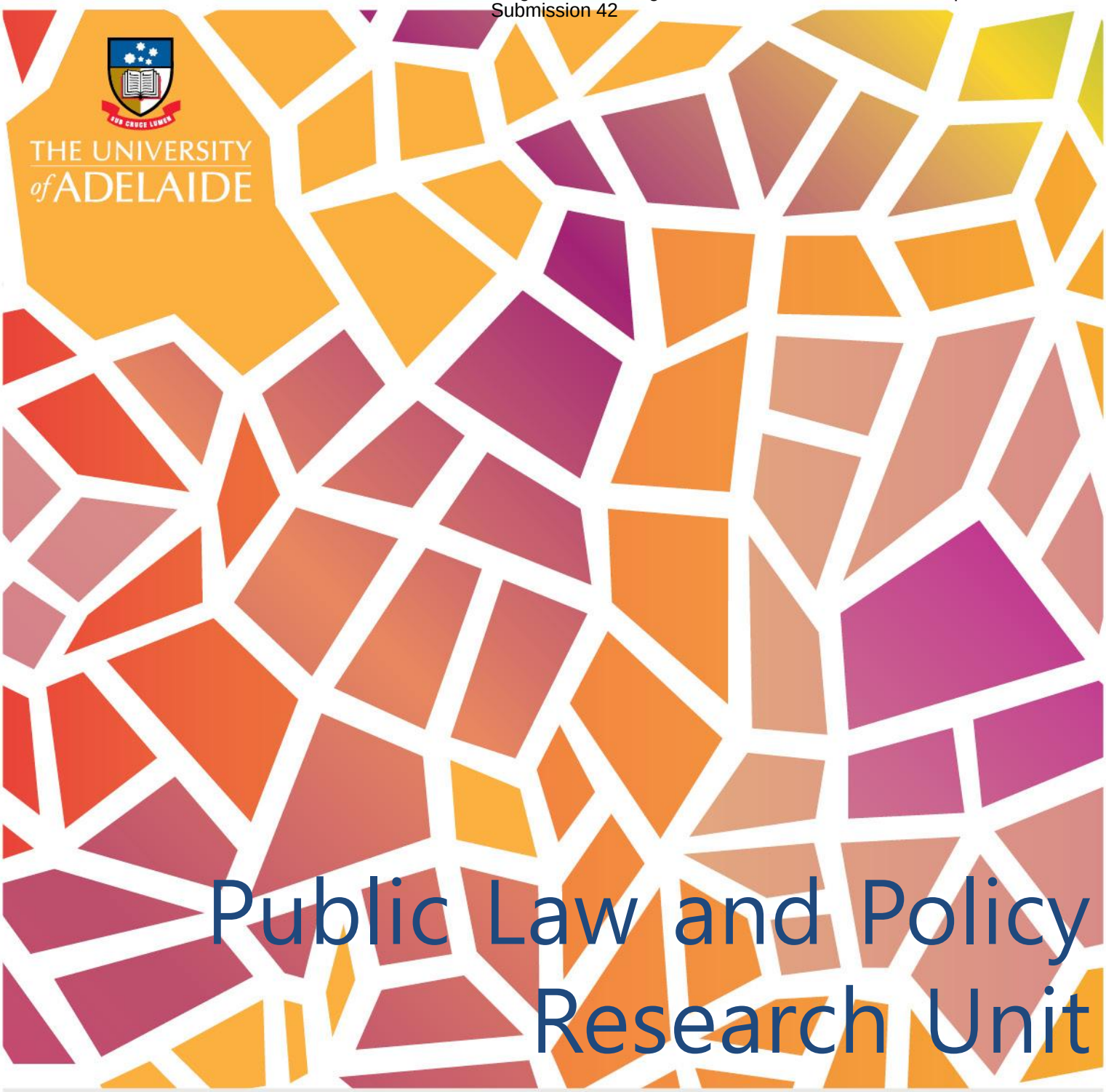

Public Law and Policy Research Unit

Submission to the Joint Select Committee on Constitutional Recognition for Aboriginal and Torres Strait Islander Peoples

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Outline of Submission

The Public Law and Policy Research Unit, University of Adelaide

The Public Law & Policy Research Unit at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.

