

THE AUSTRALIAN

Constitutional change pointless without Aborigines' support

MARK LEIBLER THE AUSTRALIAN SEPTEMBER 20, 2014 12:00AM

INDIGENOUS Australians are not only the most profoundly disadvantaged group in Australian society, but the most discriminated against.

This is one reason I and many others are passionate about the importance of indigenous recognition in our Constitution.

Of course, it makes no sense to proceed with a referendum without the support of indigenous - Australians. In my view, that support may not be forthcoming unless the proposal includes constitutional protection against indigenous racial discrimination.

I came to this view in my time as co-chairman, with Patrick Dodson, of the Expert Panel on - Indigenous Constitutional Recognition. Overwhelmingly, through all our consultations, indigenous people told us their support was dependent on the proposal including the removal of the race provisions, to be replaced by a new non-race-based recognition provision — section 51A — and the insertion of constitutional safeguards to protect against future indigenous racial discrimination.

It was Marcia Langton's advocacy on the Expert Panel that convinced me there is no place for race-based provisions — sections 25 and 51 (xxvi) — in the Constitution. That there is no such thing as an "Aboriginal race".

That it is a construct, born of prejudice and ignorance, just like "half-caste", "quarter caste"; "quadroon" and "octoroon". Controlling mechanisms. Discredited.

As Noel Pearson says, there is only one race — the human race.

It is clear from the history of section 25, which assumes states can disqualify people of any "race" from voting, and by so doing must reduce the state's eligible voting population, that it serves no useful purpose. It is a dead letter.

Parliament is also authorised, under section 51 (xxvi), to make special laws for "the people of any race", including, from 1967, indigenous Australians. Moreover, we know from subsequent judicial interpretations that this section retains its original racist character, by being able to be turned to the advantage or disadvantage of any group by reference to "race".

These notions are completely out of kilter with current attitudes and our celebration of indigenous connections to country, in all their varying cultural complexities. Hence, we recommended the repeal of these race-based constitutional provisions.

While momentum is building on this front, there seems to be concern that the Expert Panel overreached on the recommended racial discrimination prohibition.

During my time on the panel three things were uppermost in my mind: indigenous people must support the proposed model, otherwise it will be a complete waste of time; there must be bipartisan support for it; and it must be reasonably capable of achieving referendum success.

This is why we made no recommendation to dedicate indigenous seats in federal parliament. From our extensive consultations we found the idea lacked any real support among most Australians, indigenous and non-indigenous alike.

Indigenous people have been on the receiving end of racial discrimination in this country for centuries now, and anything less than a substantial measure of protection against history repeating itself would be unlikely to win indigenous support.

We honoured that with our proposed section 116A, prohibiting racial discrimination by government.

However, I am certainly not wedded to section 116A. What I am wedded to is ensuring a successful referendum. To achieve this, indigenous people must give their free, prior and informed consent to it. Must be proud of it. Must champion it.

I have met many champions in my reconciliation journey. But no one more so than Pearson. Pearson has taught me indigenous communities must be intimately involved and prepared to take responsibility on all decisions that affect their future, rather than being consigned to the “last box to be ticked”.

Pearson believes, and I wholly agree with him, that indigenous constitutional recognition will succeed only if the lead first comes from the right.

Of late, Pearson has devoted much of his extraordinary intellect and deep passion for revolutionary change to persuading the Prime Minister of the merits of indigenous constitutional recognition.

In his recently published Quarterly Essay, *A Rightful Place: Race, Recognition and a More Complete Commonwealth*, Pearson sketches his preferred model, which would involve the establishment of a new indigenous body to give indigenous people a formal parliamentary voice in the laws and policies made about them. I see truly great potential in this suggestion.

The body would be authorised to provide advice to parliament and to the executive on matters relating to Aborigines and Torres Strait Islanders.

The advice would not be binding. No one in parliament or in the executive would be duty-bound to act on it. Rather, the government would be required only to table in each house any advice received. Parliament, too, would need only to give consideration to it in proposing laws relating to indigenous peoples. Simple really. But also simply powerful.

Make no mistake — if ultimately passed at a referendum, this proposal would be a huge step forward in the relationship between indigenous people and those who make laws and policies about them. It may well have greater implication for indigenous empowerment than a blanket prohibition on racial discrimination.

Pearson may encounter some resistance to his suggestions from other indigenous leaders, and I would urge them to hear each other out. His greatest task may be to convince them, and the hundreds of thousands of indigenous Australians guided by them, of the merits of his recommendations, and together to convince all Australians.

In doing so, minds will doubtless be focused on the recent interim report of the Joint Parliamentary Committee on Indigenous Constitutional Recognition, chaired by Ken Wyatt.

The committee recommends not pursuing section 116A, and instead inserting into the

recognition section a prohibition of indigenous racial discrimination. The parliamentary power to make laws with respect to indigenous people would be limited to those that do not discriminate adversely against them, and so the section could not be interpreted to their detriment. History will then be incapable of repeating itself.

Again, a simple but powerful suggestion.

The challenge from here on is to balance indigenous aspirations to achieve substantive recognition by precluding racial discrimination with conservative concerns to avoid overreaching.

The balance can, and will, be achieved only with goodwill on all sides of politics. Pearson's recommendations and those of the joint committee go a long way to achieving this balance.

Let's keep talking about it. And as we do, the Expert Panel's recommendations should not be taken as holy writ. They are a starting point.

After all, the panel consulted with thousands of people and its recommendations were unanimous. If the government is to deviate from them it should only do so after consultation with indigenous leaders.

The very moment we can be satisfied the referendum will carry we must move swiftly. We have people on all sides of politics committed to so doing.

I am optimistic that we will very soon find agreement on a form of words that indigenous peoples can be satisfied with and that will meet general expectations of all persuasions in society.

When the form of words is agreed to and the Prime Minister and Opposition Leader are at one, prepared to champion this in a very direct, open and public way, the dynamics will quickly change. Hearts and minds will follow and prospects will soar.

Then we will be ready for a historic vote. A golden window of opportunity awaits.

Mark Leibler is the senior partner at Arnold Bloch Leibler and was co-chairman of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islanders, which reported in 2012.

The Expert Panel's recommendations for referendum

Remove section 25 — which says the states can ban people from voting based on their race.

Remove section 51 (xxvi) — which can be used to pass laws that discriminate against people based on their race.

Insert a new section 51A — to recognise Aboriginal and Torres Strait Islander peoples and to preserve the federal government's ability to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples.

Insert a new section 116A, banning racial discrimination by government.

Insert a new section 127A, recognising Aboriginal and Torres Strait Islander languages were this country's first tongues, while confirming English is Australia's national language.

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