

**The Relevance of Difference —  
Equal Justice and Equality before the Law**

**Brennan Justice and Leadership Program  
Faculty of Law and UTS Law Society  
University of Technology, Sydney**

Chief Justice Robert French AC

27 August 2015, Sydney

Justice blindfolded represents the idea of 'equality before the law', indifferent to differences between those who come before her. Equality before the law is not however a guarantee of equal justice. The point was made in the well-known statement of Anatole France:

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.<sup>1</sup>

Some laws are deliberately rigid. They do not permit distinctions to be drawn between different cases and circumstances. Mandatory minimum sentencing laws are leading examples. They give effect to legislative policies which accord a very high priority to the norms which they enforce, such as the sanctity of life. They provide certainty of outcome. That certainty however may result in injustice. That is because such laws require that the same punishment be applied to an offender regardless his or her moral culpability and the gravity of his or her conduct. Such laws are consistent with formal equality before the law. In Australia they have not been found to be beyond the limits of legislative power. In 2013, the High Court rejected a challenge to a Commonwealth law which provided for a mandatory

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<sup>1</sup> Anatole France, *The Red Lily (Le Lys Rouge)* (1894), ch 7.

minimum sentence of five years to be imposed on the crewmen of people-smuggling boats.<sup>2</sup> The challenge depended upon the proposition that the law required the courts to act inconsistently with the judicial power of the Commonwealth in imposing punishments disproportionate to the circumstances of the offender.

Some laws are designed to discriminate. They still meet the requirement of formal equality before the law. A law may provide for benefits to be paid to a particular class of person. Such a law lays down a general rule even though it is directed to particular classes of individuals. That kind of reasoning is reflected in decisions of the Supreme Court of Canada in the 1970s concerning the application of a provision of the *Canadian Bill of Rights* guaranteeing the 'right of the individual to equality before the law'. The Court held that the provision did not require that all Federal statutes apply to all individuals in the same manner.<sup>3</sup>

The race power under the Constitution authorises racially discriminatory laws. Section 51(xxvi) of the Australian Constitution empowers the Commonwealth Parliament to make laws for the people of any race for whom it is deemed necessary to make special laws.<sup>4</sup> The 1967 Referendum brought Aboriginal people within its scope. The purpose underlying the amendment was beneficial discrimination. Like laws conferring targeted benefits, laws made under the race power for the benefit of Aboriginal people would not offend against the idea of equality before the law. I will say some more about the race power a little later in this talk.

The aspiration to equal justice is tested where a society comprises people of different cultural backgrounds. Australia is such a society. The Australian Census in 2011 disclosed that 26% of Australia's population was born overseas and that a further 20% had at least one parent born overseas.<sup>5</sup> The Census revealed that about 4 million people in the Australian population at 2011 spoke a language other than English at home.<sup>6</sup> The spectrum of countries of origin has shifted significantly. The proportion of the overseas born population originating from Europe declined from 52% in 2001 to 40% in 2011. The proportion of migrants born in

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<sup>2</sup> *Magaming v The Queen* (2013) 252 CLR 381.

<sup>3</sup> *Bliss v Attorney-General of Canada* [1979] 1 SCR 183, 194.

<sup>4</sup> Constitution s 51(xxvi).

<sup>5</sup> Australian Bureau of Statistics, *Cultural Diversity in Australia - Reflecting a Nation: Stories from the 2011 Census*, (16 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>>.

<sup>6</sup> Australian Multicultural Council, *The Australian Community: The Australian Multicultural Council's Report on multiculturalism and social cohesion in Australian neighbourhoods* (2013) 9.

