***Constitutional Change or Oppression –***

***It’s Your Choice***

The most important word missing from the Australian Constitution is ***Custodianship.*** It is a word of strength and beauty that can unify us and bind us to the ideal of what it means to be Australian.

Custodianship is a central concept of Aboriginal and Torres Strait Islander knowledge with a striking relevance to the most brilliant earth science. Custodianship gives every one of us who call this country home a responsibility to contribute to the balance of life. Custodians must care for this land and all its people, not only for our generation but for countless generations to come. This valuing of all life, respect for all creatures, connects us to our past, present and future. It unifies the descendants of the world’s oldest continuous Cultures with the newer arrivals from more than 230 other places. Aboriginal people would say, invitingly, ***the land owns us all.***

This is Aboriginal knowledge. To some it may be a new way of seeing and thinking but it is very old to Aboriginal people. It is written in their law, which after all is the world’s oldest, unbroken legal code. I believe that Custodianship is the key to a distinctive

expression of what it is to be ***here***, what it means ***to be*** ***Australian***.

If we bring Indigenous wisdom to the Referendum question in the political season ahead and ultimately imbue Indigenous knowledge in changes to the document that guides our nation, we will offer the most meaningful respect and recognition of Aboriginal and Torres Strait Islander people. Instead of mere words, built on English Law concepts, we will embrace as a nation an intellectual concept that is infused with meaning for all who live here. Our foundation stone is then uniquely Australian, solid and deep like Uluru. The country under our feet will sing to us all.

Our new Constitution might begin… ***Australia is a nation founded on Custodianship. All of the people of this land are equal and free.***

This is a vision of a greater sense of nationhood based on the common good, genuine equality and a shared responsibility.

While Custodianship is not one of the ideas offered to us by the Government appointed Panel on Constitutional Recognition of Indigenous Australians, some of its members have encouraged me to share this personal proposal as it reflects the importance of the language, not only in a strictly legal sense but in how it ***defines us as a nation***. It is certainly the idea that best expresses what so many old and wise Aboriginal elders say to me as I listen carefully to them as I travel to the most far-flung communities around this country.

So many times Aboriginal people have heard promises. Only a few years ago many were greatly moved by the sincere words of the National Apology to the Stolen Generations. But very little has changed for the better for Aboriginal people after so many of those promises or as a consequence of English law. To close that space between us it is more than mere words and English legal concepts that Aboriginal people are seeking. For each one of us recognition must be written in the head and the heart in a form that implicitly conveys the truth that this is an Aboriginal land.

Imagine a country where Aboriginal and Torres Strait Islander people are recognized as the sovereign owners of lands they have lived on for sixty thousand years or more.

Imagine the freedom to be yourself, culturally, spiritually, linguistically, regardless of your age, gender, colour or ethnic origin.

Imagine a Constitution that enshrines these human rights and upholds all of our international legal obligations.

Imagine a Constitutional prohibition on discrimination on the basis of race, colour, religion, gender or national origin.

Imagine a positive mandate in that Constitution to ensure laws are made and programs enacted to end the impoverishment of so many of the First Australians as well as others.

Imagine an Australia where the Indigenous value of *Custodianship* binds all of us to a shared responsibility to care for this land and for one-another.

In this Constitution there would be power and poetry. It would inspire us,

expressing our true sense of place, acknowledging the longer timelines of history, defining us and unifying us as Australians.

This is my dream and I hope you have one too, a dream of a new Democracy and a constitution that is inclusive of all Australians.

If you can’t see that far into the future to a brighter day that some day will come, then you risk settling for the status quo. Do you want that? Maybe you will talk with some of those Australians who don’t know the Constitution exists or as opinion polling indicates some of those who confuse the Australian Constitution with the American Declaration of Independence?

Clearly a major challenge to meaningful discussion of Constitutional change is that so many Australians don’t know what is in the document or that we have the power to change it for the better. On the encouraging side, polling done for the *Recognize* movement as well as comments by over a million voters on the ABC’s federal election *Compass* have indicated that a clear majority of Australians, 70% or more, supports some form of recognition that Aboriginal and Torres Strait Islander people were the first inhabitants of this land.

