CONSTITUTIONAL RECOGNITION BY WAY OF AN INDIGENOUS ADVISORY BODY?

by George Williams

INTRODUCTION

Noel Pearson has injected an additional, important idea into the debate on changing the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples. He has suggested that recognition should provide Indigenous peoples with a voice in the lawmaking process. New text would be inserted into the Constitution creating a body of Indigenous peoples to advise the federal Parliament on the making of laws.[1]

Like other proposals for change, this idea demands careful scrutiny and analysis. In this article I identify problems relating to its design, its viability at a referendum and its relationship with the races power in section 51(xxvi) of the Constitution. After setting out these concerns, I propose how the model might be improved.

DESIGN ISSUES

The advisory body is being proposed on the basis that it will 'guarantee Indigenous people a better say in the nation's democratic processes with respect to Indigenous affairs'.[2] This is a worthy goal, but I have a number of concerns about whether its design will enable this to occur.

First, the effectiveness and influence of institutions within Australia's system of government can depend upon the powers to be exercised by that body. When it comes to shaping the state of the law on contentious matters of social and economic policy, such powers can be decisive. In this case, it is proposed only to:

> create an Indigenous body to advise and consult with Parliament on matters affecting Indigenous interests. While the body's advice would not be binding, Parliament should be constitutionally required to consult with and consider the advice of the Indigenous body when debating proposed laws.[3]

It is questionable whether, in the absence of any determinative powers, such advice or consultation will have much effect on the making of laws by the federal Parliament. In particular, it is hard to see how the advice of Aboriginal people will be sufficient to overcome the demonstrated willingness of the federal Parliament to enact laws to their detriment. It is notable that such laws have been enacted even over the vocal opposition of Indigenous peoples. Examples include laws for native title and the Northern Territory ('NT') intervention that suspended the operation of the *Racial Discrimination Act 1975* (Cth).[4]

The problem for Indigenous peoples is not only that parliamentarians have been willing to ignore them in the past, but that political parties can gain popularity in the broader electorate by being seen to act contrary to the wishes of minorities such as asylum seekers and Indigenous peoples. There may thus be a political upside for a government seen to act contrary to the advice of the body. It is hard to see how the body could overcome this dynamic.

Second, the influence of the body will depend upon its capacity to speak with one voice. If it does not, it will enable the government to either ignore the advice on the basis that it is incoherent, or to pick and choose between the perspectives on the advisory body in order to find support for its own policy preference. However, it is unrealistic to expect Indigenous members on the advisory body to act unanimously. As with the rest of the community, Aboriginal Australia contains deep divisions on a range of political and ideological lines, and it is to be expected that these would be reflected on the advisory body.

A related issue is whether the body will actually enable Indigenous voices to be heard in Parliament, whether or not they speak with one voice. Unless the reform mandates that this must occur in some way, there is no guarantee that this will result. Advisory bodies of this kind are frequently ignored in parliamentary debate, including even bodies comprised parliamentarians, such as the Parliamentary Joint Committee on Human Rights. Its reports are typically tabled in Parliament without further engagement, and indeed the Pearson proposal could also permit this.

Where greater attention is paid to the findings and advice of advisory bodies, it is because the advice provided coincides with the views of parliamentarians. Such advice is thus used to confirm a

position, rather than to change it. This is a matter of common sense. Why would a parliamentarian reference and use material contrary to their own perspective? The result is a weak form of participation in parliamentary democracy that may enable Indigenous voices to be heard, but not to change outcomes.

Third, it is been suggested that the advisory body would be effective and listened to because it will be included in the text of the Constitution by way of a referendum. It is a mistake to overstate the effect of this proposal being supported in this way.

Referendum outcomes can be ephemeral unless they subsequently receive political backing. This was true even for the landmark 1967 referendum that deleted discriminatory references to Aboriginal people from the Constitution. Expectations were high after that referendum that the Commonwealth would move to use its new power to make laws for Indigenous peoples. This did not happen, leading one of the champions of that referendum, Faith Bandler, to state that the government had made 'a mockery of the referendum … It is as if the electorate had never made any moral commitment to do a great deal more for Aborigines.'[5] Things did change, but only five years later in 1972 when the Whitlam government came to power with a mandate and a desire to act.

Another example of this point is a section already within the Constitution. Section 101 sets out what was thought to be a key institution of Australia's federal architecture in stating that:

> There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

According to the Constitution, that body 'shall' exist, but no attempt has been made to constitute it for decades. It is a very different institution to what is being proposed here, but it nonetheless demonstrates how undue significance can be placed upon an idea being put within the Constitution.

