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CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Roundtable discussion

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SYDNEY

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CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Friday, 19 December 2014

Members in attendance: Senators McKenzie, Peris, Siewert and Mr Stephen Jones, Mr Neumann, Mr Wyatt.

WITNESSES

TWOMEY, Professor Anne, Private capacity

WILLIAMS, Professor George, AO, Private capacity

Committee met at 09:00

CHAIR (Mr Wyatt): I declare open this private meeting of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. On behalf of the committee, I would like to acknowledge the traditional owners of the lands on which we meet and pay my respects to elders, both past and present. The committee has been asked by the Commonwealth parliament to build a secure, strong multi-partisan consensus around the timing and wording of the referendum proposals to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

I welcome Professor George Williams AO and Professor Anne Twomey who have agreed to provide the committee with some more detailed advice, on the proposals the committee has been considering, to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution. Today, the committee is taking a *Hansard* record of proceedings but is not being broadcast. The committee may wish to make the *Hansard* record public at a later date, and we will try to seek your views on doing this before doing so.

Parliament has the authority to order the production and publication of undisclosed evidence provided to parliamentary committees. You should also note that an individual committee member may refer to such evidence in writing, a dissenting report to the extent necessary to support their dissent. The committee would try to seek your views before doing this.

When you provide information to the committee you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage you on account of the evidence given, and such action may be treated by the parliament as a contempt. It is also a contempt for you to give false or misleading information if you make an adverse comment about another individual or organisation. That individual or organisation will be made aware of the comment and given a reasonable opportunity to respond to the committee.

Welcome to both Professor George Williams and Professor Anne Twomey. I invite you to make any comments or statements before committee members ask questions.

Prof. Williams: Would it be useful to the committee if I talked through the email that I sent, just so that we can discuss some of those issues? I note that Anne and I did have one telephone conversation about that. What the email sets out is my concerns as to whether the three options represent the best three options for parliament to debate next year. I do not have any issues to raise about the first option.

The second option I do have concerns in that as I indicated in the email I think there are some problems with drafting. Most significantly, I think the addition of subsection (2) is problematic in that it is not clear what purpose it serves. In fact, it serves to confuse the issue because subsection (1) already indicates that the power cannot be used so as to discriminate adversely against Aboriginal and Torres Strait Islander peoples. That means you do not need anything in the form of subsection (2). In particular, subsection (1) only is a limitation as to adverse discrimination.

It does not apply to any positive forms of discrimination, so putting in subsection (2) authorising positive discrimination is either redundant or, at worst, problematic. It could well be problematic, because it would leave the High Court in a position where it has to make some sense of subsection (2). It would need to give it a meaning of some kind, but it is not actually clear what meaning it could be given. My advice on that would be to simply drop subsection (2). It is not required. Also, it would return us to what is a much simpler option, in terms of its drafting.

The other points I made were with respect to option 3. Firstly, in the description of option 3, it specifically refers to it as having an option of enacting an active recognition. It does, but every other option has that as well, so it is confusing to suggest that it is located within that but, by implication, not the other options. The other issue with option 3 is that it just does not contain any recognition. If it were set up in that form with the recognition of options 1 and 2 but without any protection against racial discrimination that would be a viable third option, even though it leaves out the racial-discrimination aspect. But I think if you leave out the symbolic aspect then you just have something that is completely unworkable. It does not even get to first base, and perhaps is not a fair reflection of what that third option might encompass.

There are other things I can talk about but I perhaps might leave, in terms of the process—whether there would be some sort of peoples event prior to parliamentary debate and other matters. I might leave it there, if that is useful.

CHAIR: Just on the 'people's convention' there are two that the committee have agreed to. The first is a convention for the general population of Australia, and that is proposed to be held in Sydney—symbolically for the reason of 1788 and it would be a good place to return to for a general people's convention. The second is an Indigenous convention in Alice Springs. Both of those have been agreed to by the committee and they will be incorporated into our next report.

Prof. Williams: That is certainly good to hear. I think the idea of a day of parliamentary debate is an excellent idea, but preceding it with a popular event is crucial to give the community a clear sense that our political leaders are listening to the community, that the community is going first in the process, that people are really engaged. One thing I did was encourage Paul Kildea, who is probably a leading expert in these issues, to put in a submission on the design of these issues. I should also say that Anne and I had some involvement in the Northern Territory constitutional convention, which did not occur but was a similar exercise, and the most recent exercise where people have attempted to, in that case, develop what was really a purely popular process of constitution making.

Could I ask a question just about those processes? I note that the act of recognition is due to expire on 28 March next year. Are we talking, in terms of time lines, the parliamentary debate and the popular debate being in March? This seems awfully soon. What will happen when the act of recognition expires? Are we going to have a gap of recognition or perhaps it does not matter that much so long as there is a clear process that we will follow within a reasonable time?

CHAIR: The Prime Minister's office has been advised that there is a need to extend the time period for that act so that will prevail. The time lines have not been firmed for either of the two people's conventions or the time for the debate concurrently in both chambers.

I want to go back to the first part of what we started with—that is, the options and your comments there. Are there members who want to talk about that? We will come back to the people's conventions. I am interested in looking at processes that you would recommend that should be considered in respect of any convention.

Mr STEPHEN JONES: My comments and questions are procedural and not about the substance of the—

CHAIR: That is fine; just do the procedural.

Mr STEPHEN JONES: On the issue of parliamentary debates, it is recommended on the presumption that the people of Australia will not focus on these issues until their elected representatives do, and I think that is a fairly safe assumption. Unless there is leadership on this, unless the people of Australia are saying, 'This is actually going to go somewhere', it is unlikely that an organic debate is going to be conducted with the same sort of precision or enthusiasm. In respect of the recommendations that have been put forward from your centre, does that presume that there would also be a parliamentary process either at the front or the back-end of that?

Prof. Williams: I am strongly of the view that parliamentary process is important. If nothing else, until it goes through parliament you cannot have a referendum. It is not enough to show popular engagement; you need to show the political leadership that you were referring to. I think the idea of having a day of debate that would extend the act of recognition is appropriate and the debating of these issues is certainly worthwhile. I think also it is because this is a campaign that very significantly lacks momentum and generating that through a parliamentary debate, which I think should be preceded by the popular events because I think our leaders should be seen to be listening to the community in that order—

Mr STEPHEN JONES: The community conventions should be held in the knowledge that they will be proceeded by a parliamentary discussion, a parliamentary debate?

Prof. Williams: I think so. It should be a clear discussion, a clear time line. I think it is appropriate that the community events go first. You have got to have the political events if only because you do not have a referendum unless parliament has the numbers there to enact it, so it is an inescapable part of it. But if it was said to the community that the first step is that the people are going to debate these issues, they are going to identify their views, they are going to generate popular understanding and this will be followed by a political debate where our leaders will determine whether there is sufficient agreement on an option, then at least if we know the options to something we can put that on to a smaller list and that would be appropriate.

My own view as to where we are is that we've almost got to the end that where we can get to in terms of: what are the legal options? You can have Anne and me back a number of occasions, but I am not sure there is much more we can tell you about what the legal options are. You have three options that, with a bit of tweaking, will be viable. You have other proposals around advisory bodies and the like. But I think the focus should actually move away a bit from the work we do, which has been identifying these, to actually engaging with people and hearing

what the broader community has to say and ensuring that parliamentarians and leaders are engaged in that process.

CHAIR: Other questions?

Mr STEPHEN JONES: I think those observations are without controversy.

CHAIR: Senator Siewert.

Senator SIEWERT: I wanted to go back to the substance of your comments in terms of subsection (2) and (1). Your suggestion in option 2 is to take out subsection (2). I was a little bit confused, reading your option here—which I must admit is not necessarily to do with reading this; it happens with me frequently, sorry!

Senator McKENZIE: Don't take it personally!

Senator SIEWERT: Yes. You would leave 'adversely' in there as well? So you leave 'adversely' in and simply take out subsection (2)?

Prof. Twomey: Yes.

Prof. Williams: Yes. I think that is the safest course, and indeed that is where we had got to in the discussions. The original draft that I did of option 2 simply said 'but not so as to discriminate against them', which I thought was sufficient, but I was happy to add in the word 'adversely' based upon Anne's view, Henry Burmester's view and that of others. But let us be absolutely crystal clear about this: it is only adverse forms of discrimination that we are affecting. We are not affecting anything that is positive. By keeping in the word 'adverse', you remove any need for subsection (2). I cannot come up with a clear wording, I think, than that.

Senator SIEWERT: I wanted to double-check 'adversely'.

Prof. Williams: I should ask Anne as well, because Anne has done a lot of work on this as well.

Prof. Twomey: I endorse what George said about it. I think putting subsection (2) in there does confuse the issue, and it is likely then to lead to, as George said, the High Court trying to give extra meaning to it, which is potentially dangerous. I think it is a more sellable option if it is just paragraph 1. Paragraph 2, of course, is like a red rag to a bull for people who are concerned about some people getting special things that other people are not getting, the us-and-them argument and all that sort of stuff. It is unnecessary, so it is unnecessary to provoke that sort of an argument.

The other thing to say about it is that one of the things I have struggled with in the past about the various proposals is when anybody uses a word like 'benefit' or 'advantage' or any of those sorts of words, because it is very, very hard to ascertain what is beneficial, what is to someone's advantage. This actually is a better proposal because it is just focusing on something that is narrower, which is 'adverse', in 'adverse discrimination against'. So you have the word 'against' there, also supporting that. So you have 'against'; you have 'adverse'. But it is different from having to try and ascertain what is a benefit, what is advantageous, because that is a much bigger and harder issue. What you are doing with this terminology is narrowing the scope of the debate to a much smaller, more controlled area.

Now, that is not to say that it is going to be absolutely crystal clear in every circumstance, it is not to say that there will not be situations where judges will have to make decisions about it, because there will still be issues about whether something is 'adverse discrimination against' if it adversely affects some members of an Aboriginal group for the purposes of benefiting others. That is still a debate out there, but there is just no way of getting around that. One way or another, judges will have to decide those sorts of issues, and I think what needs to be explained to people who are concerned about this—at least, that is what I have tried to do when I have talked to people about this—is that there will always be some of those issues. But, when judges are deciding these things, they are deciding them in a very narrow, small zone. This is not something that goes out and affects the whole of the Constitution, and very large issues and large numbers of people. It is confined to very small numbers of issues of those controversial sorts of things, where measures have both an adverse and a beneficial effect. In the end, yes, it may be that some judges decide that; but that is not a whole bill of rights. It is a much smaller zone. So, in terms of being a target for, particularly, the very conservative side and the people who are sensitive to a one-line bill of rights, this is a much, much smaller, more confined target. You cannot say the issue has completely gone away, but you can say it is small enough to balance against the benefit of the proposal—and that is where I think it lies.

Senator SIEWERT: Regarding the process for option 3, I take the point about there being no recognition in there, but as to the proposition—notwithstanding the recognition, just assuming something is done there—do you think that is achievable? Do you think it would get support in the community?

Prof. Twomey: When you say option 3, do you mean just replacing section 51(xxvi) with Aboriginal and Torres Strait Islander peoples and nothing else?

Senator SIEWERT: Yes. There is the issue that you raise in your submission around—

Prof. Twomey: Where the recognition goes.

Senator SIEWERT: where the recognition goes. Do you think that is saleable in the community?

Prof. Twomey: I think many of you, if not all of you, were there at Tony Abbott's speech at the Recognise function. The critical thing that he said was that he disagreed with options 1 and 2 because he thought they were too much but he thought option 3 was too little. I have also heard that separately from him. I know you are talking to Noel Pearson later on, and he also thinks option 3 is not enough. That suggests that you need to do a little more thinking about another option that is somewhere between. Personally, I have no problem with option 2, but, assuming that there are some people who are critical to getting it through parliament who do have a problem with it, there needs to be some sort of cut-through. Assume for present purposes that the Prime Minister and others think option 3 is not enough; then you have to start thinking of ways to build up option 3 to something more but at the same time not trigger the concerns that they have about the antidiscrimination issues. That is the really hard point for the committee to consider at the moment.

Prof. Williams: I agree. I certainly do not see option 3 as saleable at the moment. If you had that, I think you would sort of say, 'Why bother?' Why would you spend all the money to do that? It does not actually get you to even first base on the recognition point. Frankly, I think the money could be better spent, I suspect, on other things and I think it would be very vulnerable to that argument.

You could certainly improve option 3 by just making it a 51A style proposal—just add in the symbolic text and then end up with the words of the power but without any discrimination protection. But I remain of the view that, without some form of limitation on that power, I do not think it will be viable, otherwise it is simply open to the position that you are replacing one form of words with another but not actually doing anything of substance to remove the ability to enact exactly the sorts of laws that we have been trying to overcome in the past. Of course, its silence to these matters is permission. That is the bottom line. If it simply says 'Aboriginal and Torres Strait Islander peoples', you could use that, subject to any other implications, to prevent Aboriginal people from voting or to pass discriminatory laws of other kinds. So you need some words there, otherwise it is vulnerable to that.

One advantage, given what the Prime Minister said the other night, with amending option 2 is that the committee can come back and say, 'We've changed option 2. We've removed any reference there to 116A, which is what you have. You have a large part of 116A added into option 2, which we are saying you should remove. I think, by removing that, you will divorce it completely from what seems to be the primary concern. However, as Professor Twomey says, there is still going to be a zone of decision making. But, in the end, that is what a constitution is about. It is a legal document and judges will interpret this. Unless there is some engagement with what seem to be the core concerns of a very large part of the Indigenous community about overcoming past laws in this area, I still cannot see how it is likely to be viable or meaningful to those people.

Senator McKENZIE: Senator Siewert addressed many of my issues, but I am interested to hear from the shadow minister.

Mr STEPHEN JONES: The proponents of option 3 point to 67 and say that a lot of the benefit of 67 was the extra constitutional things that occurred around it, and they say that the same benefits can be gained through what is proposed in option 3. Do either of you have any comment to make on that?

Prof. Twomey: It is possible. Any win for Indigenous people in a referendum will obviously be hugely symbolic, but the risk you have is that it is not enough for Indigenous people themselves. If that is the case, if Indigenous people do not wholeheartedly supported it, then everybody else will say, 'Why should I vote for this if the Indigenous people themselves do not want it?' That undermines things.

If you want three to be a serious option—I sort of get what you meant by saying that this may also involve an act of recognition, I think you just need to be more explicit, that you are still wanting to do recognition somewhere. You could either say, 'We'll do this plus there will be a commitment for the parliament to make a declaration,' like the Declaration of Independence, something that is quasi-constitutional and that has all the symbolic language and that sort of stuff and doing this as a package. You could put that forward to make it clear that it does not just leave out recognition.

The other way of dealing with that, if you just want to change it in section 51(xxvi)—without having a separate 51A with the preambular stuff—is considering again the issue of putting a preamble in the Constitution. You know it is not my favourite thing, but I am conscious of the fact that the Prime Minister still has somewhere way in the back of his head this little voice speaking about 'stick something in a preamble'. It may be something—as I

said, I am not keen on it myself, generally—sellable if you had something preambular plus the 51(xxvi). That's another option.

At the risk of respruiking my dead options, could I at least raise again the other possibilities? Looking at the political situation, if you have got to a point where an anti-discrimination provision, in terms of 116A, or even the 'so as not to discriminate' version, if neither of them were on the table simply because they will not get through caucus in parliament, if they are off the table, then you might start thinking again about other ways in which we can limit potential damage. A couple of them I put forward earlier.

One is to make it more a subject-matter type head of power rather than one for Aboriginal peoples, generally, so that you are confining the sorts of issues that the Commonwealth can legislate against, so that they cannot enact oppressive legislation that just applies generally to Aboriginal people. The only things they can legislate about are things that are relevant to Indigeneity rather than a category of people. The second thing I raised, which I know went down like a lead balloon but might be considered again, is that if you want another way of dealing with the anti-discrimination thing you could think about the proportionality issues—that is, whether you have a test you put in instead, a test that the High Court would apply. In your subject-matter provisions you would say 'Commonwealth has power to make laws with respect to the purpose of protecting native title, supporting the enjoyment of cultural heritage' and what-not rights so that within the notion of it there is a well-accepted test of how to deal with it, but it is done without using words like discrimination, benefit and all that sort of thing. You could think about them again.

Prof. Williams: I think, though, if the ultimate objection is, 'We just don't want the High Court deciding these matters,' then what we are doing is shifting the decision to other terrain, ultimately.

Prof. Twomey: It is at least moving off the issue of discrimination, antidiscrimination. It is another option you might just want to think about again. Having said that, there is also the other option that you will be talking about later with Noel Pearson of the Cape York Institute, which I think should be given consideration too—that is, the consultation model. You have a constitutionally established body that is representative, that is able to provide advice to parliament, that there are formal procedures for that advice to be tabled in the parliament, and that there be an obligation for parliament to at least consider that advice.

If the body is sufficiently respected, and a culture is developed of having deep regard for the importance of that advice and it gives, constitutionally, a voice to Aboriginal people to influence the way laws affect them, then that might also be an acceptable alternative. Again, from talking to people, particularly on the conservative side, that sort of thing has a far greater chance of getting through the parliamentary party. The big question is whether that is sufficiently acceptable to the Indigenous people, but at least it should be something put on the table as an alternative.

Mr STEPHEN JONES: The opponents of establishing a constitutional protection against discrimination, how ever so cast, whether broad or narrow—narrow in the sense of option 2—always point to the danger of having judges and not parliamentarians adjudicate on what is or is not discrimination. Is there any body of evidence, academic or otherwise, that you can point to that indicates perversity when judicial bodies are required to adjudicate on matters such as this? That is to say, the fear is very real in those who say, 'We are concerned that it is unelected judges who make these decisions and not parliamentarians.' Is there any empirical data which can substantiate that fear that there is a wellspring of perversity emanating from the bench which would justify that fear?

Prof. Twomey: I do not think the concern is perversity per se. I do not think that is the issue about it. I think the concern is that when something is constitutionalised you do not get a second go at it. People have genuinely different views on issues like the intervention and all sorts of other things. But if it is at the statutory level, if parliament is dealing with those things, then the people have the ability to vote out a government and vote in another one that they think will deal with it better. Parliament in the future has the ability to change it when circumstances change. The difficulty is that once you constitutionalise a thing and the High Court has said X, some people will agree and some people will disagree, but the problem is it is then frozen because you cannot get rid of it unless you have a referendum to change the Constitution. That is, as we know, extremely expensive and extremely difficult.

