

Removing Racism from Australia's Constitutional DNA

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Abstract

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 article, 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 article 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.

REMOVING RACISM FROM AUSTRALIA'S CONSTITUTIONAL DNA

GEORGE WILLIAMS

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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.² The panel's report³ and its recommendations for constitutional change were released publicly in early 2012. Its recommendations, which mirror those explored in this article, 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.

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Race and the *Australian Constitution*

Much of the debate about recognising Aboriginal and Torres Strait Islander peoples in the *Constitution* has had a narrow focus. Indeed, the use of the word 'recognition' suggests some form of symbolic change that does no more than mention Indigenous peoples. This is consistent with the last attempt to change the *Constitution* in this regard. At the 1999 referendum on the republic, Australians also overwhelmingly rejected a new preamble to the *Constitution* that, most prominently among a range of statements, included the words:

We the Australian people commit ourselves to this Constitution ... honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.

The problem lies deeper than mere recognition. The *Constitution* was written in the 1890s against a backdrop of racism that led to the White Australia policy and a range of other discriminatory laws and practices. Many of these laws and practices were not directed at Aboriginal people, but Chinese and other non-white immigrants to Australia. Nonetheless, they demonstrate how Australia's legal system was created with an embedded capacity for racial discrimination. Separating people according to their race was based upon a discredited 19th-century scientific theory in which a person's race can determine everything from their intelligence to their suitability for certain roles. Unfortunately, this thinking remains in Australia's constitutional DNA.

Australia's 1901 *Constitution* referred to Aboriginal peoples only in negative terms. Section 127 even made it unlawful to include 'aboriginal natives' when counting the number of 'people' of the Commonwealth. Section 127 was removed by the 1967 referendum, but other problems were left untouched. Australia today has a *Constitution* that in its text and operation still runs counter to the idea that Aboriginal Australians are equal members of the community.

The first problem is section 25. Headed 'Provision as to races disqualified from voting', the section provides that if a State disqualifies the people of a race from voting in its elections, the people of that race are not to be counted as part of the state's population in determining its level of representation in the federal parliament. This section was proposed in the 1890s constitutional conventions by Tasmanian Attorney-General Andrew Inglis Clark, who adapted the wording from the 14th Amendment to the United States Constitution. The section has the apparently benign purpose of ensuring that states suffer a loss to the level of their federal representation when they disqualify people from voting because of their race.

Although section 25 acts as a penalty, it does so by acknowledging that the states may disqualify people from voting due to their race. This reflects the fact that at Federation in 1901, and for decades afterwards, Aboriginal people were denied the vote in federal, Queensland and Western Australian elections. Unfortunately, the *Constitution* still recognises this as being a legal possibility for state elections.

The second problem is the races power in section 51(26). As drafted in 1901, the section stated:

51. Legislative powers of the Parliament The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: –

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

This power was intended to allow the Commonwealth to restrict the liberty and rights of some sections of the community on account of their race, though not Aboriginal peoples because it was thought that such laws for them should be passed by the states. By today's standards, the reasoning behind the provision was clearly racist. Sir Edmund Barton, later Australia's first prime minister and one of the first members of the High Court, made the position clear when he told the 1897–98 Constitutional Convention that the

racism power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.⁴ By this, he was indicating that the federal parliament needed a power to pass negative laws in areas like employment for the Chinese and other non-white people who had entered Australia. In this, the framers were driven by a desire to maintain race-based distinctions when it came to 'Chinamen, Japanese, Hindoos, and other barbarians'.⁵

Inglis Clark supported a counter provision taken from the US Constitution requiring the 'equal protection of the laws'. However, the framers were concerned that Inglis Clark's clause would override laws such as those in Western Australia under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field'.⁶ Sir John Forrest, the premier of Western Australia, summed up the mood of the 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.⁷

Inglis Clark's provision was rejected, and section 117, which merely prevents discrimination on the basis of state residence, was instead inserted. In formulating the words of section 117, Henry Bournes Higgins, one of the early members of the High Court, said 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 on colour and race'.⁸

In the 1967 referendum, Australians chose to strike out the words 'other than the aboriginal race in any State' in section 51(26). While the referendum thus meant that Aboriginal peoples could be subject to laws made under the power, nothing was put in the *Constitution* to say that these laws had to be positive. In effect, the racially discriminatory underpinnings of the races power were extended to Aboriginal people without any indication that the power should only be used for their benefit.

