Senate Occasional Lecture

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Indigenous Constitutional Recognition

The 1967 Referendum and Today

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Indigenous Constitutional Recognition – The 1967 Referendum and Today

Distinguished guests, ladies, gentlemen, brothers and sisters. I thank you all for attending.

I would like to express my appreciation at being invited and afforded the opportunity to present this Occasional Lecture in this special place at this special time. Many thanks to Tim Bryant, Director of Research and to Filia Antonino, Programme Coordinator in the Australian Senate. I would also like to thank Peter Hugonnet AM, Capt., RAN Retired for his support and suggestions for improvements to my paper.

As a Kamilaroi man and in our language ***Garay bubati*** (the language of my father) I say to you: ***Yaama Ngindaay, yaamagera Ngindaayuu!*** (Hello everyone, hello to all) – **Gulbiyaay Baawaa Gulbiyaay Dhagaan** welcome sisters welcome brothers ***Dhawun ngaya winangaylanha*** (I wish to formally recognise & acknowledge country) ***Yuruunda ngadaagilidja, Gundhidha ngadaagilidja, yal l wunga Ngunnawal Ngambri nhalay!*** (Under the bitumen and this great building, this is always the land of the ***Ngunnawal*** and ***Ngambri*** peoples).

I pay respects to their elders past, present and future, and pay tribute to their resilience and continued cultural practices on country.I would also like to acknowledge and pay respects to other elders and leaders, both Indigenous and non-Indigenous here today.

I would like to dedicate this lecture to all those people, both Indigenous and non-Indigenous, who campaigned in support of the successful 1967 Referendum. We owe them a great debt.

Introduction

This week marks the 50th anniversary of an extraordinary event in the history of Australia and I feel very privileged in being asked to share my perceptions about the nature and impact of this event.

The event, of course, being the successful 1967 Referendum in which an overwhelming majority of Australians voted to amend certain clauses in the Australian Constitution concerning Aboriginal people. Essentially changes to these clauses allowed for Aboriginal peoples to be included in the census and altered the 'race power' to allow Federal Parliament to make 'special laws' about Aboriginal peoples.

Firstly I should acknowledge that I am neither lawyer nor an expert on legal constitutional issues, secondly that although I have great respect for history I am not a trained historian and thirdly and importantly that my comments today represent my own Indigenous perspective rather than being presented as THE Indigenous perspective on the subject related issues.

Despite these shortcomings and qualifications I nevertheless feel very privileged and very proud to be invited here today and to be able to share my thoughts on this important historical and contemporary topic. Perhaps as some indication of the integrity or legitimacy of my perspectives I would refer to my past experience of over 30 years as a senior public administrator involved in Indigenous Affairs and in particular to the 15 year tenure (of the last 20 years) as the last Principal and inaugural Chief Executive Officer of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) - which ended in December last year. I am extremely proud of my long term association with AIATSIS.

To provide a reminding 'snapshot' of the social and political environment prevailing in 1967, I will highlight the few prevailing issues of the time::

- Australia was still coming to grips with a new Prime Ministerial era involving a transition from the long term Menzies era to the relative new administration and leadership of Harold Holt;

- Domestically we continued to enjoy a long economic boom and the bourgeoning mining boom was underway;
- Australian involvement in the war in Vietnam was a major cause of social and political unrest giving rise to emerging fiscal resourcing challenges;
- Sadly as an almost 'back to the future' scenario, Hobart bush fires claimed 62 lives and the 66-67 summer was considered to be the worst cyclone season in Eastern Australia on record.;
- The four digit national post code system was introduced and STD calls were possible in most of Eastern Australia;
- In the sporting arena Red Handed won the Melbourne Cup. After successful long term success St George did not play in the NRL Grand Final (won by the mighty South Sydney Rabbitohs) and Richmond started a new era by winning the VFL (now AFL) flag.

From a broader international perspective, there appears little doubt that the 1960's were rightfully considered to be the age of protest and an era of significant reform across various important socio-political agendas (domestically and internationally) involving various prominent individuals as well as powerful collectives.

I should also reflect that in May 1967 I was 19 years old and extremely unworldly and unwise regarding matters political and particularly so with regard to matters constitutional. Perhaps my main concern at that time revolved around whether or not I was to be conscripted into National Service and how this might affect my life.

However despite my general unworldliness, I was nevertheless keenly aware of the discriminatory place and low social standing of Aboriginal peoples in Australian society - developed in a visceral sense through the prism of the lived experience and history of my own immediate family and kinship and community connections.

In the interest of brevity I should state that as a small Aboriginal family residing in the Sydney inner city waterfront precinct of Millers Point (historically better known as "The Rocks" area) we were nevertheless far from isolated from the wider Aboriginal community in Sydney (particularly La Perouse and Redfern) as

well as being in touch (through frequent reciprocal visitations and the reliable Koori 'grapevine') with family and other connections from our traditional Kamilaroi country located in the New England area of New South Wales.

Accordingly, true to my riding instructions, my lecture today includes three components of my personal perspectives being:

- a short commentary about the history up to 1967 and the nature of challenges, demands and the associated campaign for national constitutional reform on Aboriginal issues;
- my personal recollection and perspective on the impact of the successful 1967 Referendum; and finally
- my perspective on aspects of the significant challenges associated with constitutional recognition currently facing the nation.

The 1967 Referendum Questions

To set the historical and factual context, I should highlight that the 1967 Referendum conducted on 27 May 1967 posed two questions. The first question for consideration, referred to then and historically as the 'Nexus question' represented an attempt to alter the balance of numbers of the Senate and the House of Representatives.

My cursory research suggests that the coupling of the Nexus question with the Aboriginal issues was thought, by some political players, to have the potential to influence a more positive outcome for the Nexus question. However I do not cover this issue in my address today and leave that commentary to others including experts such as my colleague Denis Strangman AM here today.

Suffice it to state that history shows that the 'Nexus question' was not supported having only achieved a majority in one State and a National 'yes' vote of around 40%.[1]

The focus of my comments today of course involve the second question which was to determine whether two references in the Australian Constitution,

[1] 'Clearly a majority of electors had distinguished between the two proposals and on the Nexus question had rejected the advice of the parties they traditionally supported' Strangman p341

which discriminated against Aboriginal people should be removed. The sections of the Constitution seeking reform were:

> *51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-*
>
> *… (xxvi) The people of any race**, other than the Aboriginal people** of any State, for whom it is necessary to make special laws.*
>
> *127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth**, aboriginal natives** should not be counted.*

Those championing constitutional reform considered that the removal of the words *'…other than aboriginal people of any State…'* in section 51(xxvi) as well as the entire removal of Section 127 were essential to the achievement of a successful campaign.

It is probably unnecessary for me to state that the campaign was indeed successful, and spectacularly so, in that the 1967 Referendum saw the highest YES vote ever recorded in a Federal referendum with an unprecedented 90.77% vote for change[2]. Interestingly, according to Barry Dexter {2015 p.15} such a successful outcome i.e. '*the size of the vote'* came as somewhat of a surprise to the Prime Minister of the day, the Hon Harold Holt.

Until that time only four of twenty-four Referendum had previously been successful.

I make the point that politically there was a bi-partisan approach to this Referendum and there was a complete absence of any 'NO' case formulated or publicly articulated.[3] I will make some comment about this later.

[2] Subsequently the Constitution was changed, giving formal effect to the referendum result, by the Constitution Alteration (Aboriginals) 1967 (Act No 55 of 1967), which received assent on 10 August 1967.

[3] although 9.23% voted 'No' nationally with the highest 'No' votes being recorded in Western Australia, South Australia and Queensland – said to be in those states and in rural areas where aboriginal people were most visible.

The Campaign for Reform

The demands and the formal campaign for constitutional reform in Aboriginal Affairs leading to the successful 1967 Referendum had endured a long, complex, tortuous, and to say the least frustrating history. It involved many champions and heroes both Aboriginal and non-Aboriginal alike.

