

COMMONWEALTH OF AUSTRALIA

SPEECH

BY

The Rt. Hon. SIR ROBERT MENZIES,
K.T., C.H., Q.C., M.P.,

ON

CONSTITUTION ALTERATION (PARLIAMENT) BILL 1965

AND

CONSTITUTION ALTERATION (REPEAL OF SECTION 127) BILL 1965

[From the "Parliamentary Debates", 11th November 1965]

CONSTITUTION ALTERATION (PARLIAMENT) BILL 1965.

Bill presented by Sir Robert Menzies,
and read a first time.

Second Reading.

Sir ROBERT MENZIES (Kooyong—
Prime Minister) [8.0].—I move—

That the Bill be now read a second time.

This is a Bill of immense importance but of not great complexity in itself. It is designed to break the nexus—a term which we have all come to understand—created by section 24 of the Commonwealth Constitution. Section 24 states—
and I want to state this matter with all

possible clearness because I think that is vital to an understanding of it—

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The phrase "as nearly as practicable, twice the number of the senators" is something that has to be borne in mind in the whole parliamentary and public consideration of this matter. I do not undertake to be dogmatic as to what is meant by the phrase "as nearly as practicable", because, after all, if there are 60 senators it is quite practicable to have 120 members of this House, yet we have 122 plus 2 who do not have a general vote. But

it is quite clear that "as nearly as practicable" imposes genuine limits, however they may be defined, on the number of people in this House.

What are the facts? In 1949, following the increase in 1948 of the House of Representatives from 74 to 121 members with full voting rights and of the Senate from 36 to 60 senators, each member of this House represented, on the average, 66,000 people. Today, such is the growth of the population that each member, on the average, represents not 66,000 people but 94,000 people. Without a constitutional change, how far can we increase the number of members of this House, increasing the numbers to do justice and to give effective representation to the people of Australia, who have now reached $11\frac{1}{2}$ million and who could easily become 15 million, 18 million or 20 million in due course? Without a constitutional change how far can we increase the membership of this House—by two or three or four—because the words of the Constitution are "as nearly as practicable"?

I would not care to commit myself to the proposition that we could increase the number of members of this House by more than two or three or, in a handsome moment, four. I would not like to say that we can do better than that. We cannot discuss this problem, nor can our people discuss it, in a practical way without bearing in mind the current and now well established method of electing the Senate—a method which means that in a vote for five senators, as at present, barring casual vacancies, one side may get three and the other two, but that in a vote for six senators all the chances are that each political side will secure three senators, however the political sides may be made up. If that happened in every State we would have a perpetually deadlocked Senate with 30 senators on each side. An habitually deadlocked Senate would mean that at any stage a government chosen at a general election for the House of Representatives—and this is how governments are chosen in our country—could be rendered impotent. This would not be good for parliamentary democracy and, therefore, would not be good for the people of Australia. The practical problem, therefore, is whether we should continue the constitutional system

under which the House of Representatives should be limited in numbers to twice the numbers of the Senate.

Having said that—because that is the vital question—I start with the Senate, whose functions, properly understood, I profoundly respect. At present there are 60 senators—10 from each State. Originally, before the increase of the House of Representatives in 1948, there were 36 senators, three retiring from each State each three years. At present there are 60 senators—10 from each State—and they are elected five at a time in each State. So at each Senate election there is a reasonable probability of one side or the other having a majority of three to two. Should the Senate be increased by one senator per State—that is, to 66—each Senate election under normal circumstances would require the choice of one half of 11 senators, that is, of five and a half senators, which, as our late lamented friend Euclyd would have said, is absurd. The only practical course under those circumstances would be to choose six at one election and five at another. I invite honorable members who have implicated themselves in the mathematics of elections to realise the confusion that course could produce.

