C.3473

CONFIDENTIAL

FOR CABINET

SUBMISSION NO. 1009

COPY NO. 33

CONSTITUTIONAL AMENDMENTS : SECTIONS 24-27, 127 and 51(xxvi.)

On 7th April, 1965, Cabinet after consideration of a Submission which I had brought forward, decided that the nexus established by the Constitution between the number of Senators and the number of Members of the House of Representatives should be broken, so that the House might have a flexible future, and that for that purpose a referendum should be held. Cabinet also decided that the question of the abolition of section 127 of the Constitution should be put to the referendum at the same time. These decisions were recorded in Cabinet decision No. 841.

Sections 24-27 and 127

2. In my Submission, I recommended that section 24 of the Constitution, which provides for the nexus between the number of Members of the House of Representatives and the number of members of the Senate, and section 27, which was an incidental provision, should be replaced by a provision to the effect of the Constitutional Review Committee's recommendations. I also recommended, as did the Constitutional Review Committee, that at the same time sections 25 and 26 should be repealed. Section 25 provides that, for the purposes of section 24, if by a law of a State all persons of any race are disqualified from voting at elections for the more numerous House of Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race residing in that State are not to be counted. I expressed the view in the Submission that section 25 should be repealed as being of an apparently discriminatory character. It has not ever had any practical application and could in any event be avoided very easily by a State if it so desired. I pointed out that its repeal was recommended by the Constitutional Review Committee and that its repeal as part of the group of sections to be replaced by a new section 24 might well result in the section

COPY P.M.
DATE 15/7/65

24 proposals receiving some additional support from persons who were sensitive to discriminatory provisions.

3. Section 26, as I also mentioned in my former Submission, makes provision for the number of members of the House of Representatives for each State in the First Federal Parliament and its operation is, of course, completely exhausted. Its repeal would merely be of a tidying-up character and would have no political significance.

4. I have asked the Parliamentary Draftsman to put in hand the drafting of Constitution Alteration Bills to give effect to the foregoing. The Bills cannot, however, be finally settled until the matter referred to in paragraphs 6-9 is decided. Thereafter I would propose to submit the draft Bills, and, if Cabinet approves a amendment of section 51(xxvi.), a Bill to amend that provision, to Cabinet for approval with a separate short submission.

5. I draw Cabinet's attention to the fact that, under the proposed new section 24, in accordance with the recommendation of the Constitutional Review Committee, a State would get an additional member for a remainder, after division of the number of people of the State by the determined 'quota', exceeding one-half of the divisor. Under the amendment of the Representation Act last year, a State would get an additional member for any remainder. That amendment was made against the background of a reduction in the numbers of members of the House in some States produced by the formula contained in section 24. I think the new formula would give all the flexibility desired and the one-half provision contained in the proposed new section 24 would have the virtue of avoiding giving to the electors any impression of seeking to achieve the greatest number of members possible and also of enabling the adoption of the Select Committee's recommendation in whole.

6. There is one further matter concerning the proposal to replace section 24 by provisions along the lines of those

recommended by the Constitutional Review Committee that was not traversed in my previous Submission. This further matter is the provision that should be included in the new section 24 to cover the position pending the determination by the Parliament of the number of members for each State under the new section 24 and any consequential redistribution of electoral Divisions. It is clear that there would inevitably be a substantial period of time between the holding of the referendum and the determining of the numbers of members and, assuming that the numbers of members so determined were not identical with the existing numbers, the completion of the necessary procedures to determine new electoral Divisions in consequence of the determination. This makes it necessary for some transitional provision to be made to provide for the numbers of members for the respective States, and the electoral Divisions to be used, for the purposes of any election that might take place before the procedures under the new section 24 have been completed.

