THE 1967 REFERENDUM: 40 YEARS ON

Larissa Behrendt*

On Australia Day in 1938 a group of Aboriginal people protested in front of Australia Hall after they were moved off the Town Hall steps. This small protest was the culmination of decades of activism by Indigenous communities and their leaders in the south east of Australia; leaders such as William Cooper and Fred Maynard, who had sought the same rights as all other Australians, especially in relation to their ability to own land, to access jobs and to access education and health services.

The protest was also a beginning. It was the beginning of the Indigenous rights movement and the long road to equality under the legal system. The focus on citizenship rights as an important part of the campaign for Indigenous equality was a key platform in the activism of advocates like Cooper and Maynard, and it influenced future generations to come.

Inclusion through equal access to education, employment and the economy were seen as key ways of improving the situation of Aboriginal people. Men like Cooper and Maynard had worked on pastoral stations that they were prevented from owning. They were self-taught men and they believed that if Aboriginal people were given the same opportunities as other Australians and could make the key decision about their communities, their families and their lives, they would be able to find their own solutions to their problems. These notions of access and opportunity underpinned the desire for 'citizenship rights', and along with the claim over land and the desire for self-determination, they created the key platforms in the Indigenous political agenda.

Today, Indigenous Australians still have a life expectancy that is 17 years less than that of their non-Indigenous counterparts. Statistics continue to show poorer health, education, housing and employment outcomes for Indigenous people. While some moments in our nation's history have shown a heightened interest in Indigenous issues and a greater effectiveness at addressing Indigenous disadvantage, there have equally been moments in which it is clear that the issue of reconciliation with Indigenous people is a contested priority within the Australian community. But one moment at which Australians seemed united in their interest in Indigenous equality was in the popular support for the 1967 referendum.

Forty years on from that constitutional moment, it is an opportune time to reflect on that constitutional change and evaluate the impact and legacy of that important constitutional moment.

I The Silences in the *Constitution*

To understand the 1967 referendum, it is important to remember the some of the key assumptions and choices made by the framers of the *Constitution*.

The omission of Indigenous people both from the drafting process and from within the content of the *Constitution* is a reminder of the ideologies that shaped thinking around Indigenous people at that time. Most influential were the beliefs in white racial superiority, the idea that Aboriginal people were a dying race and that the most humane thing that could be done for them was to allow them to fade out with dignity. These ideologies are often cited as the main reason why Aboriginal people were excluded from the *Constitution*; however, the absence is also explained by considering the attitudes towards rights more generally within the founding document.

The framers of our *Constitution* believed that the decision-making about rights protections – which ones we recognise and the extent to which we protect them – were matters for the

Parliament. They discussed the inclusion of rights within the *Constitution* itself and rejected this option, preferring instead to leave our founding document silent on these matters. It was a document framed within the prejudices of a different era – of xenophobia, sexism and racism.

A non-discrimination clause was discussed in the process of drafting the *Constitution*. In *Human Rights under the Australian Constitution* George Williams notes that the Tasmanian Parliament put forward a proposed section 110 that, in part, stated 'nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws'.[1]

This clause was rejected for two reasons. First, it was believed that entrenched rights provisions were unnecessary. Second, it was considered desirable to ensure that the Australian States would have the power to continue to enact laws that discriminated against people on the basis of their race. If one is aware of the intentions and the attitudes held by the drafters of the *Constitution* it explains why it is a document that offers no protection against racial discrimination today.

II The Legacy of Silence

The 1997 case of *Kruger v Commonwealth*[2] was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. In *Kruger* the plaintiffs brought their case on the grounds of the violation of various rights by the effects of the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs claimed a series of human rights violations, including the implied right to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in section 116 of the *Constitution*. They were unsuccessful on each count, a result that highlights how the general lack of rights protection in our system of governance has led to a legal silence surrounding the damage done to Indigenous people through the policy of forced removal.

In spite of those deficiencies, what we can see from the *Kruger* case is that the issue of child removal – seen as a particularly Indigenous experience and a particularly Indigenous legal issue – can be expressed in language that explains what those harms are in terms of rights held by all other people: the right to due process before the law, equality before the law, freedom of movement and freedom of religion. *Kruger* also highlights how few rights that we assume that we hold are actually protected by our legal system. It reminds us that there are silences in our *Constitution* about rights, and that these silences were intended; it also gives us a practical example of the rights violations that can be a legacy of that silence.

The inequities perpetuated by the silences in the *Constitution* have given Australians cause to reflect upon our foundation document in the past. The feeling that this canonical document did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum.

