Submission to the Joint Select Committee on

Constitutional Recognition of Aboriginal and

Torres Strait Islander Peoples

Response to Interim Report of July 2014: Constitutional Recognition of Indigenous Peoples

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Australian National University. 14 October 2014.

Introduction

This submission responds to the options for constitutional reform provisionally set out in the Interim Report of the *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (JCATSI, 'the Committee') of July 2014 ('Interim Report'). Appendix A to this submission addresses the recommendations made by the Expert Panel[2] by this author (and appears as Submission 18 on the Committee's website ('previous submission'). The present submission cross refers, where appropriate, to Appendix A.

The Interim Report notes the wide gap that exists between law and the public perception of law, particularly in this context with reference to s 51(xxvi), the 'races' power[3]. The Committee also refers to the erroneous perception held by the 'many Australians',[4] who believe that the Constitution provides for 'commitment to racial non-discrimination'[5]. Further, while the position of 'Aboriginal' or 'Torres Strait Islander' (ATSI) people as the first peoples of this Continent is widely acknowledged,[6] this recognition is still to be reflected in the Commonwealth Constitution. The aim of the next referendum is to rectify these omissions. The level of public 'awareness of the [recognition] referendum has dropped over the past year in the general population, slipping from 42 per cent to 34 per cent'.[7] There is therefore a general need for broad public education on the

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2 The Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples ('the Expert Panel'). This Panel produced an excellent report containing a series of recommendations: The Report of the Expert Panel, '*Recognising Aboriginal and Torres Strait Islander People in the Constitution*', January 2012. (Hereinafter 'the Panel Report').

3 Interim Report, 4 (para 2.6)

4 Interim Report, 4 (para 2.6)

5 Interim Report, 4 (para 2.6)

6 Panel Report, 145.

7 *Patricia Karvelas,* Nation wants equality, not ready to vote, The Australian, 20 September 2014. <*http://www.theaustralian.com.au/national-affairs/indigenous/nation-wants-equality-not-ready-to-vote/story-fn9hm1pm-1227064724957*>.

Constitution and the reform process, if the proposed referendum on constitutional recognition, and a constitutional provision to entrench a prohibition against racial discrimination against Indigenous people are to have a reasonable chance of adoption.

The recognition in fact and in law of Indigenous people as the occupiers of the Continent (prior to the claim of sovereignty over it by the British Crown) is now reflected both in Australian common law[8] and in Commonwealth legislation;[9] in State Constitutions[10] and is now a fact generally that is denied by few people in Australia. The Interim Report reiterated the existence of multi-party support for the principle of constitutional recognition of Indigenous people.[11] Thus in principle, the inclusion in the Constitution of the 'recognition' element ('statement of recognition'[12]) is non-contentious. However, the specific form and wording of this recognition, and the extent of its legal effect, if any, is yet to be agreed upon. That is, translating 'in principle' support into a firm commitment to a form of words that will codify these sentiments, and which enjoys multi-party support, appears elusive at present.

It is re-iterated in this submission that the statement of recognition should be aspirational, non-binding and should be crafted by poets and writers,[13] rather than lawyers seeking to circumscribe the legal effect of the recognition statement/s, thus arguably creating hurdles to the Constitution unambiguously, eloquently and generously reflecting a well-established fact, and thus, remedying an omission in the Constitution as it currently stands.

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8 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.
9 *Aboriginal and Torres Strait Islander Recognition Act 2013.* ('2013 ATSI Recognition Act').
10 Interim Report, 40 (para A1.29).
11 Interim Report, 4 (para 2.7).
12 Interim Report, 23 (para 2.72); Panel Report 72.
13 Please see discussion below at p 34.

This submission now individually examines the 'possible options' for constitutional change as presented in the Interim Report.[14] This paper concludes that some of these proposed options are unlikely to win public support, a fact that is implicit in the Committee's presentation of the options as alternatives. The submission concludes with some recommendations for a productive course of action, for the Committee's consideration.

