Secret women's business and women judges – the *Wilson* case

Hindmarsh Island is an island off the coast of South Australia near the mouth of the Murray River and primarily a tourist destination. It was linked to the mainland by a cable ferry. It was proposed in 1989 to connect the Island to the mainland by a bridge. Environmentalists opposed it, while local business people supported it.

Also opposed to it were some of the local Ngarrindjeri women, including Doreen Kartinyeri, who said it would destroy a sacred site concerning secret women's business. They said they could not give evidence about the cultural heritage of the site except to other women. Other Ngarrindjeri women, including Dorothy Wilson, asserted that the sacred site claim was fabricated. There were various reports, a royal commission and much litigation concerning whether the evidence was fabricated and whether a male Minister could exercise powers to protect the site without himself assessing the evidence.

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996)

Justice Jane Mathews of the Federal Court was appointed to complete a report advising the Minister for Aboriginal Affairs on whether a particular area was of sufficient Aboriginal cultural significance for it to be protected by an order made under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Sections 9 and 10 allowed the Minister to make a declaration for 'the protection and preservation… from injury or desecration' of areas 'of particular significance to Aboriginals in accordance with Aboriginal tradition'. If the claimed area was protected, the Bridge would not be able to be built.

The Minister's power to order the protection of the site was conditional upon the Minister receiving and considering a report 'from a person nominated by him', which addressed the particular significance of the area to Aboriginal people and the extent of the area that *should* be protected. The word 'should' was important, because it showed that the person making the report was not just making findings of fact or reporting evidence to the Minister, but was making a policy decision about what should happen.

Hindmarsh Island Bridge | Construction was completed in 2001
Source: Wiki Commons

The question was whether a policy advisory role of this kind could be exercised by a person who was also a Federal Court judge and has to be independent of the Government. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, a majority of the Court discussed the incompatibility of office doctrine. This doctrine says that where two offices cannot be faithfully and impartially discharged by the same person, one of them is vacated. Ordinarily, it is the first office that is vacated and replaced as a result of taking up the second office. But because of the constitutional provisions that protect the tenure of judges (i.e. they cannot lose their office without a vote of both Houses of Parliament and action by the Governor-General), this doctrine could not be used to vacate the office of a judge. This meant that the office of reporter had to be vacated, if that office was incompatible with being a judge.

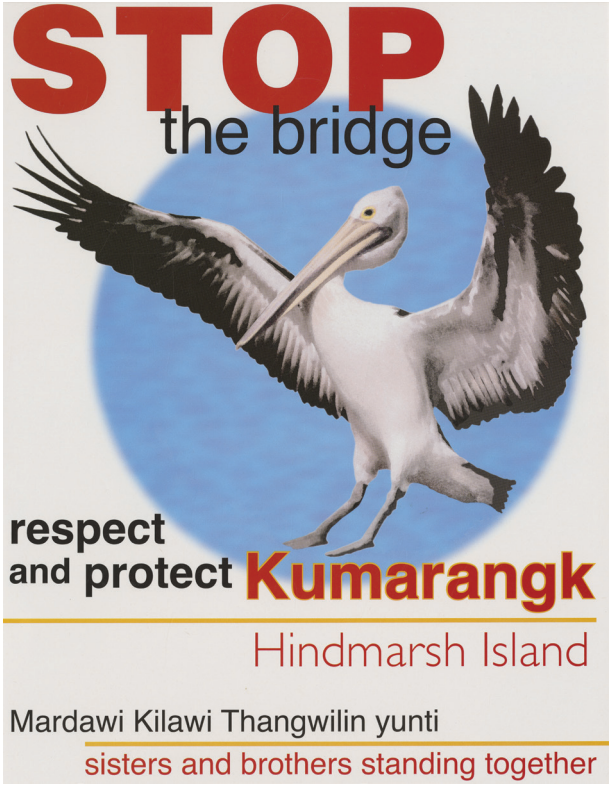
The majority also noted that the constitutional principle of the separation of powers is a limitation on legislative power. So the legislation could not validly authorise the appointment of a judge to fulfil a role that is incompatible with the level of judicial independence required by the separation of powers.

Incompatibility of office

The High Court had to decide whether the role of a person reporting to the Minister was so entwined with the political process that it potentially undermined judicial independence and therefore breached the separation of powers. In short, was this kind of office 'incompatible'?