The Public Law and Policy Research Unit brings a range of theoretical, comparative, international and interdisciplinary perspectives to its research and scholarship. It has a particular focus on the functioning of Australia's constitutional and political systems, government integrity and accountability, human rights and anti-discrimination law, environmental law, local government law and migration and refugee issues. The Research Unit facilitates and hosts seminars, workshops and conferences on these areas of law and policy, as well as coordinating submissions to government and parliamentary bodies on current issues. Our members are committed to active community engagement.

Basis of Submission and Importance of Indigenous Consultation

Our comments in this submission are based on our research in public law, and into Indigenous legal and policy issues in particular. None of us is Indigenous, and we have not consulted with Aboriginal and Torres Strait Islander Australians in making this submission. We offer these comments based on our experience as constitutional scholars, whilst emphasising that listening to and taking into account the voices of Aboriginal and Torres Strait Islander Australians is an indispensable element of the process of determining the model that will be put to the Parliament and the Australian people.

Introduction

We thank the Committee for the opportunity to make a submission on the form of recognition of Aboriginal and Torres Strait Islander peoples that should be included in the *Australian Constitution*. We support many of the conclusions of the Committee's *Interim Report*, including that s 25 should be repealed, and that the Expert Panel's proposed s 116A and s 127A should not be pursued.

Supporting the repeal of the races power s 51(xxvi), we recommend the insertion of Chapter IA into the *Australian Constitution*, containing s 60A which gives the Commonwealth power to make laws with respect to Aboriginal and Torres Strait Islander peoples subject to the guarantee that no Commonwealth, State or Territory law will adversely discriminate against Aboriginal or Torres Strait Islander peoples. We address the specific content of s 60A below, adopting a modified form of the model contained in Box 2 of the Committee's *Interim Report*.

Our submission is largely confined to the questions of the appropriate form of recognition, rather than advancing arguments in favour of such recognition generally. Nonetheless, we believe that the proposed recognition of Aboriginal and Torres Strait Islander peoples in the *Australian Constitution* is both essential and urgent. In addition to addressing a fundamental constitutional flaw, this reform has the potential to contribute to enhancing a sense of civic identity for both Aboriginal and Torres Strait Islander peoples and Australians more generally. A stable and complete sense of identity brings benefits including positive impacts on personality and wellbeing for individuals, and can contribute to increasing the impact of other measures taken to ameliorate disadvantage faced by Aboriginal and Torres Strait Islander Australians.

Repeal of s 25

We support the Committee's recommendation that s 25 of the *Constitution* be repealed. Even though the purpose of the section was arguably to punish those States whose electoral laws were racially discriminatory, the utility of the provision is spent. While s 25 remains in the

Constitution, the whole document is tainted by the fact that it envisages the possibility of racial disenfranchisement. Moreover, Aboriginal and Torres Strait Islander peoples were the chief victims of such discrimination. It is therefore appropriate to remove s 25 from the *Constitution*.

Declining to Proceed with Section 116A

We support the Committee's preliminary view that a separate, broad-ranging prohibition against racial discrimination such as that proposed in by the Expert Panel in the form of s 116A should not be pursued at this stage.

The proposed s 116A goes beyond the immediate concern of the proposed referendum: to recognise Aboriginal and Torres Strait Islander peoples within the constitutional document while ensuring that the federal Parliament has power to make laws that are, generally speaking, for the benefit of Aboriginal and Torres Strait Islander peoples. A more narrowly drawn non-discrimination provision within a newly drafted legislative power will address concerns (as far as is possible) that the Commonwealth Parliament has, in the past, used its legislative power over Aboriginal and Torres Strait Islander peoples in a detrimentally discriminatory way. As we indicate below, however, such a non-discrimination provision should apply to State and Territory laws as well as Commonwealth laws.

The breadth of the proposed s 116A means that its potential impact on federal, State and Territory legislative power is significant. In light of this impact, its inclusion should be accompanied by wide-ranging consultations with the Australian people, including the groups whom it protects, which includes but is not limited to Aboriginal and Torres Strait Islander peoples. In the time since the Expert Panel recommended s 116A, its wider scope and potentially wide interpretation by the courts to strike down legislation has caused public consternation. As such, we believe its inclusion is unnecessary, and may be detrimental to the success of this referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Declining to Proceed with Section 127A

We support the Committee's view that the Expert Panel's recommendation to include a languages provision in a new section 127A should not be pursued. The languages provision primarily recognises English as the national language and only secondarily recognises Indigenous languages.

