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Recognition Roulette

The Honourable Nicholas Hasluck

This Conference marks the 25th anniversary of The Samuel Griffith Society. The Society was founded in 1992 and the inaugural Conference was held in Melbourne in July of that year. Some months later my father, the late Sir Paul Hasluck, was invited to launch the Proceedings of the Inaugural Conference.

Unfortunately, he was unable to launch the book in person due to ill-health. I was therefore delegated to present the address he had prepared and did so on 25 November 1992 at a dinner in Perth.

I felt privileged to have had this personal involvement in the early days of the Society and I feel equally privileged to be playing a part in these proceedings 25 years later. I salute the Society and its supporters for the splendid work they have done to encourage a wide understanding of the Commonwealth Constitution and our national achievements under it.

On this occasion I was invited to speak on a topic of my own choosing. However, as I dwelt upon the early days of the Society, I was drawn back to John Stone's foreword to the inaugural volume of proceedings. He noted that the chief purpose of the Society is "to ensure that if any changes are to be made in our Constitution, they should only occur after the

widest range of thought and opinion has been canvassed."[1]

This took me to the current push for recognition of Indigenous Australians in the Commonwealth Constitution and to my father's time as Minister for Territories in the Menzies Government. In *Shades of Darkness*, an autobiographical work covering his involvement in Aboriginal affairs over 40 years from 1925 to 1965, first as a journalist and social reformer, then as a politician, Paul Hasluck confirmed that an earnest effort was made to change Australian indifference towards Aborigines, to improve their conditions and to raise their hopes for the future. He said: "We strove for the full recognition of their entitlements – legally as citizens, socially as fellow Australians."[2] It struck me that it might be useful to evaluate current proposals for constitutional "recognition" in the light of those words.

There have been various proposals for "recognition" in recent years, ranging from statements of fact for inclusion in the Preamble to the removal of references to race in certain substantive provisions (such as sections 25 and 51 (xxvi) of the Constitution), and even to proposed new clauses rendering discriminatory conduct unlawful.

It now seems, however, in the aftermath of a convention at Uluru, and a Final Report submitted to the Turnbull Government by the Referendum Council, that the proposals mentioned earlier have been replaced by what one Council member called "a relatively new development",[3] namely, that the Constitution should provide for a representative body that gives indigenous people a voice to the Commonwealth Parliament and the right to be consulted on matters that affect them.[4]

The details of this proposal have not yet been worked out, even after widespread consultation with indigenous delegates. This has caused concern. Linda Burney, a Labor member of the House of Representatives, described the Referendum Council's recommendations as "limiting" and as providing "no clear line of

sight to a referendum." Ken Wyatt, a Liberal member of the House, observed that a representative body of the kind proposed need not be enshrined in the Constitution, but could simply be enacted in legislation. Senator Patrick Dodson (Labor, Western Australia) called the proposed body "a bolt in the dark."[5] He said also that the whole thing seemed to be "going round in circles."[6]

This took me to the *Concise Oxford Dictionary* and the word "roulette". It means: "Gambling game on table with revolving centre." I have called this paper "Recognition Roulette" accordingly. The title evokes the elements of chance and uncertainty hovering over the Referendum Council's Report.

I will enlarge upon my criticisms in due course. They go to a paucity of consultation with the general public and the prospect of disharmony if a special entitlement based upon race is entrenched in the Constitution. Before looking at these matters, however, I must turn to a fundamental objection, namely, that an Aboriginal advisory body will complicate and eventually erode the structure of responsible government. I mean, by "responsible government", the system in which the Head of State – in this case, the Governor-General – acts on the advice of a Prime Minister as the leader of a cabinet of ministers drawn from the party holding a majority in the lower house, and with these ministers being in charge of the various departments of state.[7]

My objection is illustrated by some controversial events in the history of Western Australia, where an ill-fated attempt was made to confer special entitlements upon the indigenous people of the State. For the sake of historical accuracy, I will use the language of the colonial era, although I am conscious, of course, that certain terms are now being questioned by contemporary commentators.

