

2011 GRIFFITH LECTURE

INDIGENOUS AUSTRALIANS ARE COMING TO OUR MEIJI MOMENT: HOW TO PURSUE DEVELOPMENT AND KEEP OUR CULTURE

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Let me acknowledge the indigenous people of Brisbane: I bring greetings from our people in Cape York Peninsula. I also acknowledge Chancellor Forde and Vice Chancellor O'Connor for extending me the honour of delivering this year's Griffith Lecture. I wish especially to express our gratitude to the university for providing a welcome and supporting home for the Cape York Institute in the seven years since its founding. Over these years I have personally received unstinting encouragement from Ian, Michael Powell and Cairan O'Faircheallaigh and our policy and leadership work for our people in Cape York Peninsula has been generously and long-sufferingly supported by this fine university. I want to thank all of the staff of this university who have assisted our institute.

Introduction

In the lead up to the 2007 Federal Election I proposed that John Howard commit to recognition of Indigenous Australians in the Constitution of the Commonwealth. This proposition emanated from a well-formed conviction that the profound challenge posed by constitutional reform – requiring “a majority of electors in the majority of states” – meant that Nixon had to go to China. My view was that only a conservative leader convinced of the need for constitutional reform would be able to garner the requisite majority for change. It would have to be John Howard or someone from down his end of the political spectrum.

It was clear to me that the Kevin 07 show was in the ascendant and coming to town. My approach to Howard was based on the belief that constitutional reform had to be championed and owned by the conservatives.

John Howard opened his campaign with a commitment to constitutional recognition. Kevin Rudd immediately matched Howard's commitment, but at the end of the campaign he told Paul Kelly at *The Australian* that it would not be delivered in his first term. I condemned Rudd for this late departure from his original commitment, but the electorate was on the eve of bringing Howard's long reign to an end.

In the negotiations following last year's federal election, both major parties, the Greens and the independents put constitutional reform on the agenda for the new parliament. In December Prime Minister Julia Gillard appointed an Expert Panel on Constitutional Recognition of Indigenous Australians.

I sit on this Expert Panel with other Indigenous leaders: with Professor Patrick Dodson, co-chair of the Panel, with Professor Marcia Langton, with constitutional lawyer and Professor Megan Davis, Social Justice Commissioner Mick Gooda, co-chairs of the National Congress of Australia's First Peoples, Les Malezer and Jody Broun, and Liberal MP Ken Wyatt, among others.

We have before us a great opportunity. It's an opportunity for Indigenous Australian leaders and it's an opportunity for Australia's leadership, and Australians all, to unite behind a good idea, to do something big and good together – for Indigenous Australians and for the nation.

The present reality for Indigenous Australians is depressingly parlous. If there is one thing I am sure of, it is that what the country has been doing to move indigenous affairs forward from its colonial legacy has not worked, and is not working still. We need to do with Indigenous policy what former Prime Minister Paul Keating did with the Australian economy. We need to update it, make it more efficient, more accountable, more dynamic and more fair. We need to subject it to the right principles. We need big and bold change. Or we will continue to fail.

The question of constitutional reform therefore presents us with the chance to drive something big and bold in Indigenous affairs and in the Australian nation. This is our opportunity to *fundamentally reform* our approach to Indigenous affairs in Australia. It is our opportunity to address the pressing problems confronting Indigenous wellbeing. Our potential is to lead the world in rising to the Indigenous development challenge.

The Problem

The problems with our current situation are many. Two, however, are of utmost importance. First, Indigenous Australians still suffer disproportionate levels of poverty in Australia. They do not share in Australia's wealth. Secondly, Indigenous Australian cultures and languages continue to disappear. They are not shared with or enjoyed by all Australians. Indigenous Australian culture is a suppressed part of our Australian identity.

This is the time to confront these problems.

The purpose of a Constitution is to set up a framework that enables the citizens of the nation to live together in a good society and to achieve wellbeing. On this measure, the Australian Constitution works very well for the 97 per cent majority of Australians who enjoy First World standards of wellbeing. But the 3 per cent minority – Indigenous Australians – still suffer dismal *un-wellbeing* compared to the rest of the nation. If we ask, has the Australian Constitution created the framework within which Indigenous Australians are able to achieve socio-economic parity in this country? And has it allowed for Indigenous Australian cultures and languages to prosper, and to be enjoyed by all Australians? The calamitous and sad answer to both these questions is no. When it comes to Indigenous

wellbeing, the Australian Constitution does not yet provide the framework for the wellbeing of its indigenous citizens.

Why hasn't our Constitution enabled Indigenous socio-economic and cultural prosperity and equality within Australia? Because it was not intended to. The Constitution was drafted deliberately excluding and ignoring Indigenous Australians. It was drafted, as Pat Dodson said plainly, "in the spirit of *terra nullius*."¹

Australia must now attend to these constitutional deficiencies. It is also an opportunity to resolve and define the position of Indigenous peoples within Australia and to become what we have been trying to be: "a reconciled indivisible nation."² This is much more than a question of symbolism, though symbols are important. This is a question of national wellbeing and national identity. It is about coming to terms with who we are as a nation, and deciding who we want to be in the future.

