Race Has No Place in Constitutional Reform

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In 1967 Australians voted in favour of a constitutional referendum proposal in greater numbers than had ever been achieved before, and has ever been achieved since.

That referendum removed racial discrimination from the Australian Constitution, and helped to further include Aboriginal and Torres Strait Islander peoples in mainstream Australian life. 90.77 per cent of the eligible votes cast were in favour of the referendum proposal.

A number of factors influenced the result in 1967—the proposal was simple, it had a clear moral message, and it proposed to remove text from the constitution rather than adding it. But more important was the idea that underpinned the proposal. The idea was uncomplicated but enormously compelling—that Aboriginal and Torres Strait Islanders are equal to all other Australians. This is the key message that lies at the heart of the success of the 1967 referendum. The easily explained proposals were aimed at equality.

As a new constitutional referendum proposal relating to Indigenous Australians appears on the

horizon, it's important for modern political leaders to learn this crucial lesson of constitutional history.

Following former prime minister Tony Abbott and his extraordinary statement that he would 'sweat blood' over the issue of Indigenous recognition, Malcolm Turnbull has recommitted his Coalition government to the project of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution. The Prime Minister and Leader of the Opposition Bill Shorten jointly announced in December 2015 the establishment of a bipartisan advisory council to consult on the best way of moving forward.

The current campaign for constitutional recognition revolves around proposals that are divisive, inappropriate for a liberal democracy and which go against eff orts to move away from the outdated concept of race. The best way forward is to ensure the nation's founding document unites all Australians in the same way that Australians were unified in 1967— around the principle of equality.

While it is intended a referendum to make such a constitutional alteration should take place in 2017, the proponents are not united in their view of what form this change should take.

As the IPA's Chris Berg noted in the ABC's *The Dr um* last year in June, 'constitutional recognition… is a conceptual, legal and political mess,' and nothing has changed. T e lack of clarity of what proponents actually desire is predictably giving rise to various proposals. This ranges from the supposedly minimal— such as declaratory statements of recognition—to similarly vague but objectionably more dangerous proposals such as prohibitions against racial discrimination, in effect creating a one-clause bill of rights.

There is a compelling case to be made for changing the constitution. References to race, such as section 25 and the race power in section 51 are either out of date or inappropriate in a liberal democracy. Unfortunately, much of the passion from activists is directed towards substantive proposals. Even 'preambular' language—a declaration in the constitution of historical fact—is not typically supported in and of itself.

Most disappointing is that so many proponents continue to see the government as the fi x when government action, particularly from Canberra, has served the Indigenous community so poorly up until now.

The report Joint Select Committee on Constitutional Recognition (JSC) tabled in parliament in June 2015, proposes a number of changes from which we can gather would ultimately be chosen for consideration by the Australian people at a referendum. The JSC made the following recommendations:

Section 25 should be repealed; section 51(

1. vi) (the race power) should be repealed, and in its place a new 'beneficial' race power inserted; and that as part of a new race power, a series of declarations of recognition should

be inserted, recognising the Australian continent's first inhabitants, acknowledging and respecting that Indigenous Australians have a continuing relationship, and continuing cultures, languages and heritage.

Section 25 is another provision that includes a reference to race. Despite being mischaracterised by most as somehow permitting governments to restrict voting rights on the basis of race, it was designed to actually to prevent that from happening. At the time of federation, Queensland, Western Australia and the Northern Territory of South Australia denied the vote on racial grounds (in the case of the Northern Territory, such as it was then, most immigrants were banned from voting but all British subjects, including Indigenous Australians could vote).

Section 25 would theoretically act to exclude those groups from being counted in the population of the states, which would reduce their allotment of seats in the House of Representatives. In effect, those states which had prohibitions on voting at the state level could be penalised by losing their entitlement to the amount of House of Representatives seats they might otherwise have claimed. But that is only part of the story. At the time and until 1967, section 127 of the constitution provided:

In reckoning the numbers of the people of the Commonwealth, or of a State or other part of a Commonwealth, aborigine natives shall not be counted.

