REPLACING THE RACE POWER: A REPLY TO PRITCHARD

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I Introduction

Being in almost total agreement with the views of a distinguished scholar on which one is supposed to be commenting is both a welcome relief and an unfortunate predicament. It is a relief because it means the commentator is not forced into saying anything that is too controversial. It is a predicament because it leaves the commentator wracking their brains for something intelligent to say that hasn't already been said more eloquently. Reading Dr Sarah Pritchard's rich and wide-ranging discussion left me feeling, in equal parts, relieved and predicament-bound.

As Dr Pritchard makes clear, the need to amend the race power in any future constitutional reform process is compelling. Section 51(xxvi) is grounded in the anachronistic, incorrect and, to many, offensive concept of 'race': it is not an appropriate form of constitutional recognition for Australia's first peoples. More worryingly, as interpreted by the High Court, the power can probably be used to support laws that discriminate against Aboriginal and Torres Strait Islander peoples and other ethnic groups. Based on the actions of past and more recent Federal Parliaments, this is far from a hypothetical proposition. It is plain to me that we need judicially enforceable and constitutionally entrenched constraints on the capacity of parliaments and governments at all levels to adversely discriminate against groups of people, and especially Aboriginal and Torres Strait Islander peoples, on the basis of their race. The insertion of a constitutional prohibition on racial discrimination, endorsed by both Dr Pritchard and the Expert Panel on Constitutional Recognition of Indigenous Australians, would be an important step forward.[1]

At the same time, there also seems to be an equally pressing need for the Federal Parliament to retain a power to make laws specifically about Aboriginal and Torres Strait Islander peoples.[2] Ideally, this would be a new Indigenous-specific power: the race power is problematic, as I have already said, and other constitutional heads of power are almost certainly inadequate. Again, these points have been made well by both Dr Pritchard and the Expert Panel.[3]

What I propose to do in these comments is to explore in a little more depth the reasons why a specific power to make laws about Aboriginal and Torres Strait Islander peoples is needed. To this end, I address four issues: equality and Indigenous difference, Indigenous sovereignty, federalism, and the appropriateness of governance by legislation. In each case, I respond to possible objections to the Federal Parliament retaining a power to make laws concerning Aboriginal and Torres Strait Islander peoples.

II Equality and Indigenous Difference

On one view of the principle of equality, everyone should be treated the same, no matter what their racial, ethnic or cultural background. According to this 'colour-blind' understanding, the act of making racial distinctions is inherently discriminatory. In the case of laws made specifically about Indigenous people, the criticism would be that such laws either discriminate against Indigenous people by adversely impacting upon them *or* (and this is perhaps the more common contemporary criticism) benefit Indigenous people only and thereby constitute discrimination against non-Indigenous people. On this view, it is inappropriate for the Federal Parliament to make laws about Indigenous people because this violates the egalitarian idea that everyone should be treated the same. Presumably, advocates of this view would like to see the race power repealed and

not replaced by some other power to make laws specifically about Indigenous people.[4]

As I see it, this understanding of equality is impoverished. Equality does not demand equal (ie, the same) treatment in all circumstances; it requires that everyone be treated as an equal, that is, with equal concern and respect.[5] Typically, this means that where people are alike in relevant ways they should be treated alike, and where they are different in relevant ways they should be treated differently in proportion to that difference.[6] Where there are relevant factual differences between groups of people, treating those people with equal concern and respect demands that their differences be taken into account in an appropriate and proportionate manner. Under international law, for differential treatment of particular racial groups to be non-discriminatory and accord with the principle of equality, such treatment must be undertaken for legitimate purposes and must be proportionate to those purposes.[7]

To the extent that there are relevant factual differences between Aboriginal and Torres Strait Islander peoples and other groups, then, it can be legitimate to take those differences into account, including through law. Without generalising about or essentialising the incredibly diverse Australian Aboriginal and Torres Strait Islander populations, some differences that may be relevant to take into account in lawmaking are that Indigenous people:

- have a unique status as descendants of the first peoples of Australia, with certain concomitant claims or rights entailed by that status (eg, rights to land and heritage);
- are recognised as peoples under developing international law and state practice (including in Australia), with associated rights to self-determination;[8]
- are a cultural minority within the broader Australian polity;
- have been historically subjected to injustices by the state (for instance, issues surrounding dispossession, the Stolen Generations and stolen wages); and
- are, statistically speaking, the most disadvantaged group in Australia across a whole range of social and economic indicators.

