

EQUALITY FOR INDIGENOUS PEOPLES IN THE AUSTRALIAN CONSTITUTION

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I Introduction

From a human rights perspective, the text of the *Australian Constitution* is bleak. It contains little protection for individual rights or group rights, focussing instead on the rights of the states and the Commonwealth. The individual rights that are included, such as that to trial by jury, are constricted and technical; they appear incidental to the main game of designing a federal polity. There is in particular little interest in concepts of equality and non-discrimination between people or groups of people, except in the limited context of religious discrimination for public office in the Commonwealth,¹ and discrimination by states against residents of other states.² Indeed, the *Constitution* enshrines race as a legitimate category of distinction between people.

Tasmanian Attorney-General, Andrew Inglis Clark, made a proposal during the 1890s to include a clause in the *Constitution* preventing an Australian state from 'deny[ing] to any person, within its jurisdiction, equal protection of its laws'.³ The clause, and the provision in which it was contained, was based on the text of the Fourteenth Amendment to the *United States Constitution*. It was roundly rejected at the Melbourne Convention in 1898. One of the reasons for this rejection was the drafters' sense that it was a product of the United States' revolutionary history, and that the peaceful course of Australian Federation made a guarantee of equal protection unnecessary. The clause was also considered dangerously vague and uncertain.

At the same time, the nineteenth century constitutional debates indicated concern that an equal protection provision would inhibit the continuation of forms of racial discrimination practised by the states, particularly in the context of mining and factory legislation. Talk of popular,

or individual, rights, Robert Garran observed in this context, was an unjustified interference with state rights.⁴ The final version of section 117 that emerged from these debates was said by Henry Bournes Higgins to allow Western Australia's Premier, Sir John Forrest, 'to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race.'⁵

Indigenous Australians were at the margins of the constitutional settlement. They were referred to only once explicitly, in section 51 (xxvi), which gave the Commonwealth power to legislate for 'the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws'. The words 'other than the Aboriginal race in any State' were removed in the 1967 referendum. The same referendum also removed section 127, of which the heading was 'Aborigines not to be counted in reckoning population'. It stated that '[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted.'

This was relevant to the calculation of the numbers of members of both Houses of the Commonwealth Parliament in section 24 of the *Constitution*, and the Commonwealth's power to legislate in relation to census and statistics (section 51 (xi)). The rationale for section 127 was to prevent Queensland and Western Australia from acquiring more parliamentary seats or federal funds by virtue of their large Aboriginal populations. In this sense Aboriginal people were seen as a type of illegitimate population ballast, with no political significance or value.

The *Constitution* now contains only two implicit references to Indigenous Australians in provisions dealing with people or

persons 'of any race'. Apart from section 51 (xxvi), discussed by Sarah Pritchard in this issue,⁶ section 25 provides:

For the purposes of [section 24], 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.

This is a startling provision in a modern constitution, contemplating governmental discrimination on the basis of race. It is at odds with Australia's national mythology of egalitarianism as well as our international human rights commitments. In this paper, we briefly consider the evolution of Australia's ambivalent articulation of race in its *Constitution* and propose the repeal of section 25. We propose that it should be replaced by a guarantee of non-discrimination and equality. We argue that any constitutional provision should be bolstered by legislation both prohibiting discrimination and imposing a duty to promote equality.

One of the founding narratives of the Australian polity is that of a tolerant and egalitarian society, in contrast to the class-ridden societies of Europe. Both sides of politics have translated this as a commitment to a 'fair go'. This narrative's patchy implementation suggests a weak commitment to the principle of substantive equality, not only in respect of Australia's Indigenous Peoples. Although it fails to tally with the experience of many Indigenous Australians, the narrative has nonetheless endured to accommodate an apology to, but a rejection of reparations for, the Stolen Generations. More recently, it has been adapted to justify the damaging aspects of the Northern Territory Emergency Intervention and persists as Australia struggles to demonstrate progress in reconciliation between its non-Indigenous and Indigenous peoples.