Section 25

The Committee agrees (with the Expert Panel and others) that s 25 of the Constitution, which it notes as having been described as 'odious' and 'racist', should be rescinded.[15] What is surprising however, is that s 51(xxvi), the rescission of which would also be widely supported by the public.[16] As a section with wider application, than is s 25, it is surprising that s 51(xxvi) is not denounced with comparable vigour. However, this submission supports the proposition that s 25 should be rescinded and is a reiteration of the position on s 25 in my previous submission.[17]

Section 51(xxvi)

The Committee supports and advocates for the retention of a 'races' power, (albeit in a 'new' form)[18] primarily, it appears, for the existence of 'some risk of invalidating legislation relating to ATSI peoples previously enacted […]'[19]. Deane J. described s 51(xxvi) as 'dismissive' of Aboriginal people,[20] a characterisation that

14 Interim Report, 1 (para 1.3)
15 Interim Report, 7 (para 2.17).
16 Interim Report, 8 (para 2.20).
17 See below on Section 25 particularly text accompanying n 106.
18 Interim Report, 9 (para 2.27).
19 Interim Report, 9 (para 2.26).
20 *Commonwealth v Tasmania* (1983) 158 CLR 1, 272. (Deane J).

is incompatible with any sincere form of recognition. Further, why, in the Committee's view, for the existence of 'some risk',[21] one 'odious' and 'racist' power[22], ie s 51(xxvi) (or a replacement power that has a similar impact on Indigenous people *only*[23]), should be maintained in the Constitution, while the other the narrower and less coercive power (s 25) should be rescinded, is curious.

Retaining one 'odious' and 'racist' power means, that in practice, the characterisation of the Constitution as such *will* remain unchanged. This is a terrible indictment on a modern democratic state such as Australia. Such a characterisation of the Constitution must surely be unacceptable to the majority of the population. This submission proposes a means of expunging 'race' from the Constitution and entrenching and creating equality before the law without becoming a 'back-door way' of introducing a Bill of Rights.[24]

The Committee made 5 specific proposals, Box 1 to Box 5, for alternative heads of power, to replace section 51(xxvi) of the Constitution. The Committee noted that the amended legislative power is 'based not on race but on the special place of those [Indigenous] peoples in the history of the nation', a 'special place' which is broadly recognised.[25] However, given Australia's constitutional history, these concepts of 'race' and Indigeneity are arguably not entirely distinguishable. The Committee recognised some merit in the Expert Panel's recommended

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21 It is argued in Appendix A that in any event the 'new' races power [s 51A] which is said to preserve only beneficial legislation would eliminate this risk for the existence of clearly detrimental or arguably detrimental legislation (or parts of such legislation). See below at discussion accompanying n 119 at p 30.

22 Interim Report, 7 (para 2.17).

23 Robert French, 'The Race Power: A Constitutional Chimera' in eds., H.P. Lee and George Winterton 'Australian constitutional perspectives' 180, 185.

24 Timothy McDonald, Abbott concerned about anti-discrimination proposals, ABC News, World Today Programme, 20 January 2012.
< http://www.abc.net.au/worldtoday/content/2012/s3412221.htm>.

25 Interim Report, 8 (para 2.23). [Footnotes omitted]; Interim Report, 20 (para 2.60) where the notion of preventing the new head of power from discriminating on the basis of 'race' is supported by Professors Dixon and Williams.

replacement for section 51(xxvi) by section 51A.[26] Consequently, this notion of a first nations people is acknowledged in the proposed preambular texts.[27] The recommended options (Boxes 1-5) are now considered in turn.

Box 1: 'The alternative new section 51A' of the Constitution

The formulation in Box 1 for a replacement power for s 51(xxvi), which the Committee called the 'the alternative new section 51A'[28] is similar to the Expert Panels original proposal[29] but with two significant differences. First, the statement of recognition differs from the preambular part of Panel's proposal and specifically the clause related to 'advancement' which is changed from:[30]

> **Acknowledging** the need to secure the *advancement* of Aboriginal and Torres Strait Islander peoples

To

> **Acknowledging** that the Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage

The new formulation of the recognition clause/ statement of recognition, incorporates aspects of the Panel's s 127A. The incorporation of the 'language recognition' aspect of the Expert Panel's s 127A(2)[31] into the new s 51A by passes the entrenchment of the English language — as was the case in the Expert Panels section 127A(1). This formulation also eliminates the need for s 127A and therefore, simplifies a potential referendum proposition. The omission of s 127A in the Interim Report addresses the critique raised on this section in my previous submission to the Committee.[32]

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26 Interim Report, 10 (para 2.30); Interim Report, 29 (para 2.96).
27 Interim Report, 8 (para 2.23)
28 Interim Report, 10 (para 2.31).
29 Panel Report, xviii.
30 Interim Report, 11.
31 See Discussion on the Expert Panel's proposed Section 127 below at page 42.
32 See: Submission 18 to JSCATSI.