My understanding is that the concerns of those who do not want these things to be determined by judges is not that judges should not be able to decide things or that they distrust judges themselves inherently, or that they think the judges will behave perversely; the problem is that once you do that and a decision is made, you are stuck there forever with a balance that you cannot fix unless you change the Constitution. Let me give you a small example and hopefully it is accurate, but I may have it slightly wrong because this is a long time ago. The statement in the French constitution about liberty, equality, fraternity and all the rest of it—but their equality provision, or

whatever, was interpreted in such a way by the courts as not to allow for positive discrimination. And they were stuck with that because it was constitutionalised and the only way they could get rid of that after a court decision was to change the Constitution. Those are the risks that you face—one decision that goes one way that you might not expect the court to go. We obviously all have our expectations of how a court might interpret this. But I have been in the game long enough to know that things I have drafted or whatever will be interpreted completely differently from what I have intended in 10 or 20 years time. You have to be aware of that. But being at the parliamentary level, you get a chance to change it. At the constitutional level, you have to be so much more careful because you may be putting into effect things that you just cannot get rid of.

Senator McKenzie interjecting—

Prof. Williams: That is absolutely right in terms of the risks and there are always real risks in putting language of this kind in. I suppose that is why these words have actually been chosen. It has always struck me as somewhat ironic that there is this concern about the language of discrimination but the reason that word is chosen is because it has the clearest legal meaning in this context. We already have the word 'discrimination' in the Constitution, section 117. The High Court has taken a cautious approach to that. It has not tended to be interventionist. It has adopted a permissive approach in terms of providing leeway for a broad range of policy choices that the government might adopt. If you were to apply language of that kind to something like the Northern Territory intervention, it would give some comfort that you are not likely to have a court that would be second-guessing the social policy decisions of the government. It does not lend itself to that.

That is at the constitutional level, but at the statutory level, of course, discrimination is an endemic concept. It is looked at all the time. We have antidiscrimination statutes, and not only that we also have the RDA, which has looked at the racial discrimination concept quite directly in terms of alcohol management and other areas. I have gone through those decisions carefully and I cannot think of a better word because it, in a sense, best describes, given the past decisions, the sorts of outcomes that would be most likely to be acceptable to the current government. And as I think Anne indicated, if you pick 'benefit' or other words, I do not know what they mean. 'Discrimination' carries some baggage, but in a legal sense it is the most accurate descriptor. And it also, as Anne has said, really narrows that field of what the court does to only adverse discrimination against a particular class of people thereby dealing with what are legitimate concerns of Aboriginal people about past laws without actually dealing with the broader conduct that 116A covers.

Mr NEUMANN: I apologise: it was the wonders of Qantas and the beauty of daylight saving, coming from Queensland—I did vote for it, but I was in the minority. I am always mystified—I am interested to hear of this from you, Anne—by those constitutional conservatives who oppose a provision like 116A. Under our Constitution the High Court itself deals with issues of the Constitution and it argues about parliamentary sovereignty, for example. Yet, the High Court has had a long history of determining issues in relation to the rights of corporations and state governments and federal governments and individuals and organisations—116, 119, 92 and 51 for a start; even provisions in relation to whether the Commonwealth has the power over chaplaincy issues.

Professor Williams interjecting—

Mr NEUMANN: Exactly. The High Court has dealt with this stuff every week, every month, every year of its existence regardless of who has been on the bench. Yet for some reason or other this particular provision, which has a long history in terms of the word discrimination jurisprudence, is somehow interpreted as a one-line bill of rights where we know that the High Court has been quite imaginative in determining issues, whether it is the engineers' case, Franklin Dam, bank nationalisation or Communist Party dissolution and even the [inaudible] type decisions. Can you explain to me how they can just ignore all that legal history and—

Prof. Twomey: I do not think they do ignore it. I think that whole history is what freaks them out, frankly.

Mr NEUMANN: Is that what enrages them?

Prof. Twomey: You would find many on the conservative side who object to, for example, the implied freedom of political communication. I do not. In fact, I was one of the people working in the High Court who helped to develop that.

Mr NEUMANN: I agree with you Anne; I commend you.

Prof. Twomey: There are many on the conservative side who are concerned about the High Court interpreting creatively. That is actually the red rag to the bull. That is not something they are ignoring; that is something they are worried about. The difficulty in it arises because—you see this not just in the very conservative side; you saw this in the whole bill of rights debate, the Frank Brennan report and whatever—Australians generally seem to have a reluctance to go down the American path of litigating everything, of having rights when they conflict

being dealt with permanently by a constitutional court. The real problem with rights is this: rights are great and everybody supports them, but the thing is they will always conflict. Your right to freedom of speech will conflict with your right to freedom of religion and will conflict with rights against discrimination. The question in the end is: how do you resolve those? And, yes, in day-to-day life it is the courts that resolve them every day in relation to discrimination acts and how they deal with other things. That is okay because if you get to a point where there is a big policy issue, then the parliament has the capacity to override and change the law. But in the United States, for example, if there is a big policy issue—be it abortion or gun rights or any of those sorts of things—in the end the legislature does not have the ability to change the rules because it is the Supreme Court that is the only one that has the ability to change the rules.

I think in the general community, particularly in the conservative community, there is a concern about freezing and constitutionalising things when it comes to rights because there are legitimate views about how to deal with conflicting rights and a concern that, in the end, a democratically elected parliament should be the one to be able to make that call and that the people should be able to influence that call through their members of parliament because they are not able to influence that call in relation to their courts. So it is a democratic issue as well.

Mr NEUMANN: Yet the idea of the High Court interpreting the Constitution in that way has been there since Federation.

Prof. Twomey: Yes, but the way our Constitution was constructed means that, mostly, that role of the High Court has been in relation to dealing with the constitutional relationships between the various parts of government—so, the executive, the legislature and the courts, and the federal system: who has the power to do this, how broad is the corporations power et cetera. When it comes to rights, there is not a lot in our Constitution. They just did not go there. If you go back and read the debates about this, when Andrew Inglis Clark wanted to put in the bits from the US Bill of Rights about equality before the law, due process of law—all those things that are hugely important in the United States—people were saying, 'How do we know what "equality before the law" means? How do we know how a court will interpret that in the future?' They said, 'Let's confine this,' and we ended up with the fairly pathetic section 117, which does very, very little. That is where all that stuff was going to go.

Prof. Williams: What they also said, of course, was, 'Not only do we want parliament to be able to make the decisions but we want the power to discriminate against people on the basis of their race.'

Prof. Twomey: Yes.

Prof. Williams: It is absolutely clear that they designed a constitution that primarily gave the High Court decision-making powers over federalism matters and left—

Mr NEUMANN: Barton said stuff about this, didn't he?

Prof. Williams: That is right—Barton and others. There was a deliberate decision, in rejecting that clause, that people could be discriminated against on racial grounds and that Aboriginal people would be excluded from the political settlements. I look at this debate and in a sense, yes, I can understand where they were coming from. But the very point is to actually overcome some of those problems and that history, and to have a constitution that no longer permits the sorts of adverse laws that have been passed against Aboriginal people in the past.

In terms of positioning this, one thing that concerns me about the Cape York submission is that I think, if you end up with a proposal, a position, that, if you like, is completely acceptable to the far Right—or, for that matter, the far Left—you are missing the centre on this. And, if you look at the polling on this done by the expert panel and also the polling done by the Congress of Aboriginal Peoples, the No. 1 most popular aspect is dealing with the racial discrimination problem. You have to deal with it in one way or the other. I think, if you take out what is the most saleable aspect of this, which is not, I believe, recognising Aboriginal people, because I think that does concern a larger body of people, then you end up with something that deals in a very orthodox way with the Constitution but does not ultimately fix the underlying problem.

Prof. Twomey: I have generally been agreeing with everything George says but I disagree on the point about how saleable the antidiscrimination provision is. I honestly think, if you had a 116A in there, it would fail.

Senator McKENZIE: Fail.

Prof. Twomey: I really do. It potentially provokes all sorts of arguments that go beyond Aboriginal issues and you will—

Prof. Williams: That is why I would not be focusing on 1; I am really focusing on option 2, for the reasons Anne puts.

Prof. Twomey: Yes. As I say, I have no problem personally with option 2; option 2 does not worry me. But I have had discussions with people who are members of parliament on the, shall we say, highly conservative side, and, as much as I have argued, I have not been able to convince them about option 2. So I am okay with option 2, but, if option 2 is not getting through, the question is: is there something you can do that is as good in another way?

The other thing to say about the Noel Pearson proposal, which is, I think, of huge advantage to it, is that one of the big issues that you also hear out there in the community is: what does this do in practical terms for Aboriginal people; what does recognising them in the Constitution do at all in relation to health or education or anything? 'It does nothing.' That is what people say. It is not, in practice, achieving anything. The thing about the role of Aboriginal people and having a voice in parliament to influence laws that affect them is that you can say, 'Actually, this will have positive benefits in the future, now and forever, because Aboriginal people will have much more of an ability to get out there and influence health, education, jobs and all those sorts of things.'

It is not just about putting pretty words in a constitution. It has, potentially, a practical impact going on. It helps defeat that argument of, 'Why are we doing this? It's not going to achieve anything.' That is a powerful thing to take forward. If you look at those Recognise What? people, one of their arguments is that this does not achieve anything practical for anyone. You can defeat that if you can say, 'Actually, giving Aboriginal people a direct voice into the parliamentary system on laws that affect them does have the potential to give positive benefits in future.' That is an important thing to deal with, to acknowledge that would be able to play out in the debate.

Prof. Williams: Could I make some comments on that one as well? I do not have any problem with the advisory body. I think it is a good idea. I think it is acceptable. But by itself I do not think it is a practical measure. It may give a voice but it will not give influence, I think is the basic problem. Within a parliamentary system based on our Westminster traditions and the strictness of the party system, to have an advisory body—of which we have had many in the past—which may well provide advice, the odds of it being influential and listened to, in the context of legislation, especially, that is already in parliament just does not seem likely. In fact, if you look at other bodies in the past, they have shown that is the case.

Whether it is in the Constitution or not does not make a big difference to me. The form of it in the Constitution versus legislation does not necessarily make a big difference, though putting it in the Constitution would be fine. Saying particularly to Aboriginal people that we will 'give you another advisory body' and we already have one at the moment—and the Prime Minister could appoint Warren Mundine or whoever to the new body—I am not sure they would necessarily see that anything would change.

Also, if you look at the international experience where these sorts of bodies have been tried, they consistently do well for a period of time and then they drift off as political commitments to them wane. They tend to be successful for a short period of time and then party processes tend to overcome them. I would also say one particular problem is, where you have Indigenous people in parliament voting on legislation, it gets very confused as to which voices should be listened to. If there is a difference of opinion between the Indigenous advisory body and the Indigenous elected representatives, not surprisingly, the Indigenous representatives always trump that, as they should, within the parliamentary system. You do not need too much of that happening before you get to the point of asking, 'What's this advisory body going to do? How is it going to operate?'

The way it could operate would be if you had the body and you had something like option 2. Then they would have something meaningful to advise on, in terms of the adverse discrimination point. Parliament would be seized with that issue, knowing that the High Court could look at it. The High Court could well be influenced by the fact that an Indigenous advisory body had looked at this carefully, had provided advice, had been consulted on it, and it may well give comfort to parliament and lead to better drafting of legislation that is less likely to run into High Court problems. You have to twin it with an operative provision, otherwise you have something like the Interstate Commission which, in section 101, we know must exist but has not existed for decades, because of a variety of problems attaching to it.

Mr STEPHEN JONES: If you entrench an advisory body that has specific powers in relation to the parliament, does it not give a procedural remedy against either house of parliament or the executive, in the case of a deadlock?

Prof. Williams: I would not think so because, if nothing else, the courts would not intervene. I cannot see any court, including the High Court, issuing a writ against parliament to do this or that.

Mr STEPHEN JONES: Let us take an intervention as an example. An emergency is said to exist. Legislation is rushed through both houses of parliament within a 48-hour period. Their consultative body says, 'This falls

fairly and squarely within our remit and we haven't had time to consider the options on this.' Do you not think they would have a remit?

Prof. Williams: It really depends on the drafting of the Constitution. Every like body that I am aware of has a clause in it that says, 'If this procedure is not complied with, it does not have a legal effect.' You have the human rights committees and other bodies. If you put a clause in that said, 'This Indigenous body must render a report,' you cannot require parliament to listen or do anything. It is like our advice on the act-of-recognition point. You cannot compel anything.

Mr STEPHEN JONES: It is different, for all the reasons we discussed not 10 minutes ago, once you entrench an advisory body within the Constitution and give it a function. This is what will be different if it has a function that is entrenched within the Constitution.

Prof. Twomey: It depends how it is done.

Mr STEPHEN JONES: I would be astounded if they did not have a remedy against a parliament for a procedure like I have just outlined.

Prof. Williams: People will certainly try it, there would be no doubt about that. Whether they succeed, as Anne said, it would depend on—

Mr STEPHEN JONES: I am not saying that I am hostile to that, by the way. It might be a good idea. I would be astounded if it did not exist and that is why I am astounded that it is seen as a more palatable option. The third way is more palatable than the first or the second.

Prof. Twomey: Again, you should raise this with the Cape York people afterwards. My close understanding of that point is that it was drafted specifically, at least what they are proposing, in such a way as to make it nonjusticiable. It is drafted in similar terminology to sections 53 and 54 of the Constitution to concern itself with internal proceedings of parliament so that a court would not intervene to make those points justiciable. Again, that is precisely for the same point as everything that was said before: it just would not be acceptable to conservative people if it was justiciable.

Mr STEPHEN JONES: But what about the G-G?

Prof. Twomey: What, that the Governor-General would refuse assent to a bill—no. By convention, they are not really able to do so—and I tell you that as a woman writing a book right now about reserve powers. No, it is not an issue.

Mr NEUMANN: We have not actually seen what they describe as the handsome yet nonjusticiable procedural chapter, so I am not sure what they are talking about. I am interested to hear of this advisory body because they seem to me to be establishing some sort of quasi Indigenous house of lords, partly appointed, where they cannot stop what the lower House or the Senate can actually do. How are these types of advisory bodies elsewhere appointed? To what extent does this body have a say—for example, in education where you talk about Indigenous loadings and schools, and funding for Indigenous health? It seems to me hard to argue that most legislation that deals with non-Indigenous Australians would not also deal with Indigenous Australians, and would it then therefore have a role in all legislation that is before the House and the Senate?

Prof. Twomey: I think you probably need to ask them.

Mr NEUMANN: I will ask.

Prof. Twomey: My difficulty with this is I am not really authorised to speak on their behalf or reveal their wording, or do any of those sorts of things.

Mr NEUMANN: I am interested in your comments about that because that seems to be the logical consequence of what they are saying.

Senator McKENZIE: Chair, I just feel that the shadow minister is talking over Professor Twomey. She was in the middle of talking.

Prof. Twomey: No.

Senator McKENZIE: Sorry. I was waiting for her to finish.

Prof. Twomey: The issues are how far it goes in terms of issues affecting Indigenous people. I do not have the words in front and, to be honest, I cannot remember. The other one was how you appoint the body. My understanding is that that was to be left to the legislation and that is a further debate to be had. That was my understanding the last time I spoke to them which was a while ago. They may have a different view by now.

Senator SIEWERT: I thought they had some ideas about how people would be appointed. It had a tiered system.

Prof. Twomey: Yes. In fact, it may have been in the submission. My understanding is that they did not want to load all that stuff up in the Constitution. They wanted to have legislation to deal with those things for obvious reasons. There are difficulties about constitutionalising things and there are difficulties about putting in too much detail. The actual proposal that they had was intended to be as simple and clean as you could get.

CHAIR: Which is the point, I think, Mr Neumann was making about its feasibility constitutionally as opposed to the detail of what is proposed by Noel and Cape York. On 10 September, the Premier of Western Australia met with me briefly on another issue but at the same time we discussed constitutional recognition. He indicated that Western Australia would mount a vigorous campaign against options 1 and 2 in respect of recognising land and acknowledging the continuing relationship, and that they would enjoin with other states to mount that 'no' case. That is something I have not had the opportunity to share with members. The view put by his Attorney-General is that those three elements would leach into the Constitution and would have an impact on other sections.

Prof. Williams: If there is a problem with the words that they are not the right words of recognition, that is a debate that needs to be had, but, as to their legal effect, as the expert panel recognised, the drafting of 51A in the symbolic sense provides a pretext for understanding the power, but the Constitution does not otherwise deal with these issues anyway. As the High Court has identified with preambular text otherwise, it is occasionally useful but not usually very much. I wondered whether the concern might have actually been with the discrimination clause, but, of course, there cannot be any concern there; it only applies to Commonwealth laws—under option 2, at least. If they have some legal advice, I am sure Professor Twomey and I would be happy to look at it, but it does not seem an overly plausible argument to give rise to strong concerns.

Prof. Twomey: This is sort of a point that I have raised earlier. In one of our earlier appearances I pointed to that particular part of the preambular thing, where it says, 'Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters,' and I asked the question: is that intended to override requirements in native title litigation that you prove your continuing relationship with land and water? Can people then come along and say, 'I don't need to establish that because the Constitution recognises my continuing relationship with my traditional land and waters; therefore, that affects how the native title litigation proceeds'? I have raised that before. I do not have strong views one way or another on whether it should or it should not. My only view is that what is meant should be clear. If it is meant to override that, then we should say that; if it is not meant to override that, we should also say that so people know what they are voting about.

I suspect that is where he is coming from, although I do not know. I have not had any contact with Western Australia about this. But, when I did raise it previously, my recollection is that Henry Burmester and people from the expert panel said it was never intended to do that. So it was not intended to override requirements in native title law that people establish their continuing connection—that is just not what it was there for. If that is the case, maybe that needs to be made clear, either in the drafting of the words themselves or at least in the explanatory memorandum and the public debate to defuse the issue if that is going to be a bomb that is about to go off. If it is not intended to do that, we should deal with that.

What really stunned me about that provision was that I was talking to a New South Wales constitutional convention of students on Indigenous recognition. One of the questions raised by a student was precisely that. He said: what does that mean and does that change native title law? I was astonished that a year 10 student had picked that up and asked that question, but it just made me think, 'Golly, if a year 10 student is asking that question, maybe that will be something that comes up in the debate on this.' So I think we do need to be conscious that that is an issue. I had not been aware that WA was raising it. In fact, as far as I knew, I was the only person who had mentioned it. But, if WA is concerned about it and it is not intended to do that, I think it is fairly easy to defuse that bomb. I just think people need to be clear about what they are voting for and what it is intended to mean.

CHAIR: Equally, the Attorney-General of the Northern Territory raised the same issue. In the meeting that we had with the Attorney-General, he said he would oppose any reference to acknowledging.

Prof. Williams: I think it is problematic in part because it is undeniable as a matter of fact that Aboriginal peoples do have that continuing relationship. As a matter of fact, the courts have identified that, and this is not saying that every Aboriginal person has a continuing relationship; it is merely identifying the fact of it. It is hard to know how you could draft this better without becoming somewhat, I think, insincere and demonstrably lacking generosity about it.

