



# fact sheet



NEW SOUTH WALES  
ABORIGINAL LAND COUNCIL

## HUMAN RIGHTS

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## Introduction: Australian Constitutional Reform

This document has been prepared to support Aboriginal peoples' consideration of the Australian Constitution and current proposals for its reform.

**Please Note:** While all care has been taken in the preparation of this document, it should not be seen as a substitute for independent consideration of the issues and/or legal advice on this subject. The information in this Information Sheet is current as of June 2011.

### The Australian Constitution

The Australian Constitution is the foundational document for the nation of Australia and establishes the Commonwealth Parliament and its powers amongst other things. It can only be amended through a referendum in which a majority of voters nationally and a majority of voters in a majority of States and Territories votes in favour of change.

The tone and content of the Australian Constitution can largely be attributed to the attitudes of the political elite and the popular ideologies of the last decade of the 19<sup>th</sup> Century. It is framed so as to ensure that decision-making about rights protections are matters largely for the Parliament with only the most limited of rights embedded in it for Australia's citizens<sup>1</sup>.

At this time *terra nullius* was used to deny Aboriginal sovereignty, and Aboriginal peoples were seen as an inferior and dying race. As a result little consideration was given to Aboriginal peoples in the nation-building act of drafting the Constitution.

### Exclusion of Australia's Aboriginal peoples from the Constitution

The foundation of Australia's relationship with its First Peoples is cemented in the Australian Constitution.

Aboriginal peoples of Australia were excluded from the constitutional drafting process and as a result of the Constitution itself, from the citizenry of the new nation.

Prior to 1967, the Australian Constitution held two sections which specifically mentioned Aboriginal people:

- Section **51(xxvi)**, commonly referred to as the '**race power**', empowered the Commonwealth to make laws in 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', and
- Section **127** ensured that '**aboriginal natives shall not be counted**' in the census of the Commonwealth, States and Territories.

<sup>1</sup> Prof. Larissa Behrendt, *The 1967 Referendum: 40 Years on...*, Australian Indigenous Law Review (2007) Vol 11 (Special Edition) Australian Indigenous Law Review 12.

## 1967 Referendum to change the Australian Constitution relating to Aboriginal peoples

In 1967, Australia witnessed the most successful referendum in its history, with over 90% of the voters supporting changes to the Australian Constitution relating to Aboriginal peoples.

The referendum changed the Australian Constitution by:

- **Amending the 'race power'** to give the Government the power to now make laws for Aboriginal peoples as well as for other specific 'races'; and
- **Repealing section 127** to allow Aboriginal peoples of Australia to be counted in the national population census.

The 1967 referendum did not give voting rights and citizenship rights to Aboriginal peoples – these had been achieved federally in 1962 and in all States and Territories by 1965. Nor did the referendum end legal discrimination against Aboriginal peoples of Australia – this occurred with the *Racial Discrimination Act 1975*<sup>2</sup>.

It did however provide formal recognition for Australia's Aboriginal peoples in the population of Australia; allowing for Aboriginal peoples to be counted for the first time in their own country.

These changes, however, were achieved through the removal of any reference in the Australian Constitution to the existence of Aboriginal peoples<sup>3</sup>.

While the referendum's success is generally recognised as riding on a wave of community goodwill, it is now understood that the purpose of the 1967 referendum for the Australian Government was not necessarily to

<sup>2</sup> Russell McGregor, *The Myth of Aboriginal Voting Rights*, newmatilda.com (October 17, 2008),

<http://newmatilda.com/2008/10/17/myth-aboriginal-voting-rights>

<sup>3</sup> Prof. Mick Dodson, *The continuing relevance of the Constitution for Indigenous peoples*, National Archives of Australia in Canberra, Transcript, 2008,

<http://www.naa.gov.au/collection/explore/federation/talks.aspx>

redefine Aboriginal peoples place in the Australian nation, so much as about the redistribution of tax revenue<sup>4</sup>, and the improvement of Australia's racially discriminatory image<sup>5</sup>.

## Inherent discrimination of the Constitutional 'race power'

While popular sentiment hoped that the 1967 amendments to the Australian Constitution would be for the benefit of Aboriginal peoples, the discriminatory possibilities remained within the document<sup>6</sup>.

Unfortunately when it comes to the 'race power' the discriminatory intent of the Constitution's 19<sup>th</sup> Century drafters triumphs over the expectations of the modern nation.

The High Court of Australia in the Hindmarsh Island Bridge Case<sup>7</sup> has as recently as 1998, confirmed that the discriminatory 'race power' may be used to the detriment of Aboriginal peoples of Australia.

In that matter, the Australian Government was successful in arguing that it had authority, by virtue of the Constitutional 'race power', to enact legislation expressly removing the Hindmarsh Island area from the purview of the *Racial Discrimination Act 1975* and the *Aboriginal Heritage Protection Act 1984*.