While section 25 did act to exclude various groups from determining the population of a state, section 127 rendered section 25 redundant where the franchise of Indigenous Australians was concerned. As Professor Anne Twomey noted in 2012:

Section 25, therefore, did not apply to voting rights in the States for as long as s127 existed.

Section 127 was repealed, sensibly, in 1967, which reactivated section 25. However, by that point the franchise had been extended to Indigenous Australians, leaving it redundant.

The existence of section 25 points towards a darker time in Australian history, where many laws were passed which detrimentally affected certain racial groups. Thankfully, Australia has progressed beyond those views and, as a 'dead letter' clause in the constitution, section 25 should be discarded.

Of more significance is section 51(

1. vi) of the constitution, which provides that the federal parliament shall have the power to make race-based laws. This is obviously discriminatory and illiberal, and gives the federal government the power to divide Australian people according to outdated concepts of race or ethnic background.

It should be a universal principle of governance that all humans are of equal worth; conversely, the concept that the state can treat individuals differently based on personal traits such as race, religion or gender, should be rejected. To his credit, one of the chief proponents of constitutional recognition shares this view to some degree. In his 2014 Quarterly Essay on the topic, Noel

Pearson roundly rejects race in the constitution, wielding a conservative case:

Conservatives value national unity They disavow separatism, collectivism and division among citizens, preferring instead individualism bound by a common sense of national unity and patriotism. That is why they should support the removal of references of “race” that serve to divide citizens.

However, soon after Pearson enters into rhetorical gymnastics by arguing that the current race power can be replaced by a new race power, that somehow isn’t quite a race power:

Constitutional recognition could therefore include removal of the race clauses and the insertion of a replacement power to enable the Commonwealth parliament to pass necessary laws with respect to Indigenous peoples.

Th is forms the basis of all the JSC’s proposals. A so-called indigeneity power is a race power by another name. For the clause to have any meaning in law, the High Court would necessarily be required to define the clause in terms of the ethnic background of a person that can be traced to pre-colonial Australia.

Furthermore, an indigeneity power which promises to be ‘beneficial’ runs into an obvious practical problem: that is, how can a law be deemed beneficial, or when would a law ever be struck down as deleterious? These are political questions that ought to be resolved democratically. Handing power to lawyers and judges does nothing to empower the Indigenous community.

There are also a number of significant problems with even the symbolic recognition proposals. No one can be certain how a future High Court will interpret words in the constitution, but given its work in recent decades to radically redraw and expand the limits of federal lawmaking power, while also reading between the lines of the document’s ‘implied rights’, it is not so absurd to be pessimistic about how the High Court would treat symbolic words in the future.

Put simply, the proponents prescribe to our constitution a symbolic power or purpose that it does not (or should not) have. Australia is one of the world’s oldest and most successful continuing democracies, which is in large part due to a constitution that is purely functional.

Limiting the constitution to such core duties is more than likely a reason why the document has been so successful in establishing Australia as a free nation. The affixation of symbolic language would distract from this.

Most strange is that the current push for constitutional recognition is being billed as concluding the work begun in the 1967 referendum. Prime Minister Abbott famously called it ‘completing the constitution’.

Although at the time of the 1967 campaign some pitched the cause as offering Indigenous peoples full Australian citizenship, it was actually a campaign to remove two clauses which referred to race—and it was overwhelmingly successful.

Now, recognition advocates wish to adopt the spirit of 1967 yet rather than remove the remaining references to race in the constitution, they wish to insert provisions of race in. This is a step backwards.

Saddest of all, Aboriginal and Torres Strait Islanders taken collectively have fallen behind. Well-intentioned but misplaced government assistance has led to welfare traps in many communities, and the response is too often an ever-more paternalistic response from the federal government. Symbolic changes to the constitution will not remedy this.