I think Professor Twomey is right, in terms of the explanation, if it is the Prime Minister and others who come up and start explaining these words in the sense of saying, 'These are symbolic words of recognition; they don't create rights and entitlements and that will be made clear in the debate; these are words that preface a power so

we can understand some of the history of this; and, if nothing else, it recognises that some Aboriginal peoples do have this relationship but we're not indicating it is exhaustive.' All of that is implicit in the words. But part of the difficulty is that we are drafting and redrafting in the absence of a fuller public debate to provide a clearer explanation for what it is about.

CHAIR: Yes. I think, in a sense, the Prime Minister has reservations as well when he sets aside both options. I have had a read of his speech, but I did not hear the nuancing of the words as they were expressed so I am not privy to that at the moment.

Prof. Williams: As long as we do not go for something like 'kinship'. This was the same debate in 1999. Very large numbers of Aboriginal people voted against and campaigned against that purely on the basis that it described the connection as being 'kinship', which was an inappropriate word. Maybe this is the process for conventions or other things to come up with other options, to discuss these matters. But personally I would be satisfied so long as Aboriginal peoples are able to say, 'It's a satisfactory form of words.' That seems to be what matters most.

CHAIR: And yet the challenge is getting the majority of Australians across the line. If we have WA and NT opposing it based on that prefacing, then it is—

Prof. Twomey: That is a huge argument that could run as a scare campaign; there is no doubt about that. It needs to be dealt with one way or another. But the reality is, if that is not what is intended, then that needs to be made very clear, and that can defuse the argument.

CHAIR: Any other questions? Why don't we turn back to the convention? If you would give us an overview of the process you went through for the Northern Territory convention, both establishing it and then what the process was to the end point, even though it did not occur.

Prof. Williams: Sure. I was on the—

CHAIR: Sorry, you were on the republic one as well.

Prof. Williams: I was involved in both, but particularly in the Northern Territory. I was on the committee of the Northern Territory parliament, helping them draft their convention leading to statehood. It got to the point where legislation was enacted and the convention was about to be held, and of course politics got in the way. But, in that process, the desire was for a purely popular convention. Politicians were not eligible to attend the convention except in an advisory capacity. It was going to be fully elected, with people chosen according to electorates, and people 16 years and up were to be allowed to both vote and be delegates to the convention—a bit like what happened with some of the Scottish referendum recently. But every attempt there was to make it clear that this was a popular process.

I think what you would take away from that is that, firstly, they identified a convention as being an appropriate way of resolving these things—that, for a big issue like the move to statehood, a convention was the right process. Also, that it was popular was a key aspect, and that they wanted to diminish the apparent influence of politicians on the process to heighten popular ownership. But, in that case, they had a lot more money. An election involving compulsory voting, even in the Northern Territory, would not be cheap. If you are holding any process here, as Dr Kildea's submission illustrates, unless you have some millions of dollars you cannot hold an election; you have to have some alternative selection process. I think it is reasonable—it may be the least worst option—to go for random selection, a person from each electorate, ensuring that the selection includes appropriate diversity of gender, ethnic background and the like. You would aim for a convention that would be, say, 150 people, if you did that; you might have a separate Indigenous convention preceding that as well; and you would have a program that would maybe go for two days in Sydney. But I would not underestimate the logistics in organising something of this kind. Just the travel arrangements for these people are enormous.

The other model you could go for is a more devolved convention, which was done during the republic time, where you hold not a big national one but smaller ones—but you will not get the media coverage and the media interest. If you want something that sends a national signal and that the ABC or Sky might cover, then I think you probably do need a one- to two-day event in Sydney at the right time, probably around the winter session next year or something like that—I think, much after mid next year and you are going to run into difficulties. And calling it a convention gives it a certain grandness, I suspect, that will attract media interest.

Prof. Twomey: One thing to be wary of is what I think of as the horror of the 2020 Summit—I think you were probably there too, George—which really was exactly how not to do this. It was a complete and utter debacle from start to finish in a number of ways, particularly for the unfortunate participants. There were all sorts of problems with it. When it started off, it was supposed to be, what was it, a thousand of the best and brightest? So there were people who were chosen, and then you got people saying, 'Hang on a minute; we want a bit more

representation of this sector,' that sector, the other sector and whatever. You ended up with a mix of those with expertise and those genuine, good people with no expertise all shoved together and broken up into groups. The problems there that started to manifest themselves were, first of all, the amount of time was too small, and the numbers in the groups were so big that many people got extremely frustrated that they did not actually get to have their say. They had gone all the way to Canberra for two days and were then were being treated as idiots, largely, in the Great Hall being entertained by Hugh Jackman or whoever but not actually getting to speak.

Prof. Williams: That was the best bit!

Prof. Twomey: I was getting pretty annoyed by that stage. What really struck me was the quality of the debate was affected by the fact that you had a proportion of the group who were needing to be educated—taught and understood up to the level of the debate that the rest of the people were trying to speak at. You had completely mismatched understandings of the issues.

It could have worked either way. It could have worked if you had people with no background and understanding in it but then you had given them instruction: 'Here are the basics, here are the issues; go away and study this before you come; then we can have a debate and discussion,' or you could have taken it with the experts and had a discussion, where we all knew what each other was talking about, and we could have debated it. When you put the two together, the experts were being frustrated because they spent half the time having to explain to the other people, who are non-experts, why they were barking up the wrong tree—because 'This wouldn't work, constitutionally,' or whatever. Everybody got frustrated and nothing was achieved.

Do not go down that model, it was awful; especially, do not just treat people as shmucks when they have come all the way to Canberra for this thing and have made a huge effort and have spent half their time in silly sessions in the Great Hall, with celebrities, and not actually dealing with the issues they genuinely thought they were going to be dealing with. That was insulting.

Prof. Williams: That is why the Northern Territory one is useful. Everything was done there to avoid the 2020. You had a very tight agenda, very carefully chosen chairs and experts, who were not delegates, who briefed and gave speeches from opposing viewpoints. Then the community representatives debated. They also broke up into working groups, where appropriate, and then at the end they had a structured agenda, saying, 'These are the issues we have identified. Let us vote on those and come up with a communique.' The focus was on working sessions, informed by experts, and then community debating, which is the opposite.

Prof. Twomey: Which I think is what you need to do. But the other really important thing to say here is, if you end up with a situation where what you are doing is taking random people off the street to do this, then you need a longer period of time. Just trying to shove it through in one weekend really does not work. In the places where they have done this, like British Colombia and Ireland or wherever, we are talking about people meeting for months so that they get up to speed, they are educated to a level of expertise so that they understand the stuff and they can take it through.

You have to remember why you are doing this, in the end. If the reason you are doing this is to try to say to the outside public, 'Here are people just like you. They are ordinary people on the street, just like you. If we put them together in a room and we give them all the information that, let's face it, you are never going to have time to get, you can trust these people, once they have all the information, that they represent you. Once they have that information they are going to reach a rational, sensible decision and you can take that as your voting cue.' That is what the point of it is, to try to convince people that people like me, if they had gone through all that process, which I have not gone through myself, they are going to come to this answer—therefore, I can trust them to say, 'All right, I'll take what you say is justified and that will give me a cue as to how to vote.' That is the rationale behind the deliberative—

Mr STEPHEN JONES: It's a big focus group.

Prof. Twomey: Yes. It is a bit more than that. To get to that decision it is not just, 'This is what I think as a person of street,' it is more, 'This is what I think after I got all the information I needed to make a decision.' People when they vote, generally, do not gather all the primary information they need to make a decision. People when they vote, generally, take cues from other people.

Mostly, that is through political parties. People who are dyed-in-the-wool Labor voters or dyed-in-the-wool conservatives will say, 'I don't know all the details about immigration policy or tax policy or whatever, but I trust John Howard' or trust Bill Shorten or whoever it is, 'to make the right decision; therefore, I will vote for these people'. That is pretty much how the system works. There are not very many people who actually go and do the primary work themselves and make that assessment. When you are getting people to vote in a referendum—

Mr STEPHEN JONES: For the record, I totally disagree.

Prof. Twomey: When you are voting in a referendum, what you are looking for are people who will give cues to other people as to how to vote. So who do you trust to make the right decision on your behalf on the basis that they have all the information and they have made a decision in the right sort of way. That is what you are looking up. So a deliberative forum is another way of dealing with that, particularly if trust in politicians is broken down and particularly where a referendum needs to be seen to have the support of the general community. That is the point of having one of these things. But unless you can give the people who are actually in this deliberative convention enough time to actually feel sufficiently informed to get that sort of a decision then it is hopeless. I cannot remember how long the Northern Territory convention was supposed to go for, but it was a couple of weeks or something.

Prof. Williams: It was a different process too because it was drafting the whole constitution for the territory.

Prof. Twomey: It was a bigger issue.

Prof. Williams: It was going to be two different sessions. It was going to be two weeks broken by a year and then another session. So it was quite different.

Prof. Twomey: It is not a weekend rushed job—that is difficult. The other thing that George mentioned about it was that it was structured and they were not just going in there saying, 'Here, write a Constitution.' My role in it was to write an underlying draft Constitution, which was just the nuts and bolts job; not the 'Here are the controversial bits.' The controversial bits were to be left to the people there—like 'Do we have a bill of rights?' and all that sort of stuff.

Prof. Williams: Do we have a right to bear arms?

Prof. Twomey: Exactly. The underlying nuts and bolts with questions as to how you deal with things was given to them. They were at least directed in terms of what they did. If you are going to do this, you need to give them direction but, at the same time, you cannot do it in such a way as to dictate the outcome because people will smell a bad fish really quickly. In fact, the other one of these that I was involved with was a South Australian one. Did you do that one? There was a South Australian constitutional convention—one of these deliberative ones; get people off the street et cetera. It was done to satisfy the Speaker, who was an independent. It was one of those things where, 'I, when I decide to become Speaker and in order to save your government, require you to do this constitutional convention thing.' He had very strong views as to what he wanted the outcome to be. Very amusingly, I was one of the experts brought in to explain to people certain issues. At the end, there was a somewhat angry rant that the convention was heading in directions that he had not proposed it to go and he was very angry that his entire thing that he had decided was going to deliver this answer was in fact going to give a very different answer. So that is the other risk in all of this.

Prof. Williams: One other thing you can do to mitigate some of those risks—and John Howard did this for the 1998 convention—is to be very precise with the questions that you ask and do not put it at large. The 1998 convention was flawed primarily because of the selection process. By appointing half of them, it actually skewed the results. But it was tightly focused in that they had three questions they had to answer and that prevented the convention going off in all sorts of different directions. For this convention, if you do it, one of the main reasons is that that trust element just does not work in terms of parties informing how voters vote on referendums. There have been referendums that fail where all the major parties say vote 'yes'. They fail in part because a small campaign can be effective in destabilising that trust or people are worried about bipartisanship.

Prof. Twomey: Particularly at the state level if you have states opposing various proposals.

Prof. Williams: At the state level, that is right. People will trust, sometimes to a greater degree, what they see as their peers debating these issues, informing the political process. They think that if people like themselves have debated this—and I have seen this on television—it gives them a higher degree of faith that this is a sensible thing.

Senator McKENZIE: In setting up a public debate such as is being discussed, there will be two sides—presupposing that there are going to be two sides. Is there a way to structure it where that inherent adversarial outcome does not occur?

Prof. Williams: Yes, and this certainly came up for the Northern Territory convention as well, that on the one hand it has to be plausible and right in the sense of representing all points of view fairly. If you are knocking out a point of view, you have a major process problem that can affect the whole legitimacy of the convention. But, on the other hand, what you do not want is just two polarised positions, because in doing that you sometimes create a division that may not be there or maybe the sides have got a different weight to them, or there is a third issue.

What happened in the Northern Territory was that the people we were choosing for the expert advice would cover both sides. In other words, you did not set it up as a debate between X and Y, but you chose a credible

person who had the job of fairly representing those sides, and that person may have even had to expose some of their material to the different sides to check that they felt that they were being properly represented. That actually took away some of the adversarial nature of it, and we thought it would lead to a different dynamic. But the convention did not happen, of course.

Prof. Twomey: The other thing to do, and this may or may not work, is to make the question—assume that we are going to have a referendum on this; it has been announced, we are going to have it: what is the best question to put up? Then it is not a debate between the 'yes, I want it' people and the 'no, I don't' people. That is where everybody, even though those who do not want it, can come together and say, 'Okay, if this is going to a referendum, what is the best question? What sort of thing could I live with? How do we do it to ameliorate my concerns the most? What is the best outcome?' If that is the focus of your convention, 'What is the best thing we can put forward', then that takes—

Senator McKENZIE: But, if you are a 'no, not under any circumstances', then you are not going to be part of that. You would have to wait to see what comes out of the convention in order to—

Prof. Twomey: You could choose not to attend. But even monarchists in the republic debate—if you were a sensible monarchist in the debate at the Constitutional Convention on a republic, you could still vote in the end by thinking, 'As a monarchist, for me, what is the best republican outcome that would be of least concern to me about the effect on the Constitution?' That would be a rational way of doing it. The other way of doing it, of course, and this is what many monarchists did, was, 'Let me support the most outrageous outcome on the basis that then it will be more likely to fail.' That is always a tactical risk. But, if you can get people of good faith, you can say to them: 'Right; this is going to a referendum. It may pass. What can you do and add to this to give us the best thing to put to a referendum?' If you can try and get people to be of good faith and contribute, genuinely, everything they can to it, then it does not have to be that sort of a yes-no fight. The yes-no fight can be left for the referendum. But actually forming the question, forming the issue and the change, should be done by people who have genuine concern about the Constitution and want to come up with the best answer.

Prof. Williams: It is directed in a constructive way; that is exactly what it is about And, under that, you can see the subsets of the questions you have: if we are going ahead, what should be the symbolic recognition, the form of words in these areas; what should we do with the existing clauses; what should any replacement clause be; and are there any other things that need to be part of the question? They are really the four things. Anything else would be needed only to provide an escape valve for people who are really hot under the collar about something. You do not want to see them being denied a chance to speak. I think, if you do that with a tight agenda, you could run something over, Paul Kildea suggested, up to three days. But, for a lot of it, there is the cost factor, of course, as well. The longer it is, the more expensive it is.

Senator McKENZIE: We could always pass some budget savings!

Senator SIEWERT: Keep dreaming!

Senator McKENZIE: Yes!

Senator SIEWERT: I want to go back to constitutional recognition. If option 3 is too minimal and option 2 is still too far, what do you think is another option? Do you have any suggestions? Would you combine options 2 and 3? I personally think option 3 is too minimal as well; I am not a fan of 3 at all. But what is another option? I do not think that the majority of Australians will support something that does not deal with racial discrimination, so I have a different view. Certainly, for the people I have been talking to, that is how you do it. I can understand how option 1 could be too far for some people. But I think there will be a very strong campaign saying, 'If you're not addressing discrimination, what's the point?'

Prof. Williams: I think, critically, it is the Indigenous community that will most identify the need for the antidiscrimination element. You saw what happened in 1999 with the preamble, where it bombed to a much larger extent than the republic issue, and one of the key factors was Indigenous people saying 'This is not the form of recognition we want.' Many people who might have been minded to vote for it, I think, understood that you cannot vote for something that the very group being recognised does not see as acceptable.

Senator SIEWERT: And we are in exactly the same position this time around.

Prof. Williams: That is right. As to where we stand, this is the product of not just your processes; this debate goes back to the late nineties, particularly the Hindmarsh Island Bridge case. So these things have been thought about in depth for a long time.

I did the drafting of option 2 because it is the best I can come up with that is the most minimalist that still does the job. But I think if you remove the second subclause then you return it to what, hopefully, will be a more acceptable level. But, in the absence of something like that, my view is that I do not think a referendum can

succeed. Unless it deals with that issue, frankly, I think it would be better to move on to something else, because we do not want to waste the money that does not meet the basic, minimal aspirations of the people being recognised. If that is the case, then so be it, but it would be better to do that than to put something that will not succeed.

On the other issue around advisory committees and the like, I just do not see them as alternatives. I see them as complementary and I can see good reasons to build those things in. But, in the end, you have to deal with what has been the core issue that has animated the most interest in this referendum, and in my experience it is that racial discrimination point, overcoming past injustices. As I said, for many people, that is actually a more important driver than the recognition through symbolic words.

Senator SIEWERT: On the point about the advisory processes, if I understand you correctly, you are not that supportive of building an advisory process into the Constitution, or you do not think it will work.

Prof. Williams: No, I do not have a problem with it. If asked, I would say, 'Yes, I'm happy for that to happen.' It is not something I feel strongly about. But I think, if it was twinned with the protective clause, it actually could do some good work in that context, in helping to provide Indigenous voices to talk about the sorts of laws that are passed. I just want it to be done in a really realistic way about what it might achieve, while leaving many of the details to be worked out by legislation so that, over time, it can be quite flexible. That is how I would see it.

Senator SIEWERT: Thanks.

Mr NEUMANN: So options 1 and 2, with the variation to option 2 that you are talking about, both satisfy the 'sound and sensible' criteria that you talk about in your papers?

Prof. Williams: Yes. I think my strong preference would be for option 1, but I can accept the fact that it does not have the level of support that is needed. I think the expert panel delivered a very good report on these matters and I am being very pragmatic by putting forward option 2 in order to, as best as I possibly can, satisfy people's concerns about option 1. But at this point, having thought about it and talked to people, I cannot go any lower than that in terms of drafting something, without actually stripping out the operative bit of it. I have always thought—or, at least, for the last year or so—that, unless we came to something like option 2 and we can fiddle around with it and come up with different words, although I am not sure what they would be, I am not sure we have a viable referendum.

Obviously, a part of that is the coalition and other members, if they wish to embrace it, explaining these issues to people and explaining things such as the fact that option 2 has nothing to do with a bill of rights. It is not a one-line bill of rights. It replicates what is already in the Racial Discrimination Act in far narrower form than we already have in federal legislation, and we need to move away from some of that rhetoric to actually engage with the reality of how the provision would work in this carefully constrained area.

The work that Anne and I have done—we come at this from quite different perspectives, and Anne, I know, is very concerned about option 1; and, in a sense, we have come to option 2 as something that represents, from the different constitutional perspectives, probably about as good as we are going to get, I suspect. If you spent another two or three years on this, I doubt you would get anything markedly different, because it is just the smallest target that can be designed, as far as I am aware. Is that fair enough, Anne?

Prof. Twomey: As I say, I am okay about option 2. I am not concerned about it. I realise there are some issues about it, but I think that is something that you balance against the benefits, and that is okay. As you know from what I have originally written, if I had my own way and was starting from scratch, I would do some other things. I would put in something to replace section 25 that prohibited discrimination in voting rights. If I had my own way, I would not make it a people's power; I would make it a subject matter power because I think that confines risks of discrimination. I would contemplate—although I am not sure how I would finally decide—some kind of purposive power, although I accept what Professor Williams says: it may well be that, if that idea was publicly run, politicians and judges would have as much concern about that as they do about discrimination, so maybe it would not fly.