II Australia's International Obligations

Australia has undertaken a range of international obligations to prohibit discrimination on the basis of race, although it has implemented these obligations in a partial and porous manner. Both the international covenants on human rights require prohibition of racial discrimination in protecting the recognised human rights. The *International Covenant on Civil and Political Rights*,⁷ ratified by Australia in 1980, states in article 2(1):

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.⁸

Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The *International Convention on the Elimination of All Forms of Racial Discrimination*,⁹ ratified by Australia in 1975, develops this general prohibition. It defines racial discrimination broadly in article 1(1) as:

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, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 1(4) provides:

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.

International human rights law has been slow to recognise the particular rights of Indigenous peoples. The adoption by the United Nations ('UN') General Assembly of the *Declaration on the Rights of Indigenous Peoples*¹⁰ in 2007, after over twenty years of drafting, was thus a significant step.

Although the *Declaration* does not have the same legal force as a treaty, it provides a valuable guide to international consensus on the situation of Indigenous peoples, as distinct from other minority racial groups. Australia voted against the *Declaration* at the time of its adoption, but made a formal statement of support for it in 2009. The *Declaration* explains the special status of Indigenous people's rights as deriving from 'historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.'¹¹ It also refers to 'the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.'¹² The *Declaration* specifies that 'Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their Indigenous origin or identity.'¹³

Australia has committed to implement its international obligations in various forms of language. For example, the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹⁴

The CERD provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law....¹⁵

And the *Declaration on the Rights of Indigenous Peoples* specifies:

States shall provide effective mechanisms for prevention of, and redress for:

- a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- d. Any form of forced assimilation or integration;
- e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.¹⁶

The various UN human rights treaty bodies regularly question Australia on its implementation of its commitments in relation to racial discrimination. For example, in 2010 the Committee on the Elimination of Racial Discrimination registered its concern in relation to Australia about 'the absence of any entrenched protection against racial discrimination in the *Australian Constitution*, and that sections 25 and 51 (xxvi) of the *Constitution* in themselves raise issues of racial discrimination.'¹⁷ This was also an issue raised by many countries during the UN Human Rights Council's Universal Periodic Review of Australia in January 2011. Australia's response to such questions is invariably that, while Australia has not enshrined a commitment to non-discrimination in its *Constitution*, it has achieved the same goal through legislation. This response is harder to justify since the suspension of the *Racial Discrimination Act 1975* (Cth) during the Northern Territory Intervention, but the current government has deflected this criticism at the international level by pointing to the reinstatement of the Act in 2010.¹⁸

III Amending the Constitution

The path to constitutional reform in Australia is littered with failed proposals. The Commonwealth Government's recent invitation to Australians to explore options for the recognition of Aboriginal and Torres Strait Islander peoples suggests, however, that constitutional change might be possible. This invitation prompts questions such as: should section 25 be repealed? Should the *Constitution* be amended to insert some type of guarantee of equality and/or non-discrimination? Such a project could be transformative in the sense Sandra Liebenberg uses the term to describe South Africa's 1996 *Constitution*. For Liebenberg, that constitution is transformative because it 'facilitate[s] a fundamental change

in the legacy of injustice produced over three centuries of colonial and apartheid rule.¹⁹ Certainly the South African judiciary has interpreted the *Constitution* with an explicit sense that the document was a charter for social change. On the other hand, constitutional adjudication is a limited tool for transformation. As Harry Arthurs has pointed out, even if a judiciary relies on constitutional guarantees at the legal level, it does not always, or even regularly, deliver social, political and economic transformation. He argues that ‘constitutional litigation has only a marginal effect on public policy, practical governance and the allocation of public goods.’²⁰

There may be some prospect of transformative constitutional amendment in the case of Indigenous Australians. One reason is that our present constitutional order contains explicit traces of a racist past, which sit uneasily with the egalitarian narrative described above.²¹ Another is the capacity of constitutional change to recalibrate the relationship between Indigenous Australians and those who came after them through formal recognition of past harms and through provision of a mechanism, albeit limited, to challenge structures of inequality. As Mick Dodson noted in 2008, ‘[t]here has never really been a moment in the history of our country where there’s been a formal recognition or acknowledgment of the Aboriginal and Torres Strait Islander peoples as the first peoples of this country.’²²

Constitutional change can legitimate claims to equality and, while not delivering social and political change by itself, it can be a critical part of broader mobilisation.²³ The social and political effect of the 1967 constitutional referendum, for example, went far beyond its legal significance. The referendum galvanised a generation of Indigenous and non-Indigenous Australians and created new momentum in Australian politics.²⁴

IV Constitutional Models

Recognition of Indigenous rights in the *Australian Constitution* raises many complex issues. We briefly address two of them here.

