Comments

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DRAFTING A REPLACEMENT FOR THE RACES POWER IN THE AUSTRALIAN CONSTITUTION

A key question for any referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution is what to do about the races power in s 51(xxvi). It enables the federal Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". The Expert Panel report[1] delivered to Prime Minister Julia Gillard in January 2012 recommended that the power be removed from the Constitution.

The Expert Panel also recommended that a new replacement power to pass laws for Aboriginal and Torres Strait Islander peoples be inserted into the Constitution. It reached this conclusion because s 51(xxvi) is of continuing importance. It enables legislation such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Native Title Act 1993* (Cth) and, since the High Court's decision in *Williams v Commonwealth*,[2] a range of direct Commonwealth payments for matters such as Indigenous education, employment and housing.[3] Repealing the races power would presumably mean that such legislation and payments would become invalid. As a result, the races power needs to be replaced, rather than merely repealed.

CONSTRAINTS AND GUIDING FACTORS

Drafting a replacement for the races power is subject to a number of constraints and guiding factors. First, the object of replacing the races power is not to alter the scope of federal or State power, but merely to remove discriminatory references to the concept of race. As a result, a replacement power ought to, as closely as possible, provide *continuity* with the scope of the races power in so far as it relates to Aboriginal peoples. This goal is also important because of the political significance attached to the 1967 referendum, which enabled the making of national laws for Aboriginal peoples by the federal Parliament. It achieved this by removing the words "other than the aboriginal race in any State" from the races power.

Secondly, the replacement power must retain the *flexibility* of the races power as a means not only to support current actions, but also future laws and payments. For example, the races power proved sufficiently flexible to enable the regulation of native title,[4] a legal concept first recognised by the High Court in 1992 in *Mabo v Queensland (No 2)*.[5] The replacement power must extend to any other common law rights particular to Aboriginal people that might be recognised by the courts. Lest the referendum be opposed by significant sections of the Aboriginal community, it must also provide a source of power should the federal Parliament ever wish to provide for a treaty between Aboriginal peoples and the state.

Thirdly, a replacement power should *not enable the enactment of laws that discriminate on the basis of race*. By today's standards, the rationale for the races power was 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 1897-1898 Constitutional Convention that the races power was necessary to enable the Commonwealth to "regulate the affairs of the people of coloured or inferior races who are

[1] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012).

[2] *Williams v Commonwealth* (2012) 248 CLR 156.

[3] *Financial Management and Accountability Regulations 1997* (Cth), Sch 1AA Pt 4, items 407.022, 407.052 and 410.017.

[4] *Western Australia v Commonwealth* (1995) 183 CLR 373 (*Native Title Act Case*).

[5] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

in the Commonwealth".[6] The High Court decision in the *Hindmarsh Island Bridge Case*[7] also left open the possibility that the power can be used to enact racially discriminate laws even after the 1967 referendum. As the Expert Panel found, a key component of the recognition agenda is to constrain the ability of the Commonwealth to discriminate on the basis of race.[8] Ideally, this would mean a constraint that engages with the potential impact, as well as purpose, of Commonwealth legislation, and one that adopts a substantive rather than purely formal view of equality.

EXPERT PANEL RECOMMENDATIONS

The Expert Panel grappled with these issues in recommending that a new s 51A be inserted into the Constitution. After setting out a preamble recognising matters including "that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples" and "acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples", the section conferred power on the federal Parliament to make laws with respect to "Aboriginal and Torres Strait Islander peoples".[9]

The Expert Panel further recommended a guarantee against racial discrimination that would limit this and other powers. The proposed s 116A would provide:

> (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
>
> (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.[10]

Neither Labor while in office, nor the new Coalition government led by Prime Minister Tony Abbott has responded to the recommendations of the Expert Panel. Abbott though has been critical of the notion that the Constitution include a clause like s 116A, rejecting the idea as a "one clause Bill of Rights".[11] Putting the merits of this claim to one side, it appears unlikely that the Abbott government will proceed with constitutional recognition in the form recommended by the Expert Panel. This has reopened debate about a replacement for the races power. The options fall into three broad categories reflective of the types of Commonwealth powers currently found in the Constitution.

A SUBJECT MATTER POWER

One option advocated by former New South Wales Chief Justice Jim Spigelman[12] would replace the races power with a power defined by reference to a list of subject matters of special significance to Aboriginal people. The power might thus refer to matters such as Aboriginal health, education, employment and representation, and the traditions, customs and customary entitlements of Aboriginal peoples, including native title. Such a list could satisfy the requirement of continuity with the races power, though the list of matters covered might need to be extensive given the diverse range of laws and payments currently supported by the races power.