The Poverty Problem

Practically speaking, Australians have come to identify their commitment to fix the gaping socio-economic gulf between indigenous and non-indigenous people with the notion of 'closing the gap'. I believe Australians are genuine in this respect. Indigenous Australians are still dying too young and suffering too much. We suffer unfair levels of poverty and disempowerment. We suffer lower life expectancy, higher infant mortality, lower education outcomes, higher suicide, self-harm and domestic violence rates, and higher unemployment. More than half of the Indigenous Australian population receives most of their income from government welfare.³

Yet, in 2011, Melbourne was deemed the world's most liveable city by the Economist Intelligence Unit, with 4 of Australia's capital cities appearing in the top ten.⁴ In the latest International Human Development index, Australia ranked as the second most liveable country in the world, only marginally behind Norway and substantially ahead of America in third.⁵ This was based on mean years of education, life expectancy, poverty, inequality, and so on. While Australia's standing in nearly all of these areas is admirable, similar findings with respect to the Australian Indigenous community are comparably miserable.

¹ Patrick Dodson, Welcoming speech (Speech delivered at the Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993) quoted in B Attwood and A Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed, 2007), pp 146-147.

² Noel Pearson, *Up from the Mission – selected writings* (2009, Black Inc.)

³ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators Report 2007* (Productivity Commission, Canberra 2007) 3.54.

⁴ Economist Intelligence Unit, www.eiu.com

⁵ Human Development Index, <http://hdr.undp.org/en/statistics/>

They are also significantly poorer than the Indigenous communities of Canada, New Zealand and the United States.⁶ Why is Australia lagging so abysmally far behind the rest of the world in terms of closing the socio-economic gap between Indigenous and non-Indigenous people? Is it purely coincidental, for example, that New Zealand, America and Canada are miles ahead of us in terms of formal recognition of their Indigenous peoples, in terms of legal recognition of their distinct cultures and languages, and most obviously, in terms of their general legal protections with respect to equality before the law for all their citizens?

Australia is now the only democratic country in the world not to guarantee equality before the law for all its citizens.⁷ Most ordinary Australians are shocked when they hear this fact – and they are equally shocked by the existence of discriminatory clauses such as section 25 in our founding document. Recent polling undertaken by the Expert Panel through Newspoll indicated that an overwhelming 90 per cent of Australians support the inclusion of a broad guarantee against racial discrimination in the Constitution.⁸ Equality is fundamental to democracy. To freedom and individual liberty. For Indigenous Australians, equal treatment before the law, equal rights and equal responsibilities are fundamental principles for the realisation of substantive equality.

While the link between equal treatment before the law and equality in life outcomes may be hard to prove in causation terms, it makes intuitive sense. But if it is proof we are looking for, the practical records of other countries, which are all ahead of us in terms of guaranteeing equality, certainly leave our own statistics with much to be desired.

While Indigenous Australian life expectancy remains relatively static at below 60 years, the life expectancy of Indigenous peoples in Canada, New Zealand and America have been steadily improving over several years, and have now all increased to above 70 years. While the gap between Indigenous and non-Indigenous life expectancy in Australia is an extraordinary 23 years (this is as a minimum – and this gap actually increased by 3 years between 1990 and 2000) in Canada, New Zealand and America, the gap is between 5 and 9 years. And in terms of income, Indigenous Australians are also far worse off than our counterparts overseas.⁹

⁶ Cooke, Mitrou, Lawrence, Guimond, Beavon, *Indigenous well-being in four countries: An application of the UNDP's Human Development Index to Indigenous in Australia, Canada, New Zealand and the United States*, 2007. <http://www.deepdyve.com/lp/pubmed-central/indigenous-well-being-in-four-countries-an-application-of-the-un-dp-s-x0MDu3yDBp>

⁷ George Williams, 'Recognising Indigenous Peoples In The Australian Constitution: What The Constitution Should Say And How The Referendum Can Be Won', Native Title Research Unit, Volume 5, Issues Paper No. 1, September 2011, 8.

⁸ Patricia Karvela, 'Most people want race discrimination removed from the Constitution', *The Australian*, 11th November 2011.

⁹ Cooke, Mitrou, Lawrence, Guimond, Beavon, *Indigenous well-being in four countries: An application of the UNDP's Human Development Index to Indigenous in Australia, Canada, New Zealand and the United States*, 2007. <http://www.deepdyve.com/lp/pubmed-central/indigenous-well-being-in-four-countries-an-application-of-the-un-dp-s-x0MDu3yDBp>

The overall solution of course is not to figure out how to keep Indigenous Australians alive longer by handing out more kidneys, or how to funnel more cash into their bank accounts through welfare, so that income indicators improve. These are band-aid solutions. Life expectancy and wellbeing indicators directly correlate with socio-economic status. Low life expectancy is a result of entrenched poverty. Why has Australia, a wealthy country, the second most liveable country in the world, unable to solve or even to significantly *improve*, the problem of Indigenous poverty? Is it possible our approach has been wrong?