Hindmarsh Island Bridge case

Nearly a century after the *Constitution* came into force, the federal parliament used the races power to pass the *Hindmarsh Island Bridge Act 1997* (Cth). A group of Aboriginal women belonging to the Ngarrindjeri people had sought to protect an area near Hindmarsh Island in South Australia from development by using the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). They argued that they were the custodians of secret 'women's business' for which the area had traditionally been used.

The *Hindmarsh Island Bridge Act* presumptively overrode their claim without allowing it to be tested. The Ngarrindjeri women brought a case against the Commonwealth in the High Court,⁹ arguing that the *Hindmarsh Island Bridge Act* was invalid. They said that the races power only allows Parliament to pass laws that are for the benefit of a particular race. Hence, the parliament could pass legislation directed at providing health care for the specific needs of a racial group. On the other hand, the power could not support laws banning people of a race from working in certain professions or from attending particular schools.

In response, the Commonwealth asserted that there are no limits to the power so long as the law affixes a consequence based on race. In other words, it was 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 federal Solicitor-General, Gavan Griffith QC suggested that the races power 'is infected, the power is infused with a power of adverse operation'.¹⁰ He also acknowledged 'the direct racist content of this provision using "racist" in the expression of carrying with it a capacity for adverse operation'.¹¹ The following exchange then occurred:

Justice Michael Kirby: 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 whatever the words say 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.

Mr Gavan 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.¹²

The Howard government thus argued that the Commonwealth could apply the races power to pass laws that discriminate against people on the basis of their race. This possibility is obviously abhorrent to most Australians, and is also inconsistent with accepted community values such as equality under the law. But this is exactly what the framers of the *Constitution* intended in drafting the races power.

A divided High Court handed down its decision in the *Hindmarsh Island Bridge Case* in 1998. The result was clear in upholding the capacity of the *Hindmarsh Island Bridge Act* to amend the *Aboriginal and Torres Strait Islander Heritage Protection Act* so as to deny the Ngarrindjeri women their claim. However, in reaching this conclusion, the High Court split on whether the races power can still be used to discriminate against Indigenous and other peoples.

The case was decided by only six judges because Justice Callinan, after some initial reluctance, disqualified himself from deciding the matter.¹³ The challenge failed by 5:1 (with Justice Kirby dissenting) because, in the words of Chief Justice Brennan and Justice McHugh:

Once the true scope of the legislative powers conferred by s 51 [is] perceived, it is clear that the power which supports a valid Act supports an Act repealing it.¹⁴

It was common ground that the *Aboriginal and Torres Strait Islander Heritage Protection Act* was valid. Hence, it necessarily followed that a later modification of its operation must also be valid. This conclusion meant that Brennan and McHugh did not need to address the scope of the races power.

The other 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, and that any discriminatory measure which benefits some may disadvantage others. They did, however, leave open the suggestion raised in the *Native Title Act Case*¹⁵ that the Court might retain 'some supervisory jurisdiction to examine ... the possibility of a manifest abuse of

the races power'. Moreover, they hinted at the possible relevance in such a case of the ultimate power of judicial review under *Marbury v Madison*,¹⁶ and of Justice Dixon's suggestion in the *Communist Party Case*¹⁷ that in the *Australian Constitution* 'the rule of law forms an assumption'.

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)'.¹⁸ 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.¹⁹

Justice Gaudron, who had previously suggested that a limitation of the races power to beneficial purposes might have 'much to commend it',²⁰ concluded that on closer examination such a limitation could not be sustained — in part because the suggestion that the original effect of the power had been changed by the 1967 amendment was too weighty a consequence to ascribe to a 'minimalist amendment'. The deletion of eight words could not change the meaning of the words that remained.

