

# Chapter 2

## Discussion of forms of constitutional wording

### Guide to this chapter

2.1 This chapter discusses issues put to the committee in its consideration of possible draft forms of wording relating to constitutional recognition of Aboriginal and Torres Strait Islander peoples. Notably, drafting issues arise in relation to several existing or possible constitutional provisions, including:

- the provision as to races disqualified from voting at Commonwealth elections if they are so prohibited in their state (section 25 of the Constitution);
- the Commonwealth's current power to make laws with respect to people of any race (section 51(xxvi) of the Constitution);
- a proposed new Commonwealth power to make laws with respect to Aboriginal and Torres Strait Islander peoples, and alternative forms of that power (such as the Expert Panel's proposed new section 51A or other replacement section 51(xxvi));
- a possible new provision addressing the possibility of the Commonwealth legislating in a racially discriminatory way;
- a possible statement recognising Aboriginal and Torres Strait Islander peoples, either alongside the Commonwealth's proposed new legislative power or in a preamble or opening statement to the Constitution; and
- a statement recognising Aboriginal and Torres Strait Islander languages.

### Expert Panel on Constitutional Recognition of Indigenous Australians

2.2 In discussing draft forms of constitutional wording, the committee notes the significant work done by the Expert Panel on Constitutional Recognition of Indigenous Australians (the Expert Panel), and the range of views canvassed in its 2012 report *Recognising Indigenous Australians in the Constitution*.<sup>1</sup>

2.3 Following public statements by the Coalition, the Australian Labor Party and the Australian Greens in support of constitutional recognition of Aboriginal and Torres Strait Islander peoples, Prime Minister Julia Gillard appointed the Expert Panel in December 2010 to consult on the best possible options for a constitutional amendment.

2.4 The Expert Panel was intended to have broad membership across the social and political spectrum, informed by nominations from the public.<sup>2</sup> Led by co-chairs

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1 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012.

2 *Ibid*, p. 2.

Professor Patrick Dodson and Mr Mark Leibler AC, the Expert Panel conducted over 250 consultations around Australia, with the aim of building public awareness of constitutional recognition.

2.5 The Expert Panel report provides the Parliament with a comprehensive option for constitutional change. Their five recommendations are set out at Appendix 2 to this interim report. In relation to the proposed new legislative power to make laws with respect to Aboriginal and Torres Strait Islander peoples, the alternatives to the Expert Panel's proposal that are discussed in the text of this interim report are set out in Boxes 1–5.

### **Multi-partisan support**

2.6 The committee agrees with the Expert Panel that 'the current multiparty support creates a window of opportunity to recognise Aboriginal and Torres Strait Islander peoples in and eliminate race-based provisions from the Constitution.'<sup>3</sup> The committee is guided by the experience of the Expert Panel that:

For many Australians, the failure of a referendum on recognition of Aboriginal and Torres Strait Islander peoples would result in confusion about the nation's values, commitment to racial non-discrimination, and sense of national identity. The negative impact on Aboriginal and Torres Strait Islander peoples would be profound.<sup>4</sup>

2.7 The committee notes that strong multi-partisan support for constitutional recognition of Aboriginal and Torres Strait Islander peoples has been in existence for the last four Parliaments.

2.8 The Prime Minister the Hon Tony Abbott MP expressed his commitment to honour the pledge of previous parliaments to the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution in his 2014 Australia Day address:

We will also begin a national conversation about amending our Constitution to recognise Aboriginal peoples as the first Australians. This should be another unifying moment in the history of our country.<sup>5</sup>

2.9 The previous Coalition Prime Minister the Hon John Howard OM AO had proposed a 'new Reconciliation' in an address at the Sydney Institute on 11 October 2007. The former Prime Minister proposed a referendum:

...to formally recognise Indigenous Australians in our Constitution—their history as the first inhabitants of our country, their unique heritage of

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3 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. xvii.

4 *Ibid.*

5 Prime Minister the Hon Tony Abbott MP, 'Australia Day 2014', media release and speech, 26 January 2014, <http://www.pm.gov.au/media/2014-01-26/australia-day-2014>, (accessed 11 July 2014).

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culture and languages, and their special (though not separate) place within a reconciled, indivisible nation.<sup>6</sup>

2.10 Former Prime Minister the Hon Kevin Rudd accepted a statement of intent from over 8 000 Aboriginal people in Arnhem Land in 2008, and pledged his support for recognition of Indigenous peoples in the Constitution.<sup>7</sup>

2.11 In 2010 former Prime Minister the Hon Julia Gillard signed agreements with the Australian Greens, Mr Andrew Wilkie MP and then independent Member of Parliament Mr Rob Oakeshott, committing to a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution during the 43<sup>rd</sup> Parliament or at the following election.<sup>8</sup>

2.12 The need for bipartisanship is one of the 'five pillars to a successful referendum' discussed by Professor George Williams AO and Mr David Hume, alongside popular ownership, a sound and sensible proposal, comprehensive public education and the distribution of information using a range of media.<sup>9</sup>

### **Disqualification from voting (section 25)**

2.13 The Expert Panel's first recommendation was the repeal of section 25 of the Constitution, which it described as 'a racially discriminatory provision that contemplates the disqualification of all persons "of any race" from voting in State elections.'<sup>10</sup> Section 25 of the Constitution is as follows:

#### **Provision as to races disqualified from voting**

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

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6 Prime Minister the Hon John Howard, 'A New Reconciliation', Sydney Institute, 11 October 2007.

7 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 1.

8 Ibid.

9 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010.

10 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 137.

