

Summary of discussion with on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution

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With

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Summary

We agree with the proposal to repeal sections 25 and 51(xxvi).

We recommend:

- That any amendments to the Constitution to recognise Aboriginal and Torres Strait Islander peoples be included in a new Chapter to the Constitution;
- That the new Chapter include
 - A preamble, encompassing the first three statements of proposed s 51A and a stronger statement on the recognition of Aboriginal and Torres Strait Islander languages using the words of proposed s 127A; and
 - A power to make laws be framed in purposive terms. The purpose should either be “advancement of Aboriginal and Torres Strait Islander Peoples” or be expressed with words adapted from proposed s 116A.

Recommendation 1: The Creation of New Chapter in the Constitution

We recommend that any amendments to the Constitution be included in a new Chapter (Chapter IIIA) to be entitled “Aboriginal and Torres Strait Islander Peoples”.

The creation of a new chapter would have the following benefits:

- It would simplify the proposal;
- It would make it easier for the proposal to be put to referendum in a single question;
- It would be an appropriate recognition of the importance of Aboriginal and Torres Strait Islander Peoples in the Australian polity.

Recommendation 2 : A Statement of Recognition in the New Chapter

We recommend that the New Chapter commence with a preamble that would reproduce section 51A as currently proposed.

The preamble would retain the important symbolism of the words of recognition but reduce the awkward placement of significant symbolic words in Chapter I Part V which is concerned with the powers of the Parliament.

Recommendation 3: Section 51A Reframed as a Purposive Power

We recommend that the proposed s 51A be reframed purposively as a power to make laws for one of the following objectives:

“The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth for the purpose of the advancement of Aboriginal and Torres Strait Islander people;”

OR

“The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of Aboriginal and Torres Strait Islander Peoples.”

While the first is a viable option, on balance, we recommend the second alternative. In our view it is not likely that the proposed s 116A will ultimately be included in any referendum proposal. This proposal retains an important element of s 116A by clarifying that the Commonwealth has power to make laws addressing past discrimination and protecting Aboriginal and Torres Strait Islander cultures and heritage.

We recommend, in addition, the inclusion of a second subsection which would make it clear that no other power could be used to make laws of special application to Aboriginal and Torres Strait Islanders. This subsection should prevent the use of powers like s 122 to overcome the protection conferred by repealing s 51(xxvi) and replacing it with the new s 51A.

Recommendation 4: Section s 127A reframed as a statement of recognition

We recommend that the proposed new language provision of s 127A be omitted and a stronger statement about the recognition of Aboriginal and Torres Strait Islander languages be incorporated into the preamble.

This proposal appropriately recognises the essentially declaratory effect of the provisions of s 127A, which is better suited to preambular words than a distinct section. It also avoids concerns that the section (particularly s 127A (1)) could have unintended and potentially regressive consequences.

Conclusion

In conclusion, we propose the following new Chapter for inclusion in Constitution:

Chapter IIIA Aboriginal and Torres Strait Islander Peoples

Section 80A

- (1) 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;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of Aboriginal and Torres Strait Islander Peoples.

- (2) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander Peoples.