Vote YES to end racial discrimination: Submission to the Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians

30 September 2011

Vavaa Mawuli, Senior Solicitor

Gemma Namey, Solicitor

Jessica Roth, Law Graduate

Laura Brown, Solicitor

Edward Santow, Chief Executive Officer

Level 9, 299 Elizabeth Street, Sydney NSW 2000 • DX 643 Sydney
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work relevant to the consultation

PIAC welcomes this opportunity to make a submission to the Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians. PIAC has worked extensively to promote the rights of, and access to remedies for, Aboriginal and Torres Strait Islander people who have suffered harm as a result of discriminatory laws, practices and policies. PIAC's work has focused on discriminatory laws that permitted the forced removal of Aboriginal and Torres Strait Islander children from their families and those that deprived Aboriginal people in NSW of their wages and other entitlements. As a result of this work, PIAC is acutely aware of the devastating impact of discriminatory laws on Aboriginal and Torres Strait Islander people and the ongoing intergenerational disadvantage to which this contributes.

PIAC's submission focuses on the issues in the Panel's discussion paper that deal with proposed constitutional reforms to promote equality and non-discrimination. While PIAC does not seek to extensively address the reform proposals in the discussion paper in relation to a statement of values or recognition, PIAC generally supports the proposal for a statement of values or recognition, which appropriately recognises Aboriginal and Torres Strait Islander people in the Constitution. PIAC submits, however, that a statement of values or recognition would not, in itself,

be sufficient to guarantee equality before the law and ensure that Aboriginal and Torres Strait Islander people have adequate protection against discrimination in Australia.

1.3 Support for PIAC's submission

This submission has been endorsed by the following organisations:

- Stolen Generations Alliance
- Gamarada Indigenous Healing and Life Training Ltd.

The Stolen Generations Alliance (SGA) is a national representative and advocacy organisation made up of a network of affiliate groups and individuals around Australia who work with Stolen Generations survivors. The SGA is dedicated to advancing the rights of Stolen Generations survivors and ensuring that their needs and those of their families are addressed.

Gamarada Indigenous Healing and Life Training (Gamarada) is a healing and life skills development program based in Redfern, New South Wales. Gamarada aims to create a greater awareness and respect for Aboriginal spirituality and traditional ways of healing and sharing knowledge with others.

The SGA and Gamarada support PIAC's submission and recommendations to the Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Australians.

2. Discrimination against Aboriginal and Torres Strait Islander people in Australia

The 1967 referendum repealed s 127 of the Constitution allowing Aboriginal and Torres Strait Islander people to be counted in the census and amended s 51(xxvi) (the 'race power') to enable the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander people. As such, it was generally seen as a positive step towards recognising the rights and equal status of Aboriginal and Torres Strait Islander people in Australia. However, over four decades later, it is clear that these reforms did not provide adequate protection against racial discrimination or guarantee equality for Aboriginal and Torres Strait Islander Australians.

Further, while many people might have thought that the constitutional reforms of 1967 would provide the opportunity to address Aboriginal disadvantage, the reality is that Aboriginal and Torres Strait Islander people remain the most disadvantaged group in Australia.[1]

The 2011 report, *Overcoming Indigenous Disadvantage*, which analyses socio-economic indicators of Aboriginal and Torres Strait Islander disadvantage and examines whether progress has been made to improve outcomes for Aboriginal and Torres Strait Islander people, reveals that there continue to be wide gaps between Aboriginal and Torres Strait Islander people and non-Indigenous people across virtually all indicators of socio-economic progress.[2]

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1 Australian Bureau of Statistics, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, cat. no. 4704.0, (2010), ABS, Canberra.

2 Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2011 Report* (2011) 3.

In seeking to redress this entrenched disadvantage, it is necessary to deal with the impact of historical injustices committed against Aboriginal and Torres Strait Islander people in Australia and in particular, the discriminatory laws, practices and policies, which have contributed to and compounded the position of disadvantage that Aboriginal and Torres Strait Islander people are in today. It is vital that there are adequate protections in Australia's legal system to assist in overcoming historical Aboriginal and Torres Strait Islander disadvantage and prevent a reoccurrence of discriminatory practices.

In 2009, the Federal Government acknowledged in a report outlining its key strategies for addressing Aboriginal and Torres Strait Islander disadvantage that the recognition of the equality of Aboriginal and Torres Strait Islander Australians before the law is essential to overcoming disadvantage and establishes a foundation for improving outcomes for Aboriginal and Torres Strait Islander people.[3]

2.1 Historical Injustices

Until the late 1960s, all states and territories in Australia had oppressive and discriminatory laws, practices and policies which that dispossessed Aboriginal and Torres Strait Islander peoples of their lands and permitted governments to control almost all aspects of their lives with detrimental consequences.[4] There were laws that regulated where Aboriginal and Torres Strait Islander people could live, whom they could marry, how their children would be raised, what employment they could seek, and what their wages and working conditions should be.[5] The rights of Aboriginal and Torres Strait Islander people were afforded an inferior level of protection as compared with others in the community.

Since 1996, PIAC has advised and represented members of the Stolen Generations. We have assisted members of the Stolen Generations to seek redress for the harm and abuses they suffered as a consequence of the laws and policies of previous governments that led to the forced removal of Aboriginal and Torres Strait Islander children from their families. The *Bringing them Home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (National Inquiry) highlights the impacts of forced removal laws and policies on Aboriginal and Torres Strait Islander people, their families and communities.[6]

Evidence presented at the National Inquiry demonstrated the degree to which Aboriginal and Torres Strait Islander peoples lives were in the hands of government officials and the inequality that existed between Aboriginal and Torres Strait Islander people and non-Indigenous people. One witness giving evidence at the National Inquiry said:

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3 Australian Government, *Closing the Gap on Indigenous Disadvantage: The Challenge for Australia* (2009), 1 and 4.

4 Human Rights and Equal Opportunity Commission, *Bringing them home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997), 28 – 31.

5 Sean Brennan and Zoe Craven, 'Eventually they get it all… Government Management of Aboriginal Trust Money in New South Wales' (September 2006) *Indigenous Law Centre*, University of New South Wales 1, 7 – 9.

6 *Bringing them home*, above n 4.

> We never ever questioned the right of any white person, whether they had a blue uniform or not, to come into our homeland more or less to do what they liked. That was just part of life and I grew up and people of my generation grew up in an environment where we had no rights other than the rights within our community ... If the teacher called us half-castes in the school there was nothing wrong with that. If the police would come into our homes and take people away because there was some offence committed somewhere in the vicinity there was nothing wrong with that. It was just the way of life and we grew up accepting that white people had some greater right than we did (Michael Mansell evidence 325).[7]

This and other similar accounts, documented in *Bringing them Home*, illustrate a political and social landscape that not only denied Aboriginal and Torres Strait Islander people fundamental human rights enjoyed by others, but specifically provided for the denial of those rights in legislation and policy.

