change.

One of the most forceful members of the panel, Noel Pearson, is quoted as saying that apart from being unachievable, “full-blown sovereignty” may not be necessary and that “local indigenous sovereignty” could exist internally within a nation state “provided that the fullest rights of self-determination are accorded.”

Once more I have to say that Noel Pearson is politically confused and shows little grasp of historical patterns. Additionally, the problem with Noel Pearson’s political advice is that he strongly supported the Howard Government’s Intervention on the lands of other Aboriginal people, one of the most blatant assaults on local self-determination in recent decades.

Given this astonishing undermining of Aboriginal authority through the Intervention and the ten year extension known as the *STRONGER FUTURES* legislation, the “fullest rights of self-determination” envisaged by Noel Pearson seem lifetimes away. Why? As the late and great Aboriginal writer, Kevin Gilbert, put it, “Because the white man won’t do it.”

This is where Australia lags far behind the rest of the world. The United States Government has more than 350 treaties with Native Americans. American courts have upheld Indigenous sovereignty repeatedly and affirmed the right of the First Nations to self-government. Native Americans not only benefit from the existence of legal compacts but they direct exploit the real, sub-surface value of the minerals in their land. Importantly evidence gathered over three decades by the Harvard Project on American Indian Economic Development, led by Professors Stephen Cornell and Joe Kalt, shows emphatically that sovereignty, control of their destiny, is the real key to development of First Nations peoples.

The only Indigenous people in the world who have equal life expectancy with the rest of their fellow citizens are the Sami spread across Norway, Finland and Sweden. All three of these countries have Sami parliaments. Norway’s constitution recognizes the country as bi-Cultural and there is a guarantee that the government will consult and negotiate with Sami to maintain their distinct language and Culture.

Such positive recognition and progress by other First Nations shows up the limitations of the Australian approach and the negative restraints imposed by a political reality, a grudging willingness to make symbolic change perhaps but real doubt about how far the politicians or the people will go.

Whatever happened to our belief in an Australian Treaty or legal compact with Aboriginal and Torres Strait Islander people to address their sovereignty and so much of this nation’s unfinished business? The *Yothu Yindi* chant of *“Treaty Now”* is still deeply heartfelt by most First Nations people.

The government panel on constitutional recognition has clearly stated that it saw its brief as coming up with recommendations that contribute to a more “unified and reconciled nation, and be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums. In addition they had to benefit and accord with the wishes of Aboriginal and Torres Strait Islander peoples, and be technically and legally sound. Specifically the experts wanted a clear expression of support from a majority of Aboriginal and Torres Strait Islander people for any statement of recognition.

In truth, however, the panel inadvertently or intentionally reinforced the perceived political ‘reality’ that recognizing Aboriginal sovereignty was not going to happen and nor was any legal compact or treaty that would in a meaningful way encapsulate land rights. The panel’s report notes that these are issues of great concern for future discussion.

What the panel proposed were five recommendations for constitutional changes that nonetheless clearly do not meet the priorities for action by the very people the changes were said to benefit.

I believe this presents a considerable threat to any chance of unity on the full potential of constitutional change.

Our nation is still held back by the timidity and lack of leadership by our elected politicians.

It is 36 years since Australians made any change to our Constitution. The last time we could find the majority of voters in a majority of states was for a referendum in 1977, the main issue then was a requirement that federal judges retire at 70.

A jurist I greatly respect, former High Court Justice Michael Kirby, has eloquently summed up the situation we are now facing. Understanding the record on referenda and noting the importance of recognizing the rights of Aboriginal and Torres Strait Islander people, Kirby declared that, “Constitutionally speaking we are still basically White Australia, however much we boast that we have changed.”

What each one of us can do is to evaluate the prospects of whether these recommended changes from the expert committee and then the refinements by the special parliamentary committee would eliminate or even reduce the overt, institutionalized and casual racism and discrimination that persists in Australia.

The first recommendation by the expert Committee and endorsed by the special parliamentary committee is to erase forever Section 25 of the Constitution. This would prevent the States from ever taking away the right to vote based on race. The main goal of this reform is to erase an expression of permissible discrimination from the Constitution and this much seems clearly achievable with no negative consequences.

The second recommendation by the expert committee to remove Section 51 (xxvi) would eliminate the negative race power that has been used to make laws that sometimes harm the rights of Indigenous people.

Here we need to examine the original intention of Section 51 (xxvi) which Edmund Barton argued was necessary to enable the Commonwealth as he put it, “to “regulate the affairs of the people of coloured or inferior races who are in the Commonwealth”.

After Federation the *White Australia* policy was aimed at restricting migrant workers such as the Chinese miners and the Kanakas, the South Sea Islanders working Queensland’s sugar plantations. Many of these South Sea Islanders were kidnapped by ‘blackbirders’ and entered labour contracts that they did not understand. Of an estimated 50,000 to 60,000 Islanders, almost 15,000 died in their first year or so from diseases like pneumonia, measles and chicken pox for which they had no immunity in their isolated island environments.

It is a cruel but little known part of our history that after such enslavement most of the South Sea Islanders were forced into mass deportation from Australia in the early 1900s. Only a few thousand remained behind. Their descendants are the estimated 40,000 South Sea islanders who still fight for recognition. I have joined some of them in discussions including Gail and Bonita Mabo and Shireen Malamoo to hear them talk of their struggle for rights and the recovery of the wages and estate that was stolen from them around 1906-1908.

Most Constitutional lawyers believe that this race power, too, in Section 51 (xxvi), can be erased to prevent selective race laws ever taking aim at groups targeted by Government like the South Sea Islanders.