It is important to note, that *Aboriginal Heritage Protection Act 1984* is intended to

<sup>4</sup> Reconciliation Australia's 1967 Fact Sheet Final sourced from the Australian Bureau of Statistics, *Informing a Nation: The Evolution of the Australian Bureau of Statistics 1905-2005*, 2005.

<sup>5</sup> Paul Kelly, *The image of a tragedy*, Article 'The Australian' (May 26, 2007),

[http://blogs.theaustralian.news.com.au/paulkelly/index.php/theaustralian/comments/the\\_image\\_of\\_a\\_tragedy/](http://blogs.theaustralian.news.com.au/paulkelly/index.php/theaustralian/comments/the_image_of_a_tragedy/)

<sup>6</sup> George Williams, *Old-style racism still in constitution*, National Times (September 14, 2010) <http://www.theage.com.au/opinion/politics/oldstyle-racism-still-in-constitution-20100913-1598c.html>

<sup>7</sup> *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337; 152 ALR 540; 72 ALJR 722 (1 April 1998)

[http://www.austlii.edu.au/au/cases/cth/high\\_ct/1998/22.html](http://www.austlii.edu.au/au/cases/cth/high_ct/1998/22.html)

provide protections for Aboriginal cultural heritage and the *Racial Discrimination Act 1975*, which gives effect to Australia's obligations under the United Nations *Convention on the Elimination of All Forms of Racial Discrimination*. Australia's obligations in this respect include taking all steps to eliminate racial discrimination and to review, rescind or amend laws that perpetuate discrimination wherever it exists.

The Hindmarsh island Bridge case clearly demonstrates that the race power can and will be used by the Australian Government to enact laws that detrimentally discriminate against Aboriginal peoples<sup>8</sup>.

### **Australian Constitutional Reform in 2011**

Amending the Australian Constitution to provide recognition of the sovereign First Peoples of Australia and to remove the discriminatory provisions has long remained a key aspiration for many Aboriginal peoples.

As part of the 2010 Federal Australian election campaign, all major political parties committed to reforming the Constitution to recognise the First Australian's in the Australian Constitution. This has followed the amendment of several State Government Constitutions to provide constitutional recognition for their Aboriginal peoples.

However, while the symbolism of the State based constitutional reforms are to be applauded, the reforms bring about little more than recognition in these Constitution's preambles and do little to create new rights for Aboriginal peoples.

It is important that the reform of the Australian Constitution seeks to achieve more than just symbolic outcomes for Aboriginal peoples.

The New South Wales Aboriginal Land Council recommends that the Australian Government move beyond mere symbolic recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution and seeks to at the least:

- I. Provide full constitutional recognition of Aboriginal and Torres Strait Islander peoples as the sovereign First Peoples of Australia.
- II. Remove section 51(xxvi) of the Constitution, also known as the "race power", and replace this with a power for the Australian Government to make laws with respect to '*matters beneficial to Aboriginal and Torres Strait Islander peoples in that such laws are only enacted for the sole purpose of securing the adequate advancement and the equal enjoyment or exercise of human rights and fundamental freedoms for Aboriginal and Torres Strait Islander peoples*'. This conforms to the accepted international standard for 'special measures' as allowed under the Convention on the *Elimination of All Forms of Racial Discrimination*.
- III. Remove in its entirety, section 25 of the Constitution, which anticipates the disqualification of persons of a particular race from voting in state elections.
- IV. Insert a general guarantee of racial equality and a prohibition on racial discrimination into the Constitution.

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<sup>8</sup> Michael Legg, *The Australian Constitution and Indigenous Australians*, Excerpt from *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 *Berkley Journal of International Law* (2002) <http://www.theage.com.au/opinion/politics/oldstyle-racism-still-in-constitution-20100913-1598c.html>

## **Moving beyond the Australian Constitution to secure greater rights for Aboriginal peoples**

To provide greater rights protections of Aboriginal peoples of Australia, the Australian Government must move beyond the reform of the Australian Constitution.

To ensure opportunities are created for Aboriginal peoples of Australia to remedy the disproportionate disadvantage experienced by so many Aboriginal peoples, the New South Wales Aboriginal Land Council strongly advocates for:

- The Australian Government to move forward from its 'commitment to formally support' the Declaration on the Rights of Indigenous Peoples, to fully implement these principles into laws, policies and most importantly practical measures.
- The Australian Government must unreservedly ratify and fully implement the International Labour Organisation Convention 169, the Indigenous and Tribal Populations Convention, 1989.

### **Where can I get more information?**

You can get more information by:

- Contact the NSWALC Policy and Research Unit on 02 9689 4444.