This seems an extremely minimalist statement of the obvious. If that were the full extent of the change it would merely follow the pattern of other acts of recognition by some State parliaments in preambles that have symbolic value but usually add non-justiciable clauses to make them of little consequence in establishing rights and ending discrimination.

We do not have a clear indication at this stage of the degree of reform Tony Abbott’s Government is willing to recommend. We have recommendations from the previous Government’s advisory committee but no detailed polling on whether these ideas would be approved by a double majority. A majority of voters across the nation and a majority of people in a majority of states are required to change the Constitution. Given our innate constitutional conservatism this has happened only 8 times in 44 referendums.

What has become clear to the many Aboriginal leaders who have spoken up on these issues, such as Professor Mick Dodson, is that many Australians have little understanding of how the Constitution is being used to oppress Indigenous people through discrimination, disempowerment and denial of fundamental human rights. I listened with locals in Katherine to Professor Dodson’s reflections on what he has gleaned from numerous encounters with Indigenous leaders around the world and also the perspective from his time at Harvard University. When you look back from overseas on how our Governments respond to United Nations criticism on breaches of human rights it is clear that our Constitution allows Australia to evade its full international human rights responsibilities.

This becomes clear when we look closely at the document that is meant to define us as a nation.

Even a glance at the Constitution reveals the deep stain of racism and discrimination. It is one of the few constitutions in the world with potentially negative race powers allowing governments to make laws and policy that trample the rights of Aboriginal and Torres Strait Islander people.

It is because the Australian constitution says very little at all about human rights that Aboriginal and Torres Strait Islander people have long been denied the right to shelter, health, education, employment, and expression of their own Cultures and languages. These days you barely hear mention of the fundamental Indigenous right to self-determination. The Australian Constitution gives no legal force to these foundational Indigenous rights and so what is missing now in the relationship between black and white Australians is a basis for trust.

Without trust the space between us is a dangerous void. It is the gap we need to close first before any of those other gaps in life expectancy, education, housing and employment can be closed.

Instead of trust, there is a very old pattern of treachery in Australia’s relationship with its Indigenous people. Every time a promise is made, a new law passed or a hand held out in friendship, we seem to betray any good intentions.

Australia took such a long time to recognize Aboriginal people were even here but soon after we abandoned them to second-class citizenship. We may have stopped classing Aboriginal people as flora and fauna but we forgot that they were human when we removed their children from their families. It took Australia almost two centuries to recognize any form of Native Title but as fast as we could we unpicked the Wik and Mabo High Court judgements and appealed against the Native Title settlements. We treated Aboriginal people as lowly domestic servants and then quibbled over their stolen wages. We paid lip service to the right of Indigenous people to speak their languages and pursue their ancient Cultures but relentlessly for at least two decades government policy and so much media have created a war, the Culture War, waged relentlessly against the value of Indigenous Culture.

As one of the great champions of excellence in Indigenous education, Dr Chris Sara puts it, there is one prevailing narrative in which “Western influence is seen as progressive and good, and the enemy is Culture and tradition.”

Any discussion of a new attempt to belatedly recognize the legal rights of Indigenous Australians and their rightful central place as the most ancient founders of the many social structures and systems of law that have been here for tens of thousands of years surely must begin with a recognition of this long pattern of injustice and oppression. As a nation we need to accept an honest statement of certain facts. These facts give us an accurate measure of the degree of exclusion, both historical and contemporary, a clear indication of the lack of recognition of Indigenous Australians.

Put yourselves in the shoes of an Indigenous Australian. Instead of beginning the story with the arrival of Europeans let us, for a change, consider the longer timelines of history. Let us start the story at the beginning.

Despite the lie of *terra nullius,* Aboriginal and Torres Strait Islander people have occupied these lands longer than anyone really knows, for at least 60,000 years is the current consensus but perhaps, as Professor Mike Archer once argued at the Australian Museum, it is 80,000 years of human occupation. We can only be sure that before European people even existed Aboriginal clans were evolving into some of the most adaptive and resilient the world has ever known.