Having said that, I got an email from Mark Leibler about it a little while back when he read the thing I wrote in the *Sydney Law Review*. He was quite excited by it; he thought it was great, but I suspect that is because he is a lawyer. The problem with the purposive power is that it makes sense to lawyers but to no-one else, which makes it very hard to sell. Although lawyers can read it and say, 'That's a clever way around the problem,' nobody else is going to get that. I do understand that.

There is another thing to raise. When I was flicking through the various submissions, I ran across John Pyke's submission and he got quite cranky about the phrasing of the preambular bit, saying it does not come up as proper grammatical language or whatever. The penny dropped when I was reading that. We all see these words that say,

'Recognising this,' 'Acknowledging that,' and 'Respecting whatever.' We read that in the context of people familiar with reading preambles to acts. But, for normal human beings, that actually does not make a lot of sense. The one thing that I got from his submission was that, in trying to sell this stuff to the Australian people—people who are not familiar with the archaic terminology used in legislation—perhaps we have been too influenced by the way these things have been drafted for 200 and 300 years because we are lawyers. Perhaps there is something to be said for writing the preambular bit in a way that does not use those—

Prof. Williams: Just in plain English—I strongly agree. It should just say: 'The continent and its islands, now known as Australia, were first occupied.' Why do we need the 'Recognising' bit? It is like where a preamble begins 'Whereas' in the British act. It should be plain English that kids can use in school.

Mr STEPHEN JONES: This is where I disagree with my point earlier and agree with what you said earlier. Most people who are turning up to the polls on this are going to be making a decision on whether they think we should constitutionally recognise Aboriginal and Torres Strait Islander Australians. That is the question that will be in their minds. The detail of it is an insiders' discussion.

Prof. Twomey: Maybe. I just raise that as something to consider. Basically, Pyke's concern is that it does not point out who does the recognising. He was saying that it needs to say, 'We, the people of Australia, recognise that'—just to make it a sentence that is a trifle more meaningful to people. I do not have strong views about it. I am okay with ancient preambular type language, but, given that this is a public debate, we may want to think about doing it in a way that probably makes a bit more sense to people, particularly if the symbolic aspect of it is the selling point for it. There seem to be two debates happening here: one is the debate about discrimination and one is the debate about recognising Aboriginal people. My suspicion is that most people out there are really talking about the recognition aspect. If we want to make the recognition aspect clear in a way that ordinary people understand rather than drafting it in preambular type language of statutes that are 300 years old, maybe there is something to be said for using that style. That is really all I am saying.

Senator McKENZIE: Do you agree, Professor Williams?

Prof. Williams: I strongly agree. I think one of the virtues of having this form of recognition is that it is something that can speak to Australians without any legal qualifications. As I have said on other occasions, I would like something where, in my kids' primary school education, they can take a form of words as a starting point for a discussion. It is in arcane lawyers' language—you would not even use this language these days. It really goes back a century or more. I would just prefer it to be simply expressed. You could have 51A—'The continent and its islands, now known as Australia, were first occupied.' You could say, 'Aboriginal and Torres Strait Islander peoples have a continuing relationship with their traditional lands and waters,' using just simple, straightforward English. If you want to recognise 'we the people' you could, but that would be a bit awkward because it is not a preamble and sticking that in the middle of the Constitution would look a bit odd. I would just reconstruct it in plain English. The words 'recognising', 'acknowledging' and 'respecting', they add an awkwardness to the phraseology of it that I think distances people from it. Anyway, that would be my—I just like plain English drafting in these things as much as possible.

CHAIR: We will go back to that. The constitutional monarchists have been quite silent in many senses about constitutional recognition. There has been some commentary, and recently the Prime Minister addressed them. Following that, the subsequent message from two of their key people is that there is a need to recognise, but it will depend on the formal words, and they have suggested a body be established to manage the process. How strong is that in the conservative element of the constitutional monarchists?

Prof. Twomey: I have not spoken to the monarchists about this at all ever, so I am really only going off what I read in the newspapers. I have spoken to Greg Craven and those sorts of people more recently about it, and I think they are singing from slightly different song sheets. Greg Craven and friends are quite strongly supportive of the Cape York proposal. David Flint and friends seem to be more concerned about having their voices heard in this, and so getting some role in some kind of a body or representation. I think they are maybe feeling a bit isolated from the debate. The one thing to be sensitive of is that the constitutional monarchists are not just people obsessed with the monarchy; they are people who have very strong views about protecting the Constitution and so they are conservative in that particularly conservative frame of 'don't change anything'. They would be quite powerful if you got them on board, so it is best to do what you can so as not to alienate them because we know these people can run campaigns—they do, very effectively. Tony Abbott had two messages recently: to RECOGNISE he said 'temper your ambition' and to the monarchists he said 'withhold your scepticism'. He is trying to walk a very difficult tightrope between those sorts of things. But I do not think they have shut any doors on it. It is a matter of just being respectful and careful in negotiation and if you can bring the monarchists on board, then frankly you will bring the whole of the right-wing on board, but it is not easy.

Prof. Williams: Kerry Jones is on board. She is a really key figure in this given the work she does and she is a strong supporter of many aspects of this. She was the face of the 1999 No campaign, but she is not connected with the organisational arm of it today as David Flint is. But they want a role. Then again it is tricky, because if they have a role the Australian Republican Movement will want a role and the last thing we want this to be about is the republic or the monarchy.

Prof. Twomey: Yes. It is quite separate from that. The role of the monarchists in this has got nothing to do with the monarchy; the role of the monarchists in this is that these are the people who feel a strong emotional attachment to the Constitution as it is and are very sensitive to changes to it.

Senator McKENZIE: And a Venn diagram of that relationship is not a complete union—it is a union rather than a subset.

Prof. Williams: Plus there are some monarchists who will not want any change at all as part of it—

Senator McKENZIE: That is right.

Prof. Williams: and some who will put up with change. Probably the larger body will put up with a modest form of change. The question is: how much do you have to temper your aspirations, to use the language of the Prime Minister? From my point of view, I see option 2 as really tempering aspirations in a very significant way and option 3 is giving up all hope.

Mr STEPHEN JONES: Are we still collecting evidence or having a group chat?

CHAIR: No, we are still collecting evidence because it is an important group—and there are people within the parliament who are associated with the body who certainly have strong views, because if that is a body that comes out against it, along with one or two states, then it is a major issue in the whole referendum because it will be lost.

Senator McKENZIE: On the parliamentary friends, Deb Smith is chair and I am the deputy chair, and we would be the two that would have different views on this issue.

Prof. Williams: This is parliamentary friends of—

Senator McKENZIE: The Constitution.

Mr STEPHEN JONES: I think we really are just having a chat.

Senator McKENZIE: You're welcome to join! Joe Bullock's on board.

Senator SIEWERT: Yes—and!

Senator McKENZIE: None of your kind!

CHAIR: Have you got any final questions? Nova?

Senator PERIS: No.

CHAIR: Senator McKenzie, behave yourself down there! If there are no other questions, then I thank you both for appearing. I do not think that we will come back to you again, because you have certainly provided good, sound advice all the way through and today's session has just clarified some things that we needed to work through. Certainly, the email that you sent back to us in response to the progress report was also important.

Prof. Twomey: Can I make just a small suggestion—and this is not intended in any way to allow us to influence the policy issues because that is obviously completely for you. Sometimes, with critical reports, before they come out, it is worth just getting someone to check the legal terminology or whatever you come up with in the final thing just to tell you whether there are any glitches. It would be worth having George or me, or both of us, run our eyes over things—in confidence—to tell you whether there are any technical legal points. This is such a critical report and you want to maintain credibility throughout; and, if there are any small errors in it, then that sort of makes you vulnerable. It is better to make sure that technically, legally, everything is correct. Of course, we would not do anything about policy. It is just a matter of making sure that all the words are right, the t's are crossed and the like.

CHAIR: Thank you for that offer. The committee will consider that offer and we will inform you of the outcome. We will suspend till 11 o'clock.

Proceedings suspended from 10:32 to 11:02

LANGTON, Professor Marcia, Private capacity

MORRIS, Ms Shireen, Policy Adviser, Constitutional Research Reform Fellow, Cape York Institute

PEARSON, Mr Noel, Chairman, Cape York Institute

CHAIR: I welcome Mr Noel Pearson, Professor Marcia Langton and Professor Shireen Morris. Thank you for meeting with the committee today.

The committee has been asked by the Commonwealth parliament to build a secure, strong, multipartisan consensus around the timing and wording of referendum proposals to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

Today, the committee is taking a *Hansard* record of the proceedings but it is not being broadcast. The committee may wish to make the *Hansard* record public at a later date, and we will try to seek your views on this before doing so. Parliament has the statutory authority to order the production and publication of undisclosed evidence provided to parliamentary committees. You should also note that an individual committee member may refer to such evidence in writing a dissenting report, to the extent necessary to support their dissent. The committee would try to seek your view before doing this.

When you provide information to the committee, you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage you on account of the evidence given, and such action may treated by the parliament as a contempt. It is also a contempt for you to give false or misleading information. If you make an adverse comment about another individual or organisation, that individual or organisation will be made aware of the comment and given a reasonable opportunity to respond to the committee.

We have your submission and supplementary information. The committee welcomes your comments and views today on the steps that can be taken towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples. Noel, would you like to make your opening statement?

Mr Pearson: Thank you very much, Ken, and thank you to the committee for this opportunity to talk about a matter that I know is important to all of us here. Along with a whole lot of other people, I have been an advocate for constitutional recognition of Indigenous Australians for a long time. I have a very firm belief that Indigenous Australia really needs this recognition. I think most Australians desire a better future for Indigenous Australians, but, like Bill Stanner 50 years ago, I do not think that future is going to materialise without us grappling with this fundamental question of recognising the Indigenous heritage of Australia and the entitlement of Indigenous peoples to be who they want to be.

Overwhelmingly, I believe the Australian people desire for us to take our fair place in the country and to take a fair share of the country, but that will always elude us, I believe, if we do not also aspire to guarantee a place for Indigenous identity, heritage, culture and languages. It cannot not just be an assimilation with the broader Australian language and culture; we have to be allowed to retain those things that make us who we are. If we get that part of the formula right, then I think the social and economic disadvantage will also be overcome in the generations to come. I just have an increasing conviction that we are never going to close the gap, or however you describe the challenge, on social and economic parameters without dealing with this fundamental issue of recognition. So I urge the parliamentary committee in your work that we get a bipartisan consensus to take to the Australian people. I congratulate Ken and your members on advancing this work. I see this as a real alignment of planets. It is a very propitious time for us to move on this.

I think in the work that was done by the expert panel, of which I was a member, along with my colleague Professor Langton, you and other members of your parliamentary committee—Senator Siewert and others—we laid a foundation with the 2011 report. I was a strong advocate for each of those propositions.

I was particularly anxious about the recognition of Aboriginal languages and am dismayed that the level of support for the idea in the Australian community is not as unequivocal as I had hoped it would be. I really think it is a sad state of affairs that we have some of the most extraordinary and beautiful and ancient languages in the world and we have not made provision for their retention and preservation. As a speaker of two of those languages that are on the brink of extinction, I feel very strongly about the languages provision, so I was startled at the less than enthusiastic public reading in relation to that provision.

In relation to the power, I think that it is correct. I was only persuaded during the expert panel process about the importance of getting rid of race as a category. I had never really thought about it like that before that. Marcia Langton and other people really switched my head on in relation to how problematic race as a category has been for our people. To the extent that we see ourselves as a distinct race, we carry a big burden; and, I think, to the extent that everybody else sees us as a race, that is very bad as well, because, invariably, whenever they see us as

a race it is as an inferior race. There is all of this baggage attached to race, which does not work out very good for us at all. I got persuaded during that process about getting the race language out and putting the Commonwealth power for Indigenous peoples in—power to make laws in respect of Indigenous peoples. I prefer 'peoples' rather than 'Indigenous affairs' I have to say, although I have heard the arguments in relation to that question as well.

Getting rid of section 25 is a universally uncontroversial proposal. I was a bit concerned in 2011 that the obvious housekeeping or cleaning that section 25 represented might detract from the real substantive changes we would need in the Constitution. It is like a quick win: it is such an obvious and quick win to put down on our scorecard. I was concerned that we made section 25 such a big issue when it is not a positive proposal. But anyway, I obviously concur with everybody else that we should get rid of section 25. I just do not think the country voting to get rid of it should think that they have done anything great by doing so. We really have to concentrate on the other substantive and positive recognition proposals.

Finally, the racial non-discrimination provision is something that, on my recollection anyway, I was a very strong advocate for and we from the Cape York Institute certainly put in a very strong submission in favour of a nondiscrimination guarantee in the Constitution. I was a leading advocate for that argument on the panel. Following the expert panel's report, the tabling of it, I was taken aback by the tremendous amount of public support for a nondiscrimination clause, which was very much against what people had predicted would be the situation. We were told early in the piece, 'This is a very controversial idea with the public', and yet, as I think Ken and Rachel will recall, it was the most popular of all of the provisions proposed. There was a great well of public support across the political divide for the idea that people should not be discriminated against.

But of course the thing that I had not factored in, and I do not think the panel had completely come to terms with, was strong opposition from constitutional conservatives to what was called 'a one clause bill of rights'. So for the last two years I have been thinking about the whole question of what do we do with what I detect to be the implacable position of a small but cogent part of the Australian political spectrum, and how do we deal with that. How do we convince them, and that is the kind of conversation I have been having with people around the countryside—about whether we can convince them of the merits of the expert panel's position or another take on a nondiscrimination guarantee.

So our concept of an alternative approach, the alternative that we are advocating, is one that asks conservatives the question: if you are not going to give us a clause that guarantees nondiscrimination, how do you answer the fact that we do not have a say over laws and policies that apply to our people that we might think have a discriminatory effect? That has been my question to people that are opposed to the nondiscrimination clause—that, if we do not have a guarantee as proposed by the expert panel, then how do we contend with parliament making laws and policies, and government pursuing policies, which we think are deleterious to our people?

Ken, I might leave my address there. Once again, thank you for giving me the opportunity to appear here.

CHAIR: Thank you, Noel. Professor Langton, would you like to make a statement?

Prof. Langton: Thanks very much. I acknowledge the traditional owners, the Eora people. I will make a written submission to the committee. I believe the closing date for submissions is 31 January. I am doing more homework in order to finish a submission to you but, like Noel, my evidence here today will be more discursive than well prepared.

You will remember some of the debates that we had as members of the expert panel. Certainly, first of all, in my opinion, apprising the expert panel members of the damage to our, let us call it, national identity for shorthand—although I am not happy with the phrase—that section 25 does was for me a matter of great importance. You will know that section 25 was a leftover bit of the Constitution that it seems, from the records, that the Attorney-General's Department back in the sixties did not include in the question that they designed for the 1967 referendum, and should have included. So many constitutional lawyers say, 'Well, nobody will ever use it,' but it is about the look of having a section 25 such as ours which goes to racially discriminating against people of, let me put it this way, other races in relation to the franchise that we in the 21st century should have a mind to have expunged from our Constitution. I think that is just an absolutely fundamental question. In all of my consultations and discussions with Australians, I have not yet met a single Australian who would agree that that section 25 should stay. So, whatever the final question that is put to the public, getting rid of section 25 must be there. If we succeed in relation to that matter, then we are halfway to having a non-racist Constitution.

About 10 years ago, I was looking at constitutions and other arrangements for including minorities in the nation-state and constructing, let us say, multiethnic polities around the world and how other people were doing that. I looked, for instance, at what was happening in eastern Europe following the civil wars there, and also the South African constitution, the constitution of Timor-Leste and others. There are some very interesting

constitutions around the globe, and there is a variety of different ways of tackling this problem of incorporating populations of multi-ethnic origins as well Indigenous people into the national polity.

Some constitutions have an explicit anti-war and human rights based approach, and you might include the South African constitution, the constitution of Timor-Leste, even though they come from relatively different traditions, and the Nicaraguan constitution—just to give you another example—whereas other constitutions, like those in eastern Europe, have an interesting approach. I was particularly impressed, just as a matter of relevant detail to what we are trying to do here, by the approach to giving constitutional assurance to citizens that Serbs and Croats are constitutionally provided for in the constitution. Now we know that it is a religious dispute, but nevertheless dealing with ethnicity around the globe is the No. 1 problem. A lot of people think it is religion, I do not agree; I think it is ethnicity because you have ethnicities that have both Muslim and Christian populations or Muslim and Hindu populations, and then you have the ethnicities that they are warring with that are similarly mixed in their religious persuasions. So assuring people of different ethnic origins that their place in the constitution is safe is a different approach from the human rights based approach. I am not suggesting we do either; I am just saying there are these different approaches.

The approach we take here in Australia to acknowledging Indigenous people is, I think, the question. This is the question, and it is a question of our vision for the nation, it is a question of how we deal with the hangover of 19th century racism in our Constitution and in our institutions, and it is a question of how we manage multi-ethnicity, including Indigenous people going forward. I thought this through a few years ago, and I gave a public lecture in Melbourne, at the Melbourne Writers Festival. It is online, but I will append it to my submission. My simple proposition is this: we must cease to identify Indigenous people as a race, as 51(xxvi) presently does by default. We must find a way to honour the place of Indigenous people in the Constitution, and I think the solution is to identify Aboriginal and Torres Strait Islander peoples as 'first peoples and the descendants of first peoples'—perhaps we just say 'first peoples' to keep it in shorthand in the Constitution.

My reason for advocating that position is the following: as we know more about the human genome we realise that race is a pretty useless category in relation to the most important human characteristics and, in any case, it is used as a motivation for the ugliest of human behaviour—from racial discrimination to war. Those two outcomes of the deployment of racial categories in human history should be enough cause for us to rid our Constitution of the notion of 'race'. In relation to Indigenous people, it has a very special role. I want to put to you that the national vision should be—I think Noel has done a beautiful job of describing it as 'completing the Commonwealth', but I want to give you a slightly different angle.

I want to put it to you that the national vision should be—and I think Noel has done a beautiful job in describing it as 'completing the Commonwealth', but I want to give you a slightly different angle—what do we want Indigenous Australia to look like in 20, 30 or 50 years time? Now, I think most decent Australians do not want our cultures, our languages and all those distinctive things that pre-date British annexation to disappear, or to contribute in any way to their disappearance or demise. Most decent Australians want these cultural treasures to survive in a modern Australia, but the question is: how do we do that? I think in the way that we conceptualise it is step No. 1.

I say to you that what we should think about is a future in which Indigenous Australians, in all socioeconomic aspects, have the same opportunities as other Australians—one in which Indigenous people are economic citizens and have the same economic opportunities as everybody else and, one would hope, are well on the way to parity in relation to, say, homeownership, education outcomes, employment outcomes, business ownership, wealth accumulation through superannuation accounts and asset ownership and so on, but in which Indigenous Australians are also able to retain our distinctive cultural heritage, including languages; song and dance performances; native title as defined by the High Court; religious beliefs, activities and protection of places; and other important aspects of our cultural heritage.