2.14 Section 25 contains a 'formula for calculating the distribution of funds and the apportionment of parliamentary seats to the states on the basis of the size of their populations'.<sup>11</sup> Professor George Williams explained that:

...where a State disqualifies the people of race from voting in its elections, the people of that race are not to be counted as part of the State's population in determining its level of representation in the Federal Parliament.<sup>12</sup>

2.15 Mr Bain Attwood and Mr Andrew Markus commented that 'the exclusion of Aboriginal people from this calculus suggests a racial assumption on the part of the makers of the Australian Constitution.'<sup>13</sup> Professor Williams further observed that:

Although the section thus acts as a penalty, it does so by acknowledging that the States can disqualify people from voting due to their race. This reflects the fact that at Federation in 1901, and for decades afterwards, States denied the vote to Aboriginal people.<sup>14</sup>

2.16 Professor Anne Twomey has noted that 'it is worth looking back at its ancestry', including the relationship of section 25 to the 14<sup>th</sup> amendment of the United States Constitution which penalises any State that denies certain voting rights by reducing the amount of votes that State has in the federal House of Representatives.<sup>15</sup> The committee is aware, however, that '...consultations and submissions to the Expert Panel, overwhelmingly supported the repeal of the section,'<sup>16</sup> and that:

The reasons most frequently provided in support of the removal of section 25 were that it is racially discriminatory, is outdated, and serves no useful purpose in contemporary Australia.<sup>17</sup>

2.17 The committee notes the symbolic value of removing references to 'race' from the Constitution, language that Professor Mick Dodson AM has described as

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11 John La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, p. 68; in Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, 2nd edition, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007, p. 3.

12 George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution Should Say and How the Referendum Can be Won', *Land, Rights, Laws: Issues of Native Title*, vol. 5, no. 1, September 2011, p. 4.

13 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, 2nd edition, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007, p. 3.

14 George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution Should Say and How the Referendum Can be Won', *Land, Rights, Laws: Issues of Native Title*, vol. 5, no. 1, September 2011, p. 4.

15 Anne Twomey, 'An obituary for section 25 of the Constitution' (2012), *Public Law Review*, vol. 23, pp 125–6.

16 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 138.

17 *Ibid*, p. 85.

'discredited' and reflecting 'outdated, outmoded concepts.'<sup>18</sup> Section 25 in particular has been described as 'racist'<sup>19</sup> and 'odious'.<sup>20</sup> The committee is not persuaded of the section's ongoing utility, and considers that it can be removed without consequential effects to the Constitution.

### **Power to make laws with respect to people of any race**

2.18 The principal legislative powers of the Commonwealth exercised by the Parliament are set out in sections 51 and 52. Section 51(xxvi) of the Constitution provides the relevant head of power for the Commonwealth to legislate for the people of any race for whom it is deemed necessary to make special laws, as follows:

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

(xxvi) the people of any race,~~other than the aboriginal race in any State,\*~~ for whom it is deemed necessary to make special laws;

*\*removed by referendum 25 in 1967*

2.19 The words 'other than the aboriginal race in any State' were repealed at the 1967 referendum, which had the effect of allowing the Commonwealth to make special laws relating to Aboriginal and Torres Strait Islander peoples. The result was described judicially by the Hon Sir Gerard Brennan AC KBE QC as 'an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end.'<sup>21</sup>

2.20 Despite this legacy, section 51(xxvi) of the Constitution is still considered one of the provisions that contemplates discrimination against Aboriginal and Torres Strait Islander peoples.<sup>22</sup> The divided High Court decision in *Kartinyeri v Commonwealth*<sup>23</sup> (Hindmarsh Island Bridge case) is discussed as establishing the proposition that

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18 Professor Mick Dodson AM, 'Constitutional Recognition of Indigenous Australians', *Papers on Parliament*, no. 57, February 2012,

[http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/pops/pop57/c02](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop57/c02) (presented in the Senate Occasional Lecture Series, Parliament House, 5 August 2011).

19 Oxfam Australia, submission 3574 to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2012; The Hon R J Ellicott QC, *Indigenous Recognition, Some Issues*, speech to the 23<sup>rd</sup> conference of the Sir Samuel Griffith Society, Hobart, 27 August 2011, p. 84.

20 The Hon R J Ellicott QC, *Indigenous Recognition, Some Issues*, speech to the 23<sup>rd</sup> conference of the Sir Samuel Griffith Society, Hobart, 27 August 2011, p. 84.

21 *The Commonwealth of Australia v Tasmania* [1983] HCA 21, para. 77, (Brennan J).

22 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. xiv.

23 (1998) 195 CLR 337.

section 51(xxvi) could be used to enact laws that discriminate against the people of any race.<sup>24</sup>

2.21 The Expert Panel reported that 'a large majority supported change' in relation to section 51(xxvi).<sup>25</sup> As noted above, removing references to 'race' from the Constitution has considerable symbolic value.<sup>26</sup> Further, the committee is of the view that amending or repealing and replacing section 51(xxvi) to remove the possibility of the Commonwealth making laws about Aboriginal and Torres Strait Islander peoples that discriminate against them, alongside repeal of section 25, could give effect to substantive change of the kind that has wide public support.

2.22 Contemplating the amendment or repeal of section 51(xxvi), the committee has necessarily had regard to its social and legal implications. In particular, the committee is mindful of the public significance of the 1967 referendum, and its legacy as a positive reform for Indigenous affairs.<sup>27</sup> For example, it has been put to the committee that it could be seen as inconsistent to, on one hand, remove the power to make laws with respect to the people of any race, and on the other hand, insert a power to make laws with respect to Aboriginal and Torres Strait Islander peoples (as recommended by the Expert Panel).

2.23 The committee has considered the possibility that the new legislative power could be framed 'based not on race but on the special place of those peoples in the history of the nation.'<sup>28</sup> After considering this particular issue, the Expert Panel concluded that:

The need for a specific head of power with respect to Aboriginal and Torres Strait Islander peoples arises because of their unique place in the history of the country and their prior and continuing existence.<sup>29</sup>

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24 See *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, p. 137; Geoffrey Lindell, 'The Constitution Commission and Australia's first inhabitants: its views on agreement making and a new power to legislate revisited', *Australian International Law Review* vol. 15, no. 2, 2011, p. 36; Megan Davis, 'Constitutional reform and Aboriginal and Torres Strait Islander people: why do we want it now?' *Indigenous Law Bulletin*, vol. 7, no. 25, 2011, p. 10.

25 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 137.

26 Professor Mick Dodson AM, 'Constitutional Recognition of Indigenous Australians', *Papers on Parliament*, no. 57, February 2012, [http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/pops/pop57/c02](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop57/c02), (accessed 11 July 2014).

27 A proposal to enable the Australian Parliament to make laws with respect to 'the aboriginal race in any State' was carried by referendum 26 in 1967.

28 Robert French, 'The Race Power: A Constitutional Chimera' in H.P. Lee and George Winterton, eds, *Australian Constitutional Landmarks*, Cambridge University Press, 2003, p. 206.

