Next step: a treaty and racism-free law

CANBTZ0020080215e42g0001c
By The Canberra Times
1608 Words
16 February 2008
Canberra Times
B02
English

I n saying sorry, Kevin Rudd acknowledged that ''the laws that our parliaments enacted made the Stolen Generations possible''. He was right to do so. Children were not taken in breach of the law, but because of it. Legislation allowed Aboriginal children to be forcibly removed from their families because of their race. For example, the Northern Territory Aboriginals Ordinance of 1918 provided for the removal of children into ''Aboriginal institutions'' and for the ''conditions on which Aboriginal and half-caste children may be apprenticed to or placed in the service of suitable people''. Only a few were exempt from the harsher terms of the Ordinance, including ''any Aboriginal or half-caste who is a female lawfully married to and residing with a husband who is substantially of European origin or descent''. This was one of many laws that produced the Stolen Generations. Other legislation ensured that no indigenous person could play an active part in the political life of the nation.

Hence, while the Commonwealth Franchise Act 1902 extended the vote in federal elections to women, it simultaneously denied this to any ''Aboriginal native of Australia''. Only in 1962 was the vote extended to indigenous people and even after then it was not compulsory for indigenous people, unlike other Australians, to enrol to vote. Equality at Commonwealth elections was not brought about until 1983, when enrolment for and voting in Commonwealth elections was made compulsory for Aboriginal Australians. These laws have now been repealed, and in 1975 the Federal Parliament passed the Racial Discrimination Act to protect all Australians. However, the legal problem is far from resolved. Even the Racial Discrimination Act has proved a fragile shield. Few people realise that it has been overridden twice in the past decade. On both occasions, in 1998 in regard to native title and in 2007 for the Northern Territory intervention, a federal law provided that if it was racially discriminatory it was to operate despite the Racial Discrimination Act. This exposes a deeper problem in our legal system, one that is still to be remedied. The problem is that we have yet to eradicate the racist premise upon which our Constitution is based. The framers of our Constitution included few rights guarantees, and no bill of rights, in the new document. They wanted the federal and state parliaments to be able to pass racially discriminatory laws. This was clearly demonstrated by the drafting of certain provisions. For example, the Constitution as drafted in 1901 said little about indigenous people, but what it did say was entirely negative. Section 51(xxvi), the races power, enabled the Federal Parliament to make laws with respect to ''people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws''. Similarly, section 127 stated, ''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 counted.'' Section 51(xxvi) was intended to allow the Commonwealth to restrict the liberty and

rights of some sections of the community on account of their race. Australia's first prime minister, Sir Edmund Barton, made the position clear when he told the 1897-1898 constitutional convention that the power was necessary so the Commonwealth could ''regulate the affairs of the people of coloured or inferior races who are in the Commonwealth''. One framer, Tasmanian attorney- general Andrew Inglis Clark,

supported a provision taken from the United States Constitution requiring the ''equal protection of the laws''. However, others were concerned that this would override laws such as those in Western Australia under which ''no Asiatic or African alien can get a miner's right or go mining on a gold-field''. The equal protection provision was rejected, and section 117, which merely prevents discrimination on the basis of state residence, was inserted instead. In formulating the words of section 117, Henry Higgins, one of the early members of the High Court, said that it would allow the ''law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based on colour and race.'' In the 1967 referendum, Australians struck out the words ''other than the Aboriginal race in any State'' in section 51(xxvi) and

deleted section 127 entirely. However, the racist underpinnings of our Constitution remained. While the referendum meant that indigenous people could be the subject of federal laws, nothing was put in the Constitution to say that such laws had to be positive. This silence meant that the racially discriminatory underpinnings of the races power were extended to Aboriginal people without any indication that the power should be applied only for their benefit. This is not a matter of historical interest but of great contemporary significance. In 1997 the Federal Parliament used the races power to pass the Hindmarsh Island Bridge Act. A group of Aboriginal women belonging to the Ngarrindjeri people had sought to protect an area near Hindmarsh Island in South Australia from development. They argued that they were the custodians of secret ''women's business'' for which the

area had traditionally been used. The Act unilaterally overrode their claim. The women argued in the High Court that the Hindmarsh Island Bridge Act was invalid. They said that the races power only allowed Parliament to pass laws that were for the benefit or advancement of a particular race. Hence, the Parliament could pass legislation directed at providing health care for the specific needs of a racial group. On the other hand, the power could not support Nazi-style laws banning people of a race from working in certain professions or from attending particular schools. The Commonwealth asserted that the power enabled it to do just that. It argued that there were no limits to the power so long as the law affixed a consequence based on race. In other words, it was not for the High Court to examine the positive or negative impact of the law. As the federal solicitor-general, Gavan Griffith, QC, said for the

Commonwealth, the races power ''is infected, the power is infused with a power of adverse operation''. He also acknowledged ''the direct racist content of this provision using 'racist' in the expression of carrying with it a capacity for adverse operation''. In this way the federal government argued that the Commonwealth still had the power to pass laws that discriminated against Australians on the basis of their race. This is obviously abhorrent to most Australians, and is also inconsistent with accepted community values such as equality under the law. On the other hand, this is exactly what the framers of our Constitution intended. A divided High Court handed down its decision on April 1, 1998. The result was that the Hindmarsh Island Bridge Act was upheld, with the court split on whether the

races power can still be used to discriminate against indigenous or other peoples. This fundamental question remains unresolved. Faced with the great wrongs done to the Stolen Generations, an apology was the right place to start. However, it is only a start. This was recognised by Prime Minister Kevin Rudd, who said that work would begin towards a referendum to provide positive recognition of Aboriginal people in the Constitution for the first time. However, even this further symbolic change will not be enough to remove the latent racism from our Constitution. The races power must also be deleted and replaced with a power to make only positive laws on behalf of Aboriginal people. A separate provision should also be added to outlaw racial discrimination against anyone in Australia. Until this has been achieved, laws can still be passed such as those that gave rise to the Stolen Generations. This was recognised by the High Court in the 1997 decision of Kruger v Commonwealth, known as the Stolen Generations case. In rejecting the arguments of five members of the Stolen Generations as well as a mother who had lost her child, the High Court could find nothing in the Constitution inconsistent with laws such as the Aboriginals Ordinance of 1918. While we are at it, we should delete section 25 of the Constitution. It recognises that state parliaments can disqualify people from voting on account of their race. It also has no place in a modern democracy. These constitutional changes are long overdue, as is an agreement with Australia's first people. This reflects the recommendations in 2000 by the Council for Aboriginal Reconciliation, which found that Parliament should enact legislation ''to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved''. This could be the linchpin of the next stage in the reconciliation process. In other countries such as New Zealand and Canada, a treaty is the accepted way of achieving a lasting settlement between indigenous and non-indigenous people. Australia is the only Commonwealth nation without an agreement. The framing of the Australian Constitution led to a pattern of discrimination against indigenous people. It enabled the laws that brought about the Stolen Generations. While Parliament has said sorry, it needs to go further. It must tackle the unresolved problem of racism in our legal system and ensure that the wrongs done to the Stolen Generations can never be repeated. George Williams is the Anthony Mason Professor at the University of New South Wales and a visiting fellow at the ANU College of Law.

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