It is useful perhaps to examine the ways in which our approach has differed from the approaches of Canada, New Zealand and America.

New Zealand's Treaty of Waitangi enshrined Indigenous rights and measures ensuring Indigenous participation in political processes: they have had designated seats in Parliament since the 1860's.¹⁰ The New Zealand national culture reflects the respectful relationship that this has created. Their national anthem, "God Defend New Zealand" has five verses, each in English and Maori. And New Zealand has a Human Rights Act which ensures equality before the law and protects citizens from adverse discrimination on the basis of race, ethnicity and colour.

Canada enshrines the rights of Indigenous people in its Constitution,¹¹ and constitutionally commits itself to regular constitutional conferences actively engaging Indigenous people.¹² It also has an entrenched guarantee of equality before the law, ensuring that no law can adversely discriminate on the basis of race.¹³ Section 15 of the Canadian Constitution reads:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour...” etc.

In America, of course, individual liberty and equality are central tenets of their system. America's 15th Amendment to its Constitution provides that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” Australia provides no such democratic guarantee for its citizens. In fact our Constitution contains the opposite – our section 25 explicitly contemplates barring races from voting. Australia also lacks the equivalent of America's Declaration of Independence, which begins:

“We hold these truths to be self-evident, *that all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness...”

¹⁰ Brian Lloyd, Research Paper no. 23 2008–09, Dedicated Indigenous representation in the Australian Parliament, Politics and Public Administration Section, 18 March 2009.

¹¹ See s 35 of the Canadian Constitution.

¹² *Ibid*, s 37.

¹³ *Ibid*, s 15.

Indeed, in Australia, this truth is not self-evident in our legal system. In fact, we have a Constitution that makes self-evident the very opposite – under our Constitution human beings are explicitly *not* equal. The Race Power (section 51(26)) and Section 25 ensure that racial discrimination, including adverse discrimination, is allowed by our legal system.¹⁴ Our Constitution – the very basis of our legal system, creates the preconditions for inequality.

Let's return now to our problem. We have the seemingly unending issue of Indigenous poverty. We also have the problem of the allowance of discrimination on the basis of 'race' in our Constitution. This discriminatory focus on race is problematic, symbolically. It sends out a divisive message, when we do not aim to be a divided Australia. But the focus on 'race' is also wrong in principle. It has created a presumption of formal and legal *inequality* which has in turn, arguably, led to and perpetuated substantive inequalities – and a mindset which expects Indigenous failure.

The current race-based approach to Indigenous policy development and elimination of Indigenous poverty is flawed. It was born from a colonial system and has perpetuated colonial myths of Indigenous Australian inferiority, dependency and incapability. It expects little of Indigenous Australians. And low expectations are disempowering.

Past approaches have perpetuated poverty, welfare dependency and passivity among Indigenous Australians, despite (in more recent times) our best intentions. Initial discriminatory protectionist approaches created inequalities and disadvantage. More recent 'special treatment' approaches, informed by ideas of cultural relativism, have sometimes inadvertently further entrenched exclusion and poverty, and in some cases exacerbated dysfunction.

The problem is that Australia has never yet put in place mechanisms or guarantees to ensure the realisation of equal rights and responsibilities for Indigenous Australians. Indigenous Australians have, as Patrick Dodson has correctly observed, for too long been the 'playthings' of politics and political trends.¹⁵ This is why real progress in Indigenous wellbeing has not thus far been achieved.

Cultural loss

We turn now to the problem of cultural loss – the existential problem. There is a significant risk that Indigenous Australians will become as culturally impoverished as they are socio-economically. Australia is losing its Indigenous Australian cultures and languages. As Western market forces bear down on traditional Indigenous ways of life, cultural assimilation is often the result.

¹⁴ *Hindmarsh Island Bridge* case confirmed the Race Power can be probably be used for beneficial or adverse use against races – the Race Power is infused with a discriminatory purpose.

¹⁵ Patrick Dodson, 'Laws detrimental to Aborigines will diminish the nation', *The Australian*, 7 April 1998.

Before colonisation there were 250 distinct Indigenous Australian languages, and 600 dialects.¹⁶ Most of these are no longer spoken.¹⁷ Indigenous Australia has been described as “a linguistic graveyard”.¹⁸ While approximately 100 Indigenous languages still exist in some form,¹⁹ 90% are near extinction.²⁰ Only 18 remaining languages are still spoken amongst all generations within a community.²¹ The 2009 Social Justice Report predicts that “without intervention the language knowledge will cease to exist in the next 10 to 30 years.”²² There is little action to slow this terrible decline.

