

2 June 2015

## ***Our constitutional reform dilemma: to win or to delay?***

I acknowledge the Kaurna traditional owners, their elders past and present.

I also acknowledge the amazing woman after whom this oration has been named, Lowitja O'Donoghue, and her profoundly important contribution to the nation, to Indigenous affairs, to Indigenous health reform, and I especially want to record my personal appreciation for her leadership of our country.

I also acknowledge the great Don Dunstan, former Premier of this State. He was one of the supporters of the 1967 Referendum question to remove racially discriminatory clauses from the

**Prof Marcia Langton**



**2 June 2015**

Constitution. He was a great reformer and supported many bills and initiatives that improved our lives.

It is a great honour to present this oration to Lowitja, and in memory of Don Dunstan.

It was the great Arnhem Land leader, Galarrwuy Yunupingu, the elder of the Gumatj clan in North-east Arnhem Land, who, in 2007, raised with me his desire to see Aboriginal people recognised in the Constitution. He was concerned to ensure that the Yolngu people have a rightful place in the nation. Noel Pearson came to visit and together we talked about how this might be achieved. As far as I know, Noel had never met Galarrwuy face-to-face, but had followed his activities because for much of his adult life Galarrwuy had served as Chairman of the Northern Land Council, which was in its day a very powerful

Prof Marcia Langton



2 June 2015

organisation. Galarrwuy was the interpreter for Justice Woodward, the Land Rights Commissioner appointed by Whitlam, and learnt from a young age about clan matters, the cultural history, heritage and landscapes. Galarrwuy was trained by his father to be the leader of the clan; his father was Mungurrawuy, and Mungurrawuy and others took the first Native Title case in Australia, *Milirrpum v Nabalco*, the Australian case that laid out the flawed legal fiction of *terra nullius*. Native Title was later recognised in 1992 by the High Court in Mabo Number Two.

Noel is much younger than Galarrwuy, and believed, incorrectly, that Galarrwuy was on the left and himself a man of the right. Neither is true, and as each of them is a problem solver with little regard for shibboleths of the parties if they do not advance Aboriginal interests. In this regard, they are very similar in their

**2 June 2015**

thinking and they came to understand that about each other, but it took some time. Several Aboriginal leaders are like that, eclectic in their policy stances, and always problem solving with the best thinking, whether notionally of the 'left' or the 'right.' This is because of the terrible impact that libertarian views and the belief in 'racial exceptionalism', especially in relation to economic participation, alcohol, drugs, and violence, have had on our population.

Standing on the sacred land at Gulkula in Galarrwuy's estate, Noel picked up a very large branch and asked Galarrwuy to hold the other side of it and push it with him, and they pushed it backwards and forwards and Noel said, "This is what we have to do; you have to push from the left and I have to push from the right, and then we'll win arrive at a solution that combines our ideas." This idea of the dialectical relationship and its effect in

**2 June 2015**

allowing creative synthesis of apparently conflicting ideas has long been a source of intellectual inspiration in Noel's work. Noel thus began his friendship with Galarrwuy. Following this, at my instigation, Galarrwuy gave two lectures at the University of Melbourne on this very topic of Constitutional recognition of Indigenous Australians and how the future of Australia might accommodate us with honour. He envisaged a future Australia in which our legal, constitutional, economic and cultural aspirations could survive and flourish. The fates favoured his ideas during these final months of the Howard Government. His visit to our University House staff club coincided with Kevin Rudd's visit and a brief discussion in the entry hallway was sparked some interest from Rudd in the challenge of accommodating Aboriginal concerns. Jenny Macklin who later became the Minister for Indigenous Affairs under the Rudd and Gillard governments attended one of his lectures, and she was

**2 June 2015**

very interested in what Galarrwuy had to say. Some years later, Prime Minister Gillard appointed that an expert panel to investigate the recognition of indigenous Australians in the Australian Constitution.

