Submission to the Legislative Scrutiny Committee

Care and Protection of Children Legislation Amendment (Every Child Matters) Bill 2026 - Serial 67

Submitted by:

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Summary position: The Assembly should not pass the Bill in its current form. The Bill contains legitimate objectives, especially child safety, early intervention and stronger legal representation for children. However, as drafted it risks converting family support into compliance, reducing Aboriginal child and family participation to a non-enforceable opportunity, and accelerating permanency without first requiring sufficiently clear, reviewable and resourced efforts to support family, kinship and safe reunification. The Bill should be substantially amended and subjected to proper consultation before passage.

Attachments: Annexure A - Becoming "We": Civic Formation and the Structural Foundations of Closing the Gap; Annexure B - Institutions of Consent: Self-Determination, Equality, and Democratic Legitimacy in Australia.

1. Scope of this submission

This submission is directed to the Committee's stated functions in relation to this Bill: whether the Assembly should pass the Bill, whether it should amend the Bill, whether the Bill has sufficient regard to rights and liberties of individuals, and whether the Bill has sufficient regard to the institution of Parliament. It is therefore confined to the content and structure of the Bill, rather than to the separate public debate about any individual tragedy or the broader Northern Territory child protection system.

The submission proceeds from four principles.

- Child safety is non-negotiable. The State must be able to act urgently where a child faces a significant and likely risk of harm.
- Culture, kinship, family connection and Country are not alternatives to child safety. Properly identified and supported, they are among the conditions that make safety durable.
- Self-determination must be institutional and accountable. It requires visible, local, participatory decision-making rather than merely symbolic consultation or a non-enforceable opportunity to be heard.
- Early intervention must be genuinely supportive. It should not become a pathway from poverty, school disengagement, family violence, disability, housing insecurity or youth justice contact into coercive orders and permanent separation.

In my own work on “institutions of consent” and “civic formation”, I have argued that durable self-determination depends on structures through which communities can authorise, renew and hold accountable those who exercise authority on their behalf. The same principle applies here. A child protection system cannot be made safe merely by invoking Aboriginal participation in principle. It must create enforceable processes through which Aboriginal children, families, kinship groups and accountable community-controlled organisations participate in decisions before removal, placement and permanency decisions are made, except in urgent safety situations.

2. Whether the Assembly should pass the Bill

The Assembly should not pass the Bill in its current form.

The Bill’s stated objectives are serious and legitimate. The Explanatory Statement says the Bill seeks to keep children safe and central to decision-making, hold parents accountable, promote early intervention, introduce family responsibility agreements and orders, clarify principles, introduce a broad placement principle, establish proactive efforts and strengthen children’s access to legal representation in long-term child protection matters. Those objectives are not objectionable in themselves.

The difficulty is that the Bill’s operative architecture does not yet match those objectives. Three structural concerns stand out.

First, the Bill states that the underlying principles do not create or confer any right or entitlement enforceable at law. That means principles concerning participation, family, Aboriginal children, placement and proactive efforts may guide decision-makers but may not provide children or families with a meaningful remedy when those principles are not followed.

Second, the Bill elevates safety, harm protection, stable relationships and permanency in a hierarchy of best interests considerations, while matters such as strengthening family relationships, reunification, and the child’s right to enjoy culture and tradition are placed in a separate subsection as matters that “may also be relevant”. Safety must be paramount. But family, culture, kinship and reunification should not be treated as secondary or optional matters. In Aboriginal child protection, they are often central to safety and identity.

Third, the Bill introduces broad family responsibility agreement and order mechanisms that may be triggered by an “event of concern”, including criminal or anti-social behaviour, school non-attendance, or any event adversely affecting a child’s wellbeing. In practice, those concepts may capture complex social conditions - housing, disability, poverty, family violence, grief, remoteness and service failure - that cannot be solved by parental compliance orders alone.

For those reasons, the Bill should be amended before passage. At minimum, Part 2 should not commence until the Legislative Assembly has received evidence from Aboriginal families, kinship carers, Aboriginal community-controlled organisations, family violence specialists, children’s legal services, frontline child protection workers and people with lived experience of the care system.

3. Whether the Assembly should amend the Bill

The Assembly should amend the Bill substantially. The following amendments are recommended.

3.1 Make child-safety principles enforceable as duties of consideration, reasons and review

New section 7(4) should be amended. It may be legitimate to avoid creating a general damages action from every principle, but it is not appropriate to make the principles legally inert. The principles should create enforceable duties to consider, record and give reasons in significant decisions, and to permit review where a decision-maker has failed to consider mandatory matters.

Recommended amendment: replace the present non-enforceability clause with wording that confirms the principles do not create a separate cause of action in damages, but do impose duties of consideration, reasons, participation and procedural fairness where a significant decision involving a child is made.

3.2 Treat family, culture, kinship and reunification as mandatory protective considerations

New section 8(3) should be amended so that the listed matters must be considered where relevant, rather than "may also be relevant". This does not require culture or family connection to override immediate child safety. It ensures that, when the State makes a significant decision, it must consider whether safe family support, kinship care, cultural connection and reunification planning can protect the child without unnecessary long-term separation.

Recommended amendment: change "may also be relevant" to "must also be considered, where relevant", and make clear that these matters are protective factors to be weighed consistently with the paramount concern of the child's best interests.

3.3 Restore a real Aboriginal Child Placement and Participation Principle

The proposed section 12C gives Aboriginal children and families an "opportunity to participate" in significant decisions. The Explanatory Statement indicates this is a deliberate change from a right to participate and be enabled to participate. That is a substantial reduction in procedural protection.

The Bill should restore stronger language. Aboriginal children and families should have a right to participate and to be enabled to participate in administrative and judicial processes affecting significant decisions, subject only to urgent child-safety exceptions. "Opportunity" is too weak. An opportunity can be nominal, poorly timed, culturally unsafe or practically inaccessible.

Recommended amendment: restore participation as a right and require decision-makers to document what was done to enable participation, including language support, disability support, family-led decision-making, kinship identification, and the involvement of an Aboriginal community-controlled organisation where appropriate.

3.4 Require family-led and ACCO-supported decision-making before escalation

Before a family responsibility order, protection order, long-term parental responsibility direction or permanent care order is sought, the CEO should be required to convene or attempt

a family-led decision-making process, with Aboriginal community-controlled support where the child is Aboriginal, unless urgent safety circumstances make that impossible.

Recommended amendment: insert a mandatory family-led decision-making step before escalation, together with written reasons if that step is not taken.

3.5 Tighten “event of concern”, “anti-social behaviour” and “wellbeing” triggers

The Bill’s “event of concern” trigger is too broad. School non-attendance, anti-social behaviour and adverse wellbeing may reflect parental neglect in some cases, but they may also reflect disability, lack of transport, unsafe housing, domestic and family violence, grief, community trauma or absence of accessible services.

Recommended amendment: define “event of concern” more precisely and require the CEO to identify the specific risk to the child, the family circumstances said to contribute to that risk, the services offered, and why a voluntary support plan is insufficient before moving to an agreement or order.

3.6 Make service availability a condition of accountability

The Bill requires the CEO, before entering into a family responsibility agreement, to ensure that facilities or services reasonably required for compliance are reasonably available. That safeguard should be extended and strengthened. No family should be treated as refusing to engage or failing to comply where services were unavailable, inaccessible, culturally unsafe, not disability-appropriate, not trauma-informed, or not safe in a domestic and family violence context.

Recommended amendment: provide that non-compliance with a family responsibility agreement or order cannot be relied upon for escalation unless the Court is satisfied that required services were actually available, accessible, culturally safe, disability-appropriate and safe having regard to family violence risks.

3.7 Extend domestic and family violence safeguards beyond agreements

The Bill’s express domestic and family violence safeguard in relation to family responsibility agreements is important. However, family violence risk does not disappear when the matter escalates to a family responsibility order or protection proceeding.

Recommended amendment: apply the family violence risk assessment and management framework to all family responsibility agreements, family responsibility orders, protection order applications and reunification/permanency decisions. The Bill should also require decision-makers to distinguish perpetrators from non-offending protective parents and should prevent orders that increase risk to a child or protective parent.

3.8 Strengthen natural justice for family responsibility orders

The Bill permits family responsibility order applications and variation applications to be heard in the absence of a parent in certain circumstances. This may sometimes be necessary, but it should be tightly limited because family responsibility orders can have serious consequences, including directions connected to income management, banned drinker orders, housing information, restricted premises, investigations and protection order applications.

Recommended amendment: require actual notice wherever possible, independent legal or advocacy assistance, interpreters in the parent's preferred language, written reasons for any hearing in absence, and a finding that proceeding in absence is necessary and proportionate having regard to child safety.

3.9 Ensure family responsibility orders are supportive, not punitive

The Explanatory Statement acknowledges that some family responsibility order directions may appear punitive, but says they are intended to support child wellbeing and parental capacity. That intention should be made operative in the Bill.

Recommended amendment: require the Court to be satisfied that each proposed direction is necessary, proportionate, connected to an identified child-safety need, and the least intrusive available means. Directions concerning income management, alcohol restrictions, housing information or restricted premises should require specific findings that they will reduce, and not increase, risk to the child or family.

3.10 Do not allow Court-directed protection applications to bypass statutory thresholds

The Explanatory Statement states that the Bill would allow the CEO to apply for a protection order if directed to do so by a family responsibility order, regardless of whether the CEO holds the ordinary beliefs in section 121(1)(a). That is concerning. The State should not be placed on a path to protection proceedings unless the statutory child protection threshold is supported by evidence.

Recommended amendment: require any Court-directed protection order application to be accompanied by evidence addressing the ordinary statutory threshold and the least-intrusive-means requirement. The Court should not be able to convert insufficient proactive efforts into a pathway to protection proceedings without the child-protection threshold being met.

3.11 Prevent carer standing after eight months from hardening delayed kinship failure into permanency

The Bill gives carers standing in certain proceedings once the child has been placed with that carer for more than eight months. Long-term carers may have relevant information and should not be ignored. However, in a system where kinship searches may be delayed or under-resourced, eight months can allow a non-kin placement to become the status quo before kinship options have been fully identified and supported.

Recommended amendment: carer standing should be accompanied by a mandatory report on kinship searches, cultural connection planning, family-led decision-making, and reasons why any family or kinship placement has not been pursued or supported.

3.12 Strengthen and resource children's legal representation

The proposed replacement section 143A is one of the stronger parts of the Bill. The Court must not hear an application for a permanent care order or a protection order with a long-term parental responsibility direction unless the child is represented, has made an informed and independent decision not to be represented, or urgency requires the matter to proceed. This should be retained and resourced.

Recommended amendment: make representation effectively mandatory in long-term and permanent matters, narrow the urgency exception, require written reasons if the matter proceeds without representation, and ensure funding for independent, culturally competent child legal services.