On the other hand, omitting of the notion of 'advancement' from the Expert Panels s 51A is 'contentious', as has been discussed in my previous submission.[33] Altman has argued that the term 'advancement' is problematic[34] and evidently the Committee concurs. The Interim Report discusses some anticipated problems associated with the inclusion of the word 'advancement'. The verb 'to advance' (recommended by the Panel) has been omitted from the provision in Box 1, as it was by Parliament in the 2013 ATSI Recognition Act.[35] In the latter, however, *inter alia* includes legislative recognition of ATSI people's position as Australia's first people. The wording of the recognition aspects in the 2013 ATSI Recognition Act is otherwise similar to that recommended by the Expert Panel.

The Statement of Recognition

The Committee noted that 'this general approach [of linking a statement of recognition to the constitutional legislative power] is used in the forms displayed in Boxes 1-3 of this interim report'[36]. This preambular text or 'statement of recognition'[37] could be given legal effect resulting from the amended s 51(xxvi) (for example, as worded in Box 5[38]). The Committee's formulations, (as in the case of the Expert Panel's formulation of s 51A), are very similar in style to the 'UN type' preambular texts or *chapeaux* within provisions, and which serve as an introduction to a substantive provision, (as opposed to a general preamble which introduces an

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< http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Submissions>.

33 See discussion accompanying n 134 below which examines some of the competing views on the inclusion of the word 'advancement' in the recognition section of the proposes replacement clause.

34 Jon Altman, *Will constitutional recognition advance Australia fair*? Crikey, 14 October 2014. <http://www.crikey.com.au/2012/02/10/will-constitutional-recognition-advance-australia-fair/>.

35 See discussion accompanying n 131.

36 Interim Report, 23 (para 2.71).

37 Interim Report, 23 (para 2.72); Panel Report 72.

38 Interim Report, 27.

Act as a whole). A *chapeau* has particular significance for interpretation under international law,[39] (and as distinct from preambles and their role in statutory interpretation in common law jurisdictions[40]). Australia has a dualistic system in which international law (including its specific interpretative tools) are not self-effecting. It therefore remains to be seen how a domestic Court would interpret the words of the *chapeau* if this format is adopted in the Constitution. A more certain alternative would therefore be to clearly separate and identify the binding and non-binding elements of the proposed recognition text.

According to the Interim Report the statement of recognition may be used in interpretation, particularly if the preambular text is used to determine the meaning of this provision, for example by adopting an appropriately adapted form of the 'complex test' cited by the Committee.[41] The application of this test is arguably contingent on the preamble[42] or a statement of recognition (with legal effect,[43]) which would therefore, necessarily need to be carefully crafted, and would most likely, affect the quality and the breadth of the *symbolic recognition* that can be adopted.[44]

Further, the Committee, as with the Expert Panel, do not, distinguish between the words 'acknowledge' and 'recognise'. Clearly the use of these two

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39 WTO Appellate Body Report on U.S. – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (October 12, 1998).

40 *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J).

41 Interim Report, 18 (para 2.52).

42 Generally, preambles are considered as part of an Act: Section 13(2)(b) *Acts Interpretation Act 1901* (Cth); *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J). Therefore, unless Parliament provides clear, unambiguous and express words to the contrary, for example in this context because the Statement of Recognition is deemed to be purely symbolic, the relevant preambular words could be used to aide interpretation.

