

## **Race and the Australian Constitution**

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The idea of a referendum on recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution was put on the national political agenda in the aftermath of the August 2010 federal election. This occurred without any announcement of what form the change would take. In effect, it was a commitment by the minority Gillard government to a referendum at or before the next federal election without a specific proposal for change. This poses a major challenge. Although Indigenous peoples have long sought recognition in Australia's national and state Constitutions, common ground has not yet emerged on how this should be achieved. Hence, the task is not simply one of convincing Australians to vote Yes, but of determining what the amendment should be in the first place.

The fact that the federal government has not stated what Australians will vote on has opened up debate about the nature of Australia's Constitution and the form that the change should take. In 2011 this discussion was led by a government appointed expert panel chaired by Professor Patrick Dodson, former Chairman of the Council for Aboriginal Reconciliation, and former Reconciliation Australia co-chair Mark Leibler. The panel's report and its recommendations for constitutional change were released publicly in early 2012. Its recommendations, which mirror those explored in this paper, have helped to frame the discussion, yet significant disagreement remains. The panel's report has not galvanised community and political support around an agreed set of changes.

In this paper I return to first principles. I examine the place of race in the Australian Constitution, and the implications this has for the debate. The Constitution and its history is examined with a view to determining what changes are needed to appropriately recognise Australia's first nations in the document.

### **The Constitution as drafted**

The Australian Constitution was not written as a people's constitution. Instead, it was a compact between the Australian colonies designed to meet, amongst other things, the needs of trade and commerce. Consequently, the Constitution says more about the marriage of the colonies and the powers of their progeny, the Commonwealth, than it does about the relationship between Australians and their government. It does not mention the concept citizenship, only 'the people'.

The document does not expressly embody the fundamental rights or aspirations of the Australian people. It contains few provisions that are explicitly rights-orientated. According to Lois O'Donoghue, a former Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC):

It says very little about what it is to be Australian. It says practically nothing about how we find ourselves here – save being an amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.

The Australian Constitution was drafted at two Conventions held in the 1890s. Neither Convention included any women, nor representatives of Australia's Indigenous peoples and ethnic communities. In most cases, Aboriginal people were not qualified to vote for the delegates to the Convention, and appear to have played no meaningful role in the drafting process itself. It is not surprising then that the Constitution as drafted did not reflect their interests or aspirations.

While the preamble to the Constitution set out the history behind the enactment of the Constitution and the notion that the Constitution was based upon the support of the people of the colonies, it made no mention of the prior occupation of Australia by its Indigenous peoples. In fact, the operative provisions of the Constitution were premised upon their exclusion, and even discrimination against them (not citizens in any sense). This then was the legal foundation upon Aboriginal people were made part of the Commonwealth of Australia on 1 January 1901.

This was reflected in the terms of Australia's Constitution:

- Section 25 recognised that the States could disqualify people from voting in the elections on account of their race.
- Section 51(xxvi) provided that the Commonwealth Parliament could legislate with respect to “the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws”. This was the so-called, “races power”.
- Section 127 went further in providing: “In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted”. Significantly, neither provision spoke of Indigenous peoples as people, but in the latter case as “aboriginal natives”.

Section 51(xxvi) was inserted into the Constitution to allow the Commonwealth to discriminate against sections of the community on account of their race.

Of course, Aboriginal people were not subject to this section. However, this was not because they were to be protected, but because it was thought that the Aboriginal issues were a matter for the States and not the federal government.

By today's standards, the reasoning behind s 51(xxvi) was clearly racist. Edmund Barton, the Leader of the 1897-1898 Convention and later Australia's first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to “regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.” In summarising the effect of s 51(xxvi), John Quick and Robert Garran, writing in 1901, stated that:

It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.

One framer, Andrew Inglis Clark, the Tasmanian Attorney-General, supported a provision taken from the United States Constitution requiring the “equal protection of the laws”. This

clause might have prevented the federal and state Parliaments from discriminating on the basis of race.

However, the framers were concerned that Clark's clause would override Western Australian laws under which "no Asiatic or African alien can get a miner's right or go mining on a gold-field." Clark's provision was rejected by the framers who instead inserted s 117 of the Constitution, which merely prevents discrimination on the basis of state residence. Sir John Forrest, Premier of Western Australia, summed up the mood of the 1897-1898 Convention when he stated:

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.

In formulating the words of s 117, Henry Higgins, one of the early members of the High Court, argued that it "would allow Sir John Forrest ... to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race."