A majority of the Court decided that four factors needed to be taken into account in order to decide whether an office was incompatible. They were whether:

- the function is an integral part of, or closely connected with, the Parliament or the Executive Government. If not, then no constitutional incompatibility appears.
- the function is required to be performed independently of any instruction, advice or wish of the Parliament or Executive Government (other than a law). If not, then the function is likely to be incompatible.
- any discretion to be exercised by the judge may be exercised on political grounds (ie on grounds not confined by objective criteria set out in the law). If so, then the function is likely to be incompatible.
- the function must be performed judicially (ie without bias, giving interested persons an opportunity to be heard, etc.). If not, then it is likely to be incompatible.



Stop the Bridge : respect and protect Kumarangk | Hindmarsh Island
Source: State Library of SA

People who conduct Royal Commissions, for example, are required to act independently and judicially. This is why such a function is able to be exercised by a judge, although there is usually sufficient concern about the likelihood of being embroiled in politics that a retired judge is chosen for the task. Chief Justice Knox in 1919 objected to serving High Court judges conducting royal commissions, so they do not do so, but sometimes serving State judges do.

In this case, the Court concluded that the report was 'no more than a condition precedent to the exercise of the Minister's power to make a declaration'. It was not an independent review of the exercise of the Minister's power, but rather an integral part of the process of the Minister's exercise of power. It placed the judge 'firmly in the echelons of administration' in a position equivalent to that of a ministerial adviser. The obligation to consider competing interests was essentially political, as was the decision as to the extent of the area that *should* be protected and the type of prohibitions to be made. These decisions could not be made merely be finding facts. They involved opinion and discretion.

The Hindmarsh Island Ferry from the Goolwa landing | 1986
Source: © Jenny Scott | State Library of SA

A majority of the High Court decided to resolve the issue by using a judicial technique of 'reading down'. This involves the court in saving a provision, rather than striking it down, by reading its words or phrases narrowly so that it complies with the Constitution. The High Court decided to read the word 'person' in the legislation narrowly to exclude a judge who has been appointed under Chapter III of the Constitution.

In this case, it was ironic. In times past, women had been excluded from voting or being lawyers or judges because they were deemed not to be 'persons' under legislation. Even after women were treated as 'persons' and allowed to become lawyers in 1918 in New South Wales, it took a long time for them to become judges. Jane Mathews was the first woman judge in New South Wales, when she was appointed to the District Court in 1980. She was later the first female appointed to the Supreme Court of New South Wales. She then became a Federal Court judge. But now, in the *Wilson* case, as a female judge, Justice Mathews was deemed not to be a 'person', because she was a judge, rather than because she was female.

The *Kartinyeri case* – interpreting the race power

In 1997 the Commonwealth Parliament legislated to prevent challenges to the construction of a bridge between Hindmarsh Island and the South Australian mainland. The building of the bridge had previously been challenged a number of times due to environmental concerns and arguments that it would damage an Aboriginal sacred site. The *Hindmarsh Island Bridge Act 1997* (Cth) prevented the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) from being used to preserve or protect the area from the construction of the bridge.

The only constitutional power that the Commonwealth Parliament had to support the making of the 1997 Act was the 'race power' in section 51(xxvi) of the Constitution. It originally said that the Commonwealth Parliament has power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. It was amended at the 1967 referendum to remove the words 'other than the aboriginal race in any State'. This meant that the Commonwealth Parliament could now make special laws with respect to Aboriginal people if it deemed it necessary.

The validity of the 1997 Act was challenged by Doreen Kartinyeri, one of the Ngarrindjeri women who opposed the building of the Bridge, on the ground that it would interfere with a sacred site. She argued that the intent of the 1967 referendum was that the race power could only be used to make laws that were for the benefit of Aboriginal peoples. She then argued that the *Hindmarsh Island Bridge Act* was not for the benefit of Aboriginal peoples, because it limited the protection given to Aboriginal cultural sites by the *Heritage Protection Act*.

All seven Justices of the High Court heard the case, but Justice Callinan later decided not to give a judgment, because before he was a judge he had advised the Commonwealth on the validity of the proposed *Hindmarsh Island Bridge Act*. The case was therefore decided by six Justices and the challenge failed by five to one (with Justice Kirby dissenting).