PIAC has also worked extensively to seek redress for the deprivation of wages and other entitlements due to Aboriginal people, as a consequence of discriminatory laws that existed in NSW between 1900 and 1969. During this period, the NSW Government systematically withheld wages, pensions and other entitlements from Aboriginal people by placing these monies into government-managed trust fund accounts. The NSW Government then failed to pay the money back (hence the appellation, 'Stolen Wages'). The *Aborigines Protection Act 1909* (NSW), which established the Aborigines Protection Board, provided that:

> The board may, in accordance with and subject to the provisions of the Apprentices Act, 1901, by indenture bind or cause to be bound the child of any aborigine, or the neglected child of any person apparently having an admixture of aboriginal blood in his veins, to be apprenticed to any master, and may collect and institute proceedings for the recovery of any wages payable under such indenture, and may expend the same as the board may think fit in the interest of the child.[8]

As a consequence of this and other similar legislation, which remained in place in NSW until 1969 when the *Aborigines Protection Act 1909* was finally repealed, countless Aboriginal people, primarily those who had been forcibly removed from their families, were sent to work as apprentices at a young age and did not receive any wages. Many did not even know that they were supposed to be receiving wages. As one of PIAC's clients said of her experience working as a domestic servant apprentice:

> We were all slave labour. No-one told us about wages or that we were supposed to get paid. The welfare put us out there and all we had to do was be little black slaves. I worked long hours from dawn to dusk. We worked seven days a week. There was a lot of work to do for a child. We didn't have that much experience really. Like milking the cows and chopping wood, we had no experience in that. We had no choices. We couldn't complain.[9]

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7 Ibid 95 – 96.

8 Section 11(1), *Aborigines Protection Act 1909* (NSW).

9 Charmaine Smith and Simon Moran, 'Stolen Wages: The Unsettled Debt', Submission No 76 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Stolen Wages*, 29

Although PIAC's experience in relation to Stolen Wages is largely limited to NSW, discriminatory laws such as the *Aborigines Protection Act 1909* (NSW) existed in nearly all states and territories in Australia.

Aboriginal people were not only denied wages, but were also denied access to certain social security benefits and government services. In NSW, for example, s 51(d) of the *Old Age Pensions Act 1900* (NSW), which commenced on 1 July 1901 and operated for eight years until it was superseded, excluded Aboriginal "natives" from entitlements under the Act. At a Federal level, s 16(1)(c) of the *Invalid and Old-age Pensions Act 1908* (Cth) denied "aboriginal natives of Australia" any entitlements under the Act. Legislation also prohibited Aboriginal and Torres Strait Islander people from enjoying the citizenship benefits enjoyed by non-Indigenous Australians, such as housing and education. These discriminatory laws would prevent Aboriginal and Torres Strait Islander people from effectively participating in the economy, thus entrenching the levels of poverty that existed in Aboriginal and Torres Strait Islander communities, the consequences of which can still be seen today.

In the 1960s, many of the discriminatory laws began to be repealed as political and community attitudes towards Aboriginal and Torres Strait Islander people shifted. In NSW, by 1969, the Aborigines Protection Board had been abolished and so too had the draconian legislation that gave the Board wide-ranging powers of control over the lives of Aboriginal people.

2.2 Contemporary Injustices

Discriminatory laws, practices and policies did not cease following the 1967 referendum. Indeed, the NSW government department that replaced certain functions of the Aborigines Protection Board, continued to withhold Aboriginal wages and entitlements but without any clear legislative authority.

The most recent and stark example of laws having a broad and discriminatory impact on Aboriginal people is the package of legislation introduced by the Federal Government as part of the Northern Territory Intervention. The legislation was introduced in response to the release of a report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: Little Children are Sacred*.[10]

The legislation limited the rights of Aboriginal people to property, social security, employment opportunities and self-determination. Among the broad range of measures introduced, the legislation enabled the Commonwealth government to compulsorily acquire and control specified Aboriginal land through five-year lease arrangements.[11] It also introduced a compulsory 'income management' regime enabling the government to quarantine fifty per cent of welfare payments and one hundred per cent of lump sum payments and divert the income into an 'income

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September 2006 *Submission to the Senate Stolen Wages Inquiry*, 29 September 2006, Public Interest Advocacy Centre, 7.

10 Northern Territory Government Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 'Ampe Akelyernemane Meke Mekarle: Little Children are Sacred,' *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, (2007), Northern Territory Government.

11 Part 4, *Northern Territory National Emergency Response Act* 2007 (Cth).

management account' for use on food and other essentials.[12] The income management regime, which bears striking resemblance to the discriminatory Stolen Wages policies abolished over forty years ago in NSW, applies to all people living in "prescribed" Aboriginal communities, regardless of whether or not they have responsibilities over children or have demonstrated irresponsibility in managing income in the past.

In implementing these measures under the intervention, the Federal Government suspended the operation of the *Racial Discrimination Act 1975* (Cth) (RDA), thereby removing the legal protections that Indigenous people in the Northern Territory had against racial discrimination. For example, s 132(2) of the *Northern Territory National Emergency Response Act 2007* (Cth) provided that:

> The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the Racial Discrimination Act 1975.

This provision and other similar provisions in the suite of Northern Territory Intervention legislation introduced in 2007, and which excluded the operation of the RDA, were subsequently repealed in 2010 following widespread criticism both domestically and internationally.

After a visit to the Northern Territory in August 2009, the United Nations Special Rapporteur on human rights and fundamental freedoms of Indigenous people, Professor James Anaya, condemned the Federal Government's actions describing the Northern Territory Intervention as an infringement on the rights and self-determination of Indigenous people and incompatible with Australia's international human rights obligations. In Professor Anaya's *Observations on the Northern Territory Emergency Response in* Australia published in February 2010, he called on the Government to reinstate the RDA, diminish or remove the discriminatory aspects of intervention legislation and adequately take into account the rights of Indigenous peoples to self-determination and cultural integrity.[13] As noted above, in June 2010, the Federal Government finally announced that it would reinstate the operation of the RDA.

This history of policy and law making demonstrates the need for greater protections against racial discrimination for Aboriginal and Torres Strait Islander people. Legislative protection alone is not sufficient as governments are able to amend, repeal or suspend the operation of enactments in a way that can open the door for racial discrimination. PIAC submits that constitutional protection is imperative to protect the rights of Aboriginal and Torres Strait Islander Australians against racial discrimination.