I will summarise the Expert Panel's recommendations, Noel Pearson's proposition and Frank Brennan's proposition.

But first, let me make it clear that I believe that any idea of race and the ability of the Parliament to use race in its law-making should be removed from our Constitution. Because of the way that the notion of 'race' has been historically applied to Indigenous people in Australia, our rights to peoplehood have been undermined. I believe that our peoplehood should be recognised.

**Prof Marcia Langton**



**2 June 2015**

I am arguing that defining Aboriginal people as a 'race', as the Constitution does, sets up the conditions for indigenous people to be treated, not just as different, but exceptional, and inherently incapable of joining the Australian polity and society. The history of legislation and policy applied to Indigenous Australians demonstrates this in a number of ways: not citizens until after the 1967 Referendum; the shameful effects of the nearly half-century old Community Development Employment Program (a work-for-the dole scheme); the Northern Territory Emergency Intervention; and this is to only name a few of the exceptionalist initiatives that have isolated the Aboriginal world from Australian economic and social life. In turn, many Indigenous Australians have developed a sense of entitlement, and adopt the mantle of the 'exceptional indigene', the subject of special treatment on the grounds of race. My experiences across Australia during the past 50 years have impressed upon me how this exceptionalist status, to which many Aboriginal people have ascribed unwittingly, involves a degree of self-loathing, dehumanisation, and complicity in racism.

As the exotic, Aboriginal people are not required to be normal, such as attending school regularly, or competing in a meritocracy (except in the AFL and NRL and some other sports codes). In the slowly building campaign for constitutional recognition of Indigenous Australians, it is vital that we broaden the understanding that the constitutional tradition of treating Aborigines as a 'race' must be replaced with the idea of 'first peoples'. By this I mean simply what is proposed in the UN Declaration on the Rights of Indigenous People: It recognises that: 'Indigenous peoples are equal to all other peoples, while recognising the right of all peoples to be different, to consider themselves different, and to be respected as such.' The very next part of the Declaration states:

**Prof Marcia Langton**



**2 June 2015**

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

The problem is not 'race', but racial discrimination. Indigenous people define themselves according to their lineages and cultures that tie them to places and ways of life that existed long before colonisation. If we accept these principles of defining the status of Australia's indigenous people, then the power that 19th century race theories have had on our society through our Constitution and scores of legislative acts becomes null and void. Not immediately, of course, but over time. This would not be a simple task, I need to say.

Since the Expert Panel recommendations were presented to Prime Minister Gillard and published, Prime Minister Abbott has made an unequivocal commitment to supporting recognition of Indigenous Australians in the Constitution, several arguments



**2 June 2015**

have been mounted against those recommendations, and a 'No' case has been threatened. The question is: what would constitute 'recognition' and what would 'recogniton' mean. However, before we become optimistic, let me also warn that if a 'No' case is formalised, funded by the Government, and included in the question to be put to a Referendum, Constitutional recognition of Indigenous people will almost certainly fail. In the history of Australian referendums, all those questions which have had a formal 'No' case have been voted against by the majority of Australians.

Ours is most difficult Constitution in the world to change. Not only do a majority of voters have to vote positively for a question, put in a referendum to Australian voters, each Australian State Parliament must vote in the affirmative and in the majority for a constitutional change. There is no other

**2 June 2015**

constitution in the world that is so difficult to change as the Australian Constitution. And as a result only eight out of 44 questions in Australia's history have succeeded.

Some of us who served on the Expert Panel on Constitutional Recognition of Indigenous Australians are concerned to ensure that, when the proposed referendum question is settled, we have a strategy to avoid failure at the referendum. If this question fails at a referendum proposed to be held in 2017, it will not be supported by any government in the future. A negative vote would completely rule out any question of this being taken up again in our lifetimes. Those of us who have considered this matter would rather leave it to another generation rather than have a failure now.

**2 June 2015**

The exclusion of Aboriginal people from the nation's Constitution took place in the nineteenth century.