Today's lecture will not allow me to properly do justice to this struggle or to the role of individual leaders and participants however in my paper I have attempted to paint a succinct picture of these demands - and the associated campaign supporting the 1967 Referendum.

It is clear that universally the demands for constitutional change were essentially about the Commonwealth Government assuming control for Aboriginal Affairs and therefore resting control from the States (i.e. in addition or rather in concert with efforts seeking the removal of discriminatory and racist elements in the Constitution itself).

Megan Davis and Marcia Langton (2016 p.4) have reminded us of the history of the calls for constitutional change and Commonwealth Government control for Indigenous Affairs by individual Indigenous leaders prior to the 1967 Referendum including those by David Unaipon (1926), Fred Maynard (1927), King Burraga (1933), William Cooper (1937), Doug Nicholls (1949) and the Yirrkala Elders Petition (1963). To this list I would add the 1938 'Day of Mourning' protest held in Sydney involving Aboriginal leaders and activists, Jack Patten, Bill Ferguson and Pearl Gibbs as well as the 1965 'Freedom Rides' under the leadership of Charles Perkins.

Such individual demands had long been supported by various societal organisations in a long history commencing in earnest from the early 1900's. The collective thinking at that time, held by individuals and groups who wished for improvement in the lives and circumstances of Aboriginal peoples, was that the way to achieve such improvement was for the Federal Government to assume a greater (and controlling) role in Aboriginal Affairs. Such advocates, according to Attwood and Markus (1997 p.6) "*urged the federal government to recognise Aboriginal welfare as a trust vested in the nation and argued that*

it should actually assume an Australian-wide responsibility for Aboriginal people'.

This reform position became a common and shared objective for the various individuals and groups who championed positive change (involving a wide diversity of individuals, political representatives, academics, humanitarian, church, feminist, welfare community groups, trade union representatives and others). However until the 1960's such demands appeared to fall on deaf ears as far as the Federal government was concerned and certainly were vehemently opposed to varying degrees and on various grounds by the States.

At the risk of excluding significant players in the progressive historical demands for reform, I have simply attempted to summarise some elements of these events and developments (from Federation in 1901) and these are included in **Attachment 1** to this paper.

Despite the apparent bi-partisan political environment, the history of this Referendum campaign, in the relatively brief period prior to early 1967, involved ongoing parliamentary scrutiny and debate.

Significantly around the same time the Federal Council for Aboriginal Advancement (later the Federal Council for the Advancement of Aborigines and Torres Strait Islanders) was established in Adelaide (in 1958). Further, in 1962 this organisation, at its annual conference, formally proposed to undertake a national campaign - which ultimately became the successful coordinated campaign supporting the 1967 Referendum;

The Federal Council for Aboriginal Advancement in 1962-63 prosecuted a strategy known as the Petition Campaign - which sought to first and foremost highlight to the public at large, the legal discrimination faced by Aboriginal people – as fundamental evidence to support constitutional change. This campaign showcased the national discriminatory laws and policies controlling the lives of Aborigines. It included compelling factual evidence of discrimination involving voting rights, marriage freedom, parenting rights, personal mobility restraints, property ownership, wage rates, alcohol consumption and the diversity and inconsistency of legal settings within and between States.

Remarkably, through its efforts the national campaign collected some 103,000 signatures in 94 separate petitions and ultimately led to the securing of Parliamentary support and on 26th May 1967 the Referendum was conducted - with the 'YES' vote carrying the day and with an overwhelming vote!

Some critique of the Campaign regarding myths and/or misrepresentation

The historical records confirm that essentially the 'YES' campaign was based on the call for the attainment of 'citizenship' for Aborigines, our emancipation from discriminatory legislative restraints on our lives and freedoms and the securing of the capacity for the Federal Government to make special laws for Aborigines

However there is no doubt that in the appeal to the public to support the "YES" vote, there was a degree of either deliberate or misguided misrepresentation of what the 1967 Referendum was all about by those advocating reform.

In making this comment, I essentially focus on key inter-related issues being: citizenship, voting rights and the nature and degree of the existing legislative discrimination.

Even today many commentators both Indigenous and non-Indigenous, young and not so young, make comments about the 1967 Referendum which repeat the myths associated with the event and which disclose a fundamental misunderstanding about the nature of the Referendum. Phrases such as "*when we got the vote*" and "*when we became citizens of our Country*" are often heard and, in my view hark back to the 1967 campaign itself which utilised similar sentiments in its advocacy. Indeed the very petitions which were prepared for the public campaign were headline captioned with the words "*National Petition – Towards Equal Citizenship for Aborigines"* (AIATSIS archives).

Citizenship

In pragmatic terms I will simply state that the Constitution makes no formal reference to citizenship – and as others (including Hasluck see Attwood and Markus 1997 p.20) have remarked, Aborigines already had formal citizenship

via the Federal statute of the 1948 Nationality and Citizen Act (supported in various contexts by State based legislations).

Voting Rights

Aboriginal voting rights dated back to the 1850's and various State and Federal legislation since that time (including Federally in 1902, 1949 and 1962 and 1962 in Western Australia and 1965 in Queensland) have incorporated and supported Aboriginal franchise.

Whilst I readily accept that owing to a number of significant socio-political factors (including social exclusion and discrimination, education standards, general ignorance of and misinformation about the political system as well as the 'tyranny of distance' affecting access to voting processes) many Aboriginal people either chose not to vote or were unaware of their eligibility to vote. Nevertheless Aboriginal franchise was clearly not part of the Constitutional reform of the 1967 Referendum.

Discriminatory Legislation

With regard to the discriminatory legislation existing in both State and Federal legislation, by around 1965 most of the discriminatory laws had been repealed by various Federal and State Governments (and here I emphasise that I am not referring to discriminatory administrative policies or practices and/or social discrimination here but rather legislation).

By 1966 Aborigines federally were entitled to pensions, maternity and unemployment benefits. Progressively in 1957 in Victoria, 1963 in New South Wales and 1966 in South Australia state based legislations were amended and repealed to remove the long standing oppressive and discriminatory laws.

At the time of the 1967 Referendum, Queensland and Western Australia certainly retained discriminatory legislation covering the rights, lives and freedom of Aborigines where these folk still lived 'under the Act' (although both these States had allowed Aboriginal franchise).

In so saying I do not wish to ignore or dilute the harsh reality of oppression and discrimination still suffered by Aboriginal peoples even after various discriminatory legislations had been repealed.

I would certainly not wish to do this during this month when we celebrate the 20th Anniversary of the April 1997 *Bringing Them Home Report*, being the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*. This report highlighted the entrenched assimilationist policies and practices which lie at the cause of the inter-generational trauma suffered by the Stolen Generations and their families. Sadly I understand that many of the Report's recommendations which go to supporting and healing our 'mob' have yet to be implemented.

However in the confines of my lecture today, I am simply attempting to show that the degree and influence of discriminatory laws had positively shifted in the lead up to the 1967 Referendum – although this situation did not appear to be acknowledged and certainly not promulgated by the 1967 campaigners.

I have made the foregoing comments in the interest of highlighting some myths about the 1967 Referendum. I also consider that there are other aspects of the campaign which could be similarly challenged however I have only focussed on the forgoing issues for today's lecture[4].

Whilst I do not make these comments as a criticism of the campaign or the campaigners themselves, it appears to me that those involved in the campaign did misrepresent the issues at stake either by accident or design. I also restate that the significant objective of the campaign was to secure Commonwealth Government primacy in Aboriginal Affairs.

Obviously the campaigners shaped and presented the case which was designed to appeal to a broader societal sense of social justice and fairness and in ways which were easily digested and understood (and thus avoiding any need to articulate the specific details of the amendments and/or any complex legal interpretations relating to these changes).

[4] E.g. The debate as to whether prior to the 1967 reforms the Constitution prevented the Commonwealth Government for becoming involved and/or taking control of Aboriginal Affairs.

My points here have resonance today in the context of the current Constitutional reform discourse and I will come back to this later.