3.13 Require public reporting and independent review

The Bill should include annual reporting on the use and outcomes of family responsibility agreements, family responsibility orders, proactive efforts, kinship searches, Aboriginal placements, reunification outcomes, legal representation, domestic and family violence safeguards, and protection order escalation. Without data, Parliament cannot know whether the Bill is reducing harm or merely accelerating removals.

Recommended amendment: insert a statutory review after two years of operation and annual public reporting disaggregated by Aboriginal status, age, region, disability, order type, placement type and reunification outcome, while protecting privacy.

4. Whether the Bill has sufficient regard to rights and liberties

In its present form, the Bill does not have sufficient regard to the rights and liberties of individuals. The concerns fall squarely within the Committee's Terms of Reference.

4.1 Administrative power and reviewability

The Bill makes substantial consequences depend on administrative assessments by the CEO: whether a child's wellbeing raises concern, whether a family's circumstances have contributed to an event of concern, whether services are reasonably available, whether a family responsibility agreement is appropriate, whether proactive efforts have been sufficient, and whether non-compliance should lead to variation, replacement or protection proceedings. Those powers require clearer thresholds, documented reasons, and review pathways.

4.2 Natural justice

Natural justice concerns arise because family responsibility order proceedings may be heard in the absence of a parent; agreements may be entered in a context where refusal may trigger escalation; and parents may face complex legal consequences without guaranteed independent advice. These concerns are heightened in remote settings, where language, transport, disability, trauma and mistrust of government systems can affect practical participation.

4.3 Aboriginal and Torres Strait Islander tradition

The Committee must consider whether the Bill has sufficient regard to Aboriginal and Torres Strait Islander tradition. The Bill recognises the role of kinship groups and communities in promoting the wellbeing of Aboriginal children, but then weakens that recognition by making Aboriginal participation a non-enforceable opportunity and by making section 12C subject to section 12B. The result is that Aboriginal tradition may be acknowledged but not structurally protected.

The better approach is not to give culture an automatic veto over safety. It is to require decision-makers to treat culture, kinship, family and Country as concrete child-safety and identity factors that must be investigated, recorded, supported and reviewed.

4.4 Clarity and precision

The Bill should be clearer. Terms such as “anti-social behaviour”, “event adversely affects a child’s wellbeing”, “family circumstances”, “reasonably available”, “appropriate”, “sufficient and appropriate” and “another activity or action considered appropriate by the CEO” are broad. In child protection law, breadth can become discretion; discretion can become inconsistency; and inconsistency can become unequal treatment.

5. Whether the Bill has sufficient regard to the institution of Parliament

The Bill also raises parliamentary scrutiny concerns.

First, the Bill is substantial. It replaces the core principles of the Act, introduces family responsibility agreements and orders into the child protection Act, creates a stepped escalation pathway, alters protection-order processes, changes permanency settings, gives carers standing after eight months, replaces child legal representation provisions, amends worker screening, and makes consequential amendments to other laws.

Second, the consultation period is extremely compressed given the legal, social and cultural significance of the reforms. A Bill of this kind affects children, parents, carers, kinship groups, Aboriginal communities, legal services, family violence services, schools, housing, police, courts and government agencies. It should not be rushed through before the Committee has heard from those most directly affected.

Third, commencement is deferred by proclamation, with a long-stop date in 2028. Staged commencement may be sensible, but Parliament should require implementation readiness criteria before commencement of the most coercive provisions, including service availability, legal representation funding, family violence training, Aboriginal community-controlled partnership arrangements, data systems and public reporting mechanisms.

6. Recommended Committee finding

I recommend that the Committee report as follows:

- the Assembly should not pass the Bill in its current form;
- the Assembly should amend the Bill substantially before passage;
- the Bill does not yet have sufficient regard to rights and liberties, particularly natural justice, reviewability, Aboriginal participation, family and kinship connection, and the need for clear and precise statutory thresholds;
- the Bill does not yet have sufficient regard to the institution of Parliament because the scale of reform requires fuller consultation, implementation readiness criteria, annual reporting and independent statutory review.

The Committee should recommend that the Bill be amended to preserve urgent child-safety powers while strengthening enforceable participation, family-led decision-making, Aboriginal kinship safeguards, service obligations, family violence protections, legal representation and parliamentary accountability.

7. Conclusion

The central issue is not whether the Northern Territory should protect children. It must. Nor is the issue whether family, culture or kinship should override safety. They should not. The question is whether this Bill, as drafted, will make children safer or whether it will make escalation, removal and permanency easier while leaving the underlying service, housing, family violence, disability and kinship-support failures unresolved.

The safest child protection system is one that can act immediately where a child faces serious harm, but which also requires the Territory to demonstrate on evidence that it has genuinely supported family, kinship and community structures before converting temporary intervention into long-term separation.

No child should be left in danger because of culture. Equally, no child should be removed or permanently separated because the State failed to identify kin, failed to provide services, failed to manage family violence, failed to support a protective parent, or failed to hear the child and family in a culturally safe and legally meaningful way.

For those reasons, the Bill should not pass in its current form.

8. Annexures and supplementary materials

I attach two short background papers as annexures. They are included to explain the institutional premise relied upon in this submission, not to distract from the Committee's direct scrutiny of the Bill.

The annexures should be read only for the following proposition: child safety, self-determination and accountability are strengthened when Aboriginal children, families, kinship groups and community-controlled services participate through visible, accountable and reviewable institutions. They are not advanced as a claim that culture overrides immediate child safety. The submission maintains the opposite: urgent protection from significant and likely harm must remain available, but long-term intervention should be supported by enforceable participation, reasons, review, service availability and documented kinship work.

Annexure A - Becoming "We": Civic Formation and the Structural Foundations of Closing the Gap

This annexure supports the submission's argument that the Bill should not treat Aboriginal participation as merely symbolic. It explains why Closing the Gap-style reforms can measure socioeconomic outcomes without sufficiently measuring the civic infrastructure that makes durable outcomes possible: who decides, how authority is renewed, how responsibility is mapped, and whether families experience governance as something local, participatory and accountable.

Its relevance to this Bill is practical. It supports amendments requiring family-led decision-making, ACCO-supported participation, documented kinship searches, transparent reasons, annual reporting and independent review. These mechanisms help convert self-determination from consultation language into visible child-safety governance.

Annexure B - Institutions of Consent: Self-Determination, Equality, and Democratic Legitimacy in Australia

This annexure supports the submission's argument that self-determination must be institutional, not merely rhetorical. It explains that democratic legitimacy and self-determination depend on institutions through which authority can be authorised, exercised, contested and renewed, and on legal conditions that protect equal participation and accountability.

Its relevance to this Bill is to support enforceable duties of consideration, reasons and review; stronger natural justice protections; child and family participation rights; clarity around proactive efforts; service-availability safeguards; and family violence protections. Those safeguards do not weaken child safety. They make intervention more legitimate, more reviewable and more likely to produce stable long-term outcomes.

In the event of any inconsistency between these annexures and the recommendations in this submission, the recommendations in the submission should prevail. The annexures are supplementary explanatory material only.

References

[1] Legislative Assembly of the Northern Territory, Legislative Scrutiny Committee, Call for Submissions: Care and Protection of Children Legislation Amendment (Every Child Matters) Bill 2026.

[2] Legislative Assembly of the Northern Territory, Legislative Scrutiny Committee, Terms of Reference, Sessional Order 14, adopted 15 October 2024.

[3] Care and Protection of Children Legislation Amendment (Every Child Matters) Bill 2026 (NT), Serial 67.

[4] Explanatory Statement, Care and Protection of Children Legislation Amendment (Every Child Matters) Bill 2026 (NT), Serial 67.

[5] Matthew Jennings, Becoming "We": Civic Formation and the Structural Foundations of Closing the Gap (2026), attached as Annexure A.

[6] Matthew Jennings, Institutions of Consent: Self-Determination, Equality, and Democratic Legitimacy in Australia (2026), attached as Annexure B.

ANNEXURE A

Becoming 'We': Civic Formation and the Structural Foundations of Closing the Gap

Supplementary material to the submission of Dr Matthew Jennings

Legislative Scrutiny Committee - Legislative Assembly of the Northern Territory

Care and Protection of Children Legislation Amendment (Every Child Matters) Bill 2026 (Serial 67)

Status	Annexure to main submission; supplementary material only.
Purpose	This annexure is provided as supplementary analytical material to support the main submission. It explains why durable reform requires visible, participatory, accountable local authority and civic formation, rather than relying only on centrally administered service delivery or compliance mechanisms.
Relevance	Its relevance to the Bill is confined to the institutional question raised in the main submission: child protection reform should strengthen Aboriginal family, kinship and community participation through accountable structures, while maintaining a universal and non-negotiable child-safety floor.
Use	This annexure should be read with the main submission. The main submission remains the document directed to the Committee's Terms of Reference and the content of the Bill.

Prepared by Dr Matthew Jennings
Sydney, Australia | May 2026

Becoming "We":
Civic Formation and the Structural Foundations of Closing the Gap

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Abstract

For more than fifteen years Australia's Closing the Gap framework has sought to reduce disparities between Indigenous and non-Indigenous Australians across health, education, employment and justice. Billions of dollars have been invested, yet progress remains uneven and in some domains, particularly incarceration and child removal, trends have stagnated or worsened. This article argues that the persistent underperformance of Closing the Gap is not primarily a funding failure but a structural one. The framework measures socioeconomic outcomes rigorously but does not systematically address civic legitimacy or visible governance participation within Indigenous communities themselves. Durable self-determination requires more than national advisory representation or programmatic service delivery; it requires the formation of a lived, participatory political "We" within communities. Drawing on democratic theory, UNDRIP implementation debates and Australian constitutional jurisprudence, the article explores how local mandate clarity, visible community authority and institutional participation may strengthen the foundations of self-determination. It also considers how modernising race-based legal language in favour of political relationship may clarify the institutional framework in which these processes operate. If Closing the Gap is to succeed, the task is not simply managing disadvantage but cultivating the civic institutions through which communities become capable of overcoming it.

Keywords

Closing the Gap; Indigenous governance; civic formation; self-determination; democratic consent; UNDRIP; constitutional equality; Indigenous policy Australia.

Suggested Citation

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Part 1 - Diagnosing the Structural Problem

Australia has long told stories about who "we" are, sometimes romantically, sometimes mythically, yet the question of how political community is formed and sustained in practice remains unsettled. Political communities are not formed simply by sharing territory or history. They are formed through institutions that make collective decision-making visible, legitimate and renewable. A society becomes a political "we" when its members recognise both the authority through which decisions are made and the responsibilities that follow from them. Where those structures are weak or opaque, programs may be delivered and outcomes measured, but the deeper foundations of self-determination remain fragile. In the Indigenous policy context, that unsettled question is not symbolic. It is structural.

This article does not question the legitimacy of Indigenous nations or the unity of Australia's constitutional order. Rather, it explores the institutional space between them. Democratic legitimacy ultimately rests on the consent of equal citizens, yet consent itself requires visible civic institutions through which communities authorise and renew authority. The question considered here is how those institutions develop within Indigenous nations and how they interact with the shared constitutional framework.

