AUSTRALIAN CATHOLIC UNIVERSITY

5 May 2017

Ms Pat Anderson AO & Mr Mark Leibler AC
Co-Chairs
Referendum Council

Via Email: ConstitutionalRecognition@pmc.gov.au

Dear Ms Anderson and Mr Leibler,

Submission to the Referendum Council

Thank you for your letter of 27 February 2017 inviting me to provide a submission to the Referendum Council on matters within its terms of reference. I do so gladly.

1. Introductory observations

By way of background, I am the Vice-Chancellor and President of Australian Catholic University (ACU). ACU is a public not-for-profit university with campuses in Adelaide, Ballarat, Brisbane, Canberra, Melbourne, North Sydney, Strathfield, and Rome. As a Catholic university, ACU regards reconciliation with Aboriginal and Torres Strait Islander peoples as a deep moral imperative. Authority for this conviction may be found in the *Compendium of the Social Doctrine of the Church*, prepared by the Pontifical Council for Justice and Peace at the request of Pope John Paul II.

As a Professor of Constitutional Law and former Crown Counsel in Victoria, I am motivated to contribute to this discussion not only by a shared commitment to this moral imperative, but also with a conviction that reconciliation with Australia's Indigenous peoples must be done in a way that:

(a) is consistent with the principles that underpin the Australian Constitution;
(b) does nothing to undermine the integrity of any aspect of the structure of the Constitution; and
(c) puts in place structures that will make a positive contribution to the way that Australia is governed now and in future.

I was closely involved with the Yes Case during the 1999 referendum about whether Australia should become a republic. I bring this experience to bear when making these submissions about what question should be put to the Australian voters at a referendum about constitutional recognition of Indigenous peoples, because I am acutely aware of the very real difficulties that are faced by those prosecuting the Yes Case in any referendum campaign.

For all of these reasons, I have encouraged ACU to give active support to the movement for constitutional recognition of Indigenous Australians.

Before he was elected to the Commonwealth Parliament, Mr Julian Leeser MP was ACU's Director of Government, Policy and Strategy. During this time, together with Mr Damien Freeman, he established Uphold & Recognise, an organisation committed to the dual imperatives of upholding the Australian Constitution and recognising Indigenous Australians. The Hon. Lloyd Waddy AM RFD QC served as inaugural Chairman of Uphold & Recognise and was recently succeeded in this role by Mr Sean Gordon (Chief Executive Officer, Darkinjung Local Aboriginal Land Council). I am pleased to relate that ACU has continued to provide in-kind support to Uphold & Recognise, which supports the approach advocated in this submission.

In preparing this submission, I have also had the benefit of support from the PM Glynn Institute, the public policy think-tank established by ACU in 2016.

2. The proposed referendum

I have taken an active interest in discussions about constitutional recognition of Indigenous peoples for a long time. Whilst I have a deep personal commitment to this as a public policy imperative, I believe that some of the propositions put forward with the hope of achieving this end are flawed and, from a constitutional perspective, unacceptable.

I have placed on record my firm opposition to the recommendations contained in the Final Report of the Expert Panel on Constitutional Recognition of Indigenous Australians ('Expert Panel').[1] My central objection surrounded the call for a racial non-discrimination clause to be inserted in the Constitution. Additionally, I have publicly explained my reasons for supporting an alternative approach to constitutional recognition[2]; and the case for supporting the kind of approach developed by Mr Noel Pearson in his 2015 Quarterly Essay, and by Messrs Freeman and Leeser with respect to an Australian Declaration of Recognition.[3]

Recently, I have also outlined why I believe that recent moves in Victoria and South Australia to conclude 'treaties' with the Indigenous peoples of those States, and calls for this approach to be adopted by the Commonwealth, pose a threat to the movement for constitutional recognition of Indigenous peoples.[4] It is not only misleading to speak of these proposals as 'treaties' but they cannot deliver to Indigenous peoples what they seek.

Instead, I strongly believe that the following core propositions and approach will more effectively progress indigenous recognition in Australia, in the context of the current political environment and debate:

- Support a modest amendment to the Constitution that would remove the provisions that currently deal with race, and replace the race power with an Indigenous peoples power.