The first is whether the language of equality or non-discrimination (or both) should be used. As we have seen, discrimination is a concept already present in the Constitution, albeit in contexts other than race. Geoff Lindell’s paper in this collection expresses a preference for

this term on the basis that it is familiar to Australian courts – ‘a judicially workable and manageable concept’.²⁵ This was, as he notes, the approach of the 1988 Constitutional Commission. It is interesting to compare the formulation proposed by the Commission’s Advisory Committee on Individual and Democratic Rights in 1987, which used both the terms ‘equality’ and ‘discrimination’.²⁶

The international legal approach has also been to use both ‘equality’ and ‘non-discrimination’. As set out above, the guarantee of equality in article 26 of the *ICCPR* defines equality as non-discrimination, and some scholars assume that the terms are positive and negative statements of the same principle.²⁷ On this analysis, equality means absence of discrimination, and there is an assumption that non-discrimination between people will achieve equality.

One risk of such an approach is that equality comes to mean equality of opportunity alone; it requires a comparator from the majority or dominant group and measures equality only in that limited context. In effect a non-discrimination approach accepts the status quo, the values of dominant cultures, and removes race as an impediment *only if people are similarly situated*. In the case of Australia’s Indigenous peoples, this is a very modest remedy.

Moreover, a non-discrimination analysis is based on individual cases and does not respond to situations of structural equality. To adapt Nicola Lacey’s account of sex discrimination laws, the concept of race discrimination makes it hard to address (or transform) a world where social goods are so unevenly distributed.²⁸ Discrimination assumes ‘a world of autonomous individuals starting a race or making free choices’ and not one where Indigenous people may be running a different race.²⁹ Linking equality and non-discrimination emphasises fault by particular actors in particular cases and obscures the broader situation of marginalised groups. As Iris Marion Young has observed, ‘[w]hile discriminatory policies sometimes cause or reinforce oppression, oppression involves many actions, practices, and structures that have little to do with preferring or excluding members of groups in the awarding of benefits.’³⁰

The history of dispossession and injustice of Indigenous Australians over more than two centuries has created deep social, economic and political divides that require an approach that goes beyond that of non-discrimination. The language of equality may be more useful than discrimination

in the context of the *Australian Constitution* in achieving a substantive equality. It allows consideration of the history and context of inequality and relative distributions of power. A useful analysis of this type can be found in the 1994 report of the Australian Law Reform Commission ('ALRC'), its reference on *Equality Before the Law: Women's Equality* (although the Equality Act it proposed was designed as a statutory scheme). The report called for a provision that expanded the conventional discrimination focus to one that incorporated 'equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms'.³¹ The 'subordination' approach to inequality described by the ALRC involved consideration of whether a law, policy, program, practice or decision was consistent with equality in law taking into account:

1. the historical and current social, economic and legal inequalities experienced;
2. the historical and current practices of the body challenged and the extent to which those practices have contributed to or perpetuate the inequality experienced; and
3. the history of the rule or practice being challenged.³²

Such an approach requires a broader understanding of the context of inequality and disadvantage and would undermine the common objection that recognition of Indigenous rights is a form of discrimination against non-Indigenous Australians.³³

A second threshold issue for the constitutional recognition of Indigenous equality is whether an equality provision in the *Constitution* should be broadly applicable, or apply only to Indigenous Australians. We support a generally applicable provision on the basis that members of vulnerable groups regularly experience inequality on many fronts and that to focus on one aspect of people's lives is artificial. The *Declaration on the Rights of Indigenous Peoples*, for example, refers to the special situation of the elderly, children, persons with disabilities and women.³⁴