Impact of the 1967 Referendum

My perceptions about the impact of the 1967 Referendum have two aspects or rather two distinct and separate narratives which have to do with:

(i) the immediate and short term impact; and
(ii) the longer term impact.

These two aspects of my perspective are very different to each other.

Immediate and Short Term Impact

In attempting to describe the immediate and short term impact of the 1967 Referendum, I am reminded of one of my late father's sayings. He would utter this expression in situations where his expectations were not met on some key issue or event of personal importance - where he would declare: *'They promised us the world and gave us an Atlas!'* This expression goes some way to describing my perception of the immediate impact of the 1967 Referendum.

The campaigners had predicted a brave new world for all us blackfellas and proposed that that a successful referendum would bring about great and immediate beneficial reforms through greater recognition, the application of social equality and a new progressive era of Aboriginal Affairs.

From my personal perspective however nothing changed at all in our lives. When the outcome was announced, I can recall a number of family and Aboriginal friends acting rather celebratory about the outcome (including in particular my Grandmother who was a big fan of Faith Bandler). I personally wondered what all, or indeed any, of the fuss was about!

There was absolutely no evidence to me that anything had changed at all. Indeed I remember that my family discussions gave some prominence to the right to legally patronise and be served in hotels as an important (albeit misconstrued) outcome of the Referendum – and I have no recollection whatsoever of any other discussions or mention of the census and/or expectations about changes in Aboriginal Affairs.

As far as I could tell, the Referendum outcome had no impact on any of our other Aboriginal relatives and/or friends and community connections.

Certainly I did observe the local non-Indigenous community appeared to be very satisfied and comfortable with the outcome. I feel our local non-Indigenous friends and community assumed that somehow over-night the outcome signalled the closure on a bad old racist Australia and the beginning of the good new non-racist country where Aborigines would be given "fair go". I also agree with the view that this line of thinking for many non-Indigenous Australians was regarded as an 'act of redemption' (also see Attwood & Markus 1997 p.59) in that it resulted in all us blackfellas now being instantaneously the 'same as everyone else', enjoying the same rights and freedoms. I recall that the press coverage (and here I am mainly referring to radio broadcasts) appeared to give this impression[5].

So from my perspective, apart from some immediate 'feel good' behaviours, in the short term the 1967 Referendum had very little impact whatsoever.

Similarly (and with the benefit of hindsight) it is obvious that the Federal Coalition Government(s), involving in the immediate term the Holt administration and then the successive longer term McMahon and Gorton administrations, took very little, if any, action at all to alter the status quo and to assume control of Aboriginal Affairs immediately following the 1967 Referendum outcome – despite the weight and integrity of the overwhelming 'YES' vote.

It is of interest that one of the heroes of the successful campaign, Faith Bandler expressed similar views and I quote:

> '*Changes following the referendum were disappointingly slow. Our earlier euphoria died down. The government despite putting the*

[5] In my view, the outcome confirmed to the broader Australian public what it always believed of itself – that Australia and Australians were fair-minded, humanitarian people who do not tolerate discrimination. However In my view this position, however honourable and laudable and which appeared to be held by most non-Indigenous Australians was based on a complete lack of any in-depth knowledge or understanding about Aboriginal people and the history and the prevailing nature and degree of social, economic, legal and political discrimination and pervasive state control encountered by Aboriginal people in our everyday lives.

> *referendum to the people had themselves been lukewarm about it. This was evident not only from their pre-referendum posture but also from the absence of any real plan of action on which they should embark following the referendum. Meanwhile the lives of Aborigines virtually remained the same – still under state control... .'* (Bandler 1989 p.116)

In this context we are also heavily indebted to Barrie Dexter for his memoir entitled *'Pandora's Box'* (Dexter 2015) as a member of the three-man Council for Aboriginal Affairs (together with economist Dr H.C. 'Nugget' Coombs and esteemed anthropologist Professor Bill Stanner) and as the newly appointed head of the Office of Aboriginal Affairs established by Prime Minister Holt following the Referendum later in 1967.

Dexter outlines, in considerable chronological detail, the work of the Council in the context of public policy and, in doing so, his memoir paint a most salient picture covering the five years following the Referendum as a regrettable period of, '*political and bureaucratic apathy and a paucity of empathy, understating of and commitment to improving Indigenous lives*'.[6]

Dexter's account describes the detail and the initial air of optimism entailed in Prime Minister Holt's actions and positive intentions in the establishment of both the Council and the Office of Aboriginal Affairs almost immediately following the Referendum. However the following quote from Dexter summarises his view of the period following the Referendum - and in my view is appropriate in describing the Coalition Government(s) commitment and actions up until 1972 :

> '..*the firm support that Mr Holt had shown for handling the Commonwealth's new responsibilities through the Council and the Office would, I reasoned, no doubt be continued by his governmental colleagues.* ***How wrong I was!***' (Dexter 2015 p.23 emphasis added)

So from a number of perspectives, and particularly my own, the immediate to short term impact of the 1967 Referendum was negligible.

[6] See The Guardian - article by Paul Daley *'When two old foes opened Pandora's box, it unleashed an unlikely reconciliation'* 29 March 2015

Longer Term Impact

My perceptions about the longer term impact of the 1967 Referendum are very different to my thoughts and negative perception about its immediate short term impact. I consider that the longer term impact to be both positive and extremely profound. I am reluctant to use the word symbolic in this context because whilst the outcome could be accurately described as being symbolic in many ways, in my view the impact also had a much greater tangible transformative nature and therefore is both symbolic and substantial in its historical influence.

I base this view on a variety of integrated thoughts and evidence which collectively have convinced me that the outcome of 1967 Referendum does represent an unprecedented critical and momentous tipping point in the history of progressive (and regressive) developments involving Australia's Aboriginal or nowadays referred to as Indigenous Affairs sector.

Regardless of any myths and/or misrepresentations I believe very strongly that the majority of my fellow Indigenous Australians take considerable comfort, confidence and moral strength from the 1967 Referendum outcome.

Many of us consider the outcome to represent the historic high point in our relationship with the Nation and we collectively own and cherish this historic marker despite any pragmatic assessment of what it was all actually about.

Even if not entirely accurate it is good to talk about citizenship in the context of the 1967 Referendum as a collective marker and moral compass point regarding our existence and dignity, our cultural integrity, our quest for recognition and respect for our place in the fabric of the Nation. It is good to own such a collective historic tipping point in history as I believe it acts as a uniting influence in our arguments for change and for a better world.

A New beginning

Clearly the Referendum outcome was directly responsible for the involvement of the Commonwealth Government in Indigenous Affairs – something that we take for granted today. I have no doubt that the progressive public policy and administrative reforms initiated, firstly by Holt through the work of the

embryonic Council for Aboriginal Affairs and later, and to a much greater degree, under the Whitlam Government and by successive governments since that time (both Labor and Coalition) draw from and/or owe their origins from the strident 'call to arms' represented in the positive 1967 Referendum outcome. This work resulted in the dismantling the residual discriminatory laws and policies of Governments and paved the way and supported more enlightened approaches and developments.

Another critical and tangible (as opposed to symbolic) outcome was the provision of the power of the Commonwealth Government to make special laws on behalf of Indigenous Australians.

Whilst as Indigenous Australians we might now question or debate whether this power has historically been used beneficially of detrimentally (e.g. the NT Intervention and the thrice times suspension of the Racial Discrimination Act), there is absolutely no doubt that such powers represent a substantive reform and real outcome of the 1967 Referendum.

Assimilation/Self-determination and beyond

Some commentators of the day may well have considered that the overwhelming 'YES' vote appeared to validate the policy of 'assimilation' in the collective desire for equality. However conversely it appears clear to me that the 1967 Referendum, which in the longer term heralded in a more enlightened policy approach, actually acted as a catalyst in the dismantling of the policy of 'assimilation' - initially into an era of 'self-determination' and then beyond.

This reform better acknowledged our existence, influence and voice as a distinct cultural group and more accurately captured our position and aspirations as Indigenous Australians and our preferred relationship with governments.