We can also be certain that these Aboriginal lands were invaded, from James Cook’s initial hostile gunshots to the wave of ships manned by marines. The pattern of settlement was frequently brutal. The English took what was never theirs.

To deny the invasion and the many massacres linked to the theft of lands, and I say this with grim irony, of course would undermine any claim that the Australian Constitution has to even a contested sense of legitimacy.

This nation, constituted by the Australia Constitution Act of 1900, a British Act of Parliament, is founded on the misguided notion of White Supremacy and the equal folly of the concept of conquest. As several Australia judges have noted conquest is a facet of international law frequently used to justify claims by nations to sovereignty over lands they have seized. Having witnessed some thirty of the worst conflicts over the past 45 years including three genocides almost beyond belief, I am convinced that this ancient belief in conquest is not only a vestige of our most predatory traits as a species but in the end it threatens the term of our species on this earth.

Yet conquest of a sort, along with an extraordinary denial of the truth of the Aboriginal presence here, is what has landed us all in this Constitutional mess.

Despite the fact that the original English invader, James Cook, ignored his orders to ‘consult with the natives’, despite the truth that Aboriginal resistance did occur, that there was no surrender of sovereignty and no negotiation of a treaty, the colonies and the ‘Mother Country’ eventually established a Constitution that looked right through Aboriginal people as if they were not here. Common sense and simple observation told everyone that the great south land was widely settled. By some estimates there were up to 700,000 Aboriginal people here when the Europeans arrived, a population peak that Indigenous Australians are once more steadily approaching after more than two centuries. To achieve the country wide occupation and the obliteration of the Aboriginal way of life in so many places, it was deemed necessary to reduce the First People of this land to irrelevance.

Usually the British utilized some laws from the lands that they conquered but in the case of Indigenous people the invaders treated them with such disdain that there was no real interest in Aboriginal law. English law was imposed on Aboriginal people. Even after Federation there was still a complete denial of the existence of a traditional law that had been here for tens of thousands of years before any city existed in Europe, before the ancient Greeks debated democracy or the Egyptians built the pyramids. The disdain for Aboriginal history, knowledge and law is at the heart of our national denial and on going delusion.

In the 1901 Constitution Act there were just two references to ‘natives’. Both tragically aimed to exclude Aboriginal and Torres Strait Islander people from the life of the nation. The ‘natives’ were not even to be counted in the census because given the prevailing racism it was assumed that out amidst the flora and fauna they were doomed to extinction. The Parliament was prohibited from making laws for the ‘natives’ but this exclusion did not prevent shameful policies aimed at assimilation and at times acts of genocide.

It was not until the 1967 Referendum, after many decades of campaigning by the Aboriginal Rights Movement, that an extraordinary 92% majority of Australians voted emphatically to allow Aboriginal and Torres Strait Islander people to be counted in the census along with all other citizens. Yes, we voters said, the Commonwealth also could make laws for Aboriginal people.

It was the first referendum I voted in and working at that time as a young reporter covering the street protests and the campaigning by the Rights Movement, I am certain that most Australians believed that what we were voting for was a legal measure of equality. No one I know envisaged that the Commonwealth would use this power to make laws that clearly harmed and discriminated against Aboriginal people.

It is a wretched truth that the hopefulness of the 1967 Referendum was never carried forward by the political leadership or by the popular will. This was one of the greatest opportunities lost that could have moved this nation towards genuine greatness as perhaps the most equal and unified on earth.

Instead, for another half a century we have been mired in the mud of a racist Constitution. We have been stuck with a Constitution that is anachronistic in that it is based on false concepts of European supremacy which gained much attention in Charles Darwin’s day but have long been totally discredited by modern science.

Let me state this very bluntly. The Australian Constitution is clearly racist because it is built on the false notion of a *White Australia*n ascendancy. The race powers are deeply repulsive and eternally threatening to Indigenous people but they should be equally repugnant to us all.

I say to you that this is not *my* Constitution and I doubt it is truly *yours* because most of us do not want to live with official racism and discrimination.