It is important, conceptually, to separate the consideration of the constitutional status of English and the recognition of minority language rights. Language plays a complex role in the formation of the nation. Promoting a national language is aimed at promoting national unity

and enhancing the political and economic participation of individuals in the state, whereas protecting minority languages is aimed at recognising linguistic diversity, enriching the cultural life of the state, maintaining connections with other nations, and recognising language choice as a basic human right.

There are symbolic and substantive reasons to reject a provision which recognises English as the national language. These are discussed at length in an article in the *Federal Law Review* by one of us.[1] While constitutionalising English has a superficial appeal as acknowledging the 'existing and undisputed position'[2] of English in Australia, and as 'contribut[ing] to a more unified and reconciled nation',[3] it sends the wrong message in our increasingly multicultural society. Although the Expert Panel found that the recognition of English as Australia's national language was popular, this popularity may well be based on an intolerance of difference and diversity.

We agree with the Committee that the languages provision is likely to be interpreted as declaratory only and thus does not directly empower the Parliament to pass laws relating to language use. However, we submit that the constitutional status of a language can encourage law makers to promote the official language in a way that might directly disadvantage minority groups, including Aboriginal and Torres Strait Islander peoples, such as requiring schooling in the national language.

While we submit that there is a strong case for recognising minority languages in the Constitution, this should be pursued separately from the recognition of Aboriginal and Torres Strait Islander peoples in the current referendum proposal.

In the current referendum proposal the recognition of the value of Indigenous languages is best achieved through their acknowledgment in the preamble to a new substantive power as outlined in Box 1, 2 and 3 of the Committee's *Interim Report*.

Repeal of s 51(xxvi) and Insertion of s 60A

We support the repeal of s 51(xxvi) and the consequent insertion of a new chapter of the Constitution giving the Commonwealth power to make laws with respect to Aboriginal and Torres Strait Islander peoples, subject to the guarantee that no Commonwealth, State or Territory law will adversely discriminate against Aboriginal or Torres Strait Islander peoples.

[1] Alexander Reilly, 'Confusion of Tongues: Constitutional Recognition of Languages and Language Rights in Australia' (2013) 41 *Federal Law Review* 333.
[2] Report of the Expert Panel, 131.
[3] Report of the Expert Panel, 132.

We recommend the insertion Chapter 1A Aboriginal and Torres Strait Islander Peoples, containing s 60A, as follows:

> **60A 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, or by a State or Territory, shall not discriminate adversely against them.[4]

We note that consideration should be given, in the drafting of the replacement legislative power, to the matter of ensuring the continuing validity of legislation passed under the races power s 51(xxvi) after it has been repealed and replaced by s 60A. It is possible that at least part of the reasoning of Dixon J in *Victorian Stevedoring Co Pty Ltd v Dignan* might apply,[5] with the result that it will be important in the final drafting of the replacement legislative power to ensure that the validity of existing laws is saved.

We make the following observations about the content of our proposed s 60A.

[4] We are aware of the possibility of inserting an additional paragraph, perhaps as sub-s (3) to the effect that 'Sub-section (2) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of the same peoples'. In our view it is likely that such a result would follow from the interpretation of the provisions indicated above; however, we acknowledge that there may be arguments in favour of expressly providing for this.

[5] 'In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only the enactment, but upon the continuing operation of the statute by which it is so authorised … with the result that with the repeal of the statute the regulation fails': (1931) 46 CLR 73, 103. Furthermore there is authority to suggest that a power which is relied on to support a law must be capable of supporting the law when it was first passed. See: *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 192, 268. This does not prevent the passage of anticipatory legislation being supported by a power which subsequently comes into being, but only if, and when, the operation of the legislation is postponed or suspended until the new power comes into being. See eg: *R v Judges of the Australian Industrial Court; Ex p CLM Holdings Pty Ltd* (1977) 136 CLR 235, 243.

A New Chapter, Not a Preamble

We support the inclusion of the provision to provide recognition of Aboriginal and Torres Strait Islander peoples and the special legislative power and non-discrimination provision in a separate chapter. In our view, it is inappropriate to put any part of this in a preamble to the Constitution - the statement of recognition is linked to the special legislative power and non-discrimination provision (and must therefore not be separated from it), and a preamble is not an acceptable place to deal with legislative power.