The current Closing the Gap reporting reveals a consistent pattern: progress occurs where administrative programs can be delivered, while outcomes most closely tied to social cohesion, justice and governance remain resistant to change.

1.1. The Funding Narrative and Its Limits

The most recent Closing the Gap reporting illustrates this pattern clearly. While several targets linked to program delivery are improving, the most resistant indicators remain those tied to justice and social cohesion. As the Prime Minister acknowledged in presenting the 2026 report to Parliament, "the challenges facing us are significant, complex and connected." These outcomes cannot be reduced to service provision alone. They reflect deeper questions of community authority, civic participation and institutional legitimacy.

Closing the Gap was born of urgency and moral recognition. First announced in 2008, it articulated a national commitment to reduce measurable disparities between Aboriginal and Torres Strait Islander peoples and the wider Australian population within a generation.[1] It was premised on a straightforward logic: identify key indicators of disadvantage, set national targets, mobilise resources, and monitor progress annually.

Over time, the framework expanded and was refreshed. Targets now include early childhood development, school attendance, life expectancy, employment, incarceration rates and out-of-home care.[2] Governments at all levels have repeatedly reaffirmed their commitment, most recently through significant funding announcements tied to remote employment schemes, community-controlled health infrastructure and maternal care programs.

Yet the results remain mixed. The most recent Closing the Gap reporting confirms the structural imbalance. Four targets are currently on track and six are improving, yet key justice indicators, including suicide, incarceration and child protection involvement, remain

[1] Council of Australian Governments (COAG), National Indigenous Reform Agreement (Closing the Gap) (2008).
[2] National Agreement on Closing the Gap (2020).

stalled or worsening.[3] The pattern is striking: areas most responsive to program delivery show improvement, while those most closely tied to social cohesion and governance remain resistant to change.[4] Justice outcomes, in particular, have drawn sustained concern. As civil society submissions to Australia's reporting under the International Covenant on Civil and Political Rights have observed, justice targets historically lacked specific measurable benchmarks, reflecting a deeper structural gap in addressing the drivers of incarceration and violence.[5]

It would be facile to conclude that insufficient funding explains these patterns. Australia has committed substantial resources over more than a decade and a half. Nor is it credible to suggest that policymakers lack goodwill. The question, rather, is whether the architecture of Closing the Gap addresses the right layer of the problem.

The framework is overwhelmingly outcome-oriented. It measures disparities in life expectancy, literacy, employment participation and contact with the criminal justice system. What it does not systematically measure is the civic infrastructure within communities themselves: who makes decisions, how authority is renewed, how responsibility is shared, and whether governance is visible and participatory at the local level.

In other words, Closing the Gap tracks socioeconomic indicators but does not directly track political legitimacy. It treats communities primarily as sites of service delivery rather than as political communities with internal structures of authority and responsibility. This omission is not trivial. In democratic theory, durable improvements in social outcomes tend to follow from stable and legitimate governance arrangements, not precede them.[6]

If this diagnosis is correct, then the persistent shortfalls in Closing the Gap are not merely failures of implementation. They are symptoms of a structural blind spot. Democratic legitimacy ultimately rests on the consent of equal citizens. Yet consent itself requires civic institutions through which communities authorise and renew authority. Closing the Gap measures disadvantage rigorously, but it does not yet systematically cultivate the institutions through which communities become a political "we" capable of overcoming it.

1.2. Measuring Outcomes Without Measuring Governance

The most recent Closing the Gap implementation review reflects this structural concern directly. An Aboriginal and Torres Strait Islander-led Independent Review of the National Agreement identified three core reform priorities: strengthening self-determination, improving capability across institutions, and reinforcing governance systems themselves.[7] The persistence of governance reform as a central recommendation suggests that outcomes cannot be understood independently of the institutional structures through which authority is exercised.

The dominant logic of Closing the Gap is technocratic. Identify disparities, assign targets, fund interventions, monitor statistical movement. This model has strengths. It imposes

[3] National Indigenous Australians Agengy, Closing the Gap Annual Report 2025.
[4] Productivity Commission, Closing the Gap Annual Data Compilation Report 2025
[5] Human Rights Law Centre et al., Australia's Compliance with the ICCPR (2017).
[6] David Beetham, The Legitimation of Power (2nd ed., 2013).
[7] Productivity Commission, Review of the National Agreement on Closing the Gap (2024).

accountability on governments and creates transparency around entrenched inequality. It also aligns with international reporting frameworks under instruments such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[8]

But technocratic models are not neutral. They shape what is seen as the "problem." In Closing the Gap, disadvantage is primarily framed as a deficit in service access, health outcomes, educational attainment and labour market participation. What is less frequently framed as a problem is the condition of civic authority within communities themselves. The framework asks:

- Are children attending school?
- Are incarceration rates falling?
- Are employment numbers rising?

It does not systematically ask:

- Who decides how schooling is structured locally?
- How are priorities debated and resolved?
- Is there a visible process for renewing community mandate?
- Do parents see themselves as participants in governance?
- Do children witness decision-making as something "we" do?

This absence matters. UNDRIP repeatedly affirms that Indigenous peoples possess the right to self-determination and autonomy in internal and local affairs. [9] Yet autonomy cannot be reduced to the existence of programs or advisory bodies. It requires institutional coherence and visible participation.

The Canadian UNDRIP implementation literature has grappled explicitly with the operational problem of identifying which Indigenous "peoples" hold consent rights in specific contexts.[10] Governments cannot meaningfully implement free, prior and informed consent (FPIC) if they cannot identify who is authorised to speak for a given community or territory. The issue is not simply cultural; it is institutional. Consent presupposes clarity of mandate.

Australia faces a parallel problem. There exist land councils, prescribed bodies corporate under native title, community-controlled health organisations, regional alliances and peak bodies. Each plays an important role. Yet the relationship between them is often layered, overlapping and opaque to external observers, and sometimes to community members themselves.

Closing the Gap interacts with this ecosystem largely through funding agreements and reporting requirements. It does not require, or measure, clarity of mandate or visibility of decision-making processes. The result is that outcomes are monitored without systematically strengthening the political structures through which those outcomes are shaped.

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[8] International Covenant on Civil and Political Rights (1966); International Convention on the Elimination of All Forms of Racial Discrimination (1965).

[9] United Nations Declaration on the Rights of Indigenous Peoples (2007), arts 3–4, 19, 32(2).

[10] See discussion of identifying Indigenous "peoples" and consent-holders in UNDRIP implementation debates, particularly in Canadian jurisprudence on free, prior and informed consent.

This is not an argument for imposing uniform governance models. It is an argument for recognising that socioeconomic improvement is deeply entangled with civic legitimacy. Where decision-making is opaque, where authority is contested or unclear, or where responsibility is diffusely allocated between Commonwealth, State, and local bodies, programmatic interventions struggle to produce durable change. This pattern is reflected in the current Closing the Gap data, where justice and suicide indicators remain stubbornly resistant to improvement despite increased program investment.

In short, the framework measures symptoms more rigorously than structure.

1.3. The Missing Internal "Collective We"

The phrase "collective We" can easily be misunderstood. It does not refer to a single, unified national Indigenous polity. Nor does it imply homogeneity across more than 250 distinct nations and language groups. Rather, it refers to the lived experience of political community at the level where daily life unfolds.

A functioning political community exhibits at least three characteristics.

First, authority is visible. Community members can identify who makes decisions, how those decisions are reached, and what mechanisms exist for review or renewal. Authority may take many forms: elected councils, elders' forums, hybrid boards, assemblies or culturally grounded decision circles. The form is not decisive; visibility is.

Second, mandate is renewable. Those who exercise authority do so by virtue of a recognisable process through which legitimacy is periodically affirmed. This may be electoral in character, but it need not be. It may be grounded in custom, consensus or structured consultation. What matters is that authority is not assumed to be permanent or self-authorising.

Third, responsibility is shared and legible. Community members understand what falls within their own sphere of responsibility, what is properly a State or Commonwealth function, and how failures are addressed.

These characteristics are not abstractions. They are observable conditions. And they are particularly significant for younger generations. Political theorists have long noted that democratic identity is formed not primarily through constitutional texts but through participation and observation.[11] Children who witness adults debating, deciding and renewing authority internalise governance as a collective activity. Where governance is invisible or externally mediated, civic identity weakens.

These forms of community authority do not replace the wider constitutional order. Rather, they represent nested civic communities through which authority becomes visible and legitimate at different levels of a democratic system.

In this light, the persistent invocation of a national Indigenous "voice", whether advisory or otherwise, cannot substitute for internal civic formation. National representation operates

[11] Jürgen Habermas, Between Facts and Norms (1996); Hannah Arendt, On Revolution (1963).

at one layer of governance. It may influence legislation, policy design and public discourse. But it does not automatically generate local mandate clarity or participatory legitimacy within individual nations and communities.

The sympathetic case for the Voice was that it sought to institutionalise a channel of advice at the federal level. That objective addressed one dimension of structural exclusion. Yet national advisory representation and local civic cohesion are distinct phenomena. One does not mechanically produce the other.

If Closing the Gap is to move beyond a cycle of targets and funding announcements, it must attend to this internal dimension. The question is not whether Indigenous communities possess culture, identity or history. They indisputably do. The question is whether policy settings strengthen or obscure the visible exercise of political agency within those communities.

Until that question is confronted directly, structural reform will remain incomplete.

Part 2. -Reframing the Legal and Policy Architecture

2.1. The Distorting Effect of Race-Based Legal Constructs

Australia's constitutional and statutory landscape still carries language that reflects nineteenth and early twentieth century taxonomies of race. Section 51(xxvi) of the Constitution empowers the Commonwealth to make laws with respect to "the people of any race," and the Racial Discrimination Act 1975 (Cth) implements Australia's obligations under ICERD using the terminology of race, colour, descent and national or ethnic origin.[12]

These provisions have played complex roles. The Racial Discrimination Act has been an important instrument in combating discriminatory treatment. The High Court has interpreted the "race power" expansively, at times permitting legislation for the benefit of Aboriginal and Torres Strait Islander peoples, and at other times leaving open the theoretical possibility of adverse laws.[13] Yet the persistence of race-based constitutional and legislative language generates two structural distortions.

First, it frames Indigenous policy through a biological lens rather than a political one. The constitutional head of power is phrased in terms of "race," not political relationship, nationhood or peoples. Even where legislative intent is remedial or protective, the architecture remains taxonomic. In a scientific and ethical environment that recognises race as a socially constructed category rather than a biological fact,[14] this language is increasingly anachronistic.

Second, race-based legal constructs encourage categorical administrative thinking. If law is structured around racial classification, it becomes natural for policy to rely on boxes and categories as primary instruments of design. This risks conflating political identity, cultural

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[12] Australian Constitution s 51(xxvi); Racial Discrimination Act 1975 (Cth).

[13] Kartinyeri v Commonwealth (1998) 195 CLR 337; Koowarta v Bjelke-Petersen (1982) 153 CLR 168.