Asia increased from 24% of the overseas born population in 2001 to 33% in 2011. The largest growing groups between 2001 and 2011 came from India and China.<sup>7</sup>

In its Report on Multiculturalism and the Law, published in 1992, the Australian Law Reform Commission discussed the idea of cultural exemptions from particular laws, including religious exemptions. They included exemptions from voting on religious grounds, the authorisation of the slaughter of animals in accordance with religious ceremonies, which would otherwise violate laws relating to the meat industry, and exemptions from the requirements to wear motor cycle helmets.<sup>8</sup> Laws creating such exemptions generally fall into the same category as laws which are applicable to defined classes of people. They do not offend the principle of equality before the law because the law itself, like laws conferring particular benefits, defines a class of persons to whom it applies. Whether they are a good idea is another question entirely. The Commission suggested that that judgment requires consideration of:

- the rights and interests protected by the law absent the exemption;
- the harm which the law seeks to prevent;
- the beliefs or practices which are at stake; and
- the extent to which an exemption if granted would undermine the law's effectiveness.<sup>9</sup>

The Commission proposed that laws should make allowance for individual religious and cultural freedoms only where the significance to the individual of upholding that freedom outweighs the harm the law seeks to prevent and where recognition of that freedom by the law poses no direct threat to the person or property of others.<sup>10</sup>

There has been much debate about whether such exemptions should be granted at all. There are those who argue that there is nothing inherently unfair about a general law which

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<sup>7</sup> Australian Bureau of Statistics, *Cultural Diversity in Australia - Reflecting a Nation: Stories from the 2011 Census* (16 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>>.

<sup>8</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report No 57 (1992) [8.3].

<sup>9</sup> Ibid [8.20].

<sup>10</sup> Ibid.

has a different impact on different people. Others argue that a readiness to consider exemptions based on culture or religion may favour articulate, well-organised, well-funded and well-connected groups seeking such exemptions over others who do not have those advantages.

The provision of cultural defences to criminal liability is a closely related topic and understandably contentious. The argument for such defences is that apparently objective criteria of liability, such as 'reasonableness', may be applied from the perspective of what is called 'the dominant culture'. Such criteria, it is argued, may disadvantage individuals from different cultural backgrounds who have different values. One answer to that concern is that there are certain standards or values to which all who enter Australian society are expected to conform and if that is a reflection of the dominant culture, it is the price of the benefits which Australian society confers. The Commission concluded in its 1992 Report:

a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different groups would lessen the protection afforded to all by the criminal law.<sup>11</sup>

The issue has been discussed in the context of the defence of provocation which is defined by reference to the responses of an 'ordinary person' to the alleged provoking conduct. The question is whether the responsible ordinary person should be judged by reference to his or her cultural attributes. In *Stingel v The Queen*,<sup>12</sup> the High Court said:

The principle of equality before the law requires ... that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community.<sup>13</sup>

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<sup>11</sup> Ibid [8.38].

<sup>12</sup> (1990) 171 CLR 312.

<sup>13</sup> Ibid 329.

It has been said that the notion of an 'ordinary person' in a multicultural society is 'pure fiction'. Justice McHugh, who made that observation, went on to say:

Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.<sup>14</sup>

The legal merits of that observation need not be debated here. It reflects a concern that what is sometimes called 'cultural diversity' may raise difficult questions about the application of a general law. It is also in this area that tensions can arise between ideas of equal justice and concerns for the protection of society and vulnerable persons, particularly women, from violence or other forms of abuse.

A law may be flexible in the way in which it can be applied to individuals. If the law permits, the exercise of a discretion may take into account differences between people which are relevant to the scope and purpose of the law. The leading example is the exercise of sentencing discretions. In that case equality before the law can co-exist with equal justice. In 2011, Justices Crennan, Kiefel and myself, in a sentencing decision, observed:

'Equal justice' embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. ... It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.<sup>15</sup>

As appears from the preceding discussion, the idea of 'equal justice' may be seen as a more demanding standard than that of formal 'equality before the law'.

The difficult question of how and to what extent a person's indigenous background should be taken into account in sentencing was considered in 2013 in *Bugmy v The Queen*.<sup>16</sup>

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<sup>14</sup> *Masciantonio v The Queen* (1995) 183 CLR 58, 74.

