
INDIGENOUS CONSTITUTIONAL RECOGNITION, NON-DISCRIMINATION AND EQUALITY BEFORE THE LAW

WHY REFORM IS NECESSARY

by Shireen Morris

Australia currently has a unique opportunity to fundamentally and positively change its approach to Indigenous policy and law. There is multi-party support for recognition of Indigenous people in the Australian Constitution.¹ The government-appointed Expert Panel on Indigenous recognition has consulted across the nation.² There is discussion of the need to eliminate constitutional provisions that allow racially discriminatory laws to be passed, and to insert instead a protection against racial discrimination for all Australians.³ This paper will argue that constitutional recognition of Indigenous Australians needs to remove the discriminatory structural barriers that are impeding realisation of Indigenous equal rights, socio-economic parity and cultural prosperity. Effective constitutional reform should therefore include Indigenous recognition, eliminate racist provisions and insert a new non-discrimination guarantee that allows for special measures to rectify the effects of past discrimination and dispossession implemented under strictly applied principles of equal rights and equal responsibilities.⁴ Under a new non-discrimination provision, this paper proposes that any targeted special measures or Indigenous-specific laws must be periodically reviewed to ensure the measures are effective in enabling equal rights. Similarly, special measures must be implemented with the agreement of the people whom the measures are intended to benefit.

RECOGNITION OF EXISTENCE

What does 'recognition' of Indigenous people actually mean? Arguably recognition means acknowledgement of distinct identity and existence. Historically, Indigenous people have been systematically excluded or ignored in Australia's Constitution.⁵ The Constitution is our founding document. It facilitated the federation of the Australian nation and its legal and political institutions. It is the supreme source of law in Australia and 'sets the rules by which Australia is governed.'⁶ However, the Constitution's drafting is still infused with the racist and colonialist attitudes of 1900.⁷ Despite the 1967 referendum, our Constitution remains a relic of institutionalised racism, inappropriate to Australia's modern values.

The 1967 referendum removed the explicit exclusion of Indigenous people from the Constitution. It amended the exclusionary wording of the s 51 (xxvi) 'race power', thereby including Indigenous people within its scope. It also removed s 127 of the Constitution, which was a provision disqualifying Indigenous people from being counted in the official census.⁸ But the 1967 reforms did not include any positive mention of the Indigenous history preceding colonisation and federation. They did not eliminate the potential for laws in Australia to be racially discriminatory, as our Constitution still contains no entrenched non-discrimination clause, meaning the *Racial Discrimination Act 1975* ('RDA') can be suspended.⁹ Nor did the 1967 changes remove the outdated concept of 'race'.

Ironically, the 1967 referendum turned explicit exclusion of Indigenous people into a constitutional silence, perpetuating a myth of Indigenous non-existence comparable to the colonial mindset of earlier times. This non-mention of the prior and continuing existence of, ownership and occupation by Indigenous people can be seen as akin to an institutionalised assertion of *terra nullius*, unacceptable in the modern era.

Terra nullius was wrong because it denied that Indigenous people existed, or asserted that Indigenous people lacked the social and political organisation to warrant equal treatment or recognition. It rendered Indigenous people politically and legally invisible, which suited the colonial objectives of domination and dispossession.¹⁰ The *Mabo* decision overturned the presumption of *terra nullius* as a fallacy in Australia.¹¹ It is therefore important that Australia's Constitution is modernised to align with our current social, political and legal standards.

The Constitution must also be updated to align with our values as expressed through Australia's support of international human rights conventions such as the *International Convention to Eliminate all forms of Racial Discrimination* ('CERD') and the *Declaration on the Rights of Indigenous People* ('UNDRIP'), both of which recognise the rights and existence of Indigenous people.