Hopefully such reforms can continue to lead to an elusive, and yet to be achieved, era of genuine 'empowerment' whereby the principles of the United National Declaration of the Rights of Indigenous Peoples, supported by real and shared engagement with 'our mob', are central and provide the

fundamental template and drivers for any Commonwealth and/or State approaches, policies and practices in Indigenous Affairs.

Census

Another significant impact which owes its origins to the 1967 Referendum involves the national census and its collation of the extremely significant information about the size, composition and nature of Australia's Indigenous population since 1967.

Such information is of critical importance and significance to the public policy community (and others including service delivering agencies and educators) and to the creation and shaping of policy, programs and projects aimed at addressing the wicked, intractable degree of intergenerational disadvantage suffered by Indigenous Australians. The national 'Closing the Gap' campaign and associated initiatives rely upon such demographic information which provide the basis for setting aspirations as well as for assessing progress at the various regional, state and national levels. 'Closing the Gap' is important business and a direct tangible result of the 1967 Referendum.

Recognition and Rights

I make the observation that the public policy and administration changes flowing from the 1967 Referendum also coincided with and tended to better recognise and support emerging Indigenous collectives (e.g. Aboriginal Legal Services, Aboriginal Medical Service, Land Councils etc) and the formation of a collective Indigenous identity and related movements.

Such ground-breaking individuals and groups sought a range of reforms (including initially land rights) but were particularly assertive in demands for greater recognition (domestically and internationally) of Indigenous Australians as members of a particular, unique and resilient cultural group as Australia's First Nations peoples (involving recognition of both the rights as citizens as well as the special or unique rights as the First peoples of Australia).

A quote from Prof Larissa Behrendt:

> '*…the referendum remains an important moment in Australian history. The real achievement was the way the referendum united people across the political spectrum'* and *'..it was an important step in furthering the political agenda for a new generation of Aboriginal activist'* (Behrendt in Attwood & Markus 1997.p167)

The Size of the 'YES' Vote

It is doubtful whether the same overwhelming result as was produced in 1967 would be possible today.

I say this with all due respect. However I do so knowing that political and public perceptions have diversified and shifted considerably since 1967 and of course in 1967 there was an absence of any 'NO' case – a situation which would not be possible today and I provide more comment about this later in the paper when commenting on contemporary challenges.

And so in this context the 1967 Referendum and its impact is historically significant, of itself, owing to the success and landslide strength of the 'YES' vote.

In referring to the 1967 Referendum Davis and Langton maintain that *'The 1967 Referendum should be remembered on its own for a wonderful achievement of collaboration between Indigenous and non-Indigenous Australia'* (Davis and Langton 2016 pp.5/6)

High Point and Tipping Point

Similarly, as further fundamental evidence of the significant and profound impact of the 1967 Referendum, I would highlight the innumerable times that the event has been, and continues to be, referred to in public (and other) discourse by various Indigenous thought-leaders, commentators, activist, politicians, academics, public servants, educators and others. Invariably such references provide thoughts and discussions of a comparative nature involving the circumstances and the outcome prevailing then and those of the present.

Invariably, in this context the 1967 event and its significance are positively judged and portrayed as having acted as a catalyst for change and as basis for

right and proper consideration of matters in Indigenous affairs of national importance which need to be recognised and/or resolved.

Such common and frequent references to the 1967 Referendum outcome, on anniversary dates and at other special occasions, serve to highlight and reaffirm the significance of the event and its impact on society entrenched in the hearts and minds of many. In particular, the importance and significance placed on the event by both Indigenous Australians and others during such times clearly reaffirms the weighty historical impact on the Nation.

I feel that whilst many progressive and significant socio-political developments in Indigenous affairs have occurred since 1967 (e.g. the Tent Embassy, Land Rights, Mabo and Native Title, Reconciliation, the Redfern Speech, the Apology[7] etc.), the 1967 outcome is nevertheless a 'stand out' milestone as a most historic and significant influence in the relationship involving Indigenous Australians, governments and mainstream Australia.

So in summary, I believe that the longer term impact of the 1967 Referendum to be a watershed event, extraordinarily powerful in both symbol and substance.

I believe that the impact represents both a high point and tipping point in the history of Australia as a result of its :

- Unprecedented success in the landslide 'YES' vote;
- Success in securing the Commonwealth Government's involvement in Indigenous Affairs and the related positive Influence in dismantling discriminatory laws and policies and the breaking down of the 'assimilationist' policy regime applying up to the 1970's and since that time;
- Contribution to the Improvement of the Nation's capacity to better recognise and understand the scope and size of our Indigenous population and the degree of disadvantage suffered by Indigenous Australians – and therefore to design strategies to address such disadvantage;

[7] Which in my view all have connection to the 1967 referendum outcome)

- Beneficial impact on the nature of the relationships between Indigenous Australians, Governments and mainstream Australia;
- Positive influence in the acceptance and recognition of Indigenous Australians as a resilient, culturally rich and unique First Nations peoples;
- Unifying and mobilizing effect on Indigenous Australians, as individuals and collectives, in our efforts to advocate for a better future and to do so with greater support and understanding from a more informed broader mainstream Australia.

A Parity of Esteem

I wish to record further personal thoughts about both the short term and long term impact of the 1967 Referendum - which reflect my feelings at age 19 and which remain unchanged to the present day.

I feel strongly that in addition to the issues of equality and equity sought by Indigenous Australians and the associated quest to 'close the gap' in various elements of our health, education and other socio-economic indicators, there is another important aspirational objective shared by Indigenous Australians.

I refer to this quest as to our seeking of a 'parity of esteem'.

Many people who know me are aware that I have spoken about this objective often and for some time. My long held thoughts have been most eloquently articulated in the more recent words of Noel Pearson in stating:

> *'…that there is a basic democratic problem in our Country. Unless this nation continues to harbour that old pseudo-scientific belief in the inferiority of its Indigenous peoples – for some a matter of romantic tragedy and for others an unsentimentally brutal truth – then there is something wrong with the nation as a whole, rather than with the parlous minority"* (Pearson in Davis and Langton 2016 pp163-164).

In referring to the attainment of a parity of esteem I refer to the reaching of a point in time whereby Indigenous Australians and our identities, our cultures, our languages, our histories and our dignity as resilient peoples are afforded the same degree of respect as other cultures. In this and in the Australian

context I am specifically referring to the cultures collectively referred to as Western cultures.

As Indigenous Australians, as the most resilient cultural group on the planet, we are tired of being too often referred to, treated and considered as peoples whose cultures, languages, beliefs and histories are somehow inferior or secondary to others. We seek greater acknowledgement and respect for who we are and our place in the Nation and the world.

In raising this issue it is important that I explain that in seeking this parity of esteem, I believe that we Indigenous Australians do not wish to deny, denigrate or usurp the cultures of others or to take over the world. We simply seek to establish our rightful place in the Nation and globally – we seek genuine mutual regard for the integrity and dignity for our ways of knowing, our ways of thinking, our ways of doing and who we are.

I believe that, despite the claims for a better world articulated by the successful 1967 Referendum campaigners and despite other positives, we did not go anywhere near achieving a parity of esteem at that time.

Without ignoring the obvious good will and good faith involved, I feel that the outcome of the 1967 Referendum was driven by other societal influences which more involve the benevolent and patronising support for dealing with the Aboriginal 'problem' rather than as a means of giving expression to the concept that I refer to as a parity of esteem. I feel that today we still have some way to go in this quest before we can really believe that we have reached, truly share and maintain a parity of esteem between Indigenous Australians and other Australians.

Indigenous Constitutional Recognition – What does it mean?

I need to record that Indigenous Constitutional Recognition to me refers to having embedded in our Constitution both symbolic and substantive content which acknowledges Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia, acknowledges and values the richness and diversity of our cultures and provides permanent safeguards that we have a role in decision making and will be treated fairly.