Suppose that the Senate were increased in numbers to 72. I mention this because at present you cannot increase the membership of this House, whatever the population of Australia may be, without increasing the numbers in the Senate. Suppose we say that the other propositions to which I have referred are not good and that we will increase the numbers of the Senate to 72. That would mean 12 senators from each State, six to be elected at each election. Under the present system for Senate elections—and nobody has been able to suggest a better system—the election of six senators from each State would almost guarantee in every State the election of three Government senators and three Opposition senators and so we would produce a deadlocked Senate, with every motion and every amendment defeated. I remind honorable members that section 23 of the Constitution states—

Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative. I have always rather liked that phrase—"the question shall pass in the negative."

What it means is that the question will not be passed at all but will be resolved in the negative. That is the position in the Senate. A deadlocked Senate would not be any good to a government in this House, elected by the people, because nobody could pass a resolution and nobody could pass an amendment. Therefore, if there is to be a Senate in which a clear majority becomes possible, the numbers of the Senate would need to be such under the existing Constitution that an odd number would be elected every three years. Having mentioned the present odd number of 5, I must, therefore, go on to the next odd number of 7. If 7 were to be elected every three years there would be a Senate of 84 members and under the Constitution as it now stands, the House of Representatives would have 168 members.

Mr. Cope.—A member would not have the opportunity to ask a question.

Sir ROBERT MENZIES.—I think the honorable member would, because he always asks such good questions. I wait for them. But the point taken by the honorable member is right. Nobody pretends for a moment that we want 168 members in the House of Representatives. Most people, realising the duties of members of the Parliament and the enormous and growing population that must be represented, would say: "We ought to have 130 or 135 or whatever it may be, but we do not want 168." I want people to understand that, under the Constitution as it is now, if this referendum were defeated, we could not increase the number of members in this House to fewer than 168 if at the same time we were to increase the membership of the Senate to an extent that made that institution workable.

This seems to me, and I think to all of us, to be quite clear. It follows from this that, as long as the present section 24 remains, the membership of this House must stand still or vary by perhaps only one or two, unless a massive increase is made in the numbers in the Senate. Therefore, this Bill has one simple purpose, and I hope that the people of Australia will accept it as an expression of the joint judgment, wisdom and opinion of this House. We propose an amendment to break the nexus. Should someone be a little anxious as to whether

we will in an extravagant way want to increase our numbers in some ballooning form, we propose two matters in this amendment to afford protection. First, we will protect State representation in the Senate. It was said to me at one stage that perhaps in some States there might be a fear that, with all this changing of the existing rules, individual States would have fewer senators. We have sought to meet this. We have provided in this amendment that all original States, which under the existing Constitution are entitled to no fewer than 6 senators, will be entitled to no fewer than 10 senators. In other words, we protect the existing State position in the Senate.

Secondly, we believe—I know that my friend, the Leader of the Opposition (Mr. Calwell), will agree, because I have read what he has had to say—that there must be a limit on the increase of the membership of the House of Representatives. The Bill provides that the number of members of this House shall be ascertained by dividing the number of people of the States by such number as is for the time being determined by the Parliament, that number being not less than 80,000. In other words, the quota for electorates is to be not less than 80,000. I point out for the information of honorable members that if the Parliament decided that the quota should be 80,000, with today's population the membership of this House would be 143. If the Parliament decided that the quota should be 85,000—it cannot be less than 80,000 but it can be more—the membership of the House would be 135.

I give these simple statistics to illustrate the real nature of the problem with which we must cope. I want to emphasise to the House and to the people of Australia that the defeat of these proposals would inevitably mean that any increase in the membership of the House in future would be extravagant. We would have double the number of an increased Senate, as I have indicated, or no increase at all. I am one of the oldest inhabitants of this place. I know exactly what honorable members opposite are about to say and I am not sure I do not agree with them. I look around the House and I see my old friend, the honorable member for Darling (Mr. Clark), who is a contemporary of mine in