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[6] "Debates of the Australasian Federal Convention", Third Session, Melbourne (27 January 1898) (Sir Edmund Barton) in *Official Record of the Debates of the Australasian Federal Convention, 1891-1898* (Legal Books, 1986) Vol 4, pp 228-229.

[7] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (*Hindmarsh Island Bridge Case*).

[8] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, pp 149-150.

[9] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, p 133.

[10] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, p 173.

[11] Karvelas P, "Historic Constitution Vote over Indigenous Recognition Facing Hurdles", *The Australian* (online) (20 January 2012), http://www.theaustralian.com.au/national-affairs/policy/historic-constitution-vote-over-indigenous-recognition-facing-hurdles/story-fn9hm1pm-1226248879375.

[12] Spigelman J, "A Tale of Two Panels" (Speech delivered at the Constitutional Law Dinner, Sydney, 17 February 2012), http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner_speech_j_spigelman.pdf.

A different concern is whether even a long list of subject matters can include all topics of potential future significance to Aboriginal people.[13] One way to overcome this problem of flexibility might be to make such a list illustrative, rather than exhaustive, and to give power to the Commonwealth to make laws with respect to these and other "like" subject matters. The Constitution already contains a power in this form – that in s 51(v) over "Postal, telegraphic, telephonic, and other like services". Overseas experience, however, suggests that courts can have difficulty developing clear and predictable criteria for identifying those topics or categories that count as analogous in this context. The more internally diverse the categories are, the more likely this also is to be the case. An illustration is the approach of the Supreme Court of Canada to identifying "analogous" grounds of discrimination under the *Canadian Charter of Rights and Freedoms 1982*.[14] That court has sometimes taken a generous approach to the task, but in other cases has adopted a more formalistic approach.[15]

A different approach again would be to define the relevant subject matter more broadly. In a submission to the Expert Panel, Allens (Arthur Robinson) proposed a power to make laws with respect to "the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples".[16] Words such as this would likely have a high degree of continuity with current law (though it is not certain that they would encompass the concept of native title), but it is not clear that they are sufficiently flexible to encompass subjects of future actions with respect to Aboriginal peoples that would currently fall under the races power, such as laws and payments dealing with the economic empowerment of Aboriginal communities.

In any event, none of these drafting options deals directly with use of the power to enact legislation that discriminates against Aboriginal people. The test of whether a law is valid under a subject matter power is whether it has a "sufficient connection" to the relevant subject matter.[17] And while it may be thought undesirable to pass a law under a power that was designed to further Aboriginal disadvantage, it is not clear that such a law would be beyond the scope of the power. This is because the question of characterising the law is merely whether the requisite connection exists, and not additional matters relating to the "justice, fairness, morality and propriety" of the law.[18]

A PURPOSIVE POWER

A second option is to define Commonwealth power by reference to certain ends, or purposes. The validity of a law purportedly enacted under such a power is determined not merely according to whether the law has a sufficient connection to the relevant subject matter, but whether the law is "proportionate" or "reasonably appropriate and adapted" to the achievement of the relevant purpose.[19] This may enable the High Court to examine the impact of the law upon human rights, including whether the law on its face or in its practical effect discriminates against Aboriginal peoples. Even if the court did take this approach, such protection would be limited to laws passed under this power. It would not apply to laws enacted pursuant to other heads of power.

A purposive replacement power might enable the making of laws with respect to the elimination of all forms of race-based discrimination, or the adoption of "special measures" for the elimination of racial discrimination. A federal power to eliminate race-based discrimination has clear parallels with the United States Constitution, which gives Congress a power to "enforce, by appropriate legislation"

[13] Brennan S, "Constitutional Reform and its Relationship to Land Justice" (2011) 5(2) *Land, Rights, Laws: Issues of Native Title* 1 at 7.

[14] *Canada Act 1982* (UK) c 11, Sch B, Pt 1 (*Canadian Charter of Rights and Freedoms*).

[15] Dixon R, "A New Theory of Charter Dialogue: The Supreme Court of Canada, Charter Dialogue and Deference" (2009) 47 *Osgoode Hall Law Journal* 235.

[16] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, p 151.

[17] *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 at 491 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[18] *Burton v Honan* (1952) 86 CLR 169 at 179 (Dixon CJ).