There is universal acceptance that the original Constitution, supposedly the founding document of the Nation, was drafted with a complete absence of any Indigenous considerations whatsoever save some elements of discrimination and exclusion. It appears clear that the 1967 Referendum left some significant unresolved issues which of course include any formal recognition of Indigenous Australians (and left unchanged the voting veto on the basis of race vide Section 25).

I acknowledge that Indigenous Recognition in the way I have defined it can happen outside of the Constitution (through common law and other legislative provisions). However if we concur that the Constitution is truly the foundation document of Australia, provides the structural basis for our system of Government and somehow reflects our values as a Nation then I believe that, as Australians, we must support the need for amendment.

We must accept, as Professor George Williams has suggested, that it is:

> *'Time to fix a silence at the heart of Australia's constitution'* (Article Sydney Morning Herald 18 July 2014)

So there remains some important unfinished Constitutional business to be conducted.

Indigenous Constitutional Recognition – Contemporary Challenges

I wish to acknowledge that, as we speak, the Indigenous National Convention conducted under the auspices of the Referendum Council convened in Central Australia comes to a close today.

This event, which is the culmination of 12 Indigenous only 'Dialogues' meetings recently convened around the Nation, is attempting to determine the preferred position (involving both symbolic and practical reform) on Constitutional Recognition from the perspective of Indigenous Australians.

Of course this is entirely appropriate given that as Indigenous Constitutional Recognition is about us, Indigenous Australians, then it is entirely fitting and proper that our views have primacy in deciding the nature and form of any Constitutional amendments.

Accordingly, in order to determine the preferred Indigenous position, the fundamental questions being put at these Indigenous Dialogues and the National Convention and hopefully resolved, appear to be:

> *'Do you support constitutional change? And, if you do, what form do you think change should take?'*(Referendum Council Discussion paper 2016 p1)

Whilst I have not been involved in these events, in my previous role with AIATSIS I was involved in the scoping, planning and scheduling of these events in consultation with the eight Indigenous members of the Referendum Council under the leadership of one of my heroes, Patricia Anderson AO.

From a broader perspective the Indigenous National Convention has as a guiding template for possible Indigenous Constitutional Recognition, the work and recommendations of two significant national consultations being: the 2012 Report of the Expert Panel and the 2015 Final Report of the Australian Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. The Indigenous National Convention can also draw from the Referendum Council's own 2016 Discussion Paper of the topic.

In the interest of brevity, and for the purpose of my lecture today, I do not intend to articulate any details on each and every recommendation in either of these reports and discussions but will make some selective comments about their deliberations and findings.

Both the Joint Select Committee and the Expert Panel have indicated that there is strong national support for Indigenous Constitutional Recognition and this appears to be confirmed by the surveys conducted through the work of RECOGNISE in its recent public campaign to raise awareness of the issue. Importantly, both the committees and Panel have opted for a range or package of amendments rather than any single amendment to the Constitution.

In considering these reports the Referendum Council (Discussion Paper 2016 p.9) has summarised the key proposals as including:

- Drafting a **statement** acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, and inserting it either in the Constitution or outside the Constitution, either as a preamble in a new head or power, or in a statutory Declaration of Recognition,
- **Amending or deleting the 'race power', section 51 (xxvi)** and replacing it with a new head of power (which might contain a statement of acknowledgement as a preamble to that power) to enable the continuation of necessary laws with respect to Indigenous issues
- **Inserting a constitutional prohibition against racial discrimination** into the Constitution;
- Providing for an **Indigenous voice** to be heard by Parliament, and the right to be consulted on legislation and policy that affect Aboriginal and Torres Strait Islander people;
- **Deleting section 25**, which contemplates the possibility of State governments excluding some Australians from voting in State elections on the basis of their race.

Please refer to **Attachment 2** of this paper for further explanatory notes covering each of the foregoing proposals as articulated in the Referendum Council's 2016 Discussion Paper.

However as the saying goes, the 'devil' is always in the 'detail'! And it also goes without saying that not only do we need to concern ourselves with the details about the content of any proposed amendments to the Constitution but we also need to have strong regard to the processes that support any Referendum.

An obvious and fundamental concern about the issue of Indigenous Constitutional Recognition, is that of securing the necessary double majority, i.e. a majority of 'YES' votes in a majority of States. This represents a momentous challenge in any Referendum and in my view this is particularly the case with this issue today!

I quote Patrick Dodson:

> *'History shows us that Australians tend to be cautious when it comes to changing the constitution, particularly if the proposition put to the voting public is not well understood'* (Dodson in Davis and Langton 2016 p.183)

To my thoughts, and Dodson's words, and to highlight the challenges involved, I echo the four Principles adopted by the Expert Panel (see Final report 2012 p.xi) in developing its findings - which were that proposals must:

- *Contribute to a more unified and reconciled Nation;*
- *Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;*
- *Be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and*
- *Be technically and legally sound.*

There is considerable challenge in addressing these significant conditions today.

And further the Expert Panel held concerns, as I certainly do, that:

> *'For many Australians, the failure of a referendum on recognition of Aboriginal and Torres Strait Islander peoples would result in confusion about the nation's values, commitment to racial non-discrimination, and sense of national identity. The negative impact on Aboriginal and Torres Strait Islander peoples would be profound'* (Expert Panel Final Report 2012 p.xvii)

To which I would add that any negative impact would perhaps have a much more deep and profound effect on, and say much more about, mainstream Australians and the Nation with regard to its standing and position internationally – and any such negative impact would inevitably be long term!

Importantly, in this context, the following factors of concern have also been articulated by the Expert Panel (Final Report 2012 p. xvii) and in my view again are all extremely valid and are reflective of the challenges ahead – these are:

- *Whether there is strong support for the proposals to be put at referendum across the political spectrum;*

- *Whether the referendum proposals are likely to be vigorously opposed by significant and influential groups;*
- *The likelihood of opposition to the referendum proposals from one or more State governments;*
- *Whether the Government has done all it can to lay the groundwork for public support for the referendum proposals;*
- *Whether there would be sufficient time to build public awareness and support for the referendum proposals;*
- *Whether the referendum would be conducted in a political environment conducive to sympathetic consideration by the electorate of the referendum proposals;*
- *Whether the referendum proposals would be seen by electors as genuine and meaningful so as to avoid the risk of rejection on the basis that they represent and inadequate or 'tokenistic' response to the profound questions raised by constitutional recognition of Aboriginal and Torres Strait Islander peoples.*

I believe that the response to these questions today would be either a resounding 'NO' or give rise to serious uncertainty and suggest that much more needs to be done. I will come back to these concerns.

To further help set the context from an Indigenous perspective, I refer to statements made at a very recent Indigenous Dialogue forum held in Brisbane[8] wherein the following positions were articulated by Indigenous participants including members of the Referendum Council:-

- '*Aboriginal people were interested in proper substantive change';* and *'As somebody said at one of the dialogues, If we can't do something spectacular here it's not worth doing'*; and
  '*People are rejecting minimalism, some sort of poetry or nice words, what we are asking for is very modest, we just want to have a say in the affairs and legislation that affects us'*. (Pat Anderson AO. Co-Chair Referendum Council); and

[8] These are selected quotes from ABC News found at www.abc.net.au/news concerning the recent Brisbane Indigenous Dialogue meetings.

- '*Indigenous People were focussed on the best model, not on how to construct a successful Referendum'*; and
  '*That means that politicians are looking at something very different from what Aboriginal people are looking at, and that tension will play out*', and
- '*Indigenous Australians are rejecting the 'elite', 'politicians' model for changing the constitution'* and instead are *'overwhelmingly voicing a desire for changes that give them direct power over their future'*; and
- *'the minimalist model is the idea that conservatives in the Government are most likely to support. What we are hearing is that's not enough. They want a bit of action. They want something substantive as well'*; and
- '*They appear to show interest in all the substantive reforms that actually lead to some sort of structural change: the kind of reforms that will change the way in which business is conducted between the Government and indigenous communities'* (Professor Megan Davis, member Referendum Council) and
- *'This is possibly going to be part of making history and I want to play a positive part in building a history that's going to influence the future for my kids'* (Chelsea Rolfe - Nughi and Noonuccal Teacher)

From my perspective, these comments are extremely salient and instructive!