Then there is the question of recognition itself. How will constitutional reform alter the national psyche? How will it affect the psychologies of Indigenous individuals? Consultations with Indigenous people have indicated that Indigenous Australians feel excluded from the Australian nation. They feel that they do not belong. We have also heard Indigenous Australians confide that they feel as though white Australians hate them. These findings should be a cause of great sadness for the nation.

Our challenge now is to move from exclusion to inclusion. The Australian nation must extend this positive message to Indigenous Australians. We need hope, we need bold reform, and we need leadership if this problem is to be solved.

The Indigenous Poverty Problem is a Development Problem

The Indigenous poverty problem is, at its core, a development problem. At the Cape York Institute, we contend that closing the gap will require Indigenous Australians to become active agents in our own development pathways. Indigenous poverty is a development problem that can only be solved by reversing the disenfranchisement of Indigenous responsibility and empowerment.

As Indigenous Canadian author Calvin Helin asserts, “The responsibility for getting out of the welfare trap rests, first and foremost, squarely on the shoulders of indigenous people themselves.”²³ Until we allow Indigenous Australians to take responsibility for our own lives, development and equality will not be achieved.

¹⁶ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 57.

¹⁷ *Ibid.*

¹⁸ Suzanne Romaine, ‘Preserving endangered languages’ 1 (1-2) (2007) *Language and Linguistics Compass* 115, 121.

¹⁹ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 58.

²⁰ Suzanne Romaine, ‘Preserving endangered languages’ 1 (1-2) (2007) *Language and Linguistics Compass* 115, 121.

²¹ Australian Human Rights and Equal Opportunities Commission, Social Justice Report 2009 ‘Chapter 3: The perilous state of Indigenous languages in Australia’, 58.

²² *Ibid.*

²³ Calvin Helin, *Dances with Dependency – out of poverty through self-reliance* (2008, Ravencrest Publishing) 167.

This is a fundamental shift from all Indigenous policies of the past. Indigenous policies to date have been premised upon exclusionary and hierarchical conceptions of 'race'. They proceed from historical assumptions of Indigenous inferiority and incapability. These assumptions have convinced governments that Indigenous Australians are incapable, and in many cases, convinced Indigenous Australians themselves.

Pre-colonial development history

We have thankfully moved beyond the colonial assumption that the Indigenous development predicament is a result of innate biological or genetic inadequacies peculiar to Indigenous people or the darker-skinned 'races'. The Darwinian approach which characterises blacks inferior has been discredited as a racist colonial device used to justify domination and enslavement.²⁴

The belief in the sub-humanity of Indigenous people underpinned the colonial idea of *terra nullius*. *Terra nullius* worked to justify the denial that Indigenous people existed, and the denial of Indigenous people as human beings entitled to human rights. These ideas have since been rejected.

The Indigenous development challenge now, therefore, must proceed from an honest analysis of the historical, cultural, social and legal factors that impede Indigenous development. These factors do not include the facile assumption that Indigenous people are stupid, inferior or incapable. There are no 'fundamental deficiencies' in Indigenous people themselves.²⁵ Such assumptions are self-defeating, condescending and untrue.²⁶ They have led to ineffective policies that still inhibit Indigenous responsibility and empowerment today.

When the British colonised Australia, the resident Indigenous people were predominantly hunter-gatherers. As writers such as Diamond and Blaut have shown, the disparities in Indigenous development as compared to European were, at that moment in time, the result of a mixture of circumstances including geography and environment.²⁷ The nomadic hunter-gatherer lifestyle was, it is now understood, a 'sensible adaptation' to the given conditions of the Australian landscape.²⁸ It had nothing to do with Indigenous inferiority, as was the predominant colonial view.

Equally, Europeans did not create the wealth and development Australia enjoys today out of the raw materials native to Australia, driven by some superior talent or penchant for productivity. Rather, as Diamond explains, English colonists imported into Australia from

²⁴ Jared Diamond, *Guns, Germs and Steel – the fates of human societies* (2005, WW Norton and Company), 298.

²⁵ *Ibid.*

²⁶ *Ibid*, 19, 300.

²⁷ *Ibid*, 450.

²⁸ *Ibid*, 309.

Europe and other parts of the world, all the elements of a “literate, food producing, industrial democracy.”²⁹

Blaut argues that the fact of colonisation was also an integral factor in European development. Wealth was generated from resources and riches taken from the colonies and free or cheap labour provided by the people in conquered countries.³⁰ By the time they reached Australia, the British had accumulated wealth from America, India, the Caribbean and Africa. The British arrived as a mighty force, and irreversibly altered the lives of Indigenous Australians.

Colonial contact

The British brought new weapons, technology, new clothes, new food, alcohol, and disease. They brought new domestic animals, new crops and agricultural methods. They brought with them the English language and Christianity, English law, with its notions of parliamentary sovereignty, the rule of law and representative democracy. Indigenous Australians were suddenly confronted with Western modernity. The new economic opportunity that Australia offered, realised through introduced processes of Western liberalism, went on to attract immigrants from all over the world.

