

# An answer to the race question

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**In late 2010 Julia Gillard appointed us to provide her with a considered answer to the question: How could the indigenous peoples be recognised in the Australian Constitution?**

The answer is largely a technical solution, a matter not understood by those who have rushed to the media before reading the report, handed to the Prime Minister only last Thursday.

Among our terms of reference was the proviso that our answers be legally sound. The report of the expert panel is about 300 pages in length and it examines in detail the problem posed to the panel by the Prime Minister.

The problem is complex because of potential unintended consequences. The risks were several and can be summed up in this way: if we change this part of the Constitution, there will be a consequence for another part and also for the law-making powers of the federal parliament.

This is why it is important that Australian leaders, including opinion leaders, read the report, especially Chapter 4, on forms of recognition.

Would a majority of Australian voters and the state parliaments agree to recognise indigenous Australians in the Constitution within the next two years?

Leaving aside the question of recognition for the moment, we need to examine the other key issue that has exercised members of the political class in early responses to the Report on Constitutional Recognition of Indigenous People. Should Australians be given the opportunity to answer the question: Do you want to remove racist provisions from our Constitution? If the responses from journalists, columnists and bloggers are the measure, we should consider the consequences of a referendum being held within the term of Gillard's government.

Our constitution has an imperial preamble legislated by the British parliament in 1900. The Australian parliament cannot change it. It would be entirely inappropriate to have a preamble to the Constitution recognising indigenous Australians without a more comprehensive debate among Australians about what such a preamble ought to say about all Australians, a matter not included in our brief. More to the point on the matter of what might be legally sound, two preambles to our Constitution would be awkward, not to say historically incongruous and arguably absurd.

The weight of legal opinion is that a preamble has no legal effect. The panel took this issue to ordinary Australians at its consultations, as required by our terms of reference, and their response was that it would be absurd to ask Australians to vote

at a referendum on a proposition that would have no legal effect; a pointless exercise, to say the least.

In the referendum of 1967, Australians voted to remove the racist passages that excluded Aboriginal people from being counted in the national census and from commonwealth law-making powers. Until Australians voted overwhelmingly in 1967 to remove sections 127 and alter section 51 (xxvi), these were the only references to Aboriginal people in the Constitution.

Two provisions that have had racist consequences remain. The race power and Section 25 are remnants of the racist sentiment of the Constitution developed in the 1890s at the end of the colonial period.

In part, the exclusion of Aboriginal people was designed in the late 19th century so that the states with the largest Aboriginal populations, Western Australia and Queensland, could not use these very large remnant Aboriginal populations still in the north to outnumber the southern settled states for the purposes of parliamentary representation and distribution of income by the proposed federal government.

By amending the "race power" after the 1967 referendum to remove the exclusion of Aboriginal people, which sets out the powers of the parliament to make laws, including special laws for the people of "any race", the federal parliament has had the power to legislate for Aboriginal people.

However, the weight of legal opinion is that the Constitution as it presently reads enables the commonwealth to make laws that are beneficial or detrimental; this means that the race power can support adverse laws that can discriminate against people on the basis of race.

If this is the case, as we believe it is, then this Constitutional provision enables the commonwealth to discriminate on the basis of "race", not just against Aborigines, but against any Australian deemed to be a member of a "race".

This was a constitutional problem that the panel could not ignore or exclude from our considerations in answering the Prime Minister's question.

Section 25 presented us with a similar problem. Section 25, which was not the subject of the questions put in the 1967 referendum, and which remains in the Constitution, is more difficult to comprehend. It states: "For the purposes of the last section, if by the law of any state all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the state, then, in reckoning the number of the people of the state or of the commonwealth, persons of that race resident in that state shall not be counted."

It mandates not who should have the vote but how many House of Representatives divisions to which each state shall be entitled. Legal opinion is universal that Section 25 can be interpreted as contemplating denial of the franchise to certain people on the grounds of race. Moreover, some hold that "race" is now such a discredited biological and social construct that its citation in a democratic constitution is undesirable.

The evidence of our research and inquiry and our consultations with ordinary Australians and indigenous Australians has led us to the conclusion that, as with every other inquiry into constitutional reform, we should recommend that Australians be asked to agree to remove Sections 51 (xxvi) and 25 from our Constitution because of their outdated racism.