One would hope that all Australians have the same right to their heritage so long as that heritage is not in any way repugnant to our laws and our standards of community safety. There are some aspects, I would say as a qualification, of Indigenous heritage that ought not to survive. This is not the place to talk about them, but these are discussions that need to be had, going forward. The idea that there are some traditions that are repugnant to our laws goes back to the Australian Law Reform Commission report on the recognition of Aboriginal customary laws; I think that was in 1982. The Law Reform Commission was very clear that there ought to be qualified recognition of Aboriginal customary laws but that such recognition should not allow for any laws or practices that are repugnant to Australian laws—and we ought to retain that approach, in my view.

If we can imagine a future in which there is socioeconomic parity and inclusion of Indigenous cultures, then we would no longer have to debate nonsensical propositions such as those put by some political outliers who think

that doing anything at all for Aboriginal and Torres Strait Islander people is giving them more than what, say, rural white Australians have. Their idea of a fair Australia, a level playing field, does not admit that there never has been a level playing field and that Indigenous Australians have been denied, on a grand scale, for over 200 years, equal access to economic participation, ownership of property, accumulation of normal levels of wealth and the right to work, and that some tens of thousands of our people are welfare dependent and incapable of escaping from welfare dependency and poverty without some fairly brutal policy levers.

So if we admit that there is a historical burden of economic inequity and admit that that is the main problem then there ought to be no need for special measures in the future if we reach parity, but until then we need special never measures. What the political outlier argument does not recognise is that special measures are capable of being used for any vulnerable part of our population. Of course there are, as you know, international standards for the use of special measures in legislation for vulnerable groups. They include, for instance, that the special measures should be temporary and that implies that there ought to be some measurement of whether an outcome has been achieved. Therefore, we could regard many of the legislative measures to overcome Indigenous economic inequity as special measures and look forward to the day when those measures will no longer be necessary, and that legislation will no longer be necessary because we would have reached parity or close to parity, or the conditions in which parity could be reached.

My vision for the Australian future is that there is socioeconomic parity but that there is special recognition of the fact that Indigenous people are the first peoples of this continent by an immeasurably long period of time, never really established by historians but currently believed to go back at least 60,000 years in human history or pre-history. As a result of that long occupancy and ownership of this continent, we therefore have very special traditions that we bring to the nation that ought to be recognised and retained as part of our social fabric. To get to that point, however, we must cross a minefield and the minefield includes the opposition from conservative constitutional lawyers to the idea of explicit rights in the Constitution. There are, some argue, some implicit rights but there is a general opposition amongst at least half of our population to the idea of explicit rights in our Constitution. That is unfortunate because it makes the job of overcoming the Commonwealth's power to discriminate racially, which it has had since 1901, our most serious challenge. So we must find a way to resolve the problem of a nondiscrimination nature of our Constitution in the future with the opposition to explicit rights.

The second problem is that many conservative constitutional lawyers and even non-conservative constitutional lawyers are opposed to the idea that any of the propositions posed in the final question should be amendable to litigation. If we propose a part of a question that would lead in the future to courts interpreting it, we would find widespread opposition. So that is another mine that we have to disarm by finding a solution.

Another problem is posed by the Maloney High Court case in Queensland in which the High Court judges each found a different interpretation of the right to consult. I am not a lawyer, but, having been briefed on it, read parts of the case and studied the Canadian constitution, which has an explicit right to consult for first nations, I think we have a pretty serious problem again with this. This is another mine to be disarmed. The High Court has lowered the standards of the right to consult, in my opinion. That is a matter that I will explore further in my written submission, but it is one that I urge you to look at because I think we can do better than that.

Another problem, and it is really is, I guess, the main problem for not just conservative constitutional lawyers but many others as well—and not just lawyers but many people—is whether or not our final question in relation to constitutional recognition of Aboriginal and Torres Strait Islander people in any way diminishes the sovereignty of parliament. That, of course, is the fundamental problem in relation to the litigability of any proposition. So we must disarm that mine and find a way to ensure the sovereignty of parliament in order for whatever final question we are able to put to the public in a referendum to find favour across the political and ethnic spectrum.

Prof. Morris: I do not have any opening statement that I want to make, but I am very happy to step you through in a more detailed way the legal and policy thinking behind the proposals that you have no doubt read by now. As the conversation progresses, I am happy to do that.

CHAIR: That is what we will do, because I want to now allow the members to ask questions of you.

Senator McKENZIE: Your essay, Mr Pearson, I thought actually grappled with the real problem of orthodoxy, conservatism and fundamentalism really well. As a conservative, I appreciate you taking the time to articulate that in this particular forum. Thank you. You talk about an Indigenous position quite often. For those of us who are not Indigenous or Aboriginal or Torres Strait Islander, there are a multitude of voices. I was not on the expert panel. I come to this from the complete outside, probably like most of the population who will be grappling with any question. In your submission to us, you talk about an Indigenous constitutional convention being needed to be held. Would you talk us through how that would come about and how Aboriginals and Torres Strait

Islanders come to a place of having a position on the sorts of words they would like to see us recommend so that, obviously, broader Australia can get on board.

Mr Pearson: I think it would be very good if Indigenous Australia had an opportunity to consider any proposition before we have an all-in. I think the possibility of the three per cent voice being drowned out in a general referendum is something we should try to avoid. We should really have an indication of where Indigenous Australians sit on a proposal. I previously floated with colleagues the concept of having a series of compass point conferences—north, south, east, west and centre; north-east, south-east, south-west and north-west—and then perhaps an all-in with Indigenous Australia. I really think we need to go through a process where we give an opportunity for a couple of days of consideration at our compass points, with of course the Torres Strait, and then perhaps fitting in the concept that I have heard about a convention of sorts in Central Australia. I would urge the committee to think about that idea. My own view is that the Indigenous community is wanting something within this vicinity that we are talking about. I think that is where the weight is. There is obviously a slice of opinion that is seeking something very much more ambitious and kind of out of the ballpark. But my own sense, from around the countryside, is that the weight of Indigenous community opinion is in this ballpark that we are talking about.

I participated in a conference in Cairns with leaders from North Queensland and Cape York that included some young people and some older people. It was a sample of people from our North Queensland, Cairns, Cape York end of the country. I got a real sense that people really want this thing to happen and the ballpark that we are talking about is where they want to land. So if we had a set of proposals that could be taken around initially some regional conferences that could be brought together and then into an all-in, I think we would be able to get Indigenous Australia to get their head around all the questions and to be really apprised of what the issues are.

Senator McKENZIE: In looking at how those conventions or compass points could be constructed, would they include a broad group of Aboriginal and Torres Strait Islanders at each one or selected experts and leaders et cetera?

Mr Pearson: Yes. My own personal view is that some of the people who have been involved, particularly the expert panel and the Indigenous representatives., but also the processes that have happened since 2011 should be involved in facilitating discussions. People who have become familiar with the argument and the issues and so on could play a very useful. I would urge the committee to reach out to the expert panel members of the past and ask them to continue to be involved in this process going forward. I did float the idea of having some kind of pre-poll of Indigenous Australia to gauge where they stood on this, but I think I got shouted down on that idea. I have no objection or fear of gauging where Indigenous Australia stand on a proposition. I think it would not be a good thing if we had a successful referendum and we did not really know where Indigenous Australia stood on the question.

Senator McKENZIE: Professor Langton, do you have a view?

Prof. Langton: Just to follow-up on that point. Having a few conventions is tremendously important. Everybody, even historians, even us amateurs, go to the 19th century conventions to understand our Constitution. That is the way that the Constitution is oftentimes interpreted not just with constitutional legal precedents but by going back to the conventions. They are a very important source of interpretive evidence for present-day questions about our Constitution. Even if we are fastidious about constructing a question that does not pose potential for litigation on constitutional questions in relation to our recognition and related matters in the future, we cannot guarantee that there will be no litigation. Therefore, we need conventions in which the full range of opinions on this pretty complex matter are expressed and recorded in order for future interpretations to take place.

But it is not just for questions of litigation but for the spirit of the Constitution and to reassure the public that they have had a say in it. I think it is almost a democratic principle that you would want to do this: take this complex question to the people affected and involve all kinds of people in it. The monarchists want to have a say? Fine, let them have a say. Let everybody have a say. On that matter, can I say that there are many Aboriginal monarchists. Down here in the cities, everybody thinks we are stark raving mad Lefties like them! No. We have some very conservative, Christian people who are 100 per cent loyal to the monarchy, and they comprise a pretty large proportion of our population and their views must be heard. Everybody's views must be heard.

We need to have these conventions so that everybody can put their views on the table and also to drown out the people who are trying to give the impression that they are the only ones with a legitimate view. For instance, you would have seen that there is this group called Brisbane warriors or warriors against recognition who have been meeting in Brisbane, and I think they then flew over to Alice Springs for some kind of meeting. They were burning effigies of Warren Mundine, Noel Pearson and me, and they were burning the Australian flag in the streets of Brisbane during the G20. Masterful at social media—they all own mini iPads and iPhone 6s—they are

on social media all the time, giving citizens of cyberspace the view that all Aborigines are in favour of their idea of Aboriginal sovereignty.

The truth of the matter is—as you would know, I presume, from meeting with Aboriginal people around the country—yes, people are very attached to their pre-annexation traditions, but they are very practical as well and feeling quite desperate about what the future holds for their children and their grandchildren. They want practical outcomes. Now, I am not saying that practical outcomes are more important than symbolism—not at all. There are no practical outcomes without symbolism, and vice versa.

But I think we need to have the conventions in order to have the mainstream Aboriginal view on the record. Most mainstream Aboriginal people have not been heard publicly on the matter; and, if there are conventions and a good record, we will hear their views. And, as Noel said, and I agree: I think the majority of the Aboriginal and Torres Strait Islander people are in favour of constitutional recognition but, yes, like the rest of us, are worried about what it might look like and whether or not it is a worthwhile exercise if we get it wrong. Of course, everybody is thinking about the terrible potential for the question to be lost.

I was almost teary when I heard Rachel Perkins's speech at the RECOGNISE gala the other night here in Sydney. I cannot remember her exact words, but she said there were all sorts of reasons why non-Indigenous Australians would benefit from recognition; it would relieve them of this historical burden. But, for us, it would relieve us of one of the most terrible burdens that we carry as parents, and that is passing on this conflict to our children and our grandchildren, leaving them with this burden of racism, hatred. Whether it be a sense of Aboriginal entitlement, a form of Aboriginal racism, or being victims of racism, we need to take measures to clear it up for our own children, and constitutional recognition will achieve a very large part of relieving us of the inevitability of passing on this terrible state to our children. We are leaving them with this burden of racism and hatred, this feeling of whether it be a sense of Aboriginal entitlement and a form of Aboriginal racism or being victims of racism. We need to take measures to clear it up for our own children, and constitutional recognition will achieve a very large part of relieving us of the inevitability of passing on this terrible state to our children.

Senator SIEWERT: I just want to follow up on the point you made about there being majority support in the Aboriginal and Torres Strait Islander community for constitutional recognition. I think you are absolutely right, that is the feedback I am certainly getting. It is then the nature of the question—

Prof. Langton: Yes.

Senator SIEWERT: and I am certainly getting the feedback that there will be a point—there is not an indication of where the line is, but the point in the feedback I am getting is, 'If it is so minimal, we don't want to support it'. That is why a convention is also important, to see where that line is.

Senator McKENZIE: Yes, and I guess that is my follow up—

CHAIR: Before you do that, let us have an answer first. I will go up the table, and then I will come back to you.

Senator SIEWERT: Is that the sense you get?

Prof. Langton: That is right; that is exactly the problem. But people need to know how difficult the problem is, which is why I went through my minefield analogies before. People really need to understand what the minefield is: to not only not have unrealistic expectations but to also understand that this is a highly technical question. As one of the constitutional lawyers put it to us when we were serving on the expert panel, you cannot simply pull one thread out of the Constitution and merrily go on your way. There will be unintended consequences, or there could be unintended consequences, and so the problem requires analysis and regard to the unintended consequences.

Also, people do not understand, as I said before, things like special measures and they do not understand that the Constitution is not a bill of rights, it does not in any case right now give us rights. It does not really give any citizen rights; it gives the states rights. There are states rights, not individual rights. People do not understand the Constitution and people need to be educated on what the Constitution does, and to be educated about understanding that future legislation could deal with the problems that they presently believe the constitutional change might achieve. Something other than the constitutional change, like legislation or other measures, are more likely to resolve these problems.

However, I will say this: Megan Davis and I attended a conference in Canada a couple of years ago. It was the 35th anniversary of section 35 of the Canadian constitution. We gave a paper; it will be published in the proceedings of the conference. The conference considered section 35 on the duty to consult with the First Nations 35 years after Canadian constitutional change, which incorporated section 35 as a new provision. That is a very good outcome for the First Nations of Canada, and it gives us a really strong idea about how to proceed with these

problems that we face in constitutional change. I think it sets a really high example, and I think also the discoveries that one of our team has found in going to New Zealand gives us another very strong example of how we might proceed with these problems. Even though Canada and New Zealand have treaties and we do not, that does not mean there are aspects of the way that they deal with these issues that we cannot adopt. There are non-constitutional and constitutional and legislative ways of resolving these problems that have been achieved and work very well in Canada and New Zealand. They are both common law countries, they are both in the Commonwealth tradition and we ought to look to them for answers. I think the answers lie there in large part.

I really like Noel's idea of a body at the heart of this that is constitutionally entrenched, that incorporates something similar to the Canadian duty to consult provision in section 35 and something like the arrangements in New Zealand. I think it does complete the Commonwealth. It establishes first peoples, the British traditions and the emergence of a democratic multicultural society with a very strong democratic polity in which all ethnicities, including the first peoples, are treated with respect and honour and so on. I love the concept. It is now in the detail: how do we do it?

I think we can achieve it and I think it is very attractive to all Australians. I think it also resolves the problems that I listed before. It resolves the problem of parliamentary sovereignty because the Indigenous body, whatever it turns out to be, would advise parliament. It would provide a parliamentary consultation process that enables the parliament to be apprised of Indigenous views on legislation that affects their interests. It would overcome the thing where you hear people say, 'You're proposing something like ATSIC.' The whole idea of that quango or quasi-governmental institution as a consultative body is now such a poisonous idea because of the political slugfest and the media slugfest during the demise of ATSIC.

A parliamentary institution would be above politics. It would be bipartisan. It would have a mutual role in advising on legislation. And it would answer your question: what do you mean by an Indigenous position? That question would be answered every time and the answer to that question might be quite surprising. For instance, you would hear from somebody, 'Yes, there are cultural and heritage issues at stake and they look like this' or you might hear from, say, an Aboriginal Federal Court judge, 'This is a technical question and we recommend that it is resolved in this way in the issue of fairness.'

I was quite surprised to see our Aboriginal Federal Court judge the other day with a really well-developed position in the newspapers on this problem of children being removed from their families now because of the situation in so many families. He is advocating for the Aboriginal population to step-up and foster these children rather than them going into the system. I agree with him; that is the answer. I think he is very wise to say so. That is a very different view from the leftie, la la view out there that 'It is another stolen generation.' No, it is not. These children cannot be put at risk in so many of the cases. Maybe there are cases that are questionable but, by and large, children are being removed from dangerous and risky situations for their own good.

Senator PERIS: Thanks for coming in today. Noel, in your response you have written that you came to the view that a nondiscrimination clause would not win bipartisan support. You have to think of where we are today and the whole process of how we got where we are today. From my point of view, going out to communities and talking to our mob, talking about the current financial times at the moment, I have found people are asking what can occur out of this and what will be the substantial flow-on effects. Look at the public backlash when the proposal for the RDA occurred earlier this year. There was a huge outcry. Australia is now a very multicultural society. I think that the only way we can get this over the line is to work out what is the catch—how do we get people out of bed on a Saturday to come and tick a box for Aboriginal people?

So my question to you, to Marcia and to Shireen is: are you proposing a stand-alone question to the Australian people, be it as simple as a duty to consult—because, if there is too much change, people are scared? Are you proposing a stand-alone question or one about nondiscrimination, or are you going right away from that? I am just really interested. I think what information you have provided is very interesting and I like it. I am here to listen to what you guys are proposing.

Mr Pearson: We are in support of removing section 25. Our submission is about changing the Commonwealth power to a power in relation to Aboriginal and Torres Strait Islander peoples, section 51(xxvi). And we propose that an advisory body be established, as a chapter in the Constitution, that would produce advice to the parliament and oblige the parliament to table it, by the Prime Minister or through some other mechanism, in both houses, and that we have legislation that would give form and function to this body.

Let me just go back to ATSIC. I really think there is a big hole in Aboriginal Australia without a proper representative body. I think that, for all the problems with ATSIC, there were some good aspects to that history, particularly at the regional level. When I look back on all of our vision and plans and the progress we have made in Cape York, I look at the Cape York regional plan and I think, 'We've followed this plan for 20 years.' The script

that we had back in 1990 is the script we have been following since—and it was a script that our regional council had. The progress that we have made is down to the fact that in the nineties we were following a regional development vision for getting our land back but also for health and education and everything else. So I do not subscribe to the idea that ATSIC was a complete disaster. I think the national body was riddled with all kinds of problems, and we should never revisit that.

I heard the line that this constitutional body should be about democracy and not bureaucracy; I think that really should be the aspiration here. It is about giving a democratic voice in the system to Indigenous peoples. I really think that we are suffering from the lack of a voice in the laws and policies that are being generated, and the good intentions of the wider community will never meet our determination to make those things work until we have a proper voice in the system.

In a sense, you could have a constitutional guarantee of not being discriminated against, but that is kind of just a protective, defensive thing where you might or might not succeed if you rely on it. It is only when a crisis point comes up: 'We believe that that provision passed by the parliament is discriminatory and, therefore, we're going to launch a High Court case and get it struck down.' It will be once in a blue moon that that protective provision is used, I think, and it will not proactively generate participation and a voice on our part. So I actually think the body idea is a superior idea. It is not just an alternative idea; it is a superior idea because it really could provide a voice for Indigenous Australians.

If we did have a body, I have the idea that we have to invert ATSIC. It has to be the regions and the local communities. I saw Marion Scrymgour's lecture. I completely agree with her that the empowerment has to be of local communities and regions, not a concentration in the pyramid that ATSIC was. We have some design principles around the body that we think should be acceptable to constitutional conservatives because those principles have really sought to allay this concern that we have a rights provision that is going to be supervised by the High Court. Obviously, you guys understand that that is where the constitutional conservatives are coming from. They are highly resistant to a rights clause supervised by the High Court. That is not my native position on this question; I am just trying to respond to the reality of where a certain section of Australia comes from in relation to this question.