Initial contact with the more developed British world irrevocably changed the environment in which Indigenous Australians had to survive. Indigenous people, previously accustomed to working hard for minimal food sources, having to hunt for meat, travel, and gather to collect plant food, were gradually bombarded with the surplus and comparative decadence of British culture. Colonising governments and missionaries began to use food hand-outs to befriend and entice Indigenous groups into learning about Christianity, or in humanitarian gestures. The invisible cost of accepting hand-outs could not have been foreseen by Indigenous people themselves, nor perhaps by those delivering the rations. But this was the beginning of welfare dependency.

The hunter-gatherer lifestyle was dramatically and conclusively interrupted. Colonial contact, as occurred all over the world, changed what survival meant for Indigenous people. This remains true today.

Having disallowed traditional modes of Indigenous survival through a history of appropriation of land and forcible removal, how are Indigenous people today to survive? Must they assimilate, and lose their tradition, culture and identity altogether? Should they be cut off from the modern world to pursue a frozen-in-time hunter-gather lifestyle on homelands recovered through Native Title? Or is there some appropriate middle road? What is the best way for Indigenous people to prosper independently in this predominantly

²⁹ *Ibid*, 321.

³⁰ J.M. Blaut, *The Coloniser's Model of the World – Geographical diffusionism and Eurocentric history* (1993, The Guilford Press), 153.

white-man's world, without becoming overwhelmed by Western vices, and without losing treasured Indigenous cultures, languages and identities?

We have come to a point in history where the right approach must be decided.

Despite the many political phases that have seen dramatic shifts in Australia's approach to Indigenous policy and development, none of these approaches have achieved the correct balance – a balance that respects unique Indigenous culture and identity, while allowing for full and equal participation in the opportunities and benefits of Australia's Western liberal economy.

Assimilation versus separatism

Past policies have gone from one extreme to another. In the assimilation era, success in developing Australia meant denial of Indigenous practice, conversion to Christianity, and adoption of Western culture.³¹ But such assimilationist policies were not successful in ensuring Indigenous wellbeing. They proceeded from a denial of Indigenous identity.

Wellbeing means more than socio-economic stability and prosperity. And admittedly, in the mission days of unequal and stolen wages, socio-economic prosperity was also far from achieved. In Queensland in particular, under the guise of 'development' and 'protection', Indigenous people were severely discriminated against by the state government. The result was widespread impoverishment and even starvation.³² Mistreatment and removal significantly harmed the lives and culture of many Indigenous Australians.³³

The colonised, assimilated person, as Memmi describes, wears a mask. He lives a lie and is oppressed. In Australia, an Indigenous person who must suppress his culture in order to realise socio-economic prosperity, is not free.³⁴ He is subjugated in his own land and in his own skin, denied by the nation that should rightly be his home. True freedom means not only freedom from poverty. It means the freedom to express and maintain your cultural identity without discrimination. It means freedom to be yourself.

The onset of the 60's and 70's, the rights-driven era, saw new respect for cultural difference. 1967 removed the explicit exclusion of Indigenous people from Australia's Constitution. But the land rights era post-*Mabo* arguably swung too far in the opposite direction – the direction of cultural relativism and collectivism at the expense of individual rights and individual equality, driven by a misguided interpretation of 'self-determination' as mere separatism and collective treatment of Indigenous Australians – what Peter Sutton describes

³¹ See Bryan Keon-Cohen QC, *Mabo in the Courts* (Chancery Bold, 2011), 31.

³² Marcia Langton, 'The Australian federalism and race: the special cases of Queensland and the Northern Territory'.

³³ *Ibid.*

³⁴ Albert Memmi, *The coloniser and the colonised* (Earthscan 2003).

as “racially defined political autonomy” taking precedence over vulnerable individuals’ rights to “wellbeing and safety”.³⁵

The Indigenous policies of our current era can be construed in some ways as a reaction to this relativism of the past. The current movement seems to be one of ‘practical reconciliation’, ‘closing the gap’, and more recently, ‘Indigenous responsibility’ and ‘welfare reform’.

All these political trends can be said to have been successful in certain aspects and ineffective in others.

Assimilation and protectionism implemented integration at the expense of Indigenous culture, identity, families and Indigenous equal rights. The self-government era was effective in securing separate identities and land, but ineffective in addressing poverty, respecting individual rights, allowing economic participation, and maintaining social norms, law and order and community safety. All the while, alcohol abuse and welfare dependency began to infect all corners of Indigenous experience, generation to generation. These destructive influences still stand in the way of Indigenous wellbeing at all levels.

While welfare reform, our most recent innovation, has been successful in taking the small steps towards reinstating social norms, promoting education and championing Indigenous responsibility, it has arguably not done enough to prevent cultural loss and extinction of Indigenous languages.