Without an Indigenous-specific power in the *Constitution*, it would not be possible for the Federal Parliament to make laws on many of these issues on a national basis, as Dr Pritchard has pointed out.[9] Accordingly, if we want the Federal Parliament to be able to take account of relevant Indigenous differences when making laws, it is desirable to create a new power to make laws about Aboriginal and Torres Strait Islander peoples.

III Indigenous Sovereignty

Some may raise an Indigenous sovereignty objection to the Federal Parliament making laws about Aboriginal and Torres Strait Islander peoples. Such a view holds that it is inappropriate for the Federal Parliament to make laws about Indigenous peoples because this represents an unjustified incursion upon sovereign and self-determining Indigenous polities. Those holding this view may seek that the race power be repealed and not replaced by an Indigenous-specific power, so that non-Indigenous sovereignty does not impinge upon Indigenous peoples. On my understanding, this view, at least in its absolute form (ie, the Australian Government should exercise no sovereignty over Indigenous people whatsoever), is not widespread amongst Aboriginal and Torres Strait Islander people or the non-Indigenous population, though it no doubt has adherents. That being said, I do not at all dismiss this aspiration to Indigenous sovereignty and self-determination, and more generally I think Indigenous peoples ought to have options for exercising greater self-governance where they so choose.

However, to insist that Indigenous sovereignty or self-determination should currently and of necessity exclude the exercise of Anglo-Australian sovereignty over Indigenous peoples would be, I think, to ignore two interrelated present-day realities. First, after more than two centuries of often brutal colonisation, Aboriginal and Torres Strait Islander peoples are now to differing extents bound up within the wider Australian polity and society. Second, Aboriginal and Torres Strait Islander peoples are extremely diverse and have a variety of individual and collective aspirations, which are in part determined by their relationship with wider Australia.

As such, for many – perhaps a considerable majority – of Aboriginal and Torres Strait Islander people today, the recognition of Indigenous sovereignty (or sovereignties) wholly unencumbered by the Australian state is neither feasible nor desirable. Their lives are, for better or worse, inextricably interwoven with the social, political and economic fabric of broader Australia. For these people, the question is not *whether* they should be subject to non-Indigenous sovereignty, but *how* and to what *extent* such

sovereignty should be exercised over them. Here it is worth recalling that it can be legitimate for lawmaking to take account of Indigenous difference, and that an Indigenous-specific head of power is likely to be necessary for such purposes.

For other Aboriginal and Torres Strait Islander peoples, total independence from the Australian state may nonetheless be feasible and desirable. Let us assume here that this is also a political and practical possibility. Due to the entanglement of Indigenous and non-Indigenous polities and communities in Australia, any process of decolonisation or secession is bound to be messy and complex, and would require much more than a simple abdication of Anglo-Australian sovereignty over those Indigenous polities that demand independence. If this process is to be achieved by lawful rather than revolutionary means, it would most likely require legislative action by the Federal Parliament.[10] To this extent, a specific head of power to make laws about Aboriginal and Torres Strait Islander peoples may be of assistance or even necessary to any project of Indigenous independence, rather than antithetical to it.

In sum, a specific head of power to make laws about Indigenous people has something important to offer both those Indigenous groups who wish to remain a part of the Australian state and those who aspire to total independence from it.

IV Federalism

Any consideration of the powers to be given to the Federal Parliament needs also to take into account issues of federalism. While some people may not object to specific laws being made about Aboriginal and Torres Strait Islander people, they may nevertheless object to such laws being made by the Federal Parliament (as distinct from the state parliaments). As Dr Pritchard has observed, this federalist position was the general view of the *Constitution*'s framers, who felt that the governance of Indigenous people as a distinct group was a matter for the states and not the Commonwealth.[11] The result was that Aboriginal people in the states were excluded from the scope of the race power. However, from the early years of federation this position came under attack. Ultimately it was roundly defeated in the 1967 referendum, the outcome being an acceptance that the Commonwealth and the states each should shoulder considerable responsibilities insofar as the governance of Aboriginal and Torres Strait Islander people is concerned.