[19] See, for example, in the context of the defence power in s 51(vi) of the *Constitution*: *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 592-593 (Brennan J) (*War Crimes Act Case*).

the requirements of Equal Protection found in the Fourteenth Amendment.[20] A power to adopt "special measures" would reflect the recognition provided by international law that states may take such measures to achieve substantive equality.

A concern with such drafting would be its capacity to ensure continuity. The *Native Title Act*, for example, is not directed to eliminating discrimination, but regulating a common law property right held only by Aboriginal peoples. It is also not clear that such drafting would enable the general recognition of Aboriginal culture and languages. Most provisions that focus on discrimination, and its elimination, contemplate a point at which such a goal will be achieved. In the United States, O'Connor J famously suggested in 2003 that in 25 years, "the use of racial preferences [would] no longer be necessary" to achieve racial diversity in higher education.[21] Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* likewise states that special measures "shall not be continued after the objectives for which they were taken have been achieved".[22] For many Aboriginal people, however, the Constitution must enable *enduring* recognition of their distinctive traditions, culture and ties to land. While arguments could be made for this within a discrimination-based paradigm, this will necessarily involve great uncertainty.

One way to overcome this problem may be to draft a purposive power with a more forward-looking focus, such as by framing the power in terms of:

> the recognition and advancement of Aboriginal and Torres Strait Islander people.

The concept of "recognition" might be understood by the High Court to be purely formal and symbolic, or to have a more substantive dimension. But in any event, it would likely give the Commonwealth a power to adopt measures that acknowledge the status of Aboriginal and Torres Strait Islanders as Australia's first peoples. Beyond that, it is hard to say what the court might make of the concept of "recognition" as a source of power.

"Advancement" is a term that has a mixed history in Australia. It has been used to justify racially paternalistic, and racist, policies.[23] But it has also been used by Aboriginal people as a rallying cry for asserting their civil rights. Borrowing from the language used by civil rights leaders of the NAACP or National Association for the Advancement of Colored People in the United States, Aboriginal leaders in the 1950s formed the Federal Council for the Advancement of Aborigines and Torres Strait Islanders. It played a key role in convincing Australians to vote "Yes" at the 1967 referendum. Recognising this, the Expert Panel proposed that the term "advancement" be used in a preamble to a new race power.[24]

The term "advancement" has been adopted in the South African and Indian Constitutions, where it has been given a wide meaning.[25] While the context for its use would be different in Australia, it is likely that the High Court would interpret it similarly to authorise measures designed to redress inequality and achieve more forward-looking goals such as economic empowerment. This could enable the making of laws for native title as well as new forms of title designed to advance Aboriginal equality in different ways.[26] Lest there were any doubt about whether such a power could support the making of laws for the recognition of Aboriginal culture and traditions, it could be further elaborated

[20] United States Constitution, Amendment XIV, s 5.

[21] *Grutter v Bollinger* 539 US 306 at 343 (2003).

[22] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[23] See, for example, Frankland K, "A Brief History of Government Administration and Torres Strait Islander Peoples in Queensland" (1994) p 11 (discussing the Queensland "Department of Aboriginal and Islander Advancement") (unpublished paper, copy on file with authors).

[24] Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, pp 150-151.

[25] See, for example, *Constitution of the Republic of South Africa 1996* (South Africa), s 9(2); *Constitution of India 1950* (India), Arts 15(4), 16(4). See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) (giving very broad scope to the concept of advancement in s 9(2)); *MR Balaji v Mysore* AIR 1963 SC 649 (giving broad scope to make reservations based on caste, providing the reservations targeted not just caste per se, and did not go above some (generously defined) ceiling).

[26] On the link between non-traditional or statutory forms of native title and empowerment, see *R v Kapp* [2008] 2 SCR 483.

so as to be expressed as being for "the recognition and advancement of Aboriginal and Torres Strait Islander people *and their distinctive culture, language and traditions*".

There is uncertainty about how the High Court would interpret such a power given the lack of domestic constitutional precedent for such language.[27] It is likely, however, to satisfy the requirements of continuity and flexibility, and may provide protection against discriminatory laws. If a legislative measure were patently not aimed at advancing the interests of Aboriginal people, or adopted means that were poorly tailored to achieving those aims, the High Court could find that it was not reasonably appropriate and adapted to meeting the purposes of the power. This, however, could cut both ways. Non-Indigenous Australians might also use this avenue to challenge legislative measures with beneficial aims on the basis that they also failed the proportionality test.[28]

A PERSONS POWER

A third drafting option would be to follow the approach adopted by the Expert Panel, while combining its proposals in respect of the races power and s 116A. It might be that, rather than inserting a new s 51A into the Constitution, the races power could be replaced with a power to make laws with respect to:

> Aboriginal and Torres Strait Islander people, but not so as to discriminate adversely against them.