Related to this is the question of whether an equality right that can be claimed by individuals is as valuable for Indigenous peoples as a right that can be asserted by groups. In the Canadian context, it has been argued that the individual equality right contained in section 15 of the *Canadian Charter of Rights and Freedoms* has delivered little to Canada's First Nations.³⁵

In our view, section 25 of the *Australian Constitution* should be repealed and replaced by a generally applicable equality provision. Such formal recognition would constitute a real and substantial articulation of and commitment to the redefinition of a relationship that has been fraught, misunderstood and undermined to one that embeds respect for the identity of the first peoples of Australia within a nation's primary document. In so doing, it has the potential to 'change the context in which debates about the challenges faced by Aboriginal and Torres Strait Islander communities take place.'³⁶ It encourages an aspiration to equality, a declaration that goes beyond the narrow hallmarks of anti-discrimination legislation and the soft urging of the 'fair go'.

To move beyond the merely symbolic value of a constitutional commitment, an equality provision must take as its starting point an acknowledgment of a history and the nature of social, political, legal and economic exclusion and disadvantage that have characterised Australia's past. Such acknowledgement might have a preliminary reference in a revised preamble of the *Constitution* and a more detailed commitment in the body of the *Constitution* to equality of worth, equality of opportunity and equality of outcome.³⁷

Where the notion of equality is recognised as a constitutional value, it can extend to both inform and transform a broader and more substantive conception of equality and signal the manner in which the right to equality might be applied and enforced, via judicial and political, social and economic initiatives.

V Statutory Promotion of Equality

Ten years ago, Chief Justice Beverley McLachlin of the Canadian Supreme Court referred to equality as 'the most difficult right' – a right that triggers a range of definitions determined by context, often promises more than it can deliver and tends to trouble the boundary between the judiciary, the legislature and the executive.³⁸ This section argues that the constitutional right to equality, with its normative potential *and* limitations, may best be served – particularly in the absence of a bill of rights – by a legislative framework that explicitly signifies how its core values may be accessed.

The articulation of equality as a constitutional value and as a right can combine to offer significant prospects for the actual achievement of equality. However, as Beth Goldblatt

and Cathi Albertyn point out, 'because rights give rise to rules and enforceable claims, they are limited in ways values are not: namely, they are constrained by the contours of justiciability and by the role of courts in a constitutional democracy.'³⁹ Where the role of constitutional law-making is explicitly expressed to effect social change, as in the South African example, the impact of constitutional litigation on social policy formulation and revision may be less marginal. This is so particularly where there exists a legal commitment to substantive equality which requires attention both to social and historical context⁴⁰ and to impact – 'the inequalities that have characterised (a nation's) past and still haunt its present'⁴¹ – in accordance with the values underlying the right.

However, where, as in Australia, the history and the role of the courts in promoting equality has largely been conditioned by the application of anti-discrimination legislation, with its focus on complaint-based individual remedies requiring a reactive rather than pre-emptive approach, there may be an innate tendency to fashion remedies that have limited reference to context and systemic inequality, punishing misconduct in relation to an individual rather than requiring the exercise of positive conduct more generally.⁴² In other words, the scope to address the multiple and varied legal claims encompassed by a guarantee of substantive equality is limited. The claims for 'similar treatment across difference, ... for recognition, for inclusion and acceptance of the status of individuals and groups as full and equal members of society', for redistribution of and access to economic benefits and resources and for the 'dismantling of systemic inequality',⁴³ go far beyond the narrow assertions and sanctions endemic to claims of discrimination. Thus, the realisation of the promise of a constitutional guarantee of equality may require a legislative mechanism to reinforce and give content to the right. Ideally, this right would be contained in a national statutory bill or charter of rights. In its absence, a statutory right to equality offers a less costly, less formal and potentially more expeditious route than constitutional litigation.