REMOVAL OF STRUCTURAL BARRIERS

Constitutional reform must help us remove the structural barriers that continue to impede Indigenous Australians from realising fulfilled and productive lives within the Australian nation. Reform to implement symbolic recognition of Indigenous people without providing much-needed protection for equal rights and non-discrimination would be fundamentally insufficient.¹² The Constitution gives the government the power to pass laws and restricts the Commonwealth Government's use of such power. Changes to the Constitution can have a significant practical impact on the lives of Indigenous people. It is therefore important that constitutional reform addresses the problem of Indigenous disadvantage, an issue recognised as a matter of urgent significance in Australia.¹³ In addition to recognition of distinct Indigenous culture and heritage, any worthwhile reform will put in place the mechanisms that will allow us to close the gap.

The causes of disadvantage, dysfunction and disempowerment in Indigenous communities are both behavioural and structural.¹⁴ As Pearson explains, Indigenous people suffer both inherited trauma – the after-effects of past discriminatory policies, dispossession and colonisation – and personal trauma – referring to the current individualised suffering arising from dysfunctional environments and pervasive addictions, both caused and exacerbated by passive welfare dependency.¹⁵ While immediate personal trauma must continue to be addressed, removal of the remnants of institutionalised racism is part of the overall solution to Indigenous disadvantage.¹⁶ Structural barriers to Indigenous advancement and wellbeing must be removed if Indigenous Australians are to achieve socio-economic and cultural prosperity in parity with other Australians. Respect for both rights and responsibilities are important in achieving this aim.¹⁷

Welfare reform strategies aim to enhance individual and family responsibility and rebuild social norms.¹⁸ Responsibility-building programs like this are essential. But equal rights and equality before the law are also essential if we are to effectively address disadvantage. Structural barriers must be addressed because they impede attempts to confront behavioural problems in Indigenous communities, and they make policies targeting behaviour less effective.¹⁹ As long as our legal system gives Parliament an unchecked power to pass racially discriminatory laws, there will never be true equality in Australia.

Being a small minority, democratic checks and balances alone have proven to be ineffective in protecting

Indigenous Australians from adverse discrimination.²⁰ Likewise, protections offered by international human rights bodies are too remote, inaccessible and domestically unenforceable to offer appropriate assistance to Indigenous Australians. While these non-discrimination principles remain un-entrenched in our domestic law, Indigenous Australians have few avenues for appeal when they are discriminated against. Only constitutional amendment will resolve this.

THE RACE POWER

Section 51(xxvi) of the Constitution provides Parliament with the power to make laws relating to 'the people of any race for whom it is deemed necessary to make special laws.'²¹ The provision contains no requirement that these laws be beneficial. In fact, courts have indicated that the race power can probably be used for beneficial or adverse use.²²

In the modern context, the race power is generally used for laws aimed at Indigenous Australians. This was not always the case. The race power was intended to pass discriminatory laws against 'alien races',²³ particularly to exclude 'Asiatic or African aliens' from the goldfields and to easily control 'undesirable immigrants'²⁴ such as Chinese, Indian, Afghan and Japanese settlers and workers.²⁵ The racism embedded in colonial attitudes of the time was not restricted to Indigenous people.²⁶ Initially, Indigenous people were excluded from the race power's operation, either because it was widely believed that Indigenous people were a dying race whose future was inconsequential,²⁷ or because their welfare was the responsibility of the states.²⁸

Professor George Williams argues that the Race Power 'was deliberately inserted into the Constitution to allow the Commonwealth to discriminate against sections of the community on account of their race.'²⁹ The Power is therefore 'inherently discriminatory.'³⁰ Michael Kirby explains that the Race Power 'reflects nineteenth century concepts of racial superiority and paternalistic interventions for 'the natives'...[and] is a relic of colonial thinking'.³¹

The existence of the race power in the Australian Constitution, without any protection against adverse discrimination, is incompatible with our current values and our international obligations to eliminate racial discrimination. As the 1988 Constitutional Commission Report stated:

It is inappropriate to retain section 51(xxvi) because the purposes for which, historically, it was inserted no longer apply to this country. Australia has joined the many nations which

have rejected race as a legitimate criterion on which legislation can be based.³²

The existence of s 25, a ‘provision as to races disqualified from voting’, further demonstrates our need for constitutional modernisation.

WHAT IS THE RELEVANCE OF ‘RACE’?