43 Interim Report, 18 (para 2.52). [See quotation from Mr Neil Young SC's submission'].

44 See above at discussion accompanying n 13 and the associated cross reference to Appendix A.

different words must mean something distinct[45] and some guidance as to the shades of meaning as intended by Parliament (if adopted) would for example be useful in giving effect to the 'complex test' cited by the Committee.[46]

The more *symbolic*, aspects of the resulting constitutional changes, and judging by the recommendations of the Expert Panel on this issue, will most likely not be substantive. That is, constitutional recognition will take a form in which formal substantive rights or obligations do not attach, including on the basis of 'race'. Consequently, such a statement of recognition will negate the need for a legal definitions for terms such as 'acknowledge', 'recognise' or 'ATSI' people. A non-binding statement of recognition or provision, *ipso facto* will be neutral on crucial issues such as constitutional interpretation and therefore, is unlikely to make any substantive unintended difference to future laws. To this end this submission supports and proposes referendum questions that will not require a legal definition for Indigenous peoples /ATSI, or the circumscribing the legal effect of words such as 'recognise' or 'acknowledge'.

Generally, however, the Committee seeks input from the public and will continue to receive submissions for the proposed statement of recognition to be included, *inter alia* in what the Interim Report describes as an introductory statement.[47] The process of developing a statement of recognition particularly if the recommendation made in this submission for 'generous recognition' are adopted, is strongly supported.

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45 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 (McHugh, Kirby and Hayne JJ).

46 Interim Report, 18 (para 2.52).

47 Interim Report 26 (Para 2.84).

Adverse Discrimination?

The change in the Box 1 s 51A formulation, also differs from s 51A as proposed by the Expert Panel:

> 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 Aboriginal and Torres Strait Islander peoples …

To, include the words, 'but not so as to discriminate adversely against them'[48] ('the phrase' which is bolded in context below).

> 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 Aboriginal and Torres Strait Islander peoples, **but not so as to discriminate adversely against them**.

The Committee notes the drawbacks of the Panel's proposed s 116A, which contained the anti-discrimination provision, and favoured entrenching a prohibition against racial discrimination by incorporating this extra element into the proposed replacement for s 51(xxvi),[49] thus eliminating the need for s 116A. The inclusion of the phrase intends to negate the view of majority in the *Hindmarsh Island Bridge Case* who held that s 51(xxvi) permits Parliament *inter alia* to make both beneficial and detrimental laws for people of a 'race'.[50] However, given Australia's legislative and constitutional history (with respect to the treatment of Indigenous people), it is unclear how a court would limit the scope of this power, so that it will authorise only objectively beneficial legislative action. Even if the High Court accepts the Committee's interpretation, that the scope of the legal effect of the phrase 'but not so as to discriminate adversely against them', *prima facie*, negates the broad permission of the *Hindmarsh Island Bridge Case* and thus narrows

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48 Interim Report, 19 (para 2.58).
49 Interim Report, 21 (para 2.63-2.64).
50 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [29] (Gaudron J); Interim Report, 8 (para 2.20); Interim Report, 19 (para 2.56) citing Mr Pearson (Footnotes omitted).

the power; the precise 'new scope' of s 51A (if adopted) will still have to be determined by the courts. On the other hand, the proposed s 51A arguably, still retains the notion of 'race' for ATSI people and is critiqued below.[51]

Further, if adopted, the meaning of the word 'discriminate' in this provision will arguably be similar to existing discrimination law jurisprudence.[52] The meaning of 'discrimination' in both the common law and in statute carries a 'negative' meaning. For example s 14 of the *Age Discrimination Act 2004* (Cth) contains a typical example of the standard description of direct discrimination based on *less favourable treatment*.[53] Dawson and Toohey JJ explain that: [54]

> Direct discrimination occurs where <u>one person</u> is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race).

Similarly the word discriminate impugns a 'negative' meaning in the ACT legislation.[55] Discrimination in this context is potentially about the differential treatment of an ATSI individual only. However, being able to run a discrimination action as a constitutional issue in the High Court in the first instance is a very positive development. This submission therefore raises the issue for debate, but questions the utility and efficacy of using an individual focused concept to notionally protect a group (or part of a group as a class), which would again

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51 See discussion accompanying n 101.

52 Interim Report, 20 (para 2.61).

53 Section 14 *Age Discrimination Act 2004* (Cth):

> …a person (the ***discriminator*)** discriminates against another person (the ***aggrieved person***) if the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age…

54 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392 (Dawson and Toohey JJ). (Emphasis added).