The word, "Australia", first appeared in the Imperial Statute Book in the Act of 1829 providing for "the government

of His Majesty's Settlement of Western Australia on the western coast of New Holland."[8] It appears from Paul Hasluck's seminal work, *Black Australians* – a survey of native policy in Western Australia published 70 years ago – that in the absence of any specific instructions concerning the indigenous inhabitants of the new land, the first Governor, James Stirling, simply reiterated the principle of protection applicable in other colonies. The rights of the Aboriginal people as British subjects were fully acknowledged.[9]

The decision to accept convict transportation – a step taken 20 years after the colony was founded – meant that Western Australia could not take immediate advantage of the opportunities offered by the *Australian Constitutions Act* 1850.[10] When transportation ceased, the push for autonomy gathered pace, but there were complications. Settlers in new districts, especially in the north-west of the State, had been facing the dangers of first contact with indigenous people and were dealing with them in violent ways.[11]

An Aborigines Protection Board was established in 1886 to guard against ill-treatment and to distribute funds for welfare granted by the Legislative Council. But the colonial authorities in London and Governor Broome in Perth continued to receive disquieting reports from the frontiers.[12] Indeed, at about this time, the Reverend J.B. Gribble, a missionary working in the Carnarvon area, published a booklet with the provocative title, *Dark Deeds in a Sunny Land*, alleging dire misconduct by settlers. These charges were denied. In the libel action that followed, the Supreme Court in the colony brought in a verdict against Gribble.[13]

The Court's finding may have suggested to local people that the missionary could not substantiate his allegations, but this and other incidents led to Governor Broome recommending to the Secretary of State for the Colonies in London that "some

special arrangement should be made when self-government is granted" to ensure the protection of the native population.[14] His recommendation was received in London in a climate of idealistic concern for indigenous people and led to a protective clause concerning Aborigines being inserted in the Bill providing for responsible government.[15] The colonial politicians recognised that in order to obtain something close to governmental autonomy they had to accept the special provision. But they viewed its inclusion in the Bill as being due to coercion.

The steps by which Western Australia achieved responsible government under the *Constitution Act* 1889 mirrored the process followed by the other Australian colonies. In the end, however, unlike any other Australian colony, the State's new constitution included a special provision, in section 70, placing Aboriginal inhabitants of the Colony under the care of a Board independent of the local parliament. An annual grant equal to one percent of the Colony's gross annual revenue was to be passed to the Aborigines Protection Board for "the welfare of the Aboriginal Natives" and "the education of Aboriginal children (including half castes)".

Section 70 was entrenched by "manner and form" provisions. It could only be amended or repealed with the approval of the British Government. These arrangements were inconsistent with the usual conventions concerning responsible government and suggested that ministers in the colonial government could not be trusted to deal with Aboriginal people fairly. The elected government had no control over funds set aside for Aboriginal welfare. There was no clear link between the one percent formula and the needs of the Aboriginal people.

Then, after agitation in the Colony about these matters, section 70 was repealed by the *Aborigines Act* 1905 with the approval of the British Government. Since that time funds for Aboriginal welfare have been subject to ministerial supervision in

Western Australia in a manner consistent with responsible government.

In the post-war era critics of governmental policies such as the white activist, Don McLeod, queried the repeal of section 70, but the High Court has now held in *Yougarla's case* that the repeal effected by the 1905 Act was valid.[16] Legal opinions have established that steps related to the repeal did not give rise to any actionable breach of fiduciary duty.

The section 70 controversy must now be seen as part of a broader social and political picture: a scene that has been transformed by a range of different policies and practices over the years and by allowance for native title to land in the aftermath of the High Court's decision in *Mabo*.[17] Nonetheless, this ill-fated attempt to create a protective clause for the benefit of Aboriginal people in the *Constitution Act* of Western Australia points to significant flaws in the Referendum Council's proposal. I will deal with each of these in turn.

First, an obvious point – changing times weigh against the use of constitutional provisions to effect social improvements.

