

Published on *Australian Policy Online* (<http://apo.org.au>)

[Home](#) > Race matters: changing the Australian Constitution

Race matters: changing the Australian Constitution

Creator (other):

Russell McGregor

Proposed constitutional changes must be put in terms that promote consensus, argues
Russell McGregor

-

CAN THE changes recently recommended by the **Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples** ^[1] succeed? Or to put it another way, can we repeat the success of 1967, when an overwhelming majority of Australians voted for constitutional change favourable to Aboriginal people? To answer these questions, it's helpful to put the recent panel's recommendations in historical perspective.

The panel recommended the repeal of the two sections of the Constitution which refer to 'race': Section 25, which permits states to disqualify people of a particular race from voting in state elections (though it also deters states from actually doing so); and Section 51(xxvi), which empowers the Commonwealth parliament to enact 'special laws' applicable solely to specific races. The panel made other recommendations on the constitutional recognition of Aboriginal and Torres Strait Islander peoples, but here I'll focus on the sections recommended for repeal, particularly Section 51(xxvi) since it is, and always has been, the more contentious of the two.

The original Constitution of 1901 included an additional discriminatory provision in Section 127, which stipulated that 'aboriginal natives' not be included in official census counts. This section was deleted in consequence of the 1967 referendum, which resulted in the removal of all constitutional references to Aboriginal people. The same referendum brought about the amendment of Section 51(xxvi) to its present form. Before 1967, this section specifically excluded 'the aboriginal race in any state' from its ambit. In effect, this meant that the Commonwealth had the power to enact 'special laws' for any race except the Aboriginal race.

Why was the exception made? A definitive answer is impossible. The record of constitutional drafting that culminated in 1901 gives few clues; indeed, Aboriginal issues were very seldom raised in the numerous federation conventions and conferences. Perhaps the best explanation is that offered by Hugh Mahon, a federationist and member of the first Commonwealth parliament.

Mahon suggested that the 'aboriginal race' in Section 51(xxvi) did not originally refer exclusively to Aboriginal Australians but also to Maori. The section first appeared in the constitutional draft of 1891, when New Zealand was a prospective member of the federation. At the time, Maori in New Zealand, unlike Aboriginal people in Australia, enjoyed full civil rights and New Zealand delegates were reluctant to jeopardise this by putting Maori affairs under federal (effectively, Australian-dominated) control. So a 'race power' clause was

inserted allowing the Commonwealth to discriminate against what were then regarded as undesirable 'alien' races (such as Pacific Islanders and Chinese), but the 'aboriginal race in any state' was excepted to assuage New Zealand sensitivities. After New Zealand withdrew from the federation process, the exception was retained largely out of the federal leaders' indifference toward Aboriginal affairs.

The original intention of the reference to the 'aboriginal race' in Section 51(xxvi) seems to have been beneficent (to safeguard Maori rights) but its implementation was to the detriment of Aboriginal people. Invoking this clause, successive Commonwealth governments shrugged aside responsibility for Aboriginal affairs onto the states. Whenever there was criticism of Australia's record in indigenous affairs, Commonwealth authorities trotted out Section 51(xxvi) as the standard excuse for inaction. There was nothing they could do, they protested (somewhat disingenuously) since the Constitution made Aboriginal affairs a state prerogative.

As public disquiet intensified over the status and treatment of Aboriginal people, especially after the Second World War, so pressure grew for the Commonwealth to take a greater role in Aboriginal affairs. Many campaigners for the Aboriginal cause came to believe that this required constitutional change, specifically the repeal of Section 127 and the deletion of the reference to the 'aboriginal race' from Section 51(xxvi). A campaign to amend the Constitution in this manner was launched by the human rights activist Jessie Street in 1957, and over the next ten years the campaign was led by the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI).

Some activists and politicians in the 1950s and 1960s advocated the repeal of the entirety of Section 51(xxvi): that is, the abolition of the Commonwealth power to enact 'special laws' applicable to specific races. (This is what the current Panel on Constitutional Recognition recommends.) However, the leaders of FCAATSI were convinced that the Commonwealth needed to retain its power to enact laws specific to a particular race so it could legislate for the benefit of Aboriginal people, in, for example, granting land, employment and economic opportunities. Not all FCAATSI members agreed with this, but the leadership line prevailed, so when Australians went to the polls on 27 May 1967 they voted for the deletion not of the entirety of Section 51(xxvi) but only of the reference to the 'aboriginal race'.