Other federations have seen fit to assign governmental authority concerning Indigenous people to the federal level of government, in some cases exclusively. Under the *United States Constitution*, the 'Indian commerce clause' gives Congress the power to 'regulate commerce … with the Indian Tribes', which has long been judicially construed as giving Congress exclusive and plenary power to make laws in Indian affairs.[12] Canada's *Constitution Act 1867* similarly makes clear that exclusive legislative authority is vested in the Canadian Parliament with respect to 'Indians, and lands reserved for the Indians'.[13] More recently, the 1996 *South African Constitution* stipulates that concurrent power vests in the South African national and provincial parliaments in respect of 'Indigenous law and customary law' and '[c]ultural matters'.[14]

There are a number of sound reasons why the Federal Parliament ought to have specific lawmaking power in Indigenous affairs. Many of these were raised by those who campaigned for the race power to be amended in the 1967 referendum.[15] They include the following:

- in some areas (for instance, where national uniformity or coordination is required or desirable) lawmaking in Indigenous affairs is more appropriate and effective on a national basis;
- the Commonwealth, not the states, is held accountable internationally for the treatment of Australia's first peoples;
- financially, the Commonwealth is better positioned than the states to make provision for Indigenous people's welfare;
- the Commonwealth has become increasingly involved in areas of traditional state responsibility that have a bearing on Indigenous people (eg, health, education, housing, lands, law and order); and
- the existence of a national lawmaking power concerning Indigenous people provides, by virtue of section 109, the legal opportunity for the Commonwealth to override discriminatory state laws.

Of course, this is not to deny the ongoing importance of the states – their responsibilities often have great significance for Aboriginal and Torres Strait Islander people's wellbeing and interests. It is just to say that there are good reasons why the Federal Parliament ought to also have lawmaking power with respect to Aboriginal people and Torres Strait Islanders. As such, the retention of a national power to legislate

specifically about Indigenous people can be defended on federalist grounds.

V Appropriateness of Governance by Legislation

Within the Australian political system, the task of governing the population is enabled primarily through the passage of legislation. Excepting the limited range of unlegislated executive powers, administration must be authorised by and carried out according to statute.[16] And aside from the common law, the public laws enforced by the judiciary are parliamentary enactments (with the *Constitution* being a special type of enactment). It is this predominant form of legislative governance that is enshrined in relation to Aboriginal and Torres Strait Islander peoples when the Federal Parliament is expressly given power to make laws about Aboriginal and Torres Strait Islander people. Governance by legislation (and administration according to legislation) has been the principal means of formally governing Indigenous people within the Anglo-Australian political system for over a century. Of course, for many millennia right through to the present, Aboriginal and Torres Strait Islander peoples have also been governed under their own political and legal arrangements.

Is this form of governing Aboriginal and Torres Strait Islander people appropriate? It is certainly not ideal. To begin with, it does not necessarily take seriously the principle of Indigenous self-determination – of Aboriginal and Torres Strait Islander peoples having control over their own lives. Comprising only a very small proportion of the overall population, Aboriginal and Torres Strait Islander peoples are generally at a significant disadvantage when it comes to influencing parliamentary outcomes. This occurs at the ballot box, where Indigenous voters routinely, though by no means uniformly, constitute an electoral minority whose concerns can be discounted or neglected by political parties. It also occurs within parliaments themselves, with the number of Indigenous members generally not even being proportionate to their small numbers in the general population. At the Commonwealth level, there have been only three Aboriginal parliamentarians since Federation (Ken Wyatt, the first Aboriginal member of the House of Representatives, was elected in 2010) and no Torres Strait Islander parliamentarians. Indigenous political power can be influential in other ways – for instance, through lobbying and campaigns conducted by the organisations comprising the 'Indigenous sector'[17] – but 'the problem of the three per cent Mouse versus the 97 per cent Elephant'[18] remains.