Chapter I, The Parliament, is concerned with the structure, processes and powers of the Commonwealth Parliament. While the proposed provision does include a federal legislative power, its fundamental purpose is to provide a statement of recognition for the Aboriginal and Torres Strait Islander peoples of Australia. By including the provision within Chapter I, this underlying purpose risks being lost.

We therefore recommend that the provision is included as a new Chapter. However, in our view Chapter IIIA would be misplaced. Instead, it should be included in Chapter IA, immediately after Chapter I, as this recognises the provision's dual objectives of recognition and conferral of legislative power.

The Importance of Recognition: Why Boxes 4 and 5 are Unacceptable

In our view, both boxes 4 and 5 are unacceptable in that they contain no recitals recognising Aboriginal and Torres Strait Islander peoples as the first Australians, no acknowledgement of their continuing relationships to country or languages, and no indication of respect for their cultures and heritage. These forms of recognition are, in our view, absolutely essential in any provision inserting a new power for the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples.

The Third Recital

We support the inclusion of the recitals within the legislative power (as seen in Boxes 1, 2 and 3). We have a strong preference for third recital as it appears in Box 2:

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

'Respecting', when compared with the term 'recognising' that is used in Boxes 1 and 3 for this recital, better reflects the underlying purpose of the provision. Recognition imports notions of acknowledgement and acceptance; respecting imports notions of esteem, acclaim and admiration of culture and heritage, which in turn imply the need for actions that preserve and promote them. The better word in the third recital is therefore 'respecting'.

A Prohibition of Adverse Discrimination

In our view, it is appropriate that the legislative power to make laws with respect to Aboriginal and Torres Strait Islander peoples include a prohibition of adverse discrimination under such laws in the form proposed in our s 60A(2). It is commonly accepted that the existing races power (s 51(xxvi)) permits laws which adversely discriminate on the basis of race.[6] Sadly, throughout our history, there have been times when Aboriginal and Torres Strait Islander peoples have suffered from legislative discrimination. In order for the repeal of s 51(xxvi) to mean something, it must not be replaced with a power that – like the present measure – contains no protections against adverse discrimination for Aboriginal and Torres Strait Islander peoples. Without any form of protection for Aboriginal and Torres Strait Islander peoples, it is hard to see what benefit arises from the repeal of s 51(xxvi) if it is to be replaced with a new legislative power to make laws with respect to Aboriginal and Torres Strait Islander peoples that similarly permits adverse discrimination. By conditioning the new legislative power with a guarantee against adverse discrimination, the purpose of the Constitutional amendment is made clear. This creates a coherence and logic to the proposed s 60A, and removes any capacity for the circuitous undermining of the purpose of the Constitutional reform.

We thus agree with Dixon and Williams that 'a replacement power should *not enable the enactment of laws that discriminate on the basis of race*'.[7] In order to achieve this, we further agree that there must be not only a new legislative power but also a protection against adverse discrimination, resulting in a new section of the Constitution which is 'both a power and a guarantee'.[8]

Once this proposition is accepted, there naturally arises a question as to the scope of the prohibition of (or guarantee against) adverse discrimination. In our submission, the wording adopted in Box 2 is suitable, in that it makes it clear that the prohibition of adverse discrimination operates at any point in which the *Constitution* supports the enactment of laws with respect to Aboriginal and Torres Strait Islander peoples ('whether enacted under this section or under any other provision of the Constitution').

Further, the proposed s 60A makes plain what would otherwise be a matter of implication, namely that the prohibition of adverse discrimination applies not only to the new section but to

[6] See eg *Kartinyeri v Commonwealth* (1998) 195 CLR 337. But see: Geoffrey Lindell, 'The Constitutional Commission and Australia's First Inhabitants: Its Views on Agreement-Making and a New Power to Legislate Revisited' (2011) 15(2) *Australian Indigenous Law Review* 26, 36-7.
[7] Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 83, 83 (emphasis in the original).
[8] Ibid 87.

laws made under any other provision of the Constitution.[9] For this reason, Box 2 is to be preferred to Box 1 where the limiting effect of the proposed section is not express but relies instead on an implication which could leave some ambiguity around its scope.