The discussions at the Indigenous Dialogues will have no doubt included wide ranging issues, questions and positions which embrace various extremes including those who champion substantive Constitutional reform to those who are not interested at all in the Constitution and therefore do not see any value in or any need for change. I respect all such views.

In addition, in my lecture today I am not ignoring either the 'S' word or the 'T' word - and I readily recognise that both the issue of Sovereignty and the concept of a Treaty (or Treaties) will provide legitimate grounds for discussions at these Indigenous Dialogue and the National Convention.

However I am attempting to stick to the script in my discussion specifically around the issue of Indigenous Constitutional recognition consistent with the invitation to speak today.

Treaty or Treaties

I am aware that the issue and any discussions on a Treaty (or Treaties) have been dismissed and/or assigned to an unspecified point in time in the future by our political leaders. I am also aware that some political players feel that the concept of a Treaty either detracts or places restraints around progressing the issue of Constitutional Recognition. I believe that this does not need to be the case and that Constitutional Recognition and the concept of a Treaty are not mutually exclusive and can be integrated or linked in ways which can bring value and meaning to both.

I place on record my view that Constitutional Reform and the establishment of a Treaty or a package of Treaties between the Commonwealth Government and Indigenous Australians are both worthwhile aspirations. I believe that there is considerable value and benefit to the Nation in currently pursuing and securing both meaningful Constitutional change and the establishment of agreement making in the form of a Treaty (or Treaties) in order to address unresolved issues of sovereignty and historical grievances.

I believe that as a nation, Australia should recognise that where Treaty making has been used internationally (e.g. New Zealand, Canada and the United States) such instruments and processes have served these nations and the relationship with their Indigenous peoples very well in the past and will continue to do so.

Concluding Perspective

The preferred and legitimate Indigenous position on Constitutional Recognition has not yet been established and any final recommendations made to the Government via the Referendum Council are awaited with particular interest.

There are very strong indications that the Indigenous peoples involved in the Dialogues are not simply discussing, but rather, will be advocating quite substantive reforms to the Constitution.

According we have a potential convergence, or perhaps confrontation, of a package involving substantive Indigenous reform (assuming such is supported by the Referendum Council in any considered recommendations to Government) versus conservative positions of what the Government and others might support.

The conservative position would probably be based on a practical consideration of what might be achievable in a Referendum process and other opposing positions including that 'the Pendulum has swung too far' type responses of the past. As Professor Megan Davis has suggested it will be very interesting to see how this 'tension' will play out.

Challenges

However without specific knowledge of the Indigenous preferred position and to reflect my own Indigenous perspective on the challenges facing the country at the present time, I record the following personal thoughts:

- Chances of securing strong support for the proposals to be put at referendum across the political spectrum will be extremely challenging. I hold this view in the context of the current political environment and the machinations of major parties, minor parties and independents and their respective propensity for adversarial and oppositional positions and behaviours. I also note the emergence of xenophobic positions and re-emergence of the fear and/or loathing of racial and cultural difference prominently playing out in the political and public discourse both domestically and internationally;
- Similarly I do not feel that any referendum today would be conducted in a political environment conducive to sympathetic consideration by the electorate;
- It is highly likely that any proposals will be vigorously opposed by significant and influential groups including possibly one or more State Governments. Unlike 1967, I expect that there will be a strong "NO' case and I understand the 'NO' case will be supported with Government funding (in order that the Commonwealth Government be seen they be seen as honest brokers). I

consider that the more detailed and substantive Constitutional change proposed, the stronger the opposition;[9]

- Much more needs to be done, and undoubtedly more time is needed to create public awareness, before Australians can all hold our hand on our hearts and be satisfied that the Government has done all it can to lay the groundwork for effective public engagement and support or otherwise for any referendum proposals and to dispel perceived concerns about a lack of interest;
- There is considerable risk that any Referendum proposals may not be seen by electors as genuine and meaningful so as to avoid the risk of rejection on the basis that they are inadequate or 'tokenistic' – my fears here relate more to the Indigenous electorate and their perspectives and likely positions.

Misgivings

To complete my own Indigenous perspectives and obvious misgivings about the current challenges, I would add the following points:

- Most Indigenous Australians support both symbolic and substantive reform and that they will resoundingly reject any reform that is only symbolic, cosmetic or minimalistic in nature;
- If any substantive reforms are rejected or seriously diluted or compromised by Government, then in my view the Indigenous leadership, supported by the Indigenous electorate, will simply walk away;
- From an Indigenous perspective, Indigenous Constitutional Recognition will take 'as long as it takes' and that the timeframe will not be high-jacked or unduly influenced by the political convenience or expedience and agendas of others;
- Indigenous Constitutional Recognition should not be achieved at any price. I am deeply concerned that in any upcoming public social or political airing of the arguments for and against Constitutional change

[9] See Noel Pearson's analysis and critique of the likely opposition from *'more hard hearted unempathetic liberals who oppose any form of Indigenous rights and recognition whatsoever*' in Davis and Langton 2016 pp. 163-179

there exists a real threat to our social cohesion. With this in mind I make the following points:

- The public debate around any proposed Indigenous Constitutional recognition needs to be absolutely respectful by all involved.
- All campaigners and advocates need to be fully aware of the sensitivities in any arguments and the potential for hurtful and divisive impact and fall-out.
- The risk in causing any immediate or longer term damage to social cohesion and unity needs to be anticipated by the avoidance of any ill-considered public statements and positions.
- Racism and cultural denigration will divide us and will deter and even destroy any real and potentially beneficial engagement.
- Put simply, I seek to protect my family, my children and grandchildren from being harmed by being denigrated and/or dismissed as second class Australians because of some misguided, uninformed or racist contribution to the debate.
- We claim to uphold the values of a democratic country and in doing so surely in such an important public discourse we can display all the respectful qualities of a truly civil society. This is certainly my fervent hope;

- Hand in hand with these misgivings, I reiterate my hard held concerns that an unsuccessful Referendum dealing with Indigenous Constitutional recognition would deal a tremendous blow to Australia's international standing as a modern nation which values its reputation for liberal thinking, equality and human rights.
  - Indigenous Australians do think about, respect and cherish our reputation as a County internationally;
  - Such nationalistic pride is not the exclusive province of Non-Indigenous Australia. Mind you, as Indigenous Australians, we approach these matters from very different cultural and historical paradigms and experiences. To a very large degree that is what the concept of Indigenous Recognition in the Constitution is all about! It is about recognition and respect for our existence and history before and since 1770 and the resilience of our peoples

and our cultures as the First Australians within a modern, multi-cultural Nation made up of and shared by more recently arrived other Australians;

- The indelible global blemish on the Australian nation created as a result of an unsuccessful Referendum outcome would last for a very long time indeed - given the timeframe required to achieve any redress (and which would require revisiting the same Constitutional Referendum processes); and
- I repeat my view that such an outcome would speak much more harshly about the broader Australian Nation than about its minority Indigenous population.

Conclusion

To conclude I would like to briefly revisit the issue of a 'parity of esteem' that I raised earlier in the lecture.

Today I have voiced strong reservations and concerns about challenges in achieving Indigenous Constitutional Recognition.

However I nevertheless remain optimistic in the firm belief that Indigenous Constitutional Recognition is an honourable aspiration for all Australians, that it is achievable and that it is well overdue.

However I would hope that, whatever the proposals may be and however we may conduct the debates, we could together, as a Nation, achieve some significant progress towards achieving the illusive 'parity of esteem' about which I have spoken.

If we were to do this, through stronger mutual regard and respect for each other, I have no doubt that Australia would be a better country and that all our lives and life choices and those of our children and their children would be greatly enriched and much more rewarding and fulfilling.