And still, the question of equal rights and equality before the law remains unanswered. How can we expect equality in life outcomes for Indigenous people, if we do not ensure they are treated equally before the law? How can we expect Indigenous people to behave with responsibility, when we deny them equal rights? Indigenous Australians still do not have equal opportunities in Australia. Until equality before the law is the over-riding presumption, Indigenous Australians will still not truly be given a ‘fair go’.

We contend that cultural recognition and equality are wholly compatible. Indeed, we contend that they are two sides of the same coin, tied together just as rights are tied to responsibilities. Colonisation has almost wiped out Indigenous cultures and languages. Indigenous Australians have historically been denied the equal opportunities to practice their cultures freely. Remedying this is part of remedying the effects of past discrimination – part of ensuring equal opportunities.

CYI’s constitutional reform policy

At Cape York Institute, our policy on constitutional reform is largely informed by our on-the-ground knowledge of the challenges faced by Indigenous communities in Cape York. These

³⁵ Peter Sutton, *The politics of suffering – Indigenous Australia and the end of the liberal consensus* (Melbourne University Press, 2009), 10.

include the ways in which structural and legal barriers, still often informed by out-dated and self-defeating attitudes towards Indigenous people, continue to inhibit Indigenous development, participation in the real economy, and fulfilment of substantive equality and Indigenous wellbeing at all levels.

The Institute's welfare reform initiatives focus on Indigenous responsibility and rebuilding social and behavioural norms in Indigenous communities. Indigenous responsibility is of utmost importance in achieving wellbeing. However wellbeing will not be achieved unless Indigenous Australians enjoy equal before the law. If Indigenous people, and all Australians, are not guaranteed equality before the law, we feel certain that substantive equality in Australia will not be achieved.

Rights and responsibilities are two complementary and essential components of Indigenous empowerment. Indigenous Australians are still fighting for their "right to take responsibility"³⁶ in all aspects of their lives – most notably in their use and management of their land, and in their pathways towards development and wellbeing. Indigenous voices are still not being heard in matters concerning their own affairs. Indigenous Australian empowerment is still obstructed by the challenges of being a powerless, voiceless minority before governments and bureaucracies unaccustomed and uncompelled to listen to what blackfellas have to say.

Constitutional reform needs to address the need for equality before the law while acknowledging the importance of cultural distinctness and enrichment for Indigenous Australians and Australia as a whole, and importantly, giving Indigenous Australians a voice in our legal system in matters directly affecting them.

The reform package that we advocate are reforms that we think would offer the best chance for the realisation of equality, and socio-economic and cultural prosperity for Indigenous Australians. The reforms should include a guarantee of equal treatment before the law, but also recognition of unique Indigenous culture and language.

Equality on the one hand and cultural distinctness on the other, at first blush may appear to be contradictions. But they are not. Equality before the law is wholly compatible with recognition of distinct Indigenous identity, and indeed with a constitutional power to address the unique needs of Indigenous Australians, who occupy a distinctive political place in this country that no other group can occupy – the unique place of a colonised and dispossessed people.

I acknowledge that an argument for reform that at once advocates for equality and Indigenous recognition, at first appear full of internal contradictions. Properly construed however, that these are not contradictions, but complementary and necessary principles

³⁶ See Noel Pearson, *Up from the Mission – selected writings* (2009, Black Inc.), 'Our right to take responsibility', 143-171.

required to facilitate national and Indigenous wellbeing within a fair post-colonial democracy.

I have long advocated the quest for what I call the “radical centre”: the “dialectical synthesis” that is the correct policy position in between competing philosophical ideals, or for example, between the political left and the political right.³⁷ These proposals, equality before the law and cultural recognition, are, we believe, the *radical centre* in terms of constitutional reform for Australia.

The desired future

I have discussed our two most pressing problems in Indigenous affairs. First, Indigenous Australians still suffer unfair levels of poverty in Australia. Second, Indigenous Australian cultures and languages are disappearing. A subsidiary point is that there is no mention of Indigenous existence in the Constitution at all. This is akin an institutionalised assertion of *terra nullius*, and a false representation of our national history and the circumstances in which our federation was created. These are the problems we need to address. I move now to our vision. What is our desired future?

Our vision is this.

We want the gap to be closed. We want Indigenous Australians to achieve wellbeing. Wellbeing means social, economic and cultural prosperity. We want Australia as a country to achieve wellbeing. Australia should be socially, economically and culturally prosperous.

We want Indigenous Australian cultures and languages to be enjoyed by all Australians, and the entire world. We want them to live and develop as modern cultures and languages.

We want all Australians to enjoy equality before the law, equal rights and equal responsibilities. We want to truly be able to say that Australia is a nation that denounces and guards against racism. We want a reconciled indivisible Australia that will ensure stability and peace for future generations.

We want a Constitution that will serve all Australians well into the future. It should be good for another millennium.