If that reform were accomplished it leads to the necessity for the third recommendation by the Government’s advisory committee and one endorsed by the special parliamentary committee, that is for a new power, a Section 51A that would give the federal parliament authority to pass laws that *benefit* Indigenous Australians.

It has been proposed by the Government’s advisory committee that this new Section 51A would also set out a clear statement of recognition of the prior occupancy of the continent and the on-going relationship of Indigenous people with the land and waters. Echoing the Sami Constitutional recognition, there is also a proposal in this section to require the government to secure the *advancement* of Aboriginal and Torres Strait Islander peoples. This may or may not give more of the right kind of support to programs that could bring equity in health, education, employment and life expectancy.

The special parliamentary committee suggests changing the words “race power” to “Aboriginal”, arguing that the High Court would then establish whether new laws are positive or beneficial for the First Peoples.

The highly contentious issue is what constitutes laws that clearly benefit Indigenous people. The Howard Government argued that the Northern Territory Intervention benefited Aboriginal families. Look closer and that Intervention clearly failed even current standards of justice because there was no prior, informed consent by Aboriginal people for the five-year mandatory leasing of their communities to the federal government and other discriminatory provisions targeting only Aboriginal people.

The only mechanism that can ensure Governments do not manipulate this area of law is to offer a strong legal guarantee that Indigenous people must give prior, informed consent. Given the pattern of political treachery and relentless assimilation this is a major challenge of genuine Constitutional reform, ensuring that change makes a meaningful difference, that it ends the historic pattern of dispossession and disadvantage.

The special parliamentary committee, at least in its provisional report of July 2014, appears to have abandoned the fourth and fifth recommendations fro change made by the earlier Government appointed committee of ‘experts’. This includes dropping the recommendation for a new non-discrimination clause.

Some like Professor Greg Craven, Vice Chancellor of the Australian Catholic University, have argued that a non discrimination clause would doom the whole Recognition referendum . However, in my view, a non-discrimination clause is not a mini Bill of Rights in one clever line. It is simply the one current proposal that unequivocally adds real teeth to challenge ongoing discrimination and oppression that damage the wellbeing of so many of the First Peoples.

Yes a non-discrimination clause also raises questions about Australia’s treatment of asylum seekers and so widening the discussion increases the political risk.

But if we are serious about meaningful change that eases discrimination and oppression it must be applied to all human beings in this land.

Finally, in their fifth recommendation, the government appointed expert panel sought a language provision that stated that English is the national language but also affirms Aboriginal and Torres Strait Islander languages as part of our national heritage. The parliamentary committee has incorporated this idea to some extent in a recommendation for some symbolic recognition of prior occupancy, recognizing that *the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples and the continuing cultures, language and heritage* of these peoples.

As yet there is no final proposal for Constitutional changes and so we do not really know what we might be considering in a referendum. It seems timely to question, however, whether the current proposed wording on languages will truly bring meaningful recongnition and even support of the right of First Peoples to speak and even be educated in their original languages.

For example, in recent years the Northern Territory Government required English to be taught in schools for the first four hours every day, even though these children spoke their own languages at home. Of course such an absurd policy has broken down but governments and technocrats are divided on the issue of bi-lingual education. The NSW Government has been actively promoting the revival and practice of Indigenous languages. At Ian Thorpe’s Fountain for Youth, of which I am the Honorary CEO, we have provided the core funding for the first major atlas and dictionary of the language and cultural life of the people of Crocodile Island in the Northern Territory to honour the wishes of their wise elders.

In summary, the discussion of Constitutional recognition so far has drawn some bi-partisan political support but no clear statement of how far this reform agenda should go.

There appears to be public approval of a limited form of recognition but also limited public awareness of the real issues at stake, especially on going discrimination and oppression.

At the same time, there is virtually no high-level political discussion about abandoning oppressive policy such as the Stronger Futures legislation in the Northern Territory that officially discriminates against Aboriginal communities. On the contrary, the Abbott Government talks aloud about a new and more punitive policy linking school attendance to cutting welfare payments. Education proposals include abandoning secondary schooling on the homelands.

For Australia’s Indigenous citizens here is the painful tension between the on going oppression and talk of recognizing their rights.

When Aboriginal people are vilified and humiliated by the most blatant outbursts of racism, even if you are the Australian of the Year, some sections of our society will be sympathetic but others raise the argument of their right to free speech. To hear an Australian Attorney general declare, even as an intellectual boast, that people have the right to be bigots, is an extremely cowardly retreat from the high principle evoked when William Cooper spoke up for the rights of Jewish people not to be vilified and put to death.

 Put yourself in the shoes of an Aboriginal person subjected to racism. While ever some in our midst are willing to inflict the deliberate hurt of racism, we have an indication of this nation’s casual complacency over the suffering endured by Indigenous people for more than two centuries.

For more than two centuries Indigenous people have been brutally excluded from their rightful place at the center of life in this nation and for the past century or more they have been excluded or discriminated against by the Australian Constitution.

It is time that all of us took a personal stand against this injustice.

Dr. Jeff McMullen AM Address to Macquarie University Law students. Macquarie University August 27th 2014.

1. Easterly,William. *The Tyranny of Experts. Published by basic/Perseus Book group. New York 2013.* [↑](#footnote-ref-1)
2. Cox, Eva. *Forest report ignores what works & what doesn’t for First Nations People.* National Indigenous Times. Page 19. August 13 2014. [↑](#footnote-ref-2)