### **Since 1901**

Given the drafting history of the Constitution, it is not surprising that legislation enacted by the new Commonwealth Parliament was premised upon racially discriminatory policies. The *Immigration Restriction Act 1901* (Cth), for example, prohibited the immigration into Australia of any person who, when asked by an officer, was unable to "write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer". This was the means by which the White Australia policy was implemented.

Of more significance to Aboriginal people was legislation that denied them the right to vote in federal elections. The scope of the federal franchise was determined after Federation by the *Commonwealth Franchise Act 1902* (Cth). That Act extended the federal franchise to women, and it had been proposed that the Bill also extend the franchise to Aborigines.

However, that proposal was strongly resisted and was finally defeated. Among its opponents were Isaac Isaacs, subsequently Chief Justice of the High Court and Australia's first Australian Governor-General, who thought Aborigines "have not the intelligence, interest or capacity" to vote; and Henry Higgins, later a Justice of the High Court, who thought it "utterly inappropriate . . . [to] ask them to exercise an intelligent vote".

As finally enacted, s 4 of the *Commonwealth Franchise Act* specifically denied the voting rights of the "aboriginal native[s] of Australia . . . unless so entitled under Section 41 of the Constitution". It was not until 1962 that the *Commonwealth Electoral Act 1918* (Cth) was amended to extend universal adult suffrage to Aboriginal people (and then not equality until 1983 – denied basic rights as citizens).

### *The 1967 Referendum*

The obvious discrimination against Aboriginal peoples on the face of the Constitution was one factor in the emergence of moves to amend it. Another factor was a concern that Aboriginal issues were not being dealt with appropriately at the State level and the federal Parliament ought to be given primary responsibility for their welfare.

In 1967, a proposal was put before the Australian people under which the words “other than the aboriginal race in any State” in s 51(xxvi) would be struck out and s 127 deleted entirely. The people overwhelmingly voted “Yes”. The proposal was supported in every State and nationally by 89.34% of Australians, with 9.08% voting “No”. Out of the 44 referendum proposals put to Australian people since 1901, this is the highest “Yes” vote so far achieved.

The 1967 referendum was an important turning point in the place of Aboriginal people within the Australian legal structure. However, it is important to note that, while the referendum deleted an obviously discriminatory provision in the form of s 127, it did not insert anything in its place (not did it remove s 25).

The change left the Constitution, including the preamble, devoid of any reference to Indigenous peoples. While the objective of the 1967 referendum was to remove discriminatory references to Aboriginal people from the Constitution and to allow the Commonwealth to take over responsibility for their welfare, it may be that, in failing to set this intention into the words of the Constitution, the change actually laid the seeds for the Commonwealth to pass laws that impose a disadvantage upon them.

The racially discriminatory underpinnings of s 51(xxvi) were extended to Aboriginal people, but without any textual indication that the power could be applied only for their benefit.

### *The Hindmarsh Island Bridge Case*

The possibility that the races power, as extended to Indigenous peoples, might be applied to their detriment was raised in a case before the High Court of Australia in 1998. The Minister for Aboriginal and Torres Strait Islander Affairs was urged to exercise his powers under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for the protection and preservation of the area. Ngarrindjeri women claimed to be the custodians of secret ‘women’s business’ for which the island had traditionally been used, and which could not be disclosed to Ngarrindjeri men, nor to other men.

In 1994 and 1996, the claim was the subject of two reports to the Minister. Each report ended in a controversy that failed to resolve the underlying issue. The *Hindmarsh Island Bridge Act 1997* (Cth) was then enacted by the newly elected Howard (Liberal-National Party) Coalition Government to preclude any further possibility of a protection order under the 1984 Act. The *Hindmarsh Island Bridge Act* amended the *Aboriginal and Torres Strait Islander Heritage Protection Act* so that it no longer applied to ‘the Hindmarsh Island bridge area’ and thus prevented any further possible claim by the Ngarrindjeri women.

The Ngarrindjeri women responded by bringing an action in the High Court challenging the validity of the *Hindmarsh Island Bridge Act*. They argued, with myself as part of their legal team, that the Act could not be passed under the races power because that power extends only

to laws for the benefit of a particular race, and cannot be used to impose a detriment on the people of a race. This argument was of momentous political significance because, if accepted, it might have provided a legal platform from which to challenge the Howard Government's 'ten point plan' for native title, a plan that in the words of the deputy prime Minister involved 'bucket loads of extinguishment'.