7. I would not think that any such transitional provision should provide for an increase in the total number of members of the House. On this basis, there appear to be three possible courses that could be taken for this purpose:-

(a) to provide that the total number of members of the House shall remain the same as at the date of the referendum, but permit -

  (i) adjustment between the States on the basis of population changes; and

  (ii) adjustment of electoral divisions within each State;

(b) to provide that the total number of members of the House, and the number of members for each State, shall remain the same as the date of the

referendum, but permit adjustment of electoral Divisions within a State;

(c) to provide that the total number of members of the House and the number of members for the States shall remain the same as at the date of the referendum, and that electoral boundaries within the States shall also remain the same as at that date.

8. Although course (a) appears in many respects to be the most equitable course, I am myself inclined to favour pegging the whole position as it is at the date of the referendum, that is, to favour course (c). I think that, as a transitional provision, a provision preserving the existing position is the most attractive course. It is true that this transitional position could continue for some time if Parliament was unable, because of Senate opposition, to determine the numbers under the new section 24 speedily, and that consequently the apportionment of the members amongst the States, and the electoral Divisions, could become out of date. But that very factor would tend to force a compromise between the two Houses in the event of disagreement. In the decision on my earlier Submission, Cabinet decided that it was impracticable to think in terms of holding the referendum and, if the vote was affirmative, of completing the additional Parliamentary and redistribution action necessary to conduct the next elections on the amended basis. Course (c) would seem to be consistent with this decision.

9. I do not think that electoral boundaries within a State should be subject to adjustment without at the same time allowing adjustment of members between States, as this would be attempting to deal only with part - and the smaller part - of the problem. And I do not myself favour permitting both adjustment

CONFIDENTIAL

of members between States and electoral Divisions within States for the reasons that I have given for favouring course (c).

Section 51(xxvi.)

10. The Constitution contains in all three provisions that either are, or are regarded by many as being, of a discriminatory character in relation to aborigines; first, section 127, the repeal of which Cabinet has agreed should be sought; second, section 25, the repeal of which I have proposed above - and which I think Cabinet envisaged in considering my earlier Submission; and third, section 51(xxvi.).

11. Section 51(xxvi.) reads:-

> 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-
>
> (xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.'

12. The Constitutional Review Committee made no recommendation in relation to this paragraph. It said in its report (page 56, paragraph 397):-

> 'When the Committee ceased its deliberations in 1958, it had given some consideration to the very important question as to whether the Commonwealth Parliament should have an express power to make laws with respect to aborigines, and representations from various quarters advocated the adoption of a recommendation to this effect. The Committee had, however, not completed its inquiries on all the issues involved and consequently no recommendation has been made. It wishes to make clear, however, that the recommendation to repeal section 127 does not necessarily affect the broader and more vital question of Commonwealth power over aborigines.'

13. There appears to be a strong body of public opinion, and there have been many representations, that the words 'other than the aboriginal race in any State' should be deleted by constitutional amendment. Indeed, as Ministers will recall, Mr. Calwell introduced a Constitution Alteration (Aborigines) Bill on 14th May, 1964, for this purpose and to repeal section 127. During

the debate on that Bill he guaranteed on behalf of the Opposition that they would support a referendum for these purposes. I think it quite probable, therefore, that if the Government does not present a Bill to alter section 51(xxvi.) the Opposition will do so.

14. As the paragraph now stands, the Commonwealth has, except in the Territories, no power to legislate 'with respect to' aborigines as such. The States do have the power. If the words are deleted it will have the result of vesting in the Commonwealth Parliament concurrent legislative power with respect to aborigines as such - they being the people of a race - provided the Parliament deems it necessary to make special laws for them. This would enable the Commonwealth, if it chose, to replace all State law, or so much of State law as it thought fit, that made special provision for the welfare of, or imposed special disabilities or restrictions on, aborigines.

15. Two separate arguments for the deletion of the words have been put forward:

A. that the words should be deleted because the special mention of aborigines constitutes a 'discrimination' - our Constitution should not suggest that aborigines are in any respect different from other Australian citizens. Those who put forward this argument have failed to understand that, in its present context, the specific mention of the aboriginal race is necessary to prevent aborigines, as a race, being treated differently from ordinary citizens in pursuance of the Commonwealth's exercise of the power.