But I also would argue that the potential here for common ground is a superior position to simply protection from racial discrimination. It will be a proactive provisioning in the Constitution that then has to cascade down. It will then necessitate legislation to give effect to that body and its functions and how Indigenous people at the grassroots level and in the regions are empowered through that process.

I really think that this proposition does not work unless we see the whole pyramid with the Constitution at the top, legislation that gives effect to the provision, and agreements, policies and programs at the bottom level giving effect to all those things. We can see the whole proposition as a coherent cascading of proposals—not that we have to hammer out all of the detail of this, I do not think. If we have the right constitutional provisions at the top of the pyramid, we could take all of the lessons we have learned from previous bodies like ATSIC, the bad bets and the things to avoid in the future.

Also, there is a great deal of recognition now that there were strong aspects to what we have done. Not everything we have done in the past has been a disaster. I think that the parliament and the Indigenous community could devise legislation to give effect to a body like that. The highest function of that body is to advise the parliament, but how that body is elected or appointed or a mixture of both would need to be determined.

I would think that a lot of the discriminations are kind of special measures. Is banning alcohol discrimination or a special measure? These require judgement. It is not absolutely clear that banning alcohol from communities, that I know of, is discriminatory. It is a special measure for the benefit of communities that are in crisis. So the law on discrimination would say, 'No, that's not unlawful'. And because these things require judgement—have you consulted with the community; how long are you going to have this measure; should it end after a certain period—on the part of parliament, then parliament actually needs clear advice from Aboriginal people. Discrimination and nondiscrimination: it is never that clear in this area.

In fact, a lot of the things that will really test us are supposedly beneficial provisions that actually keep us down. That phrase: 'soft bigotry of low expectations'. In fact, in this era probably some of the most dangerous things that treat us differently are things that are supposedly for our benefit and so, therefore, those affirmative action style things require judgement on the part of parliament. We ought to have a say; parliament ought to listen to our views when they make that judgement. They should have our views in front of them. I do not know, I have asked Shireen whether, when our body provides that advice, should our representatives be able to speak in the chamber? Should they be able to say: 'This is our advice on this legislation. This is the advice we would give to the parliament on this question.' It is an issue for the legislation that gives effect to this body.

But what I really want to communicate, Ken, to the committee is that I just think this space here, this common ground space, is potentially fruitful. This is a space where the people who are going to fight you tooth and nail on a nondiscrimination clause—if you remove the basis for their objection, then you can talk about something that is actually quite potentially superior to the nondiscrimination clause.

Prof. Langton: I just want to add to that—may I?

CHAIR: Two minutes.

Prof. Langton: I am very worried about there being a no case forming out there somewhere, and it is on this matter that a no case will form. If we have a strong push for a prohibition of racial discrimination provision, that will be the grounds for a strong no case. If there is a no case from a group of parliamentarians, for instance, or other people, then we will lose. We should all just pack up and go home if that happens because we know from history that every referendum question that has had a no case run against it has lost. We run the risk of losing, and we must not put up a question that will lose. We can tell whether or not the question will lose if we speculate on historical conditions such as a no case will, according to the historic record, pretty much automatically lead to losing the case. You need to get every state and territory government—while the law says to change the constitution we need a majority, on this question we need all of them. Really? Because if one state or territory says no, there is the grounds for another no case. I could go on, but I have only got two minutes.

We have to resolve these problems. We have to put the most reasonable but high-standard formulated question to a series of conventions and quell the opposition. We even have to bring on board the monarchists and the political outliers, or at least neutralise their arguments. We even have to bring on board the monarchists and the political outliers, or at least neutralise their arguments, because my view is that if we do not have an acceptable question—and, further, if there should be a no case—I want to see the whole thing pulled, because we must not run the risk of losing on this question. We would have to leave it to the next generation; and, if the debate continues, so be it. But we have to lay up the best information that we can.

Mr STEPHEN JONES: Thanks for your work on this. Thanks for coming down to have a yak with us. Everyone around this table would know that I am an advocate of the expert panel's propositions in this space, and I see whatever we do thereafter as a necessary political compromise and not a virtue in and of itself, except that there is virtue in taking a step forward.

I have looked at what you have put in here, in the submission to the committee, and the thing that I am trying to get my mind around is: if this Indigenous body enshrined in the Constitution is an alternative to judicial review, without judicial review—I understand that conceptually—how do you make it meaningful as a means of restraining parliament or the executive without agitating all of those concerns amongst conservative lawyers and others? How does it become meaningful without raising all of those same complaints that they are going to have? I am very mindful, and I am glad, that you went to the issues around the bars on consultation and the procedural requirements in other constitutions around consultation; I think that is a live issue whenever you try and draft something around here. How do you draft something that is meaningful as a restraint on and a guidance for parliament that at the same time does not excite a no case from all those conservatives?

Prof. Langton: Okay. Have you ever tried to get a minister on the phone, to complain about something? Impossible. Impossible—unless you are a very special person. Having a permanent institutional answer to the question of 'who do I talk to', 'who is your leader', 'who is the right Aborigine', means all of that is resolved. And you will get good responses with such a body—

Mr STEPHEN JONES: Can I just give you one—

Prof. Langton: and the parliament will be informed. At the moment, the parliament is not informed.

Mr STEPHEN JONES: Okay. I will give you an example. I want you to answer this. I want you to say, 'No, Jones, you're wrong on this.' The human rights and equal opportunity commission currently has those functions. It currently has those functions that you talk about. The Race Discrimination Commissioner currently has some of those functions. Every act that comes before the parliament is required to have a provision in there about the human rights implications of that legislation. It goes to your issue, Noel: how do you make this about democracy, not bureaucracy? I know the way that legislation is formed. I sit in parliament; I see those bills come before it. If the answer is to have one of your mob stand up and read a report in parliament before we vote on a bill, it would be pretty powerful at first, but over the years it would be diluted, I can tell you. I want you to be able to convince me that this is going to have the authority you hope that it will have as an alternative to judicial review.

Prof. Langton: In many ways, the Aboriginal and Torres Strait Islander Social Justice Commissioner position is a special measure, because of inequity. We are not talking about a special measure; we are talking about a

permanent parliamentary institution here—at least, that is what I think we are talking about. We are not talking about a special measure. We are talking about the future of Australia. What is the place of Indigenous people—

Mr STEPHEN JONES: I get that. But, while you were talking, I went back to the human rights and equal opportunity act and looked at the functions of the commissioners within the act, and they have those functions that you are talking about.

Mr Pearson: Sure—and, obviously, the commission does not represent Aboriginal and Torres Strait people.

Mr STEPHEN JONES: I get that difference.

Mr Pearson: It does not help us—

Mr STEPHEN JONES: But you are talking about—

Mr Pearson: with democratic representation.

Mr STEPHEN JONES: But you are talking about a role in law, a function in law. How do you ensure that this body, which is an alternative to judicial review, does not have the same problems? I am sure there was all the goodwill in the world when those provisions and the functions of the commission were established. How do you ensure that what you are proposing does not fall into being the same, if you like, bureaucratic, ineffectual, ineffective body that I am absolutely certain you do not want it to be?

Mr Pearson: Absolutely. It has to have proper institutional recognition. It should not be committee of the parliament kind of slinking around the corridors. It should be an institution in the Parliamentary Triangle that has an honoured place in the nation's democracy. It should be supported by good legislation. With the proper status and respect being accorded to this institution, it could be a powerful voice in the parliamentary process. It would not undermine parliamentary sovereignty. There is no mechanism that you can think of that could operate as a veto or anything. It would be inconsistent with the idea of the parliament if you had anything other than the moral power of a people's voice, which is a lot more than we have now and, I think, crucially important for the 97 per cent elephant to hear from the mouse in an agreed way and through an appropriately recognised institution. The difference between this concept and those kinds of official structures that are already in the parliament and the review processes that already exist is that Aboriginal and Torres Strait Islander people would be represented through that voice.

Mr STEPHEN JONES: I did have a separate set of questions about that. How do you ensure that you get the plurality of voice in that representative Indigenous body to overcome what I understand to be some of the concerns you are expressing, albeit in a different context earlier. If you are going to have an Indigenous body entrenched in the Constitution with some authority to persuade parliament, how do you ensure it has a plural voice?

Mr Pearson: We would need legislation to answer those questions. The design of how people are represented from the regions and local communities up through—

Mr STEPHEN JONES: But how do you see it?

Mr Pearson: I am only thinking at a level of high principle at the moment which is that we have to have an approach to Indigenous affairs that is region and local community focused and driven by the empowerment of local communities rather than the pyramid structure we had with ATSIC. But, of course, we have to grapple with this whole issue. How do we invert ATSIC, that traditional style of percolating leadership up to the top and so on? The constitutional provision that I have in mind is something that would need to be matched with very good process for designing the legislation that gives effect to it.

Mr NEUMANN: I am always mystified by those constitutional conservatives who are very happy for the High Court to interpret sections 116, 119, 92 and 51, and that has been there since Federation, and also for the High Court to interpret the Racial Discrimination Act but afraid of the sort of provision that you have supported for a long time, and Stephen and I also have supported. Stephen asked a lot of the questions that I was going to ask, but I will come back to the model. How do you see the empowered communities legislation relating to the structure that you have here?

Mr Pearson: As I say, we have to have legislation to give effect to the parliamentary voice, but there is also legislation required to empower communities in their dealings with government to make our social and economic programs more productive. How do Aboriginal communities deal with government on some kind of level playing field? How does a three per cent mouse sit down with the elephant and say, 'Right, these are our plans. You guys have got all the resources. We agree on a policy agenda. Let's pursue an agenda for the development of our communities that we have played a leading role in determining as a community.' How do we equalise our relations with government? I think that requires legislative architecture as well. At the moment, the whole seesaw

is sitting askew, where we just do not have a level playing field in our relations with government. So I see that enabling legislation would have to both tackle a voice in parliament and also provide for a way of communities dealing with government and overcoming the power imbalance that currently exists in our dealings with government.

Mr NEUMANN: On page 24 of your submission, you also mention 'a handsome, yet non-justiciable, procedural chapter'. I take it you got that from having discussions with constitutional conservative lawyers. Have any provisions been drafted by them or by you that we could look at?

Mr Pearson: We have some design principles, and I might ask Shireen to go through the limbs of the principles that we think would be needed in order to have something substantial that constitutional conservatives could agree with as well.

Ms Morris: I will also answer that by trying to answer Mr Jones's question too, because it goes to what makes this a meaningful mechanism when, as Noel says, you cannot have a veto—so we are not proposing a veto. What makes it meaningful is the way the provision is drafted and the fact that it is in the Constitution, which is a significant change to the current instructions to parliament that are in the Constitution that say nothing whatsoever about a need to consult with Indigenous people.

Mr Jones, there is no definitive response to what you are saying, but it is important to recognise that both the options have pros and cons. The Constitution is the document that gives the parliament its legislative powers and it is also the document that finds ways to restrain the exercise of those powers. One way of restraining the exercise of those powers is by substantive limitations on the exercise of power. The panel's proposed 116A, as a substantive qualification on the power' but not so as to adversely discriminate', would be a substantive limitation, and those types of limitations are justiciable, obviously.

But another way to limit parliament's power is to define and specify the way the power is executed and the way the power is exercised without making it justiciable. In our work with constitutional experts, we have found that certain provisions in the Constitution are drafted in a way that they are highly procedural, specific instructions for parliament and, because of the way these clauses are drafted and the language that is used, the High Court has said, 'These clauses are not justiciable; they are political, procedural instructions to parliament.' Those are the two options: substantive limitations that are justiciable; or political, procedural limitations that are not justiciable. So for obvious reasons the constitutional conservatives, who are obsessed with parliamentary sovereignty, like the procedural limitations whereas they are very nervous about the substantive limitations.

In terms of what is more meaningful, it is important to remember that both have their pros and cons. As Noel and Marcia mentioned with the Maloney case and AMPs, one of the strengths of substantive limitations is that they give the High Court a say, which can be good because often it is the High Court that protects minority interests, where parliament is not willing to do so, as we have seen in the Mabo case and whatever. But in more contemporary times, an Indigenous litigant might go to the High Court and, as happened in Maloney, might argue discrimination and they might not get the outcome they were looking for because special measures are highly subjective. The litigant can spend years and years, 10 or 20 years, getting the case to the High Court, spending lots of money, and it has this retrospective operation. That arguably discriminatory law has been in operation for 10 or 20 years, and they go to court and they do not get the outcome they were looking for. Those are the pros and cons.

On the other hand, they might get the outcome and the law gets struck down. As Noel said, you have to wait for a crisis to arise, something really bad that you can argue is discriminatory. And when you are talking about the qualification being just in relation to the one power those circumstances narrow even more. With 116A you get a general prohibition, the qualification on the power is more narrow. I know George Williams would argue that that power in effect qualifies the other powers as well. But that is relying on the High Court to interpret it that way, so that is not certain.

However, by the same token, with what we are proposing there are no guarantees either. It is not a veto. It is basically a clause that relies upon political, moral pressure. It is in the Constitution so a constitutional imperative is created—(1) for parliament to create the body and (2) for parliament to follow those procedural instructions. Then, depending on how the legislation is drafted, what other procedures might you have? What other duties might you give the body? Can the body make recommendations saying actually it is not just a reactive body? Maybe they can make recommendations saying, 'Parliament, you should pass this law.' That is for the legislation to decide. Then, what other creative ways can we build that political, moral pressure? For example, as Noel said, could the head of the body be allowed to observe in parliament, address the parliament, answer questions on their advice? Can we ensure that the advice is public? Can we create a situation where there is good media attention and public debate generated so that it makes it really politically and morally difficult for the parliament not to

follow the advice—which of course is not a guarantee? But, as Noel said, it is about a hundred times better than our present situation where there is no constitutional imperative for any of that.

Mr NEUMANN: What about the breadth of the voice in terms of the legislation upon which this body may comment or give advice?

Ms Morris: I will talk about the design principles and that may be helpful.

Mr STEPHEN JONES: What is jurisdiction?

Mr NEUMANN: Yes. I can see a circumstance where it would be highly appropriate on native title and a whole range of areas. But what about an Australian education act which had, amongst other things, a comment on loading for Indigenous education—for example, Gonski? Would that be inappropriate?

Ms Morris: We are envisioning a broad jurisdiction. The principles that we want to employ when thinking about how we would draft this nonjusticiable but very handsome chapter—it could be a new chapter 1A of the Constitution—are, firstly, to establish an Aboriginal and Torres Strait Islander body that has to give advice to the parliament and the executive government on matters relating to Aboriginal and Torres Strait Islander peoples. There is the jurisdiction, so matters relating to Aboriginal and Torres Strait Islander peoples, and obviously there is a narrow interpretation of that and there is a broader interpretation of that.

My own personal view is that given it is not a veto, given it is simply the right to table advice and to express an opinion on a particular issue, what is the problem if a broader interpretation is there? That is especially true if there is no potential for this procedure to hold up the machinery of parliament. The idea is that this is drafted in a way that does not have the potential to slow parliament down. The onus is on the body to advise. If they do not advise, then there is nothing for parliament to consider. That is the first thing—that is, the chapter should establish this body that has to advise parliament on matters relating to Aboriginal and Torres Strait Islander peoples.

The second thing is that the chapter should give parliament the power to legislate for the construction of the body, its terms of reference, how it is made, its procedures, roles, functions and that sort of thing. The third thing is that the chapter should require a copy of the body's advice to be tabled to the parliament and the executive government, so tabled to both houses. It should require that both houses give consideration to the advice when debating proposed laws relating to Aboriginal and Torres Strait Islander peoples. Those design principles are drawn from our discussions with constitutional experts with, foremost, wanting to make it nonjusticiable, wanting it to not slow down or hinder the machinery of parliament in any way—

Mr Stephen Jones interjecting—

Ms Morris: So that it cannot be abused, so that if—

Mr STEPHEN JONES: That is a design weakness in my view.

Ms Morris: You want it to be abused?

Mr Stephen Jones interjecting—

CHAIR: Let Professor Morris finish first. What I want to do is adjourn for lunch and, if you three are available, to come back after lunch and spend more time exploring this. I know that Senator McKenzie, Senator Siewert and Senator Peris have all got additional questions, and I know that you two will have additional questions as well—and then there are mine.

Prof. Langton: I would like to finish my answer to Stephen's question too.

CHAIR: Yes, we will do that. I will let Professor Morris finish.

Ms Morris: [Inaudible] the final thing: nonjusticiable, not holding up the mechanisms—so making sure it is not vulnerable to being abused—it cannot slow down parliament and does not compromise parliamentary sovereignty, which is related to being justiciable.

CHAIR: Professor Langton?

Prof. Langton: We can do it after lunch.

CHAIR: You want to do it after lunch?

Prof. Langton: I am happy with that. I just wanted to let you know that I had not finished my answer.

CHAIR: Not a problem. I constrained you on time because I am very conscious of the questions that other members have. We will continue with the discussions after lunch, because there are a number of questions that members want to put to you and for us to explore in detail some of those principles and concepts.

Proceedings suspended from 12:38 to 13:08

CHAIR: We will reconvene.

Mr NEUMANN: Related to the technology by which the body would elected, Noel, you mentioned that some would be appointed and some elected. Do you have any more thoughts in relation to that or is that what you have at the moment?

Mr Pearson: Yes, that is the detail as it is. Issues from the community have been raised about whether people with cultural authority representing communities may not be best represented through an open selection process. I personally think that models of mixed representation are best with some appointed. The appointment process could be, as I think Marcia described, a jury process. The government and Indigenous organisations have to mutually agree on the appointment, so it is not entirely a government or parliament question; it is a mutual appointment.

On the body generally, I think what is needed is a body that would have that constitutional function of advising parliament. Whether it is the same body or part of some legislative architecture that would tackle those three big areas that I see as needing an institutional solution for Indigenous people, I do not know. Those three areas, for me, are, firstly, social and economic parity. How do we deal with government so that government can best support us to reach social and economic parity? It is about programs, it is about funding, it is about the administration of our communities and so on. It is what we have come to start calling the productivity piece. How do we get more productive social and economic programs in Indigenous affairs? How do we relate to government not as welfare recipients but as people who are charting a development agenda for our mob, and we are partners with the government in a development agenda? That is the productivity piece, which is all about social and economic parity.

The other piece is land and resources. We already have institutional pieces of the jigsaw in existence—the Native Title Tribunal, the Indigenous Land Corporation and so on, and we have ILUAs, Indigenous land use agreements, as a mechanism for capturing agreements between government and Indigenous titleholders. Land and resources are obviously a key part of the agenda for us. We already have the makings of the institutional solutions with the Native Title Act, the tribunal and the agreement-making mechanism that exists through ILUAs.