Given that the elephant in the room in the debate about constitutional recognition of indigenous people is the "race" question, how should the Constitution read so as to be fair and treat all citizens equally?

The answer to that question can only be the prohibition of racial discrimination and discrimination on the grounds of ethnicity or national origin. This is part of the answer to the Prime Minister's question and is proposed as a new section, Section 116A.

An unintended consequence of any proposition to remove these two offending sections is that, without them, the federal parliament would have no power to make laws for Aborigines (or Torres Strait Islanders). It could not make laws such as the Native Title Act. Therefore, the panel proposed that in order to avoid removing altogether the parliament's power to make laws for all those peoples thought by racists to be members of inferior "races", there should be Subsection 2 of the new 116A which reads: "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."

In addition the panel has recommended the deletion of the race power and the insertion of a new head of power, section 51A, to make laws for Aboriginal and Torres Strait Islander peoples.

Some of those commenting are saying that this new section is a power for the advancement of ATSI peoples, when in fact, if one actually reads the report and the reasoning, the panel put advancement in the preamble to section 51A, not the substantive power.

Again, this was deliberate to ensure parliamentary sovereignty but also to respond to the many ordinary Australians consulted and who made submissions that a commonwealth head of power should not enable adverse laws that discriminate against people on the basis of race.

Constitutional change in Australia is notoriously difficult to achieve, as history shows. Only eight of 44 referendums have succeeded, none under a Labor government. The referendum question proposed by the expert panel on constitutional recognition of indigenous Australians will be the most difficult to win for a range of complex reasons.

Opinions published on this matter show how deeply this question divides even the most hardened political factions and the attachment to the race paradigm that permeates Australian law and public sentiment.

The hysteria manufactured about the panel's recommendations, long before the release of the report has caused widespread alarm among ordinary Australians, who

do not comprehend fully the simple fact of the inherent difference of indigenous people.

Patrick McCauley, speaking for the old Quadrant club of white men who lunch, denounced the idea in a hysterical diatribe against every Aboriginal leader (except Noel Pearson) in "The grim legacy of compassion" (The Weekend Australian, January 14-15).

It is not, as McCauley ignorantly argues, that we do not see ourselves as Australians, but rather that we are Australian and, as well, indigenous. McCauley, who exempts Pearson from his hysterical rage against Aboriginal people cannot comprehend that Pearson is Australian and Yimithirr, and his Yimithirr ancestors were here many tens of thousands of years before Arthur Phillip. He speaks not just Guugu Yimithirr, his father's language, but also his mother's, Guugu Yalanji, and two or three other local languages; not dialects, languages. Pearson has inherited cultural and linguistic wealth, customary rights to land and waters, along with customary responsibilities, all of which he fulfills intelligently while also participating fully in the modern nation as an intellectual and legal thinker.

The task of our inquiry was to identify the options for recognising indigenous Australians within the terms of reference. Why would we want to do so?

Briefly, it is because there are thousands of Aboriginal people who are the members of distinct groups (such as clans or tribes, not "races") whose occupation of the continent and islands long predates by tens of thousands of years the British and any other ethnic group residing here now. The ancestors of indigenous people created the country, in the way described in magnificent detail by Bill Gammage in *The Biggest Estate on Earth*, and also in far more subtle ways.

It is nonsense to say as McCauley does that the modern nation owes nothing to the first peoples. For one, it owes its land wealth to our ancestors, people who were treated savagely in order to take that land.

Their languages, or those that survive, are part of Australia's heritage, and should be treated as such, not with the contempt of McCauley and others who deny our existence as Aboriginal people.

We must proceed cautiously given the state of our citizens' understanding of these issues. Should the referendum question be defeated, the loss would result in disappointment and bitterness throughout Aboriginal Australia, and among all those Australians, such as Charlie Teo and his daughter, who have experienced racism. The question would not be put before the Australian voters again for at least a generation.

And equally, the loss would brand Australians to the world as racists, and self-consciously and deliberately so. The Prime Minister at least recognises that a referendum loss would be disastrous for the nation.

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<http://www.theaustralian.com.au/national-affairs/opinion/an-answer-to-the-race-question/story-e6frgd0x-1226249768982>