[14] UNESCO, The Race Question (1950); and contemporary genetic scholarship rejecting biological race categories.

belonging and biological grouping. It also distorts public discourse, inviting the perception that differential treatment is grounded in immutable characteristics rather than in political relationship and historical obligation.

Removing race-based identifiers from constitutional and statutory language need not weaken anti-discrimination protections. ICERD itself defines discrimination in terms of "race, colour, descent, or national or ethnic origin."[15] Domestic law can implement these obligations using precise terminology without embedding a biologically framed head of power in the Constitution. Indeed, the jurisprudence of the High Court has already recognised that the constitutional protection of equality and non-discrimination is not exhausted by the presence of the race power.[16]

The argument here is not that discrimination has disappeared or that targeted measures are unnecessary. On the contrary, the persistence of racial vilification and discriminatory treatment demonstrates the continued importance of robust remedies.[17] The point is structural: equality before the law is strengthened when the state does not itself categorise humanity into biological races as a foundational organising principle.

In this sense, modernising race-based identifiers is one reform among several that would align Australia's legal architecture with contemporary scientific understanding and human rights norms. It would not, by itself, solve the governance challenges described above. But it would remove a conceptual distortion that continues to frame Indigenous policy in categorical rather than political terms.

2.2. From Biological Taxonomy to Political Relationship

If race-based constructs distort the legal frame, what replaces them? The answer is not colour-blindness in the sense of indifference to historical injustice. Nor is it the erasure of Indigenous status. Rather, it is a shift from biological taxonomy to political relationship.

UNDRIP does not define Indigenous peoples by reference to race. It speaks of "peoples," of self-determination, of political status and of autonomy in internal affairs.[18] The emphasis is relational and political. Indigenous status is grounded in belonging to a people, not in membership of a biological category.

This distinction matters for governance. A political relationship framework recognises that Aboriginal and Torres Strait Islander peoples are the First Peoples of Australia with distinct historical, cultural and territorial connections. It grounds legislative and policy measures in that relationship rather than in race as such. It opens space for co-designed governance arrangements, mandate recognition processes and negotiated responsibilities without re-embedding biological classification at the constitutional level.

Such an approach also clarifies the operational meaning of consent. FPIC obligations under UNDRIP presuppose identifiable political communities capable of authorising decisions. As Canadian experience has shown, the practical question of identifying which Indigenous

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[15] International Convention on the Elimination of All Forms of Racial Discrimination, art 1(1).
[16] Gerhardy v Brown (1985) 159 CLR 70; Maloney v The Queen (2013) 252 CLR 168.
[17] Australian Human Rights Commission, Racism in Australia: National Survey Report (Sydney: AHRC, 2018).
[18] United Nations Declaration on the Rights of Indigenous Peoples, arts 3–4.

"peoples" hold consent rights in a given context is complex but unavoidable.[19] A political relationship model foregrounds this question explicitly, rather than obscuring it within broad racial categories.

In the Australian context, this shift would encourage a reorientation of Closing the Gap and related frameworks. Rather than asking how to target "race-based disadvantage," policy would ask how to structure durable political relationships with distinct nations and communities. Rather than designing programs around racial categories, it would design them around negotiated scope, visible and renewable community authority and shared responsibility.

This is not semantic refinement. It is a reconfiguration of the lens through which Indigenous affairs are understood. Biological taxonomy flattens plurality into a single category. Political relationship recognises diversity, nested authority and the possibility of federation by delegation.

The reform of race-based identifiers in law would therefore serve a dual function. Ethically, it would align Australia's constitutional language with contemporary understandings of human equality. Institutionally, it would clear conceptual space for the kind of mandate clarity and civic formation discussed in Part I.

It is within that space that a more coherent governance architecture can emerge.

2.3. Recognition and Renewable Community Authority

If governance legitimacy is the missing layer in Closing the Gap, and if biological taxonomy is an unstable foundation for structuring political relationships, then the immediate reform question becomes practical rather than theoretical:

How does the state relate coherently to the governance structures that already exist?

Australia does not lack Indigenous organisations. It lacks clarity about mandate and scope. Land councils, prescribed bodies corporate, community-controlled health services, regional alliances and cultural authorities each exercise forms of authority. But they do so within different legal frameworks, with varying degrees of transparency, renewal and recognised jurisdiction.

The problem is not proliferation. The problem is opacity.

A recognition and mandate clarity approach would not create new governance bodies. Nor would it impose uniform models. It would instead require that, where the state enters into formal political or funding compacts with a community, the following be visible:

1. Who exercises decision-making authority for the relevant scope?
2. How is that authority renewed or affirmed?
3. What is the defined scope of that authority?
4. How are internal disputes addressed?

[19] Dwight Newman, Revisiting the Duty to Consult Indigenous Peoples (Saskatoon: Purich Publishing, 2014)

These questions are not external impositions. They are the institutional preconditions for meaningful consent. Without clarity about mandate, free, prior and informed consent risks becoming procedural theatre.

The Canadian UNDRIP implementation debates highlight this operational tension. Governments cannot implement Article 19 or Article 32(2) obligations without first identifying which Indigenous peoples are entitled to exercise consent in specific contexts.[20] The same logic applies in Australia. It is not enough to invoke "community consultation." The identity of the decision forum must be legible.

Importantly, mandate clarity does not require Western electoral structures. It may be grounded in elders' authority, consensus forums, hybrid boards or culturally embedded processes. What matters is not the form, but the visibility of the process.

This approach has several advantages.

First, it respects plurality. More than 250 Indigenous nations and language groups exist across Australia.[21] Political coherence cannot be assumed at a national level. Recognition must begin locally.

Second, it reduces duplication and conflict. Where overlapping bodies claim authority over the same scope, clarity requirements create incentives for internal resolution rather than external imposition.

Third, it strengthens civic formation. When authority is visible and renewable, children observe governance as an internal activity rather than as an external administrative overlay.

Recognition and mandate clarity therefore operate as enabling conditions. They do not dictate structure. They illuminate it.

2.4. The Civic Gradient Model

The concept of a civic "we" does not require cultural assimilation or the erasure of distinct political identities. Political communities exist at multiple levels. Indigenous nations may form their own internal civic institutions through which authority is exercised and renewed. The question explored here is not whether those communities should exist, but how their authority becomes visible, legitimate and durable both within the community itself and in its relationship with the wider constitutional order.

Recognition alone, however, is insufficient. The state's relationship to communities must be structured in a way that encourages civic development without coercion. This is where a civic gradient model becomes relevant.

The civic gradient does not rank communities. It could be implemented administratively through funding agreements and intergovernmental compacts without requiring immediate

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[20] UN Special Rapporteur on the Rights of Indigenous Peoples, Report on Free, Prior and Informed Consent (UN Doc A/HRC/39/17, 2018)..

[21] AIATSIS, Indigenous Australia Language Map (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2020).

constitutional amendment. It links autonomy and funding discretion to demonstrable governance participation and accountability. It operates along three principles.

First, a universal rights floor applies everywhere. Protection from violence, child safety, access to basic education and emergency health services are non-negotiable state obligations. No compact can displace these duties.

Second, increasing autonomy is tied to visible governance participation and capacity. Communities that demonstrate:

- regular public decision forums,
- transparent budgeting,
- mandate renewal mechanisms, and
- effective internal dispute pathways are granted greater discretion in program design and longer-term funding arrangements.

Third, safeguards are proportionate and time-limited. Where severe deterioration occurs, for example, systemic failure in child protection or significant financial mismanagement, the state may temporarily assume narrowly defined functions. Such measures must be:

- targeted to specific functions,
- time-limited,
- transparent, and
- subject to review.

This balancing approach is consistent with UNDRIP Article 46, which recognises that the exercise of Indigenous rights must be compatible with the just requirements of a democratic society.[22] Collective autonomy and individual rights protection are not mutually exclusive; they are structurally interdependent.

The civic gradient avoids two extremes. It avoids forced consolidation, which would replicate past paternalistic restructuring. And it avoids passive deference to fragmentation, which entrenches opacity and weakens legitimacy.

Instead, it creates incentives. Cohesion becomes advantageous. Participation becomes valuable. Transparency becomes rewarded. Federation, where it occurs, emerges voluntarily through delegation rather than imposition.

Such a model also provides a bridge between existing institutional realities and longer-term constitutional modernisation. Even in the absence of formal constitutional reform, a civic gradient approach reorients Closing the Gap from program management toward political development.

In this sense, the model is evolutionary rather than revolutionary. It does not assume that all Indigenous nations will consolidate into a single national polity. It does not require symmetry. It accepts that plurality may persist. What it seeks is not uniformity, but visible legitimacy.

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[22] UNDRIP art 46.

Part 3 - Ethical and Strategic Implications

3.1. Self-Determination as Civic Formation

In contemporary discourse, self-determination is often invoked as a principle of recognition. It is framed in terms of voice, consultation, and participation in national decision-making. These dimensions are important. Yet self-determination, properly understood, is not exhausted by advisory representation or policy input. It is the lived capacity of a people to govern themselves within a defined sphere of authority.

UNDRIP articulates this in terms of political status and autonomy in internal and local affairs.[23] The language is not symbolic. It is institutional. Self-determination requires a locus of decision-making that is recognised, visible and capable of renewal.

If this is correct, then the central ethical challenge in Indigenous policy is not simply distributive, who receives how much funding, but structural: what political conditions allow communities to act as coherent agents?

Civic formation provides one answer. A community that regularly convenes public forums, renews mandate, resolves disputes and maps responsibility builds internal legitimacy over time. Children grow up observing governance as something internal rather than imposed. Authority is not abstract; it is embodied.

This intergenerational dimension is frequently overlooked in policy design. Social and emotional wellbeing research has long emphasised the importance of cultural continuity and community control as protective factors.[24] Yet cultural continuity without visible governance risks becoming symbolic. It is political participation, not only cultural identity, that embeds continuity into daily life.

The distinction between national advisory representation and local civic formation becomes ethically significant here. A national body may influence legislation. It may articulate collective concerns. But it does not automatically generate the daily experience of shared authority within communities. The latter must be built from within.

This is not a rejection of national representation. It is a recognition of layering. Durable political communities are not produced by constitutional text alone. They are produced by repeated acts of participation and renewal.

In this light, the failure of Closing the Gap to address civic infrastructure is not incidental. It is a structural omission. By focusing predominantly on socioeconomic outputs, the framework underestimates the ethical and institutional significance of visible political agency.

Reorienting policy toward civic formation does not mean abandoning outcome targets. It means recognising that outcomes follow structure. Health, education and justice indicators improve where governance is coherent and legitimate.

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[23] UNDRIP arts 3–4.

[24] Chandler, Michael & Lalonde, Christopher, “Cultural Continuity as a Protective Factor Against Suicide in First Nations Youth” (1998) 35 Transcultural Psychiatry 191.

Self-determination, then, is not merely a right to be heard. It is the capacity to act collectively and visibly.