55 Section 8(1) *Discrimination Act 1991* (ACT)

> A person discriminates against another person if
>
> (a) The person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7.

require the definition of an ATSI person. It is noted that this submission suggests an alternative, arguably much simpler, means of achieving a similar outcome.[56]

The word 'discrimination' in the proposed s 51A is further qualified by the adjective 'adverse'. This is a clear indication that the meaning of the phrase 'adverse discrimination' in this context must be different, or even establish a higher, or certainly different, threshold, to the meaning that attaches to the word 'discrimination' as established in the jurisprudence.[57] The courts will have to determine how this adjective will affect the meaning of 'the phrase 'adverse discrimination', the meaning of which according to the Interim Report is 'somewhat uncertain',[58] thus giving Indigenous people little comfort as to its prospective protective effect.

The judiciary is also likely to defer to Parliament's meaning of 'adverse'. The related question therefore is: At what threshold will the High Court intervene and deem 'adverse discrimination' to be *unacceptably* 'bad'? The issue might then arguably revert to the 'open question' raised by Gaudron J in the *Hindmarsh Island Bridge Case* as to whether the Court had 'some supervisory jurisdiction […] against the possibility of [protecting ATSI people against] a manifest abuse [by the Parliament]'.[59] It is conceded that this view was not endorsed by the majority. On the other hand, for the absence of another indicator, Gaudron J's reasoning on 'manifest abuse' could reasonably, still be considered the starting point for analysis as possibly the lowest threshold of 'adversity' at which the High Court would be

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56 Please refer to text associated with n 93.

57 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 (McHugh, Gummow, Kirby and Hayne JJ).

58 Interim Report, 20 (para 2.61).

59 *Native Title Act Case* (1995) 183 CLR 373, 460.

willing to intervene, in invalidating an 'adverse' law affecting an individual, some or perhaps the majority of ATSI people. Further, Indigenous people should recall Griffith QC's view that Nazi laws were likely to be held to be valid under s 51(xxvi).[60] At any rate, these threshold questions will remain unanswered and unresolved and thus unclear, until they are tested in the courts.

The question then is whether the proposed formulation of s 51A would afford a better or more specific level of protection to Indigenous people, than does s 51(xxvi) at present. The scope of the putative protection that inheres in a new (adopted) provision, will therefore, remain unclear until finally determined by the High Court. In the meantime it would require Indigenous people to take an unwarranted risk in supporting this option, particularly when as argued below,[61] fairer and better options still remain available.

The Interim Report cites Professor Davis who has persuasively argued for broader constitutional protection against discrimination, and for entrenching individual protections akin to those in the RDA.[62] Such protection would cover people of all 'races' and is a principle that enjoys broad community support.[63] This is however a general measure, which will incidentally, clearly protect Indigenous people as well, but without the specific need for a definition of an Indigenous person as issue that will be discussed below. Such broad, non-racially specific, general constitutional protection is supported in this submission. Such a measure however, should not be seen *only* as an Indigenous issue thereby raising the

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60 *Kartinyeri v Commonwealth* (1998) 195 CLR 337. Transcript of 5 February 1998. Grifith QC's response to Kirby J. Cited in Tony Blackshield and George Williams '*Australian constitutional Law and theory Commentary and Materials*' (Sydney, Federation Press 5th Ed 2010), 985.

61 See Appendix A below at *III Suggestions for Moving Forward*, 46.

62 Interim Report, 16 (para 2.44).

63 Interim Report, 16 (para 2.45).

question of whether such a measure should be proposed as separate general reform not exclusively tied to the issue of Indigenous recognition.

Consequently the definitional question arises how a court would decide if a particular individual/litigant's identity fits within the meaning of what constitutes an 'Aboriginal' or 'Torres Strait Islander' person for constitutional purposes (and for legislation created or supported under this 'new' head of power). There is no definition of who is an 'ATSI' person in either the Expert Panel's report or in the Interim Report. What this means is that ATSI 'racial' identity will be determined by the Courts (ie that is, primarily by non-ATSI people). As rights and or obligations attach, 'race' or 'identity' would, unless there is a clear constitutional definition, most likely have to be determined by the Judiciary.[64] In the past such litigation has been divisive and detrimental to Indigenous people.[65] The High Court could require Indigenous litigants to obtain acceptable 'Certificates of Aboriginality' for example. Linda Burney rightly descried such measures as 'offensive'[66] and is hardly a positive aspect of such 'recognition'. Setting Indigenous people up for a protracted period of litigation until these matters are settled, with its associated costs, negative publicity such as 'aborigines are getting all these "benefits" while ordinary people are getting nothing. These are all reasonably, clearly foreseeable problems that should be avoided.