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, Justice Gaudron 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'.²¹ 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, since any obvious 'relevant difference' in their situation is one of 'serious disadvantage', including 'their material circumstances and the vulnerability of their culture'.²² On the face of it, therefore, 'only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances'.²³

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

The ambiguous result in the Hindmarsh Island Bridge case highlights the tenuous position of Aboriginal peoples and Torres Strait Islanders under the *Constitution*. As a result of the 1967 referendum, laws can be made by the federal parliament with respect to them. However, there is nothing in the *Constitution* to indicate that such laws should be for their benefit, or that such laws should not discriminate against them on the basis of their race.²⁴

What change is needed?

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*,²⁵ 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.²⁶ 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*.²⁷ It might not, however, provide protection for laws passed under powers in other parts of the *Constitution*, such as the territories power in section 122.²⁸ 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.²⁹

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 the 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.³⁰ 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.³¹ 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.³² 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.³³ 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

The *Australian Constitution* should be amended to recognise Australia's first nations. However, recognition should not stop with the mere mention of Aboriginal and Torres Strait Islander peoples in a new section or preamble to the document. This would be worthwhile, but insufficient to deal with substantive problems in the body of the *Constitution* brought about by the framers' desire to enable Australia's parliaments to discriminate on the basis of race. The addition of fine words about Aboriginal people would ring hollow if the body of the *Constitution* continues to permit racial discrimination against them.

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2. For information on the panel and its work, see www.youmeunity.org.au.
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4. Official Record of the Debates of the Australasian Federal Convention: 1891–1898 (hereafter *Convention Debates*), vol 4, Melbourne 1898, at 228–229.
5. *Convention Debates*, vol 5, Melbourne 1898, at 1784 per Dr Quick.
6. *Convention Debates*, vol 4, Melbourne 1898, at 665 per Sir John Forrest. See *Goldfields Act 1895* (WA), sections 14, 92; *Goldfields Act (Amendment) Act 1898* (WA), s 4.
7. *Convention Debates*, vol 4, Melbourne 1898, at 666.
8. *Convention Debates*, vol 5, Melbourne 1898, at 1801.
9. *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337. The author appeared as counsel for the plaintiffs in this case.
10. *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (Transcript of Argument, High Court of Australia, 5 February 1998).
11. *Ibid.*
12. *Ibid.*
13. Justice Callinan had previously advised the Commonwealth that the Act was constitutionally valid. See Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of its Own' (1999) 73 *Australian Law Journal* 72.
14. *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 376.
15. *Western Australia v Commonwealth* (1995) 183 CLR 373 at 460.
16. 5 US (1 Cranch) 137 (1803).
17. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.
18. *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 411.
19. *Ibid.* at 413.
20. *Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 56.

21. *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 366.
22. *Ibid* at 367.
23. *Ibid* at 367.
24. See generally Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton, *Australian Constitutional Landmarks* (Cambridge University Press, 2003), 180.
25. The general approach to interpreting the scope of such heads of power by the High Court is that the text is to be construed 'with all the generality which the words used admit' (*R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225–6).
26. Jim Spigelman, 'A Tale of Two Panels' (Speech delivered at Gilbert + Tobin Centre of Public Law Constitutional Law Dinner, 17 February 2012) www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner_speech_j_spigelman.pdf.
27. See s 51(13) of the *Constitution*, which enables federal legislation with respect to 'Banking, other than State banking'. In *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 it was held that the words 'other than State banking' are a limit not only on the 'banking' power, but also on other heads of power in s 51. The guarantee of 'just terms' for any 'acquisition of property' in s 51(31) applies in the same way.
28. But see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 and *Wurridjal v Commonwealth* (2009) 237 CLR 309.
29. George Williams, *A Charter of Rights for Australia* (UNSW Press, 2007), 16–17.
30. See, eg, *Canadian Charter of Rights and Freedoms 1982*, s 15:
- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
31. *Wik Peoples v Queensland* (1996) 187 CLR 1.
32. *Northern Territory National Emergency Response Act 2007 (Cth)*.
33. *Report of the Expert Panel*, above n 3, xviii.