In the High Court, the Commonwealth argued that there are no limits to the races power, that is, provided that the law affixes a consequence based upon race, it is not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Commonwealth Solicitor-General, Gavan Griffith, suggested that the races power 'is infused with a power of adverse operation'. He acknowledged 'the direct racist content of this provision' in the sense of 'a capacity for adverse operation'. The following exchange then occurred:

Kirby J: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary ... or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.

Griffith QC: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.

Of course, without a Bill of Rights or express protection from racial discrimination, there was no such over-arching reason.

The challenge failed by 5:1 (with Justice Kirby dissenting).

Four judges did address that issue. Justices Gummow and Hayne held that the power could be used, as in this case, to withdraw a benefit previously granted to Aboriginal people (and thus to impose a disadvantage). More generally, they pointed out that the use of 'race' as a criterion, which s 51(xxvi) not only permits but requires, is inherently discriminatory.

Justice Kirby's dissenting judgment held that the power 'does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race)'. He argued that the 1967 amendment 'did not simply lump the Aboriginal people of Australia in with other races as potential targets for detrimental or adversely discriminatory laws', but reflected the Parliament's 'clear and unanimous object', with 'unprecedented support' from the people, that the operation of s 51(xxvi) 'should be significantly altered' so as to permit only positive or benign discrimination. Used international law.

Justice Gaudron found that the deletion of eight words could not change the meaning of the words that remained. However, she went on to examine more closely the requirement in s 51(xxvi) that the Parliament must deem it 'necessary' to make special laws for the people of a race. Applying an analysis of the concept of discrimination, she argued that any such judgment of necessity must be based on some 'relevant difference between the people of the race to whom the law is directed and the people of other races', and hence that the resulting legislation 'must be reasonably capable of being viewed as appropriate and adapted to the difference asserted'. She found it 'difficult to conceive' that any adverse discrimination by reference to racial criteria might nowadays satisfy these tests, and 'even more difficult' in the case of a law relating to Aboriginal Australians.

The overall effect of the judgments was inconclusive. The Court split 2:2 on the scope of the races power, with a further two other judges not deciding. It thus failed to resolve the issue of whether the Commonwealth possesses the power under the Constitution to enact racially discriminatory laws.

## **Today**

Indigenous peoples have long sought recognition in Australia's national and State Constitutions. They have done so because these laws have either ignored their existence or discriminated against them. They argue that the story of our nation is incomplete without the histories of the peoples who inhabited this continent before white settlement.

Prime Minister Julia Gillard has pledged a referendum at or before the next election on whether to recognise Indigenous peoples in the Constitution. When the history and current text of the Constitution are taken into account, Aboriginal and Torres Strait Islander peoples should be recognised in the Australian Constitution by way of:

1. Positive mention of Indigenous peoples and their culture in a new preamble or other section to the Constitution;
2. The deletion of:
  - (i) section 25; and
  - (ii) section 51(26).
3. The insertion of new sections that:
  - (i) grant the Commonwealth Parliament the power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples';
  - (ii) prohibit the enactment of laws by any Australian Parliament or the exercise of power by any Australian government that discriminates on the basis of race (while also providing that this does not prevent laws and powers which redress

disadvantage or recognise and preserve the culture, identity and language of any group).

I elaborate on these changes below.

Aboriginal people cannot meaningfully be recognised in the Australian Constitution unless the capacity to discriminate on the basis of their race against them is removed from the document. Symbolic change by way of a new section or new preamble to the Australian Constitution will not be sufficient. Sections 25 and the races power in section 51(26) must also be deleted.

It is important however that the races power not simply be repealed. Doing so would undermine the validity of existing, beneficial laws enacted under the power. An important achievement of the 1967 referendum was to ensure that the federal parliament can pass laws for Indigenous peoples in areas like land rights, health and the protection of sacred sites. A continuing power should be available in such areas, but in a different form.

One way of 'fixing' the races power is to grant power to the federal parliament to pass laws for 'Aboriginal and Torres Strait Islander peoples'. Such a grant, consistent with the way that the High Court interprets the Constitution, would be broad enough to cover laws enacted in the past, such as the *Native Title Act 1993* (Cth), and those that might be enacted in the future for Indigenous peoples.

An alternative suggested by former Chief Justice of New South Wales Jim Spigelman would be to insert a new head of power to pass laws with respect to particular subjects, without making any mention of Aboriginal and Torres Strait Islanders. This might grant the Commonwealth power over matters such as native title and other Indigenous specific concerns. This certainly has the merit of producing a general head of power without reference to any particular racial group.

