The Case for a Constitution Accommodating Aborigines and Torres Strait Islanders

Frank Brennan

I accept the inevitability of Australia becoming a republic. The move to a republic will be the ideal opportunity to place adverse discrimination against Aborigines and Torres Strait Islanders outside constitutional bounds. The People's Convention needs to consider more than the identity of the Head of State.

A new preamble

Next time we consider constitutional amendments, no doubt indigenous Australians will urge the adoption of a preamble describing the fullness of human history in this land and espousing the primacy of continued Aboriginal occupation and use. We ought be able to make mention of Aboriginal history, culture and place in Australian society. A preamble of the Constitution could provide:

> "Whereas the territory of Australia has long been occupied by Aborigines and Torres Strait Islanders whose ancestors inhabited Australia for thousands of years before British settlement:
> And Whereas many Aborigines and Torres Strait Islanders suffered dispossession and dispersal upon exclusion from their traditional lands by the authority of the Crown:
> And Whereas the people of Australia now include Aborigines, Torres Strait Islanders, migrants and refugees from many nations, and their descendants seeking peace, freedom, equality and good government for all citizens under the law:
> And Whereas the people of Australia drawn from diverse cultures and races have agreed to live in one indissoluble Federal Commonwealth under the Constitution established a century ago and approved with amendment by the will of the people of Australia: Be it therefore enacted:"

The 1967 Referendum

Aborigines and Torres Strait Islanders are also likely to urge some positive reference to themselves rather than the constitutional silence which was the result of the 1967 referendum deleting the two negative references to them. Many Australians think the 1967 referendum provided some special recognition of Aborigines. It did no such thing, though the voters had good reason to think they were voting in favour of Aborigines, and not against Aboriginal interests. Prior to the referendum, the Constitution contained two adverse references to Aborigines. The 1967 referendum simply took those references out. Until 26 March 1997, Commonwealth governments viewed their additional power under the 1967 referendum as exercisable only for the benefit of Aborigines.

> "The more explicit the power, the greater the perception of a mandate to legislate for Aboriginal affairs"

Prior to 1967, the Commonwealth Parliament had power to make laws with respect to "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws". Aboriginal people in the States were expressly excluded from the legislative power of the Commonwealth Parliament. In drafting what became clause 51(26) the framers of the Constitution were primarily concerned with the need for the Commonwealth to have adequate power to make special laws for groups such as South Sea Islanders labouring in the Queensland canefields and Indian coolies needing special protection or contractual arrangements.

The 1967 referendum proposal was supported by all major political parties. The Parliament stated that the purpose of the amendment was:

> "to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Commonwealth Parliament considers this desirable or necessary.....this would not mean that the States would automatically lose their existing powers. What is intended is that the National Parliament could make laws, if it thought fit, relating to Aboriginals - as it can about many other matters on which the States also have the power to legislate. The Commonwealth's object will be to co-operate with the States to ensure that together we act in the best interests of the Aboriginal people of Australia."

The referendum was carried overwhelmingly, with five million voting in favour and only half a million against. Before 1967, the States had exclusive power to make laws for Aborigines within their jurisdiction. After 1967 both the Commonwealth and the States had the power. It could be exercised concurrently, but in the case of any inconsistency the exercise of Commonwealth power would prevail. The 1967 referendum therefore brought about a new distribution of legislative and policy making power concerning Aborigines which continues to cause clashes between the Commonwealth and some States on issues which have been a traditional State concern - very recently land title, cultural heritage and land management.

The need for specific reference to Aborigines

Section 51(26) of the Constitution which now empowers the Commonwealth Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws" is an inappropriate head of power for the exercise of a specific national responsibility to our indigenous peoples. Many Aborigines and Torres Strait Islanders think the Constitution should specify the Commonwealth's power and responsibility for Aboriginal Affairs. One option recommended by the Constitutional Commission in 1988 was the omission of section 51(26) and the insertion of a paragraph granting the Federal Parliament power to make laws "with respect to Aborigines and Torres Strait Islanders". The more explicit the power, the greater the likely perception of the constitutional mandate of the Commonwealth to legislate for Aboriginal affairs including Aboriginal lands and governance.