The South African experience is instructive for an Australian legislative mechanism which could assist in the interpretation and implementation of a constitutional equality provision. Section 9(4) of the *South African Constitution* (more particularly, its Bill of Rights) requires that national legislation be enacted to prevent or prohibit unfair discrimination.⁴⁴ The *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*

(South Africa) (*'Equality Act'*) provides a legal mechanism with which to confront, address and remedy 'past and present forms of incidental, as well as institutionalized or structural, unfair discrimination and inequality.'⁴⁵

The desire to transform the pervasive history and ongoing legacy of inequality that has permeated South Africa's evolution has meant that constitutional and legislative tools and the courts have been accorded an important role in creating an egalitarian society committed 'to restore the common humanity of all South Africans.'⁴⁶ The preamble to the *Equality Act* echoes that of South Africa's *Constitution* and Bill of Rights:

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;

South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination;

Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;

This implies the advancement, by special legal and other measures, of historically disadvantaged individuals,

communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences.⁴⁷

The significance of the South African legislation was emphasised by the Minister for Justice and Constitutional Development during the second reading debate of the Equality Bill. He proclaimed that the Bill was 'regarded in importance as only second to the Constitution. It is intended to strengthen the legal basis for further transforming our society.'⁴⁸ Although the transformative nature and form of the *South African Constitution* is directed at redressing a specific political history, its experience in developing legislation to underpin a constitutional equality guarantee suggests an approach for Australia as it considers constitutional and legislative reform to enhance legal protection against discrimination.

The South African *Equality Act*, which presupposes the existence of a constitutional equality guarantee, provides legislative direction for the interpretation and implementation of the constitutional provision. The Australian Government's interest in promoting a 'national conversation about Aboriginal and Torres Strait Islander constitutional recognition'⁴⁹ may only trigger an excision of the remaining discriminatory provisions from Australia's founding document. If this were the case, any new legal framework for equality would be by way of legislation. Indeed, recent proposals for an equality Act in Australia initially raised expectations of an innovative approach. However the draft legislation appears more to seek a harmonisation of the four Commonwealth anti-discrimination laws into a single 'omnibus' law than to promote equality.⁵⁰ The goal, according to Attorney-General Robert McClelland, was not so much to enhance equality protection, although this is seen as a consequence of the process. Rather, it was heralded as a vehicle to 'reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business.'⁵¹

The South African experience leads us to suggest that the Commonwealth's proposed consolidation of anti-discrimination legislation could take the form of an equality Act, which not only harmonises the prohibitions on conduct of current Commonwealth anti-discrimination law, but also imposes a positive duty to promote equality. The South African Act, in addition to seeking to prevent and prohibit

unfair discrimination, hate speech and harassment, and the publication and dissemination of unfairly discriminatory information, provides for the active promotion of equality and values of non-racism and non-sexism by both state and non-state actors.⁵² The Act also obliges government to devise and engage in educational programmes and campaigns to promote substantive equality.⁵³

Importantly, the Act provides for the establishment of equality courts, based at High Court and magistrate's court levels, to implement its provisions. The powers of the courts are wide-ranging and designed to encourage a creative, informal approach, sensitive to the circumstances of each case and the needs and interests of the parties. Under the Act, the equality courts have the power to grant civil remedies, such as interim or declaratory orders, an apology, or a directive requiring the respondent to make regular progress reports to the court in relation to its orders.⁵⁴ The South African *Equality Act* thus provides a valuable model for Australian legislation to support a constitutional guarantee of equality. It also offers a model for legislation in the absence of a constitutional equality provision.

VI Conclusion

[T]he purpose of our new constitutional ... order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.⁵⁵

Judicial interpretations of the equality clauses in the *Canadian Charter of Rights and Freedoms*⁵⁶ and the South African Bill of Rights have both been influenced by reference to the notion of 'human dignity'. The Canadian Supreme Court and the South African Constitutional Court have held that conduct that 'violate(s) the dignity and freedom of the individual',⁵⁷ treatment that 'denie[s] recognition of [a person's] inherent dignity'⁵⁸ or has the 'potential to impair the fundamental human dignity of persons as human beings'⁵⁹ is in breach of the relevant equality provisions.