The 1889 protective clause was designed by idealists in London with a virtuous belief that something had to be done to improve the situation of Aboriginal people. A supposedly enlightened view was then entrenched in the Constitution of Western Australia, but without any clear plan of action as to what exactly should be done, and contrary to the usual rule of responsible government. A figure of one percent of the State's gross revenue was simply a rough guess as to the amount required. It was quickly overtaken by a changing economy and other significant events, including an influx of "t'othersiders" during the gold rush of the 1890s and a commitment to the federal system created by the *Commonwealth of Australia Constitution Act* 1900 (UK).

The policy of "protection" reflected in the name of the

Board appointed to distribute the special funds was superseded in due course by the move to "assimilation" – the idea that Aborigines should have the same rights and opportunities as other Australians. Some years later the policy of assimilation was denigrated as paternalistic by would-be reformers. It was supplanted by a miscellany of policies echoing the international emphasis upon "self-determination" for indigenous people.

This kaleidoscopic series of events suggests that any attempt to create a special constitutional entitlement for indigenous people is fraught with hazard because social conditions and proposals for improvement are constantly changing.

Nor can it be said with any confidence that the hardship which Aboriginal people in the west undeniably experienced would have been removed, or even substantially alleviated, if the Protection Board and special fund had operated in the manner envisaged by the section 70 provision. The governance of indigenous affairs has proved intractable from one generation to the next, and the funding provided never seems to be enough. This is undoubtedly because administrators in every era, including Aboriginal leaders on land councils and other bodies in contemporary times, have been confronted by certain fundamental issues which have never been satisfactorily resolved.

These basic issues were summarised by Paul Hasluck in his book, *Shades of Darkness*: whether Australians of Aboriginal origin are to live together with other Australians, or apart from them; are they to have the same opportunities or different opportunities; are they to bear the same responsibilities and be subject to the same laws? Is Australia to have one society or two societies?[18]

Did the Referendum Council give sufficient weight to the presence of these fundamental issues and to criticisms of the kind that led inevitably to the repeal of the section 70 protective

clause in Western Australia?

According to the co-chair of the Council, Mark Leibler, various "indigenous-designed" dialogues culminated in the National Constitutional Convention at Uluru in May 2017.[19] This led to the making of the "Uluru Statement from the Heart" which favoured the advisory body idea. It called also for the creation of a *Makarrata* Commission to supervise the making or treaties with "first nations", and with provision for truth-telling about the dark side of Australian history: Aboriginal dispossession.

The Referendum Council was not in a position to make a specific recommendation about the *Makarrata* proposal because it lay outside their terms of reference. The Council made the single recommendation mentioned earlier: that there be an advisory body giving indigenous people "a voice to the federal parliament." The co-chair acknowledged that "there's significant work to be done to flesh out the details of how a constitutionally enshrined body would operate."[20] In addition, a declaration articulating Australia's shared history, heritage and aspirations would be enacted by parliaments across Australia.

The unfortunate history of the section 70 protective clause in Western Australia shows that idealism is not enough of itself to quell all doubts about the wisdom of creating a special entitlement within the framework of a democratic constitution, especially an entitlement based upon race. Nor is it enough to point to a consultative process shaped essentially by the prospective beneficiaries and their friends.

There is an old finding in social science which goes by the name, "group polarisation"; that is, when like-minded people get together, and speak and listen only to one another, they usually end up thinking a more extreme version of what they thought before they started to talk. It is therefore not surprising that some earlier and less controversial proposals for recognition

were rejected in favour of proposals described as a means of "empowerment". Indeed, according to the co-chair of the Council, the proposed voice to parliament is to be viewed "not as a shield but as a sword."[21]

The Council's report says that the general public were "encouraged to share their views through our digital platform". Nonetheless, as a Council member, Amanda Vanstone, noted in a qualifying statement, the consultative process "cannot be said to have captured the imagination of the broad Australian community".[22] This is probably because the idea is new and the details have not been worked out. Australians, Vanstone contended, need to see a largely agreed plan as to what they would be voting for in the first instance. And yet, in a sabre-rattling tone again, Mark Leibler has announced that there is really only one way for our leaders and our nation to respond to the report; that is, "to accept the destination and work together to chart the best course to get there."[23]