3. Reform of the races power

The existing scope of s 51(xxvi) of the Constitution, and whether it permits laws that are discriminatory against Aboriginal and Torres Strait Islander people, is sufficiently uncertain as to warrant the repeal of the section. High Court jurisprudence to date suggests that s 51(xxvi) can

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12 Schedule 1 and 2, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act* 2007 (Cth).

13 James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people – Observations on the Northern Territory Emergency Response in Australia*, (2010), UN Human Rights Council, 4 and 12.

be used to permit laws that discriminate against Aboriginal and Torres Strait Islander people, and other races.

In PIAC's view, there is no place in the Constitution for a provision that enables the enactment of laws that discriminate and further entrench the position of disadvantage that Aboriginal and Torres Strait Islander people face today. It remains essential, however, that the Commonwealth continue to have the power to make laws for Aboriginal and Torres Strait Islander people to redress historical and continuing disadvantage.

PIAC supports the repeal of s 51(xxvi) of the Constitution, and replacing it with a new provision that grants the Commonwealth power to make laws with respect to "Aboriginal and Torres Strait Islander people, but only for their benefit". In the alternative, PIAC submits that the races power should be amended to insert the words "for their benefit" as a safeguard against laws that may serve to operate to the detriment of Aboriginal and Torres Strait Islander people.

3.1 History of the races power

Discussion on the races power during the Constitutional Conventions in the 1890s reveals the racist origins of this provision. It is beyond doubt that, for many of those who supported this provision, their intention was to allow the Commonwealth to pass discriminatory laws on the basis of race. The provision was proposed by Sir Samuel Griffith to allow the Commonwealth to control non-European migrant workers.[14] At the time, concerns were raised about migrant workers from the region, particularly the Kanaka plantation labourers in Northern Queensland, Chinese factory workers and miners from Asia.[15] Professor George Williams argues that the reasoning behind section 51(xxvi) was clearly racist.[16] At the 1897-1898 Convention, Sir Edmund Barton, later to become Australia's first Prime Minister, explained the reason for the power was to allow the Commonwealth to "regulate the affairs of the people of coloured or inferior races who are in the Commonwealth".[17]

The racism underpinning this approach to s 51(xxvi) was overt and even acknowledged by some of the delegates at the Convention. For instance, the former South Australian Attorney-General, Josiah Symon QC, opposed the provision, saying: "It is monstrous to put a brand on these people when you admit them. It is degrading to us and our citizenship to do such a thing. If we say they are fit to be admitted amongst us, we ought not to degrade them by putting on them a brand of inferiority."[18]

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14 Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigines' (1966-1967) 2(1) *Federal Law Review* 17, 19.

15 John Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95, 108.

16 George Williams, 'The Races Power and the 1967 Referendum' (2007) 11 *Australian Indigenous Law Review* Special Edition 8, 8.

17 As cited in *Official Record of the Debates of the Australasian Federal Convention 1891-1898*, vol 4, 1898 (reprinted by Legal Books, 1986), 228-229.

18 Ibid 250.

Interestingly the Constitutional Debates hardly mentioned Aboriginal people.[19] Although other provisions of the Constitution do refer to Aboriginal people,[20] the references are ones of exclusion. This included the races power, as originally enacted, which specifically excluded the power to make laws for Aboriginal people. This had the effect of ceding to the States legislative authority to regulate Aboriginal people.[21] Giving evidence before the 1927-29 Royal Commission on the Constitution, AO Neville, the Chief Protector of Aborigines in Western Australia, suggested that the indifference of the founders of the Constitution towards Aboriginal people was influenced by the widespread belief that "aborigines were a dying race whose future was unimportant" and that at the time there were no reliable counts of the Aboriginal population then available and guesses grossly underestimated population numbers.[22] It is interesting to compare this absence of discussion with later interpretation of the power and its application to Aboriginal and Torres Strait Islanders.

Although Aboriginal people were largely ignored during the Convention Debates, it is clear that the original purpose of the provision was to permit the Commonwealth to pass laws on the basis of race and that such laws could be discriminatory, as was the case in practice.

3.2 The 1967 Referendum

The 1967 referendum, the most successful in Australia's history, was the culmination of many years of campaigning by both Aboriginal and Torres Strait Islander people and other Australians. The referendum led to the removal of the words "other than the aboriginal race in any State" from s 51(xxvi). It also led to the repeal of s 127, thereby allowing Aboriginal and Torres Strait Islander peoples to be included in the census. The amendments to these provisions of the Constitution had been discussed on previous occasions, including at the referendum that was held in 1944. However, what distinguished the 1967 referendum was the widespread political and community support for the amendments, which contributed to its resounding success.

A crucial factor in the referendum's success was that it enjoyed bipartisan support; there was no opposition in Parliament, so only a "yes" case was put forward to voters. Prime Minister Harold Holt suggested the amendment would allow agreement between the Federal and State Governments to enact policy for "Aboriginal advancement".[23] Then Opposition Leader Gough Whitlam stressed the change would provide the opportunity to address Aboriginal disadvantage.[24]

Community support for the referendum, essential for changes to the Constitution due to the requirements of s 128 of the Constitution, was also critical. The referendum reported the highest

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19 Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigines' (1966-1967) 2(1) *Federal Law Review* 17; The Hon Justice Robert French, 'The Race Power: A Constitutional Chimera', in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, Cambridge University Press) 180 at 185.

20 Sections 127 and 51 (xxvi) of the Constitution.

21 George Williams, above n 16.

22 Geoffrey Sawer, above n 14, 18.

23 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, vol 54, 263 (Harold Holt, Prime Minister).

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1967, vol 54, 263 279 (Gough Whitlam, Leader of the Opposition).

"yes" vote in Australian history, with approximately 90 per cent of voters in favour of the amendments. As Kirby J explained in the *Hindmarsh Island Bridge Case*:

> "In the history of Australian constitutional referenda, no other such vote has come close to the unique political and popular consensus demonstrated in the 1967 referendum on Aborigines".[25]

The vote marked an important turning point in Australian history. In the preceding years, issues relating to Aboriginal people took centre stage, including the strike of workers at Wave Hill Cattle Station, the landmark decision of the Conciliation and Arbitration Commission relating to equal pay for Aboriginal pastoral workers in the Northern Territory and the bark petitions.[26] Racial discrimination was also a focus internationally, with the drafting of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), which Australia signed on 13 October 1966 and the civil rights movement in the United States. To many, the referendum was a test of Australia's standing in the world.[27]

From a technical perspective, the net effect of the referendum was to facilitate the constitutional amendment that empowered the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander people. However, there was a strong popular view that the referendum would remove discrimination in the Constitution. The campaign leading up to the referendum was centred on the discriminatory aspects of the Constitution and the need for the Commonwealth to be empowered to pass laws to address Aboriginal and Torres Strait Islander disadvantage. The "yes" case explained that the proposal was to "remove words from our constitution that many people think are discriminatory against Aboriginal people".[28]

Many believe that those voting in favour of the 1967 referendum intended that the ensuing constitutional amendment would allow the Commonwealth only to make laws *for the benefit* of Aboriginal and Torres Strait Islander peoples, and that this new power would not be used to their detriment. Joseph and Castan argue that the referendum "acquired great symbolic meaning and it was believed that the Commonwealth would assume control of Aboriginal affairs, sweep away racial discrimination, grant citizen rights, and achieve equality for Aboriginal Australians".[29] Considering the scope of the power and the 1967 referendum in the *Tasmanian Dam Case*, Brennan J commented that it was "an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial".[30] However, as outlined below, more recent High Court

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25 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 408-409.