3.2. Equality, Science and the Modern State

The argument for modernising race-based legal identifiers intersects with this governance discussion at a deeper ethical level. If the state continues to divide humanity into biologically framed racial categories within its foundational legal architecture, it reinforces a conceptual frame that is both scientifically outdated and politically distorting.

Contemporary genetic science has long rejected the notion of discrete biological races.[25] Race operates socially, not biologically. To retain race as a constitutional organising category risks entrenching a taxonomy that modern science does not support.

Yet equality before the law does not require blindness to historical injustice. ICERD recognises that special measures may be necessary to secure adequate advancement for disadvantaged groups, provided they are time-limited and proportionate.[26] Anti-discrimination protections can remain robust while constitutional language evolves.

The ethical claim, therefore, is not that difference disappears. It is that the state should ground its engagement with Indigenous peoples in political relationship rather than biological classification. The distinction is subtle but significant.

A political relationship framework acknowledges:

- prior occupation and continuing connection to land,
- treaty and native title rights,
- cultural heritage and language preservation, and
- self-governing aspirations.

These are not biological attributes. They are relational and historical realities.

Removing race-based identifiers from constitutional language would symbolically and structurally align Australia with this relational understanding. Statistical research and anti-discrimination enforcement would continue through precise terminology and privacy-protected aggregate data; what changes is not protection, but the constitutional taxonomy that frames it. It would signal that equality before the law is grounded in common humanity, while differentiated measures are justified by political relationship and historical obligation, not by race as a biological category.

Such reform would also strengthen Australia's international credibility. In global forums, accusations of hypocrisy often exploit tensions between equality rhetoric and race-based constitutional constructs. A modernised legal architecture would narrow that gap, aligning domestic law with the spirit of ICERD and UNDRIP rather than merely their letter.

None of this implies that reform is simple or costless. Constitutional change requires public consensus and careful drafting. Administrative transition demands clarity to ensure that anti-discrimination remedies remain intact and statistical research continues through

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[25] UNESCO, The Race Question (1950); contemporary genetic research rejecting biological race categories.
[26] ICERD art 1(4); Gerhardy v Brown (1985) 159 CLR 70.

privacy-protected aggregate data. But the ethical direction is clear: the modern state should not rely on biological taxonomies as a foundational organising principle.

When combined with a civic gradient approach to Indigenous governance, such reform offers a coherent path forward. Equality before the law is strengthened. Self-determination is grounded in political agency. Civic formation is encouraged rather than obscured.

3.3. The Long Arc of Reform

Structural reform rarely proceeds in a single decisive moment. It unfolds in stages, some legislative, some administrative, some cultural. The evolution of Indigenous policy in Australia has already passed through several such phases: protection, assimilation, self-management, reconciliation, Closing the Gap. Each phase reflected a different diagnosis of the problem.[27]

The next phase must grapple with a harder truth: disadvantage cannot be permanently "managed" through funding alone. Nor can it be resolved through symbolic recognition without institutional coherence. It requires political reconstruction.

A civic gradient model, paired with visible and renewable community authority, and modernised equality language, does not promise immediate transformation. It accepts asymmetry. Some communities will consolidate more rapidly than others. Some may federate regionally; others may not. Plurality is not failure. It is political reality.

What matters is that the architecture no longer obscures responsibility or flattens political communities into racial categories. Instead, it should encourage visible governance participation, reward coherence, and preserve a universal rights floor. It should recognise that self-determination matures over time through repeated acts of participation, accountability and renewal.

The reform path is therefore evolutionary rather than revolutionary. It does not impose a national Indigenous polity by decree. It does not dismantle existing organisations. It creates incentives for civic legitimacy and clarifies the state's role within a nested system of authority.

Over time, such an approach may allow new forms of federation to emerge organically, grounded in consent rather than presumption. It may also render constitutional modernisation, including the removal of race-based identifiers, less polarising, because the civic foundations on which such reform rests will be more visible and more secure.

In this sense, the long arc of reform bends toward coherence, not consolidation.

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[27] Rowse, Tim, Indigenous Futures: Choice and Development for Aboriginal and Islander Australia (2002).

3.4. Treaty, Activism and Structural Integrity

Treaty processes, including those now underway in Victoria, represent a profound and overdue effort to renegotiate the relationship between Indigenous nations and the Australian state. They are political in character, not administrative. Their legitimacy depends upon clarity of mandate and the visible authority of those who negotiate.

Nothing in the governance framework proposed here displaces treaty. On the contrary, treaty processes are strengthened where communities possess clear internal decision forums, renewable mandate structures and transparent responsibility maps. Negotiation presupposes representation. Representation presupposes legitimacy. Civic coherence is therefore not an alternative to treaty; it is a precondition for its durability.
International instruments such as the ICCPR and UNDRIP do not merely recognise rights; they assume identifiable rights-bearing political communities capable of authorising binding agreements. Where visible and renewable community authority is weak or contested, treaty processes risk resting on unclear institutional foundations. This is not an argument against treaty. It is an argument that treaty durability depends upon visible and renewable internal authority. Structural coherence protects the integrity of treaty as much as it protects the legitimacy of the state.

Similarly, concerns that modernising race-based legal constructs weakens anti-racism misunderstand the distinction between protection and taxonomy. Robust anti-discrimination law can coexist with constitutional language grounded in political relationship rather than biological classification. The objective is not to depoliticise Indigenous claims, but to ensure that they are anchored in self-governing authority rather than inherited categories.

Activist movements play a vital role in shifting public consciousness and holding governments to account. But long-term institutional durability requires visible governance structures capable of acting beyond protest cycles. Structural reform and advocacy are not opposites; they operate on different temporal scales.

The challenge is to ensure that treaty, civic formation and equality modernisation reinforce one another rather than compete.

Conclusion

Australia's commitment to Closing the Gap reflects genuine moral intent. Few question the need to address entrenched disparities in health, education and justice. The persistence of those disparities, however, suggests that intent and funding are not enough. The missing ingredient is structural. Closing the Gap measures socioeconomic outputs but does not systematically cultivate the civic infrastructure within which those outputs are generated. Without visible, participatory governance at the level of individual nations and communities, without a lived "We", autonomy risks becoming administrative and disadvantage risks becoming perpetual.

This argument does not displace treaty. Nor does it diminish the importance of national representation. Treaty processes require legitimate negotiating counterparts. National bodies require coherent mandate chains. Civic formation strengthens both.

A shift toward recognition of visible and renewable community authority, a civic gradient linking autonomy to participation and accountability, and the modernisation of race-based legal constructs offers a coherent path forward. These reforms do not weaken equality; they strengthen it. They do not diminish Indigenous recognition; they ground it in political relationship rather than biological taxonomy. They do not abandon self-determination; they render it operational.

If Australia is serious about closing the gap, it must move beyond program management and toward political reconstruction. The latest Closing the Gap reporting reinforces this lesson. Programmatic investment can move some indicators. The hardest outcomes, suicide, incarceration and child removal, remain resistant to change. These are not simply service-delivery problems. They are problems of civic structure, legitimacy and social cohesion. Civic legitimacy precedes durable autonomy. Equality before the law also demands modern language. Self-determination, to endure, must be visible not only in national forums but in the daily life of communities themselves.

The challenge is not to choose between treaty, representation or reform. It is to ensure that each rests on a visible and legitimate civic foundation through which communities are able to become a political “We”.

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About the Author

Dr Matthew Jennings is an Australian Osteopath and independent writer on law, human rights, and democratic governance. Raised in Hobart in a household shaped by constitutional law and international human rights, he grew up around debates on universality, equality before the law, and Australia’s obligations under international legal frameworks. His father served as Tasmania’s Solicitor-General and represented Australia in landmark constitutional matters and in Geneva.

For over 25 years, Dr Jennings has run a private osteopathic practice in Sydney’s Eastern Suburbs, treating people across all walks of life while maintaining a parallel commitment to public civic engagement. His recent writing focuses on incitement law, foreseeability and prevention, antisemitism, the misuse of race and identity in law, and the conditions under which democratic systems fail to protect human rights in practice.

His work is grounded in a single principle: that free, informed, and equal consent must remain the foundation of both human rights and democratic governance, especially under conditions of fear and crisis.

ANNEXURE B

Institutions of Consent: Self-Determination, Equality, and Democratic Legitimacy in Australia

Supplementary material to the submission of Dr Matthew Jennings

Legislative Scrutiny Committee - Legislative Assembly of the Northern Territory

Care and Protection of Children Legislation Amendment (Every Child Matters) Bill 2026 (Serial 67)

Status	Annexure to main submission; supplementary material only.
Purpose	This annexure is provided as supplementary analytical material to support the main submission. It sets out the institutional framework for self-determination as a process of visible authority, renewed mandate, equality before the law and protection of meaningful participation.
Relevance	Its relevance to the Bill is confined to the institutional question raised in the main submission: Aboriginal participation in child protection should be substantive, reviewable and accountable, not merely symbolic, and should operate consistently with equal protection of every child.
Use	This annexure should be read with the main submission. The main submission remains the document directed to the Committee's Terms of Reference and the content of the Bill.

Prepared by Dr Matthew Jennings
Sydney, Australia | May 2026

Institutions of Consent: Self-Determination, Equality, and Democratic Legitimacy in Australia

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Abstract

This article examines the relationship between democratic legitimacy, institutional formation and legal architecture within Australia's constitutional system. Building on two earlier essays addressing the constitutional foundations of democratic authority and the institutional conditions of self-determination, the article argues that democratic resilience depends upon institutions capable of expressing the consent of equal citizens. Constitutional systems provide the framework within which authority is exercised, while communities require institutions through which collective authority can be authorised and renewed. Law performs a further function by protecting the conditions under which democratic consent can operate, including equality before the law, freedom of political participation and protection from coercion or intimidation. Drawing on Australian constitutional jurisprudence and international human rights instruments such as the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous Peoples, the article develops a theoretical framework for understanding self-determination as an institutional process rather than a purely symbolic or doctrinal principle, linking constitutional authority, community institutions and legal protection of democratic participation. It concludes that democratic stability in pluralist societies depends not on choosing between recognition and equality but on constructing legal architectures that allow both principles to coexist through institutions of consent.

Keywords

constitutional law, self-determination, democratic legitimacy, representative government, Indigenous governance, UNDRIP, ICCPR, political communication, democratic resilience, Australia

Suggested Citation

Jennings, Matthew. 2026. Institutions of Consent: Self-Determination, Equality, and Democratic Legitimacy in Australia.