Unlike the Aborigines Protection Board in the ill-fated section 70 provision, it seems that the proposed Aboriginal advisory body would not be administering policies or related funds. Its role will supposedly be limited to exercising its right to be consulted on matters affecting indigenous people. Several widely-respected commentators have suggested that in the absence of a right to veto legislation the advisory body proposal is a comfortable fit with the structure of responsible government. They envisage that this quasi-parliamentary body will simply make useful recommendations to the government of the day and quietly abide by whatever resolutions are passed by the parliament in Canberra.

To my mind, such a view is unrealistic. The advisory body has been described by its proponents as means of empowerment and not as a shield but as "a sword". So long as the fundamental issues mentioned earlier lie unresolved the proposed advisory

body will become a lightning rod for debate about a vast array of current policies. Some of these will fit the co-chair's description of matters that "affect" indigenous people, for example, the provision of services in remote communities. Others will be debatable, especially where people claiming to be of Aboriginal descent are living in urban areas in much the same way as other Australians, and with declining links to indigenous traditions.

The report concedes that "the concept of providing advice on certain matters requires definition" and seems to accept that some laws of general application may well be interpreted as having an "impact on or significance to" indigenous peoples.[24] In other words, it may turn out that nearly every matter of current concern is seen as having an indigenous component of some kind.

The inability of Commonwealth governments to govern decisively – often due to the vagaries of cross-benchers in the Senate – is a constant talking point these days. I doubt that voters will be pleased to see the structure of government burdened by a new advisory body which, pursuant to a constitutionally entrenched mandate, may claim the right to talk incessantly about matters of interest to it, causing further indecision and delay. It may become, to use Amanda Vanstone's words, "an inbuilt dissonance within our system."[25]

It is true that in the case of the Aboriginal Protection Board the frustration felt by the elected government was exacerbated by the fact that the Board was entrenched by the authorities in London – as a caveat upon the grant of responsible government, and in a manner thought to be coercive. It might be thought that if the proposed advisory body is approved at a referendum in the manner allowed by the Constitution – approval by voters in a majority of the States and by a majority of the Commonwealth electorate – then such a criticism, referable to outside interference, would be removed from the

equation.

I admit the force of this argument in logic, but I doubt that logic will be sufficient to override any deeply-rooted controversies in which the government of the day is seen to have no control over a quasi-parliamentary body with its own constituency, and especially if doubts arise, as they have in the past, as to the range of people being described as indigenous.

The language used in the ill-fated section 70 suggested that over a century ago the term, "half-caste", was thought to mark the outer limit of aboriginality. That term was thought too restrictive by changing policies and is now seen as offensive. The range of eligibility has been opened up and is steadily expanding.

A recent report by the Australian Bureau of Statistics noted that a 93 000 increase in the count of Aboriginal and Torres Strait Islander people between the 2006 Census and that in 2011 was larger than can be fully accounted for by natural increase and migration. Seventy percent of the increase was due to natural population increase, the remaining thirty percent increase was due to an increased propensity for people to identify themselves and their children as being of indigenous descent.[26] This propensity will complicate the work of an advisory body.

The consultative process hosted by the Referendum Council has created another complicating factor. The advisory body proposal is being presented to the nation in conjunction with talk about *Makarrat*a and the making of a treaty, or perhaps many treaties.

The former Prime Minister, John Howard, noted some years ago that the indivisible nation of Australia could not make a treaty with itself. Discussion since that time seems to have led to a more flexible usage in which the term, "treaty", has been equated to other forms of agreement between independent parties, bearing in mind that large tracts of land have now been

vested in various indigenous communities under the *Native Title Act* 1993 (Cth). Whatever the usage, the term suggests separate development of some kind.