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64 *Shaw v Wolf* 83 FCR 113 (Merkel J); John Gardiner-Garden, 'Defining Aboriginality in Australia', Current Issues Brief no. 10 2002-03, 3 February 2003.

65 *Shaw v Wolf & Ors* (1998) 163 ALR 205, 268: Merkel J queried attempts legally to define Indigeneity. On the other hand his Honour noted the need for criteria to identify groups who would be the subject to laws to 'redress some of the wrongs of the past' and 'to assist Aboriginal persons'.

66 Warren Barnsley, Linda Burney speaks against 'narrow' definitions of identity, 11 July 2014, NITV AWAKEN Programme. <http://www.nirs.org.au/NEWS/Linda-Burney-speaks-against-narrow-definitions-of-identity>.

The Committee cites as an alternative, the possibility of the enactment of 'special measures' (but does so without a reference to the *Racial Discrimination Act 1975* (Cth) (RDA)[67]) as a reason for the proposed formulation for s 51A.[68] Further, the Interim Report asserts but provides no legal authority or argument for the proposition that such a head of power is required for the enactment of legislation that could be characterised as 'special measures'.[69] The Interim Report however acknowledged the possibility of the broader use of the 'special measures' provision of the RDA[70] and 'that special measures already enacted under section 51(xxvi) [sic] might include laws relating to truancy, alcohol management and native title'[71]. For a discussion of the 'special measures' under the RDA in this context please see Appendix A below.[72] The Interim Report does not address the important issue that a special measure is meant to be temporary,[73] or that the RDA provides Parliament the power to enact 'special measures' provisions even at present, and that the RDA is not dependent on s 51(xxvi) and therefore, not reliant on a new substitute power for s 51(xxvi). Therefore, given the difficulties of changing the Constitution, the 'new' head of power will most likely endure long after the exigencies requiring the special measures are past thereby arguably becoming a blot and a painful reminder of past injustices for Indigenous people, as do the 'race' provisions in the current Constitution. Removing the 'races' provisions will therefore help all sides of the arguments to heal, while maintaining these provisions will serve as a constant source of division on the grounds of race.

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67 Interim Report, 11 (para 2.32).
68 Interim Report, 11 Box 1.
69 Interim Report, 11 (para 2.32). The Interim Report cross refers to para 2.56, but this paragraph does not deal with 'special measures'.
70 Interim Report, 18 (para 2.51).
71 Interim Report, 18 (para 2.51).
72 See below discussion accompanying n 117.
73 *Racial Discrimination Act 1975* (Cth) s 8(1).

Further, it appears that the Committee, after considering the merits of this formulation, is inclined to favour a (different) 'new' s 51A[74] that will provide constitutional protection for all 'races' and not just ATSI people.[75] If this observation is correct, then the Committee is not likely (in its final report) to propose the Box 1 formulation, the rejection of which is strongly supported in this submission.

Generally however, Indigenous people should be cautious and conservative in their judgment as to the level of support they would wish to lend for such untried or tested formulae for 'race' based protection. This submission reiterates the position made in Submission 18 that an absence in the Constitution of head of power for Parliament to make laws that purport to 'benefit' Indigenous people only, is not likely to be detrimental to the development of positive substantive laws based on 'subject matter', including the needs of Indigenous people who fall within a general 'subject' class.

Box 2: A New Chapter IIIA

An alternative amended formulation of the Expert Panel's section 52A appears in Box 2.[76] The Committee refers to this formulation as a new section 80A and is to be located in a new Chapter IIIA.

Section 80 of the Constitution, which provides for trial by jury in some cases is said to be one of the few positive rights in the Constitution. Therefore the location of new proposed rights for ATSI people in s 80A, on this criterion, appears to be not-inappropriately located. Further, the inclusion of a new Chapter IIIA on

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74 Interim Report, 12 (Box 2); Interim Report, 20 (para 2.59). The qualifier 'new' is the change to the s 51A proposed by the Expert Panel and suggested by the Committee (see above).