'Beneficial law', the text of the Constitution and original intent

Chief Justice Brennan and Justice McHugh did not address the 'benefit' argument at all, because they took the view that if Parliament has power to make a law, such as the *Heritage Protection Act*, then that same power allows it to unmake the law, by repealing it altogether, or winding back its application, as the *Hindmarsh Island Bridge Act* did in this case.

The Hindmarsh Island Ferry from the Goolwa landing | 1986
Source: © Jenny Scott | State Library of SA

Justices Gummow and Hayne rejected the 'benefit' argument. They noted that while some might interpret the 1967 referendum as requiring laws only to be made for the benefit of Aboriginal and Torres Strait Islander people, an alternative legitimate interpretation of the 1967 amendment was that it was made to ensure that the Parliament *could* legislate beneficially for Aboriginal and Torres Strait Islander people. Until then, Aboriginal and Torres Strait Islander people were excluded from the race power. The race power was originally inserted in the Constitution to permit laws that discriminated either in a detrimental or a beneficial way. Removing the exclusion of Aboriginal people from the race power allowed beneficial or detrimental laws to be made about them by the Commonwealth Parliament.

Justices Gummow and Hayne considered that it is the constitutional text that should control the interpretation of the race power, and the text was not changed to confine the race power to the enactment of beneficial laws. They thought that this was most likely 'to avoid later definitional argument' about what is beneficial.

Justice Gaudron rejected the argument that the intention of voters in 1967 had changed the meaning of the race power. She looked at the issue both as a matter of language and syntax in terms of the amendment made. She also looked at the terms of the 'Yes' case that was provided to voters before they voted in the referendum. She concluded that the bare deletion of an exception could not cause the power to be limited. It could only increase the Commonwealth's legislative power – i.e. it allowed the Commonwealth to make beneficial or detrimental laws in relation to people of any race, including Aboriginal and Torres Strait Islander people. She found another way to protect Aboriginal and Torres Strait Islander people, through interpreting what made a 'special' law 'necessary'.

Only Justice Kirby held that the race power does not permit the enactment of laws that are detrimental to, or discriminatory against, the people of any race, including Aboriginal and Torres Strait Islander people. He considered that the intent behind the 1967 referendum was to permit the enactment of laws that only applied to the benefit of the people of the races affected. He pointed to the parliamentary debates as showing an intention to permit the Commonwealth Parliament to legislate to aid Aboriginal and Torres Strait Islander people. He also referred to the official 'Yes' case which described a purpose of the provision as being to 'make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race,

Doreen Kartinyeri of the Ngarrindjeri people 1935-2007 Source: Trove (Warning: This photo is of a deceased person and caution should be observed as culturally appropriate)

wherever they may live, if the Commonwealth Parliament considers this desirable or necessary'.

The problems with this argument include that:

- it is inconsistent with the plain words of the provision which do not limit the power to the making of beneficial laws;
- if it had been intended that the race power could only be used in future for making beneficial laws, the amendment could and should have said so, but it did not;
- the amendment, by deleting an exception, increased the Commonwealth Parliament's power, rather than restricting it;
- the academic commentary of the day had warned that merely removing an exclusion would result in the Commonwealth Parliament gaining a power to discriminate adversely against Aboriginal people;
- the Cabinet Minutes (which record the arguments put to the Cabinet about the proposed change) show that the Government intended to leave open the possibility of an adversely discriminatory use of the race power in the future;

Hindmarsh Island Bridge | Construction was completed in 2001
Source: Wiki Commons

- neither the 'Yes' case nor the parliamentary debate said that it was intended that Parliament only be able to enact beneficial laws; and

- there was no public debate as to how benefit was to be determined and for whose benefit it was to apply (eg whether a law would be valid if it benefited Aboriginal women and children to the detriment of men), whether a beneficial law could be repealed (as the repeal would be non-beneficial), whether it had to be solely for benefit or overall for benefit and what would happen to a law if an amendment later added a non-beneficial aspect. The people never discussed or decided these issues.