In so saying, I believe that the '*wonderful achievement of collaboration between Indigenous and non-Indigenous Australia'* that Megan and Marcia spoke about when referring to the impact of the 1967 Referendum, could be revisited and repeated at some time in the very near future.

Yaluu Maliya Maaru yanaylaya!

(Goodbye Friends Go well and be well!**)**

Attachment 1

The following information provides a succinct history of the demands and claims for Constitutional reform on behalf of relating to Indigenous from Federation until the 1967 Referendum.

- **1910**

  Public records disclose that very soon after Federation and specifically in 1910 the Australian Board of Missions was prominent in its call for the Federal government to assume control of Aboriginal Affairs on a shared basis with the States;

- **1913**

  The Australasian Association for the Advancement of Science (supported by its committee on Aboriginal welfare) echoed similar demands influenced by the Commonwealth having recently (in 1911) assumed control of the Northern Territory (previously administered by the South Australian government) and where at the time the Aboriginal population (and the Aboriginal 'problem') was in the clear majority;

- **1920's**

  The Association for the Protection on Native Races (involving church and anthropological interests) strongly advocated in favour of a Royal Commission on the constitution to enable the Federal Government to assume '*supreme control for all Aborigines*' (Attwood & Markus 1997 p.7). These demands were supported by others including the Australian Federation for Women Voters, the Victorian Women Citizen Movement and with the continued involvement of the Australian Board of Missions.

  At the same time, international interest and advocacy through the London-based Anti-Slavery and Aborigines Protection Society raised the spectre of Australia's reputation as an emerging nation and its place in world affairs and its position on human rights;

- **1929-33**
  The 1929-31 papers covering the Royal Commission on the Constitution recorded that the Commission's majority failed to support the collective calls for any reform;
- **1930's**
  Concerted reform efforts of the humanitarian, scientific and feminist community advocates were supported by various Aboriginal bodies with the Australian Aborigines' League being the most prominent;
- **1938**
  As part of the Australia's sesquicentennial celebrations, the famous Aboriginal 'Day of Mourning' protest was held in Sydney. Here again the cry for the Commonwealth Government to assume control of all Aboriginal Affairs was the issue – and importantly the protestors called for a national program that would '*raise all Aborigines throughout the Commonwealth to full Citizen Status and civil equality with whites in Australia'*(Attwood & Markus 1997 p.10);
- **1939-1945**
  During World War 11 advocacy for reform continued. In 1942 the issue of reform of Commonwealth powers was proposed and, within this broader reform agenda, the Association for the Protection of Native Races (and others) championed constitutional change to bring about Commonwealth control of Aboriginal Affairs. Other initiatives included actions in 1943 by the United Association of Women (supported by other feminist groups) to include within their Women's Charter a call for federal control of Aboriginal affairs. The Association for the Protection of Native Races (led by Sydney University's Professor of Anthropology A.E.Elkin) continued its advocacy incorporating the specific aim to '*bring into line the Aboriginal policies, acts, definitions, and regulations which prevail in different parts of the Commonwealth'* and that 'They *should be framed and administered from a national point of view' (*Attwood & Markus 1997 p.11);
- **1942-44**
  A Curtin Labor Government sponsored Constitutional Convention recommended that certain powers be transferred to the Commonwealth

for 5 years. As a result in 1944 proposals essentially covering post war construction were presented in a referendum and such powers considered for transfer included the power in Aboriginal Affairs. It is of interest that the issue was specifically referenced with regard to Australia's future post war *'special responsibility towards the native peoples of the South-West Pacific'* (including those of New Guinea) (Attwood & Markus p.11) and no doubt such considerations included sensitivities around international concern of Australia's treatment of its own Indigenous people. The referendum failed;

- **1945-1950**

  After the war years advocacy for Constitutional reform continued involving various advocacy bodies including the National Missionary Council, the Association for the Protection of Native Races and the Aborigines Uplift Society. Such campaigns were supported and indeed greatly influenced by Aboriginal organisations such as the Aborigines Progressive Association (led by Bill Ferguson) and the Australian Aborigines Leagues (led by Dough Nichols and Bill Onus).

- **1950's**

  The 1950's saw the successful establishment of a national organisation to take up the cudgel through the establishment in Melbourne of the Council for Aboriginal Rights whose main initial thrust was to test existing laws against the standards of the United Nation's Declaration of Human Rights.

  However by this time the calls for Constitutional reform had begun to gain traction. In the late 1950's the involvement of prominent socialist, feminist activist, Lady Jessie Street, the Australian representative of the London based Anti-Slavery Society together with other socio-political developments gave the reform objectives much more prominence and influence.

  Undoubtedly, Lady Street's actions in elevating the treatment of Australian Aborigines to the international stage and purview of the United Nations Commission on Human Rights was very powerful - and

indeed compelling in the context of engaging the interest and support of the Australian general public;

- **1956**

  Street's involvement coincided with the Australian Government's decision in 1956 to allow the British Government to test atomic bombs in the Warburton Ranges in Central Australia which resulted in the traditional Aboriginal people being driven off their ancestral lands. A report on the plight of these people disclosed deplorable treatment and ignited an explosion of protest from various groups including various politicians, church people, the Council for Aboriginal Rights (Shirley Andrews) and the Australian Aborigines' League (Doug Nicholls and Bill Onus) as well the Women's' International League of Peace and Freedom, the Council for Civil Liberties and members of the Communist Party of Australia and of course the public at large.

  As a result renewed calls for constitutional change emerged with considerable public support and further public airing of the plight of the Warburton Ranges Aborigines and their deplorable status and horrific conditions fanned the fire of reform.

  By this time the calls for Commonwealth control of Aboriginal Affairs (via constitutional change) were being inextricably connected to the need for both the repeal of racial discriminatory laws and the conferring of full citizenship right;

- **1950-early 1960's**

  Despite the apparent bi-partisan political environment, the history of this Referendum in the relatively brief (2 year) period immediately prior to early 1967 involved ongoing parliamentary scrutiny and debate (championed by parliamentarians including Bill Wentworth, Gordon Bryant and Kim Beasley snr).
  Significantly around the same time, through the influences and advocacy by the various social and political activists involved the Federal Council for Aboriginal Advancement (later the Federal Council for the Advancement of Aborigines and Torres Strait Islanders) was established

in Adelaide (in 1958). Further, in 1962 this organisation, at its annual conference, formally proposed to undertake a national campaign - which ultimately became the successful coordinated campaign supporting the 1967 referendum;

- **1962 – The Petition Campaign**

  The Federal Council for Aboriginal Advancement in 1962-63 prosecuted a strategy known as the Petition campaign - which sought to first and foremost highlight to the public at large the legal discrimination faced by Aboriginal people – as fundamental evidence to support constitutional change. This campaign (led by Shirley Andrews, Gordon Bryant, Barry Christopher and Stan Davey) showcased the national discriminatory laws and policies controlling the lives of Aborigines and included compelling factual evidence of discrimination involving voting rights, marriage freedom, parenting rights, personal mobility restraints, property ownership, wage rates, alcohol consumption and the diversity and inconsistency of legal settings within and between States;

  The main thrust of the Petition campaign was '*upon Aboriginal people being treated the same as other Australians'*.(Attwood & Markus 1997 p.29) and the campaign called for an amendment to Section 51 (xxvi) of the constitution.

  Despite the bi-partisan political environment the public campaign nevertheless involved an interesting and somewhat testing journey.

  This brief history included agreement and rejection to a referendum by the Menzies government in 1965 - which incidentally had been heavily influenced by the Student Action for Aborigines' 'Freedom Ride' protest in country New South Wales (led by Charles Perkins), mentioned earlier which exposed the entrenched reality of racial discrimination to a unprecedented degree.

  Remarkably, through its efforts the national campaign ultimately collected some 103,000 signatures in 94 separate petitions. In addition to the public discourse, the campaign gave rise to many and various (supportive and opposing) Cabinet and parliamentary debates and

deliberations (involving various political luminaries including Menzies, Holt, Beasley, Bryant, Snedden, Hasluck to name a few), included government sponsored bills and two private members bills (from Arthur Calwell and Billy Wentworth) and included several iterations on the detail about the nature and content and potential impact of the constitutional reform most desirable and /or considered suitable.