Laws which apply to specific races are problematic in a society that strives to be democratic, free and equal. The application of laws specific to races of people also poses practical and philosophical problems given the mixed, cosmopolitan nature of Australia’s post-colonial society. The concept of race is difficult to accurately define. Is it to be ascertained purely through physical characteristics, even though these actually vary within races more than between? Today, the notion of race has mostly been discredited. As the Human Rights Equal Opportunity Commission (‘HREOC’) explained:

There is only one race - the human race. The overwhelming weight of authority proves that as a scientific and anthropological matter, the notion that people can be definitively categorized and classified into different races is a myth. The mapping of the human genome provides irrefutable proof of this fact. Race is a social construct, frequently used for political means.³³

Importantly, the notion of race as a biological reality provides the very premise for racism itself. Dinesh D’Souza writes that ‘racism is an ideology of intellectual or moral superiority based on the biological characteristics of race... in order to be a racist, you must first believe in the existence of biologically distinguishable groups or races’.³⁴

Any current laws based on the notion of race should therefore be carefully examined. It is highly questionable whether the now discredited concept of race should exist in Australia’s Constitution at all.

Of course, while classifications according to race may be scientifically dubious, they still exist as a social and political construct. Thus racial discrimination based on the social construct, as our colonial history and its repercussions have shown us, also exists – the reality of this is all too familiar to Indigenous Australians. While race may not exist, many would argue that racism is alive and well.³⁵ Measures to redress past discrimination and laws protecting individuals against racial discrimination are still as important as ever.

ENTRENCHING DEPENDENCY

Historically, policies of colonisation and invasion were based on discrimination and categorisation of people into different racial groups which exhibited, it was argued,

different and inferior characteristics, traits and capabilities, in turn justifying domination and appropriation of their land by Western forces.³⁶ Today this is arguably reflected in policies that bypass Indigenous responsibility and exacerbate Indigenous dependence and passivity.³⁷ As Blaut explains, colonial interests produced distorted theories about non-European peoples or ‘savages’, which suited colonial purposes.³⁸ Today this type of thinking is supposedly unacceptable. But until we achieve reform to eliminate allowances of colonial-born racism in Australian law, this separatist thinking will continue to influence law and policy, particularly in Indigenous affairs. Such disempowering structures inhibit realisation of socio-economic equality and perpetuate notions of Indigenous inferiority.

The race-based approach to Indigenous policy development and poverty alleviation is therefore fundamentally flawed. It was born from a colonial system and has perpetuated colonial myths. Even if the current political climate could be accurately described as being free of racist attitudes, the absence of a constitutional guarantee against racial discrimination means this is always open to political fluctuation. The wellbeing of Indigenous Australians is therefore still, as it has been since colonisation, at the mercy of what Marcia Langton terms the ‘swings of the Australian political fulcrum’.³⁹ It is this political fluctuation that our international legal obligations urge us to guard against with entrenched non-discrimination protection.

OBLIGATIONS UNDER INTERNATIONAL LAW

NON-DISCRIMINATION

The United Nations *Declaration of Human Rights* states in article 7 that ‘all are equal before the law and are entitled without any discrimination to equal protection of the law.’ Article 2 provides that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...’

Australia has ratified CERD art 1 which defines the term ‘racial discrimination’ broadly, as meaning:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise ... of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The provision forbids racial discrimination, but allows for special measures to address the disadvantage and ensure

equal enjoyment of rights for a particular disadvantaged group.