While we may debate the historical reasons for the racism in the Constitution, the tone and the intentions, there is no denying that explicit race powers remain in certain Sections.

For example, Section 25 allows States to disenfranchise people on the basis of race and sets out the consequences. Before Federation, Queensland and Western Australia passed laws explicitly barring Aboriginal people from voting. After Federation, most young Aboriginal people who arrived at the voting age were still not able to vote in their own land. Although Section 25 has been generally regarded as not likely to be used now because the offending States would lose a degree of political representation in the Federal parliament, this is the kind of constitutional stain created by racism that should be erased once and for all.

Similarly, Section 51 (xxvi) of the Constitution allows the federal parliament to pass laws relating to “the people of any race for whom it is deemed necessary to make special laws.”

The intention of this section, some argue, was to allow the Parliament to legislate for the advancement of Aboriginal people but in practice what this means so often for Aboriginal people is political oppression.

It is why I say to you now it is Constitutional change or oppression…the choice is yours.

Just three times since the introduction of the Racial Discrimination Act in 1975 have any Australians lost the protection against discrimination. Each time it has been Aboriginal people who have been targeted for official discrimination, dressed up as ‘special measures’.

Without giving their required prior informed consent, this is clearly oppression of Aboriginal people. The most shameful recent example is the crushing humiliation of the Northern Territory Emergency Response Act of 2007.

A Prime Minister, an Opposition Leader and almost all members of the federal parliament voted to support this 21st Century act of official discrimination against Aboriginal people. They sent in Army troops, federal police and bureaucrats to take over life in 73 remote Aboriginal communities.

I know many of these communities extremely well and have worked closely with some over the past decades. I can barely find words to describe the deep shame experienced by so many Aboriginal people, smeared collectively as hopeless drunks and dangerous paedophiles, incapable of loving and protecting their children. “*Do they really think of us all this way*? “ old people ask me. “*Do they think we are all* *bad people? Why do they want to round us up into a yard like nanny goats?”*

This is why the Constitution must be changed to explicitly prevent any Prime Minister or Government oppressing the First Australians or anyone else. When the Northern Territory Intervention was launched then Prime Minister John Howard declared that he was not concerned “with Constitutional niceties” when the safety of children was at stake. What extraordinary hypocrisy. The Howard Government had stubbornly refused to provide recommended increases in primary health care and other desperately needed services for Aboriginal people. Without doubt that era of Government policy was among the most hostile to Aboriginal people, especially to their legal rights. The Intervention will be seen in history as the most damaging to Aboriginal people since the policy that created the Stolen Generations.

Prime Minister John Howard’s disgraceful words, his disregard for “Constitutional niceties”, should be chiselled deep on his political tombstone.

The Intervention was the Howard Government’s very dangerous *Big Lie*.

The 500 pages of the Northern Territory Emergency Response Act contained not one mention of Aboriginal children.

By falsely claiming that there were paedophile rings in every one these Aboriginal communities the Government exploited a perceived national emergency to take control of the townships and assert far greater control to access of Aboriginal lands. Why? Why oppress Aboriginal people when not one of those members of parliament would ever subject their own families to such an indecent intrusion on their most precious of human rights. This was never about protecting children and six years later more Northern Territory children than ever are at risk of neglect. Youth suicide rates and incarceration rates of young Indigenous people are the highest in the world.

Both sides of Australian politics persist in attempting to control Aboriginal people because there is a powerful consensus to deny Indigenous self-determination. White politicians are bent on controlling what many perceive as a “failed state” across the Top End of Australia. Social engineering and control is the methodology. The underlying goal is to maximise the future economic development in twenty growth towns and to allow rapid exploitation of the mineral wealth of Aboriginal lands. This has always been the larger agenda.

The Australian Crimes Commission fully investigated the Howard Government’s extraordinary racial smear and concluded emphatically that there were no paedophile rings in these Northern Territory communities. In characteristic neo-liberal fashion, however, those shaping the real agenda for northern development had created a so-called political ‘reality’ and moved on with their plans. The politicians used military jargon, speaking of an emergency and then a normalisation period. Essentially there has been five years of a state of emergency and we will now see ten more years of control under the euphemistically named, *Stronger Futures* legislation.