As an interesting highlight, in September 1963 Prime Minister Menzies agreed to meet with a delegation from the Federal Council for Aboriginal Advancement which included Gordon Bryant, Shirley Andrews Joe McGuinness and Kath Walker (later Oodgeroo Noonuccal). During the meeting Menzies offered Walker an alcoholic drink and was promptly informed that, in so doing, he was breaking the law. It was proposed that this incident encouraged Menzies to '*give the situation of the Aborigines more thought*' (Attwood & Markus 1997 p.33) and was considered by both Faith Bandler and Gordon Bryant as representing a 'turning point' in the campaign.

- **1967 – Referendum Conducted**

Ultimately Parliamentary support was secured and on 26th May 1967 the Referendum was conducted - with the 'YES' vote carrying the day and with an overwhelming vote!

End

Attachment 2

The following text is an extract taken from the Referendum Council's 2016 Discussion Paper -which provides some explanatory information about the key proposals for Constitutional reform:

- What are some key proposals for reform?

  We are interested in what you think about proposals for constitutional reform in the near future. As well as delivering reports, both the Expert Panel and the Joint Select Committee conducted extensive public consultations, and debate has continued since. Here are some of the key proposals to emerge from that process:

  - drafting a **statement** acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, and inserting it either in the Constitution or outside the Constitution, either as a preamble in a new head of power or in a statutory Declaration of Recognition
  - **amending or deleting the 'race power', section 51 (xxvi)** and replacing it with a new head of power (which might contain a statement of acknowledgement as a preamble to that power) to enable the continuation of necessary laws with respect to Indigenous issues
  - **inserting a constitutional prohibition against racial discrimination** into the Constitution
  - providing for an **Indigenous voice** to be heard by Parliament, and the right to be consulted on legislation and policy that affect Aboriginal and Torres Strait Islander people
  - **deleting section 25,** which contemplates the possibility of a State government excluding some Australians from voting in State elections on the basis of their race.

  Let's look more closely at each of these options, remembering that both the Expert Panel and the Joint Select Committee favoured a **package** of amendments rather than a single change to the Constitution.

  Statement of acknowledgement

  A statement of acknowledgement is a statement of facts. It could acknowledge that the continent was occupied by Aboriginal and Torres

Strait Islander peoples before the arrival of the British. It could acknowledge that there is a continuing relationship between Aboriginal and Torres Strait Islander peoples, their lands and waters, and their cultures, languages and heritage. Some suggest a broader statement that acknowledges Australia's ancient Indigenous heritage, its British institutional inheritance, and its multicultural achievement.

The Expert Panel recommended a statement of acknowledgement as an introduction (preamble) to a proposed new law-making power along the following lines:

Recognising *that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;*

Acknowledging *the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;*

Respecting *the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;*

Acknowledging *the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;*

the Parliament shall … [etc.]

Another suggestion is that a statement of acknowledgement could be enshrined in a Declaration outside the Constitution, perhaps in legislation enacted by all parliaments—federal, State and Territory—at the same time to create a national defining moment of reconciliation. This would not require a referendum.

Power to make laws for Aboriginal and Torres Strait Islander peoples

Section 51 is the part of the Constitution that contains the powers to make national laws on various matters, such as taxation, foreign affairs and social security. To pass a law on anything, the federal government needs to identify a head of power.

The head of power that allows the federal Parliament to make laws regarding Aboriginal and Torres Strait Islander peoples on issues such as

native title and heritage protection, is known as the 'race power'. Section 51 (xxvi) currently states:

Section 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

… (xxvi) The people of any race for whom it is deemed necessary to make special laws

One of the options for reform is to delete this head of power and insert a new head of power elsewhere in the Constitution that avoids the word 'race' and more accurately describe who the power is to be used for. It would be a power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. Locating the power outside section 51 would make it easier to insert a *preambular* statement of acknowledgement. If the power were simply deleted, with no replacement, then we would go back to the situation before the 1967 referendum. Outside the Northern Territory, the States would be left in charge of Aboriginal and Torres Strait Islander affairs and the Commonwealth would lack power to make national laws dealing with native title and so on.

Another approach, with a similar effect, would be to amend, rather than delete, the current power in section 51 (xxvi) so that it authorises laws with respect to 'Aboriginal and Torres Strait Islander peoples' and the concept of 'race' is removed.

'Race' is a concept that belongs to the 19th century rather than the 21st. But removing the word 'race' and replacing it with the words 'Aboriginal and Torres Strait Islander peoples' in a new or amended power does not solve the problem of Parliament having the power to pass racially discriminatory laws. This is why a guarantee against racial discrimination by the federal Parliament is another option (see next section).

A new or amended power could also list some of the things that communities would like to see created in the future, for example, an Indigenous voice in the Parliament (see below) or an agreement-making process.

A constitutional prohibition against racial discrimination

The proposal to insert a guarantee in the Constitution to stop the federal Parliament from discriminating against a people of any race or cultural background has been made many times since 1901. A racial non-discrimination clause was discussed in the lead up to the 1967 referendum but the government did not include it in the proposal put to the vote. Advocacy for a prohibition against racial discrimination grew among Indigenous people following a High Court decision in 1998 that the race power can likely be used to support racially discriminatory laws that single them out for adverse treatment.

Australia's commitment to the principle of racial non-discrimination is accepted in legislation and policy in all the States and Territories. There has also been a national law since 1975, the Racial Discrimination Act. Only the federal Parliament is not bound. A constitutional guarantee against racial discrimination would change this: it would bind the federal Parliament.

A non-discrimination clause could be inserted as a new section of the Constitution. Or it could be included as a limit inside the wording of a new or amended Commonwealth power to make laws for Aboriginal and Torres Strait Islander peoples. Either way it would need to allow for laws that are specific to Aboriginal and Torres Strait Islander peoples but which don’t discriminate against them.

An Indigenous voice to Parliament

Aboriginal and Torres Strait Islander peoples are the First Peoples, but they are less than 3% of the Australian population. In Australia’s representative democracy, which works by majority vote at the ballot box and in Parliament, it is difficult for their voice to be heard and for them to influence laws that are made about them. Indigenous people have long advocated for better political representation and fairer consultation.

Australia has acceded to the United Nations Declaration on the Rights of Indigenous Peoples, which emphasises the importance of genuine Indigenous participation and consultation in political decisions made

about their rights—but no formal processes for this to occur have yet been implemented.

If section 51 (xxvi) were to be replaced or amended, Aboriginal people and Torres Strait Islanders would need some assurance that any new or amended power could only be used for their advancement or benefit. This is the reasoning behind the suggestion of providing for an Indigenous voice in Parliament.

It is critical that Aboriginal and Torres Strait Islander peoples are engaged in the development and implementation of laws, policies and programs that affect them and their rights. This is important in achieving better policies and outcomes for Indigenous peoples, and a fairer relationship with government. It may also help prevent discriminatory laws and policies being enacted.

The Constitution could be amended by establishing an Indigenous body—as many other countries have—to advise Parliament on laws and policies with respect to Indigenous affairs. Such an amendment could ensure that the views of First Peoples are heard by lawmakers and could help Parliament to enact better and more effective laws.

Deleting section 25

Section 25 contemplates that the States might pass a law banning people from voting at a State election, on the basis of their race.

Under this section, if a racial group were denied the right to vote in State elections, the people of that race would not be counted in working out the number of seats which that State has in the Commonwealth House of Representatives. By reducing federal representation, in theory it acts as a penalty against race-based voting laws at the State level. But people and politicians on all sides have long said that section 25 should be deleted.

The problem is not State voting laws—the Racial Discrimination Act would take care of them. In that sense, section 25 is a dead letter. The problem is that, with section 25, our Constitution still contemplates that a government would ban an Australian from voting on the basis of their race.

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