SUBMISSION NO: 46

COPY NO: 34

FOR CABINET

Constitutional Amendment : Aborigines.

On 7 April, 1965 Cabinet, after consideration of a Submission brought forward by my predecessor, decided that the question of the repeal of section 127 of the Constitution (which provides that, in reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives are not to be counted), should be put to a Referendum at the same time as the question of the breaking of the nexus between the number of senators and the number of members of the House of Representatives.

2. The Prime Minister announced on 15 February, 1966, that Cabinet had further considered the course to be followed in relation to the holding of the referendum on the two questions and had decided that the referendum should not be held this year. At the same time, he stated that the Government's intentions were to introduce, early in the life of the next Parliament, the necessary legislation to enable a referendum to be held on both questions.

3. In Submission No. 1009 of 23 August, 1965, possible action that might be taken with respect to section 51(xxvi.) was suggested. Section 51(xxvi.) reads as follows :

> '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.'

Cabinet decided on that Submission (Decision No. 1175 of 30 August, 1965) that section 51(xxvi.) should stand unamended.

4. There has, of course, been a good deal of activity in relation to section 51(xxvi.) since Cabinet's Decision of 30 August, 1965. In particular, Mr. Wentworth has introduced a private member's Bill that, amongst other things, proposes the repeal of section

51(xxvi.) and its replacement by a new paragraph. Mr. Wentworth's proposals have been widely circulated and have received a great deal of publicity and he has been actively generating support for his proposals.

5. No doubt the matter will be raised again during the next Session of the Parliament. In these circumstances, I have thought it desirable at this stage to raise the matter again for Cabinet's consideration.

Views put in Earlier Submission

6. In the Submission of 23 August, 1965, it was pointed out that there appeared to be a strong body of public opinion, and that there had been many representations and petitions to Parliament, that the words 'other than the aboriginal race in any State' should be deleted from section 51(xxvi.) by constitutional amendment. Mr. Calwell had in fact introduced a Constitution Alteration (Aborigines) Bill on 14 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.

7. It was, in the Submission, pointed out that, as section 51(xxvi.) stands :

(a) The Commonwealth has no power (except in the Territories) to legislate 'with respect to' aborigines as such.

(b) The States do have that power.

(c) If the words were deleted it would 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 deemed it necessary to make special laws for them.

(d) 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.

8. It was also pointed out that, while section 51(xxvi.) remained 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 race, by passing legislation that 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 this to be done in respect of all races.

9. Three possible courses were suggested for Cabinet to consider :

(i) The Government could say that it does not propose to hold a referendum to seek for the Commonwealth legislative power with respect to aborigines.

(ii) The Government could say that it does not propose to hold such a referendum, but that it would 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.

(iii) 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. It was recognized that this would inevitably involve expenditure by the Commonwealth.

10. The view was expressed that :

(a) The <u>first course</u> should be ruled out on the ground that all those persons who consider that the Commonwealth should do something about aborigines would remain wholly unsatisfied.

(b) The <u>second course</u> also should be ruled out because it would lead to difficulties and would 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.

(c) The <u>third course</u> 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. My predecessor then stated that, in his view, anything less than the third alternative would not be likely to be acceptable. With this view I agree.

<u>Mr. Wentworth's Bill</u>

11. In a private member's Bill introduced by Mr. Wentworth early last year, Mr. Wentworth proposed :

(a) that section 51(xxvi.) be omitted and replaced by a paragraph as follows :

'(xxvi.) The advancement of the aboriginal natives of the Commonwealth of Australia':

(b) that a 'constitutional guarantee' be inserted after section 117 as follows :

'117A. Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin:

Provided that this section shall not operate so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia.'

12. The first proposal would give a positive power to legislate with respect to the 'advancement' of the aboriginal natives of Australia. The proposed amendment would raise difficulties as to what

was to be regarded as 'advancement'. Would, for example, a particular law made under the new provision have to be a law for advancement in substance, on the whole or in every detail of the law? It would incorporate in the Constitution express words which would tend to distinguish aborigines as second class citizens. Furthermore, the change would repeal the existing power to legislate with respect to the people of any race other than the aboriginal race. The power has not been used since the early years of Federation, but the Commonwealth could well find it of value in the future. Perhaps the principal reason why it has not been found necessary in practice to use the power in modern times is that the power conferred by section 51(xxvii.) - Immigration and Emigration - has been so exercised as to exclude entry of peoples who might create racial problems. If our Immigration policy were changed so as to admit such people in substantial numbers, the power conferred by s.51(xxvi.) might then be needed. In these circumstances, it seems undesirable to deprive the Commonwealth of the power presently vested in it by s.51(xxvi.).

13. The proposed section 117A is a constitutional guarantee, which, <u>at first sight</u>, has some attraction. It argues that the Australian people would be anxious to dispose of discriminatory practices of any kind. I now set out the disadvantages.

(a) The inclusion of such a constitutional guarantee 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 serious warning in this respect.

(b) Such a constitutional guarantee could restrict the exercise of various powers, for example :

    (a) the defence power;

    (b) the external affairs power.