One slight change from the recommendation of the Expert Panel is to use the word "people", rather than "peoples". This change, in shifting away from the notion that the power is focused upon Aboriginal people as a group, removes the possibility that it might not extend to laws for Aboriginal people as individuals or subgroups of Aboriginal people (such as Aboriginal women or youth).

The qualification "but not so as to discriminate adversely against them" adapts the wording "but not so as to authorize any form of civil conscription" in s 51(xxiiiA) of the Constitution. This wording was moved in Parliament as an amendment by Robert Menzies to the social services proposal put to the people in 1946 by the Chifley Labor government.

The word "discrimination" could incorporate the existing jurisprudence on this concept in regard to ss 92 and 117 of the Constitution.[29] As a constraint, the idea of discrimination includes a focus by the High Court on the practical impact, as well as formal terms or purpose, of legislation, and also a substantive inquiry as to whether any law with such an impact could be considered reasonably appropriate and adapted to advancing some non-discriminatory purpose.[30]

This power mirrors the scope of the races power in so far as it applies to Aboriginal people. It thus has the highest degree of continuity and flexibility. It would also provide a more effective anti-discrimination constraint than either a subject matter and purposive power because in this form it has been drafted as both a power and a guarantee.

The High Court has adopted a broad approach to interpreting the powers granted to the Commonwealth Parliament in s 51: this is one reason why members of the court in the *Hindmarsh Island Bridge Case* suggested that the races power may still extend to measures that negatively, as well as positively, discriminate with regard to racial minorities. However, the court has adopted a different approach to powers that contain express qualifications.[31] Hence, it has held that the words "other than State banking" in s 51(xiii) impose a restriction upon federal legislative power generally,

[27] Brennan, n 13 at 6.

[28] See Expert Panel on Constitutional Recognition of Indigenous Australians, n 1, pp 150-151 (noting this, and suggesting that it favoured use of the word of advancement only in a preamble to, rather than in the body of, a new races power).

[29] See Simpson A, "The High Court's Conception of Discrimination: Origins, Applications, and Implications" (2007) 29 *Sydney Law Review* 263. "Discrimination" is used in a different context in s 51(ii) in respect of taxation and equality of treatment between the States.

[30] See *Maloney v The Queen* (2013) 87 ALR 755 at 808 (Bell J).

[31] There are, of course, debates as to what constitutes such a limitation: see, for example, *New South Wales v Commonwealth* (2006) 229 CLR 1 (*WorkChoices Case*) (on the effect of the words "conciliation and arbitration" in s 51(xxxv).

rather than a restriction only on the scope of s 51(xiii).[32] The court has also recognised a number of like prohibitions, including the words "but not so as to authorize any form of civil conscription" in s 51(xxiiiA),[33] and has suggested that such limits may apply to the Commonwealth's power to regulate the Territories under s 122.[34]

Yet, a power and guarantee in this form would offer significantly narrower protection than the proposed s 116A. It would apply only to Commonwealth, and not State and Territory, laws. It would also not protect all people from racial discrimination, only the Aboriginal people referred to in the power.

CONCLUSION

Determining a replacement for the races power as part of a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution raises a number of challenging drafting issues. The difficulty is magnified by the need to continue the scope of the races power with respect to Aboriginal peoples, while also providing for future flexibility and limits upon the capacity of the Commonwealth to discriminate against Aboriginal peoples.

Our analysis suggests that a subject matter power is not likely to satisfy these requirements. A more appropriate option would be in the form of a purposive power or a provision that incorporates both a power and the guarantee. Provisions in this form might, respectively, be drafted as powers that enable the federal Parliament to make laws with respect to either:

> the recognition and advancement of Aboriginal and Torres Strait Islander people and their distinctive culture, language and traditions
>
> or
>
> Aboriginal and Torres Strait Islander people, but not so as to discriminate adversely against them.

Either drafting option could meet the requirements of continuity and flexibility, while the latter provides a superior option in terms of the protection offered against racial discrimination.

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[32] *Bourke v State Bank (NSW)* (1990) 170 CLR 276.

[33] *WorkChoices Case* (2006) 229 CLR 1 at 127 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[34] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Wurridjal v Commonwealth* (2009) 237 CLR 309.