26 The Hon. Justice Robert French, 'The Race Power: A Constitutional Chimera', in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 180, 188.

27 George Williams and David Hume, *People Power: the History and Future of the Referendum in Australia* (2010), 142.

28 Chief Electoral Officer, Commonwealth, *The Arguments For and Against the Proposed Alterations Together with a Statement Showing the Proposed Alterations* (6 April 1967) 11.

29 Sarah Joseph and Melissa Castan, "General Themes in Federal Constitutional Law", in *Federal Constitutional Law - A Contemporary View*, (2nd ed 2006) 441, 448.

30 *Commonwealth* v *Tasmania* (1983) 158 CLR 1, 242 (*Tasmania Dam Case*).

jurisprudence has not confined s 51(xxvi) to a solely beneficial operation regarding Aboriginal and Torres Strait Islander people.

3.3 Judicial interpretation of the races power

The leading High Court cases, which have considered the races power, have yet to settle its precise scope. Of greatest concern is the capacity of s 51(xxvi), under current authority, to support legislation that discriminates against people of a particular racial group, and particularly against Aboriginal and Torres Strait Islander people.

PIAC submits that it is intolerable for the Australian Constitution to permit racial discrimination. It is particularly egregious for this discrimination to be perpetrated against a group in the Australian community, which already suffers from historical and ongoing disadvantage. While there is a significant body of judicial opinion suggesting that the races power does not authorise the making of laws to the detriment of Aboriginal and Torres Strait Islanders, the fact remains that the leading High Court authority permitted this exact result.

Writing extra-judicially prior to his appointment as Chief Justice of Australia, the Hon Robert French AC suggested that the central to the divergence in judicial opinion on the scope of the races power is the difficulty in adopting a unified purposive reading of the power, taking into account the relevant views expressed pre-1901 and in the lead up to the 1967 referendum. French said:

> The tension between the original objectives of the power and those that informed its amendments in 1967 give it the character of a constitutional chimera – a dangerous conjugation of conflicting elements.[31]

Early decisions of the High Court supported a beneficial interpretation of the races power,[32] albeit in obiter dicta. In *Koorwarta v Bjelke-Petersen*,[33] which concerned the validity of the *Racial Discrimination Act 1975* (Cth), Murphy J found that the races power could only be exercised for the benefit of peoples of a particular race.[34] He found that the word "for" in s 51(xxvi) should be read as "for the benefit of" not "with respect to".[35] He reasoned that, if the intended meaning of the word "for" had been otherwise, the words "with respect to" would have been expressly used as they had been in other paragraphs of s 51, namely paragraphs (xxxi) and (xxxvi).[36]

The *Tasmanian Dam Case*[37] also considered the races power. Justice Brennan considered that, in its original form, s 51(xxvi) authorised laws discriminating against particular racial groups.[38]

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31 The Hon. Justice Robert French, above n 26, 181.

32 See *Koorwarta v Bjelke-Petersen* (1982) 153 CLR 168, 242 (Murphy J): *Commonwealth v Tasmania* (1983) 158 CLR 1, **180** (Murphy), **242** (Brennan J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 56 (Gaudron J); *Kruger v Commonwealth* (1997) 190 CLR 1, 111 (Gaudron J).

33 (1982) 153 CLR 168.

34 *Koorwarta v Bjelke-Petersen* (1982) 153 CLR 168, 242.

35 Ibid.

36 Ibid.

37 *Commonwealth v Tasmania* (1983) 158 CLR 1.

38 Ibid 242.

However, as outlined above, he noted that the 1967 referendum revealed that the primary object of the power is beneficial.[39]

In the same case, Deane J suggested that, since the 1967 referendum, the provision includes a power to "make laws benefiting the people of the Aboriginal race".[40] However, he also stated that s 51(xxvi) "remains a general power to pass laws discriminating against or benefiting the people of any race."[41] It seems difficult to reconcile these two statements of Deane J.

In the *Tasmanian Dam Case*, Murphy J, consistent with his earlier comments in *Koowarta v Bjelke-Petersen*, confirmed a broad reading of the races power so that it authorises "any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass special laws".[42]

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[43] Gaudron J in obiter supported the comments of Murphy J stating that it "has much to commend it".[44] Similarly, in *Kruger v Commonwealth*,[45] Gaudron J found it "arguable that that power only authorises laws for the benefit of 'people of [a] race for whom it is deemed necessary to make special laws'".[46]

The most recent High Court authority to consider the races power is the *Hindmarsh Island Bridge Case*.[47] In this case, the Court was split as to whether s 51(xxvi) authorises the Commonwealth to pass discriminatory laws that operate to the detriment of Aboriginal and Torres Strait Islanders. In this case, Gummow and Hayne JJ held that the power could be used to withdraw a statutory benefit granted to Aboriginal people. They noted that "the differential treatment of those upon whom the law operates by conferral of a right or benefit may also impose an obligation or disadvantage upon others".[48] Therefore, according to Gummow and Hayne JJ, the power authorised laws that discriminate against Aboriginal and Torres Strait Islander people.

Gaudron J seemed to retreat from the position she had intimated in earlier cases as outlined above. She rejected the suggestion that the 1967 referendum limited the power in relation to Aboriginal and Torres Strait Islanders to beneficial changes. Instead, she held that the result of the referendum was to place "them [Aboriginal and Torres Strait Islanders] in precisely the same constitutional position as the people of other races".[49] Rather than the power being limited to beneficial changes, Gaudron J suggested there were other limitations on the power. Laws made pursuant to the races power must be deemed "*necessary* – not expedient or appropriate – to

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39 Ibid 242.

40 Ibid 272.

41 Ibid 272.

42 *Commonwealth v Tasmania* (1983) 158 CLR 1, 180.

43 (1992) 176 CLR 1.

44 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 56.

45 (1997) 190 CLR 1.

46 *Kruger v Commonwealth* (1997) 190 CLR 1, 111.

47 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (*Hindmarsh Island Bridge Case*).