In these circumstances it is not surprising that some commentators have seen the push for a treaty, or series of treaties, as essentially a stalking horse for an eventual claim to sovereignty by indigenous communities. Indeed, in his account of the Referendum Council's consultation process, the co-chair observed that: "the idea of a declaration of recognition inserted as a preamble to or within the Constitution was rejected because delegates were concerned that it might undermine, rather than bolster, the status of first peoples who never ceded sovereignty and have not yet had the opportunity to negotiate a formal agreement with the Commonwealth."[27]

Treaty talk is divisive. It will undermine the prospects of an amendment being approved by referendum and an advisory body being set up. All of these factors add to the concern I voiced earlier as to whether those involved in the Referendum Council's consultative process to date, in their haste to seek vindication for past wrongs, have given proper consideration to the structure of responsible government and to the role of a constitution.

The Preamble asserts that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern. The word, "constitution", in this context, connotes the idea of a fundamental law couched in general terms: a law which is not easily changed, although social habits and policies for improvement may change. It differs from a treaty because an agreement between independent regimes is terminable at the will of the parties involved. The Constitution of Australia was designed to endure and is binding on every member of the community.[28]

As a consequence of statutory reforms since the Constitution was enacted indigenous people now have essentially the same status as other citizens. The handicaps which they continue to suffer today are social rather than official.[29] It follows that what is proposed by way of recognition – the setting up of an Aboriginal advisory body as a quasi-parliamentary entity – can best be effected by statute, not by constitutional amendment, if, indeed, after wider consultation, it is seen as useful. This would at least avert the risk of creating a permanent forum for dissension based upon race.

Is the proposed advisory body likely to be of any real use? Policies come and go. Missionaries are replaced by anthropologists. Descriptions of identity are varied and expanded. Proposals for recognition are canvassed and rejected. There is talk of treaties while solutions to fundamental issues are pushed back and forth. There is, indeed, a sense of things going round in circles, as Senator Dodson noted. This suggests that the process of recognition is still evolving and it would therefore be unwise to have a potentially divisive proposal crystallised in the Constitution.

At a time when public opinion seems to be sympathetic to indigenous aspirations, the energy of those involved would surely be put to better use by looking for answers to the fundamental issues mentioned earlier. It may well emerge from a broader consultative process that these aspirations can be achieved by constructive collaboration on all sides.

The nature of indigenous aspirations can be gleaned from a piece published in *The Australian* by three leading figures associated with the Uluru convention, namely Megan Davis, Noel Pearson and Pat Anderson. They approved the Referendum Council's Report, but certain passages in their column seemed to open up other possibilities. They wrote:

Let us be a modern version of ourselves. We know we

> need education, economic development and individual freedom as well as communal culture and the gifts of our heritage. Give us the space to enjoy the best of both worlds, to hold to our traditions while embracing the future.[30]

There may well be support for aspirations of this kind within the general community so long as they are not obscured by divisive talk about swords or treaties or claims to sovereignty. The reality is that the aspirations voiced by the three authors can be achieved within the framework of the Constitution in its present form and they seem to be compatible with the aspirations of the Australian people as a whole.

Paul Hasluck completed *Shades of Darkness* by saying that in the 1950s he and his contemporaries strove for the full recognition of the entitlements of Aborigines "legally as citizens, socially as fellow Australians." It is entirely consistent with that objective, and pleasing to note in passing, that the first Aboriginal member of the House of Representatives, Ken Wyatt, was elected in the seat of Hasluck. He has been joined in the Federal Parliament by Senator Dodson and Linda Burney. They and others like them in times to come, in Parliament and in the mainstream professions, will be a significant voice for indigenous people – a voice to speak of their stake in the future and of a people who love their land.

Voices to parliament of this kind will do more to advance the indigenous desire to "hold our traditions while embracing the future" than the creation of an extraneous advisory body bogged down in debate fostered to a large extent by international ideology. Australians of goodwill can probably be persuaded to support a case for change they understand, but they are likely to reject a claim that smacks of special privilege or coercion, or is tainted by virtue-signalling and a sanctimonious tone. The future will be a troubled one if we do nothing but assert rights against

each other and forget our common responsibility to work for a common future.[31]

Law must ultimately be tailored to the society it serves. It follows that would-be law reformers should always keep in mind not only the entire range of Australian history, indigenous and non-indigenous alike, but also the strengths of their own system, including the Westminster style of government. In our haste to atone for past wrongs we must not forget that we are still part of Western civilisation.