Can we envisage the day where we negotiate regional-wide settlements of outstanding claims like we are attempting to do in Cape York now? We have basically come to the view that if we do a claim-by-claim process in Cape York, it will be another 50 years before these claims are going to be finished. Can we have a regional negotiation of the outstanding claims with the state and with the Commonwealth? We have lodged a claim for the balance of Cape York under the Native Title Act and the Queensland government have reacted quite constructively to it. They can see the benefits of settling native title in our region in a much more timely way. Have we reached a deal about how it could look? We have architecture in place with the native title act and ILUAs? Land and resources are another piece of it. Can we pursue settlements of land and resource claims in a more efficient way?

The third piece for me is what is sometimes called the symbolic business—that is, recognition and reconciliation. There is all the work that has been identified in the past about place names, but how do Aboriginal groups living in a region like the Murray-Goulburn area or Cape York, or wherever they might be in the country, deal with that? They have an agenda for the recognition of place names and so on. How do we interact with the institutions in Australia that are responsible for place names? How do we have a program for the joint recognition of names? In relation to our languages, if we do not have explicit recognition in the Constitution proper of our languages, should the subsidiary legislation provide a mechanism for the recognition of Indigenous languages?

So there is the whole business of symbolic recognition of Indigenous heritage, languages and place names and so on.

They seem to me to be the three areas where we need some institutional response: productivity and social and economic parity; land and resource rights settlements; and, thirdly, this question about recognition of heritage, place names and languages—a cultural recognition.

Mr NEUMANN: Even if we do not go down the road of section 116A, even if the Australian public does not go down the road of a provision that says 'not so as to discriminate adversely against' Aboriginal and Torres Strait Islander peoples, there is an option in our progress report for a preamble to a rewritten section 51(xxvi), a new 51A, that talks about language, heritage and a whole range of things. How you feel about the rewrite of that power under section 51A that mentions language, that mentions prior ownership, custom and culture?

Mr Pearson: I have to say I was never a big enthusiast for section 51A, I think it was called, because I wonder what would flow from that, from just 'recognising'. I am more interested in the power and getting rid of the race basis for it. I did not—not personally, anyway—set great store by the preamble clauses in that section. If I knew that that would give rise to some kind of response and so on, I think I would be more enthusiastic.

But I have come to the view that the idea of having a voice in parliament is one piece of it, but that legislation would also deal with these other three corners of it—a way of dealing with government in relation to social and economic parity, on one side; reconciliation and recognition at a symbolic level, on another side; and land and resources, on the other side, which really is just a recapitulation of the architecture we already have on that. Then I really think we would have a real, substantial way of closing the gap on disadvantage as well as assuring people like Galarrwuy and people in western Cape York that there are going to be people in 100 years time, in 200 years time, that are going to have their languages, and Wik people are going to be educated and they are going to be working all over the country. This vision that we have is of people, like Marcia said, participating in Australian society as Australians; but, at another level, they would know that they were also Wik people and they have a place in the country as well. Did you want to say something, Marcia?

Prof. Langton: Let me say this. The expert panel report arises from its terms of reference, and the terms of reference stated that our job was to find a way to recognise Indigenous Australians in the Constitution. The terms of reference stated that our job was to find a way to recognise Indigenous Australians in the Constitution. The word 'recognise' was a key term in the terms of reference.

Now that we are not bound by those terms of reference, we can think laterally about what the problem is. The problem might be better seen—as I explained at the beginning, this is what I think—in this way: how do we find an honourable place for Indigenous Australians in the Australian polity? And because we are proposing constitutional change, we are therefore looking at a pretty permanent answer to that question and therefore we have to imagine what the future is like. The future, one hopes, is not going to be like the present, by which I mean that Indigenous Australians will not be seen as a disadvantaged group but that Indigenous Australians will be seen as citizens like any other citizen, but with some qualifications. If we can imagine that future, and it is the only kind of future I want to imagine, then the question about how is this parliamentary body different to the Human Rights Commission does not need to be asked. The Human Rights Commission, especially the bit of it that concerns especially us—that is, the Aboriginal and Torres Strait Islander Social Justice Commissioner's job—is heavily weighted towards Aboriginal people as disadvantaged, marginalised, discriminated against victims of breaches of human rights. The raison d'etre for that job is not Indigenous people are citizens like any other citizen.

Mr STEPHEN JONES: Affirmative action.

Prof. Langton: It is not affirmative action; it is all about special measures, which necessarily must be temporary because once you reach a stated goal the measure must be removed. That is the point of a special measure. We are not talking about that scenario; we are talking about Indigenous people as citizens of a future Australia and, therefore, what is the honourable place for Indigenous Australians in the Constitution? It is not how do we deal with disadvantaged Aborigines? It is what is the place of Indigenous citizens? That is what this body addresses. It does not address our status as disadvantaged, as people who suffer disadvantages; it addresses us as citizens of the nation. That is the purpose. The question is not really a relevant question. The question is: what is the place of Indigenous people as citizens of the nation in the future?

Is the fact of our descent from the first peoples relevant? We all say it is. We all say it very much is, which is why I am getting very worried about all of the expert white views coming before the committee. I am very worried about that. I am very worried about the influence they are having on you. I am very worried that you are listening to all of these—I am not being racist—white fella constitutional lawyers who do not get the fundamental fact that we are descendants of the first peoples and we want that recognised. That is what we want recognised. And that goes to 'who are we as citizens'. We did not fill out a form and become naturalised. Let me put it this way, because when I say it like this to my students the penny drops: everybody in my mother's mother's line going back I do not know how many thousands of years was born in this country. And some Indigenous people can say, 'Everybody in my ancestry was born in this country going back to time immemorial.'

This is not an issue that your technical constitutional lawyers—and I do not care whether they are the so-called progressives or the so-called conservatives—should be grappling with. That is not their bailiwick; that is our bailiwick. How do we as Indigenous people want that addressed? I am very concerned about the weight of the expert advice being given to you. I want that question answered properly, and it is not about closing the gap or our disadvantaged status; it is about who we are as citizens.

We were not recognised in this Constitution. In fact, we were deliberately excluded from it. Let me tell you how—and it is not an answer that a lot of people like to hear. We were excluded because at that time we were the majority of the Australian population. It was done in order to prevent the states with the very large Aboriginal populations, particularly South Australia, which then included the Northern Territory, and Western Australia, from having a majority of citizens, which they then did because they were mostly Aboriginal. That would have mucked up the formula that is used for the distribution of taxes raised by the Commonwealth and distributed to

the states. So our exclusion was based on that formula and states' rights, to stop the states with the big Aboriginal populations like Queensland—

Mr STEPHEN JONES: That is what section 25 was all about?

Prof. Langton: Yes, that is right.

Mr STEPHEN JONES: And most people do not want to know that.

Prof. Langton: The question now is: how do we want to be recognised? I do not want to be recognised as some halfwit. I am a human being with particular traditions and I want, as a human being with particular traditions, to be recognised in an honourable and fulsome way. I do not want to be recognised as a person with disadvantages—that is not what this is about—and I want it done properly so that I can say to my son and daughter: 'Your children will be treated with respect as Australians and as descendants of the first peoples.' I have to be able to say that to them or I pass on to them conflict.

I have to say it again: I do not want that question answered by whitefella constitutional lawyers. I want their advice, I want to know what they are saying and I want to consider what they are saying, but I want our mob to consider what that recognition looks like. When people say, 'Oh, we just want the symbol; we just want the poetry; we just want a preamble,' they are just talking about formats. I might as well say to them, 'Do you want it in PDF or Word? Or how about text?' All of that stuff is just people avoiding the main problem. The main problem is: what is Australia going to look like in 50 or 100 or 200 years time? We are proposing a pretty much permanent answer to the question. It is with us for generations. We have to get it right and, if we cannot get it right, call it off for the time being. The question is not: how is this different from ATSIC? The question is not: doesn't the Human Rights Commission already do this? No. They have particular jobs to do with our disadvantaged situation. We are talking about the Constitution, where we want to be treated properly as human beings with a special status. I want to know that I have answered your question.

Mr STEPHEN JONES: The proposition that I raised was not whether the Human Rights Commission, whoever is in the job, or the Aboriginal and Torres Strait Islander Commission, whoever is in the job, adequately covers the field at the moment. The proposition I raised was: how do you avoid the weaknesses in the current arrangement? Because I think they are quite manifest. If what you are trying to do is have not only a restraint on the power of parliament and the executive but also a bigger voice there, you want to look at a model that does not go down the same path as the existing institutions. That is why I was asking the question, 'What are you saying that is different in the way you would design it from what is already there,' because I can see manifest pitfalls in what is already there. For me to get excited about it, I need to see how it is different. I can see that, if it is entrenched in the Constitution, that raises it up a bit both legally and rhetorically. But what else? And maybe that is a design issue. Maybe some of the principles that Shireen—

Prof. Langton: It is a big design issue.

Mr STEPHEN JONES: was talking about go to that.

Prof. Langton: It is a big design issue.

Mr STEPHEN JONES: I do not want to leave you with the impression, though, that I was saying, 'Don't worry about that, mate, because the existing architecture already deals with it.' I certainly was not. I was saying: beware the pitfalls of the existing architecture in what you are recommending to us.

Prof. Langton: You think we don't know!

Mr STEPHEN JONES: No, I am certain you do. I will leave it there.

Prof. Langton: Thank you.

CHAIR: Senator McKenzie.

Senator McKENZIE: I return to my original question, which was about Aboriginal Australia's say in this. With regard to Aboriginal Australia coming to consider the question and being united on what they want to go forward, my understanding from our earlier conversation, in terms of a time line, was that that should occur prior to a broader community constitutional convention—that Aboriginal Australia should have a range of forums around the country to decide on how to do this and then take that to a convention.

Mr Pearson: I think so, yes.

Senator McKENZIE: Thank you. I just wanted to clarify that. I have another question. In your essay, Mr Pearson, you talk about the British government and its role in genocide in Tasmania, and you quote Lawson, I think, and a variety of other authors on this being a product of colonial endeavour, shall we say. Other than these

authors, has there been any sort of recognition of that very issue that you raised—or dealing with it, if you like, in a formal sense—by the British government over the last 150 years?

Mr Pearson: No.

Senator McKENZIE: No? Thank you.

Senator SIEWERT: I have a couple of questions. One goes to the issue of recognition itself. Marcia, you made the point that the panel was asked about recognition specifically, because it has been on the agenda for a while and political parties have committed to it et cetera, and because there has been a push by both Aboriginal and Torres Strait Islanders—some sections; not everybody, I acknowledge—and broader Australia. So people think they are talking about recognition. I totally get what you are saying in terms of actually addressing some of the fundamental issues that need to be addressed, and this is an opportunity that we probably will not get again. So I am on board with that.

One of the issues I have with your proposition, Noel, is that it would not actually include the word 'recognition' in the Constitution. As I understand it, you are suggesting you could do that in a legislative act. So the double-bang question is: would your position be to use the words from the expert panel—or modified words, because some people think they should be a bit more paltry, that the words there are too stark—and your proposal? In other words, you are dealing with how broader Australia sees recognition, and they want some words in there, and the substantive change that you are talking about in terms of setting in place a body. Do you think that is a possibility? Because the second part of that is: if we ignore the language around 'recognition', are we setting ourselves a harder problem to get your proposition up? That question is to both of you.

Mr Pearson: Yes, sure. I think we should think about the whole thing as a package and that it is not just about the tip of the pyramid—the constitutional words—but that we should have a look at recognition as how it is reflected and how it cascades down the whole pyramid.

What is that package that, as a whole, will give effect to proper recognition? If we have a voice in the parliamentary system—at the moment we are completely obscured in the bureaucracy; we are invisible, by virtue of our numbers have I say in the essay. We have to somehow address that. We have to become visible in the law-making processes of the country.

This modest idea of a body that is recognised in the Constitution will really be a question not just for the words in a new chapter of the Constitution but also for the quality of the legislation that is negotiated to give effect to it. It will also be in the kind of institutional arrangements that are made for the body, where it sits and—

Senator SIEWERT: Sorry to interrupt but just picking up on that point, I would have thought that in order to get support for it through a referendum the legislation would need to be described fairly clearly to people in order for them to not think they are signing off on a blank cheque. People would need to be seeing a draft of that legislation.

Mr Pearson: I would think that could form the basis of a lot of the substantive discussion that could take place in these compass-point meetings.

Senator SIEWERT: I am very attracted to the idea of the body or the process. We would need to talk a bit more about how it is made up. Do you think there is room then for doing some of the words in the Constitution as well?

Mr Pearson: Damien Freeman and Julian Leeser proposed the idea of a declaration. I was initially not taken with the idea, but I am a big supporter of it now, for this reason: I think there is strength in the argument that a formal declaration can have a lot of moral power, especially if we make it part of the public institutional rituals of the country. I really think a 200-word declaration of some sort offers us a chance to be more generous in the recognition and the words and the intent than us miserably fighting over 'Is it occupation; is it ownership?' et cetera, which a preamble would necessitate. I understand why, even in our expert-panel process. When you are checking the thing for legal effect, you end up with a very miserable set of words.

I am persuaded by Freeman and Leeser's argument that a declaration that is recitable by all our children in the schools, that is used on formal occasions in parliament and so on, will allow us to come up with a much more generous and handsome set of words without trimming and so on. It is like the American Declaration of Independence—it is not a constitutional document, but it has historical force.

Senator SIEWERT: I bet a lot of people actually think it is a constitutional thing. So that is not necessarily a bad thing.

Mr Pearson: I do not see a preambular provision as a die-in-the-ditch issue, for me. I would be happy with a declaration, and the poetry and symbolism can be captured in such a declaration, provided that the substantive parts of the Constitution do give rise to proper recognition.

Senator SIEWERT: The issue we need to overcome is the one people keep bringing up: that it is another ATSIC. It is not. I totally get that. But it does not stop it being an issue. It is what people think. So being able to articulate quickly that it is not some way of overcoming that is going to be an issue that needs to be dealt with. People just automatically think ATSIC, whether it is or not.

Mr Pearson: I agree. As I said, I read Marion Scrymgour's Coombs lecture about empowering people at the local level. That has got to come out of all of this. That is what is demanded by our mob on the ground. They are not going to place their hopes on some kind of national structure unless they can see that it is going to give rise to people making their own decisions and having their own leadership at the local level recognised.

Senator PERIS: When I was talking earlier on, Noel, I was talking about the catch to get people to help get this over the line. I am just going through what you have put through here, in your paper. Removing 25 of the constitutional—I guess that's a pretty big catch, to get everyone to say, 'This is a racist provision; let's get rid of it.'

In the second bit, 51(xxvi), I have a question for you. If we go back to the people—I am thinking now as an Aboriginal person who has seen the recent television series *First Contact*, where a lot of people think Aboriginal people get everything. If we did, we would not be in this position today. What do you think the wider community would say about removing section 51(xxvi)? It says:

the people of any race, other than the Aboriginal race in any state, for whom it is deemed necessary to make special laws;

At the moment, that allows laws to be made for a lot of people, and we are removing that to say we can only make laws for Aboriginal and Torres Strait Islander people.

That brings me to the third one. Do we not touch 51? It could be seen as, 'Bugger this, I'm not going to tick a box for Aboriginal people when I'm of a different ethnic background, and I want laws to be made for me.' I am just throwing things out there. With your chapter 1A, are you thinking that it is a long one, a paragraph? What would we go to the polls with, to ask people? Is it going to be simple, like you have put there, or is it a combination of the UN declaration of article 18 or 19, the provision of 'must consult'? We have heard from the conservatives that they do not want too much added or changed.

That is what I am asking you. All this stuff we have been talking about can clearly come under it through legislation, but what do we go through, that's simplistic, nonthreatening? But we need to have all the systemic flow-on positive effects from this simple 'must consult' with this body that we are thinking of putting up.

Mr Pearson: Well, 51(xxvi), as I understand it, is not relied upon to legislate in relation to anybody else, anymore, other than us. I could see that people could have that concern. The question for me is that I am still not settled on this entirely. Is it affairs? Is it peoples? Is it heritage? Do we want to give the Commonwealth parliament power to legislate in respect of affairs, peoples or heritage? If we could be confident that heritage could be interpreted in a full way—that is, our Indigenous heritage both past and present—heritage would be my preference: this is about the Commonwealth parliament's law-making in respect of us as Indigenous peoples because we have an Indigenous heritage. At this stage of the game, we are proposing peoples but I am hearing arguments about affairs, peoples and heritage.

In relation to the body, in order just to give effect to those principles that Shireen identified, it would be a substantial chapter; it would not just be a one-clause provision.

Ms Morris: But it could be four or five short statements, not a chapter that goes on for pages. It could be four or five subclauses.

Mr Pearson: I do not think some slight, half a clause reference to something would do it. The observation has been made by some people that this could end up like the Inter-State Commission—an institution in the Constitution that was never enacted. I do not think that that is going to be the case. If we have an Indigenous body chapter in the Constitution, there will forever be an imperative on the parliament to give effect to it in some way or another. It will not sit like the Inter-State Commission unutilised. I cannot ever envisage parliament being able to let the chapter sit in disuse. If parts of it do not work, it is legislation and it can be amended—the architecture of it can be amended.

When I say 'package of recognition', I would urge the committee to propose a package that includes non-constitutional recognition perhaps in the way that Leeser and Freeman are proposing that includes constitutional provisions and that includes legislative provisions. When you have the package, Senator Peris, I think that is the catch then. Once our mob see a package: 'Oh, gee, if this is delivered here, this is real, this is substantial.' If we

just zero in on the constitutional provisions by themselves, people might wonder whether it is substantive recognition. I think recognition happens through the whole.

I would want to legislation that recognises those symbolic things like place names and Aboriginal languages, and the fact that this country here is Wik people's country. We recognise that in the law. The tribes that have been here for hundreds and thousands of years are the Wik people, or the Kuku-Yalanji people and so on. Proposing a package of reforms that all together add up to recognition is the thing that I think will grab people's attention and bring our mob on board.

Prof. Langton: And also allay fears amongst the Conservatives. Can I answer the question in relation to section 51(xxvi) because I have a slightly different view from Noel. These are not settled matters yet and that means we have some work to do. Can you repeat your question about section 51(xxvi) because I did not really understand what you were asking? I want to make myself very clear on this point because there is a lot of confusion about it.

Senator PERIS: I am saying I am playing the devil's advocate out there. We have seen recent documentaries on first contact and I have lived in this country long enough to see people's perceptions of Aboriginal people. My point is that a question that we put to the people is could they turn around and say we are making a law exclusive for Aboriginal people. We want to be inclusive.

Prof. Langton: Can I borrow your copy of the Constitution?

Senator PERIS: Yes.

Prof. Langton: The problem with people who put that argument is either they cannot read and write or if they can they do not. Isn't that the answer to your question? But to give you a more fulsome answer, section 51 states:

The Parliament shall, subject to this Constitution, have the power to make laws for the peace, order, and good government of the Commonwealth with respect to—

and it goes on and on, and when you get down to subsection 51(xxvi) it states:

the people of any race for whom it is deemed necessary to make special laws;

All of the 39 subsections apply to all Australians. There is one that presently only applies to us because since the Mitosh case—and I cannot remember exactly when it was but it was sometime in the early 20th century—it has not applied to any other race except. That is the order 1 answer to your question.