Background to the drafting of the 1967 amendment

In 1966, a backbench Liberal Member of Parliament, W C Wentworth, put forward his own proposed constitutional amendment. It proposed that the race power be replaced with a power to make laws with respect to the 'advancement' of Aboriginal people. He also wanted the insertion of an anti-racial discrimination provision in the Constitution. Wentworth argued in Parliament that if all that was done were to cut out the words 'other than the aboriginal race in any State', then this would allow the Commonwealth Parliament to discriminate in a way that was against the interests of the people concerned. He wanted to prevent this.

But the Cabinet rejected his proposal. The Attorney-General pointed out to Cabinet the difficulty of deciding what laws would be for the 'advancement' of Aboriginal people. Would advancement be assessed in relation to the entirety of the law, or each section of it? It was too uncertain. He also argued that it would treat Aboriginal people as second class citizens in the Constitution by saying that they needed 'advancement'. Cabinet concluded that it would be better just to remove the exclusion of Aboriginal people from the race power, and leave the power capable of use either adversely or beneficially, as the circumstances warranted.

The Cabinet's records were not shown to the High Court during argument in the case. The Court only considered the parliamentary debates and the official 'Yes' case that was sent to voters.

But the *Kartinyeri* case did raise a very interesting question. If one is looking to find the 'original intent' behind an amendment to the Constitution, whose intent counts? Is it the intent of the Cabinet, which determined the wording of the constitutional amendment, or the intent of the Parliament which passed the amendment, or is it the intent of the people who voted in the referendum? How does one determine what that intent is, particularly when it is the intent of a collective body? Is it the intent of the majority? How does voting 'Yes' or 'No' on a bill in Parliament or in a referendum really tell you what was meant beyond the text of the change? Original intent is very hard to ascertain in any legitimate or accurate way.

The result in *Kartinyeri*

In the *Kartinyeri* case, three judges rejected the benefit argument, two didn't address it, one was in favour, and one did not give a judgment. As there was no clear majority on the point, we are left with no precedent, apart from the proposition that the power to make a law includes the power to amend or repeal it. Otherwise, the uncertainty remains until the issue comes before the High Court again in the future, or the race power is again amended.

The case shows, however, that the Commonwealth Parliament can at the very least wind back existing Indigenous rights in statutes, such as the *Native Title Act 1993* (Cth), and probably make new laws that discriminate against Aboriginal and Torres Strait Islander people. The race power has not been relied upon to make laws about the people of any other race – just Aboriginal and Torres Strait Islander peoples. This is one of the reasons why Indigenous Australians want a constitutionally guaranteed voice in laws made about them. They want a say in laws that directly affect them, like the Northern Territory intervention of 2007, native title and cultural heritage.

Justice Mary Gaudron
Source: HCA

If the race power is to be amended by a referendum in the future, this case shows how important it is to make the 'intent' behind a provision crystal clear during the referendum campaign and that the intent matches the text of the amendment.

This will ensure that that courts in the future have the benefit of clearer guidance as to what was intended and can take this into account when it is appropriate.

Attempts to expand Commonwealth industrial relations and corporations powers

The Constitution was drafted so that most powers were still exercisable by the States, as they are closer to the people. The federal level of Government was intended to deal with matters that could only effectively be done at the national level (eg external affairs and defence) or required uniformity (eg weights and measures, currency, census and statistics) or involved matters that crossed over two or more States.

When it came to commercial and industrial matters, the Commonwealth's role was limited. It could legislate about interstate trade and commerce (section 51(i)) but not trade within a State. It could legislate about industrial relations, but only to prevent or settle industrial disputes that crossed State borders (section 51(xxxv)).

As for the power to legislate about corporations, section 51(xx) confined the Commonwealth to legislating about 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Did this mean that it could legislate to instruct those corporations about what they can or can't do in running their businesses?

The High Court in the *Huddart Parker* Case in 1909 decided that a federal law that prohibited foreign, trading and financial corporations from joining in unfair competition was invalid. This was because section 51(i) showed that the Commonwealth Parliament did not have the power to legislate to control trade within a State.