Finding the development solution – equal rights and equal responsibilities

The Indigenous development challenge is a quest for Indigenous, and national, wellbeing. Here, we have defined it as social, economic and cultural stability and prosperity. It means that every individual in Australia should be free and secure in their identity within a diverse and unified nation.

³⁷ Noel Pearson, ‘White guilt, victimhood and the quest for the radical centre’, *Up from the mission – selected writings*, 219-262.

In achieving wellbeing for Indigenous Australians, economic development and cultural development are both necessary. One without the other is unacceptable. Indigenous Australians must be free from poverty *and* they must not lose their cultures. Money and culture are equally important.

In our Western liberal society, money means empowerment and participation. But non-material questions of identity and heritage are equally important. Knowing one's culture is respected and accepted, even celebrated, is how we feel worthwhile and included as human beings.

How do other groups achieve wellbeing in Australia?

Contrary to the views of Gary Johns and others,³⁸ Indigenous people, like all human beings, deserve both cultural richness and socio-economic parity. The difficult question is whether Indigenous culture is impeding Indigenous Australians from achieving socio-economic success in the mainstream. This question is not an easy one, but it must be investigated honestly. It must also be put into context. Many other non-Western, non-British cultures immigrate to Australia and achieve socio-economic prosperity without losing their distinct cultural identities. What is the difference with Indigenous people?

The difference, arguably, is about equal rights, individual choice and empowerment.

When immigrants migrate to Australia they generally do so of their own volition, with their own plans, dreams and aspirations, and are able to pursue their plans freely with equality under Australian law. Taking a bird's eye historical view, Indigenous hunter-gatherer lifestyle was, by comparison, unexpectedly interrupted. The cultural clash with Western domination was phenomenal and almost fatal. For many generations, Indigenous Australians were not afforded equal rights and have not enjoyed equality before the law. They were explicitly excluded. A variety of laws and policies were at work to keep them down. Arguably, Indigenous Australians are still subject to unequal treatment before the law. An Indigenous Australian today is not afforded equal rights in the same way that an immigrant, or a child of an immigrant is.

Similarly, when immigrants arrive they are free to pursue their *cultural* development. They have not suffered, as Indigenous people historically have, laws against the use of their languages, forced assimilation, forced removal, destruction of family units, and missionisation in Australia. They have not suffered land loss in Australia, and thus loss of their most important economic assets, and the links to their traditional ways of life at the hands of Australian governments. Additionally, they are generally not subject to racially targeted laws by Australian governments under the Race Power. While the Race Power was initially aimed at immigrants, these days it is only used for Indigenous Australians. These racially-targeted laws have arguably often impaired Indigenous rights and responsibilities, both historically and in recent times. They have also perpetuated beliefs about Indigenous

³⁸Gary Johns, *Aboriginal Self-determination – the whiteman's dream* (Connor Court Publishing, 2011), 76.

inferiority and incapability that have had massive adverse impacts on Indigenous Australians.

The problems we are facing today are perhaps unsurprising. The Race Power, and the policies it has inspired, were born in a colonial time and are infused with colonial values. It is no surprise therefore that Indigenous policy has erroneously proceeded from generalised assumptions of Indigenous inferiority, incapability, and separateness, with a racist premise at its source. Confronting the Race Power involves confronting our deepest assumptions with regards to Indigenous affairs. Once we confront them, the next brave step is to admit that these assumptions are incorrect.

The incorrect assumption that Indigenous Australians are inferior and thus dependant has created widespread welfare dependency. We have spent generations excluding Indigenous people and telling them, through our laws and policies, that they are unequal, incapable and irresponsible. Is it any surprise that lack of confidence, lack of initiative, passivity and fear are still crippling Indigenous communities today? This mentality must change. Change must be compelled from the top down, as well as in the hearts of Indigenous Australians themselves.

Australia must become a world leader in rising to the Indigenous development challenge. We propose that constitutional and legislative reform put in place the mechanisms to allow for development, realisation of equal Indigenous rights and responsibilities, as well as cultural prosperity.

Thus far, Australia has not provided the legal framework to allow this to happen. Indigenous Australians have never been allowed to take an active role in determining their own development pathways.

Rather, Indigenous Australians have been fighting a system geared against their economic participation and geared against their cultural development. In some ways, the effects of this system on Indigenous Australians have been inevitable. For this was a colonialist system. As such, colonial racism still flows inadvertently through all our Indigenous laws and policies, seeping down from the very top of our legal system and poisoning the way in which everything grows. Most Australians, of course, are immune to its effects. This poison does not tend to affect the white majorities. Nonetheless in our complacency it lingers on, thwarting Indigenous and Australian wellbeing, as long as we allow it.