In 2010 the CERD Committee stated its concern about ‘the absence of any entrenched protection against racial discrimination’ in the Australian Constitution. It also noted that ‘sections 25 and 51(xxvi) of the Constitution ... in themselves raise issues of racial discrimination,’ recommending that Australia ‘draft and adopt comprehensive legislation providing entrenched protection against racial discrimination.’⁴⁰

SPECIAL MEASURES ARE TEMPORARY WHEN NEEDS-BASED, AND PERMANENT WHEN RIGHTS-BASED

According to our obligations under CERD, race-based laws are allowed as temporary targeted measures to ensure advancement or equal enjoyment of rights.⁴¹ Article 1(4) states that special measures to secure advancement for certain disadvantaged groups are not to be considered racial discrimination, provided ‘such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’ This allowance for special measures has also been incorporated into Australian domestic law through the RDA,⁴² and into the *Native Title Act 1993*, which states in its preamble that:

the people of Australia intend to rectify the consequences of past injustices by the *special measures* contained in this Act ... for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders...⁴³

Article 1(4) of CERD, as the preamble to the *Native Title Act* demonstrates, is generally interpreted to include measures to rectify the effects of past discrimination, in order to enable equal enjoyment of rights. This includes matters arising from Indigenous rights like land rights, which arise from pre-existing and continuing ownership. These rights can be addressed as special measures to ameliorate the effects of past discriminatory dispossession. Addressing the effects of past discrimination is an important part of special measures. This is demonstrated in the special measures allowances provided in other Constitutions and the Victorian Charter.⁴⁴

Correctly construed, laws such as Native Title and other cultural or language protection laws arise from Indigenous rights pre-existing and surviving colonisation. Unlike special measures solely addressing socio-economic disadvantage, laws arising from pre-existing Indigenous rights need not necessarily be time limited or need based.

Rather, part of the ‘desired objective’⁴⁵ of such measures is to provide recognition of pre-existing and continuing Indigenous rights. These measures should therefore be viewed as permanent in character. However, such measures should still be scrutinised to ensure that they are helping address any existing Indigenous poverty, and to ensure that they are in fact enabling equal enjoyment of rights,⁴⁶ and not perpetuating discrimination or inequality.

THE SUBJECTIVITY OF ‘BENEFIT’ OR ‘ADVANCEMENT’

With any ‘special measures’, caution must be exercised. History shows us that laws implemented for the supposed benefit of Indigenous people are often in retrospect considered inappropriately discriminatory, paternalistic and contrary to human rights principles. Laws permitting the removal of Indigenous children from their families, redolent of the policies which led to the Stolen Generations, are arguably examples of laws enacted for supposed benefit or ‘advancement’ but which were subsequently denounced as racial discrimination. The question as to what constitutes benefit or advancement for the purposes of a legitimate special measure is highly subjective.⁴⁷ It is therefore important that any racially-targeted ‘special measures’ are monitored and periodically reviewed to ensure compliance with principles of non-discrimination. Any racially-targeted laws must be justified, necessary, proportionate, effective in addressing any existing disadvantage, and must not in themselves create inequalities or perpetuate poverty. Special measures should usually consist of preferential treatment, and should not impair other human rights.⁴⁸ Similarly, basic human rights should not be breached on the basis that the breaching measures are taken to advance other ‘superior’ human rights.⁴⁹

THE NEED FOR AGREEMENT

Importantly, any racially-targeted laws should not be contrary to the wishes of the targeted community. CERD specifies that special measures should be implemented with the informed consent of the targeted group,⁵⁰ but this requirement is repeatedly ignored when it comes to laws targeting Indigenous Australians.⁵¹ Recognising this problem, the 2007 Social Justice report also recommended that interventionist measures should be subject to ‘regular monitoring and review to establish whether they meet the purposes of a ‘special measure’.’⁵² It noted:

The consent of the intended beneficiary is important in determining whether an action should be classified as beneficial... each proposed action or measure must be tested individually to establish whether it meets the criteria for a ‘special measure’.⁵³

Currently, there is no independent process by which special measures can be fairly adjudicated except via the courts (which are costly, time consuming and therefore unrealistic for most Indigenous individuals and communities). Human rights bodies, despite providing persuasive reports and recommendations on Australia's human rights performance, have little force in the domestic sphere and thus do not help Indigenous Australians in any immediate sense. We need entrenched protection in domestic law.

A built-in review requirement for all special measures and race-based laws, whether based on socio-economic need or pre-existing Indigenous right, should be incorporated into a new constitutional protection against racial discrimination, to ensure compliance with non-discrimination principles and to ensure all special measures are legitimate, effective and agreed to. Importantly, agreement should be ascertained in a democratic way that respects individual rights within the collective. This review mechanism would be in addition to judicial review.