In the 19<sup>th</sup> century, the Federation Movement, and it began with a speech by Henry Parkes, the Premier of the Colony of New South Wales. In 1889 at Tenterfield he called for the Colonies to unite and create a great national government for all Australia. At that time Australia was six colonies. All Australian colonies reported back to the Home Office in London on matters of State, and were, in most important ways, governed from the Home Office.

Parkes wrote to the other colonial Premiers proposing a meeting to discuss a Constitution for the new nation, at which he famously remarked that, "The crimson thread of kinship runs through us all." By this he referred to common racial and British

**2 June 2015**

heritage of the colonists as the basis upon which the new nation might be founded.

Parkes initiated a decade of conventions and public debate which culminated in a Constitution and the Australian Federation in 1901. So the Constitution was drafted at two Constitutional Conventions, and I'll just say something about those: Conventions are tremendously important, and most people who are interpreting the Constitution read those Conventions and read the debates to look for the spirit of what was meant in the actual Constitution drafting.

So the Convention transcripts and speeches are quite powerful in their impact on Australian society today.

**2 June 2015**

The main issues at the Conventions were the financial and trade issues arising from the Federation. So at that time the colonies could not trade with each other; they had to write back to the Home Office to get permission to trade with each other. There was no free trade across the colonial borders. And they couldn't do anything jointly about finance, so each colony operated independently as a financial unit which was very restricting in terms of building the economy. What they were considering was how best to weigh the interests of the small states against those of the more populous states in the new Federal Parliament that they proposed: how would New South Wales and Victoria stand against the smaller states. So all the white people were down here in this corner and there were a few scattered elsewhere in the country, so if everybody down here had the money, did they have to hand their money over to the others? The same old budgetary problems. This is why Aboriginal people were

**2 June 2015**

excluded – to prevent the colonies with large Aboriginal populations from getting a greater share of the tax distributions that would have been funded by New South Wales and Victoria – the jurisdictions with the largest white populations.

Customs, duties, tariffs and the capacity of the Upper House to veto money bills were of far greater concern to the Convention delegates than anything else. No indigenous person attended any of the conventions, nor did any delegates seek to represent their interests. At one point one of the delegates proposed that New Zealand be a part of Australia, and then there were complaints about including the Maoris, and the possibility of including Aborigines in the recognised population. Hence, New Zealand, the Maoris and Aborigines were excluded, the Aborigines quite formally so.

**2 June 2015**

There was a long interregnum but they eventually they made a fresh start with the 1897-'98 Convention, at which they revised the draft. It was endorsed by the 1891 Convention. Later under Edmund Barton, the first Prime Minister of Australia, and one of the first members of the High Court, developed the revised draft and it was put to the people of the Colonies of New South Wales, South Australia, Tasmania and Victoria; no referendum was held in Queensland or Western Australia. The draft Constitution received majority support in each of the four colonies holding referendums but as nevertheless deemed unsuccessful in New South Wales because the number of people that voted for the draft did not reach the minimum of 80,000 required by the New South Wales Parliament. It was then amended again in 1899 at a conference attended by the Premiers; in 1899 and 1900 it was again put to the voters in the colonies, this time also in Western Australia and Queensland, and it was supported by the majority

**2 June 2015**

of voters in each colony, but large sections of the community were excluded from voting, including most women and many Aboriginal people. Women were able to vote for or against the draft Constitution only in South Australia and Western Australia, while Aboriginal people were able to vote only in New South Wales, South Australia, Tasmania and Victoria. However, even where Aboriginal people had a legal entitlement to vote there is no evidence that they did so.

Aboriginal people played no role in the Constitution.