Separating cultural development from economic development

Remnant racism is not the only thing holding Indigenous Australians back. In Australia both British settlers and generations of immigrants have forged successful lives by following the liberal development path. Successful cultures across the world pursue economic prosperity through capitalist means. These cultures, despite having grown from ancient spiritual beliefs equally rooted to their hunter-gatherer origins and close connections to the land, just like

Indigenous Australian people, find a way to reconcile their cultures with the imperatives of liberal capitalism. They find a way to engage with other cultures, and the world at large, and not only to engage, but to compete. Competition is at the core of all development. The development challenge is therefore also a challenge presented by the imperatives of globalisation. Indigenous people cannot cut themselves off from the rest of the world. They must embrace it and be embraced by it. Australian law must allow them the freedom to do this.

But while Indigenous Australians must find a way to reconcile their cultures with modern imperatives, they must find a way, nonetheless, to maintain cultures and pursue cultural development in order to achieve total wellbeing.

Our challenge in pursuing constitutional and legislative reform to ensure both the well-being of Indigenous Australians and the Australian nation is to support Indigenous Australians in finding a way to maintain but reconcile their traditional cultures with the modern Western liberal imperatives required to succeed in a capitalist market.

Indigenous Australians may need to select which elements of culture work for them. For socio-economic prosperity and success, they may have to let go some aspects of their cultures in preference for some pragmatically chosen mainstream behaviours conducive to success in the mainstream. Indigenous people may need to adopt the productive elements of economically successful cultures and incorporate these behavioural traits into their own adapted culture. Importantly, Indigenous people must be supported to figure this path out for themselves, and in their own way.

Cultural loss should be avoided. Socio-economic failure is equally unacceptable. Indigenous Australians need to maintain modern forms of their languages and cultures, while succeeding in the Western economic world.³⁹

The Meiji moment

The Meiji moment was the point at which the Japanese managed to separate their ancient culture from the imperatives of capitalism. This 'Meiji' moment in the history of various peoples happened in vastly different ways. In the case of the British, it evolved as liberal capitalism developed. In the case of the Jews, they were making accommodations between their orthodoxy and their dealings with Gentiles in the marketplace over a long period. Sometimes there was a steady social and cultural evolution, and sometimes it was a conscious political and cultural realisation and decision.

But unlike other peoples who have contended with the challenge of development and cultural determination, and unlike immigrants to Australia, Indigenous Australians have been never been allowed to self-determine their answer to the challenge.

³⁹ Noel Pearson, 'Conservatism too is relevant to our culture', *The Weekend Australian*, 31 July 2010.

Through discrimination they were prevented from access to development. Following this, the welfare era did not allow Indigenous Australians to self-determine their own reconciliation between development and culture, because welfare is choice without consequence, choice without responsibility: therefore not a real choice.

The choices that Indigenous Australians might be said to have made (I want to maintain my traditional cultures but I still want to have all the vices of the Europeans, I want passive welfare to enable us to maintain our traditional lifestyles) were and are not real acts of self-determination.

Indigenous Australians must now be empowered to take charge of their own development. The case for a constitutional 'Meiji' moment in time is clear. Without it, self-determination is the welfare version. And in terms of cultural determination, at every turn Indigenous Australians harbour the fear of assimilation. The virulent but sometimes subtle antipathy of white Australians to the existential claims of Indigenous Australians understandably is the source of the Indigenous Australian anxiety.

We need a constitutional imprimatur for the development formula and for the cultural existence formula. Nothing short of this will provide the needed clarity.

Conclusion: reconciling traditional culture with modern imperatives

The Western liberal economy has arrived in Australia. It is not going away. Cultural characteristics aside, there is indeed no closing the gap in Australia without Adam Smith.⁴⁰ The path of liberal development and economic participation is the only successful and viable path, regardless of culture or ethnic background. This is a universally true paradigm.

If Indigenous people are not afforded equal rights and equal responsibilities, free from remnants of institutionalised racism and policy mindsets that perpetuate the dependence and passivity begun in colonial times, socio-economic parity will never be realised.

Likewise, if Indigenous languages and cultures are not saved from complete extinction, Indigenous and national wellbeing will never be achieved. Our aim, we must remember, is a reconciled indivisible nation in which Indigenous Australians, and all Australians, are socially, economically and culturally prosperous.

We argue that the only way to achieving this aim, a method which has not yet been pursued in Australia is one of formal equality before the law, under strict accountability. The only solution is equal rights. And importantly, with equal rights comes equal responsibilities.

Indigenous Australians must now be guaranteed equal rights and equal responsibilities, along with all Australian citizens. Australia's history of Indigenous policy failure must end. The Australian nation must now do everything it can to ensure equality and success.

⁴⁰ Noel Pearson, 'Conservatism too is relevant to our culture', *The Weekend Australian*, 31 July 2010.

If Indigenous people are truly given equality before the law and equal opportunities to pursue socio-economic success and cultural determination, if all remnants of racist structural barriers are removed, then the Australian nation will have done its job.

Indigenous wellbeing is then the responsibility of every Indigenous individual.