29 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 145.

2.24 The committee considers that a policy question remains about whether there is popular support for Parliament having the power to make laws in order to benefit the people of any race, other than Aboriginal and Torres Strait Islander peoples.<sup>30</sup> Professor Williams has expressed an opinion that the Commonwealth's legislative power may not be required in relation to 'other races'.<sup>31</sup>

2.25 Considering the legal implications of repealing section 51(xxvi), the committee has had regard to the view that the repeal, without any replacement section, would have the effect of removing the Commonwealth's authority in section 51 to legislate about people of a particular race 'for whom it is deemed necessary to make special laws', including for Aboriginal and Torres Strait Islander peoples.<sup>32</sup> On this point, the committee was advised other possible heads of power exist to legislate with respect to Indigenous people, notably:

The Commonwealth can also employ its external affairs power in s 51(xxix) of the Constitution to enact laws that implement provisions of treaties that Australia has ratified which are relevant to indigenous peoples and their rights and interests.<sup>33</sup>

2.26 Notwithstanding other possible heads of power, it was put to the committee that repealing section 51(xxvi) carries some risk of invalidating legislation relating to Aboriginal and Torres Strait Islander peoples previously enacted in reliance on that power, which may include:

- *World Heritage Properties Conservation Act 1983*;
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;
- *Native Title Act 1993*; and
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.<sup>34</sup>

2.27 For this reason, the committee agrees with the Expert Panel that changes to the existing terms of section 51(xxvi) should be accompanied by a new legislative power in order to achieve continuity with the Commonwealth's power to make laws for Aboriginal and Torres Strait Islander peoples. The Expert Panel reasoned that 'as a

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30 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 16.

31 George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution Should Say and How the Referendum Can be Won', *Land, Rights, Laws: Issues of Native Title*, vol. 5.1, 2012, p. 4.

32 Megan Davis, 'Constitutional reform and Aboriginal and Torres Strait Islander people: why do we want it now?' *Indigenous Law Bulletin*, vol. 7.25, 2011, p. 10.

33 Anne Twomey, 'A revised proposal for indigenous constitutional recognition', *Sydney Law Review*, vol. 36.3 (2014, forthcoming), p. 18.

34 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 33.

seamless exercise, such laws would continue to be supported by the new power... from the time of repeal of the old power', but that this may warrant further consideration by government.<sup>35</sup>

### **Power to make laws with respect to Aboriginal and Torres Strait Islander peoples**

2.28 The committee has considered a number of forms of wording that could change the form or wording of section 51(xxvi) and continue to allow the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples. The alternatives that have been put to the committee are discussed in the text of this interim report and set out in Boxes 1–5.

2.29 The Expert Panel recommended the repeal of section 51(xxvi) alongside the insertion of a new section 51A as 'a new grant of legislative power' that would allow the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples<sup>36</sup> (see Appendix 1). The Expert Panel noted that this provision was suggested by the Constitutional Commission in 1988.<sup>37</sup> Mr Neil Young QC agreed with the Expert Panel that 'the power should be expressed, broadly simply, as a power to legislate 'with respect to Aboriginal and Torres Strait Islander peoples'.<sup>38</sup>

2.30 The committee considers there to be some merit in the Expert Panel's view that an advantage of proposed new section 51A is that it could incorporate language of recognition into the legislative power.<sup>39</sup> Language of recognition is discussed in this interim report from paragraph 2.65.

#### ***Legislative power with a prohibition of racial discrimination***

2.31 It has been put to the committee that a proposed new section 51A could also incorporate a prohibition of racial discrimination by the Commonwealth in making laws with respect to Aboriginal and Torres Strait Islander peoples. The alternative new section 51A, in Box 1 below, would give the Commonwealth power to make

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35 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp 150–151.

36 *Ibid*, p. 130.

37 Constitutional Commission, 'Summary', *Final Report of the Constitutional Commission*, Australian Government Publishing Service, 1988, p. 54 and vol. 1, para. 10.372; in *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 145.

38 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 3.

39 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 131.

laws with respect to Aboriginal and Torres Strait Islander peoples, but only so long as those laws did not 'discriminate adversely against them'.<sup>40</sup>

2.32 It has been put to the committee that the addition of the word 'adversely' could limit the type of laws that may be made by the Commonwealth to those that do not have an adverse discriminatory effect on Aboriginal and Torres Strait Islander peoples, while allowing for the continued enactment of laws that give effect to 'special measures' to overcome disadvantage and the effects of past discrimination.<sup>41</sup> This is discussed further in this interim report from paragraph 2.56.

### **Box 1**

*A proposed new section providing the Commonwealth with power to legislate with respect to Aboriginal and Torres Strait Islander peoples*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51A' be inserted, along the following lines:

#### **51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander people with their traditional lands and waters;

**Recognising** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

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

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

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.

### ***Legislative power in a new chapter***

2.33 It has been put to the committee that instead of the Expert Panel's proposed section 51A, the power to make laws with respect to Aboriginal and Torres Strait Islander peoples could be framed as a new chapter of the Constitution, for example

40 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution', *Public Law Review*, vol. 25, 2014, p. 88.

41 Article 1 of the United Nations Convention against Racial Discrimination (Schedule to the *Racial Discrimination Act 1975* (Commonwealth)).

*Chapter IIIA Aboriginal and Torres Strait Islander Peoples.*<sup>42</sup> An option that would amend the Constitution in this way is included in Box 2 below.

2.34 The option of inserting a new chapter into the Constitution includes a new subsection (2) which would confine the Commonwealth's power to make laws that are 'specially applicable to Aboriginal and Torres Strait Islander peoples' to those that do not discriminate adversely against them. Like the proposed new section 51A discussed above, this subsection could incorporate language from the Expert Panel's proposed new section 116A (discussed further from paragraph 2.44 of this interim report).

## **Box 2**

*A proposed new chapter providing the Commonwealth with power to legislate with respect to Aboriginal and Torres Strait Islander peoples*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'Chapter IIIA' be inserted, along the following lines:

### **80A Recognition of Aboriginal and Torres Strait Islander Peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

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

- (1) 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.
- (2) Laws specially applicable to Aboriginal and Torres Strait Islander peoples, whether enacted under this section or under any other provision of the Constitution, shall not discriminate adversely against them.

