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THE 1967 REFERENDUM 40 YEARS ON

By Professor Larissa Behrendt

On Australia Day in 1938, a group of Aboriginal people protested in front of Australia Hall after they were moved off the Town Hall steps. This small protest was the culmination of decades of activism by Indigenous communities and their leaders in the southeast of Australia, such as William Cooper and Fred Maynard, who had sought the same rights as all other Australians, especially in relation to their ability to own land, and to access jobs, education and health services.

The protest was also a beginning. It was the beginning of the Indigenous rights movement and the long road to equality under the legal system. The focus on citizenship rights was a key platform in the activism of advocates like Cooper and Maynard and it influenced future generations.

Inclusion through equal access to education, employment and the economy was also seen as the key way of improving the situation of Aboriginal people. Men like Cooper and Maynard had worked on pastoral stations that they were prevented from owning. They were self-taught and they believed that if Aboriginal people were given the same opportunities as other Australians, and were given the chance to make decisions about their communities, their families and their lives, they would be able to find their own solutions to their problems. This notion of access and opportunity underpinned the desire for 'citizenship rights' and, with the claim for land and the desire for self-determination, created the key platforms in the Indigenous political agenda.

Today, Indigenous Australians still have a life expectancy that is 17 years less than that of their non-Indigenous counterparts. Statistics continue to show poorer health, education, housing and employment outcomes for Indigenous people. While at some moments in our nation's history there has been a heightened interest in Indigenous issues and a greater political will to address Indigenous disadvantage, there have equally been moments when reconciliation has clearly been contentious in the Australian community. But a key moment when Australians seemed united in their interest in Indigenous equality was the popular support for the 1967 referendum.

Forty years on, it is an opportune time to reflect on that important moment of constitutional change and evaluate its impact and legacy.

THE SILENCES IN THE CONSTITUTION

To understand the 1967 referendum, it is important to remember some of the key assumptions and choices made by the framers of the Constitution.

The absence of Indigenous people from both the drafting process and the substance of the Constitution is a reminder of the ideologies that shaped thinking around Indigenous people at that time. Most influential were the beliefs in white racial superiority and the idea that Aboriginal people were a dying race. It was thought that the most humane thing that could be done was to allow them to fade out with dignity. These ideologies are often cited as the main reason why Aboriginal people were excluded from the Constitution, but their absence is also explained by the attitudes towards rights more generally within the founding document.

The framers of our Constitution believed that the decision-making about rights protections – which ones we recognise and the extent to which we protect them – were matters for Parliament. They discussed the inclusion of rights within the Constitution itself and rejected this option, preferring to leave our founding document silent on these matters. It was also a document framed by those who held the prejudices of a different era – which had its own kinds of xenophobia, sexism and racism.

The framers discussed including a non-discrimination clause in the Constitution when it was being drafted. George Williams, in his book, *Human Rights under the Australian Constitution*,[1] notes that the Tasmanian Parliament proposed clause 110 that, in part, stated:

> 'nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws'.

This clause was rejected for two reasons:

- it was believed that entrenched rights provisions were unnecessary; and
- it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

These intentions and the attitudes of the Constitution's drafters help to explain why it is a document that offers no protection against racial discrimination today.

THE LEGACY OF THE SILENCES

The 1997 High Court case of *Kruger v The Commonwealth*[2] reinforces this point. This was the first case to be heard in the High Court to consider the legality of the government's formal assimilation-based policy of removing Indigenous children from their families. In *Kruger*, the plaintiffs brought >>

their case on the grounds of the violation of various rights by the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs claimed a series of human rights violations including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in s116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, those silences had a disproportionately high impact on Indigenous people.

What we can see in *Kruger* is the way that the issue of child removal – seen as a particularly Indigenous experience and a particularly Indigenous legal issue – can be expressed in language that explains what those harms are in terms of rights held by all other people (the rights to due process before the law, equality before the law, freedom of movement and freedom of religion). *Kruger* also highlighted how few of the rights – that we might assume each person holds inherently – are actually protected by our legal system. The case reminds us that there are silences in our Constitution about rights and that these silences were intended. It also gives us a practical example of the rights violations that can be the legacy of those silences.

