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Ms Toni Matulick
Committee Secretary
Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples
Parliament House
Canberra ACT 2600

Dear Ms Matulick

You have asked for my advice in regard to the following proposed replacement to section 51(xxvi) of the Constitution:

> **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, and within this power must enact and maintain an Act of Recognition.

My answers to your specific questions are below. I preface my answers by saying that there is no precedent for such a provision in the Australian Constitution. As a result, the proposed section gives rise to novel legal questions about which there is significant uncertainty.

1. **Can the Commonwealth Constitution be amended in such a way as to require the further enactment of legislation by the Parliament (an Act of Recognition)?**

There are few, if any, limits on what the Constitution can be altered to provide. This is because section 128 the Constitution provides an open-ended mechanism for change. The question then is not whether such an amendment is possible, but whether it is an appropriate change to the Constitution. The following analysis of the legal aspects of such a replacement

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power may help to inform such an assessment. It suggests that the proposed wording would be unwise.

The Australian Constitution authorises the making of laws by Parliament. It does not mandate which laws must be enacted. It is recognised that this should be a matter for Parliament itself. This is an expression of the concept of parliamentary sovereignty.

On occasion, the Constitution recognises that Parliament may wish to enact a law on a specific subject. However, it does not mandate the passage of such a law. Instead, it sets out what the legal position shall be 'until the Parliament otherwise provides'. For example, section 10 of the Constitution states:

> Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

Stating in the Constitution that Parliament must enact a law on a particular topic could give rise to problems and uncertainties. For example, it is not clear what should occur if a majority of members do not support the enactment of an Act of Recognition, or a majority of members simply cannot agree on what form that Act should take.

The proposed section also does not indicate what an Act of Recognition is. The term does not have any clear meaning in Australian or comparative constitutional law. It presumably means that Aboriginal and Torres Strait Islander peoples must in some way be recognised by legislation, but beyond that nothing can be said. Such matters would presumably be left to Parliament to determine. It may be that legislation would be sufficient that does no more than provide mere lip service to the constitutional requirement, such as by stating only that 'Aboriginal and Torres Strait Islander peoples are hereby recognised'.

The proposal also gives rise to some difficult questions in relation to the separation of powers. These arise in the context of the enforcement or the proposed section. Even though the requirement to enact an Act of Recognition is expressed in mandatory terms, it is not clear that this could be enforced.

The High Court has traditionally not interfered in the internal workings of Parliament. As a result, it has said that it will not rule upon sections of the Constitution that deal with 'proposed laws', such as section 53 which states that 'Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate'. The enforcement of section 53 is left to Parliament itself.

The proposed section raises a more difficult case. It specifies the finished product of the legislative process, an Act of Recognition, which in accordance with the normal approach of the High Court could be the subject of judicial attention. For example, a person might seek a declaration from the Court compelling the enactment of an Act of Recognition. Or, a person might seek a declaration from the Court that legislation enacted by Parliament does not fit the description of an Act of Recognition.

Such litigation is conceivable, though questions would arise as to who would have the standing to bring such a case. It might be that the High Court would regard an Aboriginal and Torres Strait Islander person or group as having the right to bring such a case. Even if

such a case were brought, the High Court may be reluctant to second-guess Parliament in this area.

In all likelihood, it would be extremely difficult to enforce the requirement that there be an Act of Recognition. There is no precedent for the High Court directing Parliament to act, though it must be said that this is in the absence of any like clause in the Constitution.

The closest that the Constitution comes to imposing such an obligation on Parliament is as follows:

> **101. Inter-State Commission** There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

It is instructive that, despite the mandatory nature of this provision, and the implicit direction to Parliament to act in this regard, Australia has not had an Inter-State Commission for many years.

2. **If the Constitution can be amended to require the enactment of an Act of Recognition, what would be the status of that Act? For example, how and when would the Parliament be able to amend that Act?**

In areas where the Parliament enacts legislation under the Constitution in accordance with the words 'until the Parliament otherwise provides', the resulting statute is merely an act of Parliament. It has no special constitutional significance, other than it being legislated in accordance with the relevant section of the Constitution. There is no doubt about the capacity of Parliament to alter such a statute.

The status of an Act of Recognition would be different, reflecting its quasi-constitutional status. First, Parliament will not have its normal right to repeal the Act. This is because the section says that such an Act must be maintained. Any attempt to merely repeal an Act of Recognition could be subject to being struck down by the High Court.

Second, amendments to the Act of Recognition might be challenged in the High Court on the basis that they alter the Act so that it no longer answers the description of an 'Act of Recognition'. It may be that the High Court shows considerable deference to Parliament in determining what Act of Recognition is, but nonetheless the Court has repeatedly indicated that it is the final arbiter of the meaning of constitutional terms. Hence, any attempt to amend the Act of Recognition so that the Act no longer fits the constitutional description might be subject to constitutional challenge.

3. **What effect, if any, would an Act of Recognition have on future constitutional interpretation?**

Ordinarily, legislation enacted in accordance with the Constitution does not itself impact upon interpretation of that document. It is not clear whether this would be the case for an Act of Recognition, due to its unusual status. It is possible that the Court might view the Act of Recognition as a quasi-constitutional instrument that justifies greater reference to it in constitutional interpretation, statutory construction and common law development

4. **If the proposed Act of Recognition prohibited discrimination by the Commonwealth, State and Territory legislatures in making laws about Aboriginal and Torres Strait Islander peoples, would the Act have an invalidating or limiting effect on other Commonwealth, State and Territory laws or executive action?**

It is not clear that an Act of Recognition can prohibit discrimination in this way. The term 'Act of Recognition' is not defined, but it might be taken to mean no more than symbolic recognition, rather than laws including substantive legal provisions.

In any event, it is likely that such an Act would have the same operation as other federal legislation, such as the *Racial Discrimination Act 1975*, in overriding inconsistent State and Territory statutes. Such inconsistency is provided for in the case of State statutes by section 109 of the Constitution.

The effect of the Act of Recognition on Commonwealth legislation is less clear. Ordinarily, federal legislation is able to amend prior federal Acts without restraint, subject only to the general limitations of the Constitution. This may not be possible here, if only because future legislation could not expressly or impliedly alter the Act of Recognition such that it no longer fits the description of an 'Act of Recognition' mandated by the Constitution. It may even be that the High Court develops a broader principle consistent with the quasi-constitutional status of the Act that means it cannot be subject to any form of implied repeal.

5. **Are there other Commonwealth laws that have a similar status to the proposed Act of Recognition?**

No.

Yours sincerely

George Williams