CURRENT DISCRIMINATION

As discussed, a major problem for Indigenous Australians is lack of protection from racial discrimination. The weak protection of the RDA can be suspended at political whim. This was demonstrated by the Northern Territory Intervention,⁵⁴ which prompted the CERD Committee to report that Australia was in breach of its non-discrimination obligations.⁵⁵ While in 2011 the Intervention's explicit suspension of the RDA was removed, albeit four years after it was implemented, the relevant interventionist laws still effectively only apply to Indigenous people. This is because the definition of 'prescribed areas' to which income management and alcohol restrictions apply is still defined under s 4 of the Act to mean Aboriginal land, Aboriginal Land Rights land under Northern Territory law, and other declared areas. The law is therefore still racially targeted.

Section 10(1) of the RDA provides for equality before the law. In the 1985 case of *Gerhardy v Brown*, the High Court of Australia held that 's 10 should be read in the light of [CERD] as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination.'⁵⁶ Thus, while the Intervention no longer explicitly suspends the RDA the effect of the law is still crucial to the question of racial discrimination.

As James Anaya, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of

Indigenous Peoples, points out: 'no consultations with Indigenous peoples in the Northern Territory were carried out prior to the adoption' of the Intervention,⁵⁷ despite the requirement of 'genuine consultation with Aboriginal people' being clear in recommendations of the *Little Children are Sacred* which prompted the Intervention.⁵⁸ While the government claimed that the laws were valid special measures, consent for these measures, an important determinant of validity under CERD, was not obtained. Altman suggests the Intervention represented a return to 'the era of assimilation' that failed forty years ago.⁵⁹ Sutton similarly describes it as 'punitive and paternalist... informed by the ethnocentricity of earlier colonial policies.'⁶⁰ As always, the special measures exemption is politically fraught and, in the case of the Intervention, its validity is questionable.

Australia currently has no independent domestic review mechanisms or entrenched protections to guard against governmental misuse of the legitimate special measures allowance. Australia should put in place mechanisms to manage this ambiguity and minimize this risk. The Intervention's suspension of the RDA would arguably not have been possible if Australia had constitutionally entrenched protection against racial discrimination. Likewise, if Australia had proper procedures and transparent mechanisms for review and analysis of all special measures or racially-targeted laws, there would have been pressure on the government to enact the special measures in a way that was non-discriminatory, and with better consultation and community agreement. It is, however, important that any proposed reforms still allow governments to conduct interventionist measures where this is deemed necessary. The proposed reforms would not necessarily disallow this, but such measures should be subject to transparent review.

PROPOSED REFORMS

Australia should remove the race power and s 25 from the Constitution, and insert a protection against racial discrimination for all Australians which allows, under strict new guidelines, positive measures to enable equal enjoyment of rights, ameliorate disadvantage, redress the effects of past discrimination, and enable recognition of pre-existing and continuing Indigenous rights. This would include protection of cultural heritage, language rights and land rights.

The race power should be replaced with a non-discriminatory power to enact special measures in accordance with the new non-discrimination provision. Importantly, CERD requires that special measures

provide 'adequate advancement' for disadvantaged groups to enable equal enjoyment of 'human rights and fundamental freedoms'.⁶¹ Such human rights are broad. They include, without discrimination, rights to property ownership (land rights),⁶² education,⁶³ adequate living standards,⁶⁴ health care,⁶⁵ and rights to employment,⁶⁶ but also rights to cultural determination.⁶⁷ In general, the CERD requirement that governments take positive action to eliminate discrimination includes recognising and respecting Indigenous 'culture, history, language and way of life...'⁶⁸ Special measures in our new constitutional non-discrimination provision need not be solely socio-economic, though any effective special measure should help with, rather than hinder, socio-economic advancement.