An Aboriginal child born in one those remote communities in 2007 will spend the first fifteen years of life in an occupied territory, controlled by the new Great White Protectors thousands of kilometres away in Canberra. The Federal Government and bureaucrats now dictate fundamental aspects of family life, Cultural life, work, welfare and education. The remote community citizens are subjected to income management and punitive policies if their children do not attend school. Despite a disastrous slump in school attendance in the Intervention period, Government still seems puzzled that Aboriginal people are now deeply suspicious of all parts of the ‘gubba’ system. The white ghosts who floated into their lives two centuries ago cannot be trusted. Genuine Indigenous rights to an equal opportunity for health, education, housing and a decent standard of living has never been honoured in this hollow Constitution and Aboriginal people know it better than anyone.

With the arrival of Tony Abbott’s Government we will hear much talk of a new economic agenda, especially up north, and of a new relationship with Indigenous people. The Coalition Government has pledged to prepare a draft amendment for Constitutional Change to go before parliament within twelve months of taking office. The new Attorney General, Senator George Brandis, Indigenous Affairs Minister, Senator Nigel Scullion and the West Australian Member for Hasluck, Ken Wyatt, a Noongar man, will be the core of a new committee to progress Constitutional Recognition of Indigenous Australians.

New Governments have new opportunities to alter the course of history. Whether Tony Abbott can change tack from the Howard era and create a new relationship is possible but this would require a radical shift from the prevailing mindset in Canberra. In the 21st Century neo-liberalism is heavily influencing the policies of all Governments towards Aboriginal lands and the legal rights of those who belong to these lands. There is undoubtedly a new land grab underway in northern Australia and as yet Tony Abbott has given no signal that he would alter this approach which undermines Indigenous self-determination and denies sovereignty.

As I consult Aboriginal and Torres Strait Islander people privately and publicly in many places and many forums around the country, overwhelmingly they speak of their land as “***the land that owns them***”. This sense of sovereignty is the animist essence of their being.

Sovereignty may mean many things to different people but to most Indigenous people clearly it means the legal right to control their destiny on their lands and waters. This is at the heart of Aboriginal law. Before leaders ever spoke of Land Rights this deep belief in belonging to the land was the most meaningful expression of the Aboriginal sense of time and place. It’s Aboriginal land, always was, always will be.

Whatever would make any politician think that Aboriginal people would give up this attachment to land? To take an Aboriginal person away from country is to tear out a part of their mind.

Polling by the National Congress of First Peoples on Constitutional recognition tell us that this deep and abiding belief in sovereignty is still foremost on the minds of Indigenous people, along with the health and education of their children.

Here then is the first dilemma in the current approach to Constitutional recognition of Aboriginal and Torres Strait Islander people. The consensus paper prepared by the government appointed panel makes it perfectly clear that sovereignty is not going to be included in any referendum proposal for Constitutional recognition and change.

One of the most forceful members of the panel, Noel Pearson, is quoted as saying that apart from being unachievable, “full-blown sovereignty” may not be necessary and that “local indigenous sovereignty” could exist internally within a nation state “provided that the fullest rights of self-determination are accorded.”

The problem with Noel Pearson’s advice is that he strongly supported the Howard Government’s Intervention on the lands of other Aboriginal people, one of the most blatant assaults on local self-determination in recent decades.

Given this astonishing undermining of Aboriginal authority through the Intervention and the ten year extension known as the *STRONGER FUTURES* legislation, the “fullest rights of self-determination” envisaged by Noel Pearson seem lifetimes away. Why? As the late and great Aboriginal writer, Kevin Gilbert, put it, “Because the white man won’t do it.”

This is where Australia lags far behind the rest of the world. The United States Government has more than 350 treaties with Native Americans. American courts have upheld Indigenous sovereignty repeatedly and affirmed the right of the First Nations to self-government. Native Americans not only benefit from the existence of legal compacts but they direct exploit the real, sub-surface value of the minerals in their land. Importantly evidence gathered over three decades by the Harvard Project on American Indian Economic Development, led by Professors Stephen Cornell and Joe Kalt, shows emphatically that sovereignty, control of their destiny, is the real key to development of First Nations peoples.