On the other hand, there is no easy way of formulating a head of power to enable the federal parliament to make laws generally for Indigenous-specific disadvantage. Enabling the Commonwealth to legislate with respect to something like 'disadvantage', risks the granting of a power of extraordinary width that would permit federal laws in a range of areas of existing state legislative concern. Ultimately, it is not clear that a generic subject matter power can be constructed to enable federal laws to be passed specifically for Aboriginal and Torres Strait Islanders.

A power to make laws for 'Aboriginal and Torres Strait Islander peoples' could still be used to pass negative laws. This could be avoided by expressly limiting the grant of power to enable the federal parliament to make laws with respect to 'Aboriginal and Torres Strait Islander peoples, but not so as to discriminate against them on the basis of their race'. This would provide more secure protection in at least providing a clear statement that laws passed under the power could not discriminate against them on the basis of their race.

The limitation might also provide protection to Indigenous Australians in respect of laws passed under the other heads of power in section 51 of the Constitution. It might not, however, provide protection for laws passed under powers in other parts of the Constitution, such as the territories power in section 122. It might thus continue to be possible for laws

such as the *Northern Territory National Emergency Response Act 2007* (Cth) to be enacted under the territories power on a discriminatory basis.

To avoid this, the Constitution should contain both a new power over ‘Aboriginal and Torres Strait Islander peoples’ and an overarching freedom from racial discrimination. Such a guarantee is a standard feature of other national constitutions, and is lacking only in Australia because it is now the only democratic nation in the world not to have a national framework for human rights protection such as a human rights act or Bill of Rights.

A general freedom from racial discrimination would not only protect Indigenous Australians. It would protect all people in Australia from laws that discriminate against them on the basis of their race. The freedom could be drafted only to apply to federal laws, or also to state and territory laws. The freedom might also be applied to government action, such as programs and policies supported by government funding and departmental action without a separate legislative basis. Given the past record of discrimination by Commonwealth and the states and territories, and the fact that as a matter of principle racial discrimination ought to be prohibited generally within Australian government, it would be preferable for the freedom to have a wide operation.

There is a possibility that a freedom from racial discrimination might be interpreted by the High Court to strike down laws and programs that provide special benefits or recognition to Aboriginal and Torres Strait Islanders. It might be held that these discriminate against non-Indigenous people. This could affect programs which, for example, provide accelerated entry into university in order to redress the long-term shortage of Indigenous doctors and lawyers.

To avoid this, the freedom from racial discrimination should be made subject to a savings clause stating that it does not affect laws and programs aimed at redressing disadvantage. Such a clause would enable the High Court to determine the consistency of laws and measures with the savings clause. Such a power is typically found in other nations as part of their protection from discrimination or equality guarantee. The clause should also ensure that, irrespective of whether Indigenous peoples continued to suffer disadvantage, laws may be made to recognise and preserve culture, identity and language (of Aboriginal peoples or indeed any other group).

The practical impact of these constitutional changes would be significant. A freedom from racial discrimination in the Australian Constitution applying to all laws and programs would mean that a law or program could be challenged in the courts if it breached the guarantee. Examples of recent federal laws that might be challenged on this basis include the *Native Title Amendment Act 1998* (Cth), which implemented the Howard government’s ‘ten point plan’ for native title after the *Wik* decision. In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, ‘bucket-loads of extinguishment’, the Act overrode the *Racial Discrimination Act 1975* (Cth). This was achieved through section 7 of the new Act, which provides that the *Racial Discrimination Act* has no operation where the intention to override native title rights is clear. A similar suspension of the *Racial Discrimination Act* was achieved under the legislation that brought about the Northern Territory intervention. Both of these statutes are examples of laws that could not stand in the face of a constitutional guarantee of freedom from racial discrimination. It would also not be possible in the future to suspend the *Racial Discrimination Act* so as to permit racial discrimination.



Recognising Aboriginal peoples through positive words combined with substantive changes that eradicate racial discrimination and protect against future discrimination provides the best basis for constitutional change. Fortunately, these changes are all contained within the recommendations of the government's expert panel. In addition, the panel proposed that the Constitution contain a new section entitled 'Recognition of languages'. This would recognise that the 'national language of the Commonwealth of Australia is English' and that the 'Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.'

## **CONCLUSION**

Australia ought to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. It does not speak well of our nation that after more than a century we have yet to achieve this, and have not removed the last elements of racial discrimination from the document. It is past time that we had a Constitution founded upon equality that recognises Indigenous history and culture with pride.