- Oppose any restriction on how the Parliament might exercise this Indigenous peoples power, such as through a racial non-discrimination clause.

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[1] Craven, G., 'Keep the constitutional change simple', *Australian Financial Review* (6 February 2012) [accessible via http://www.afr.com/news/politics/national/keep-the-constitutional-change-simple-20120205-i3ocf].

[2] Craven, G., 'The law, substance and morality of recognition' in Freeman, D., and Morris, S. (ed.), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (2016).

[3] See Pearson, N., 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' 55 *Quarterly Essay* (2015); and Freeman, D., and Leeser, J., *The Australian Declaration of Recognition* (2014) [accessible via http://damienfreeman.com/wp-content/uploads/2014/11/DTF-14.pdf].

[4] See Craven, G., 'False promise of indigenous 'treaty' could derail recognition', *The Australian* (17 December 2016) [accessible via http://www.acu.edu.au/__data/assets/pdf_file/0009/1140597/20161217_The_Australian_False_promise_of_indigenous_treaty_could_derail_recognition..pdf].

- Support an amendment to the Constitution that would make provision for an Indigenous body to advise the Parliament on proposed laws with respect to Indigenous affairs along the lines proposed by Professor Anne Twomey in chapter 13 of *The Forgotten People*.

- Support the adoption of an Australian Declaration of Recognition outside the Constitution along the lines proposed by Mr Freeman and Mr Julian Leeser in chapter 8 of *The Forgotten People*.

- Support the negotiation of agreements between the various Indigenous peoples of Australia and the Crown in right of the Commonwealth and in right of the various States along the lines of the Noongar settlement in Western Australia.

- Oppose any proposal for a national 'treaty' between Australia and its Indigenous peoples.

3. Indigenous aspirations

The Australian Constitution belongs to all Australians, and any change to it must be in the national interest. Of course, any proposal to change the Constitution to recognise Aboriginal and Torres Strait Islander peoples is of especial significance to these peoples. In these circumstances, whilst any amendment must be motivated by a commitment to the broader common good, it should also seek to realise the aspirations of Indigenous Australians.

What has become apparent, ever since the Expert Panel's report, is that Indigenous Australians are seeking some form of substantive change that transcends the mere symbolic. They have endured discrimination and dispossession, which was justified in part by the prevailing attitude to race. Therefore, it is not enough for Indigenous people that the concept of race be removed from the Constitution. They seek some guarantee that their treatment in future will be different from their treatment in the past. Although we all like to believe that public policymakers in Australia today are more enlightened than some of their predecessors, and that they would not make policies that adversely discriminate against Indigenous people, the magnitude of the historical injustice that Indigenous peoples have suffered warrants some guarantee that the future will be different from the past.

While changes must be more than merely symbolic, Indigenous Australians seek a form of reconciliation that does involve a symbolic dimension. It involves recognition both of the past injustices against Indigenous peoples and the enduring value of the cultural heritage of Indigenous peoples as part of the patrimony of the Australian nation. This patrimony includes the nation's British institutions and multicultural character, as well as its Indigenous heritage, and all of these should be affirmed as the fundamental components of Australia's national identity.

4. Constitutional conservatives

The group of people that I dub 'con-cons' and with whom I identify might, at first, seem to be opposed to any amendment to the Constitution to incorporate the recognition of Indigenous peoples, but this is to misunderstand their motivations. The constitutional conservatives ('con-cons'), are a constituency who have a serious commitment to the Australian Constitution, and whose concerns I believe must be heeded if there is to be a successful referendum. I have sought to outline their views below.

Con-cons regard the Australian Constitution as something akin to received wisdom. The nineteenth-century colonial statesmen who drafted it appreciated the wisdom of the English tradition of government, and also looked beyond it to the lessons of the American, Canadian and Swiss traditions. The Constitution that they drafted was a cultural achievement that might

not have been possible in other conditions (including those of today), and one which con-cons fiercely defend. Con-cons appreciate the virtues of the sovereignty of parliament, the rule of law, the distinction between legislative and judicial activities, responsible government, federalism, and constitutional monarchy upon which the Constitution is based. They will vigorously oppose any change that has the potential to diminish these virtues.