It is also important to note that Box 2, while it clarifies the scope of the guarantee, does not reintroduce a free-standing prohibition against discrimination, as had initially been suggested under section 116A. It is quite clear that the prohibition of adverse discrimination only applies when there is a law 'specially applicable to Aboriginal and Torres Strait Islander peoples.' This ensures that there can be no legitimate claim of over-reaching into areas other than the treatment of Aboriginal and Torres Strait Islander peoples under the *Australian Constitution*.

In summary, our proposed s 60A, emulating the model in Box 2, provides a logical connection between the new legislative power and a guarantee against adverse discrimination which is expressly stated (rather than implied) but is clearly limited to laws 'specially applicable' to Aboriginal and Torres Strait Islander peoples. Thus, it does only what is necessary to secure the full effect and purpose of the Constitutional reform.

The Prohibition of Laws which Adversely Discriminate against Aboriginal and Torres Strait Islander Peoples Should Extend to the States and Territories

Insofar as the Expert Panel's proposed s 116A prohibited adverse discrimination against Aboriginal and Torres Strait Islander peoples by the Commonwealth, State and Territory, we believe that it provides greater protection for Aboriginal and Torres Strait Islander peoples than a non-discrimination clause purely applicable to federal legislative power such as that proposed in the various boxes contained in the Committee's *Interim Report*. We suggest that the Committee consider including a prohibition on State and Territory laws that adversely discriminate against Aboriginal and Torres Strait Islander peoples within the non-discrimination provision in a federal power.

We believe this proposal is consistent with the fundamental recognition objectives of the referendum. It will protect against the States and Territories undermining the protection provided by the non-discrimination provision. This will also prohibit the Commonwealth from funding State programs and schemes under s 96 of the Constitution that may discriminate adversely against Aboriginal and Torres Strait Islander peoples. It is not otherwise entirely certain that a non-discrimination provision attached to a federal power would limit the Commonwealth from making grants to the States to fund discriminatory schemes under s 96.

[9] As Dixon and Williams have said, this is analogous to the banking power, and the High Court 'has held that the words other than State banking in s 51(xiii) impose a restriction upon federal legislative power generally, rather than a restriction only on the scope of s 51(xiii)': ibid 87-8, citing *Bourke v State Bank (NSW)* (1990) 170 CLR 276.

Legislative Powers: Persons, Subject-Matter and Purposive

The above analysis deals with one of three relevant options for describing a legislative power in the Constitution. It proposes a power to make laws with respect to particular persons (in this case Aboriginal and Torres Strait Islander peoples). In order to address the potential for a persons power to be extremely intrusive from the perspective of the persons to whom it relates, and in view of the particular historical experience of Aboriginal and Torres Strait Islander peoples, we recommend inserting a prohibition on adverse discrimination.

Two alternative means of describing the relevant legislative power have been proposed. One option would be to draft a 'subject-matter' power. This would give Parliament less scope for passing laws, because they would have to relate not simply to Aboriginal and Torres Strait Islander peoples, but to some particular topic relevant to Aboriginal and Torres Strait Islander peoples. The disadvantages of a subject-matter power include that the subjects specified may not cover all areas in which the Parliament might legitimately wish to legislate, and that within the specified topics it offers no protection from adverse discrimination.

A second option would be to have a 'purposive' power. This would be an attempt to identify a middle ground. A purposive power would be more flexible than a subject-matter power, giving Parliament greater scope to pass laws with respect to Aboriginal and Torres Strait Islander peoples. However, a purposive power would also be more restrictive than a subject-matter power, in that it would introduce judicial scrutiny to ensure that laws passed under such a power are 'reasonably appropriate and adapted' to achieving the purpose.

For the reasons that follow, we believe that the best approach is a power to make laws with respect to Aboriginal and Torres Strait Islander peoples which is conditioned by a prohibition on adverse discrimination. In our submission, this approach is superior to either creating a subject-matter or purposive power.

A Prohibition on Adverse Discrimination is Better than a Subject-Matter Power

The model proposed in Box 3 offers an alternative to a prohibition on adverse discrimination such as contained in Boxes 1, 2, 4 and 5. Reflecting an approach suggested by Professor Anne Twomey, Box 3 aims to draft the replacement legislative power as a subject-matter power to make laws 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'. The intention behind drafting the power as a subject-matter

power is to offer some limit on the possible Commonwealth laws that would be passed and to avoid the problem of the hypothetical 'no Aboriginal or Torres Strait Islander person shall' law.