B. that the words should be deleted for the specific purpose of giving to the Commonwealth a legislative power in relation to aborigines which it does not

> now possess. Generally speaking, those people supporting this argument are dissatisfied with the form of legislation or the administration of aboriginal affairs by the States and look to the Commonwealth, because of its broader, national approach to problems and its participation at the international level in matters concerning the welfare of indigenous inhabitants, to improve the situation.

It is illogical to argue for both views (for if the Commonwealth could and did legislate it would necessarily involve treating the aborigines specially and this would be contrary to the basis of the first argument) yet it is reasonable to conclude that a great many of those people who want the words eliminated have not identified their true purpose and would probably embrace both the arguments above.

16. I have said publicly that while the words remain in paragraph 26 they constitute, not a discrimination against aborigines, but a protection from discrimination against aborigines. This is, of course, true only in respect of the Commonwealth Legislature (there being no power at all) but leaves untouched State Legislatures, which can discriminate against aborigines. It is because it is said that State legislation does discriminate that there is representation to have the words deleted.

17. The two alternatives of dealing with the problem so far revealed are, <u>first</u>, to leave the paragraph as it now stands, which means leaving the present situation stand, or, <u>secondly</u>, to delete the words, which would result in a redistribution of power between the States and the Commonwealth in relation to the subject of aborigines. It should be emphasised that the power conferred on the Commonwealth by the second alternative would be

a mere concurrent power, and that therefore, unless and until the Commonwealth exercised its new legislative power, the status quo would remain.

18. It will be seen that the adoption of the second alternative (i.e.to delete the words) but not to legislate, would satisfy only argument A above but not argument B above. And, because the bulk of the people interested in the problem would support argument B, difficulties would continue to exist - probably more acute than they now are - for the Commonwealth would no longer be able to say it lacked power.

19. I think it is reasonable to assume that once the Commonwealth had the legislative power it would be very strongly pressed to exercise it. The exercise of the power would bring its own administrative difficulties unless the Commonwealth so exercised the power that it left the administration in the hands of the States and Northern Territory, which presently have the administrative staff and experience. But if this were done, the exercise of the power would appear to fall short of what people would expect of the Commonwealth and might not in practice result in the Commonwealth doing more than it could achieve by a section 96 grant.

20. A <u>third</u> possibility has been proffered, namely, the elimination of the whole paragraph. To eliminate the whole paragraph would be merely to deprive the Commonwealth of legislative power in respect of the people of any race (and the Commonwealth may in the future find this power of real value, e.g. the proposal for resettlement of the Nauruans) but would leave untouched the power of the State Parliaments either in relation to aborigines or the people of any other race. The States could, therefore, if they chose so to do, discriminate against the people of any race in a number of areas.

21. To meet this resultant problem that the States could discriminate, it has been suggested that the Constitution should be amended so as not merely to eliminate the whole of paragraph (xxvi.), but to insert a new provision prohibiting discrimination of any kind within the Commonwealth in the form of a constitutional guarantee similar to those to be found in the United States Constitution (e.g., the 14th Amendment). This has at first sight a real attraction on the grounds that the Australian Public would be anxious to dispose of any discriminatory practices of any kind. However, the inclusion of a broad constitutional guarantee of this kind could provide a fertile source of attack on the constitutional validity of legislation and bring about difficulties and embarrassment out of all proportion to the gains achieved by its inclusion. The extent of litigation in relation to section 92 provides a warning in this respect. Moreover, even apart from this very formidable objection to the proposal, a closer examination of the proposal reveals other substantive difficulties. For example, would the prohibition operate in respect of discrimination against any person in Australia or only against Australian citizens? If it is the former, it could have a serious impact upon our present restricted immigration policy, which discriminates between European and other residents in respect of their right to remain in Australia and to be naturalised. Even if it is the latter (i.e. Australian Citizens), it could likewise have a serious impact on our present immigration policy in that the encouragement given to Australian citizens of European origin to bring friends and relatives to Australia for permanent residence would be morally (even if not legally) irreconcilable with the proposed constitutional guarantee.

