

“RECOGNISING INDIGENOUS AUSTRALIANS IN THE CONSTITUTION”

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There is beginning to be broad agreement that our Constitution ought to be changed to pay recognition to Aboriginal Australians and Torres Strait Islanders and to remove racist elements from the Constitution itself. I want to sketch briefly the history of Australia in relation to these matters and then make one or two suggestions about how we might go about change.

While our founding fathers accepted it as the natural order of things for their time, today we regard the attitudes exhibited in the discussions leading to Federation and indeed the Constitution itself as racist. There were many who believed that there should be special powers so that laws could be made controlling the affairs of people regarded as inferior.

The very Constitution itself was racist in relation to Aboriginal Australians and Torres Strait Islanders. They were not to be counted in referenda and they were denied to vote, even though before Federation, Aboriginals in South Australia had had the vote.

Elements of racism have shown themselves several times during Australia's first 100 years. During discussions concerning the League of Nations, the Japanese wanted a racial non-discrimination clause in the Preamble. Australia's Prime Minister, Billy Hughes, led the opposition to it.

There was communication between delegations of like mind - Canada, California, South Africa and Australia. Many of the arguments adduced in those regions were similar to the position preferred by Billy Hughes. A meeting was called to try and find compromise wording that might be acceptable to the Japanese and to the opposition group. Billy Hughes refused to attend. He said words to the effect that they do not understand; it is not the words that are at fault, but the very idea of racial equality that is so repugnant and offensive.

Racist attitudes exhibited themselves in different ways. In 1938 there was a meeting of 31 nations at Evian in France to try and find a solution for the

many thousands of Jews fleeing Nazi Germany. Sir Thomas White, the Australian Minister at that Conference, indicated that Australia would like to help but could not because there was no racism in Australia and we had no intention of importing it.

Against these attitudes, the great migration program that began in the years after the war was all the more remarkable. The program was introduced with 600,000 servicemen and servicewomen waiting to be demobilized and the memories of 20% plus unemployment, only 6 or 7 years old. It was a great achievement.

The flood of people fleeing from Europe, from oppression, from dictatorial regimes, from Eastern Europe and later from parts of the Soviet Union, meant that the character of that immigration program was to change the face of Australia.

We committed ourselves to the Refugee Convention in 1954. That in my view meant the White Australia Policy had to end. No politician was prepared to trumpet that objective, but little by little and by basic agreement between the parties, the Policy was unwound. Hubert Opperman, as Minister for Immigration, ended the practical elements of White Australia in a speech made in parliament in 1966. Gough Whitlam got rid of legal remnants in 1972 and the practical result of those changes made possible the great Indo-Chinese migration that began in the aftermath of the Vietnam War. A migration that has done so much for Australia and again changed the character of our society.

This happened because in those days politicians of both parties behaved differently from that which they do today. There was a bipartisanship. We all knew that if either party started to play politics with issues of race or religion, the migration program would fall apart. We also knew that Australia needed thousands, indeed millions more people and that therefore these issues had to be above and outside the normal political fray.

The 1967 Referendum did two things. It removed the words “*other than the aboriginal race in any State*” from **Section 51(xxvi)** which then allowed the Commonwealth to make laws for any racial group. In the initial Constitution Aboriginal Australians and Torres Strait Islanders had been excluded from Commonwealth legislative competence because it was believed that regulation of these peoples was the province of the States.

The Referendum of 1967 also removed totally **Section 127** which said that ***“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.”*** This referendum was approved overwhelmingly with over 90% voting for. This referendum was carried against the background of bipartisanship between the political parties, a bipartisanship which had extended beyond Aboriginal affairs to matters of race and discrimination generally.

There are still problems with our Constitution. There is demand for specific recognition of Australia’s first people up front in the Preamble. At the moment there is no Preamble to the Constitution, but that should not be a problem. I do not believe that the Preamble should only recognise Aboriginal Australians and Torres Strait Islanders. A more complete Preamble should be drafted. There is no need for this to be a controversial exercise. The Preamble should recognise us all.

I am not trying to draft specific words, but a Preamble may go something like this. *“We, the People of Australia, Aboriginal Australians and Torres Strait Islanders, whose ancestors have lived here since time immemorial, the original people of this land, together with those whose ancestors arrived subsequently from all regions of the world, and those who have come more recently, amongst these are people from nearly every race and every religion found on this earth, acknowledge this as our Constitution and we, one and all commit ourselves to be bound by it, unless it is duly and lawfully changed by we, the People of Australia, in a Constitutional Referendum. This Constitution will enable us all to live together in liberty, in peace and equality under the law.”*

The next suggestion I would like to make would concern **Section 25** which provides that ***“...if by the law of any State all persons of any race are disqualified from voting at elections.....of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race....shall not be counted.”*** Whatever its original intention, it has racist overtones. It should be abolished. Its abolition would have no related consequences.

We come then to **Section 51 (xxvi)** which was part amended in 1967. ***“The people of any race for whom it is deemed necessary to make special laws.”*** My basic inclination would be to abolish such a power absolutely. I do not believe that laws should be made on the basis of race

because to do so is to accept that discrimination on grounds of race is permissible.