There are silences in our Constitution about rights, and these silences were intentional.

The inequities perpetuated by the silences in the Constitution have given Australians cause to reflect upon our foundation document in the past. The feeling that this canonical document did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum.

THE 1967 REFERENDUM

The Federal Council for Aboriginal Advancement (FCAA) emerged in the 1950s as the first national representative body for Aboriginal people. It became the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI). It was the dominant voice on Aboriginal rights until the late 1960s. Its agenda focused on 'citizenship rights', but it also called for special rights for Aboriginal people as well. The involvement of people like Jessie Street saw non-Aboriginal people work alongside emerging Aboriginal leaders such as Doug Nicholls, Joe McGuiness and Kath Walker.

Perhaps because of the focus on 'citizenship rights' in the decades leading up to the referendum, and because of the rhetoric of equality for Aboriginal people that was used in 'yes' campaigns, it was inevitable that the constitutional change would be mistakenly seen as allowing Aboriginal people to become citizens or attain the right to vote. The referendum did neither.

In reality, the 1967 referendum did two things:

- it allowed Indigenous people to be included in the census; and
- it gave federal parliament the power to make laws in relation to Indigenous people.

Inclusion in the census

Marilyn Lake, in her biography of Faith Bandler, goes some way towards explaining why those who advocated so hard for the constitutional change thought it went further than it did.[3] The notion of including Indigenous people in the census was, for those who advocated a 'yes' vote, more than just a body-counting exercise. It was thought that including Indigenous people in this way would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together. It was hoped that this inclusive nation-building would overcome the prevailing 'us' and 'them' mentality.

Sadly, this aspiration has not become reality. One need only look at the native title debate to see how the psychological divide has been maintained and used to produce results where Indigenous people's rights are treated as different and given less protection. One of the fundamental vulnerabilities of the native title regime, as it currently exists, is that the interests of native title-holders are treated as secondary to the property interests of all other Australians. The rhetoric of those antagonistic to native title interests often evokes the nationalistic myths of white men struggling against the land to help reaffirm three notions in the public consciousness:

- that when Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land can evoke an emotive response but Aboriginal people can not;
- that when Aboriginal people gain recognition of a right, they are seen as getting something for nothing rather than getting protection of something that already exists. They are seen as 'special rights'; and
- that when Aboriginal people have a right recognised, it is seen as threatening the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being 'unAustralian'.

These examples show how the notion of an 'us' and 'them' still permeates thinking about Indigenous people, especially when it comes to issues concerning Aboriginal rights. It also highlights how inclusion in the census was an ineffective way to sustain an act of inclusive nation-building.

Section 51(xxvi) – the 'races power'

It was thought by those who advocated for a 'yes' vote that the changes to s51(xxvi) of the Constitution (the 'races power') to allow the federal government to make laws for Indigenous people was going to herald an era of

non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the federal government to make laws for Indigenous people would see that power used benevolently.

This, however, has not been the case, and we can see just one example of this failure in the passing of the *Native Title Amendment Act* 1998 (Cth), legislation that prevented the *Racial Discrimination Act* 1975 (Cth) from applying to certain sections of the *Native Title Act* 1993 (Cth).

Whether the races power can be used only for the benefit of Aboriginal people, as the proponents of the 'yes' vote had intended, has been given some attention by the High Court. In *Kartinyeri v Commonwealth*,[4] only Justice Kirby argued that the races power did not extend to legislation that was detrimental to or discriminated against Aboriginal people. Justice Gaudron said that while there was much to recommend the idea that the races power could be used only beneficially, the proposition in those terms could not be sustained. Justices Gummow and Hayne held that the power could be used to withdraw a benefit previously granted to Aboriginal people and thus to impose a disadvantage.

When analysing the failure of the 1967 amendment to ensure benevolent and protective legislation, one is reminded of the original intent of the framers to leave decisions about rights to the legislature. History provides us with many examples of the legislature overriding recognised human rights, or passing legislation that protects rights only to override them when politically expedient. The other lesson that can be learned from the 1967 referendum is that the federal parliament cannot be relied upon to act in a way that is beneficial to Indigenous people.