Then in 1899 and 1900 a delegation of the Australian Colonies went to London to have the draft Constitution enacted by the British Parliament, the Imperial Parliament still exercised ultimate authority over the Australian Colonies, was introduced to the House of Commons, completed its passage through the



2 June 2015

Imperial Parliament on 5<sup>th</sup> July 1900, was assented to by Queen Victoria on 9<sup>th</sup> July 1900, and came into force on 1<sup>st</sup> January 1901 entitled the Commonwealth of Australia Constitution Act 1900. Section 9 of the Act reads:

*“The Constitution of the Commonwealth shall be as follows...”*

and thereafter the Act contains the entire text of our Constitution.

Two Constitutional experts, Megan Davis and George Williams of the University of New South Wales, have published a book, *“Everything You Need to Know About the Referendum to Recognise Indigenous Australians.”* Helpfully, at the very

2 June 2015

beginning of the book, excluding the frontis pages they have set out summaries of The Case for Yes and The Case for No.

The case for Yes, they write, is the following:

1. *The Constitution was drafted to exclude Aboriginal and Torres Strait Islander peoples from the political settlement that brought about the Australian nation."*
- “2. *It is important that the Constitution, the founding document of the nation, recognises Australia's full history, not just the period from British settlement.*
3. *We need to remove discrimination from our Constitution; it should prevent rather than permit racial discrimination so that all Australians are treated equally.*

2 June 2015

4. *Recognition in the Constitution would protect against the future loss of Australia's unique indigenous cultures which are a vital part of our national identity. Recognition will help improve indigenous health and wellbeing.*
5. *A successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution would be an uplifting achievement that unites Australians."*

The No case:

2 June 2015

- "1. There are more important issues to address. Rather than changing the Constitution Australia's politicians should focus on ending indigenous disadvantage by way of health and education reforms.*
- 2. Changing the Constitution is expensive; there are better things to spend tens of millions of dollars on.*
- 3. The Constitution has worked well enough for more than a century; it should not be changed or tinkered with unless there is a compelling reason. If it ain't broke, don't fix it.*
- 4. The High Court would be left to make sense of what the changes mean, and judges could bring about unintended consequences.*

2 June 2015

5. *There is no agreement about how the Constitution should be changed. Even Aboriginal and Torres Strait Islander peoples have different views. Until there is unanimity no referendum should be held."*

These are the broad grounds of the debate as it is being conducted today, but there are more details to understand.

Another matter to understand about our Constitution is that when it was drafted in the 19<sup>th</sup> century it specifically excluded Aboriginal people on the grounds of race, and it is this exclusion that lies at the heart of the state authorised discrimination that continues to this day. Moreover, the Constitution authorised racial discrimination. Ironically, as George Williams points out

2 June 2015

*"...the change actually laid the seeds for the Commonwealth to pass laws that impose a disadvantage on [Indigenous peoples.]"* **[Race and the Australian Constitution, George Williams, Australian Parliamentary Review, Autumn 2013, Vol 28(1), 4 – 16, 6.]**

There is yet a third matter that is worth mentioning about our Constitution. Our Constitution sits in a glass cabinet in Westminster, because it was created by an Act of the British Parliament at Westminster in London. Its Preamble is a nineteenth century concoction of Imperial forelock-tugging.

**Prof Marcia Langton**



**2 June 2015**

In a more innocent time, Australians understood the proposition about the rights of Aboriginal people, although perhaps in a less sophisticated way. Australians voted overwhelmingly in favour of removing discrimination against Aboriginal people in the Referendum on 27 May 1967. They were clear in their intent of removing racial discrimination. That referendum comprised three questions, two of which concerned the specific references made to Aboriginal people in the Constitution. The first question, referred to as the 'nexus question', is in Section 24 of the Constitution, which required that the number of members in the House of Representatives be as near as possible to twice the numbers of members in the Senate. This section has the purpose of preventing the overwhelming of the Senate's power in the case of a joint sitting following a double dissolution election. The question was:

Do you approve the proposed law for the alteration of the Constitution entitled 'An Act to alter the Constitution so that the number of members of the House of Representatives may be increased without necessarily increasing the number of Senators'?