<sup>15</sup> *Green v The Queen* (2011) 244 CLR 462, 472-73 [28] (footnotes omitted).

<sup>16</sup> (2013) 249 CLR 571.

The appellant argued that sentencing courts in New South Wales should take into account the unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender. It was also argued that courts should take into account the high rate of incarceration of Aboriginal Australians. The Court said:

An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.<sup>17</sup>

The plurality in the Court also quoted from the judgment of Brennan J in *Neal v The Queen* in 1982 that:

The same sentencing principles are to be applied ... in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.<sup>18</sup>

In *Munda v Western Australia*,<sup>19</sup> the Court referred to what Brennan J had said. It also referred to an observation by Eames JA, of the Victorian Court of Appeal, who said that regard to an offender's Aboriginality seeks to ensure that a factor relevant to sentencing which arises from the offender's Aboriginality is not 'overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored.'<sup>20</sup> The High Court added that it would be contrary to what Brennan J said in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities:

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<sup>17</sup> Ibid 592 [37].

<sup>18</sup> Ibid 593 [39] citing *Neal v The Queen* (1982) 149 CLR 305, 326.

<sup>19</sup> (2013) 249 CLR 600, 618 [50].

<sup>20</sup> Ibid 619 [52] citing *R v Fuller-Cust* (2002) 6 VR 496, 520 [80].

To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.<sup>21</sup>

The proposition that Aboriginality be considered as a means of identifying the circumstances of an offender that are relevant to sentencing is applicable to ethnicity or culture, which in a similar way may shed light upon the existence or non-existence of factors traditionally regarded as relevant to the exercise of sentencing discretions.

The equal justice idea extends beyond the field of sentencing for criminal offences. That leads into the general question of the extent to which the notion of equal justice requires the legal system to respond to differences between persons, specifically cultural differences. There are difficulties in seeking culture-specific adjustments to the substantive law. But equal justice also requires consideration of the procedures and practices which effect access to justice and effective engagement with the legal system. That covers the ways in which justice is administered by judges, court officials and ancillary service providers, lawyers, regulators, prosecuting authorities and law enforcement agencies including, importantly, police services. Much of the practical impact of the law and the legal system depends upon how it is administered day-to-day. That is something upon which the participants in that administration may have a direct and beneficial effect without the fraught debates that surround law reform in this area generally.

There has recently been established a Judicial Council on Cultural Diversity, chaired by Chief Justice Wayne Martin, the Chief Justice of Western Australia. The Council will be an important new source of research, education and advice to members of the Australian judiciary trying to do equal justice in a culturally complex community. It has the support of the Council of Chief Justices of Australia and New Zealand and of the Migration Council of Australia, which was instrumental in its establishment. It will provide advice to the Council of Chief Justices. On 3 March 2015, the Federal Government announced the allocation of

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<sup>21</sup> Ibid 619 [53] (footnotes omitted).

\$120,000 over two years to support the development by the Judicial Council of a national framework, guidelines, protocols and training to ensure more effective and consistent administration of justice for culturally and linguistically diverse women and their families. The development of that framework will be conducted under the auspices of the Judicial Council and the Migration Council. The media release issued by the Prime Minister and the Minister Assisting the Prime Minister for Women recognised that a 'one-size-fits-all' approach to dealing with family and sexual violence will not address the unique challenges faced by different groups of women in Australia.<sup>22</sup> That observation reflects the reality that equal justice can accommodate a variety of measures in the administration of justice. It does not require a single approach which ignores diversity.