### ***Legislative power by 'subject matter'***

2.35 The Commonwealth's power in section 51(xxvi) to make laws with respect to the people of any race is legally characterised as a 'persons power'. The aliens power

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42 Draft wording reflecting a number of sources including national consultation conducted by Mr Henry Burmester QC, Professor Megan Davis and Mr Glenn Ferguson, provided on an informal basis.

in section 51(xix) and the corporations power in section 51(xx) are other examples of persons powers.<sup>43</sup> Professor Geoffrey Lindell explained that a persons power:

...requires the law to deal with things or activities which help to differentiate or identify the persons referred to in the power from other persons who are not referred to in the power.<sup>44</sup>

2.36 Persons powers can be contrasted with the remainder of the Commonwealth's legislative powers in section 51 which are organised by 'subject matter', for example, the power to make laws with respect to 'postal, telegraphic, telephonic, and other like services' (section 51(v)) and 'lighthouses, lightships, beacons and buoys' (section 51(vii)). The committee has been advised that the validity of laws made under a subject matter power is determined by applying a different common law test. Those laws will be valid as long as there is a 'sufficient connection' between the law and a particular subject matter.<sup>45</sup>

2.37 It was put to the committee that section 51(xxvi) could be replaced by a legislative power defined by reference to relevant subject matter.<sup>46</sup> The subject matter power would need to be broad enough to cover all subject matters on which it is desirable to enable legislation, and drafted to include existing legislation in relation to the protection of Indigenous heritage, native title and Aboriginal and Torres Strait Islander corporations.<sup>47</sup>

2.38 A subject matter power would necessarily be narrower in scope than a power allowing the Commonwealth to legislate with respect to Aboriginal and Torres Strait Islander peoples. Professor Twomey has commented that a persons power 'is too wide and has the potential to be used in a detrimental or oppressive manner'.<sup>48</sup> Professor Twomey has argued that the Commonwealth's legislative power should be limited to:

...those subjects in relation to which the Commonwealth presently relies upon the race power, which can be justified as being governed by national laws, rather than State laws, and which are related to the special status of

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43 Geoffrey Lindell, 'The Corporations and Races Powers', *Federal Law Review*, vol.14, 1984, p. 219.

44 Ibid, p. 220.

45 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492, para. 16, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

46 A subject matter power was also supported by former NSW Chief Justice Jim Spigelman AC QC in 'A Tale of Two Panels', speech to the Gilbert + Tobin Centre of Public Law's Constitutional Law Dinner, Sydney, 17 February 2012.

47 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 33.

48 Anne Twomey, 'A revised proposal for indigenous constitutional recognition', *Sydney Law Review*, vol. 36, no. 3, 2014 (forthcoming), p. 15.

Aboriginal and Torres Strait Islander peoples as being the first peoples of Australia.<sup>49</sup>

2.39 An example of a new section recognising Aboriginal and Torres Strait Islander peoples and providing the Commonwealth with legislative power defined by subject matter appears below in Box 3.

### **Box 3**

*Proposed new section providing the Commonwealth with power to legislate with respect to certain subject matters*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51A' be inserted, along the following lines:

#### **51A Recognition of Aboriginal and Torres Strait Islander peoples**

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander people with their traditional lands and waters;

**Recognising** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

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

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

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 the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.<sup>1</sup>

2.40 The committee recognises the challenges of drafting a subject matter power, as noted by Professors Rosalind Dixon and George Williams who queried 'whether such a list can ever hope to include all topics of potential future significance to Aboriginal people.'<sup>50</sup> Mr Neil Young QC also noted that 'it is very difficult to arrive at

49 Anne Twomey, 'A revised proposal for indigenous constitutional recognition', *Sydney Law Review*, vol. 36, no. 3, 2014 (forthcoming), p. 16.

50 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution', *Public Law Review*, vol. 25, 2014, p. 85.

a list of subject matters that is sufficiently comprehensive' and acknowledged 'an inherent difficulty with a catch-all expression such as "other like things".<sup>51</sup>

### ***Replacing section 51(xxvi) of the Constitution***

2.41 It has been put to the committee that a further alternative drafting option for the Commonwealth's legislative power could be to simply revise paragraph (xxvi) of section 51 of the Constitution. This proposal is included in Box 4 below.

2.42 Like the proposed new chapter and new section 51A discussed above, the committee has considered a view that this form of words could prohibit racial discrimination against Aboriginal and Torres Strait Islander peoples by the Commonwealth using the words 'but not so as to discriminate adversely against them'<sup>52</sup> (discussed further from paragraph 2.56 of this interim report).

#### **Box 4**

##### *Proposed new wording for section 51(xxvi) of the Constitution*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51(xxvi)' be inserted:

#### **51 Legislative powers of the Parliament**

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

- (xxvi) Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them.

2.43 While the Expert Panel refers in proposed section 51A to 'Aboriginal and Torres Strait Islander peoples', Professors Dixon and Williams would frame the power in relation to 'Aboriginal and Torres Strait Islander people' in the singular. They argued this 'removes the possibility that it might not extend to laws for Aboriginal people as individuals or sub-groups of Aboriginal people (such as Aboriginal women or youth).'<sup>53</sup> The committee notes that this question was considered in the Hindmarsh Island Bridge case.<sup>54</sup> There, the High Court concluded that the phrase 'the people'

51 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 7.

52 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution', *Public Law Review*, vol. 25, 2014, p. 88.

53 Ibid.

54 *Kartinyeri v Commonwealth* [1998] HCA 22, para. 77, Brennan CJ and McHugh J.

included 'any members of that class'.<sup>55</sup> Mr Neil Young QC suggested that 'the word "peoples" will be construed in much the same way as "people"' and that 'there is no compelling reason to depart from the language recommended by the Expert Panel'.<sup>56</sup>

### **The Expert Panel's proposed new section 116A**

2.44 The Expert Panel proposed a prohibition of discrimination by the Commonwealth, a State or a Territory in new section 116A (recommendation 4 in Appendix 1). Professor Davis has contended that the 'practical need for' a prohibition of racial discrimination:

...is based on real experiences of Indigenous people of discrimination at the hands of the Commonwealth Parliament. For example, the Northern Territory Emergency Response, the Native Title Act and the Wik amendments. These were commonly cited as examples in community consultations [by the Expert Panel] in Aboriginal communities.<sup>57</sup>

2.45 In 1975 the Commonwealth Parliament legislated to prohibit adverse discrimination on the basis of race (inter alia).<sup>58</sup> This principle enjoys broad community support. The question remains as to whether this should be prohibited in the Constitution which would preclude legislative override of any judicial decision that was consequent on the amendment.

