

HEAD OF POWER

1. What is the proposal?

This option would amend or delete and replace the power that the Commonwealth relies on to make laws for Aboriginal and Torres Strait peoples.

The present power is in section 51(26), which states:

Section 51 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 for whom it is deemed necessary to make special laws.

As a result of the 1967 referendum, the power extends to Indigenous Australians as a 'people of any race'. The section has been interpreted to allow laws that discriminate in a positive and negative way against Indigenous people.

Suggestions have been made to change the existing power. These emerged after a High Court decision that found it is likely the power can be used to support negative laws that discriminate against Aboriginal people. This is because the Commonwealth is not bound by the Racial Discrimination Act. The expert panel combined a new head of power with a racial non-discrimination clause. Without a prohibition on racial discrimination, the race power is vulnerable unless the amendment requires that the Parliament can only make laws for the benefit or advancement of Indigenous peoples. This might be done by amending the existing power or taking it out of the Constitution and replacing it with another head of power.

2. Some issues to consider

- Section 51(26) has some symbolic significance, because it was the outcome of the 1967 referendum. However the High Court decision in Hindmarsh has taken away some of that gloss because the changes in 1967 have been interpreted as likely to permit racially discriminatory laws that are to the detriment of Indigenous peoples.
- It is necessary to write the power in a way that enables the Commonwealth to make laws for positive purposes but not to discriminate adversely against Indigenous peoples. This is a complicated legal drafting exercise. Also, there may not be political will to do so.
- For this reason, there is a link between this option and the option of adding a section to the Constitution that prohibits racial discrimination.

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

- The existing power needs to be changed because it can be used to the detriment of Indigenous peoples. However this cannot be guaranteed in any drafting.
- The primary argument for amending the race power by politicians is not that the power is discriminatory but that it contains the word 'race'. It is not appropriate to legislate for Indigenous Australians by reference to race. There is no case for legislating for non-Indigenous groups by reference to race.

4. What are some of the arguments against?

- The power in section 51(26) has historical and symbolic significance and should not be removed from the Constitution.
- It will be hard to write any power in a way that ensures it will be used for the benefit or advancement. Ultimately what a power means is up to the High Court.
- Despite the decision in Hindmarsh where the High Court found it may be used for detrimental discriminatory purposes, there is an established jurisprudence of the High Court over many years relating to s 51 (26).
- There are questions about whether one abandons the power as currently amended in 1967 for a new power that is unknown territory and unpredictable as to what it means until after there is High Court litigation.
- The power as currently drafted has a wide scope. Any proposal to amend or delete and inset a new power risks limiting the scope of the power.
- Aboriginal and Torres Strait Islander peoples can achieve much of their political aspirations under the current race power from treaties to representative bodies. The issue is not lack of legal power, it is lack of political will.
- The primary motivation for amending the race power appears to be the use of the word 'race' not the discriminatory impact of the power. Removing the word 'race' does not remove the potential for discriminatory legislation.

5. What do you think?

- Is this option worth considering for the purposes of recognition?
- Should the existing power be changed or replaced altogether?
- Should the power apply only to Indigenous Australians?
- For what purposes should a power to make laws for Indigenous Australians be used? Give some examples.
- What should be the limits on a power to make laws for Indigenous Australians?
- Should section 25 be removed from the Constitution?
- Is there anything else you need to know about this option?