In our view, there are two significant failings of the subject-matter power approach. First, the subject-matter power is inherently at risk of failing to identify all of the different contexts in which the Commonwealth might have a legitimate wish to pass laws with respect to Aboriginal and Torres Strait Islander peoples. As an example, the proposed subject-matter powers covers 'cultures, languages and heritage' and 'relationship [to country]'. It is entirely possible that such a power would not be interpreted to permit laws on such matters as addressing socio-economic disadvantage, Aboriginal and Torres Strait Islander health, political representation, self-government or self-determination of Aboriginal and Torres Strait Islander peoples. Thus, there is a risk that a subject-matter power will fail to give the Commonwealth sufficient legislative power with respect to Aboriginal and Torres Strait Islander peoples.

Second, in our view a subject-matter power fails to offer any protection to Aboriginal and Torres Strait Islander peoples in light of their past experience of legislative discrimination. Although it may narrow the range of topics on which the Commonwealth Parliament can make laws with respect to Aboriginal and Torres Strait Islander peoples, within those topics it offers no protection.

Thus, in our view the subject-matter power approach is inferior to the approach of including an express prohibition of adverse discrimination.

A Prohibition on Adverse Discrimination is Better than a Purposive Power

One alternative approach not directly considered in the Committee's Interim Report, but advocated by Professor Anne Twomey in the same paper as her suggested subject-matter approach, is to frame the power to make laws with respect to Aboriginal and Torres Strait Islander peoples as a purposive power. Thus, Professor Twomey has suggested wording the legislative power so as to permit laws:

> 'with respect to the purpose of preserving, protecting or supporting Aboriginal and Torres Strait Islander heritage, cultures and languages and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters'.

Taking into account the observations we have made above regarding the subject-matter power, in our view a more comprehensive description might be given such as 'with respect to the purpose of supporting Aboriginal and Torres Strait Islander peoples'.

A purposive power offers a middle ground. Laws under a purposive power are scrutinised by the High Court more rigorously than laws under a subject-matter power through the application of a test that requires laws to be 'reasonably capable of being considered appropriate and adapted to achieving the purpose or object'.[10] This level of scrutiny is, however, less than would apply to an express prohibition of adverse discrimimation.

The advantage of a purposive power, assuming it is carefully drafted, is that it will respond to any community reluctance to see the High Court enforce the prohibition of adverse discrimination which we support. However, there is a critical disadvantage of such a power. In our view, it offers insufficient protection to Aboriginal and Torres Strait Islander peoples, particularly given their experience of legislative discrimination in the past.

In our submission, the purposive power approach should not be adopted. Instead, a prohibition of adverse discrimination should be included such as that appearing in our proposed s 60A(2).

Constitutional Problems with Box 5

The proposed provision in Box 5 purports to require the federal Parliament, under the new legislative power, to enact an Act of Recognition. In theory, this proposal would achieve a positive statement of recognition, but also allow flexibility in its enactment and change through normal parliamentary process. We do not support this proposal for two reasons: one symbolic and the other constitutional.

Symbolically, we believe a parliamentary Act of Recognition would provide insufficient recognition to the history and place of Aboriginal and Torres Strait Islander peoples in the Australian community. Its adoption by Parliament rather than by the people through referendum demotes its status to just another statute. Further, constitutional recognition enjoys greater certainty and longevity, as an Act of Recognition is subject to amendment through the ordinary parliamentary processes.

Constitutionally, we are uncertain that the provision would be enforceable against Parliament. If Parliament did not take steps to enact the Act of Recognition, or if there was dispute as to whether a statute met the requirements of an 'Act of Recognition', it is unclear whether there would be avenues for redress beyond public and political pressure.