It is not however, quite so simple as that. One suggestion may be to put in a power to enable the Commonwealth to make laws to redress the hardship of any group and have people defined by hardship. The mention of race would not be necessary. There are already powers which make it possible for the Commonwealth to tackle economic hardship as indeed it has attempted to on many occasions. This is done under **Section 51 (xxiiiA)** which mentions *“the provision of maternity allowances, widows’ pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.”* But that is not the end of the question.

There is a significant body of legislation which does depend on **Section 51 (xxvi)** and that includes Aboriginal and Torres Strait Islanders Heritage Protection Act, ATSIC Legislation, the Act establishing the Council for Aboriginal Reconciliation and various Acts regulating the grant of Native Title and legislation setting up Native Title bodies. We would not want such bodies struck down by the simple removal of **Section 51 (xxvi)**. These provisions would not be covered by **Section 51 (xxiiiA)**.

It may be possible to grandfather existing legislation regarded as beneficial to Indigenous Australians. So these provisions would continue in force even after removal of **Section 51 (xxvi)**. That would make it difficult to amend legislation if it were proven necessary or if there were a need for new legislation to cover some further aspect of Aboriginal disadvantage.

Alternatively, it may be possible to replace **Section 51 (xxvi)** with new words that focus on protection and advancement and for the benefit of Aboriginal Australians and Torres Strait Islanders, or perhaps for the benefit of a particular race making the provision wider. Such a provision would need to include culture, historic and sacred sites. I am not sure however, especially when I look at today’s parliament, that I would want politics to have any role in determining the meaning of culture. Some interpretations of culture could indeed be regressive. Current debates in Canberra have opened that possibility.

In 1967 it was Wentworth’s preference, apparently in discussion with Nigel Bowen, that there should be a power relating to *“the advancement of Aboriginal Natives”*. We clearly would not use the term “Aboriginal

Natives” today, we might say however, *“for the advancement and benefit of Australia’s first people or alternatively Aboriginal Australians and Torres Strait Islanders.”*

It is clear in relation to the Intervention introduced by the Howard Government and basically continued by the present government, that they both would have claimed and would both have accepted that the Intervention was for the benefit of Aboriginal Australians and Torres Strait Islanders. There are many who would argue that this was not so.

The words “for the benefit of” for the advancement and benefit of, would not provide sufficient protection by themselves. The outcome may be reinforced by a prohibition against discrimination by either the Commonwealth or the States by legislation or by executive action of any kind against Aboriginal Australians and Torres Strait Islanders, against adverse discrimination.

Wentworth, who was nearly half a century ahead of his time on these issues, had a formulation. *“Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth to any discrimination or disability by reason of his racial origin, provided that this section shall not operate so as to preclude the making of special laws for the special benefit of the Aboriginal natives of Australia.”* Those were his words. Again the term Aboriginal Native would clearly need to be changed in today’s world.

His wording I believe may well cover the situation as well as could be done. It is my understanding that these words were worked out in part, in cooperation with the Attorney General of the time, Nigel Bowen, a distinguished Constitutional lawyer.

It may be possible to use Wentworth’s formulation, but to alter his last clause so that it may read *“provided that this section shall not operate so as to preclude the making of special laws for the special benefit of people in need.”* That would take away the racial overtones of the clause.

It is striking this balance between an enabling Commonwealth power to make positive laws for the special benefit and advancement of Aboriginal Australians and Torres Strait Islanders and an embedded Constitutional prohibition on Commonwealth, State and Territory laws of racial discrimination which is critical to any Constitutional change.

It is worth noting that South Africa has tackled this problem in a rather different way, but it seems to work. Their Constitution prohibits unfair discrimination on the grounds of race either directly or indirectly and to provide that discrimination is unfair, unless it is established to be fair.

There is another possibility in the agenda and that is the power to make agreements with Aboriginal Australians and Torres Strait Islanders and to provide a legislative base by virtue of a treaty. I am not attracted to this approach.

We still do not have a truly representative group with whom a government would be able to negotiate such a treaty. Given the great diversity amongst Aboriginal Australians and Torres Strait Islanders, many different negotiations would be needed. There could be arguments about interpretation. The experience of consultations in relation to the Intervention does not augur well for the way such consultations would be handled out of Canberra.

There are other issues also which we need to consider which are important to this question. There is a toxic attitude in Canberra. Everything has turned into an issue of politics. I can hardly think of a subject which a government and opposition handle on the basis of Australia's national interest as opposed to their perceived and often wrong and often erroneous view of their political advantage. Unless there is a more far reaching leadership on the part of both parties, I would not want a referendum on this issue to go forward in the present climate.

Secondly, I would not want this issue to go forward in a referendum involving other issues. I have had some experience of referenda. I have put four referenda to the people of Australia and won three. Even though I gained a significant majority of votes for the fourth question over simultaneous elections, 62% of the total, it was lost, because I did not gain a majority of states.

Passing referenda is difficult. The agreement of both parties is highly desirable. We need to be aware that other extraneous bodies can spring up to oppose the substance of a particular question.

If a referendum relating to Aboriginal Australians and Torres Strait Islanders were put forward together with other issues at the same time, there would be the possibility of confusion, disruption and the creation of doubt, especially since as I have sought to show, the proper resolution of

Section 51 (xxvi) has options available that need to be determined. If the best choice needs to be made, there needs to be unity behind it.