This question was rejected by the Australian voters and did not achieve a majority of states in favour. The second question concerned two clauses, Section 127 and Section 51 (xxvi), which were the only references to Aboriginal people in the Constitution:

2 June 2015

Section 51 subclause xxvi, prior to the '67 Referendum read:

*"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ...*

*The people of any race **other than the Aboriginal people in any state** for whom it is necessary to make special laws."*

Until 1968, the Parliament could not pass laws for Aborigines because of 51(xxvi); it excluded any lawmaking power of the Parliament in relation to Aboriginal people which legally included Torres Strait Islanders, of course. The second reading speech for the Repeal Bill – Repeal of Section 127, reflects the strange views of the time.

*Some people wish – and indeed the wish has been made clear in a number of petitions presented to this House – to*



2 June 2015

*associate with the repeal of section 127 the removal of what has been called, curiously to my mind, the 'discriminatory provisions' of section 51(xxvi). They want – and I understand their view – to eliminate the words “other than the Aboriginal race in any state”, on the ground that these words amount to discrimination against Aborigines. The power granted is one which enables the Parliament to make special laws, that is, discriminatory laws in relation to other races – special laws that would relate to them and not to other people. The people of the Aboriginal race are specifically excluded from this power. There can be in relation to them no valid laws which would treat them as people outside the normal scope of the law, as people who do not enjoy benefits and sustain burdens in common with other citizens of Australia.*

*What should be aimed at, in the view of the Government, is the integration of the Aboriginal in the general community,*

2 June 2015

*not a state of affairs in which he would be treated as being of a race apart. The mere use of the words “Aboriginal race” is not discriminatory. On the contrary, the use of the words identifies the people protected from discrimination...”*

**[‘Aborigines’, Extract from Second Reading Speech on Constitution Alteration (Repeal of Section 127) Bill; Attachment ‘E’; National Archives of Australia: A4940, C4257, page 155.]**

**The other clause that was removed was 127:**

Prof Marcia Langton



2 June 2015

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

The question was:

Do you approve the proposed law for the alteration of the Constitution entitled 'An Act to alter the Constitution' so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population?

The majority of Australians voted 'Yes,' and this Referendum had **the highest ever YES vote recorded in a Federal referendum with 90.77% in favour of amendment.**

so 51(xxvii) was deleted from the Constitution and the words "other than the Aboriginal people in any state" were removed from 51(xxvi). But strangely, and I haven't done my homework on this but I'm doing it, but people tell me that it was some kind of oversight; I don't believe it, but anyway, Section 25 was not

2 June 2015

removed. Let's have a look at Section 25. So this remains in our Constitution. We'll go to [0:26:58.4], and it reads:

*"Provision as to races disqualified from voting."*

This remains in our Constitution.

*"For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted."*

2 June 2015

Let me now take you to the Expert Panel recommendations.

### Expert Panel Recommendations

*“Remove Section 25 – which says the States can ban people from voting based on their race;*

*Remove section 51(xxvi) – which can be used to pass laws that discriminate against people based on their race;”*

*“Insert a new section 51A – to recognise Aboriginal and Torres Strait Islander peoples and to preserve the Australian Government’s ability to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples;*

*Insert a new section 116A, banning racial discrimination by government; and*

*Insert a new section 127A, recognising Aboriginal and Torres Strait Islander languages were this country’s first*

**Prof Marcia Langton**



**2 June 2015**

*tongues, while confirming that English is Australia's national language."*

Prime Minister Abbott has said is that he wants to recognise indigenous Australians, but like the constitutional conservatives, rejects proposed amendments 116A, that constitute what he calls a 'one clause bill of rights.'

Most sensible people agree that Section 25 should be removed. I wrote in *Meanjin* a few years ago.