75 Interim Report, 21 (para 2.64).

76 Interim Report, 12.

the one hand, appears to leave the current structure of Chapters 1 to 3 (which reflects Montesquieu's views on the separation of powers) physically intact. On the other hand however, the Constitution currently locates the principal powers of the legislature in Chapter 1.

Thus, the inclusion of a Chapter IIIA, which contains (legislative) powers for making laws 'with respect to' ATSI people [s 80A(1)] and an anti-discrimination clause 'specially applicable' to ATSI people [80A(2)], with a physical nexus to Chapter III, but the subject matter of which is not directly related to the judiciary, without a clear explanation of the reasoning for such a positioning appears *prima facie* inappropriate and thus disconcerting. The Committee should provide better particulars as to its analysis and reasoning in order to help those not privy to their deliberations to understand their approach in this instance.

The general issues related to the protective efficacy of words such as 'shall not discriminate against them (ATSI people)' has been discussed above and these arguments are re-iterated as applicable. Thus the general principle of broadly supporting positive rights which protect all people against (at least racial) discrimination is supported in this submission. The proposed *de facto* re-structure of the Constitution resulting from the proposals in Box 2 however need further and better explanation before it can be supported as a sensible piece of constitutional reform and therefore is not supported at this point in time.

Box 3: Subject Matter Definition

The Interim Report examines the distinction between 'persons powers'[77] (the 'aliens power'[78] and the 'corporations power'[79]) which it contrasts with the other

77 Interim Report, 12-13 (para 2.35).
78 *The Australian Constitution* s 51(xix).

'subject matter' powers.[80] The Committee noted that a 'persons power' with respect to Indigenous people is likely to be too broad and favours a narrower 'subject matter' type power[81] to enable Parliament (arguably in this context to make laws with respect to Indigenous people only) when the subject matter is 'sufficiently connected'.[82]

Parliament already has enumerate powers to make laws with respect to 'a subject' (affecting the general population including Indigenous people) on these subject areas. Further, the special measures provisions in the RDA[83] permits Parliament to make special laws for those with a special need, without the need for a further special head of 'persons power' with respect to Indigenous people, (or for that matter, any other historically distinguishable 'racial' group, if such a special need is established).

This formulation of s 51A (Box 3) specifies the relevant possible 'subject matters' with respect to Aboriginal and Torres Strait Islanders, while rightly noting that its scope would have to be broad to cover the list of all relevant 'subjects',[84] an exhaustive and comprehensive list that is likely to be impossible to achieve in practice. The Committee acknowledges the problems that relate to the limited scope of the 'subjects' in question.[85] Further, again the definition for an Aboriginal or Torres Strait Islander person who is to be the subject of such a provision is absent. The problems associated with *identifying* Indigenous people at law described above are re-iterated.

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79 *The Australian Constitution* s 51(xx).
80 Interim Report, 12-14.
81 Interim Report, 13 (para 2.36).
82 Interim Report, 13 (para 2.36).
83 *Racial Discrimination Act 1975* (Cth) S 8.
84 Interim Report, 13 (para 2.37).
85 Interim Report, 14 (para 2.40).

The narrower scope of the Box 3 formulation reduces the scope of the 'persons' power (because it is *prima facie* limited by the 'closed' number of 'subjects') as compared to the formulation in Boxes 1 & 2. This option is significantly different to that proposed by the Expert Panel and some discussion and further debate around the pros and cons of this proposal would be useful. Some of the concerns discussed with respect to the options in Boxes 1 and 2 including the grant of power which singles out Indigenous people only with no guaranteed protection remains with this option, and as it stands, this submission does not support the Box 3 formulation of s 51A.