The Expert Panel's proposal for a racial non-discrimination clause is unacceptable to con-cons because it undermines the principle of the sovereignty of parliament. Con-cons have no interest in seeing discrimination proliferate in Australia. But they believe that whether a specific measure discriminates against a group of people in an adverse way involves a political judgement. In a representative democracy, such political judgements should be made by the politicians assembled in parliament, which is accountable to the people, rather than by the unaccountable judges who sit in the courts.

Various contributors to this discussion have called for preambular recitations to be inserted either within a section of the Constitution, or at the head of the Constitution, or in the preamble to the *Commonwealth of Australia Constitution Act 1900* - the enactment of the Imperial Parliament in which the Constitution is contained in the last of the Covering Clauses. Such preambles cause problems for con-cons because they introduce symbolic language into the Constitution. The Constitution is a rulebook. The interpretation of its rules and their application in specific circumstances is the responsibility of the Justices of the High Court of Australia. Former Chief Justice of Australia Sir Harry Gibbs, High Court Justice Stephen Gageler and New South Wales Court of Appeal Justice Mark Leeming have all written about the significance that a preamble can have for the interpretation of a document such as the Constitution. Con-cons have grave concerns about the uncertainty that might be introduced into the interpretation of the Constitution if it is interpreted in light of a symbolic preamble containing legally ambiguous language.

Notwithstanding these reservations, con-cons have sought to make a constructive contribution to the discussion around recognition of Indigenous Australians. They have tried to gain an understanding of realising legitimately held aspirations without undermining the sovereignty of parliament or creating legal uncertainty in the interpretation of the Constitution. In particular, they have backed calls for an Indigenous advisory body and an Australian Declaration of Recognition.

5. Australian Declaration of Recognition

I am conscious of, and certainly appreciate, the deep and profound significance that symbols of recognition and reconciliation have. While I believe Australia should adopt such symbols, I am opposed to the introduction of such symbols into the Constitution for two primary reasons. Firstly, any statement that is rich enough to capture the deep and profound significance of these issues will invariably contain the kind of language that is susceptible to legal uncertainty. Secondly, symbols of recognition need to be present in the civic and cultural life of the people; they need to be found in documents that are recited at citizenship ceremonies and learnt off by heart by schoolchildren. Such symbols could more readily be located in an Australian Declaration of Recognition[5] that is outside the Constitution, than within the Constitution itself.

Recognition demands a powerful and poetic statement that captures the imagination. An Australian Declaration of Recognition would have the kind of cultural significance for Australians that the Declaration of Independence has for Americans—even though it is not part of the Constitution of the United States.

[5] See the proposal in Freeman, D., and Leeser, J., *The Australian Declaration of Recognition* (2014) [accessible via http://damienfreeman.com/wp-content/uploads/2014/11/DTF-14.pdf].

A Declaration of Recognition should recognise the three constituents of Australia's national identity: its Indigenous heritage, its British institutions, and its multicultural character. It should say something about the history of each of these, and their enduring significance for the nation's aspirations for the future.

6. Indigenous advisory body

There is evidently a need for some form of guarantee that the future will be different from the past. One of the fundamental reasons that public policy discriminated against the interests of Indigenous people in the past lies in the fact that Indigenous people were not part of the process through which these policies were formed. The establishment, by constitutional amendment, of an Indigenous advisory body would ensure that Parliament receives and considers advice from Indigenous people when debating proposed laws about Indigenous affairs. This would provide a guarantee that gives Indigenous people reason to believe that law and policymaking will be different in future.

Such an approach would not disturb the balance between the Parliament and the High Court. Ultimately, it would still be for Parliament to decide what is in the interests of Indigenous people. Whereas a racial discrimination clause would mean that the seven Justices of the High Court would decide whether Parliament's laws discriminate against Indigenous people, the constitutional establishment of an Indigenous advisory body would require Parliament to consider whether Indigenous people themselves believe that a proposed law discriminates against them. In this way, Indigenous people become incorporated into the processes of Parliament without undermining the sovereignty of Parliament.