*"Section 25 which was not the subject of the questions put in the '67 Referendum and which remains in the Constitution, is more difficult to comprehend. According to constitutional law scholar Brian Costar, this 'obscure, puzzling, contested but largely neglected Section 25 of the constitution mandates not who should have the vote but*

2 June 2015

*how many House of Representatives divisions each state shall be entitled to. Some constitutional lawyers assert that it is 'a mild deterrent to discrimination on racial grounds',"*

as he was saying,

*"while others view it as 'odious and outmoded'."*

*Harold Holt stated:*

*We believe the provision should be taken out of the Constitution because it is outmoded and misleading, and gives cause for criticism both inside and outside Australia by people unaware of the actual situation."*

**["Referendum Statement by the Prime Minister, Mr Harold Holt." National Archives of Australia: A4940, C4257, page 204.]**

2 June 2015

Why would you use a race power to manage the number of divisions in the House of Representatives for each state? This smacks of Apartheid, the hallmark of the old South African Constitution.

*"Costar's thinking on this clarifies the debate,"*

for me at least; he writes:

*""At first glance then s25 appears racist but on second glance one cannot be so sure. The section certainly seems to permit the states to exclude potential voters on the grounds of race, but also to penalize states that do so by reducing the number of federal electorates to which they might otherwise be entitled. Under this contemporary reading of the section, the constitutional framers emerge as progressive inclusionists: an interpretation, however,*



2 June 2015

*which it not borne out by the historical record.” [Brian Costar, “Odious and Outmoded? Race and Section 25 of the Constitution.]*

*“To assume that the Section has been voided by the passage of legislation deeming discrimination on the grounds of race illegal,”*

like the Racial Discrimination Act,

*“would be false,”*

*“for the simple reason that such legislation may be repealed or amended by parliament.”*

2 June 2015

And you'll remember that there was an attempt to do so last year.

*"Furthermore, the right to vote is not explicitly enshrined in the Constitution,"*

We don't have a constitutional right to vote, it must be understood. Costar continues:

*"And Section 30 has been interpreted as giving to the Commonwealth parliament the authority to determine its electoral procedures."*

*"We can only speculate,"*

writes Costar,

2 June 2015

*“as to whether any future legislation restricting the right to vote on grounds of race, gender, class, etc. would be held by the High Court to be in breach of the ‘directly chosen by the people’ words of Sections 7 and 24. Given that uncertainty, a case can be mounted that Section 25 should be retained until the right of citizens to vote is unambiguously guaranteed in the written constitution or firmly embedded by judicial review in the unwritten one.”*

So having dealt with Section 25 as part of the proposition, and as I say, most people agree it should go, how do we then deal with the problem of the Parliament’s lawmaking powers? So if Section 51(xxvi) is interpreted to allow discriminatory treatment, there is a dilemma. We must retain the lawmaking power so

**2 June 2015**

Parliament can make laws for Aborigines and Torres Strait Islanders, but find a way to prevent racist discrimination by the Parliament.

This is difficult because many Australians are race-obsessed, and their political discourse is not sophisticated enough to accommodate notions of ethnicity or polity or culture or First Peoples.

So we have this problem that for the Parliament to make laws for Aborigines and Torres Strait Islanders we have to write it in such a way that there is an explicit power to do so, but which doesn't empower the Parliament to discriminate against us as it presently can

**2 June 2015**

Noel Pearson devised this idea to resolve this dilemma, a dilemma which may yet prove fatal to our aspirations for our rightful place in the nation. This may be the best solution to preserve parliamentary sovereignty and to avoid justiciable clauses in the Constitution. It is these two issues that are the grounds for objection by constitutional conservatives to the Expert Panel recommendations.

He proposes is that there be a simple constitutional amendment that to establish a body of indigenous people empowered to review specific legislation in Parliament and to comment on the effects of legislation on Indigenous people. This would, he believes, provide a hook for something more substantial outside of the Constitution, including a Declaration of Recognition which could then be legislated in the Parliament, or could be a

**2 June 2015**

freestanding document. He envisages a proposed Declaration of Recognition having the status of the Gettysburg Address, or in other words, a founding document or a post-founding document.