While governments may commit to processes of engagement and consultation with Aboriginal and Torres Strait Islander people in relation to the making of law and policy, the quality and level of such engagement varies and its occurrence is ultimately at the discretion of government. Indigenous stakeholders can have input into parliamentary deliberations; for instance, through the making of submissions to parliamentary committees or through the convening of consultations. However, the impact and quality of such input may be substantially reduced through both an unreceptiveness to expressed Indigenous views and truncated processes. Each problem was clearly manifest in relation to the original Northern Territory Intervention legislation, and arguably also in relation to the subsequent amendments of that legislation.[19]

It is possible that alternative modes of governance would produce better and more just outcomes. In particular, outside of Australia Indigenous–state governance arrangements have for many centuries frequently taken a different form: formal negotiation and agreement-making between Indigenous peoples and government representatives. During the early days of settler-colonies, such agreement-making typically took place as a government-to-government exercise, from the non-Indigenous side as an incident of executive (or Crown) power. In recent decades in Australia, an incipient culture of agreement-making between Aboriginal and Torres Strait Islander peoples and other stakeholders (including governments) has developed (though generally under the auspices of legislation).[20] Agreement-making allows Aboriginal and Torres Strait Islander groups to have a much more direct say over how they are governed. It is also conducive to the reaching and implementation of arrangements that are tailored to the circumstances of discrete and diverse Indigenous groups. Agreement-making and negotiation is well-suited to Indigenous peoples exercising their right of self-determination.[21] It is these and other attractions that have led to advocacy for the insertion of an Indigenous–state agreement-making power within the *Constitution*, an option that was raised but ultimately rejected by the Expert Panel.[22] There is, in my opinion, a great deal to recommend the insertion of some sort of agreement-making power in the *Constitution*.

Nonetheless, governance by legislation, for all its drawbacks, is likely to be a necessary feature of the Indigenous affairs

landscape for some time to come. Though the knowledge and expertise of Indigenous and non-Indigenous participants in negotiations has significantly increased over the last few decades,[23] there is not yet an entrenched and dominant culture of agreement-making between Indigenous peoples and Australian governments. Some may say that this is precisely the problem that withdrawing lawmaking capability over Indigenous people from the Federal Parliament would be designed to address. However, in the current absence of widespread Indigenous–state agreement-making, the removal of federal legislative power in Indigenous affairs may leave an undesirable governance vacuum. Until we are confident that agreement-making is capable of standing alone as an Indigenous–state governance method, governance by legislation remains indispensable. Thus, while agreement-making should be encouraged and increased (including, for instance, through a new constitutional agreement-making power), the power to legislate should not be abandoned – at least not yet. Furthermore, the alternative modes of governance by legislation and by agreement-making are not mutually exclusive. Lawmaking in Indigenous affairs may actually enable and facilitate agreement-making by, for instance, putting in place regimes by which Indigenous groups are able to take on legal form or under which negotiations can be structured. This is in fact the case with extant forms of agreement-making between Aboriginal and Torres Strait Islander peoples and others in Australia. Finally, even within a context in which agreement-making is the predominant mode of Indigenous–state interaction, in some areas national lawmaking about Aboriginal and Torres Strait Islander people as a whole may still be necessary or desirable.

To sum up, while governance of Indigenous people by legislation is flawed and agreement-making has much to recommend it, lawmaking is presently a necessary means by which Aboriginal and Torres Strait Islander peoples in Australia should be governed.

VI Conclusion

I have tried to tease out in these comments the main reasons that it makes sense to include an Indigenous-specific power in the *Constitution*. Though this is arguably among the least controversial ideas for constitutional reform concerning Aboriginal and Torres Strait Islander peoples, I think it is worth being clear on the reasons why such a power is still necessary. Replacing the race power with an Indigenous-specific power is important for taking account of Indigenous difference, accommodating Aboriginal and Torres Strait Islander peoples' diverse aspirations and relationships with Australian society, striking an appropriate federal balance in Indigenous affairs, and maintaining effective modes of governing Indigenous people.