The second part of the answer to your question is that Australia goes forward in history as a nation with a racist Constitution. So taking our whole remit seriously as members of the expert panel, we looked at the Constitution and thought that if we are going to make any recommendations at all, as decent human beings we have to make propositions that resolve the problem of Australia's racist Constitution. Obviously, one is removing section 25 and the other is removing section 51(xxvi), which states:

the people of any race for whom it is deemed necessary to make special laws;

Knowing what we know about the human genome, this is an entirely unnecessary clause in a modern constitution. However, if you remove it, some constitutional lawyers say you would not be able to have specific Indigenous laws such as the Aboriginal Heritage Act, the Native Title Act, the act to remove all Aborigines from Western Australia or whatever they wanted to do. Therefore, you have to replace it with a law-making power that applies to Aborigines and Torres Strait Islanders which is what the expert panel proposed for that very simple reason.

However, once you do that then you continue the meaning of the Constitution—that is, that the Commonwealth because there is no prohibition on it being racially discriminatory may continue to be racially discriminatory and may continue to be racially discriminatory in its making of laws specifically for Indigenous people. So the expert panel wanted to say something about that and exclude that possibility. However, as I say, we have run into the minefield and nobody is happy with that idea. We will lose the proposition if we go forward with that restriction. So we have to find an answer to that problem.

Why can't people be happy with 39 of the subclauses of this provision that provides for the parliament to make laws and have one of them apply to us? It is because, very simply, they do not want us to exist and we either deal with that as a problem or we do not. One hopes that, when it comes to a vote, they are in the minority. One hopes that in general they are in the minority.

Senator PERIS: I agree with that, but I am just saying that we have to convince wider Australia to do that.

Prof. Langton: That is the answer to the question, and that is what I say to people. When I explain it to them like that, decent Australians say, 'Oh, I didn't understand that.' But, if you say it to a racist idiot who can or cannot read and write—it does not matter either way—they will continue with their nonsense. There is no answer to the question from a mad person. We have to deal with the presumption that we are dealing with intelligent and decent

human beings and, if we are, the answer I have given you is the answer. You cannot give mad people the right answer.

Senator PERIS: I understand and I totally agree, but I am putting it out there that I have been through many times when people have to rock up to vote, and a lot of people still cannot get it right. If you get someone who does not have that collective knowledge and has not been to any forums—

Prof. Langton: What you are saying is right: yes, that risk is out there. There is a woman from Queensland who wants to run again, presumably on this proposition yet again. There are still people who say this; however, we have to measure the risk and the way to measure the risk is very simple. We do exactly what Recognise is doing right now: we poll the people in a number of different ways. We use professional pollsters, we have conventions and we observe what the parliamentarians' response is. If members of the parliament form a 'No' case, we pull the pin. For me, the bottom line is that the parliament would continue to make laws that specifically apply to us, one would hope without being racist. One would hope that Noel's answer to that problem—I believe it would—resolves the risks that we are taking. I believe it would resolve those risks. If anyone thinking along the lines that you are describing proposes that section 51(xxvi) stays in our Constitution, I am going to argue up hill and down dale that we just forget the referendum, because, if it stays, I am not interested.

Senator PERIS: I am not suggesting that, but I wanted to ask that question, purely because, like I said, I have walked this country many times and I know the public perception out there. It is a fear factor and all it takes is one person to come along and say, 'Disregard. Don't give the background information of the other 38 sections to it.' That is how people think, unfortunately. Like Noel has said, we are the mouse in a room full of elephants.

Prof. Langton: And that is the risk we are taking, isn't it?

Ms Morris: Can I indicate the way that I often answer that question. It is a criticism or question that is also relevant to our body proposition, because people might say, 'How come Asians don't get a body?' or this other minority group might say, 'How come we don't get a body?' I think a good way to answer it is to go back to the history and to point out why the Indigenous heritage and history and political and legal situation justifies a differentiated response that is not true for Asians or homosexuals or other minority groups, who also might be lacking a voice. A good way to argue it is that Indigenous people were the only group that were displaced and dispossessed by British settlement and the establishment of the nation. They were uniquely excluded and discriminated against by the constitutional arrangements of 1901 and they are the only group that requires legislative responses to those problems—and that is why the race power is only used for Indigenous people now. So they are the only group requiring this sort of power to support things like native title and Indigenous heritage type laws and they are the only group requiring this sort of a body to guarantee that the Indigenous voice is heard. And that is also true at international law. The UN Declaration on the Rights of Indigenous Peoples says there are distinct Indigenous rights, in addition to the rights to be treated equally, as equal citizens. So maybe that is one way of explaining.

Senator PERIS: Yes. I do use—

CHAIR: Let us not get into a debate. I will stop you there, Nova.

Senator PERIS: Okay. No worries.

CHAIR: Mr Neumann, have you got a question?

Mr NEUMANN: You used the analogy of the mouse and the elephant a number of times in the report. If section 116A or the adverse discrimination provision does not go in and you have got a body that is respected, authoritative, persuasive, but it does not have a veto over legislation, have you thought of other ways that we can come up with to enhance protection against discrimination? We have the Racial Discrimination Act. Is there any other constitutional method, or any strengthening of the Racial Discrimination Act, that is on your radar?

Mr Pearson: No. I believe that the protections in the Racial Discrimination Act ought to be better. It should apply to the Commonwealth parliament as well as state parliaments. Personally, I think it is a real hole in our constitutional structure. But it is not an argument we are going to win in this context. It is really a bill-of-rights question. I would think it a tragedy if we try to re-litigate the argument on a bill of rights on an Indigenous recognition agenda.

That is my pragmatic view—that we have to keep in mind that this process is about Indigenous recognition primarily; it is not a bill-of-rights agenda. I think we have had a go at that and it did not float, it did not get very far. In fact, I would be really urging the committee to be careful about that. Obviously, these things are related; but, by and large, the question about nondiscrimination is really a question about human rights and a bill of rights. It is not about recognition.

We could not be more reliant, in the history of Queensland, on the Racial Discrimination Act. Even right at this minute, something the Queensland government has done, we believe, is falling foul of the Racial Discrimination Act. So it is a tremendous protection for us. But letting the bill-of-rights mob have another go at the prize through this process would let us down, I think.

CHAIR: Professor Langton? And then I will go to Mr Jones.

Prof. Langton: This is what I mean about my fear that you are being persuaded by a particular kind of constitutional advice. This is exactly what I am worried about—that you mix up the issue of recognition of Aboriginal and Torres Strait Islander people with various human rights problems. Now, either we want to win the recognition issue or we want to lose it. If you mix it up with all of these general human rights problems, then we will lose it. We will lose the referendum. And we may not be able to stop the train. Actually, my greatest fear is that we will not be able to stop the train and that whatever question is designed will go forward and lose, and we will not be able to stop a referendum. That is my greatest fear.

So my personal request is that I want you to consider the problem of recognition and leave aside the other issues—because there are too many people who are riding on our bus and they want to load up our recognition bus with all of these human rights issues. For me to say that section 51(xxvi) is the line in the sand is not to mix up recognition with all the human rights issues; it goes to the quality and standard of the recognition answer. If we are going to lose our recognition scenario because it has been loaded up on the bus with all of these other human rights problems, I want the bus to stop. I do not want the guilt of white Australians on this bus. Just let's deal with this issue of recognition and leave all of those extraneous human rights issues to another time. And I am afraid that people have influenced you to a position to put too much on the bus. Am I clear in my analogy?

Mr STEPHEN JONES: If I could, Noel, I want to get inside your thinking around the Indigenous body. Is it a deliberative body? I presume only part of the function is to advise or to make statements to parliament; maybe you could contemplate things, because you talked about the inverted pyramid, and we used the analysis of ATSIC—which is both helpful and unhelpful, I have to say, and you know exactly why. Sometimes one way to test the thinking on these things is to look at how a body like that would have dealt with a past problem or a past issue. I take the intervention as a good example, because it was incredibly controversial within the population as a whole but also within the Aboriginal and Torres Strait Islander community. How would the Indigenous body deal with an issue like that and would it be possible to speak with one voice to parliament on an issue such as the Northern Territory intervention?

Mr Pearson: There would have to be a process of the Indigenous body coming to a view about the proposals. As with alcohol management or any of these kinds of measures that are said to be for the benefit of people, they are treating people differently but in order to address a special need. Then a view would be proffered to the parliament that the intervention provisions are not special measures; they are discriminatory. They do not comply with the idea of a special measure. Then that view would be proffered to the parliament and parliament would either take heed or not.

Can I say, if you are going to give an example, look at section 18C. My own view is that three people will help kill that: Ken, Marcia and Warren Mundine. I think those interventions kill section 18C.

Prof. Langton: The bill?

Mr Pearson: The bill. Ken as a parliamentarian took a position and Marcia as a public figure took a position, as did Warren Mundine. I think an Aboriginal voice of standing will have great influence, but, as with anything, the institution will have to earn its credibility. I do not think that getting involved in the party-political process would be good for an institution like that. It should really be a voice to all of the parties.

It is a better idea than playing the numbers game in the House through seats or something. Having our own people elected might have a superficial attraction, but the worst thing for Indigenous Affairs is for it to become part of the partisan ruck. Instead, the institution should become a voice that is heeded by both sides of politics and so on—three sides, sorry, Senator Siewert! The three sides of politics should pay heed to the Indigenous voice.

This is the quandary for Australia. South Africa has its own permutation. Every other country has its own permutation. Ours is: how do you give three per cent of a country some kind of a voice? This is our challenge, and this is an attempted answer to that. To just look at it and say, 'It doesn't have a veto,' who would want a veto?

Prof. Langton: Who would accept a veto?

Mr Pearson: Who would accept a veto? Would we really want a parliamentary system that is subject to some kind of veto given that the great percentage of the laws we want to contribute to are laws that apply to Australians generally? We want to give our voice in relation to those issues as well not just in relation to the laws that apply to us—much more than we have today.

Prof. Langton: Back in the early eighties we were approached by some parliamentarians. There was a joint select committee on Aboriginal and Torres Strait Islander affairs that had not ever functioned. Maybe it had functioned back during the euro-colour days or something, but since then it had hardly ever met. Nobody took it seriously. Somebody asked us, 'Why don't you come down to Canberra and make it work? Put a submission in and have somebody convene the committee?' We said, 'All right then; let's do it.' So we did.

Ever since, it has been a pretty robust committee. You have to make things work. If people do not make things work, then that is their problem. Our job is to set up the conditions in which people can make an institution work. You can be sure that there will be Aboriginal people around who want to make this work, and there will be people who want to stop it from working as well. We can ask the same questions you are putting to us. We can put the same questions back to you about the state of the parliament at the moment.

Mr STEPHEN JONES: You could put on better questions than—

Prof. Langton: It just gets worse and worse. Are we capable of making an institution like this work? I think so. That is the answer to the question.

Senator McKENZIE: I will go back to the questions around 51(xxvi) and our interim report with the suggested replacement. I will read a form of words to you that comes from our recommendation of its option 2 and get a sense of your opinion here, given that we delete and replace. Your recommendation would be around getting rid of the preambular language that we have recommended, the 'recognising, acknowledging and respecting'; and that goes into another document. We are already getting rid of subsection (2) thanks to some other advice. My understanding is it would be replaced with, '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'. It would be without the 'but not so as to discriminate adversely against them'. My question would be: is that what you are suggesting the replacement is, deleting the 'so as not to discriminate adversely against them' of our recommendation? The second part of that question is: would you have anything against putting 'as Australia's first peoples' in that replacement clause?

Mr Pearson: So how would it read?

Senator McKENZIE: I will bring it over to you.

Senator SIEWERT: In other words, it is a more complex version.

Prof. Langton: You do not have to put 'first peoples' there. 'First peoples' can go in some other document. I am not saying you have to put 'first peoples' in the Constitution; I am just saying that in the end, whatever the package, we are not a race, we are first peoples. So I am happy with 'Aborigines and Torres Strait Islanders', but I do have an old-fashioned grammatical problem of 'people' versus 'peoples'. I will come back to it in my submission.

Unidentified speaker: Thank you.

Prof. Langton: I am not crazy about this 'peoples' thing because it might exclude some—see that will be justiciable. It will be justiciable and the court might end up saying you cannot make laws for just—what if you just wanted to change the social security act in relation to some Indigenous people receiving a particular kind of benefit? I am a little bit freaked out about this, I have to tell you, and I want to get an opinion on it before we go down the road of 'peoples' versus 'people'.

On the other hand, if it only reads 'people' a judge or a court might then say that will exclude an Indigenous group because people cannot be interpreted as an Indigenous group like a clan or a nation or a tribe or a language-speaking group. Before I settle on my opinion, I really need to hear what some good lawyers have to say on that.

Senator SIEWERT: [Inaudible] the expert panel because that is what convinced me around 'peoples' for the reason you have just articulated.

Prof. Langton: Was it just spoken or was it written advice?

Senator SIEWERT: Can you remember, Ken?

CHAIR: I think it was written, but we are going to have to go back and check.

Prof. Langton: I want to check it. Personally, before I say I am happy with 'peoples' I want to check it.

CHAIR: There was a discussion around the plurality of the word 'people' as well.

Senator SIEWERT: Yes.

Senator McKENZIE: Grammar aside, we will get your opinions—you will address that in your submissions? Have I correctly encapsulated—let the *Hansard* reflect Mr Pearson nodded.

Mr Pearson: Yes, for sure.

Senator McKENZIE: Thank you. My next question then goes to—sorry, Professor Langton, you are all right too?

Prof. Langton: Yes, I am fine.

Senator McKENZIE: I want to ask about conservatives' support or otherwise of a whole new chapter in our Constitution. You are confident—I guess you would not have put this forward as a suggestion if you had not consulted with conservatives—there is a likelihood, given there is a group of parliamentarians who want neither a jot nor a tittle changed of that Constitution, of the insertion of an entire new chapter? Are we are confident that we will not convince everyone, and I take Professor Langton's comments earlier on board, but that we will be able to bring some of those very hardline conservatives over?

Mr Pearson: I do not like compromise, cutting it somewhere in the middle between two positions. There is another thing called a higher compromise, which is a different position. That is where you have regard to the other party's point of view and then ask the question, 'You have to face this reality, would you support something better?' I think that is what we are talking about here. It is not just a kind of trimming exercise or a cut the thing in half exercise; it is about finding a higher compromise. So when Shayne described this as possibly a radical idea, I kind of agree that it is.

Senator McKENZIE: Hence my question about the conservatives.

Mr Pearson: But it is a radical centre idea. It is not a radical left or a radical right idea; it is a radical centre idea. I really think that philosophically and morally and logically this is a real place that you can get people to. As to whether we can bring parties into that space—

Senator McKENZIE: Like bringing the Samuel Griffith Society to this place, for instance.

Mr Pearson: Yes, I think you would get a number of those people. I have just had a test exploration of this with individuals and so on, and certainly members of the Samuel Griffith Society, and there are decent conservatives who can come to that space. But it is going to require your committee to really get the big numbers, to take this beyond an exploration exercise to something else. What I would assert to the committee is that there is a sweet spot there. There is a logical spot that takes account of the constitutional conservative objection, but it does not leave it at that. It says to the constitutional conservatives: 'If you're not going to go for that, what about the problem of discrimination and voicelessness and nonrecognition we are trying to address here? This is the answer you can come to.' The committee can play a big role or play the leading role—

Senator McKENZIE: I would just like to declare my membership of that particular association.

Mr Pearson: in bringing people to that. The truth is I have as many conversations as I can with people, and I have a sufficient sense that this place has legal, philosophical and moral logic behind it.

Prof. Langton: Do not forget there are very conservative Aborigines too.

Senator McKENZIE: Correct; absolutely.

Prof. Langton: We have got to be able to convince them. I am not talking about you, Ken! I am talking about really conservative Aborigines.

Senator McKENZIE: As we are in the roundtable section of our agenda, I have a question for Shayne: as one of the ones on our committee who probably has really, really strongly held to the aspects of 116 and—

Mr Neumann interjecting—

Senator McKENZIE: Yes, but specifically around racial discrimination. My question is: after hearing this evidence today, has that impacted on you—on options 1 and 2, but particularly on the second—

Mr NEUMANN: I am not here to answer questions. I am here to ask questions.

Senator McKENZIE: Sorry, it is a roundtable, Shayne.

Mr NEUMANN: There will be time for me to express our views as a party, after consultation with Bill Shorten's office et cetera.

CHAIR: You will discuss it privately.

Mr NEUMANN: I will discuss it privately.

Senator McKENZIE: Okay.

CHAIR: Any further questions?

Senator McKENZIE: I have got one. Shireen, you might be able to answer this. Aboriginal Australia is a diverse population. We had, earlier today, some evidence about looking at what happens if the legislation before parliament adversely affects one subset of the population and positively benefits another subset of Aboriginal

Australia. How do you envisage the advisory body reconciling that and advising parliament on the outcome of the legislation?

Ms Morris: I think Noel sort of answered it before. However the institution is designed, just like any institution it has to deal with disagreement amongst its members and factions and that sort of thing. So the institution needs to be designed in a way that deals with disagreement. That will be for the processes of the body. But there will have to be mechanisms to deal with those sorts of issues. Would you agree, Noel?

Mr Pearson: Yes.

Ms Morris: On what you asked before about first peoples in the power, the question to maybe get legal advice on is: does it unhelpfully limit the scope of the power in any way or is it purely symbolic? I have no problem with it at all as a symbolic add-on, poetic add-on or whatever, but you have to make sure it does not limit the legislative scope.

CHAIR: I will not ask questions, given that we have canvassed many issues and matters across the breadth of points that are important in this deliberation. But any additional papers that you may have that could be tabled with us in the near future—for example, the principles—would be very helpful. They will be used exclusively by the committee; and, where we wish to cite those documents, we will seek your approval to do that. I think it is important that you have raised some principles for which, having read both papers you have provided, I think there are other elements you have that will contribute to our final deliberations. So, with your indulgence, I would appreciate having access to those.

Mr Pearson: I think we can provide a follow-up submission—before the end of January, is it?

CHAIR: Yes. Professor Langton, you will also be providing a submission, based on the points you made earlier?

Prof. Langton: Yes.

CHAIR: Do you have any questions of us?

Prof. Langton: Submissions do close on 31 January—correct?

CHAIR: Yes.

Prof. Langton: Yes. Thank you.

CHAIR: That concludes today's proceedings. The committee is required to present a final report on or before 30 June 2015. We thank you for your attendance and, if you have taken questions on notice, please provide the answers to the secretariat by 20 February 2015. You are welcome to make a supplementary submission or provide further information to the committee at any time. I thank the staff from Broadcasting and the secretariat for their assistance today. The committee will now adjourn.

Committee adjourned at 14:28