this place. Going back over this time, anybody who knew anything about the business of the Parliament would never disagree with me for one moment when I say that the problems being looked at by honorable members today are three or four times more weighty and more complex than they were when I first came into this House. I know this at first hand. I am not an idler; I have worked all this time and I know what it means. I would think it dreadful if the people were to cast a vote that permitted the members of this House to represent not 50,000 or 60,000 but even more than the 120,000 represented by my colleague, the Attorney-General (Mr. Snedden), in Bruce and by the honorable member for Lalor (Mr. Pollard), whose presence there has been so encouraging that the population has risen rapidly. But it is true that we have these big electorates. If in ten years' time we had a situation in which every member of this House represented 120,000 electors, I would think that this was an outrage to the effective democratic representation of the people. After all, we are the Parliament of the nation. We disagree amongst ourselves. We may have all sorts of opinions of each other. But we have the supreme duty to represent our people and to represent them effectively. To represent them effectively, there must be a proper proportion between the number of members of this House and the number of electors in the nation as a whole.

In moving the second reading of the Bill, I have not gone into any little side alleys, because my experience has been that these problems have to be seen at the centre. They must be seen with clarity if a change is to be made in the Constitution. As for this one, I profoundly hope and I deeply believe that when this is adequately explained to the people of Australia they will say "Yes" and they will change this rule and thereby make a tremendous contribution to making this Parliament an effective agent of the popular will.

Debate (on motion by Mr. Calwell) adjourned.

CONSTITUTION ALTERATION (REPEAL OF SECTION 127) BILL 1965.

Bill presented by Sir Robert Menzies, and read a first time.

Second Reading.

Sir ROBERT MENZIES (Kooyong—Prime Minister) [8.20].—I move—

That the Bill be now read a second time.

The purpose of this Bill is to alter the Constitution by repealing section 127. That section provides that in reckoning the numbers or the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted. The Government believes that the first opportunity should be taken to have it repealed and proposes to submit the Bill to referendum at the same time as the referendum on altering the method of determining the number of members of the House of Representatives. The Joint Committee on Constitutional Review recommended repeal in its report—that is the 1959 report—at paragraph 398.

No doubt the principal reason for the inclusion of section 127 in the Constitution in 1900 was the practical difficulties that would be encountered in satisfactorily enumerating the Aboriginal population. There were no doubt real difficulties then in ensuring that a census of Aborigines could be effectively taken. In modern times, this is not so. Moreover, section 127 is not related to the qualification of Aborigines as voters in Commonwealth elections. Section 41 of the Constitution has always guaranteed an Aboriginal the right to vote at Commonwealth elections if he had a right to vote at elections for the more numerous House of the Parliament of a State. The Commonwealth Parliament itself has removed all disabilities in respect of voting at Commonwealth elections so far as Aborigines are concerned. Consequently, Aborigines are now entitled to enrol and to vote and they should, in the view of the Government, be recognised as forming part of the population of their State for any purpose.

I think I should at this point make reference to the Government's decision not to put forward any amendment of section 51 (xxvi.). I mention this because the Deputy Leader of the Opposition (Mr. Whitlam) had a question on the notice paper about it and I am now, in effect, answering that question. Section 51 (xxvi.) provides that the Parliament may make laws for the peace,

order and good government of the Commonwealth with respect to "the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws".

Some people wish—and indeed the wish has been made clear in a number of petitions presented to this House—to associate with the repeal of section 127 the removal of what has been called, curiously to my mind, the "discriminatory provisions" of section 51 (xxvi.). They want—and I understand their view—to eliminate the words "other than the Aboriginal race in any State", on the ground that these words amount to discrimination against Aborigines. In truth, the contrary is the fact. The words are a protection against discrimination by the Commonwealth Parliament in respect of Aborigines. The power granted is one which enables the Parliament to make special laws, that is, discriminatory laws in relation to other races—special laws that would relate to them and not to other people. The people of the Aboriginal race are specifically excluded from this power. There can be in relation to them no valid laws which would treat them as people outside the normal scope of the law, as people who do not enjoy benefits and sustain burdens in common with other citizens of Australia.