But this cannot be the only constitutional reform. Without additional changes – in particular, a constitutional prohibition on racial discrimination, and the further development of structures for Indigenous–state agreement-making – any future referendum to replace the race power would represent an opportunity missed. True, it would advance the worthwhile goal of cleansing the *Constitution* of the concept of race, but it would do little to overcome the constitutional potential for state-sanctioned racism.

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1 Sarah Pritchard, 'The "Race" Power in Section 51(xxvi) of the *Constitution*' (2011) 15(2) *Australian Indigenous Law Review* 44, 52–4; Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) 167–73 <http://www.youmeunity.org.au> ('*Expert Panel Report*').

2 There is no need for a power to make laws about other 'races', for the reasons elaborated by Dr Pritchard: see Pritchard, above n 1, 52. See also Dylan Lino, Submission No 3355 to the Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 30 September 2011, 10 <http://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/Expert%20Panel%20Submission%2030Dec2011.pdf>.

3 Pritchard, above n 1, 52; *Expert Panel Report*, above n 1, 147–52; Lino, above n 2, 10–12.

4 If those with such a view were serious about their position, they would have to advocate the insertion of a constitutional prohibition on laws that make racial, ethnic or cultural distinctions. This is because, absent such a prohibition, laws making such distinctions could be passed under numerous constitutional heads of power, even without a new Indigenous-specific power. If people of this view were *really* serious, the

constitutional prohibition would have to extend to the States and Territories as well. See further Lino, above n 2, 12–13.

5 See Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 227.

6 A concise statement of this position can be found in *South West Africa (Liberia v South Africa) (Judgment)* [1966] ICJ Rep 6, 305 (Judge Tanaka).

7 See, eg, Committee on the Elimination of Racial Discrimination, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, 57th sess, [8], UN Doc CERD/C/GC/32 (24 September 2009).

8 The *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) explicitly recognises Indigenous groups as peoples and as having the right of self-determination: at art 3. Though Australia, Canada, the United States and New Zealand voted against the *Declaration* in the United Nations General Assembly (and were the only states to do so), all four countries have now changed their position and publicly endorsed the *Declaration*.

9 Pritchard, above n 1, 52.

10 This is analogous to the processes which occasioned the achievement of 'responsible government' for the Australian colonies in the 19th century, and the Commonwealth's and States' legal independence from the United Kingdom in the 20th century. To varying degrees, these processes have relied upon the passage of legislation by the United Kingdom.

11 Pritchard, above n 1, 47. See also Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) 2–5.

12 *United States Constitution* art I § 8. See Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, 2009) 57–9.

13 *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, s 91(24). Provincial parliaments' capacities to pass laws concerning Indians are restricted: see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) 116.

14 *Constitution of the Republic of South Africa Act 1966* (South Africa) sch 4 pt A.

15 See generally Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007) chs 3–6.

16 By unlegislated executive powers, I mean the prerogative, specific powers conferred by the *Constitution* (such as the Governor-General's power to prorogue Parliament under s 5), the Crown's powers as a legal person, and the 'nationhood power': see Anne Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313.

17 See Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal and Islander Australia* (UNSW Press, 2002).

18 Noel Pearson, 'Reconciliation Must Come with the Republic', *The Australian* (online), 14 January 2010 <http://www.theaustralian.com.au/news/opinion/reconciliation-must-come-with-the-republic/story-e6frg6zo-1225818986734>.

19 On the original Intervention legislation, see generally Northern Territory Emergency Response Review Board, *Report of the Northern Territory Emergency Response Review Board* (2008); John Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications, 2007). For critiques of subsequent amendments and consultation processes, see the various publications released by the organisation called Concerned Australians: <http://www.concernedaustralians.com.au>.

20 See, eg, Agreements, Treaties and Negotiated Settlements Project <http://www.atns.net.au>; Marcia Langotn et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006).

21 See Dylan Lino, 'The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples' (2010) 34 *Melbourne University Law Review* 839.

22 Expert Panel on Constitutional Recognition of Indigenous Australians, 'A National Conversation About Aboriginal and Torres Strait Islander Recognition' (Discussion Paper, May 2011) 19; *Expert Panel Report*, above n 1, 8–9.

23 See, eg, Sean Brennan et al, *Treaty* (Federation Press, 2005) 117.