The Huddart Parker Case 1909: heard by the High Court of Australia, comprising Sir Samuel Griffith, Sir Edmund Barton and Richard O'Connor (pictured), and Sir Isaac Isaacs and H B Higgins (not pictured). Source: National Archives of Australia

The pristine Franklin River.
Source: © Peter Dombrovskis,
The National Library of Australia

It therefore could not use its power to make laws about trading corporations to control how they traded within a State. The majority of the Court was concerned that if it interpreted the corporations power more broadly, it would allow the Commonwealth Parliament to interfere in all sorts of areas of State jurisdiction, merely because the body performing the act was a trading corporation. Such an approach would allow the Commonwealth Parliament to determine the trading hours of hotels or determine the minimum wage payable by every trading corporation to its employees. This was thought to go against the scheme of federation.

Referendums to alter these powers

In the early years of federation, the Commonwealth became very frustrated by its limited powers to deal with trade, corporations and industrial relations, and tried to amend the Constitution to expand its powers on these subjects. Every time the people voted No.

There were referendum questions to expand the scope of the corporations power in 1911, 1913, 1919, 1926 and 1944 (with this last one dealing with 'companies' and for five years only). There were referendum questions to expand the scope of the industrial relations power in 1911, 1913, 1919, 1926 and 1946.

The referendums came from both sides of politics with Labor Governments proposing the referendums in 1911, 1913, 1944 and 1946, the Hughes Nationalist Government proposing the 1919 referendum and the Bruce-Page Coalition Government supporting the 1926 referendum. Even within political parties, there was not always agreement.

For example, the 1911 referendum, proposed by the Fisher Labor Government was opposed by NSW Labor politicians on the basis that centralisation of power would frustrate State Labor Governments from undertaking their own social experimentation.

Change by interpretation

Despite these defeats, the results have since been effectively overturned by High Court interpretation of these powers. In 1971, the High Court in the *Rocla Concrete Pipes* Case overruled the *Huddart Parker* Case. Chief Justice Barwick (a former Liberal Attorney-General) argued that just because section 51(i) does not give the Commonwealth Parliament power to make laws about trade within a State, this should not limit the Parliament's power to make laws that control the trading activities of trading corporations within a State.

In 1983 there was a political struggle between the Commonwealth and Tasmania about the building of a dam on the Franklin River to produce hydro-electricity. The Commonwealth wanted to stop it. One of the powers it used was the corporations power in section 51(xx).

In the *Tasmanian Dam Case*, five judges accepted the validity of a law that prohibited acts by a trading corporation (i.e. acts involved in building a dam) if done 'for the purpose of engaging in its trading activities' (i.e. selling hydro-electricity generated by the dam). But only three of those judges took the wider view that the power could be used to direct a trading corporation about what to do, regardless of any connection with its trading activities.

Work Choices Case 2006 : Chief Justice Gleeson (above) led the majority, with Justices Kirby and Callinan dissenting.
Source: HCA

In 2006 in the *Work Choices* Case, a majority of the High Court took the final step in expanding the Commonwealth's powers and overturning the effect of previous referendums. The Commonwealth Parliament had enacted an industrial relations law that was not confined to preventing and settling interstate disputes. Instead, it based the entire law on the corporations power, by applying this new industrial relations regime to the employees of foreign, trading and financial corporations. It applied regardless of whether it had anything to do with their trading activities.

The High Court decided the law was valid. It built on the steps taken in the previous cases to decide that the corporations power was not affected by the limitations on the trade and commerce power or the industrial relations power.

The majority concluded that the Commonwealth Parliament could make any laws that regulated the activities of these corporations, or imposed obligations on them, or concerned their relationships with others, including their employees. This massively expanded the Commonwealth's powers both in relation to industrial relations and corporations, giving it the powers that it had sought, but failed to obtain, in those earlier referendums.

As most organisations and institutions these days are considered trading corporations, including universities and hospitals, the Commonwealth Parliament now has the power to legislate to control what they do and how they do it. This was precisely what the majority of judges in *Huddart Parker* (who were framers of the Constitution) had strongly opposed.

Almost 100 years after *Huddart Parker*, the majority in the *Work Choices* Case did not consider that its constitutional interpretation should be affected by referendums held long ago. It pointed out that the defeated proposals in those referendums were not the same as the law in this case. The referendums were also affected by politics and how the campaign had been run. The majority doubted whether the voters were informed when they made their choice.

Justices Kirby and Callinan disagreed. They thought that the continued refusal of Australian voters to grant a general industrial relations power and a broader corporations power to the Commonwealth was a relevant factor in constitutional interpretation. What do you think?