48 Ibid 378.

49 Ibid 361.

make a law which provides differently for the people of a particular race", with the criterion of necessity being based on a "relevant difference between the people of the race to whom the law is directed and the people of other races".[50] Further, discriminatory laws may be passed, providing they meet a test of being "reasonably capable of being viewed as appropriate and adapted to the difference asserted".[51]

Kirby J, in dissent, held that the races power "does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race."[52] The other two judges who reached a decision in this case,[53] Brennan CJ and McHugh J, approached this matter differently and so did not need to consider the question of whether the races power authorised laws only for the benefit of a race.

In summary, while the High Court jurisprudence on the races power does not appear to be settled, the most recent authority permitted the races power to be used to authorise laws that are detrimental to Aboriginal and Torres Strait Islanders and, by implication, detrimental to people of other races as well. As French commented eight years ago, "As construed by a now substantial body of High Court jurisprudence, there is nothing in the power, other than the possibility of a limiting principle of uncertain scope, to prevent its adverse application to Australian citizens simply on the basis of race".[54]

In light of this case law, there is a pressing need to amend the races power in a way that clearly prevents it from being used to discriminate against Aboriginal and Torres Strait Islander people, or people of any other race. The next section of this submission considers the options for such reform.

3.4 Options for reform

There are a number of options to reform the races power. PIAC submits that, in considering these reforms, two critical objectives must be satisfied. First, the Commonwealth should retain the power to makes laws for Aboriginal and Torres Strait Islander people, so as to address historic and continuing disadvantage. Secondly, the races power must not be able to be used in a way that discriminates against Aboriginal and Torres Strait Islander people. PIAC outlines below two options for reform.

Option 1: repeal s 51(xxvi) and replace with new head of power

PIAC's preferred option for reform is that s 51(xxvi) be repealed and replaced with a new head of power in s 51 of the Constitution. That new head of power should enable the Commonwealth to make laws with respect to '*Aboriginal and Torres Strait Islander peoples, but only for their benefit*'.

This amendment would have three principal consequences:

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50 Ibid 365-66 (emphasis in original).

51 Ibid 366.

52 Ibid 411.

53 Note: the seventh judge who heard this matter in the High Court, Callinan J, recused himself before the decision of the Court was announced.

54 The Hon. Justice Robert French, above n 26, 206.

1. It would remove the Commonwealth's power to makes laws by reference to race generally.
2. It would provide the Commonwealth with a new power to make laws with respect to Aboriginal and Torres Strait Islander people.
3. In exercising this power, the Commonwealth would be restricted to make laws that are beneficial to Aboriginal and Torres Strait Islander people.

The first element of this reform would be to remove the Commonwealth's power to legislate by reference to race generally. As outlined above, the framers of the Constitution intended this power to permit laws to be passed for groups of people they referred to as the "inferior races", and to control the movements and employment of particular migrant workers. The original intent was infused with a desire to allow laws to discriminate against a particular race.

The power to discriminate on the basis of race was abhorrent to some, but certainly not all, at the time of the drafting of the Constitution. However, by the twenty-first century, that abhorrence has become almost universal in the Australian polity. It is recognised in Australia's ratification of international treaties that seek to eliminate racial discrimination;[55] by bipartisan support for the *Racial Discrimination Act 1975* (Cth) and corresponding laws at the State and Territory level; by the common law; and by democratic institutions that foreswear racial discrimination. In addition, there is no conceivable public policy or rational justification for the Commonwealth to retain a power to pass laws that discriminate on the basis of race. The existence of the races power in the Constitution puts Australia out of step with other countries.

It may be argued that the removal of the races power will restrict the Commonwealth's power to pass laws with respect to a particular race. If a need arose to pass laws in relation to a particular race, and in PIAC'S view this would be unlikely, then the external affairs power, s 51(xxix),[56] would be an alternative source of power for the enactment of non-discriminatory laws.

The 1988 Final Report of the Constitutional Commission also supported the removal of the Commonwealth's power to pass laws on the basis of race. The report highlighted that it was inappropriate to retain s 51(xxvi) "because the purposes for which, historically, it was inserted no longer apply in this country".[57]

The second element of this proposed reform would involve the addition of a new constitutional head of power to make laws for Aboriginal and Torres Strait Islander people. The 1988 Final Report of the Constitutional Commission recommended that s 51(xxvi) should be replaced with a new power limited to Aboriginal and Torres Strait Islander people.[58] Such a new power to pass laws for Aboriginal and Torres Strait Islander people would not be based on race. Rather the power would ensure that the Commonwealth can continue to make laws with specific reference to Aboriginal people, for example in the areas of land rights,[59] protection of heritage and cultural

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55 See especially the *International Covenant on Civil and Political Rights*, Articles 4, 20, 24, 26; and CERD.

56 And through it the CERD.

57 Constitutional Commission, *Final Report of the Constitutional Commission* (1988).

58 Constitutional Commission, *Final Report of the Constitutional Commission* (1988).

59 Such as the *Native Title Act* 1993 (Cth).

sites[60], and to address particular areas of disadvantage, such as health. As French commented extra-judicially in 2003, such a power would be "based not on race but on the special place of those peoples in the history of the nation".[61]

Repealing s 51(xxvi), and inserting a new power in its place as PIAC proposes, would have other benefits. Any further amendment to s 51(xxvi) risks further complicating the purposive approach to this provision. The task of reconciling the conflicting intentions already identified with reference to the original drafting of the provision and the 1967 amendment could, in practice, become more difficult by further amending the provision. By contrast, if s 51(xxvi) were simply repealed and replaced, these problems could more easily be avoided.

The third aspect to the proposed reforms is that the new power should be limited to passing laws that *benefit* Aboriginal and Torres Strait Islanders.[62] Such a limitation would provide clearer guidance to Parliament (and the Courts) regarding the scope of the power. Limiting the power to legislate in this way would overcome the existing uncertainty regarding the potential for s 51(xxvi) to be used by Parliament to pass laws that operate to the detriment of Aboriginal and Torres Strait Islander people (and people of other races).

In PIAC's view, the words "but only for their benefit" provide greater guidance as to the scope of the power than the existing limiting words in the races power. That is, the words "special law", "deemed necessary" and "for" have all been subject to differing judicial interpretations. The greatest area of uncertainty has centred on the word "for" in s 51(xxvi). Clarifying that the power is solely beneficial in nature would address the High Court's difficulty in extricating this head of power from its undoubtedly racist origins. Admittedly the term "for their benefit" is inherently value laden, nonetheless it is still preferable that the words be included as they add greater clarity.

Additionally, the insertion of a non-discrimination clause on the basis of race as outlined below in part 4 of this submission would help guide a beneficial interpretation of the provision. However, in the event that such a non-discrimination clause is not inserted into the Constitution, the words "for their benefit" would be sufficient to guide the use of the power.