7. Liberal critique and the perspective of traditional owners

In some respects, constitutional conservatives and liberals share the same concerns, but in other respects we can identify differences of emphasis if not substance. In the latest contribution by Mr Warren Mundine to this discussion, *Practical Recognition from the Mobs' Perspective* he considers these perspectives and also approaches the issue from the traditional owners' perspective.

I have had the benefit of reading an advance copy of *Practical Recognition from the Mobs' Perspective*, which is due to be launched by Mr Noel Pearson at the Melbourne Law School on 19 May 2017. In it, Mr Mundine argues that proposals for constitutional recognition of Indigenous peoples have been filtered through the *Indigenous lens* and the *conservative lens*, but that they have not hitherto been passed through the *liberal lens*. His purpose is to offer a critique of the debate, and to offer a suggestion for how current proposals might be refined to accommodate the concerns of liberals and of traditional owners.

The most significant new proposal to be advanced in the pamphlet is that the Constitution should provide for local Indigenous bodies that are accountable to the various Indigenous peoples, as distinct from a national Indigenous body that represents all of them when providing advice to the Parliament.

The starting point is that the various peoples such as the Wik, the Yolngu, the Wiradjuri, and the Gadigal peoples each have a distinctive identity which manifests itself through their distinctive culture, language, and connection to traditional lands and waters. Mr Mundine argues that the Constitution should affirm that the Parliament has the existing power to establish a body corporate for each of these peoples, and to invest it with responsibility for preserving their language and culture, managing lands and waters over which they are recognised to possess native title, to enter into agreements with the Commonwealth to deliver a range of services to their people, and more generally to establish a representative structure through which they might be empowered to realise responsibility for the advancement of health and welfare of their people.

I believe that this is a useful contribution to the discussion about both constitutional recognition of Indigenous peoples and agreement-making between the Commonwealth and these peoples. Were the Constitution to require the Parliament to establish such bodies corporate, the Commonwealth Government could enter into a negotiation process with each Indigenous people before introducing a bill into the Parliament to establish a body corporate for that people. These negotiations could be wide-ranging, and cover all aspects of the historical relationship between the Crown and the Indigenous people, in order to arrive at a final settlement. This settlement could then be recited in a schedule to the act establishing the Indigenous body corporate, and, in stipulating the composition, roles, powers and procedures of the new body, the act could establish the basis for a new partnership between the Crown and the Indigenous people in future.

Such an approach is already well established in New Zealand, where the Crown enters into negotiations with each of the Maori tribes for a final settlement which is subsequently ratified by the Parliament. A similar approach has also been taken in Western Australia in the historic Noongar settlement.

There has been much discussion of the possibility of a 'treaty' between Australia and the First Nations. From a legal point of view, I think it is simply false to speak of any such treaty. From a pragmatic point of view, I think it is extremely unlikely that the politicians will judge public opinion to be in favour of any such treaty. Fundamentally, and from a moral point of view, I do not believe a treaty will deliver to Indigenous peoples what it is they seek.

A constitutional mandate for Parliament to establish bodies corporate for each of the Indigenous peoples, and a negotiation process resulting in a settlement between the Commonwealth and an Indigenous people, prior to the establishment of a body corporate for that people, could deliver for Indigenous people where calls for a treaty cannot.

8. Pragmatics of a referendum

Aside from considerations to do with how best to recognise Indigenous Australians in the Constitution, it is necessary also to have regard to the pragmatics of running a successful referendum campaign.

There have been 44 attempts to amend the Australian Constitution since 1901. Only eight have been successful. So it is impossible for any of us to overestimate the difficulty of changing the Constitution.

My experience in 1999, as part of the committee prosecuting the Yes Case in the lead up to the referendum on whether Australia should become a republic, is instructive of the perils that those advocating a Yes vote will face in 2018. No argument is too silly or too trivial to be deployed effectively in referendum debate. In 1999, the republic was sunk by such arguments as that there were too vast a number of amendments to the Constitution; that it would be expensive to change the coinage; and that a republican Australia would be drummed out of the Commonwealth.