What should be aimed at, in the view of the Government, is the integration of the Aboriginal in the general community, not a state of affairs in which he would be treated as being of a race apart. The mere use of the words "Aboriginal race" is not discriminatory. On the contrary, the use of the words identifies the people protected from discrimination when it is remembered that section 51 (xxvi) was drafted to meet the conditions that existed at the end of the last century—for example, the possibility of having to make a special law dealing with kanaka labourers. The power has, in fact, never been exercised. If the words were removed, as some people suggest—and there is quite an attractive argument in favour of that—it would change dramatically the scope of the plenary power conferred on the Commonwealth. That must be borne in mind. If the Parliament had, as one of its heads of power, the power to make special laws with respect to the Aboriginal race, that power would very likely extend to enable the Parliament to set

up, for example, a separate body of industrial, social, criminal and other laws relating exclusively to Aborigines. It is difficult to see any limitations on the power to do any of these things, because the existing power is a plenary power in the Constitution. Conferring such a new power could have most undesirable results.

The Joint Committee was quite clear in its recommendation that section 127 should be repealed. In relation to the question that I have just been discussing, namely, conferring a power on the Commonwealth to make laws with respect to Aborigines, the Committee, at the time it ceased its deliberations in 1958—and I mention this as an historic fact—had, paragraph 397 of the report states, 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. I have quoted this because I do not want to have it said against anyone on the Committee that he has committed himself. This is not true: This was left open. What I have said will show that the removal of the exclusion of the Aboriginal race from the scope of section 51 (xxvi), that is, to include them within the power, is not the simple matter it is often represented to be. The inclusion would, in the view of the Government, not be in the best interests of the Aboriginal people.

Returning to the Bill before the House, the matter can be simply put by saying that section 127 is completely out of harmony with our national attitudes and with the elevation of the Aborigines into the ranks of citizenship which we all wish to see. To sum up, three possibilities have been examined: First, to omit from section 51 (xxvi.), the words "other than the Aboriginal race in any State". This would give the Commonwealth Parliament power, a plenary power, to make laws, unlimited except by such general provisions as those of section 92, with respect to Aborigines—for example, industrial laws, social services laws, health laws and so forth. Is this desirable?

I have endeavoured to point out that we do not think it is. Should not our overall objective be to treat the Aboriginal as on the same footing as all the rest, with similar duties and similar rights? Section 51, placitum (xxvi.), does not create discrimination in the case of the Aboriginal. It avoids it. The second proposal was to repeal (xxvi.) altogether. Quite frankly, this has its attractions. The power has never been exercised. Yet, in the modern and complex world which changes around us almost every week we might conceivably wish to employ it. For example, we have great obligations in the case of Nauru. We might, some day, under some circumstances, wish to pass a special law with regard to Nauruans—the people of the Nauruan race—in order to help them to be re-established somewhere outside their existing island. We might. Therefore, it would be unwise, perhaps, to deprive ourselves of the machinery for dealing with a problem of that kind should that problem arise. The third proposal that has been made—and I say this with great deference to some of

my friends and supporters who have mentioned it—is to add a new provision rendering invalid laws regarding Aborigines by, for example, invalidating any Commonwealth or State discrimination on the grounds of race.

Well Sir, all I can say, with lively memories of what happened in the United States of America over their amendments—over what they called the “Bill of Rights”, the crop of litigation, and the reduction to terms of somewhat wide and rhetorical expressions—is that any provision of that kind would produce a crop of litigation. It would involve argument of definition. It could readily invalidate laws which, while designed to protect the special interests of Aborigines, could be held technically to discriminate either for or against them. Sir, I repeat that the best protection for Aborigines is to treat them, for all purposes, as Australian citizens.

Debate (on motion by **Mr. Calwell**) adjourned.