The only Indigenous people in the world who have equal life expectancy with the rest of their fellow citizens are the Sami spread across Norway, Finland and Sweden. All three of these countries have Sami parliaments. Norway’s constitution recognises the country as bi-Cultural and there is a guarantee that the government will consult and negotiate with Sami to maintain their distinct language and Culture.

Such positive recognition and progress by other First Nations shows up the limitations of the Australian approach and the negative restraints imposed by a political reality, a grudging willingness to make symbolic change perhaps but real doubt about how far the politicians or the people will go.

Whatever happened to our belief in an Australian Treaty or legal compact with Aboriginal and Torres Strait Islander people to address their sovereignty and so much of this nation’s unfinished business? The *Yothu Yindi* chant of *“Treaty Now”* is no longer on many lips.

The government panel on constitutional recognition clearly states that it saw its brief as coming up with recommendations that contribute to a more “unified and reconciled nation, and be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums. In addition they had to benefit and accord with the wishes of Aboriginal and Torres Strait Islander peoples, and be technically and legally sound. Specifically the experts wanted a clear expression of support from a majority of Aboriginal and Torres Strait Islander people for any statement of recognition.

In truth, however, the panel has inadvertently or intentionally reinforced the perceived political ‘reality’ that recognizing Aboriginal sovereignty is not going to happen and nor is any legal compact or treaty that would in a meaningful way encapsulate land rights.

The panel notes that these are issues of great concern for future discussion.

What the panel is offering all Australians now are five strong recommendations for constitutional changes that nonetheless clearly do not meet the priorities for action by the very people the changes are intended to benefit.

I believe this presents a considerable threat to any chance of unity on the full potential of constitutional change.

Our nation is still held back by the timidity and lack of leadership by our elected politicians.

It is 36 years since Australians made any change to our Constitution. The last time we could find the majority of voters in a majority of states was for a referendum in 1977 that required federal judges to retire at 70.

A legal mind that I hugely respect, former High Court Justice Michael Kirby, has eloquently summed up the situation we are now facing. Understanding the record on referendums and noting the importance of recognizing the rights of Aboriginal and Torres Strait Islander people, Kirby says, “Constitutionally speaking we are still basically White Australia, however much we boast that we have changed.”

Well you have had many months yourselves to mull over the government panel’s five recommendations. What each one of us can do is to evaluate the prospects of whether these recommended changes would eliminate or even reduce the overt, institutionalised and casual racism and discrimination that persists in Australia.

The first recommendation to erase forever Section 25 of the Constitution would prevent the States from ever taking away the right to vote based on race. The main goal of this reform is to erase an expression of permissible discrimination from the Constitution and this much seems clearly achievable with no negative consequences.

The second recommendation to remove Section 51 (xxvi) would eliminate the negative race power that has been used to make laws that sometimes harm the rights of Indigenous people.

Here we need to examine the original intention of Section 51 (xxvi) which Edmund Barton argued was necessary to enable the Commonwealth as he put it, “to “regulate the affairs of the people of coloured or inferior races who are in the Commonwealth”.

After Federation the *White Australia* policy was aimed at restricting migrant workers such as the Chinese miners and the Kanakas, the South Sea Islanders working Queensland’s sugar plantations. Many of these South Sea Islanders were kidnapped by ‘blackbirders’ and entered labour contracts that they did not understand. Of an estimated 50,000 to 60,000 Islanders, almost 15,000 died in their first year or so from diseases like pneumonia, measles and chicken pox for which they had no immunity in their isolated island environments.

It is a cruel but little known part of our history that after such enslavement most of the South Sea Islanders were forced into mass deportation from Australia in the early 1900s. Only a few thousand remained behind. Their descendants are the estimated 40,000 South Sea islanders who still fight for recognition. Recently I joined some of them along with Bonita Mabo and Shireen Malamoo to hear them talk of their struggle for rights and the recovery of the wages and estate that was stolen from them around 1906-1908. Most Constitutional lawyers believe this race power, too, in Section 51 (xxvi) can be erased to prevent selective race laws ever taking aim at groups targeted by Government like the South Sea Islanders.