The term 'cultural diversity' requires us to engage with the rather elusive concept of 'culture'. Its definition and the approach to its definition are contested. While social scientists may disagree about it some cautionary propositions, summarised by Susan Armstrong in the *Journal of Judicial Administration* in 2011,<sup>23</sup> have emerged from the literature:

- Culture cannot be defined as a static set of attributes. It is remade continually and its content is dynamic, often contested and heterogeneous. One poignant example of this is the emphatic rejection by Aboriginal women of any suggestion that domestic violence has anything to do with indigenous culture.
- Culture is not definitive of a person's identity or conduct. Identity and conduct can also be connected to psychology, class, ethnicity, religion, language, race, gender, sexuality, ability and age in specific historical, social and political contexts. Membership of a particular culture is consistent with multiple identities and affiliations.

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<sup>22</sup> Prime Minister, Minister Assisting the Prime Minister for Women, 'Support for Culturally and Linguistically Diverse Women' (Media Release, 3 March 2015).

<sup>23</sup> Susan Armstrong, 'Accommodating culture in family dispute resolution: What, why and how?' (2011) 20 *Journal of Judicial Administration* 167.

- The dominant culture in a society is a construct. Just because it is dominant it is not thereby to be assumed to be natural or normative.<sup>24</sup>

That being said, 'diversity' must be attached to a workable core meaning of 'cultural'. With appropriate caution in application, it should be sufficient to adopt as a working definition that of the Oxford English Dictionary which speaks of 'the distinctive ideas, customs, social behaviour, products, or way of life of a particular nation, society, people, or period.' In the Australian setting that enables the application of the term to subsets of the population who by reason of their history and ancestry share in varying degrees distinctive ideas, customs, social behaviours and ways of living.

The recognition and protection of particular cultures is a norm of international law reflected in Art 27 of the International Covenant on Civil and Political Rights which has been seen as part of a general movement in international law towards the universal norm of ensuring legal respect for cultural differences.<sup>25</sup> It may be coupled with Art 18 relating to freedom of thought, conscience and religion, and Art 26 which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Consistently with the international norms which have been adopted by Australia as a party to the International Covenant on Civil and Political Rights and other Conventions, it is entirely appropriate that those involved in the administration of justice in various ways should ensure so far as they can that people are not disadvantaged in their access to or interaction with the justice system by reason of their culture. With the very significant shift in the composition of the Australian population and the many countries of origin from which Australians now come, the potential for misunderstanding and misinterpretation, by people of different cultures, concerning the working of the justice system and the potential for misunderstanding and misinterpretation of those people by those involved in the justice system is real.

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<sup>24</sup> Robert Smith, 'Culture as Explanation: Neither all nor Nothing' (1989) 22 *Cornell International Law Journal* 425, 428.

<sup>25</sup> Sebastian Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Clarendon Press, 1998) 118.

Equal treatment benchbooks have been developed for judges in a number of the Australian States. Their premise, as Michael King, who is a leading proponent of reform in this area, has stated is the overriding obligation of judges and magistrates to adhere to the judicial oath to do right to all manner of people. They seek to provide judges with knowledge and to suggest processes which they can use in appropriate cases.<sup>26</sup> Taking the Queensland Benchbook as an example, some of the particular and practical insights which it offers include the following:

- In some Asian cultures support for family members accused of crimes is expressed through absence from court as it is too shameful to the family's honour to publicly support the individual.<sup>27</sup>
- In many cultures direct eye contact is considered rude or challenging, whereas in Anglo-Australian culture a failure to maintain eye contact might be seen as evasive or suspicious on the part of a witness.<sup>28</sup>
- There are a number of cultural barriers to effective communication between Aboriginal and non-Aboriginal people including family and kin loyalty, the unfamiliarity of direct questioning and gratuitous concurrence and suggestibility.<sup>29</sup>

Benchbooks, however, can only go so far. Reading the printed word is one way of learning. Engagement in active discussion and workshopping of the challenges faced by the justice system in responding appropriately to cultural diversity is a much more powerful way of developing the necessary awareness of problems as they arise in the day-to-day tasks of hearing and deciding cases.

Judges are by no means the only players in the system whose awareness of, and response to, cultural diversity is of importance. The jury which decides a case in which

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<sup>26</sup> Michael King, 'Realising the Potential of Judging' (2011) 37 *Monash University Law Review* 171, 181-82.