Topic 10.1: Lesson Three

The High Court and interpretation of the Constitution

AUSTRALIAN CONSTITUTION CENTRE

Time/Lesson	Learning Goal
• 1 hour/ 1 Lesson	• To understand how the High Court interprets the Constitution by considering a number of examples.
Rationale	**Success Criteria**
Students need to understand how the High Court interprets the Constitution in order to assess, when they are voters, whether to vote for or against constitutional amendments.	Students understand the different techniques the High Court uses in constitutional interpretation.

Teaching Reference Document

- TRD 126 - Secret women's business and women judges - the *Wilson* case
- TRD 127 - The Kartinyeri case - interpreting the race power
- TRD 128 - Attempts to expand Commonwealth industrial relations and corporations powers

Resources

- VIDEO: ABC Hindmarsh Island Bridge case: https://www.abc.net.au/rightwrongs/story/hindmarsh-islandbridge-case/

Tuning In

EXPLAIN: The building of the Hindmarsh Island Bridge was very controversial. It was opposed by environmentalists and Aboriginal people and was supported by local business people. There was lots of litigation about it, as well as inquiries and a royal commission. Today we will look at two High Court cases that related to the building of the bridge as a means of illustrating the different techniques used by the High Court in constitutional interpretation. The first case is the Wilson case which concerned whether a female judge could be appointed to hear evidence of secret women's business from Ngarrindjeri women and then report to the male Minister on whether the area should be protected from development. Did this breach the constitutional principle of separation of powers by involving a judge in ministerial policy matters? The second case, the Kartinyeri case, concerned whether Parliament could enact legislation that wound back the protection of Aboriginal and Torres Strait Islander cultural heritage laws so that they did not apply to the building of the bridge. Did the race power in the Constitution, as amended in 1967, permit laws that were not for the benefit of Aboriginal people or could it only be used for beneficial laws?

Teacher Instruction

READ: TRD 126 Secret women's business and women judges - the *Wilson* case

ANSWER questions on the following:

1. What constitutional principle was the High Court trying to protect?
2. Why was it concerned about a judge exercising a power that involved policy discretion rather than making an assessment based on facts or objective criteria?
3. How did the Court resolve the problem? What does it mean to 'read down' a statutory provision? Why does a Court want to save the valid operation of a provision as much as it can, while preventing it from operating in a constitutionally invalid way? Does it have something to do with respecting the will of Parliament, while at the same time having to uphold the Constitution?

Group Independent Learning

CLASS DISCUSSION: In the *Kartinyeri* case, the issue of 'original intent' arose. The first question was what takes primacy in constitutional interpretation. The Court gave primacy to the plain meaning of the text of the Constitution. Issues of intent only arise if there is some ambiguity in the text. But Justice Kirby thought there was some ambiguity and resorted to original intent to help resolve it. When we are dealing with the original intent of provisions drafted in the 1890s, we use the Constitutional Convention debates of the 1890s and other works written at the time to give context to what was intended. But how do we do that in relation to an amendment in 1967? Whose intent counts? Is it the intent of the Cabinet, or of Parliament or of the people? And how do we work out what that is? How would you determine the intent of the people today about a referendum proposal? Discuss ways by which we might give the High Court a clear view of the 'intent' behind a constitutional amendment - including official documents like the Explanatory Memorandum, the second reading speech and the Yes Case to the referendum. Does that really explain the intent of voters?

Wrapping It Up

DISCUSSION: Determining the intent of a body of people, whether that be a Cabinet, Parliament or voters is very difficult. Does that undermine reliance on 'original intent' and if it does, how else could you give a Court guidance about how to interpret words in the Constitution?

Differentiation/Enrichment

In Kartinyeri, it was argued that laws under the race power could only be made for the benefit of Aboriginal and Torres Strait Islander peoples. How do you decide what is beneficial? What if a law would benefit Aboriginal women, but not men? If a beneficial law was made, could it never be repealed because repealing it would not be beneficial? Ask students to analyse whether a legal constraint based on 'benefit' could be workable, given that members of a race may have different interests and needs, so that what is beneficial or detrimental to some would differ.

Assessment Strategies

Check understanding from answers to questions and participation in discussion.