(c) Such a guarantee might be construed as preventing any <u>concession</u> being given by any law to people of a parti-

cular racial origin (as it could constitute a discrimination against the rest) as well as preventing the direct imposition of a disability. It could invalidate protective provisions for aborigines, for example, a provision making certain contracts with them unenforceable (this would constitute a disability and could hardly be a law for their advancement).

(d) The proposed guarantee is confined to Government action and, indeed, to laws. It does not touch action by other persons or Government action other than the making of laws. It could not bring about the practical changes that depend ultimately upon the minds and hearts of the people rather than upon the statute book.

(e) The inclusion of such a guarantee might well raise questions as to the logic of applying discrimination under section 51(xxvii.) or against Papuan natives.

14. Because of our homogeneous population there have 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 racial, discrimination and that it will very likely disappear as the habits, manners and education of the race more nearly approach general community standards.

15. The first problem certainly does not warrant a constitutional guarantee. The second, at least at this stage, would, I think, 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 enactment of a constitutional guarantee.

16. I find it difficult to believe that we should acknowledge the existence of racial discrimination of a degree that makes it desirable at this time to provide a constitutional guarantee against it. The dangers inherent in supporting such a guarantee are such that I strongly advise against any support being given to it.

Eliminating the Whole Paragraph?

17. Consideration needs to be given to the possibility of removing the whole of paragraph (xxvi.). In my opinion, this course would be undesirable. It would deprive the Commonwealth of the power vested in it, which could be useful - i.e. to legislate for the people of a race. But more importantly it would deprive the Commonwealth of power to negate discriminatory legislation of a State against the people of any race. Such a proposition the Commonwealth, as the international State, could not accept. This deprivation of power could only be compensated for by a constitutional guarantee - a course which, as I have already made clear, I strongly advise against.

Recommendation

18. I am myself firmly of the belief that there would be a large area of dissatisfaction if the Commonwealth does nothing about section 51(xxvi.). I do not think that the people generally would be persuaded by the argument that the deletion of the words 'other than the aboriginal race in any State' would not in truth remove a discriminatory provision but would simply add a further legislature - the Commonwealth Parliament - in which discrimination could occur. The fact that our declared policy in Papua and New Guinea and the Northern Territory is to remove discrimination, while the States, in general, have a far less positive approach to the matter, would make the shift in legislative power attractive to many. To delete the words would, I believe, meet the wishes of those urging action with respect to aborigines. Moreover, I think that any steps to

remove from the Constitution words alleged to be discriminatory against the aboriginal people would be welcolmed by a very large section of the Australian people. However, it may be anticipated that certain State Governments would oppose the creation in the Commonwealth Parliament of a concurrent power with respect to aborigines.

19. I would invite Cabinet to reconsider the proposals put in the earlier Submission of 23 August, 1965 and summarized above, in the light of developments since that date. I recommend that the third course referred to in paragraph 9 above should be adopted, namely, that the Government announce that it will hold a referendum to seek legislative power for the Commonwealth with respect to aborigines by omitting the words 'other than the aboriginal race in any State' from section 51(xxvi.) and, if the referendum is successful, will hold discussions with the States to formulate a joint policy whereby the States will be responsible for administration, but the Commonwealth will have a role of policy participation.

January, 1967.
Canberra.

NIGEL BOWEN
Attorney-General.

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CONFIDENTIAL

NOTES ON CABINET SUBMISSIONS NOS.46 and 64

CONSTITUTIONAL AMENDMENT: ABORIGINES

Submission No.46 has been circulated by the Attorney-General. It is substantially in the form circulated last year. The Attorney-General recommends against adopting Mr. Wentworth's proposal, but supports a removal of the words "other than the aboriginal race in any State" from Placitum XXVI so as in effect to give legislative power over aborigines; and also deletion of Section 127, which deals with the census.

The submission from the Minister for Territories (No.64) enters a plea to the effect that the Commonwealth should not seek power to legislate for the aborigines. He sees advantage in separate administrations to cover the very different conditions among aborigines, and in co-operative action. If the Commonwealth seeks the power, it will be criticised - either for what it then does or fails to do, whereas now it is in a much less vulnerable position.

The popular mind is likely to see attractions in giving the Commonwealth power, provided the States do not feel that their position is being usurped, and make protests. Cabinet may like to consider the views of the Premiers on this matter.

I would have thought the dismissal by the Attorney-General of the use of Section 96 is possibly a little peremptory (see the top of page 4). There is every evidence that the Commonwealth has been able to influence basic policies through Section 96 grants where it has wanted to. Would this solution possibly be cheaper, and more in line with federal arrangements, than for the Commonwealth to seek full concurrent power? If the Commonwealth were to approach the electors on the basis of promise of grants under Section 96 after discussions with the States, there is a possibility that it might make some mileage with the electors for restraint which would assist in the dressing up of the nexus provisions, if these are also to be submitted to the electors.

The important thing seems to be to make the decision about power to legislate for aborigines in the context of a general agreement about the way in which the Government wishes to deal with the problems presented by the existence of our federal system.

Prime Minister's Department.

22nd February, 1967.