In keeping with the transformative rationale and purpose of the South African Bill of Rights, the South African Constitutional Court has clarified that the concept of dignity in determining differential treatment is not wholly 'concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in [our] society.'⁶⁰ In a similar vein, Mick Dodson has argued

that if the *Australian Constitution* is to have any relevance to Indigenous peoples – and any enduring relevance to Australian society as a whole – it has to ‘affirm our basic identity as human beings.’⁶¹ The retention of section 25 in the *Australian Constitution* entrenches Australia’s history of racial discrimination in the country’s highest law and breaches Australia’s international human rights obligations. We have proposed its replacement by a generally applicable provision guaranteeing ‘equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms’. We have argued for a parallel statutory mechanism to support the constitutional provision; if the proposal for a constitutional equality guarantee is not successful, we suggest that an equality Act both prohibiting discrimination and imposing a duty to promote equality would provide a valuable development in Australian law. In either case, there needs to be significant legal change to redress inequality between Indigenous and non-Indigenous Australians.

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1 *Australian Constitution* s 116.

2 *Australian Constitution* s 117.

3 See J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 68 (referring to ch V, cl 17 of the 1891 draft).

4 Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) 173.

5 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1801, quoted in George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’ (2000) 38 *Osgoode Hall Law Journal* 643, 650.

6 Sarah Pritchard, ‘The “Race” Power in Section 51(xxvi) of the Constitution’ (2011) 15(2) *Australian Indigenous Law Review* 44.

7 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*).

8 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2) (*ICESCR*) similarly provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

9 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (*CERD*).

10 GA Res 61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/29 (13 September 2007) (*Declaration on the Rights of Indigenous Peoples*).

11 *Ibid* preamble.

12 *Ibid* preamble.

13 *Ibid* art 2.

14 *ICCPR* art 2(2).

15 *CERD* art 5.

16 *Declaration on the Rights of Indigenous Peoples* art 8(2).

17 *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, UN CERD, 77 sess, 2043rd mtg, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010), [10].

18 See, eg, Australia’s formal response to the Universal Periodic Review recommendations: *Report of the Working Group on the Universal Periodic Review: Australia*, UN GAOR, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10/Add.1 (8 June 2011).

19 Sandra Liebenberg, ‘South Africa: Adjudicating Socio-Economic Rights Under a Transformative Constitution’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) 73, 75.

20 Harry Arthurs, ‘Constitutionalism: An Idea Whose Time Has Come ... And Gone?’ (2008) 75 *American Curiae* 3, 6.

21 But see Jeremy Webber, ‘Multiculturalism and the *Australian Constitution*’ (2001) 24 *University of New South Wales Law Journal* 882, 892–3. Webber argues for a cautious approach to constitutional amendment and suggests that the ‘continued presence [of section 25] ... may in fact provide a salutary reminder of the presence of racial discrimination in the country’s past’: at 892.

22 Mick Dodson, ‘The Continuing Relevance of the Constitution for Indigenous Peoples’ (Speech delivered at the National Archives of Australia, Canberra, 13 July 2008) <<http://www.naa.gov.au/collection/explore/federation/talks/dodson.aspx>>.

23 Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2009).

24 See Larissa Behrendt, ‘The 1967 Referendum: 40 Years On’ in Neil Gillespie (ed), *Reflections: 40 Years on from the 1967 Referendum* (Aboriginal Legal Rights Movement, 2007) 25.

25 Geoffrey Lindell, ‘The Constitutional Commission and Australia’s First Inhabitants: Its Views of Agreement-Making and a New