22. Because of our homogenous population there has not been thrown up the problems of discrimination which bedevil

some other countries. Such problems as do exist in Australia are of two kinds. First, occasional and unrelated acts of discrimination which upon publicity atrophy and disappear. Indeed it is my impression that coloured visitors and residents remark on the absence of discrimination in Australia. Second, discrimination against the aborigines. My impression is that this is largely a social as distinct from a racial discrimination and that it will very likely disappear as the habits, manners and education of the race more nearly approach general community standards.

23. The first certainly does not warrant a constitutional guarantee. The second, at least at this stage, would be better left to the good sense of the community rather than to acquiesce in the suggestion that discrimination in the community is at such a pitch as to warrant the passage of a constitutional guarantee.

24. For these reasons I would recommend rejection of the inclusion of a constitutional guarantee.

25. I point out that, while paragraph (xxvi.) remains in the Constitution in its present form, the Commonwealth could in large measure prevent the implementation of State discriminatory legislation, in respect of races other than the aboriginal races, by passing legislation which would be inconsistent with and, therefore, prevail over the discriminatory State legislation. If the paragraph remained, but with the words 'other than the aboriginal race in any State' eliminated, it would enable the passing of inconsistent legislation in respect of all races including the aboriginal race.

26. For these reasons, I would recommend retention of the paragraph in some form. The issue then returns to whether the words 'other than the aboriginal race' in the paragraph should be deleted.

27. If the words were deleted, the Commonwealth would have power to legislate, both so as to discriminate itself and to prevent a State discriminating. It has neither of these powers now, and it seems implicit in the arguments put forward that it is accepted generally that, if the Commonwealth were given power to legislate by the deletion of the words, it would not itself discriminate against aborigines, though it might give them special help, and, further, that it would legislate so as to remove State discrimination.

28. If the words remain, the converse is the situation. The Commonwealth can neither discriminate nor prevent a State from discriminating.

29. Up to this point, my discussion of section 51(xxvi.) has been directed to providing information for Cabinet on various aspects of section 51(xxvi.). I now venture into a different area.

30. I have formed the opinion that there would be a large area of dissatisfaction if the Commonwealth did nothing about paragraph (xxvi.). I believe the Government would be criticised, albeit mistakenly, for lacking sympathy for the aborigines. I think that the truth of the argument - that to delete the words would be only to shift the legislature in which discrimination could occur - would have insufficient impact. This is because our declared policy in Papua and New Guinea and the Northern Territory is to remove discrimination, whereas within the States removal of legislative and administrative discrimination is thought by some to be too slow a process. On the other hand, to delete the words would, I believe, meet the wishes of those making the representations and would appeal to the broad public conscience.

31. I express three possible courses that Cabinet could consider:

1. The Government could say that it does not propose to hold a referendum to seek for the Commonwealth legislative power with respect to aborigines.
2. The Government could say that it does not propose to hold such a referendum, but that it will hold discussions with the States to explore whether, and in what form, section 96 grants might be made to the States in regard to aboriginal welfare.
3. The Government could say that it would hold such a referendum and, if the referendum was successful, that it would hold discussions with the States to formulate a joint policy whereby the States would be responsible for administration, but the Commonwealth would have a role of policy participation. I recognise that this would inevitably involve expenditure by the Commonwealth

32. From what I have said above, it follows that I would virtually rule out the first alternative. People who feel that the Commonwealth should have power with respect to aborigines would continue successfully, if illogically, to allege that the Commonwealth was not prepared to face up to what they consider should be the Commonwealth's responsibility; in other words, all those persons who consider that the Commonwealth should do something about aborigines would remain wholly unsatisfied.

33. The second alternative would lead to difficulties and would, I judge, satisfy no one. The Commonwealth would be unlikely, by means of section 96 grants, to be able to influence the States sufficiently to change basic policies that it desired to be changed with respect to aborigines; and it could cover only part of the field by merely making moneys available.