Option 2: amend s 51(xxvi) by inserting the words "the benefit of"

By way of alternative to Option 1 above, PIAC submits that the races power should simply be amended with the insertion of the words "the benefit of". Paragraph 51(xxvi) would then read: 'the people of any race for *the benefit of* whom it is deemed necessary to make special laws'.

As outlined above, PIAC's primary position is that the Commonwealth's power to make laws by reference to race should be removed. However, PIAC acknowledges that the removal of the races power, and insertion of a new power limited to Aboriginal and Torres Strait Islanders, may be perceived as a more significant change to the Constitution. Consequently, that reform proposal could be less likely to attract widespread support and, as a result, fail to achieve the support needed to satisfy the constitutional amendment procedure in s 128.

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60 Such as the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth).

61 The Hon. Justice Robert French, above n 26, 208.

62 The Law Council of Australia makes a similar recommendation in its submission 'Constitutional Recognition of Indigenous Australians'.

PIAC strongly believes that Option 1 would not provide any unfair protection in favour of Aboriginal and Torres Strait Islander people; rather, it would simply allow the Commonwealth to address the historical and ongoing disadvantage of this particular group. Nevertheless, PIAC acknowledges that some members of the Australian community could perceive (albeit wrongly) that such constitutional change involves "special treatment" for Aboriginal and Torres Strait Islander people, thereby reducing the likely success of Option 1. Therefore, Option 2 arises from a purely pragmatic objective: namely, to achieve the core goal of removing the discriminatory operation of s 51(xxvi), while recognising the difficulty in amending the Constitution.

Inserting the words "but only for their benefit" in s 51(xxvi) would have the effect of removing the ambiguity, identified in the jurisprudence discussed above, about whether this head of power permits discriminatory legislation. This amendment would make clear that such discriminatory legislation would not be supported by s 51(xxvi).

Moreover, as outlined below, PIAC submits that a non-discrimination clause on the basis of race should be added to the Constitution. This provision would reinforce the proposed amendment to s 51(xxvi), and would prevent this head of power (or any other) from being relied on to pass laws that discriminate against Aboriginal and Torres Strait Islander people.

Recommendation 1:

PIAC recommends that s 51(xxvi) of the Constitution should be repealed and replaced with a new head of power in s 51 that reads:

> *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, but only for their benefit;*

Recommendation 2:

In the alternative to Recommendation 1 above, PIAC recommends that s 51(xxvi) of the Constitution be amended so that it reads:

> *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:*
>
> *[…]*
>
> *the people of any race for the benefit of whom it is deemed necessary to make special laws;*

4. Equality and non-discrimination

In addition to repealing s 51(xxvi) of the Constitution and creating a new head of power as discussed above, PIAC submits that a new non-discrimination provision should be inserted in the Constitution. This new provision should prohibit discrimination on the basis of race.

4.1 Why is it necessary to insert a new non-discrimination clause?

In PIAC's submission, there are three principal, interrelated reasons supporting the inclusion of a non-discrimination clause in the Constitution. First, it would help bring Australia further into line with its international law obligations. Secondly, it would overcome the current uncertainty as to whether the Constitution permits discriminatory laws to be passed on the basis of race. Thirdly, it would strengthen the protection against discrimination for all Australians.

As a signatory to the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), Australia has obligations under the Convention. Article 2 states:

> Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.
> …
> Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

There are no exceptions to this prohibition of racial discrimination in Article 2. There is also no ability for derogation in circumstances of national emergency.

In addition to these general clauses, CERD allows 'special measures':

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The Committee on the Elimination of Racial Discrimination (CERD Committee) has confirmed that, in terms of their application to Indigenous peoples, the obligations of the Convention require States to "ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity."[63]

PIAC endorses the recommendations made in the Australian Human Rights Commission and NGO submissions to the CERD Committee in 2010 that a general non-discrimination provision in the Constitution, in addition to the removal of existing discriminatory provisions, would help to ensure that Aboriginal and Torres Strait Islander people are treated equally and free from any discrimination.

As stated in the Australian Human Rights Commission's submission to the CERD Committee, "A constitutional guarantee of equality before the law and freedom from discrimination would provide

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63 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII*, 51st sess UN Doc A/52/18, annex V, (18 August 1997).

comprehensive protection against racial discrimination."[64] Recommendation 10 in the Commission's submission specified "removal of section 25 of the Constitution and its replacement with a clause guaranteeing equality before the law and non-discrimination."

The submission to the CERD Committee by the National Association of Community Legal Centres and the Human Rights Law Resource Centre (NGO submission) also recommended that the Government hold a referendum proposing that the Constitution be amended to enshrine the right to equality.[65] The NGO submission stated:

> With the exception of the issues set out below, the RDA generally reflects the provisions of CERD. However, the lack of constitutional protection against racial discrimination in Australia, coupled with the Australian judiciary's restrictive approach to the RDA's application, has the effect of compromising Australia's compliance with Articles 1 and 2 of CERD.[66]

In its Concluding Observations, the CERD Committee expressed concern about "the absence of any entrenched protection against racial discrimination in the federal Constitution."[67] Inserting a new non-discrimination clause in the Australian Constitution would help bring Australia further into line with our obligations under CERD.

Secondly, PIAC believes that inserting a new non-discrimination clause would address a number of deficiencies in our domestic law. In its 2008 report to the CERD Committee, the Australian government said:

> While there is no specific prohibition against racial discrimination in the Australian Constitution, human rights are currently protected in Australia in a range of ways. These include through: strong democratic institutions; certain rights in the Constitution; the common law; and legislation, including anti-discrimination legislation at the Commonwealth, state and territory levels. Australia has implemented its obligations under Convention on the Elimination of Racial Discrimination in Australian law through the RDA.[68]

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64 Australian Human Rights Commission 'Information concerning Australia and the *International Convention on the Elimination of all Forms of Racial Discrimination*', Submission to the Committee on the Elimination of Racial Discrimination, 8 July 2010, para 20.

65 National Association of Community Legal Centres and the Human Rights Law Resource Centre 'Freedom Respect Equality Dignity: Action', Submission to the Committee on the Elimination of Racial Discrimination on the Occasion of the Review of Australia's 15th to 17th Reports under the International Convention on the Elimination of All Forms of Racial Discrimination, June 2010, 20.

66 National Association of Community Legal Centres and the Human Rights Law Resource Centre 'Freedom Respect Equality Dignity: Action', Submission to the Committee on the Elimination of Racial Discrimination on the Occasion of the Review of Australia's 15th to 17th Reports under the International Convention on the Elimination of All Forms of Racial Discrimination, June 2010, 18.

67 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) para 10.

68 Australian Government, *Combined 15th, 16th and 17th periodic reports to the Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/AUS/15-17 (2 June 2010) para 25.