<sup>27</sup> Supreme Court of Queensland, *Equal Treatment Benchbook* (Supreme Court of Queensland Library, 2005) 41.

<sup>28</sup> *Ibid* 75.

<sup>29</sup> *Ibid* 111-16.

cultural questions are relevantly in play may need careful and clear instruction about how such factors may properly inform their decision-making. Lawyers who are acting for or against persons from culturally diverse backgrounds should have as part of their continuing legal education a developed awareness of the issues and professional standards which ensure that none are tempted to take unfair advantage of culturally based misunderstandings or misinterpretations of the legal process. The same is true for Registry staff, court officers and support people who attend courts to assist those caught up in the system, whether as parties or witnesses. There is a significant level of awareness of the issue in the Australian legal system. Much has been done, but much remains to be done.

Returning to the field of substantive law, the Constitution confers express power on the Commonwealth Parliament to make laws for the people of particular races. I will conclude this lecture with some reference to that power, which has formed part of the debates surrounding recognition of Australia's indigenous people in the Constitution. It is not appropriate that I express any views about the debate, but it may be that some understanding of the race power will be useful to those of you who are interested in it.<sup>30</sup>

Section 51(xxvi) provides that the Commonwealth Parliament can make laws for the peace, order and good government of the Commonwealth with respect to 'the people of any race for whom it is deemed necessary to make special laws'. From 1901 until 1967 its subject matter was 'the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws.'

The original purpose of the power, according to Quick and Garran, was to make discriminatory laws 'to localise the "people of any alien race" within defined areas, to confine them to certain occupations and to restrict their immigration.' It also extended, in a positive way, to giving such people special protection and securing their return to their country of origin.<sup>31</sup> Professor Geoffrey Sawer has commented that the power was not necessarily limited in its original conception, to laws discriminating against minority races. Sir Samuel Griffith was the principal proponent of the power and that it be exclusive to the Commonwealth. It could authorise laws for their benefit and there was an observation of

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<sup>30</sup> What follows is extracted from a more extensive account of the race power in R French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180–212.

<sup>31</sup> John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus and Robertson, 1901) 622.

Sir Samuel Griffith which supported that proposition.<sup>32</sup> In the 1898 Convention Debate on the clause, Isaac Isaacs expressed concern about its effect on the authority of the States to enact local legislation affecting particular races. Edmund Barton expressed his 'strong opinion' that 'the moment the Commonwealth obtains any legislative power at all it should have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.'<sup>33</sup>

The colonial laws in existence before Federation, which affected particular races, and the views expressed in the Convention Debates reflected cultural attitudes which informed Australia's nascent nationalism. Constitutional historian, Professor Helen Irving has written that the issue of 'colour' was unequivocally a racist issue but, more than that, 'it was a type of cultural strategy in the processes of nation building'.<sup>34</sup> In similar vein, Bob Birrell refers to Deakin's parliamentary call in 1901 for 'a united race' as reflecting an 'aspiration for a shared sense of peoplehood ... to be expected from a nationalist initiating the process of nation building'.<sup>35</sup>

The Aboriginal people of Australia were barely referred to in the Convention Debates on the race power. Even without their express exclusion, the race power had nothing to do with indigenous people. It was always about non-white races from outside Australia who had been or might in future be admitted to this country. The exclusion of Aboriginal people from its ambit marked a difference between the Australian Constitution and the Constitutions of the United States and Canada. Those constitutions made express reference to indigenous Indians.<sup>36</sup>

The only reference to Aboriginal people in our Constitution outside their express exclusion in s 51(xxvi) appeared in s 127, which provided:

In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be included.

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<sup>32</sup> Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1976) 2 *Federal Law Review* 17, 23.

<sup>33</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 228 (Edmund Barton).

<sup>34</sup> Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 100.