34. The third alternative would give the Commonwealth power to deal with the problem and it would therefore be in a very strong position to ensure that it could implement its

policy to the advantage of the aboriginal people; at the same time, it would make it clear to everyone that it intended to seek the co-operation of the States and thus take advantage of the experience and administration of the States. I do not myself think that anything less than the third alternative would be likely to be acceptable and I would personally prefer the adoption of that course.

(B. M. SNEDDEN)
Attorney-General.

23 August, 1965.

Copied in THE CABINET SECRETARIAT 5/4/84 PE
file C 4257

CONFIDENTIAL

NOTES ON CABINET SUBMISSION NO. 1009

CONSTITUTIONAL AMENDMENTS

By Decision No. 841 dated 7th April, 1965, the Cabinet agreed to seek amendments in respect of Sections 24 to 27 and Section 127 of the Constitution. The Attorney-General now seeks guidance on points which it is necessary to decide before the Bills for the proposed referendum can be completed, including a decision as to whether an amendment to Section 51(xxvi) is to be sought.

These are primarily political matters but the following summary of the points involved may be useful.

(a) AMENDMENT TO SECTIONS 24 TO 27

(i) The Attorney-General takes the view that the previous decision authorises him to prepare the Bill, along the lines recommended by the Joint Committee on Constitutional Review. It should be noted this provides an extra seat in a State only where the remainder exceeds one half of the quota (paragraph 5).

(ii) The Attorney-General seeks a decision on what provision is to be put into the redraft of Section 24 to govern any elections held in the interim period following the referendum (paragraph 7).

(iii) The Attorney-General assumes Sections 25 and 26 are to be repealed, though the repeal of neither is needful to the primary purpose.

(b) AMENDMENT TO SECTION 51 (XXVI)

The Attorney-General seeks a decision as to whether a Bill is to be drafted for an amendment to Section 51(xxvi).

It should be noted that the Attorney-General proposes that it should be a separate Bill which the Parliament would vote on as a separate matter (paragraph 41 of Submission 660).

(c) SECTION 127

Cabinet has already decided that Section 127 should be included in the referendum. The Attorney-General proposes that this also should be the subject of a separate Bill.

Copied in THE CABINET SECRETARIAT 5/7/84 file C 4257

PRIME MINISTER'S DEPT.
30th August, 1965.

C.4257

COPY No. 28

CABINET MINUTE

Canberra, 30th August 1965.

Decision No. 1175

Submission No. 1009 - Constitutional Amendments: Sections 24-27, 127 and 51(xxvi).

Concerning Sections 24 to 27 the Cabinet confirmed that the proposal to be the subject of referendum should be that Sections 24 and 27 be replaced by a provision to the effect (though as indicated below, not to the precise effect) of the Constitutional Review Committee's recommendations, and that at the same time Sections 25 and 26 be repealed.

2. The Attorney-General circulated for the information of Cabinet a draft Constitution Alteration Bill to give effect to this proposal.

3. The Cabinet noted and endorsed the draft Bill subject to the following amendments -

(a) that the proposed new Section 24(3) should be amended in its second sentence, to provide that the question of increasing by one the number of members in a State by reason of a remainder, is placed within the power of the Parliament; and

(b) that the proposed new Section 24(8) which is the transitional section, should be amended so that it will provide that until such time as the proclamation provided for in the proposed new Section 24(6) is issued the pre-existing powers of the Parliament in relation to the numbers of members and to the numbers and boundaries of electoral divisions, shall continue in full force and effect.

DATE 15/1/68

Decision No. 1175 (Continued)

4. Concerning Section 127, the Cabinet confirmed its earlier decision that a proposal should be put, by referendum, for the repeal of the Section.

5. Concerning Section 51(xxvi), the Cabinet decided that the Section should stand unamended - that is to say, that it should remain outside the scope of the referendum.

Certified true copy

A. J. Bunting

Secretary to Cabinet.

Copied in THE CABINET SECRETARIAT 5/4/84

file C 4257