PIAC believes that these protections are insufficient in preventing racial discrimination. As discussed above, the Australian Parliament simply suspended the *Racial Discrimination Act 1975* (Cth) in response to concern that some elements of the Northern Territory Intervention might be racially discriminatory. Further, the High Court has found the powers in the Constitution to be unfettered by a general requirement of equality before the law.[69] PIAC submits that it is therefore necessary to insert a new non-discrimination clause in the Constitution.

4.2 Non-discrimination clauses in the other jurisdictions

The Constitutions of many other countries guarantee equality or non-discrimination, including South Africa, Canada, the Russian Federation, Austria, the United Kingdom and Germany. Three particularly relevant examples are the South African Constitution, the Charter of Fundamental Rights of the European Union and the Canadian Charter of Rights and Freedoms.

At an international level, there is also a non-discrimination clause in the International Covenant on Civil and Political Rights. Article 26 reads as follows:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Section 9 of the South African Constitution is titled the "Right to equality" and it states:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Article 21 of the Charter of Fundamental Rights of the European Union is titled "non-discrimination" and states:

> (1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

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69 *Kruger v Commonwealth* (1997) 190 CLR 1.

(2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

The Canadian non-discrimination clause has been in effect since April 1985 and a Canadian Court issued its first ruling on the provision in 1989. Section 15 of the *Canadian Charter of Rights and Freedoms* (the Charter) provides as follows:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is interesting to note that this is not a general guarantee of equality. As set out in the landmark Canadian case of *Andrews,*[70] differential treatment does not necessarily result in inequality and identical treatment may often produce serious inequality. Subsection 15(2) above recognises this: the freedom from racial discrimination does not affect laws, programs or activities that try to redress historical disadvantage.

In Canada, this provision has been used to protect the rights of Canada's Aboriginal population, albeit not using the ground of discrimination based on race. In *Attorney General of Canada v Misquadis et al*,[71] Aboriginal communities who live "off-reserve" successfully challenged their exclusion from federal Aboriginal Human Resources Development Agreements under s 15 of the Charter. The agreements were designed to allow Aboriginal communities to create and implement employment training programs to ensure job stability.[72]

Another successful challenge under s 15 was the case of *Corbiere v The Queen and Batchewana Indian Band*.[73] Certain provisions of the *Indian Act* RSC 1985 prohibited participation in band elections by band members who did not live on reserve. A band is a group of Indians for whose collective use and benefit lands have been set apart or money is held by the Canadian Crown, or declared to be a band for the purposes of the *Indian Act*.[74] All of the justices agreed that this residency requirement violated the equality rights of band members living off-reserve. In reaching this conclusion, the court recognised that Aboriginal people living off-reserve had suffered historic

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70 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, quoted in Mary Hurley, *Parliamentary Information and Research Service, Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, revised March 2007, 2.

71 *Attorney General of Canada v Misquadis et al* [2003] FCA 473, [2004] 2 FCR 108.

72 National Anti-Racism Council of Canada 'Racial Discrimination in Canada' *Submission to the Committee on the Elimination of Racial Discrimination* on the Occasion of the Review of Canada's 17th and 18th Reports under the International Convention on the Elimination of All Forms of Racial Discrimination, February 2007.

73 *Corbiere et al v The Queen and Batchewana Indian Band* [1999] 2 SCR 203.

74 *Indian Act,* RSC 1985, s 2(1).

disadvantage in society. Being prevented from participating in the political governance of their communities only perpetuated this incursion on their dignity and identity as Aboriginal people.[75]

4.3 A non-discrimination provision for Australia

PIAC's preferred position is for a general non-discrimination provision to be inserted in the Constitution, modelled after similar provisions in South Africa or Canada. This clause would provide constitutional protection from discrimination on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The addition of such a broad non-discrimination clause would enhance the protection of human rights in Australia. The protection of human rights is vital for the effective removal of injustice in society, particularly for disadvantaged people. In essence, this would prohibit discrimination on any of the grounds specified, or any analogous grounds.

The insertion of such a provision would be consistent with the approach taken in a number of comparable jurisdictions. It would also be the most effective way of achieving the three objectives noted above: to comply with Australia's international law obligations, to put beyond doubt the question whether the Constitution permits racial discrimination, and more broadly, to strengthen the protection against discrimination for all Australians.

However, PIAC recognises that the Discussion Paper (p20) considers a narrower question: "Should the Constitution be amended to ensure that no laws can be made which discriminate against any Australian on the basis of race?" Moreover, PIAC also acknowledges that the current consultation focuses on the constitutional recognition of Aboriginal and Torres Strait Islander Australians.

Nevertheless, it is not appropriate to insert a new provision that simply refers to racial discrimination. The provision also needs to include colour, descent, national or ethnic origin, even though the core concern is racial discrimination. As Brennan J said in the *Tasmanian Dams* case, '"race" is not a term of art; it is not a precise concept. … There is, of course, a biological element in the concept [of race]. The UNESCO studies on race and racial discrimination reveal some difficulty in giving a precise definition even to this element."[76] In the same case, Deane J said that the words "people of any race" have a "wide and non-technical meaning."[77]

Section 10 of the RDA uses the phrase "race, colour or national or ethnic origin". In the Federal Court case of *Macabenta,*[78] the Full Court examined the reasoning behind the adoption of this phrase. The Court's review of the extrinsic material showed that the "addition of the words 'colour, or national or ethnic origin' was intended to give added content and meaning to the word

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75 National Anti-Racism Council of Canada 'Racial Discrimination in Canada' *Submission to the Committee on the Elimination of Racial Discrimination* on the Occasion of the Review of Canada's 17th and 18th Reports under the International Convention on the Elimination of All Forms of Racial Discrimination, February 2007.

76 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 243. He says see *Ealing London Borough Council v Race Relations Board* [1971] UKHL 3; (1972) AC 342 at p 362 per Lord Simon of Glaisdale.

77 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 273-274.

78 *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202.

'race' or 'racial discrimination'" and "capture the somewhat elusive meaning of race."[79] Section 10 of the RDA makes no reference to 'descent', which appears in Article 1.1 and elsewhere in CERD. However, the Court said that "the prima facie legislative intention must be that the transposed text … should bear the same meaning in the RDA as it bears in the Convention."[80]

With these comments in mind, if the new non-discrimination clause were limited to the concept of race, it is appropriate to consider the words of CERD as a possible model. CERD defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[81]

Furthermore, Article 5 provides that States undertake to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law."

As explained earlier, CERD also permits special measures to enable the passing of laws or implementation of programs that provide special benefits or recognition to certain racial or ethnic groups. This could apply, for example, to redress Aboriginal and Torres Strait Islanders historical disadvantage.