- Power to Legislate Revisited' (2011) 15(2) *Australian Indigenous Law Review* X.
- 26 Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights Under the Constitution* (1987) 102:
- Substitute for section 117:
- The Commonwealth or a State shall not deny equality before the law to all of the citizens and all of the permanent residents of Australia and in particular the Commonwealth or a State shall not unfairly discriminate between any of them on any grounds.
- Constitutional Commission, *Final Report* (1988) vol 1, 536:
- Section 124G:
- (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.
- (2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.
- 27 See, eg, Warwick McKean, *Equality and Discrimination Under International Law* (Clarendon Press, 5th ed, 1983) 287–8 .
- 28 Nicola Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411, 415.
- 29 Ibid 420.
- 30 Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990) 195.
- 31 Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 pt 1 (1994) recommendation 4.3.
- 32 See Australian Law Reform Commission *Equality Before the Law: Women's Equality*, Report No 69 pt 2 (1994) recommendation 4.5.
- 33 See Megan Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6. See also Claire Charters, 'Comparative Constitutional Law and Indigenous Peoples: Canada, New Zealand and the USA' in Rosalind Dixon and Thomas Ginsburg (eds), *Research Handbook in Comparative Constitutional Design* (Edward Elgar, 2011) 170, 177.
- 34 *Declaration on the Rights of Indigenous Peoples* art 22.
- 35 See, eg, Larry N Chartrand, 'Re-conceptualizing Equality: A Place for Indigenous Political Identity' (2001) 19 *Windsor Yearbook of Access to Justice* 243.
- 36 Australian Human Rights Commission, *Frequently Asked Questions: The Benefits of Reforming the Constitution, Constitutional Reform* <<http://www.humanrights.gov.au/constitution/faq/benefit.html>>.
- 37 See Simon Rice, 'And Which "Equality Act" Would That Be?', in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 21.
- 38 Beverly McLachlin, 'Equality: The Most Difficult Right' (2001) 14 *Supreme Court Law Review* (2d) 17.
- 39 Cathi Albertyn and Beth Goldblatt, 'Equality' in S Woolman, T Roux and M Bishop (eds), *Constitutional Law of South Africa* (Juta, 2nd ed, 2007) vol 2, ch 35, [58-3]. See also Anne Smith, 'Constitutionalising Equality: The South African Experience' (2008) 9 *International Journal of Discrimination and the Law* 201.
- 40 Albertyn and Goldblatt, above n 39, [58-6].
- 41 Ibid [58-3].
- 42 Rice, above n 37.
- 43 Albertyn and Goldblatt, above n 39, [58-7].
- 44 *South African Constitution* s 9(1) provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. Section 9(2) provides that 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination', may be taken 'to promote the achievement of equality', and s 9(4) provides that '(n)ational legislation must be enacted to prevent or prohibit unfair discrimination'.
- 45 Cathi Albertyn, Beth Goldblatt, Chris Roederer, *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (Witwatersrand University Press, 2001) 3.
- 46 Rósaan Krüger, *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD thesis, Rhodes University, 2008) 144 <<http://eprints.ru.ac.za/1429/1/Kruger-TR09-79.pdf>>.
- 47 *Equality Act* preamble.
- 48 South Africa, *Parliamentary Debates*, National Assembly, 26 January 2000, 380 (Penuell Maduna), quoted in Krüger, above n 46, 151.
- 49 You Me Unity, 'A National Conversation About Aboriginal and Torres Straight Islander Constitutional Recognition' (Discussion Paper, May 2011) <<http://www.youmeunity.org.au/downloads/2653fb1b6a59a1ab8d18.pdf>>.
- 50 An exposure draft is due mid-2012. The discussion paper was released in September 2011: Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination' (Discussion Paper, September 2011) <<http://www.ema.gov.au/>>.
- 51 Attorney-General, Minister for Finance and Deregulation, 'Reform of Anti-discrimination Legislation' (Media Release, 29/2010, 21 April 2010); *Australia's Human Rights Framework*, Commonwealth of Australia, 2010, quoted in Rice, above n 37.
- 52 Saras Jagwanth, 'South Africa: The Inequality Challenge' (2000) 15 *Southern Africa Report* 30.
- 53 *Equality Act* s 25.
- 54 *Equality Act* s 21.

- 55 *President of the Republic of South Africa v Hugo* [1997] 4 SA 1, [41] (Goldstone J) (Constitutional Court).
- 56 *Canadian Charter of Rights and Freedoms* s 15 provides:
- (1) 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, religion, sex, age or mental or physical disability.
 - (2) Subsection (1) does not preclude any law, 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, religion, sex, age or mental or physical disability.
- 57 *Miron v Trudel* [1995] 2 SCR 418, [69] (L'Heureux-Dubé J).
- 58 *Prinsloo v Van der Linde* [1997] 3 SA 1012, [31] (Ackermann, O'Regan and Sachs JJ) (Constitutional Court).
- 59 *Harksen v Lane NO* [1998] 1 SA 300, [53] (Goldstone J) (Constitutional Court).
- 60 *Khumalo v Holomisa* [2002] 5 SA 401, [27] (O'Regan J) (Constitutional Court).
- 61 Dodson, above n 22.