2.46 The Expert Panel reported that based on their consultations:

...there is widespread support in the Australian community for a constitutional amendment to entrench the prohibition of racial discrimination. By operation of the Racial Discrimination Act and section 109 of the Constitution, the States and Territories are already effectively subject to a constitutional prohibition on legislative or executive action which discriminates on the ground of race. The Commonwealth Parliament, on the other hand, is not.<sup>59</sup>

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55 *Kartinyeri v Commonwealth* [1998] HCA 22, para. 77, Brennan CJ and McHugh J.

56 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 6.

57 Megan Davis, 'Constitutional recognition does not foreclose on Aboriginal sovereignty', *Indigenous Law Bulletin*, vol. 8 no. 1, July/August 2012, p. 14.

58 *Racial Discrimination Act 1975* (Commonwealth).

59 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 158.

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2.47 The Expert Panel stated that grounds for discrimination would be the same as those used in the *Racial Discrimination Act 1975* (Commonwealth): 'race, colour or ethnic or national origin.'<sup>60</sup> Professor Davis explained that:

Australia's commitment to the principle of racial non-discrimination is reflected in the *Racial Discrimination Act 1975* (Cth) and is accepted in legislation and policy in all Australian jurisdictions. By constitutionalising non-discrimination, only the Commonwealth Parliament will have an additional burden placed on it.<sup>61</sup>

2.48 The Expert Panel contended that governments would still be able to pass laws and make decisions that use citizenship or nationality as criteria, for example, decisions about Australia's defence and or immigration.<sup>62</sup>

2.49 The Expert Panel articulated that this approach would be consistent with international jurisprudence, including in relation to aboriginal rights in Canada, and would recognise the special position of Aboriginal and Torres Strait Islander peoples in Australia. The Expert Panel explained the way the proposed prohibition would allow for beneficial laws to be enacted:

The inclusion of an exception for 'special measures' would minimise the risk that a general non-discrimination clause would invalidate laws for the benefit of Aboriginal and Torres Strait Islander peoples. While Australians are wary of the overuse of affirmative action policies which are perceived to unfairly favour one group of people over others, the approach proposed by the Panel is one that is needs-based, rather than one based on Aboriginal or Torres Strait Islander identity.<sup>63</sup>

2.50 It was put to the committee that careful consideration should be given to any general prohibition of racial discrimination in the form recommended by the Expert Panel. Professor Williams has noted that:

The practical impact of these constitutional changes would be significant. A freedom from racial discrimination in the Australian Constitution

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60 '[T]he Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,' section 3(1) of the United Nations Convention against Racial Discrimination (Schedule to the *Racial Discrimination Act 1975* (Commonwealth)).

61 Megan Davis, 'Constitutional recognition does not foreclose on Aboriginal sovereignty', *Indigenous Law Bulletin*, vol. 8, no. 1, July/August 2012, p. 14.

62 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 172.

63 Ibid.

applying to all laws and programs would mean that a law or program could be challenged in the courts if it breached the guarantee.<sup>64</sup>

2.51 The Expert Panel's proposed prohibition of racial discrimination would create an exception from discrimination law to enable the Commonwealth, States and Territories to implement laws and measures that address past discrimination, commonly referred to as 'special measures'.<sup>65</sup> The committee has been advised that special measures already enacted under section 51(xxvi) might include laws relating to truancy, alcohol management and native title.

2.52 The committee has given consideration to how the Expert Panel's proposed new sections 51A and 116A would work together in practice. Mr Neil Young QC reasoned that the two new sections could establish a complex test, by which:

For a law to be valid, it must fall within the broad power conferred by s 51A, perhaps as limited by its preamble, and it must not offend against the prohibition on discrimination in s 116A(1). Alternatively, if it offends against that prohibition, the question will arise whether it falls within the exception in s 116A(2).<sup>66</sup>

2.53 The committee has been advised that a proposed new section 116A 'is likely to have wide-reading application and be heavily litigated.'<sup>67</sup>

2.54 Professor Megan Davis has commented that public support for proposed section 116A has varied, noting:

...those who are well rehearsed in publicly and traditionally opposing a bill of rights or a charter of rights or judicial activism, immediately opposed section 116A and similarly those who have publicly and traditionally

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64 George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution Should Say and How the Referendum Can be Won', *Land, Rights, Laws: Issues of Native Title*, vol. 5, no. 1, 2012, p. 9.

65 Article 1 of the United Nations Convention against Racial Discrimination (Schedule to the *Racial Discrimination Act 1975* (Commonwealth)) provides that '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

66 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 13.

67 *Ibid*, p. 10.

supported rights entrenchment or bills of right, have supported section 116A.<sup>68</sup>

2.55 Mr Neil Young QC expressed a view that:

The proposed enactment of s 116A may complicate the objective of recognising Aboriginal and Torres Strait Islander peoples in an appropriate way within the Constitution.<sup>69</sup>

***Discrimination against Aboriginal and Torres Strait Islander peoples***

2.56 The committee is mindful of the Expert Panel's view 'that recognition of Aboriginal and Torres Strait Islander peoples will be incomplete without a constitutional prohibition of laws that discriminate on the basis of race.'<sup>70</sup> In reaching this conclusion, the Expert Panel referred to the argument of Mr Noel Pearson that:

Elimination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past... Still today, we are subject to racially targeted laws with no requirement that such laws be beneficial, and no prohibition against adverse discrimination.<sup>71</sup>

2.57 The committee has received evidence of community support for a prohibition of racial discrimination, however it notes mixed levels of support for proposed new section 116A and the potential for divisive debate about its merit. The committee considered whether prohibiting racial discrimination against Aboriginal and Torres Strait Islander peoples could be achieved without the need to enact section 116A.