III The 1967 Referendum

The Federal Council for Aboriginal Advancement (FCAA) emerged in the 1950s as the first national representative body for Aboriginal people. It became the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI). It was the dominant voice for Aboriginal rights until the late 1960s. Its agenda focused on 'citizenship rights', but it also called for special rights for Aboriginal people as well. The involvement of individuals such as Jessie Street saw non-Aboriginal people work alongside emerging Aboriginal leaders such as Doug Nicholls, Joe McGuiness and Kath Walker.

Perhaps because of the focus on 'citizenship rights' in the decades leading up to the referendum, and because of the rhetoric of equality for Aboriginal people that was used in 'Yes' campaigns, it was inevitable that there would be a mistaken perception that the constitutional change allowed Aboriginal people to become citizens or attained the right to vote. The referendum did neither.

In reality, the 1967 referendum did two things: it allowed for Indigenous people to be included in the census, and it gave the federal Parliament the power to make laws in relation to Indigenous people.

A Inclusion in the Census

In her biography of Faith Bandler, Marilyn Lake goes some way towards explaining why those who advocated for the constitutional change thought that it went further than it did.[3] The notion of including Indigenous people in the census was, for those who advocated a 'Yes' vote, more than just a

body-counting exercise. It was thought that the inclusion of Indigenous people in this way would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together. It was hoped that this inclusive nation-building would overcome an 'us and them' mentality.

Sadly, this anticipated result has not been achieved. One need only look at the native title debate to see how the psychological divide has been maintained and used to produce results where Indigenous peoples' rights are treated as different and given less protection. One of the fundamental vulnerabilities of the native title regime, as it currently exists, is that the interests of the native title holders are treated as secondary to the proprietary interests of all other Australians. The rhetoric of those antagonistic to native title interests often evokes the nationalistic myths of white men struggling against the land to help reaffirm three principles in the public consciousness:

- that when Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land can evoke an emotive response but Aboriginal people can not;
- that when Aboriginal people gain recognition of a right, they are seen as getting something for nothing rather than getting protection of something that already exists. Native title is seen as an example of 'special rights'; and
- that when Aboriginal people have a right recognised, it is seen as threatening the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being 'unAustralian'.

These examples show how the notion of 'us and them' still permeates thinking about Indigenous people, especially when it comes to issues concerning Aboriginal rights. It also highlights how inclusion in the census was an ineffective way to sustain an act of inclusive nation building.

B Section 51(xxvi) – The 'Races Power'

It was thought by those who advocated a 'Yes' vote that the changes to section 51(xxvi) of the *Constitution* to allow federal government to make laws for Indigenous people was going to herald in an era of non-discrimination for Indigenous people. There was an expectation that the grant of additional powers to the federal government to make laws for Indigenous people would see that power used benevolently.

This has, however, not been the case, and we can see just one example of this failure in the passing of the *Native Title Amendment Act 1998* (Cth), legislation that prevented the *Racial Discrimination Act 1975* (Cth) from applying to certain sections of the *Native Title Act 1993* (Cth).

Consideration as to whether the races power can be used only for the benefit of Aboriginal people, as the proponents of the 'Yes' vote had intended, was given some attention by the High Court in *Kartinyeri v Commonwealth*.[4] Only Justice Kirby argued that the races power did not extend to legislation that was detrimental to or discriminated against Aboriginal people. Justice Gaudron said that while there was much to recommend the idea that the races power could only be used beneficially, the proposition in those terms could not be sustained. Justices Gummow and Hayne held that the power could be used to withdraw a benefit previously granted to Aboriginal people and thus to impose a disadvantage.

When analysing the failure of the amendment to the races power to ensure benevolent and protective legislation as its proponents envisaged, one is reminded of the original intent of the framers to leave decisions about rights to the legislature. History provides us with many examples of where the legislature has overridden recognised human rights, or has passed legislation that protects rights only to override them when there is political motivation to do so. And the other lesson that can be learnt from the 1967 referendum is that federal Parliament cannot be relied upon to act in a way that is beneficial to Indigenous people.

IV And Yet, A Triumph

Despite the fact that the 1967 referendum did not create an even playing field or herald in an era of non-discrimination, it was a high-water mark for the relationship between Aboriginal and non-Aboriginal people.

Australia has been extremely reluctant to alter the Constitution, and seemingly suspicious of many of the proposed changes. The referendum in 1967 became one of only six changes, and the one that was carried with the most resounding endorsement, winning over 90 percent of voters and carrying in all six States. At a time when many parts of

Australia were actively practicing segregation, this was an extraordinary result.