Introduction: From Authority to Institutions

Modern democracies face a recurring constitutional question concerning the institutional architecture through which democratic consent is formed, expressed and sustained. This article develops a theoretical framework, described here as the institutional architecture of democratic consent, for understanding how constitutional authority, community institutions and law interact within pluralist constitutional systems. Political authority must ultimately derive from the consent of equal citizens, yet democratic societies also recognise the existence of distinct communities whose histories, identities and aspirations cannot simply be absorbed into a uniform civic framework. The tension between these principles is particularly visible in countries with Indigenous populations whose political and cultural traditions predate the modern state. In Australia, debates about constitutional recognition, self-determination, multicultural governance and democratic resilience have repeatedly returned to this same underlying issue. How can a constitutional democracy recognise distinct communities while preserving the principle that political authority ultimately derives from the consent of equal citizens?[1]

This article is the third in a series examining the relationship between democratic legitimacy, institutional formation and legal architecture in Australia. The first essay, State Within a State, considered the constitutional foundations of democratic authority. It argued that identity alone cannot function as a source of political sovereignty within a liberal democracy. Rather, political authority derives from the consent of equal citizens expressed through institutions of representative and responsible government.[2]

The second essay, Becoming “We”, addressed the institutional dimension of that principle. Democratic consent does not arise automatically from constitutional structures. Communities become political actors only when they develop institutions through which authority can be authorised, exercised and renewed. Without such institutions, representation risks becoming symbolic rather than legitimate, and the promise of self-determination becomes difficult to sustain in practice.[3]

Together, these essays develop a broader account of democratic legitimacy grounded in what may be termed institutions of consent. Constitutional authority establishes the framework within which political power is exercised, communities develop institutions through which collective authority can be authorised and renewed, and law protects the civic conditions that allow citizens to participate freely and equally in those institutions. The present article focuses on this final dimension: the legal architecture required to sustain democratic consent within pluralist societies.

Taken together, these essays describe what may be called the institutional architecture of democratic consent. Democratic legitimacy depends not only on constitutional authority or formal rights but on the structures through which consent becomes visible, renewable and protected. Constitutional systems provide the framework within which authority is exercised. Communities develop institutions through which collective authority can be

[1] John Locke, Two Treatises of Government (1689) bk II ch 8.
[2] Matthew Jennings, *State Within a State: How Group-Based Sovereignty Threatens Australia’s National Integrity and Human Rights Framework (2026)*.
[3] Matthew Jennings, *Becoming “We”: Civic Formation and the Structural Foundations of Closing the Gap (2026).*

authorised and renewed. Law protects the civic conditions that allow citizens to participate freely and equally in those institutions. When these elements operate together, democratic systems sustain legitimacy even under conditions of social diversity and political disagreement. Taken together, the trilogy develops a model of democratic legitimacy grounded in this institutional architecture, linking constitutional authority, community institutions and legal protection of participation as the conditions through which democratic consent becomes visible and sustainable.

The relationship between these elements can be illustrated as a recurring institutional cycle through which democratic consent is formed and renewed:

Figure 1. Institutional Architecture of Democratic Consent

International law recognises the importance of these conditions. Instruments such as the International Covenant on Civil and Political Rights affirm both equality before the law and the right of peoples to self-determination. Yet these principles are often treated as separate domains of legal doctrine rather than as elements of a single constitutional architecture.[4] Self-determination is discussed within the language of international rights, while democratic equality is addressed through domestic constitutional structures. The relationship between them remains insufficiently articulated.

The argument advanced in this article is that these principles are not competing sources of legitimacy but complementary components of democratic governance. Self-determination becomes compatible with constitutional democracy when communities possess institutions capable of expressing the ongoing consent of their members. Law, in turn, must protect the conditions under which such consent can be formed and renewed. These conditions include equality before the law, freedom of political participation, and protection from coercion or

[4] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

intimidation that undermines the ability of citizens to exercise meaningful choice.

Within this framework, several contemporary constitutional debates can be understood more clearly. Questions about Indigenous recognition, constitutional reform and democratic resilience are often treated as separate issues within Australian public discourse, yet each of them concerns the institutional foundations of consent. The failure of the 2023 Voice referendum revealed deep uncertainty about how Indigenous self-determination should be expressed within the constitutional order. The ongoing Closing the Gap framework demonstrates that socioeconomic outcomes cannot be separated from the legitimacy of governance structures within communities. At the same time, the rise of ideological hostility and political intimidation in public discourse has raised new concerns about the resilience of democratic participation itself. When communities lack clear structures of authority, representation becomes contested and governance loses legitimacy. When citizens face intimidation or exclusion from public participation, consent itself becomes distorted. Law therefore performs a dual function within democratic systems: it structures the institutions through which authority is exercised while protecting the civic conditions that allow those institutions to operate legitimately.

The analysis that follows develops this argument in four stages. The first section examines the constitutional foundations of democratic consent within Australia's system of representative and responsible government. The second considers how self-determination operates through institutions capable of expressing collective authority within communities. The third explores the relationship between these institutional processes and international legal frameworks concerning self-determination and minority rights. The fourth section turns to the legal architecture required to protect democratic participation itself, particularly in the face of coercive political advocacy and escalating ideological conflict.

Taken together, these sections advance a central proposition. Democratic resilience does not depend solely on constitutional design or on symbolic recognition of identity. It depends upon institutions of consent. Where communities possess structures capable of expressing authority, and where law protects the conditions under which citizens participate freely and equally in those structures, self-determination and democratic equality reinforce rather than undermine one another. This analysis suggests that the stability of pluralist constitutional systems depends not on choosing between recognition and equality, but on institutional frameworks capable of allowing both principles to coexist within a shared civic order.

Part I

Constitutional Foundations of Democratic Consent

Australia's Constitution is not a charter of individual rights but a structural framework establishing the institutions through which political authority is exercised. Drafted at the close of the nineteenth century, it reflects the priorities of its framers: the creation of a federal system capable of balancing the interests of the former colonies while maintaining stable parliamentary government within the British constitutional tradition. Its text distributes legislative, executive and judicial power, but it says little about the philosophical foundations of political authority itself.

The absence of an entrenched bill of rights was deliberate. The framers were aware of the American model but rejected it in favour of a system that relied upon representative government, parliamentary accountability and the common law to safeguard liberty.[5] This design placed trust in the political process itself. The legitimacy of government would arise not from a catalogue of enumerated rights but from the capacity of citizens to choose and replace their representatives through elections.

Sections 7 and 24 of the Constitution give expression to this principle. Both provisions require that members of the Senate and the House of Representatives be "directly chosen by the people."[6] These deceptively simple words form the constitutional anchor for Australia's democratic system. They establish that political authority flows upward from the electorate rather than downward from inherited status, executive prerogative or cultural identity.

The High Court recognised the implications of this structure in Lange v Australian Broadcasting Corporation.[7] In that case the Court held that the Constitution necessarily implies a freedom of political communication because such communication is indispensable to the operation of representative and responsible government. Citizens must be able to discuss public affairs, evaluate competing policies and criticise those who hold power if elections are to function as meaningful expressions of consent.

Importantly, the implied freedom of political communication is not a personal right comparable to the First Amendment of the United States Constitution. Rather, it operates as a structural limitation on legislative power. Laws that burden political communication are invalid only where they impermissibly distort the constitutional system through which citizens exercise political choice.[8] The doctrine therefore reinforces the same underlying principle embedded in sections 7 and 24: democratic legitimacy depends upon the capacity of citizens to participate freely in the processes through which authority is conferred and withdrawn.

[5] Jeffrey Goldsworthy, "The Case for a Constitutional Bill of Rights" (1994) 22 Federal Law Review 35.
[6] Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12, ss 7, 24.
[7] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
[8] Ibid 567–568.

This structural orientation has significant consequences for contemporary debates about self-determination and political representation. Because Australia's Constitution grounds legitimacy in the consent of citizens rather than in inherited identity, political authority cannot be organised solely around cultural or historical categories. Distinct communities may possess their own traditions, institutions and aspirations for autonomy. Yet within the constitutional order those aspirations must ultimately be expressed through structures that remain compatible with the broader framework of equal citizenship and representative government.

The High Court has occasionally confronted this tension directly. In Kartinyeri v Commonwealth, the Court considered the scope of the race power contained in section 51(xxvi).[9] Although the majority declined to impose a substantive limitation on the provision, several judges acknowledged the constitutional difficulty created by legislation organised around racial classification. Justice Gaudron observed that the text of the race power does not itself confine Parliament to laws that are beneficial, leaving open the possibility of adverse operation.[10] Justice Kirby, in dissent, argued that constitutional interpretation should not proceed in isolation from contemporary human rights principles, particularly those concerning equality before the law.[11]

These judgments exposed a deeper constitutional question. The presence of the race power reflects historical assumptions embedded within the constitutional text at federation. Yet Australia's legal and political development since the Second World War has increasingly been shaped by universal principles of equality and non-discrimination. Through legislation such as the Racial Discrimination Act 1975 (Cth), Parliament has sought to give domestic effect to international commitments that recognise the equal dignity of all persons.[12]

The coexistence of these principles illustrates a broader evolution within Australia's constitutional order. While the Constitution itself remains largely unchanged, the normative framework within which it operates has shifted toward a stronger emphasis on equality before the law and the universality of human rights. This shift does not displace the structural foundations of representative government. Instead, it reinforces them. Equal citizenship strengthens the legitimacy of democratic consent by ensuring that political authority cannot be exercised through systems that deny individuals the capacity to participate freely in public life.

This relationship between equality and consent is crucial to understanding the institutional conditions of self-determination within democratic societies. Self-determination cannot operate in a constitutional vacuum. It must function within a framework that preserves the equal civic status of all citizens while allowing communities to organise their internal affairs. The challenge is therefore not whether distinct communities may exercise forms of autonomy, but how such autonomy can be structured so that it remains consistent with the constitutional principle that political authority ultimately derives from the consent of equal citizens.

[9] Kartinyeri v Commonwealth (1998) 195 CLR 337.
[10] Ibid 366 (Gaudron J).
[11] Ibid 417–418 (Kirby J).
[12] Racial Discrimination Act 1975 (Cth).

The analysis developed in the following sections builds upon this constitutional foundation. If democratic legitimacy originates in the consent of equal citizens, and if communities require institutions capable of expressing collective authority, then law must perform a further role. It must protect the conditions under which those institutions can operate freely and legitimately. This protective function becomes particularly important in pluralistic societies where political disagreement, ideological mobilisation and cultural diversity can generate pressures that threaten the integrity of democratic participation itself.

Part II

Self-Determination and the Institutional Expression of Consent

If democratic authority ultimately derives from the consent of equal citizens, the question of self-determination must be understood through the same institutional lens. Self-determination is frequently described as a right possessed by peoples, yet the concept itself does not explain how collective authority is formed or expressed. International law recognises the right of peoples to determine their political status and pursue their economic, social and cultural development, but it offers limited guidance on the institutional mechanisms through which such consent becomes visible in practice.[13]

This ambiguity is particularly significant in democratic states where the principle of equal citizenship operates alongside recognition of distinct communities. Indigenous nations, cultural groups and regional populations may possess their own historical identities and political aspirations. Yet the legitimacy of any governing authority within a democratic system depends upon its capacity to demonstrate that it speaks with the consent of those it claims to represent. Without institutions capable of expressing such consent, the relationship between identity and authority becomes uncertain.