Use of the race power to discriminate

This is no longer an academic issue given the Howard government's reliance on Attorney General's advice that the race power can be used to legislate against the interests of Aborigines. The Hindmarsh Island Bridge Bill which prohibits the Minister from taking any action in relation to any valid application for heritage protection of Hindmarsh Island has been backwards and forwards between the two Houses of Parliament, the Senate insisting that the Bill be subject to the *Racial Discrimination Act*. The government believes that the heritage protection legislation "has proved to be unworkable in this instance, and there is no guarantee that a further reporting process would finally settle the matter." On 26 March 1997, the government informed the House of Representatives that the Bill, even if discriminatory against Aborigines, could be supported under the race power. The Minister, Dr Michael Wooldridge told the House, "Further, as to the issue about the race power, the Attorney-General has given us advice that it falls within the race power and we have to operate on that advice, as honourable members would know, having been in government themselves."

While the Attorney General concedes that Justices Murphy and Brennan indicated in the *Tasmanian Dams Case*[1] that the Commonwealth power was to be exercised only for the benefit of Aborigines even if it could be exercised to the detriment of people of other races, the Department's lawyers represent Justice Deane as having stated the contrary view when he said, "The power conferred by s. 51 (26) remains a general power to pass laws discriminating against or benefiting the people of any race." This overlooks the next sentence of Deane J's judgment which reads, "Since 1967, that power has included a power to make laws benefiting the people of the Aboriginal race." These two sentences appear in the same paragraph that conveys His Honour's interpretation of the high constitutional purpose of the 1967 referendum: "As it became increasingly clear that Australia as a nation, must be diminished until acceptable laws be enacted to mitigate the effects of past barbarism, the exclusion of the people of the Aboriginal race from the provisions of s. 51 (26) came to be seen as a fetter upon the legislative competence of the Commonwealth Parliament to pass necessary laws for their benefit." [1]

The Attorney General also relies on one sentence in the joint judgment in the *Native Title Case*[2] when their Honours are considering what constitutes "special laws" for the purposes of s. 51 (26). They say, "A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race." [2] It is a long bow to construe their Honours as supporting the assertion that the race power may be exercised to impose a disadvantage on Aborigines or on a particular group of Aborigines. It was the intention neither of the Parliament which drew up the "Case For" in 1967 nor of the voters.

Time for a guarantee against racial discrimination

Should the Hindmarsh Bill stand as a valid exercise of the race power, the thirtieth anniversary of the 1967 referendum will be the right time to scrap what was thought to be a real advance for indigenous Australians, replacing it with a provision which places beyond doubt its benign effect. Section 51 (26) should be replaced by s. 51A providing: "The Parliament shall, subject to this Constitution, have power to make laws for the benefit of Aborigines and Torres Strait Islanders."

We also need to replace s. 25, which still permits States to discriminate against people on the basis of their race, with a guarantee of non-discrimination along these lines:

> "Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin. This right is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin. Neither is it infringed by measures recognising the entitlement to self-determination of Aborigines and Torres Strait Islanders or protecting their sacred sites, native title, land rights, customary law, or cultural traditions."

Such a clause included in the Commonwealth Constitution would permanently fetter the Commonwealth Parliament and government, as well as the States, from acting in a racially discriminatory way. Failing constitutional entrenchment, the Senate Legal and Constitutional Legislation Committee ought insist that all later Commonwealth Acts, like Commonwealth legislation prior to 1975 and all State and Territory legislation, comply with the *Racial Discrimination Act*. The only exception should be when the racial group which is adversely affected has given their consent. Discriminatory legislation should hereafter never be an option.

[1] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 273.
[2] *Western Australia v Commonwealth; Wororra Peoples & Biljabu v State of Western Australia* (1995) 183 CLR 373 at 461.

Father Frank Brennan SJ AO is a Jesuit priest and lawyer.