<sup>35</sup> Robert Birrell, *Federation: The Secret Story* (Sydney: Duffy and Snellgrove, 2001) 287.

<sup>36</sup> United States of America Constitution, Art 1, s 8(3); *Constitution Act 1867* (UK), 91(xxiv).

That provision had primarily to do with the calculation of quotas for Commonwealth electoral divisions in the various States and for the purpose of calculating the distribution of Commonwealth surplus revenue among the States. It reflected the absence of any place for Aboriginal people under the Constitution and the absence of any concern about them on the part of those who were to form Australia's first national government.<sup>37</sup> While Professor Sawyer has pointed out that most of those who participated in the Convention Debates were humane and conscious of their duties to less fortunate sections of the community, there was no suggestion from any of them that Australia owed its original inhabitants some national obligation.<sup>38</sup>

Over the years after Federation, however, pressure for change in the Constitution to give the Commonwealth power to make laws with respect to indigenous Australians developed. It began as early as 1910. It continued thereafter. The Royal Commission on the Constitution, set up in 1928, received a number of submissions calling for the amendment of the Constitution to give legislative power to the Commonwealth with respect to Aboriginal people. In its 1929 Report, the Commission declined to recommend that change. It recognised that the effect of the treatment of Aboriginal people on the reputation of Australia furnished a powerful argument for a transfer of control to the Commonwealth. However, it considered that the States were better equipped to make laws with respect to Aboriginal people than the Commonwealth. They controlled police and lands and, to a large extent, the conditions of industry.

Pressure for change continued. Power to legislate with respect to Aboriginal people was one of the propositions included in the 1944 Constitutional Referendum conducted by the Curtin Government. There were, however, 13 other propositions concerned with the extension of Commonwealth power. A majority of votes was achieved only in South Australia and Western Australia.<sup>39</sup> The Constitutional Review Committee set up in 1959, recommended the repeal of s 127 but did not consider the race power.

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<sup>37</sup> Brian Galligan 'Constitutional Passages' (Paper presented at Conference on Aboriginal and Torres Strait Islander People and the Australian Constitution, Constitutional Centenary Conference, Sydney, 4 April 1991).

<sup>38</sup> Sawyer, above n 32, 17–18.

<sup>39</sup> Constitution Alteration (Post War Reconstruction and Democratic Rights) Bill 1944 (Cth).

In 1961, the Federal Conference of the Australian Labour Party, at the instigation of Mr KE Beazley MHR, resolved that s 127 of the Constitution should be removed along with the exclusion of Aboriginal people from the race power under s 51(xxvi). Pressure for change was mounting and ultimately in 1967 Prime Minister Holt introduced the Constitution Alteration (Aborigines) 1967 Bill (Cth) which proposed the removal of the words 'other than the Aboriginal race in any State' from s 51(xxvi) and the deletion of s 127. There was no opposition in Parliament to the proposal so only a 'yes' case was authorised and distributed to each elector. In the end, as we know, the referendum was one of the few to succeed.

There have been a number of decisions of the High Court in relation to the race power, including *Koowarta v Bjelke-Petersen*<sup>40</sup> in 1982, which concerned the validity of the *Racial Discrimination Act 1975* (Cth). The Act was upheld under the external affairs power. The race power was held not to support the Act because the Act applied equally to all persons and therefore was not a special law for the people of any one race. A number of the Justices expressed the view, obiter, that the race power would support laws discriminating against, as well as in favour of, the people of a particular race.<sup>41</sup> The power was again considered in 1983 in *Commonwealth v Tasmania*<sup>42</sup> (the *Tasmanian Dam case*). One of the issues in the case concerned the validity of provisions of the *World Heritage Properties Conservation Act 1983* (Cth) affording protection for specified Aboriginal sites. Section 8(1) of that Act declared that it was necessary to enact the protective provisions as special laws for the people of the Aboriginal race. A majority of the Court held that the provisions were within the legislative power conferred by s 51(xxvi). Brennan and Murphy JJ took the view that the race power would only support law benefiting the people of the particular race to whom they related. That was not however a majority view. Mason J said that the power was wide enough:

(a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community, and (b) to protect the people of a race in the event that there is a need to protect them.<sup>43</sup>

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<sup>40</sup> (1982) 153 CLR 168.