The Freedom Rides through northwest New South Wales, headed by Charles Perkins and including a group of university students – including Chief Justice James Spiegelman and historian Ann Curthoys – also worked towards changing public opinion at the time. They brought to the attention of people in the cities the crude and racist conditions that existed in places like Walgett and Brewarrina, and garnered public sympathy for Indigenous people.

The referendum also enjoyed bi-partisan support for a 'Yes' vote, a prerequisite to its success. Political leadership was shown across the spectrum to support the constitutional change that would grant more power to federal Parliament. It can be inferred that the relatively uncontentious nature of the changes – including Indigenous people in the census and increasing Federal Government power over them – assisted in obtaining this bi-partisan support. Conversely, a more radical change – one that more directly called for the entrenchment of Indigenous rights – would not have been likely to enjoy this popular support.

V An Unintended Legacy…

What are the real impacts of the changes to section 51(xxvi) of the *Constitution*? It did not produce a new era of equality for Aboriginal people as its proponents had hoped. Instead, its most enduring - though perhaps unintended - consequence was the new relationship it created between federal and state and territory governments. And rather than being a relationship of co-operation, it is one that has seen governments of both levels try to blame the other for the failure of Indigenous policies, and to shift the responsibility and the cost away from themselves.

This goes some way towards explaining one of the structural barriers to achieving social justice for Aboriginal and Torres Strait Islander people in Australia today. Indigenous communities continue to stand strong against these and other systemic injustices, recognising that although the 1967 referendum has led us to greater complications and barriers to effective Indigenous policy reform it was also another important stage in a continuing struggle for equality.

A recent example was the response prompted by negative media coverage of findings of high incidence of sexual assault in some communities and gang violence in others. Federal Minister for Aboriginal Affairs Mal Brough blamed the Northern Territory Government for not putting police into communities where violence was endemic. While he was absolutely correct that any community of 2500 people with no police force would have law and order issues, it was a simplistic response focused only on blame and cost shifting. Many other factors contribute to the cyclical poverty and despondency within some Aboriginal communities that create, over decades, the environment in which the social fabric unravels and violence, sexual abuse, substance abuse and other anti-social behaviour is rife. Just as unhelpful was the response of Northern Territory Chief Minister Clare Martin who asserted that the problem lay in the Federal Government's failure to provide adequate housing, health and education services. This assertion was correct. However, *all* governments - federal, state, *and* territory - continue to under-fund the most basic Aboriginal community needs like health services, educational facilities and adequate housing services.

Forty years ago it was precisely the same unjust conditions that made Australian voters direct the Commonwealth to take responsibility for the good government of Indigenous people, just like all other Australians.

But the other legacy of the referendum was the new era of more 'radical' rights movements that it would shape. Aboriginal people quickly became disillusioned by the lack of changes that followed from the referendum, the continual discrimination facing Indigenous people and the poor socio-economic conditions of their communities. They rejected the notion of assimilation but embraced the idea of equal rights and equal opportunities for Aboriginal people. In this environment a new generation of activists were born, and their protests culminated in the establishment of the Aboriginal Tent Embassy on the lawns of what is now Old Parliament House; from here, the new land rights movement was formed. It is this activism which will continue to carry us into the future.

VI Looking Forward

Although the 1967 referendum did not herald in the new era of equality for Aboriginal people that the proponents of the 'Yes' vote had hoped for, that constitutional change stands for something very important. At that moment, 90.77 percent of Australians voted 'Yes' for what they thought was the

beginning of a new relationship with Aboriginal people. It is one of the few occasions in our history that we can point to where we can see clear evidence of an understanding that the fates of black and white Australia are tied. It is a moment when it was understood that the quality of Australian society is going to be judged by the way it treats its Aboriginal people.

And I believe that Aboriginal people play a key role in assessing the fairness of our laws and institutions. I have always argued that it is never enough that laws, policies or the *Constitution* work for middle-class members of the dominant culture. The true test of their worth is the extent to which they work for the poor, the marginalised and the culturally distinct. Using this test, we can see that there is room for improvement in the rights of Indigenous people.

The 40th anniversary of this historic referendum is a time to reflect on what it really achieved and how much further we still have to go to achieve social justice for Aboriginal people. Otherwise we will have failed to learn the lessons of that extraordinary campaign. Facing the facts so we can meet our own challenges today is the way we can truly honour those ordinary, everyday Australians all around the country who changed our *Constitution* in 1967.

Endnotes

* Larissa Behrendt is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology, Sydney.

1 George Williams, *Human Rights under the Australian Constitution* (2002) 38.

2 (1997) 190 CLR 1 (*'Kruger'*).

3 Marilyn Lake, *Faith: Faith Bandler, Gentle Activist* (2002) 90.

4 (1998) 195 CLR 337.