

Prohibiting discrimination

1. What is the proposal?

This option would add a new section to the Constitution to prohibit discrimination against Indigenous Australians on the grounds of race.

The most recent proposal for a provision of this kind was made by the Expert Panel on Constitutional Recognition of Indigenous Australians, which suggested a new section, as follows:

116A Prohibition of racial discrimination

- (1) The Commonwealth, State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) 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, language or heritage of any group.

A section like this is aimed at discrimination by the governments or Parliaments of the Commonwealth and the States and Territories. It applies to discrimination against anyone on the grounds of race. It would be interpreted by the High Court and enforced through courts.

2. Some issues to consider?

- Sections like this need to be carefully written to ensure that governments and Parliaments can act in ways that benefit Indigenous Australians specifically, where that is justified. Section 116A (2) seeks to do this.
- It can be hard to write a section clearly enough to allow beneficial action but prevent all other forms of discrimination.
- The section recommended by the Expert Panel would prohibit discrimination against anyone on the grounds of race and would not be confined to Indigenous Australians alone.
- The section recommended by the Expert Panel deals only with discrimination on the grounds of 'race, colour or ethnic or national origin'. It would not deal with discrimination on grounds of, e.g., religion or gender.

3. What are some of the arguments in favour of this option?

- Indigenous Australians have suffered from very significant discrimination over time. It would be appropriate for the Constitution to prohibit discrimination for the purposes of recognition.
- A constitutional prohibition of racial discrimination would provide protection even if the Commonwealth Parliament decided to suspend the Racial Discrimination Act, as it has sometimes done in the past.

4. What are some of the arguments against?

- It is hard to predict how a section like this would be interpreted by the courts over time.

- This would be an unusual provision in the Australian Constitution, which provides very little protection of this kind for rights.

5. What do you think?

- Is this option worth considering for the purposes of recognition?
- Should it apply to everyone, or just to Indigenous Australians?
- What kinds of discrimination against Indigenous Australians should be prevented by a section like this? Give some examples.
- What kinds of positive action by governments, which single out Indigenous Australian, should be saved from a section like this? Give some examples.
- What do you think are the main reasons for and against a constitutional prohibition of racial discrimination?
- Is there anything else you need to know about this option?