REVIEW AND AGREEMENT REQUIREMENT

This new non-discrimination clause with an allowance for special measures should be supported by legislation to ensure periodic review of any special measures or racially-targeted laws. Noel Pearson has suggested there be a new body to monitor the 'interface between Indigenous people and governments' so that Indigenous people have a say in policies enacted for their benefit. This will help ensure that targeted policies are more likely to be empowering for Indigenous people.⁶⁹

An Act should be passed to create a new national commission whose role would be to keep a register of and monitor any special measures or Indigenous rights-based laws, new or existing.⁷⁰ This body would conduct research to ensure that such laws are working to address the disadvantage or desired objective of the law, and are not actually creating unequal rights or perpetuating disadvantage. The commission should also ensure that laws are not contrary to the wishes of the targeted community.⁷¹ The views and aspirations of the people for whom the law is intended should be taken into account when assessing whether laws are effective. Laws should also be assessed to ensure that they are proportionate to their aims and that the measures do not unduly restrict other human rights.⁷²

The commission would then make recommendations to Parliament as to how the laws should be changed or improved to better achieve their aims, how they might better enable equal enjoyment of rights, or whether they should be repealed if they are needs-based and no longer necessary because socio-economic equality has been achieved.

The new commission should operate on the constructive principles that service delivery must not create passivity

or dependence,⁷³ but must foster independence and equal participation; that the ultimate aim is for the disadvantaged individuals' rights and responsibilities⁷⁴ to become equal to those of non-Indigenous Australians; that as capabilities improve, service delivery and special measures should decrease.

The commission should be a 'watch-dog' of constitutional rights, equality and closing the gap, and should track progress towards our ultimate aims of eliminating inequality.

CONCLUSION

Australia should no longer be seen as condoning racial discrimination. Our Constitution should be modernised to ensure equal rights and responsibilities, equality before the law and equal opportunities for all Australians. This is because every Australian deserves a 'fair go', regardless of ethnicity or descent.

We must recognise Australia's Indigenous people in our Constitution and acknowledge Indigenous prior and continuing existence and rights. But it would be illogical to do this without also fixing the parts of the Constitution that allow racist laws to be passed not only against Indigenous people, but against any racial group in Australia.

Recognition is required for reconciliation. This means mutual cultural respect and acknowledgement of prior and continuing existence. But equality is required if we are to close the gap. We must put in place a new rational and systematic approach to Indigenous disadvantage and all Indigenous policy. This must proceed from a new paradigm of formal equality, incorporating vigilant review of any racially targeted laws, consideration of the views and aspirations of the people whom the law is supposed to benefit, and tracking of progress towards our ultimate aim – substantive equality and equal rights for all Australians.

Indigenous Australians who are socially, economically and culturally prosperous can be a reality in Australia. Constitutional reform must set in place the mechanisms that allow Australia to achieve this aim.

Shireen Morris is a Constitutional Reform Research Fellow at Cape York Institute for Policy and Leadership. The views expressed in this paper are the views of the author and do not necessarily represent the views of the Institute.