For an individual or group to bring an action in the High Court they must show 'standing', or a real and sufficient interest in the case. Under a strict interpretation of this requirement, it

[10] *Victoria v Commonwealth* (1996) 187 CLR 416, 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

would be difficult to identify a person or group of persons with a sufficient interest so as to be able to bring a case before the High Court to enforce the provision. It may be that an Aboriginal or Torres Strait Islander person may have a sufficient interest in the enactment of the Act of Recognition. The High Court has more recently been less strict about requiring a material interest to establish standing, and has allowed challenges by those who may receive a benefit under the challenged legislation.[11] The States may have standing to bring a case to enforce the proposed provision, as the Court has held that they have an interest in enforcing the Constitution on behalf of the people of their State.[12] This would require political inclination on the part of a State to commence an action. However, the States' standing gives rise to further possibilities. First, a State Attorney-General may grant his or her 'fiat' to an individual to bring an action on behalf of the State. Second, the High Court in *Williams v Commonwealth* allowed a challenge where the States had intervened in the matter in support of the plaintiff, and therefore, Gummow and Bell JJ explained, 'questions of standing may be put to one side.'[13]

Even if standing could be established, the High Court may refuse to hear the matter on the basis that it is unsuitable for determination by a court, that is, it is 'non-justiciable'. In the past the Court has been reluctant to enforce constitutional provisions that relate to the workings of Parliament on the ground that it will not interfere with the functioning of the other branches of government.[14] Courts have also refused to enforce obligations that require 'polycentric' decisions: decisions that turn on the consideration and balancing of competing policy interests.[15] We believe there is a risk that the High Court may refuse to entertain a challenge to Parliament's failure to enact an Act of Recognition or a challenge to whether a statute meets the requirements of an 'Act of Recognition' on either of these bases.[16]

Finally, there would be a question as to what remedy would lie against Parliament. How would the Court require Parliament to enact the Act of Recognition, or to reenact a statute if it is found not to meet the requirements of an Act of Recognition? Administrative law presently provides for remedies if government officers or inferior courts fail to meet their legal duties. A writ of certiorari will quash a decision incorrectly made; a writ of mandamus will require the officer or court to make a decision or take an action. However, these writs have never previously been extended to Parliament. To enforce the proposed provision, the Court would have to extend

[11] See, eg, approach of the judges in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.
[12] See further *Attorney-General (NSW); ex rel Tooth & Co Ltd v Brewery Employees' Union of New South Wales* ('*Union Label Case*') (1908) 6 CLR 469, 557 (Isaacs J); *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 330 (Isaacs CJ).
[13] (2012) 248 CLR 156, 223 (Gummow and Bell JJ).
[14] *Thomas v Mowbray* (2007) 233 CLR 307, 354. See also *Osborne v Commonwealth* (1911) 12 CLR 321.
[15] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 279 (Bowen CJ).
[16] Some comparison may be drawn to s 15 of the *Australian Constitution* which casts obligations on State Parliaments to fill casual vacancies in the Senate. However, there is an incentive to exercise those powers (through being deprived of a Senator in the interim), and we are not aware of any suggestion that such action could be compelled by mandamus or other relevant remedy.

traditional administrative law remedies or create a new remedy previously unknown to Australian constitutional law.

It is possible that if Parliament fails to enact an Act of Recognition, despite the constitutional duty in the proposed provision, the Court would refuse to hear the matter, or provide a legal remedy. Despite the constitutional mandate, the Act of Recognition may never exist. There is precedent for this. Section 101 of the Constitution provides: 'There shall be an Inter-State Commission'. After Federation, the Parliament enacted legislation creating an Inter-State Commission. However, in 1915 it was largely stripped of its powers by the High Court and it was dismantled in 1920. It was briefly reestablished in the 1980s, but in 1989 it was again dismantled. Today, despite s 101 mandating its existence, Parliament has made no provision for an Inter-State Commission.

Given the constitutional difficulties of enforcing the proposal in Box 5 we do not recommend its adoption.

Conclusion

In our submission, the most appropriate model is our proposed s 60A to be inserted in Chapter IA of the *Australian Constitution*. We support the Committee's view in its Interim Report that s 25 of the *Constitution* should be repealed. We support the Committee's view that the proposed s 116A and s 127A are unnecessary. We support the repeal of the races power (s 51(xxvi)).

We support the introduction of a new power to make laws with respect to Aboriginal or Torres Strait Islander peoples. This power should be contained in a new Chapter of the *Constitution*, which should appear after Chapter I and thus be Chapter IA. This Chapter should commence with the proposed clauses of recognition. It should then grant a legislative power to make laws with respect to Aboriginal and Torres Strait Islander peoples. That power should be accompanied by a prohibition of adverse discrimination in laws specially applicable to Aboriginal and Torres Strait Island peoples, whether they are Commonwealth laws (under this new power or any other provision of the *Constitution*) or laws of a State or Territory.