2.58 It has been put to the committee that a prohibition of discrimination could be incorporated into the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples, using the words 'but so as not to discriminate adversely against them,' whether the legislative power was in the form of a new section, chapter or a replacement section 51(xxvi).<sup>72</sup>

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68 Megan Davis, 'Where to next for Indigenous constitutional recognition?', speech to *Constitution Day 2013*, Parliament House, 17 June 2013, <http://constitutionday.wordpress.com/where-to-next-for-indigenous-constitutional-recognition-by-professor-megan-davis-2/>, accessed 10 June 2014.

69 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 13.

70 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 167.

71 Noel Pearson, 'A Letter to the Australian People', submission 3619 to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples; *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 167.

72 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution', *Public Law Review*, vol. 25, 2014, p. 87.

2.59 By way of example, proposed new section new 51A (in Box 2 on page 12 of this interim report) would provide that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples, **but not so as to discriminate adversely against them.**<sup>73</sup>

2.60 Professors Dixon and Williams have argued that 'a replacement [legislative] power should not enable the enactment of laws that discriminate on the basis of race.'<sup>74</sup>

2.61 The committee has advice that by including the word 'discriminate', laws made in reliance on the proposed new power would be interpreted in line with existing discrimination law,<sup>75</sup> noting that the meaning of the term in the context of a constitutional legislative power could remain somewhat uncertain. It was put to the committee that while discrimination may not have a settled meaning at common law, it has been interpreted by the High Court in a constitutional context (for example, in *Maloney v the Queen*).<sup>76</sup>

2.62 Comparing the scope of this proposal with the Expert Panel's proposed new section 116A, Professors Dixon and Williams have commented:

...a power and guarantee in this form would offer significantly narrower protection than the proposed section 116A. It would only apply to Commonwealth, and not State and Territory, laws. It would also not protect all people from racial discrimination, only the Aboriginal people referred to in the power.<sup>77</sup>

2.63 The committee has already heard unequivocal evidence of community support for a prohibition of racial discrimination to be included in the Constitution. The committee has also heard evidence that highlights the risks and implications that might flow from the Expert Panel's proposed new section 116A.

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75 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution', *Public Law Review*, vol. 25, 2014, p. 83.

76 [2013] HCA 28. Queensland regulations imposed alcohol restrictions that applied specifically to Palm Island (a community 'composed almost entirely of Indigenous people'). While the laws were found to be discriminatory and inconsistent with section 10 of the *Racial Discrimination Act 1975* (Commonwealth), they were held to be valid as special measure under section 8. Further, the High Court has considered the concept of discrimination in relation to section 117 of the Constitution in *Street v Queensland Bar Association* (1989) 168 CLR 461, paras 28–31, Gaudron J.

77 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution', *Public Law Review*, vol. 25, 2014, p. 87.

2.64 The committee has heard that constitutional protection from racial discrimination for Aboriginal and Torres Strait Islander peoples could be achieved in a number of ways, including by preventing the Commonwealth, States and Territories from discriminating on the grounds of race, colour or national or ethnic origin, as proposed by the Expert Panel's recommended section 116A, or by a targeted provision that would prohibit the Commonwealth from making laws that discriminate adversely against Aboriginal and Torres Strait Islander peoples. At this early stage of its inquiry, the committee is in favour of incorporating a prohibition of racial discrimination into the legislative power.

### **Recognition in a preamble or opening statement**

2.65 The Expert Panel gave detailed consideration to recognising Aboriginal and Torres Strait Islander peoples in a preamble or opening statement to the Australian Constitution.<sup>78</sup> Ultimately, rather than insert a preamble or opening statement, the Expert Panel recommended incorporation of preambular language into the legislative power.<sup>79</sup> This reflects the Expert Panel's experience that:

During consultations, many people expressed concern about preambular recognition being a 'tokenistic' gesture or 'merely symbolic', and argued instead for substantive change to the Constitution.<sup>80</sup>

2.66 The committee has considered other legal forms that could give effect to preambular language, including a preamble to the Constitution, an opening statement to the Constitution, preambular language to a new section 51A and an Act of Recognition.

### ***Preamble***

2.67 During Expert Panel consultations, a number of structural questions were raised about recognising Aboriginal and Torres Strait Islander peoples in a preamble at the beginning of the Australian Constitution. The Expert Panel concluded.

...that there is too much uncertainty in having two preambles—the preamble to the Imperial Commonwealth of Australia Constitution Act 1900, by which the Parliament at Westminster enacted the Constitution in 1900, and a new preamble. The Panel found there are too many unintended consequences from the potential use of a new preamble in interpreting other provisions of the Constitution and there was next to no community support for a 'no legal effect' clause to accompany a preamble. The Panel has concluded, however, that a statement of recognition of Aboriginal and

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78 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp 110–113.

79 *Ibid*, p. 131.

80 *Ibid*, p. 112.

Torres Strait Islander peoples in the body of the Constitution would be consistent with both principles.<sup>81</sup>

2.68 Professor Twomey has noted a practical difficulty in that 'while a referendum may be used to amend the Constitution itself, it is doubtful that it could be used to amend the preamble to this British Act of Parliament'.<sup>82</sup>

2.69 The Hon Robert Ellicott QC has summarised some of the challenges of drafting any preamble or opening statement:

...it would, in my view, need to be preceded by a broad debate about whether there should be a preamble and, if so, what it should contain. It does not seem to me to be consistent with the notion of a preamble to amend the Constitution solely for the purpose of inserting a statement in a preamble which only deals with indigenous recognition... it would need to be accompanied by general statements which describe the context within which the Constitution was framed and reveals the connection between a recognition of our indigenous people in that context.<sup>83</sup>

2.70 It has been put to the committee that the unintended consequences of a preamble may not be as significant as the Expert Panel considered, as the role of preambles is well defined in the Australian legal system. High Court Justice the Hon Stephen Gageler has commented extra-judicially that:

Traditionally, the preamble to an Act of Parliament has been treated as having only a limited legal effect. The proper function of a preamble is to explain and recite certain facts which are necessary to be explained and recited before the substantive provisions contained in an Act can be understood.<sup>84</sup>

If the statute is ambiguous, the preamble may be used as an aid to interpretation... if the words of a section in an Act are plain and unambiguous, their meaning cannot be cut down by the preamble.<sup>85</sup>

### ***Statement of recognition***

2.71 The Expert Panel recommended that the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples contain 'its own

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81 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. xiii.