I began by acknowledging the achievements of The Samuel Griffith Society over the past 25 years. I have sought to underline this point by drawing upon the works of one who was not actually present at the creation of the Society but was close enough to its beginnings to have had a few thoughts for a better ordering of constitutional affairs. With this in mind, let me close by quoting a passage from Paul Hasluck's autobiography in which he speaks of his understanding of men and women of all races who love their land and are comforted by memory of their own past. He wrote:

> In love of our own country each of us realises a common humanity coming from deep wells. Patriots are only understood by patriots. A feeling for one's own country is the clearest way to feel deeply for men and women in other countries. The folly and the failure of so many internationalists to do good comes from the fact that they lose sight of the true goodness in other countries when their senses are blunted to the goodness of their own. [32]

Endnotes

1. John Stone, foreword to *Upholding the Australian Constitution*, Volume 1, The Samuel Griffith Society, 1992, vii.

2. Paul Hasluck, *Shades of Darkness*, Melbourne University Press, 1988, 150.

3. Final Report of the Referendum Council 30 June 2017, 65, Appendix E: Qualifying Statement from Amanda Vanstone.

4. Mark Leibler, Co-Chair of the Referendum Council on Constitutional Recognition, *The Australian*, 18 July 2017.

5. *The Australian*, 22/23 and 24 July 2017.

6. Senator Dodson, ABC *7.30 Report*, 17 July 2017.

7. Geoffrey Sawer, *Australian Government Today,* Melbourne University Press, 1977, 89.

8. John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, Angus and Robertson, 1901, 33.

9. Paul Hasluck, *Black Australians,* Melbourne University Press, 2nd ed., 1970, 4 and 122. The first MUP edition was published in 1942.

10. David Black, *The Centenary of Responsible Government in Western Australia,* Early Days, Journal of The Royal

Western Australian Historical Society, 1990, Volume 10, Part 2, 147.

11. Hasluck supra (note 9) 59.

12. Neville Green, *From Princes to Paupers – The Struggle for Control of Aborigines in Western Australia 1887-1898*. Early Days, Journal of The Royal Western Australian Historical Society, 1998, Volume 11, Part 4, 449.

13. Neville Green, *J.B Gribble: Blackfellows' Friend,* Early Days, 2010, Volume 13, Part 4, 478.

14. Peter Johnston, *The Repeal of Section 70 of the Western Australian Constitution Act 1889,* University of Western Australia Law Review, 1989, Volume 19, Part 2, 319, 322.

15. Ibid., 323.

16. *Yougarla v Western Australia* (2001) HCA47; (2001) 25 ALJR 1316.

17. *Mabo v Queensland (1992)* 66 ALJR 408. See also *The Native Title Act* 1993 (Cth).

18. Hasluck supra (note 2) 143.

19. *The Australian,* 18 July 2017.

20. Ibid.

21. Ibid. See also Megan Davis, *The Monthly,* July 2017, 11.

22. Final Report supra (note 3), Vanstone statement, 67.

23. Ibid.

24. Final Report supra (note 3), 36.

25. Final Report supra (note 3), Vanstone statement, 66.

26. *Census of Population and Housing: Understanding the Increase Aboriginal and Torres Strait Islander Counting* 2006-2011, Australian Bureau of Statistics.

27. *The Australian,* 18 July 2017.

28. John Quick and Robert Garran supra (note 7) 285 and 314.

29. Paul Hasluck, *Black Australians*, supra (note 11) 5.

30. *The Weekend Australian,* 1 July 2017.

31. Paul Hasluck, *Light That Time Has Made*, National Library of Australia, 1995, 52.

32. Paul Hasluck, *Mucking About,* Melbourne University Press, 1977, 9.