PIAC recommends that a new non-discrimination clause in the Constitution should be primarily modelled after the language of CERD. PIAC further submits that it would be desirable for this freedom from discrimination to apply to the Federal, State and Territory jurisdictions. As a basic human right, the non-discrimination clause should be universally applicable within Australia. That is, it should apply to all levels of government.

PIAC acknowledges that there are a number of inconsistencies in the law on religion as a category of race or ethnic origin, insofar as only some religions are clearly included in a broad interpretation of race and/or ethnic origin. The New Zealand Court of Appeal in *King-Ansell*[82] decided that Jews fell within the language used in section 35(1) of the *Race Relations Act 1971* (NZ) which rendered it an offence to intentionally vilify people "on the ground of colour, race, or ethnic or national origins".[83] The Court said that the definition of an ethnic group involves consideration of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group.[84] The approach in *King-Ansell* was adopted by the House of Lords in the case *Mandla v Dowell Lee* in relation to Sikh people.[85]

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79 Ibid 209-210.

80 Ibid 209.

81 International Convention on the Elimination of All Forms of Racial Discrimination, article 1(1).

82 *King-Ansell v Police* [1979] 2 NZLR 531.

83 Neil Rees, Katherine Lindsay and Simon Rice, *Australian anti-discrimination law* (Federation Press, 2008) 177.

84 Ibid.

85 *Mandla v Dowell Lee* [1983] 2 AC 548.

King-Ansell was cited in *Miller v Wertheim* in support of the proposition that "it can be readily accepted that Jewish people in Australia can comprise a group of people with an "ethnic origin" for the purposes of the Act."[86] *Jones v Scully* also concluded that Jews are a group of people with an "ethnic origin" for the purposes of the RDA.[87]

There has been no analysis of whether Muslim people fall within the term "ethnic origin" in the RDA. However, the Explanatory Memorandum to the *Racial Hatred Bill 1994* (Cth), which later became the *Racial Hatred Act 1995* (Cth), refers to *King-Ansell* and suggests that Sikhs, Jews and Muslims fall within the term "ethnic origin" in Australian legislation.[88]

This could result in some, but not all, religions being covered by this non-discrimination provision. This undesirable inconsistency could be rectified by the inclusion of religion as a ground of discrimination in any new non-discrimination provision.

4.4 Where should a new non-discrimination provision be located?

PIAC believes that there is no existing chapter in the Constitution where a non-discrimination provision, as outlined above, would naturally fit. If it were placed in an existing chapter of the Constitution, questions could arise as to the breadth of its application.

Therefore, it makes most sense for the provision to be located in its own chapter of the Constitution. This would signify that it applies comprehensively to all sections of the Constitution.

Recommendation 3

A new non-discrimination provision should be inserted in the Constitution. The new provision should state:

(1) Every individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination on the ground of race, colour, descent, national or ethnic origin.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, colour, descent, national or ethnic origin.

Recommendation 4

A new non-discrimination clause as proposed in Recommendation 3 above should be located in a new chapter of the Constitution.

5. Removal of section 25 of the Constitution

PIAC supports the many calls for the repeal of s 25 of the Constitution, which explicitly allows a State to disqualify persons of a particular race from voting at state elections. While no Australian State currently avails itself of s 25 to disqualify members of a particular racial group from voting at

86 [2002] FCAFC 156.

87 [2002] FCA 1080.

88 Explanatory Memorandum, *Racial Hatred Bill* 1994 (Cth), 2-3.

a State election, this has occurred in the past. Indeed for many years after federation, Aboriginal people in South Australia and Queensland continued to be denied voting rights – a situation that was facilitated by the presence of s 25.

It is abhorrent that the Constitution allows a State to exclude people from voting on the basis of their race. Moreover, the presence of this provision is entirely inconsistent with Australia's approach to racial equality and simply has no place in Australia's modern multicultural democracy.

The 1988 Constitutional Commission recommended removing section 25, describing it as "odious".[89] However, neither the 1988 nor 1999 referendums included such a proposal. PIAC submits that the focus on race and recognition of Aboriginal and Torres Strait Islander people in the current consultation provides an appropriate opportunity to remove this outdated and blatantly racist provision from the Constitution.

Recommendation 5

Section 25 of the Constitution should be repealed.

6. Agreement-making power

PIAC acknowledges the importance of having a formal agreement between the Commonwealth Government and Aboriginal and Torres Strait Islander communities on issues fundamental to the relationship between these communities and the state.

Too often, Australian governments have made significant decisions affecting the lives, rights and well being of Aboriginal and Torres Strait Islander people, without proper, or in some cases, any consultation or input from the communities affected.

The Northern Territory Intervention is an example of this. As discussed earlier in this submission, the intervention measures had a profound impact on Indigenous people living in the Northern Territory. Despite the magnitude of the measures and its broad-reaching impact, laws were passed supporting the measure without any input or consultation from the communities affected.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, of which Australia is a signatory, protects the right of self-determination. The right of Indigenous people to self-determination is also affirmed in the Declaration on the Rights of Indigenous People, which was supported by the Federal Government in 2009.

However, Australia's history with embracing this right is tumultuous. Australian domestic law does not sufficiently protect this right, leaving its significance largely dependent on the appetite of the government of the day.

PIAC submits that the right of Aboriginal and Torres Strait Islander people to self-determination to freely determine their political status, have the right to autonomy in matters relating to their

89 Constitutional Commission, above n 57, 16.

internal and local affairs and freely pursue their economic, social and cultural development is essential to overcoming disadvantage.

As stated in a report about the situation of Aboriginal and Torres Strait Islander people in Australia, by Professor James Anaya, the Special Rapporteur on human rights and fundamental freedoms of Indigenous people:

> … there is a need to incorporate into Government programmes a more integrated approach to addressing Indigenous disadvantage across the country, one that not just promotes social and economic wellbeing of indigenous peoples, but that also advances their self-determination and strengthens their cultural bonds. The Government should seek to fold into its initiatives the goal of advancing indigenous self-determination, in particular by encouraging indigenous self-governance at the local level, ensuring indigenous participation in the design, delivery, and monitoring of programmes, and promoting culturally-appropriate programmes that incorporate or build on indigenous peoples' own initiatives.[90]

In PIAC's submission, it is uncertain whether it is legally necessary to have an agreement-making power in the Constitution. While having such a power in the Constitution may provide the impetus for the Commonwealth Government to enter into a treaty negotiation process, it would not necessarily compel the Government to do so.

Recommendation 6

The Australian Government should enter into agreements with Aboriginal and Torres Strait Islander communities on issues fundamental to the relationship between Aboriginal and Torres Strait Islander communities and the state.

90 James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people – The Situation of Indigenous People in Australia* (2010), UN Human Rights Council, 2.