Typically, the impacts of such arguments are strung out along a via dolorosa of falling opinion polls: typically, the highest vote for any referendum proposal is in an opinion poll taken before it actually has been formulated and before it even is certain it will be put. From then on, support declines, with a desperate attempt to keep one's constitutional nose above the majority marker.

The Hon. Gary Johns has edited a collection of the kind of arguments that we are likely to see mounted against a referendum on recognition of Indigenous peoples.[6]

The following observations are guidelines for the kind of proposal that stands the strongest chance of success at a referendum:

- The proposal should recognise, but not rely excessively upon, the formal need for constitutional change.
- The proposal should simultaneously understand the intense need for a practical solution and the reality that the payload of any true solution ultimately will be moral in character.
- The proposal should acknowledge that the Constitution can be sanitised, but that the only measure that will assure an Australia intrinsically engaged with its European and Indigenous history, present and future, is a moral response.

A modestly amended Constitution, a solemn recognition of what it is to be intrinsically Australian and inseparably Indigenous, and a continuous dialogue between Indigenous people and the policy process would offer a good outcome for Australia, and one that could contend with the difficult pragmatics of running a successful referendum campaign.

9. Recommendations to the Prime Minister and Leader of the Opposition

Having regard to the profound moral significance that recognising Indigenous peoples holds for the Australian nation, the long-held aspirations of Indigenous Australians, the legitimate concerns of constitutional conservatives and liberals, and the practical difficulties of success at any referendum in Australia, I respectfully submit that the Referendum Council should make the following recommendations in its final report to the Prime Minister and the Leader of the Opposition.

1. The Constitution should not be amended to include a racial non-discrimination clause.
2. Section 25 of the Constitution should be repealed.
3. Section 51(xxvi) of the Constitution should be repealed and replaced with a provision that enables the continuance of the Commonwealth Parliament's existing plenary power to make laws in relation to Aboriginal and Torres Strait Islander peoples.
4. A statement of the history and aspirations of the Australian nation for its future should be adopted in an Australian Declaration of Recognition outside the Constitution. This should recognise Australia's Indigenous heritage, its British institutions, and its multicultural character.
5. A new section 60A should be inserted into the Constitution, which establishes an Aboriginal and Torres Strait Islander body to advise the Parliament about proposed laws with respect to Aboriginal and Torres Strait Islander peoples, and to advise the Executive Government, but which leaves the Parliament with the plenary power to determine the composition, roles, powers and procedures of the body established by this section.
6. Consideration should be given to an amendment to the Indigenous peoples power that replaces the existing races power, either in section 51(xxvi) or in a new section 51A, which affirms that the Parliament shall establish local bodies corporate for the various Indigenous peoples, and that the Parliament has the plenary power to determine the composition, roles, powers and procedures of the bodies that it establishes.
7. The establishment of any Indigenous body corporate under the proposed section 51(xxvi) or section 51A should be preceded by an agreement-making process between the Commonwealth and the representatives of the relevant Indigenous people, and this agreement should form a schedule to the act of Parliament that establishes the body corporate that will be responsible for implementing the agreement in partnership with the Commonwealth.

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[6] Johns, G. (ed), *Recognise What?* (2014).

10. Conclusion

I believe that the recommendations listed above will make for the best chance of success at a referendum within the next twelve months. There are at least four reasons why all Australians of goodwill should now work together to make this happen speedily:

- A successful referendum to recognise Indigenous Australians in the Constitution would be a defining moment for the Australian nation.

- A referendum about recognition of Indigenous Australians is too important to fail. The consequences of a No vote would be catastrophic for Australia's relationship with its Indigenous peoples; for its conception of itself; and for its place within the community of nations.

- There is good reason to believe that a referendum would be successful if we find an approach that addresses Indigenous aspirations and at the same time addresses liberal and conservative constitutional concerns.

- In this way, a successful referendum would also be a unifying moment for the Australian nation, in which we affirm that the things that unite us are greater than the things that divide us.

Please do not hesitate to contact me should you wish to discuss these issues in further detail.

Once again, thank you for the opportunity to make a submission to this important consultation.

Yours sincerely,

Professor Greg Craven AO, GCSG
Vice-Chancellor and President