- 1 Expert Panel on Constitutional Recognition of Indigenous Australians, Australian Government, 'A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition' (May 2011), 7.
- 2 Ibid 22.
- 3 Ibid 18-19.
- 4 See Noel Pearson, *Up from the Mission – Selected Writings* (Black Inc, 2009) ('Our right to take responsibility'), 143-171.
- 5 See repealed s 127, s 51(xxvii) and s25. See also Bain Attwood and Andrew Markus, *The 1967 Referendum – Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) 2.
- 6 George Williams and David Hume, *People Power – the history of the referendum in Australia* (UNSW Press, 2010) 10.
- 7 George Williams, 'Thawing the frozen continent' (2007) *Griffith Review* 13, 26.
- 8 Constitutional Alteration (repeal of section 127) Bill 1965, Commonwealth of Australia, House of Representatives, 25th Parliament, first session, 1965.
- 9 *Northern Territory Emergency Response Act 2010* (Cth) s 132; *Native Title Act 1993* s 7.
- 10 LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* 'Terra Nullius'.
- 11 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
- 12 Law Council of Australia, 'Constitutional Recognition of Indigenous Australians' Discussion Paper 2011, 13.
- 13 Department of Families, Housing, Community Services and Indigenous Affairs, 'Closing the Gap: National Indigenous Reform Agreement' <<http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/NIRA.aspx>>.
- 14 Noel Pearson, 'A Structure for Empowerment' (*The Weekend Australian*) 16-17 June 2007; Noel Pearson, *Up from the Mission – Selected Writings* (Black Inc, 2009), 163-165.
- 15 Ibid.
- 16 Cape York Institute for Policy and Leadership, 'From Hand Out to Hand Up, Cape York Welfare Reform Project' (2007), 17.
- 17 See Noel Pearson, *Up from the Mission – Selected Writings* (Black Inc, 2009) ('Our right to take responsibility'), 143-171.
- 18 Ibid.
- 19 Ibid.
- 20 Noel Pearson, 'A Structure for Empowerment' (*The Weekend Australian*) 16-17 June 2007.
- 21 *Australian Constitution* s 51(xxvi).
- 22 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 376; As George Williams explained in this case, the court was 'split on whether the races power can still be used to discriminate against Indigenous or other peoples. This fundamental question remains unresolved,'; George Williams, 'Thawing the Frozen Continent' (2007) *Griffith Review* 13, 27.
- 23 Bain Attwood and Andrew Markus, *The 1967 Referendum – Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) 2.
- 24 Constitution Convention Debates, Hansard 3-1 (1898).
- 25 *Final Report of the Constitutional Commission, summary* (Australian Government Publishing Service, 1988), 54; see also Law Council of Australia, 'Constitutional Recognition of Indigenous Australians – Discussion Paper' (2011), 20.
- 26 Justin Malbon, 'The Race Power Under the Australian Constitution: Altered Meanings' (1999) 21(1) *Sydney Law Review* 80, 79.
- 27 Bain Attwood and Andrew Markus, *The 1967 Referendum – Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) 1.
- 28 Michael Kirby, 'Constitutional law and Indigenous Australians: Challenge for a Parched Continent', paper delivered at Law Council of Australia Forum, 'Constitutional Change: Recognition or Substantive Rights?' (22 July 2011) 19.
- 29 George Williams, 'The Races Power and the 1967 Referendum' (2007) 11 (SE) *Australian Indigenous Law Review*, 8.
- 30 Ibid.
- 31 Michael Kirby, 'Constitutional law and Indigenous Australians: Challenge for a Parched Continent', paper delivered at Law Council of Australia forum, 'Constitutional Change: Recognition or Substantive Rights?' (22 July 2011) 20.
- 32 *Final Report of the Constitutional Commission, summary* (Australian Government Publishing Service, 1988) 54.
- 33 HREOC, 'Combating Racism in Australia – Discussion Paper for the World Conference against Racism,' http://www.hreoc.gov.au/racial_discrimination/consultations/national_consultations/combating_racism.html>.
- 34 Dinesh D'Souza, *The End of Racism* (The Free Press, 1995) 27-28.
- 35 See Michael Kirby, 'Constitutional law and Indigenous Australians: Challenge for a Parched Continent', paper delivered at Law Council of Australia forum, 'Constitutional Change: Recognition or Substantive Rights?' (22 July 2011).
- 36 Blaut, *The Coloniser's Model of the World – Geographical Diffusionism and Eurocentric History* (The Guilford Press, 1993) 23.
- 37 Noel Pearson, 'A Structure for Empowerment' (*The Weekend Australian*) 16-17 June 2007.
- 38 Blaut, *The Coloniser's Model of the World – Geographical Diffusionism and Eurocentric History* (The Guilford Press, 1993) 24.
- 39 Marcia Langton, 'The Australian Federalism and Race: the Special Cases of Queensland and the Northern Territory' paper delivered at Law Council of Australia Forum, 'Constitutional Change: Recognition or Substantive Rights?' (22 July 2011).
- 40 Report of the Committee on the Elimination of Racial Discrimination, Sessional/Annual Report of Committee A/65/18, 31/10/2010, 24.
- 41 CERD, art 1(4) states: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'
- 42 *Racial Discrimination Act 1975* (Cth) s 8.
- 43 *Native Title Act 1993*, preamble (emphasis added).
- 44 The Victorian Charter of Rights allows special measures in art 8(4), providing that 'measures taken for the purpose of assisting or advancing persons or groups of persons *disadvantaged because of discrimination* do not constitute discrimination'. In s 15(2) the Canadian Constitution describes a similar allowance for any 'program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are *disadvantaged because of race, national or ethnic origin, colour...*', which is another way of saying past discrimination. South Africa's Constitution provides in s 9(2) that 'to promote the achievement of equality, legislative and other measures designed to protect or advance persons ... *disadvantaged by unfair discrimination* may be taken.'
- 45 CERD, art 1(4).
- 46 Ibid.
- 47 See Michaela Widdowson-Kidd, 'The Howard Government's Special Measures for Indigenous Australians' 1(2) *Queensland Student Law Review* 118.
- 48 James Anaya, Report of the Special Rapporteur on Human