If that reform were accomplished it leads to the necessity for the third recommendation of the Government’s advisory committee, that is for a new power, a Section 51A that would give the federal parliament power to pass laws that *benefit* Indigenous Australians.

It has been proposed by the Government’s advisory committee that this new Section 51A would also set out a clear statement of recognition of the prior occupancy of the continent and the on-going relationship of Indigenous people with the land and waters. Echoing the Sami Constitutional recognition, there is also a proposal in this section to require the government to secure the *advancement* of Aboriginal and Torres Strait Islander peoples. This may or may not give more of the right kind of support to programs that could bring equity in health, education, employment and life expectancy. The contentious area is over what constitutes laws that clearly benefit Indigenous people. The Government argued that the Northern Territory Intervention benefited Aboriginal families. Look closer and it clearly failed even current standards of justice because there was no prior, informed consent by Aboriginal people for the five-year mandatory leasing of their communities to the federal government and other discriminatory provisions targeting only Aboriginal people. The only mechanism that can ensure Governments do not manipulate this area of law is to offer a strong legal guarantee that Indigenous people must give prior, informed consent. Given the pattern of political treachery and relentless assimilation this is a major challenge of genuine Constitutional reform, ensuring that change makes a meaningful difference, that it ends the historic pattern of dispossession and disadvantage.

The fourth recommendation by the advisory committee is the one that I believe is the most urgently needed because it clearly addresses so many immediate injustices. This is a proposed non-discrimination clause to prohibit the Commonwealth, States and Territories from discriminating on the basis of race, colour, ethnic or national origin.

Disappointingly, gender has not been included in this list. Why not emphasize that important human right, non-discrimination on the basis of gender, while we are engaged in this effort to improve our Constitution? The non-discrimination clause also must be drafted to prevent any recourse to the sleight of hand when Government’s declare their discrimination as special measures.

Finally, in their fifth recommendation, the government panel seeks a language provision that states that English is the national language but also affirms Aboriginal and Torres Strait Islander languages as part of our national heritage. This is valuable as Government policy towards Indigenous languages is confused and sometimes sharply contradictory. For example, in recent years the Northern Territory Government required English to be taught in schools for the first four hours every day, even though these children spoke their own languages at home. Of course such an absurd restriction has fallen apart. Wiser governments, including the NSW Government, have been actively promoting the development of Indigenous languages. At Ian Thorpe’s Fountain for Youth, of which I am the Honorary CEO, we have provided the core funding for the first major dictionary of Arnhem Land language to be on bookshelves very soon.

In summary, the discussion of Constitutional recognition so far has drawn some bi-partisan political support but no clear statement of how far this reform agenda should go.

There is public approval of a limited form of recognition but also limited public awareness of the issues at stake

At the same time, there is virtually no high-level political discussion about abandoning oppressive policy such as the Stronger Futures legislation in the Northern Territory that officially discriminates against Aboriginal communities.

For Australia’s Indigenous citizens here is the painful tension between the on going oppression and talk of recognizing their rights.

When Aboriginal people are vilified and humiliated by the most blatant outbursts of racism, some sections of our society are sympathetic but others raise the argument of their right to free speech. I say again, put yourself in the shoes of an Aboriginal person subjected to racism. While ever some in our midst are willing to inflict the deliberate hurt of racism, we have an indication of this nation’s casual complacency over the suffering endured by Indigenous people for more than two centuries.

For more than two centuries Indigenous people have been brutally excluded from their rightful place at the centre of life in this nation.

For 112 years the First Australians have been discriminated against by the Australian Constitution.

I cannot believe that this Constitution is as an accurate reflection of the values and aspirations of the majority of Australian citizens. It is time that all of us *became the change*, became *Custodians* in a nation that dares to believe in equality.

Dr Jeff McMullen AM

Address to Macquarie University Law students.

Macquarie University September 26th 2013.