<sup>41</sup> Ibid 186 (Gibbs CJ), 243 (Aickin J concurring), 209 (Stephen J) and 244 (Wilson J).

<sup>42</sup> (1983) 158 CLR 1.

<sup>43</sup> Ibid 158.

Those propositions were approved in the joint judgment in the *Native Title Act case*<sup>44</sup>. However, the circumstances under which people of a particular race might be a threat or a problem to the general community were not identified.

In *Kartinyeri v Commonwealth*<sup>45</sup> the Court was concerned with the validity of the *Hindmarsh Island Bridge Act 1997* (Cth). The Act worked an amendment in the nature of a partial repeal of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in its application to the proposed construction of a bridge at Hindmarsh Island in South Australia. Members of a local indigenous community instituted proceedings against the Commonwealth alleging that the amending Act was invalid for want of support from the race power or any other head of Commonwealth legislative power. The Court held by majority that the Act was valid. It was properly characterised as a law 'with respect to the people of any race for whom it is deemed necessary to make special laws.'

Some general propositions emerging from the case law on the race power as adopted, whether obiter or otherwise by High Court majorities, include the following:

1. The power will authorise laws relating to any sub-group of people of a race however that sub-group is defined.<sup>46</sup>
2. The law must be a 'special law' in the sense that it must have a differential operation upon the people of a particular race or a sub-group thereof.<sup>47</sup>
3. A law can be special when it confers a general benefit which is of special significance or importance to the people of a particular race.<sup>48</sup>
4. The law will not be a 'special law' and will not be a valid exercise of the power if it is a law which applies equally to the people of all races.<sup>49</sup>
5. The power may support legislation which will:

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<sup>44</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373, 461.

<sup>45</sup> (1998) 195 CLR 337.

<sup>46</sup> *Native Title Act case* (1995) 183 CLR 373, 461–62 approving Deane J in the *Tasmanian Dam case*.

<sup>47</sup> *Ibid*, approving Brennan J in the *Tasmanian Dam case*.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

- (a) regulate and control the people of any race in the event that they constitute a threat or problem to the general community;
  - (b) protect the people of any race in the event that there is a need to protect them.<sup>50</sup>
6. Whether a law is 'necessary' for the people of a race is for Parliament and not for the court to determine.<sup>51</sup>
  7. It is an open question whether the court has supervisory jurisdiction to ascertain whether there has been a manifest abuse of power by Parliament.<sup>52</sup>
  8. The race power confers the power to amend or repeal any law validly made under it.<sup>53</sup>
  9. The power will authorise laws which impose obligations or disadvantages upon people of a particular race as well as laws for the benefit of such people.<sup>54</sup>

The race power in its origins was not beneficial to the people of particular races. On the other hand, the intention of the 1967 amendment which extended its coverage to Aboriginal and Torres Strait Islander people was entirely beneficial. The question what should be done about the power is a matter of ongoing debate. It is necessary, however, to understand its place in our national history in order to appreciate its nature and indeed its dangerous as well as its beneficial potential. It is also a useful entry point for thinking about some of the broader issues relating to equality before the law and equal justice in the face of cultural diversity discussed earlier in this paper.

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<sup>50</sup> *Native Title Act case* (1995) 183 CLR 373, 461–62 approving Mason J in the *Tasmanian Dam case*.

<sup>51</sup> *Ibid* 460.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

<sup>54</sup> *Native Title Act case* (1995) 183 CLR 373, 461 which accepts as 'special' laws conferring rights or benefits or imposing obligations or disadvantages especially on the people of a particular race.