The body is envisaged as being empowered to comment on laws for Indigenous affairs and affecting Indigenous people, rather than “all legislation”.

Professor Anne Twomey has provided constitutional drafting giving effect to Pearson’s proposal in a way that respects parliamentary sovereignty. A new Chapter 1A could be inserted into the Constitution, reading as follows:

*CHAPTER 1A*

*Aboriginal and Torres Strait Islander Body*

*60A(1) There shall be an Aboriginal and Torres Strait*

2 June 2015

*Islander body, to be called the [Title], which shall provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.*

*(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, functions and procedures of the [Title].*

*(3) The Prime Minister shall cause a copy of the [Title]'s advice to be tabled in each House of Parliament as soon as practicable after receiving it.*

*(4) The House of Representatives and the Senate shall give consideration to tabled advice of the [Title] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.*

**Prof Marcia Langton**



**2 June 2015**

Because Indigenous people constitute about three per cent of the population, it's just good luck that any Aboriginal person gets elected. As it happens, there's a few: one and one only in the House of Representatives of Australia, and he's the first ever -- Ken Wyatt from Western Australia. We've had two Senators; one back in the '60's, Senator Neville Bonner, and then a second one in the '90's, Aden Ridgeway from New South Wales. So they're the only three people who have ever been elected to the Federal Parliament. The State Parliaments have a few, but again this all is very recent in Australian history, so there's one in New South Wales, Linda Burney for the Labor Party; one in Queensland at the moment, Billy Gordon from Cape York; five in the Northern Territory where 26% of the population are Aboriginal; one in Western Australia, Ben Wyatt, but there were two until a woman stood down, Carol Martin; none in South Australia, none in Tasmania, and none in Victoria. We don't have



**2 June 2015**

much of a say in the Parliamentary life of Australia, and we have almost no say about legislation

So to have a permanent body commenting on legislation, would be a solution to the problem our status as an extreme minority status and our desire for a rightful place in the nation. Imagine that the Prime Minister had supported the government of Western Australia and announced the closure of 150 out of 500 Aboriginal communities over in Western Australia. The body that Noel Pearson proposes would lodge a report with the Parliament giving advice on that proposal as to its impact on Indigenous people and other matters, such as finances, good governance, and human rights.

Frank Brennan's proposal accepts neither the recommendations of the Expert Panel, nor Noel Pearson's proposal for an

**2 June 2015**

indigenous constitutional body to advise on laws relating to Indigenous peoples. In fact, Brennan proposes no substantive recognition or reform at all. Brennan suggests we remove s25, amend the Race Power to become an Indigenous power, and insert a symbolic preamble. This kind of merely symbolic reform sets the bar too low, and will not, in my view, be supported by Indigenous people. The proposal is dismissive and disrespectful of decades of indigenous advocacy for serious constitutional reform. Since the 1920s, Indigenous people have petitioned and advocated for constitutional protection of their interests and a constitutional voice in their affairs. Brennan calls himself an advocate for indigenous rights, yet he supports no substantive reform. He suggests that the indigenous body should be road-tested before our people should be trusted with a body of constitutional status. He also suggests there will be identity issues in deciding who is Indigenous or not, which the High Court

**Prof Marcia Langton**



**2 June 2015**

would need to resolve. Brennan is wrong. We know who we are. There are established legislative tests which provide rules in relation indigenous identity. Finally, the whole point of Pearson's proposal is for a constitutional guarantee that the Indigenous voice is heard in Indigenous affairs. A legislative guarantee will not do. I implore Australians to listen to what indigenous people want. Not Frank Brennan.

I trust that we find the right question and achieve success in this most important endeavour: obtaining the majority vote of Australians at a Referendum on recognising us, and giving us a rightful place in the nation.

I thank you for listening to me.