- Rights, 'Observations on the Northern Territory Emergency Response in Australia,' (23 February 2010) 21.
- 49 Tom Calma, 'The Debate over a Charter of Rights' (2008) 33 *Alternative Law Journal* 105, 105.
- 50 CERD, General Recommendation No 23, 'Indigenous Peoples', 18/08/97 [4(d)].
- 51 See Michaela Widdowson-Kidd, 'The Howard Government's Special Measures for Indigenous Australians' 1(2) *Queensland Student Law Review* 118, 122.
- 52 Australian Human Rights and Equal Opportunities Commission, *Social Justice Report 2007*, Recommendations 7, 14.
- 53 *Ibid* 240.
- 54 *Northern Territory Emergency Response Act 2010* (Cth) s 132.
- 55 Australians for Native Title and Reconciliation, 'CERD report requires serious Government response' (Press Release, 28 August 2010).
- 56 *Gerhardy v Brown* (1985) 57 LR 472, 493.
- 57 James Anaya, United Nations Human Rights Council, Report of the Special Rapporteur, 'Observations on the Northern Territory Emergency Response in Australia,' (23 February 2010) 6.
- 58 Rex Wild and Pat Anderson, Northern Territory Board of Inquiry Report into the Protection of Aboriginal Children from Sexual Abuse ;Little Children are Sacred' (2007) 22.
- 59 JC Altman, 'The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?' (2007) 16 *CAEPR Working Paper*, 1.
- 60 Peter Sutton, *The Politics of Suffering – Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2009) 27, 30.
- 61 CERD art 1(4).
- 62 *Ibid* art 5(d)(v).
- 63 *Ibid* art 5(e)(v).
- 64 International Covenant on Economic, Social and Cultural Rights, art 11.
- 65 CERD art 5(e)(iv).
- 66 International Covenant on Economic, Social and Cultural Rights, Article 6, the 'right to work'; CERD art 5(e)(i).
- 67 *Ibid*, art 1 provides that 'all people have the right... to freely pursue their economic, social and cultural development'; see also International Covenant on Civil and Political Rights, art 1; CERD art 5(e)(vi).
- 68 CERD General Recommendation No 23: *Indigenous Peoples : 18/08/1997*.
- 69 Noel Pearson, 'A Structure for Empowerment' (*The Weekend Australian*) 16-17 June 2007.
- 70 *Ibid*.
- 71 CERD General Recommendation No 23: *Indigenous Peoples : 18/08/1997*, 4(d).
- 72 James Anaya, United Nations Human Rights Council, Report of the Special Rapporteur, 'Observations on the Northern Territory Emergency Response in Australia,' (23 February 2010) 21.
- 73 See Noel Pearson, *Up from the Mission – Selected Writings* (Black Inc., 2009), 151, problems with passive welfare.
- 74 *Ibid*, 'Our right to take responsibility', 143-171.

Corroboree – Attempt to Break 2002
Dorsey Smith
Acrylic on canvas board, 610mm x 500mm