Box 4: A Modified Version of Section 15(xxvi)

The formulation of the head of power in Box 4 is similar to the formulation of the substantive part of the provision in Box 1. The preambular part of s 51A, as it appears in Box 1, is omitted in the Box 4 version for the replacement of s 51(xxvi). The Box 4 version also seeks to prevent discrimination against Indigenous people. The arguments with respect to the difficulties of predicting how a court would interpret elements of this provision have been discussed and are reiterated. Some of the fundamental objections raised in the discussion of the Box 1 recommendations with respect to the purported use of the power for 'beneficial' purposes only, therefore, are reiterated. Many of the disadvantages of the Box 1 version remain and the absence of a statement of recognition renders this version unacceptable until this issue is settled.

Box 5: A Modified Version of Section 15(xxvi)

The proposed replacement provision for s 51(xxvi), in Box 5, maintains a legislative head of power with respect to ATSI peoples or in the old terminology 'race' by excluding all non-Indigenous 'races'. Further, the power is putatively constrained,

so that resulting laws should not 'adversely discriminate'. The issues around the concept of adverse discrimination are discussed above and are reiterated. This provision expands what is proposed in Box 4 by requiring Parliament to enact an 'act of recognition'.

This submission supports the processes that will yield a broad aspirational statement of recognition,[86] - as discussed above - and hopes that the Committee can formulate a generous statement (of recognition).[87] This submission endorses the Expert Panel's position that the statement of recognition should be entrenched.[88]

Recognition of Languages

The strengthening of support for Indigenous languages[89] in a statement of recognition is also supported.[90] Additionally, the rejection of the proposed s 127A in the Interim Report is also supported in this submission.[91]

Conclusion

This submission supports a broad statement of recognition[92] but urges the capturing of a generous and elegantly phrased formulation or expression and description of Indigenous occupation of this Continent. The Committee should seek input from literary figures, ordinary people, poets, artists, musicians and perhaps even lawyers, to help it devise a generous statement of recognition; one that adequately captures the depth and the profound nature of the relationship of

86 Including as shown in Interim Report Boxes 1-3 as well Interim Report 26 (Para 2.83).
87 See Conclusion to this submission below at page 22.
88 Panel Report, 224.
89 Interim Report, 29 (para 2.95).
90 See below: Conclusion to *this* submission at page 22.
91 Interim Report, 29 (para 2.93). Please also see Appendix A below at pages 42 - 43.
92 Interim Report, 29 (para 2.96).

the longest continuously living cultures on this planet and its enduring connection to this Continent.

On the substantive provisions, if s 25 is regarded as 'odious' and 'racist', then there is no reason to characterise s 51(xxvi) or its proposed replacements in principle (although perhaps not in degree) any differently. The Committee's recommendations provide a head of Commonwealth power for Parliament to make laws with respect to Indigenous people *only*. The Committee's recommendations therefore do nothing to alter the present characterisation and nature of the Constitution. Consequently the provisions in Boxes 1- 5 are in principle not supported or endorsed. While the issue of recognition will touch the lives of Indigenous people, the issue of making the Constitution a document that is reflective of Australian law (for example that Australia is no longer considered *terra nullius*) is a matter that significantly affects the whole community.

Further, surely the Australian public would not endorsed the retention of an odious and racist power in the Constitution. Consequently the suggestion made in my previous submission, reproduced in Appendix A and is reiterated here, which is that *both provisions s 25 and s 51(xxvi) should be expunged*. Please refer to Appendix A for the reasons and arguments, particularly those addressing the arguments around 'saving legislation' which appears to be a primary concern for the Committee.

While the anti-discrimination aspects of the Committee's recommendations are supported in principle, the provisions suggested in the Interim Report are cumbersome, linked to a 'racist' and 'odious' provision and are in any event likely to create a degree of uncertainty particularly for definitional issues. Further, the broader community's view, which is also the legislative position, that all

Australians are equal before the law *must* be reflected and entrenched in the Constitution. Anything less is an affront to this nation's values and ethos. Therefore, the recommendation made in my previous submission, that Parliament declare its intention of creating constitutional equality before the law; and do so by articulating this clearly, unambiguously and in an express form of words. This (Parliamentary position) should be publicised and therefore, become a position about which no reasonable member of the public or the judiciary would be left in any doubt. This submission re-iterates that positive change can be achieved by people voting at the next referendum to '*Remove the RACE provisions from the Constitution; and to entrench equality before the law for all Australian citizens*'.[93]

93 Slightly modified version of the statement and reasoning that appear in Appendix A.