AND YET, A TRIUMPH

Despite the fact that the 1967 referendum did not create the even playing field or an era of non-discrimination as envisaged by many 'yes' voters, it was a high-water mark in the relationship between Aboriginal and non-Aboriginal people.

Australia has been extremely reluctant to alter its Constitution, seemingly suspicious of many of the changes proposed over the years. The referendum in 1967 initiated one of only six constitutional changes. But of all of these, it was the most resoundingly endorsed, winning over 90% of voters and carrying in all six states. At a time when many parts of Australia were actively practising segregation, this was an extraordinary result.

The Freedom Rides through northwest NSW, headed by Charles Perkins and including a group of university students (featuring future NSW Chief Justice Jim Spigelman and historian Ann Curthoys), also worked towards changing public opinion at this time. They brought to the attention of people in the cities the crude and racist conditions that >>

Constitutional change was mistakenly seen as giving Aboriginal people citizenship and the right to vote.

Photography **Melanie Poole**

existed in places like Walgett and Brewarrina, garnering public sympathy for Indigenous issues.

The 'yes' vote also enjoyed bi-partisan support, a prerequisite to ensuring its success. Political leadership was shown across the spectrum to support the constitutional change that would grant more power to the federal parliament. It can be inferred that the relatively uncontentious nature of the changes – including Indigenous people in the census and increasing federal government power over them – assisted in obtaining this bi-partisan support. A more radical change, one that called more directly for the entrenchment of Indigenous rights, would not have enjoyed such popular support.

AN UNINTENDED LEGACY

What are the real impacts of changes to s51(xxvi) of the Constitution? It did not produce a new era of equality for Aboriginal people as its proponents had hoped. Instead, its most enduring – though perhaps unintended – consequence was the new relationship it created between federal and state and territory governments. And rather than being a relationship of co-operation, it is one that has seen governments at both levels try to blame the other for the failure of Indigenous policy and to shift the responsibility and the cost away from themselves.

A recent example was the response prompted by negative media coverage of findings of the high incidence of sexual assault in some communities and gang violence in others. Federal Minister for Aboriginal Affairs, Mal Brough, blamed the Northern Territory government for not putting police into communities where violence was endemic. While he was absolutely correct that any community of 2,500 people with no police force would have law and order issues, it was a simplistic response focused only on blame (and cost) shifting. Many other factors contribute to the cyclical poverty and despondency within some Aboriginal communities that create, over decades, the environment in which the social fabric unravels and violence, sexual abuse, substance abuse and other anti-social behaviour are rife. Just as unhelpful was the response of Northern Territory Chief Minister, Claire Martin, who asserted that the problem was the federal government's failure to provide adequate housing and health and education services. Both were, of course, correct. Governments – federal, state, and territory – all continue to under-fund the most basic Aboriginal community needs like health services, educational facilities and adequate housing services.

Forty years ago, it was precisely the same unjust conditions that made Australian voters direct the Commonwealth to take responsibility for the good government of Indigenous people, just like all other Australians.

The other legacy of the referendum was to shape a new era of more 'radical' rights movements. Aboriginal people quickly became disillusioned by the lack of change that followed the referendum, the continual discrimination facing them and the poor socio-economic conditions of their communities. They rejected the notion of assimilation but embraced the idea of equal rights and equal opportunities for Aboriginal people.

In this environment, a new generation of activists was born, whose protests culminated in the establishment of the Aboriginal Tent Embassy on the lawns of what is now Old Parliament House. From here, the new land rights movement was formed. ■

Notes: **1** See George Williams, *Human Rights under the Australian Constitution*, Melbourne: Oxford University Press, 2000. **2** *Kruger v The Commonwealth* (1997) 190 CLR 1. **3** Marilyn Lake, *Faith: Faith Bandler, Gentle Activist*, Sydney: Allen & Unwin, 2002. **4** *Kartinyeri v Commonwealth* (the *Hindmarsh Island Bridge* case) (1998) 195 CLR 337.

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