The problem is not merely theoretical. Throughout the modern history of democratic governance, communities have often been treated as political actors even where the internal structures through which authority is exercised remain unclear or contested. In such circumstances representation risks becoming symbolic rather than substantive. Governments may consult with community organisations or appoint advisory bodies, but the underlying question remains unresolved. Who possesses the authority to speak on behalf of the community itself, and how is that authority renewed over time?

These questions arise with particular clarity in discussions of Indigenous self-determination in Australia. Aboriginal and Torres Strait Islander peoples comprise hundreds of distinct nations and language groups with diverse histories, traditions and governance practices.[14] While this diversity is frequently acknowledged in policy discourse, institutional structures capable of expressing collective authority within these communities remain uneven and often poorly understood within the broader constitutional framework.

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[13] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1.

[14] Australian Institute of Aboriginal and Torres Strait Islander Studies, Australia's Indigenous Languages (AIATSIS, 2020).

Many of the institutions that currently operate within Indigenous governance systems have emerged through statutory arrangements linked to land rights, native title or service delivery frameworks. Land councils, prescribed bodies corporate and community-controlled organisations perform important functions within their respective jurisdictions. Yet these bodies often derive their authority from specific legislative mandates rather than from broadly recognised processes through which communities themselves authorise representation. As a result, the relationship between institutional authority and community consent can become blurred.

This institutional ambiguity has practical consequences. Programs designed to address socioeconomic disadvantage frequently depend upon cooperation between government agencies and local organisations. Yet when the authority of those organisations is uncertain, policy initiatives risk becoming administrative exercises rather than expressions of self-determination. Communities may receive services, funding and consultation opportunities, but the deeper structures through which collective decisions are authorised and renewed remain fragile.

The Closing the Gap framework illustrates this tension clearly. Over more than fifteen years, governments have invested substantial resources in addressing disparities across health, education, employment and justice. While progress has occurred in some areas, outcomes most closely linked to social cohesion and community stability have remained resistant to change.[15] This pattern suggests that socioeconomic interventions alone cannot substitute for legitimate governance structures within communities themselves.

Self-determination therefore requires more than recognition of cultural identity or representation within national institutions. It requires the development of civic structures through which communities themselves become capable of exercising authority. Understood in this way, collective authority does not displace the democratic principle of equal citizenship. Rather, it operates through it. Communities exercise self-determination through institutions that enable their members to authorise, contest and renew authority over time. Self-determination therefore remains grounded in the same principle that underpins constitutional democracy itself: the ongoing consent of those subject to political power. Such institutions allow individuals to participate in collective decision-making, authorise leadership and renew or withdraw consent. In this sense, self-determination is not merely a legal entitlement but a civic process. It emerges where communities possess the institutional capacity to govern themselves within the broader constitutional order.

International law acknowledges the importance of these processes. The United Nations Declaration on the Rights of Indigenous Peoples affirms that Indigenous peoples have the right to autonomy or self-government in matters relating to their internal affairs.[16] Yet the declaration also emphasises that Indigenous peoples remain entitled to participate fully in the political, economic and social life of the state.[17] These provisions reflect a fundamental principle. Self-determination does not require separation from the constitutional order but rather the ability of communities to exercise authority within it.

[15] Productivity Commission, Closing the Gap Annual Data Compilation Report (2025).
[16] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) art 4.
[17] Ibid art 5.

The institutional dimension of this principle is often overlooked. Debates about Indigenous recognition frequently focus on symbolic questions of identity or constitutional wording while paying less attention to the practical mechanisms through which communities authorise leadership and make collective decisions. Yet without such mechanisms the legitimacy of representation remains uncertain. Institutions of consent must exist before self-determination can operate effectively within a democratic framework.

Understanding self-determination in institutional terms also clarifies the relationship between equality and autonomy within democratic systems. Equality before the law ensures that all citizens possess the same civic status within the constitutional order. Autonomy allows communities to organise aspects of their internal affairs according to their own traditions and preferences. These principles do not contradict one another when authority remains grounded in consent. Rather, they operate at different levels of the same governance structure.
Where communities possess institutions capable of expressing collective authority, self-determination strengthens democratic legitimacy by allowing citizens to participate meaningfully in decisions that affect their lives. Where such institutions are absent or unclear, representation risks becoming detached from the communities it seeks to serve. The challenge for modern constitutional systems is therefore not simply to recognise cultural diversity but to ensure that institutional pathways exist through which communities can exercise consent within the shared civic framework.

The analysis developed in this section establishes the institutional dimension of democratic legitimacy. If constitutional authority originates in consent and communities require institutions to express that consent, a further question arises. What legal architecture protects the conditions under which such institutions can function freely and legitimately? The following section turns to this issue by examining how domestic and international legal frameworks interact with the institutional processes through which self-determination is realised.

Part III

International Law and the Institutional Problem of Self-Determination

International law has long recognised the principle that peoples possess the right to determine their political status and pursue their economic, social and cultural development. The modern articulation of this principle appears most prominently in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which affirm that “all peoples have the right of self-determination.”[18] This recognition emerged in the aftermath of the Second World War, when the international community sought to establish a normative framework capable of preventing domination, colonial subordination and systemic discrimination among nations and peoples.

[18] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

Despite the prominence of this principle, international law has rarely provided detailed guidance on the institutional mechanisms through which self-determination is exercised within established democratic states. The doctrine developed primarily in the context of decolonisation, where the central question concerned the transition from colonial rule to independent statehood. In those circumstances, the existence of a colonised population and a territorial unit offered relatively clear parameters for determining political authority. The institutional problem was largely resolved through the creation of new states whose legitimacy rested upon the collective will of their populations.

Within existing democratic states, however, the situation is more complex. Distinct peoples may exist within the territorial boundaries of a constitutional order that already operates on the basis of equal citizenship and representative government. In such contexts, self-determination cannot be interpreted simply as a right to separate statehood. Instead it must be understood as a principle governing the relationship between communities and the institutions of the state itself.

The United Nations Declaration on the Rights of Indigenous Peoples reflects this evolution in international legal thinking. Adopted by the General Assembly in 2007, the declaration affirms that Indigenous peoples possess the right to self-determination while simultaneously recognising their continued participation within the political, economic and social life of the state.[19] Articles 4 and 5 specifically acknowledge that Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs while retaining the ability to participate fully in the institutions of the broader society.[20]

These provisions reflect an attempt to reconcile two foundational principles. On one hand, Indigenous peoples possess historical continuity, cultural identity and political traditions that predate the modern state. On the other, democratic constitutional systems derive legitimacy from the equal citizenship of their populations and the institutional processes through which authority is exercised. International law therefore recognises self-determination not as a competing source of sovereignty but as a framework through which distinct communities may exercise forms of autonomy consistent with the constitutional order in which they reside.

The declaration also emphasises an institutional dimension of this relationship through the principle of free, prior and informed consent. Article 19 provides that states shall consult and cooperate in good faith with Indigenous peoples through their representative institutions in order to obtain consent before adopting measures that affect them.[21] This provision implicitly recognises that self-determination operates through institutions capable of expressing collective authority. Consultation presupposes representation, and representation presupposes mechanisms through which communities authorise those who speak on their behalf.

[19] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007).
[20] Ibid arts 4–5.
[21] Ibid art 19.

Yet the declaration itself does not attempt to prescribe the specific institutional forms through which such consent must be expressed. The diversity of Indigenous governance traditions and the constitutional frameworks of different states make uniform institutional design impractical. As a result, the declaration establishes normative principles while leaving the task of institutional implementation to domestic legal and political processes.

This institutional gap has generated significant debate among scholars and policymakers concerned with the practical implementation of Indigenous rights. Some commentators argue that the absence of clearly defined institutional pathways risks reducing self-determination to symbolic recognition without substantive authority. Others caution that rigid institutional models may undermine the diversity of Indigenous governance traditions and the autonomy of communities themselves.[22]

Both concerns highlight the same underlying issue. Self-determination cannot operate solely as a normative principle detached from institutional structures. Communities require mechanisms through which authority can be exercised, renewed and contested over time. Without such mechanisms, representation becomes uncertain and the relationship between identity and authority remains unresolved.

This institutional dimension of self-determination aligns closely with the constitutional analysis developed in the previous sections of this article. If democratic legitimacy originates in the consent of equal citizens and if communities require institutions capable of expressing collective authority, then self-determination must be understood as an institutional process rather than merely a legal entitlement. It emerges where communities possess structures through which consent can be formed, expressed and renewed within the broader constitutional order.

International law therefore complements rather than replaces domestic constitutional principles. The recognition of self-determination in instruments such as the ICCPR and the United Nations Declaration on the Rights of Indigenous Peoples establishes a normative commitment to autonomy and equality. Domestic constitutional systems provide the institutional framework through which those commitments are realised in practice. The challenge for democratic societies lies in designing legal structures that allow these two dimensions of legitimacy to reinforce one another rather than operate in tension.

The following section turns to this question directly. If constitutional systems derive authority from consent and if self-determination requires institutions capable of expressing that consent, the role of law becomes critical. Legal frameworks must not only recognise the autonomy of communities but also protect the conditions under which citizens can participate freely and equally in the institutions through which authority is exercised. It is within this protective function that the relationship between law, democratic participation and social cohesion becomes most visible.

The remaining question is therefore institutional rather than doctrinal: if constitutional authority derives from consent and self-determination requires institutions capable of expressing it, what legal conditions allow those institutions to function? The next section turns to that question.

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[22] Oonagh E Fitzgerald and Risa Schwartz (eds), UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws (Centre for International Governance Innovation, 2017).

Part IV

The Legal Conditions of Democratic Consent

If democratic authority originates in the consent of equal citizens and if self-determination depends upon institutions capable of expressing collective authority, the role of law becomes clear. Law must protect the conditions under which consent itself remains meaningful. Without such protection, institutions of representation can continue to operate formally while the underlying legitimacy on which they depend gradually erodes.

This distinction between institutional form and democratic substance is central to the resilience of modern constitutional systems. Elections may continue to occur, legislatures may function and courts may remain operational, yet the processes through which citizens participate in political life can become distorted when intimidation, exclusion or coercive pressure undermine the ability of individuals to exercise free choice. The challenge for democratic legal systems is therefore not merely to regulate outcomes but to safeguard the civic conditions under which consent can be formed and renewed.

Several foundational conditions support the operation of democratic consent.

Equality Before the Law

The first condition is equality before the law. The principle that all citizens possess equal legal status is not simply a moral aspiration but a structural requirement of democratic governance. Where legal frameworks permit systematic exclusion from political participation or differential access to civic institutions, the legitimacy of consent itself becomes questionable. Equality before the law therefore functions as a prerequisite for meaningful self-determination within constitutional systems.[23]

This principle has long been recognised within international human rights law. Article 26 of the International Covenant on Civil and Political Rights affirms that all persons are equal before the law and entitled without discrimination to equal protection of the law.[24] Within domestic constitutional frameworks, this principle ensures that communities exercising forms of autonomy do so within a system that preserves the equal civic status of all citizens.