In any event, the constitutional niceties were lost on the majority of voters. The 1967 referendum was presented as an opportunity for the Australian public to affirm their acceptance of Aboriginal people as fellow citizens. Eagerly grasping the opportunity, the Australian people registered the greatest referendum victory in Australia's history. Over 90 percent voted Yes. In some electorates the Yes vote exceeded 95 percent, and in none was it under 70 percent – a result as close to consensus as can be expected in a democratic contest.

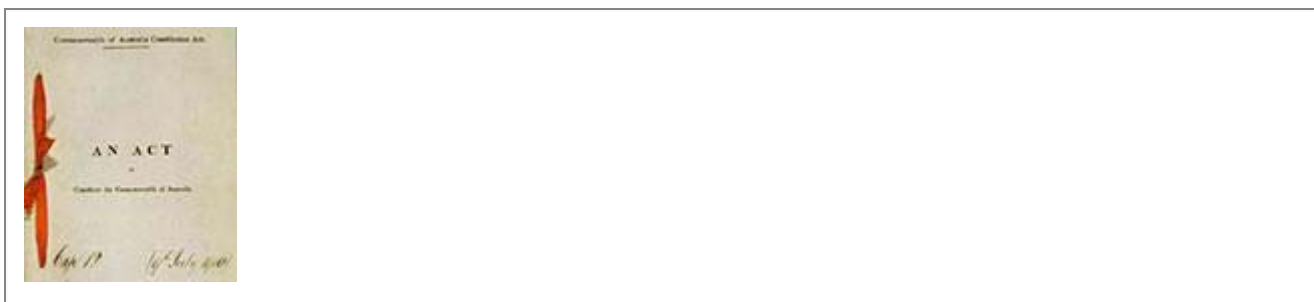
The consequences of the 1967 referendum were less tangible than is commonly supposed. Contrary to popular memorialisation, it did not secure the vote or civil rights for Aboriginal people; they already possessed these before the referendum. But this in no way detracts from the significance of the overwhelming Yes vote. As I explain in my recent book, ***Indifferent Inclusion: Aboriginal People and the Australian Nation*** ^[2] (Aboriginal Studies Press), the significance of the referendum lay in its symbolic affirmation of Aboriginal people's acceptance into the national community.

The recent recommendations of the Panel on Constitutional Recognition seek to extend that affirmation by repealing the 'race power', prohibiting racial discrimination and explicitly recognising Aboriginal and Torres Strait Islander peoples. There's an irony in the fact that the 1967 affirmation of Aboriginal acceptance resulted in the deletion of the only two references to

Aboriginal people in the Constitution, whereas the recent panel's recommendations (if successful) will put references back in again. But that merely signals the fact that social inclusion is an ongoing process that is still far from complete.

One point about the 1967 referendum that is often overlooked is that there was no campaign for a No vote. Even the federal government broke with convention by providing, in the official advice issued to voters immediately before the referendum, only the case for Yes. It seems unlikely that there will be the same degree of unanimity when the current recommendations on constitutional change go to referendum. But the lessons for those pushing for a referendum are clear: the constitutional changes must be put in terms that provoke least controversy and promote greatest consensus. •

Russell McGregor is an Associate Professor of History at James Cook University.

**Coverage:**

Australia

Subtopics:

Indigenous

Indigenous policy

Law

Reconciliation

Australian Policy Online © apo.org.au 2011. A partnership of the Australian National Institute for Public Policy and the Swinburne Institute for Social Research. | Contact APO editors at admin@apo.org.au Phone: 03 9214 8792 Fax: 03 9819 5349

Source URL: <http://apo.org.au/commentary/race-matters-changing-australian-constitution>

Links:

[1] <http://www.youmeunity.org.au/final-report>

[2] <http://apo.org.au/book/indifferent-inclusion-aboriginal-people-and-australian-nation>