82 Anne Twomey, 'A revised proposal for indigenous constitutional recognition', *Sydney Law Review*, vol. 36, no. 3, 2014 (forthcoming).

83 The Hon R J Ellicott QC, *Indigenous Recognition, Some Issues*, speech to the 23<sup>rd</sup> conference of the Sir Samuel Griffith Society, Hobart, 27 August 2011, p. 82.

84 Stephen Gageler and Mark Leeming, 'An Australian Republic: Is a Referendum Enough?' *Public Law Review*, vol. 7, 1996, p. 143.

85 *Ibid*, referring to *Wacando v Commonwealth* (1981) 148 CLR 1, paras 15–16, Gibbs J.

introductory and explanatory preamble'.<sup>86</sup> This would 'link' a statement of recognition directly to the legislative powers of Parliament in section 51, rather than inserting the statement as a preamble to the Constitution.<sup>87</sup> This general approach is used in the forms displayed in Boxes 1–3 of this interim report.

2.72 Rather than in a preamble or an opening statement, the Expert Panel concluded that including a statement of recognition in the body of the Constitution would be the option 'most likely to avoid unintended consequences', explaining:

Such an approach would incorporate the statement in the body of the Constitution, and ensure that the purpose of the new power was clear. Any current or future High Court would use the language in the adopted preambular or introductory part of section 51A to interpret the new legislative power. This would avoid the risk of a statement of recognition being used to interpret other sections of the Constitution, and avoid a discontinuity between the preamble to and body of the Constitution.<sup>88</sup>

2.73 The committee notes that the Expert Panel found that:

There was strong support for a statement of recognition in the body of the Constitution. People who advocated this referred to the possibility of practical legal outcomes, and the symbolic strength of recognition in the Constitution 'proper'.<sup>89</sup>

2.74 The committee heard views in support of a legislative power that contains a preambular statement of recognition. For example, Professor Twomey expressed a view that:

It would avoid concern about the content of the preamble affecting the interpretation of other parts of the Constitution or the creation of broad constitutional implications... It would fulfil the role of providing constitutional recognition of Aboriginal and Torres Strait Islander peoples, but it would not be seen as tokenistic, as it would introduce a substantive change in the text of the Constitution.<sup>90</sup>

2.75 Another view has been put to the committee that it would be structurally novel to include a statement of recognition in an individual provision of the Australian

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86 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 130.

87 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 117; Centre for Comparative Constitutional Studies, University of Melbourne, submission 3558 to the Expert Panel on Constitutional Recognition of Indigenous Australians, pp 6–7.

88 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 130.

89 *Ibid*, p. 72.

90 Anne Twomey, 'A revised proposal for indigenous constitutional recognition', *Sydney Law Review*, vol. 36, no. 3, 2014 (forthcoming), p. 13.

Constitution, and that it is unclear how the High Court would apply the statement in relation to the provision.

2.76 The committee has received evidence that concerns remain with the wording of the statement of recognition proposed by the Expert Panel. In particular, there is a lack of popular ownership of the term 'advancement'. The term is used in the fourth line of preambular language to the Expert Panel's proposed new section 51A, in the line italicised below:

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

*Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;*<sup>91</sup>

2.77 The term 'advancement', popularly understood as meaning improvement or development, has a wide usage and a particular meaning at international law. Professor Twomey has commented that:

... 'advancement' in the sense used by the United Nations Committee on the Elimination of Racial Discrimination, means bringing a racial group up to the same level of enjoyment of human rights and fundamental freedoms as others. It is not simply directed at the giving of a 'benefit' to a group.<sup>92</sup>

2.78 In the 2013 *Youth Report on Constitutional Recognition*, RECOGNISE THIS,<sup>93</sup> it was submitted that 'the term "advancement" does not adequately reflect Indigenous peoples' right to self-determination as it implies that governments can determine what is best for us'.<sup>94</sup> The committee has heard that an alternative word to 'advancement' could be used that better reflects the views of Aboriginal and Torres Strait Islander peoples.

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91 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 133.

92 Anne Twomey, 'A revised proposal for indigenous constitutional recognition', *Sydney Law Review*, vol. 36, no. 3, 2014 (forthcoming), p. 14; United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, 75th session, United Nations Doc. CERD/C/GC/32, 24 September 2009.

93 RECOGNISE THIS is a youth-led movement to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution, a partnership between RECOGNISE, the National Centre of Indigenous Excellence and YourExtraLife.

94 RECOGNISE THIS, *Youth Report on Constitutional Recognition*, Indigenous Youth Engagement Council, 2013, p. 31.

2.79 The Expert Panel explained that their rationale for using the term 'advancement' was that it would 'confine' the Commonwealth's power to make laws for Aboriginal and Torres Strait Islander peoples to laws that have a 'beneficial purpose'.<sup>95</sup> The Expert Panel envisaged that if challenged, a Court would assess whether the law, taken as a whole, 'would operate broadly for the benefit of the group of people concerned', rather than 'whether each and every member of the group benefited'.<sup>96</sup> The Expert Panel did not consider that this increased legal risk for the Commonwealth, noting that the term is 'widely used in legal contexts'.<sup>97</sup>

2.80 It was alternatively put to the committee that existing legal use of the term 'advancement' may justify its inclusion in the proposed language of recognition. Professors Dixon and Williams considered the use of the term 'advancement' in the constitutions of the Republics of South Africa and India, and commented:

While the context for its use would be different in Australia, it is likely that the High Court would interpret it similarly to authorise measures designed to redress inequality and achieve more forward-looking goals such as economic empowerment. This could enable the making of laws for native title as well as new forms of title designed to advance Aboriginal equality in different ways.<sup>98</sup>

2.81 The committee notes that the Expert Panel, in considering the relationship between any prohibition of racial discrimination and a proposed new legislative power, commented that:

...there would be less need to qualify the preamble to the proposed replacement power in 'section 51A' with a word like 'advancement' if a racial non-discrimination provision with a special measures exception were to be included as part of the constitutional amendments.<sup>99</sup>

### ***Introductory statement to the Constitution***

2.82 Another alternative approach to a preamble put to the committee was to incorporate a statement of recognition as an introductory statement to the Constitution. This could achieve some of the outcomes sought to be achieved by a preamble in

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95 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 131.

96 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 150.