Freedom of Political Participation

A second condition concerns the freedom of citizens to participate in political processes. Democratic consent requires more than the formal existence of elections or representative bodies. Citizens must be able to discuss public affairs, express disagreement and advocate competing visions of the common good without fear of retaliation or exclusion.

[23] David Beetham, The Legitimation of Power (2nd ed, Palgrave Macmillan, 2013).
[24] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

Australia's constitutional jurisprudence recognises this requirement through the implied freedom of political communication identified in Lange v Australian Broadcasting Corporation.[25] The freedom protects communication necessary for citizens to make informed choices at elections and thereby preserves the integrity of representative government itself. Although the doctrine is framed as a structural limitation rather than a personal right, its purpose remains closely aligned with the conditions necessary for democratic consent.

Protection from Coercion and Intimidation

A third condition concerns the protection of citizens from coercive pressures that undermine equal participation in civic life. Democratic societies depend upon the ability of individuals to make political choices without facing threats, organised intimidation or systematic exclusion from public discourse. Where such pressures become normalised, participation may continue formally while the reality of consent becomes compromised.

Patterns of ideological intimidation can develop gradually. Public rhetoric may normalise hostility toward particular communities, pressure dissenters to conform to dominant narratives or seek to enforce political positions through fear rather than persuasion. When these dynamics intensify, citizens may withdraw from public participation even where formal legal protections remain intact. The erosion of participation does not necessarily occur through explicit prohibition. It can arise through cumulative pressures that discourage individuals from exercising their civic rights.

Legal frameworks must therefore address not only explicit acts of violence but also conduct that materially undermines the conditions of equal participation in democratic life. International human rights law recognises this preventive dimension through provisions such as Article 20(2) of the International Covenant on Civil and Political Rights, which requires states to prohibit advocacy of hatred that constitutes incitement to discrimination, hostility or violence.[26] The purpose of such provisions is not to suppress political disagreement but to prevent the development of conditions in which coercion replaces consent as the basis of political authority.

Institutional Accountability and Transparency

A fourth condition concerns the accountability and transparency of institutions themselves. Consent remains meaningful only where citizens can observe, evaluate and contest the exercise of authority. Institutions that operate without clear mechanisms for public scrutiny risk becoming detached from the communities they claim to represent.

Within democratic systems this accountability operates through multiple channels. Elections allow citizens to replace representatives who lose public confidence. Judicial review ensures that the exercise of governmental power remains consistent with constitutional and legal limits. Public debate enables citizens to challenge policies and advocate alternatives. Together these mechanisms reinforce the legitimacy of institutions by ensuring that authority remains responsive to the consent of those subject to it.

[25] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
[26] International Covenant on Civil and Political Rights art 20(2).

The Relationship Between Law and Democratic Resilience

Taken together, these conditions illustrate a broader function of law within democratic systems. Law does not simply regulate behaviour or resolve disputes. It establishes and protects the institutional environment in which democratic consent can exist. Where equality before the law, freedom of participation, protection from coercion and institutional accountability are preserved, communities possess the capacity to authorise and renew authority through legitimate institutions.

Conversely, when these conditions deteriorate, democratic legitimacy weakens even if formal institutional structures remain intact. Citizens may continue to vote, institutions may continue to operate and laws may remain formally valid, yet the underlying processes through which authority derives from consent begin to erode. Democratic resilience therefore depends not only upon constitutional design but upon the legal protection of the civic conditions that sustain participation and equality.

Understanding law in this way clarifies the relationship between self-determination and democratic stability. Self-determination is realised not through symbolic recognition alone but through institutions capable of expressing consent within a constitutional framework that protects equal citizenship. Legal architecture plays a central role in maintaining this balance by ensuring that neither coercion nor exclusion can displace consent as the foundation of political authority.

The final section of this article considers how these principles may inform legal reform within Australia. In particular, it examines how legal frameworks addressing ideological incitement and democratic participation can be structured so that they protect pluralism while preserving the conditions necessary for equal civic participation.

Part V

Legal Reform and Democratic Resilience

The preceding analysis has established a basic proposition. Democratic legitimacy within a constitutional state depends upon institutions capable of expressing the consent of equal citizens. Self-determination does not stand outside this framework but operates through it. Communities exercise autonomy through institutions that authorise authority and renew consent, while the constitutional order preserves the equal civic status of all citizens. Law performs the task of protecting the conditions under which these processes can function.

The practical implications of this framework become visible when democratic participation itself comes under pressure. Contemporary democracies increasingly confront forms of ideological mobilisation that seek influence not only through persuasion but through intimidation, coercive exclusion and the normalisation of hostility toward particular communities. Such pressures do not necessarily manifest immediately in acts of violence. They often appear first as cumulative patterns of rhetoric, mobilisation and social enforcement that gradually alter the conditions under which citizens participate in public life.

Where such patterns intensify, the ability of individuals to exercise political choice may be affected long before criminal thresholds based on direct incitement or imminent violence are satisfied. Citizens may withdraw from public participation, communities may experience fear-based exclusion from civic life, and institutions may face pressure that distorts the processes through which authority is exercised. Democratic consent remains formally intact, yet the conditions that make it meaningful begin to erode.

The challenge for legal systems is to respond to such dynamics without undermining the freedoms that democratic societies are intended to protect. Freedom of expression and freedom of political communication remain essential to democratic governance. The existence of vigorous disagreement, criticism of government and robust ideological contestation is not a defect of democracy but one of its defining characteristics. Legal responses must therefore preserve the space for persuasion, dissent and peaceful advocacy while addressing conduct that seeks to enforce political positions through intimidation or coercion.

This balance is already recognised within international human rights law. Article 19 of the International Covenant on Civil and Political Rights protects freedom of expression while allowing proportionate restrictions necessary for the protection of the rights of others and the preservation of public order.[27] Article 20(2) complements this principle by requiring states to prohibit advocacy of hatred that constitutes incitement to discrimination, hostility or violence.[28] Taken together, these provisions recognise that democratic societies must protect both freedom of expression and the conditions that allow citizens to participate in public life as equals.

Domestic constitutional systems must give practical effect to this balance. In Australia, the implied freedom of political communication protects the communicative conditions necessary for representative government, yet the doctrine also recognises that legislation may impose proportionate burdens on political communication where doing so preserves the integrity of the constitutional system itself.[29] The relevant constitutional inquiry is therefore not whether expression may ever be regulated but whether legislative measures remain compatible with the system of representative and responsible government established by the Constitution.

Understanding law as a protector of democratic consent offers a coherent framework for approaching such questions. Legal measures designed to address ideological intimidation or escalation dynamics should not seek to regulate belief or suppress political disagreement. Rather, they should focus on conduct that materially undermines the conditions of equal civic participation. The objective is not to determine which ideas are permissible within democratic discourse but to ensure that persuasion remains distinct from coercion.

[27] International Covenant on Civil and Political Rights art 19(3).
[28] Ibid art 20(2).
[29] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.

Within this framework, legal responses to escalation must satisfy several principles. They must operate neutrally, without privileging or targeting particular communities or belief systems. They must rely upon clear evidentiary thresholds demonstrating a substantial and demonstrable risk of harm to the conditions of democratic participation. They must remain subject to judicial oversight and proportionality analysis, ensuring that any restriction on political communication is narrowly tailored and compatible with constitutional principles. Finally, they must preserve transparency and accountability so that citizens can assess how legal powers are exercised.

Such safeguards reflect a broader constitutional discipline. Democratic resilience is not strengthened by expansive or discretionary power but by institutions capable of maintaining legitimacy even under conditions of social conflict. Legal frameworks must therefore reinforce the underlying structure of consent rather than displace it.

This perspective also clarifies the relationship between democratic equality and self-determination within pluralistic societies. Communities exercising forms of autonomy must do so through institutions that remain accountable to their members and compatible with the broader civic framework. Where institutions allow individuals to participate freely in collective decision-making, self-determination strengthens democratic legitimacy by expanding the spaces in which consent is expressed. Where such institutions are absent or distorted by coercion, representation becomes uncertain and the authority of governance structures weakens.

Australia's constitutional system has historically relied upon the stability of representative institutions to sustain democratic legitimacy. Yet the resilience of those institutions cannot be assumed indefinitely. The pressures created by ideological polarisation, social fragmentation and escalating hostility within public discourse require renewed attention to the legal architecture that protects the conditions of participation itself.

The analysis developed in this article suggests that democratic resilience ultimately depends upon institutions of consent. Constitutional structures provide the framework within which authority is exercised. Communities require institutions capable of expressing collective authority. Law must protect the conditions under which citizens participate freely and equally in those institutions. When these elements operate together, self-determination and democratic equality reinforce rather than undermine one another.

Conclusion

Modern democracies frequently confront tensions between recognition of identity and preservation of equal citizenship. These tensions often appear irreconcilable because they are discussed at different levels of governance. Identity speaks to the historical and cultural foundations of communities. Equality concerns the civic status of individuals within the constitutional order. Self-determination seeks to reconcile these dimensions by allowing communities to exercise forms of autonomy without abandoning the shared framework of democratic governance.

The argument advanced in this article has been that the key to this reconciliation lies in institutions of consent. Political authority becomes legitimate when communities possess institutions capable of expressing the ongoing consent of those subject to that authority. Constitutional systems provide the framework within which such institutions operate, while law protects the civic conditions that allow citizens to participate freely and equally in their governance.

Seen in this light, debates about constitutional recognition, Indigenous governance, social cohesion and democratic resilience are not separate issues but aspects of the same institutional problem. Democracies remain stable when citizens can authorise and renew authority through institutions that treat them as equals before the law. Where those institutions weaken, legitimacy erodes even if constitutional structures remain formally intact.

The task for contemporary legal and constitutional systems is therefore not to choose between recognition and equality but to build institutional frameworks in which both principles can coexist. Self-determination becomes compatible with democratic governance when communities possess structures capable of expressing consent, and when law safeguards the conditions under which that consent can be freely formed and renewed.

In Australia, the continuing evolution of constitutional practice, Indigenous governance and democratic institutions presents an opportunity to strengthen this framework. By focusing on the institutional foundations of consent rather than on symbolic recognition alone, legal and constitutional reform can reinforce the legitimacy of democratic authority while preserving the pluralistic character of Australian society.

About the Author

Dr Matthew Jennings is an Australian Osteopath and independent writer on law, human rights, and democratic governance. Raised in Hobart in a household shaped by constitutional law and international human rights, he grew up around debates on universality, equality before the law, and Australia's obligations under international legal frameworks. His father served as Tasmania's Solicitor-General and represented Australia in landmark constitutional matters and in Geneva.

For over 25 years, Dr Jennings has run a private osteopathic practice in Sydney's Eastern Suburbs, treating people across all walks of life while maintaining a parallel commitment to public civic engagement. His recent writing focuses on incitement law, foreseeability and prevention, antisemitism, the misuse of race and identity in law, and the conditions under which democratic systems fail to protect human rights in practice.

His work is grounded in a single principle: that free, informed, and equal consent must remain the foundation of both human rights and democratic governance, especially under conditions of fear and crisis.