97 Ibid.

98 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution', *Public Law Review*, vol. 25, 2014, p. 86.

99 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. xiv.

recognising Aboriginal and Torres Strait Islander peoples and overcome the structural difficulty.<sup>100</sup>

2.83 The language used in the preamble to the Constitution of the Republic of South Africa was suggested as an example of what might be incorporated into an Australian context along the following lines:

We, the people of Australia:

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; and

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging our collective history and shared future;

Honouring those who have fought for justice and freedom;

Respecting those who have worked to build, develop and protect our country;

Commit ourselves to this Constitution.

2.84 The committee has not yet received direct evidence of community views on recognising Aboriginal and Torres Strait Islander peoples in an introductory statement, and invites this at its upcoming public hearings and as written submissions.

### ***Further Act of Recognition***

2.85 It was further put to the committee that a constitutional amendment to give the Commonwealth power to make laws with respect to Aboriginal and Torres Strait Islander peoples could be worded so as to require the Commonwealth to legislate on the subject of recognition, including recognising Aboriginal and Torres Strait Islander languages. This proposal is shown in Box 5 below.

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100 Patricia Karvelis, 'Abbot will lead doubters to constitutional change', *The Australian*, 31 January 2014, <http://www.theaustralian.com.au/national-affairs/state-politics/abbott-will-lead-doubters-to-constitutional-change/story-e6frgczx-1226814324051#> (accessed 12 May 2014).

**Box 5**

*Proposed new wording for section 51(xxvi) of the Constitution requiring the Commonwealth to also enact an Act of Recognition*

It has been put to the committee:

- 1 That section 51(xxvi) be repealed.
- 2 That a new 'section 51(xxvi)' be inserted:

**51 Legislative powers of the Parliament**

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

- (xxvi) Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them and within this power must enact an Act of Recognition.

2.86 It was suggested to the Expert Panel that 'legislative recognition could have a useful role in public education in the lead-up to a referendum'.<sup>101</sup> Ultimately, the Expert Panel did not recommend a legislative approach, noting that:

Unlike a constitutional statement of recognition, an Act of Parliament would not be entrenched, and a later Parliament could repeal or amend any statement contained in the Act... The Panel would be concerned if legislative action were to be used as a substitute for, or distract from, a referendum on constitutional recognition.<sup>102</sup>

2.87 To counter this concern, it was suggested that legislation of recognition could be given similar status to the *Australia Act 1986* (Commonwealth) and the *Australia Act 1986* (UK), parallel legislation enacted 'to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation'.<sup>103</sup>

2.88 The committee has not yet received direct evidence of community views on recognising Aboriginal and Torres Strait Islander peoples in a Further Act of Recognition, and invites this at its upcoming public hearings and as written submissions.

**Recognition of languages**

2.89 The committee has considered the Expert Panel's recommendation to include a declaratory provision in relation to the importance of Aboriginal and Torres Strait Islander languages, proposed new section 127A in Appendix 2 to this interim report.

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101 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 224.

102 *Ibid.*, p. 224.

103 *Australia Act 1986* (Commonwealth), Long Title.

A new section along the same lines was suggested to the Expert Panel by the Cape York Institute, to be 'supported by legislative reform to protect and revitalise indigenous languages and promote English literacy'.<sup>104</sup>

2.90 The Expert Panel observed that:

...recognition of Aboriginal and Torres Strait Islander languages as part of our national heritage gives appropriate recognition to the significance of those languages, especially for Aboriginal and Torres Strait Islander Australians, but for all other Australians as well. The Panel has also concluded that the recognition of English as the national language simply acknowledges the existing and undisputed position.<sup>105</sup>

2.91 It has been put to the committee that it is important for any referendum question to contain proposals that are 'sound and sensible'.<sup>106</sup> Former Deputy Leader of the Liberal Party the Hon Mr Peter Reith recommended that good proposals should contain 'a genuine problem and a reasonable solution'.<sup>107</sup> Professor Williams and Mr David Hume warned against asking 'different questions' in the same proposal, arguing:

Different ideas should not be lumped together in the one referendum question. The history of referendums in Australia shows that this is a recipe for failure. The effect is to ensure that opposition to individual ideas is aggregated against the joint proposal.<sup>108</sup>

2.92 Mr Neil Young QC advised the committee that in his view, 'proposed section 127A is purely declaratory' as 'it is not a source of power and it is not expressed to be a constraint on the exercise of legislative power'.<sup>109</sup> In relation to proposed new section 127A, Professor Twomey noted that 'the uncertainty and ambiguity surrounding this provision...may also prove distracting in a referendum'.<sup>110</sup>

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104 Cape York Institute, submission 3479 to the Expert Panel on Constitutional Recognition of Indigenous Australians, pp 39–40; *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 128.

105 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 131.

106 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, pp 254–259.

107 Cited in George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 254.

108 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010, p. 254.

109 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 4.

110 Anne Twomey, 'A revised proposal for indigenous constitutional recognition', *Sydney Law Review*, vol. 36, no. 3, 2014 (forthcoming), p. 2.

2.93 Based on its work so far, the committee does not favour including a provision along the lines of section 127A in a draft referendum proposal. It was put to the committee that the purpose of section 127A could be otherwise achieved in a statement of recognition within one of the forms of wording shown in Boxes 2–5 of this interim report.

2.94 The committee has received evidence that the effect of the languages provision could be further strengthened by incorporating a line of preambular language.<sup>111</sup> Indeed, the Expert Panel explained that:

To a considerable extent, constitutional recognition of Aboriginal and Torres Strait Islander languages overlaps with the question of the content of a statement of recognition... and the conferral of a head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples.<sup>112</sup>

2.95 Further, it has been put to the committee that languages could be recognised in a further Act of Recognition, should the government pursue that option alongside constitutional change (see Box 5 on page 26 of this interim report).

### **Committee view**

2.96 Based on its work so far, the committee is of the view that a successful referendum on Indigenous constitutional recognition will need to meet three primary objectives. To be successful at a referendum, the committee considers that a successful proposal must:

- recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia;
- preserve the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and
- in making laws under such a power, prevent the Commonwealth from discriminating against Aboriginal and Torres Strait Islander peoples.

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111 Neil Young QC, *Opinion on the Recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11 June 2014, p. 4.

112 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 132.