Fourth, the advisory body is misdirected in terms of where it might have the most impact. The record of a range of bodies in Australia and internationally within Westminster systems reveals the reluctance of governments to change course once a bill is within Parliament. One only has to examine the recent experience of the Parliamentary Joint Committee on Human Rights, which was enacted in 2011[6] with high hopes of it having an impact upon the making of laws that infringe upon human rights. It has an advisory role in regard to human rights, and has proved largely unsuccessful in having the government change course despite numerous recommendations and findings about rights having been breached. This is because the finding of an advisory body is not sufficient to lead a government to back down on a policy or a draft law, especially if it is popular or an election commitment.

One reason such bodies are ineffective is because governments do everything they can to avoid altering their substantive policy position once a Bill is in Parliament. To do so is to be seen to back down, and hence to suffer a political defeat. Governments avoid this by enforcing party discipline so as to impose the desired outcome. In this case, there is no reason to expect that a government would be any more willing to back down from its position based upon the view of an advisory body of Indigenous people. If a government was to change course, it would more likely be because its policy faces defeat at the hands of a hostile Senate. Of course, it is possible that the position of a majority of the Senate might coincide with that of the Indigenous advisory body, but this could not be relied upon.

We need to overcome the notion that an advisory body and racial discrimination protection are mutually exclusive.

Even if the advisory body is determined to make a difference, the pace at which legislation can be made in the contemporary era would prove a formidable obstacle. One example is provided by the legislation that brought about the NT intervention, including the *Northern Territory National Emergency Response Act 2007* (Cth). These were extraordinary laws with significant human rights ramifications designed to remedy a devastating social problem.

The Bills—running to 604 pages—were introduced in the House of Representatives on 7 August 2007; the first at 12.32pm, the last at 1.47pm. This was the first opportunity that most parliamentarians had to read them, yet all five Bills were passed by the House at 9.34pm that same day. The Bills were subjected to greater scrutiny in the Senate, where the government did not hold a majority. The legislation was debated in the Senate, but ultimately passed without amendment on 16 August. As this example shows, the window for advising on laws such as these may be extremely short.

If there is scope for an advisory group to make an impact, it is not likely at the parliamentary stage. It is at the stage at which laws are drafted and policy developed, that is, within the executive. This is why governments have set up advisory bodies at this level of government. Such bodies however would not likely be put in

the Constitution because they need to be flexible and adaptable to the processes and needs of the government of the day. A body at this level will also typically operate behind closed doors, as that maximises its chances of bringing about changes in policy.

The sum of these problems is that there cannot be confidence that this new advisory body would be effective in the sense of having an impact upon the making of laws. Certainly, it could not be described as being a check upon the capacity of Parliament to enact laws that discriminate against Indigenous peoples on the basis of their race.

Any change to the Constitution must also deal with the problem of racial discrimination.

PROBLEMS AT THE BALLOT BOX

An Indigenous advisory body can only be inserted into the Constitution if Australians vote for it at a referendum. However, this is unlikely to occur. A weakness of this model from a strategic viewpoint is that it has been cast so clearly by Pearson and others as being championed and owned by 'constitutional conservatives'.

This raises a problem that has beset many referendums in the past.[7] When a proposal is publicly identified as being connected to one part of the political spectrum, typically a major political party, it has tended to alienate others and has met defeat at the ballot box. Whether proposal is cast as conservative or progressive, Labor or Liberal, signalling its political alignment bears the significant risk that people will oppose it simply because it runs counter to their own political outlook. They may do so without even the barest understandings of what is being proposed.

A different, but related problem is that this model suffers from some of the same problems that beset the minimalist models during the 1990s republic debate. Australians have shown that they are wary of voting for something cast as a minimal attempt to deal with a problem. They want a proposal that deals with an issue in a substantive, meaningful way. The fact that the 1999 republic model had a number of these hallmarks was a key reason why it was defeated by monarchists combining with republicans opposed to minimalist change.

The same possibilities for opposition are evident here if the advisory body is proposed as an alternative to more substantive change in the form of providing protection against racial discrimination. In such a case, an advisory body would be inserted into the Constitution while Parliament would retain the same power to discriminate on the basis of race. This outcome is vulnerable to attack on the basis that it is a largely symbolic change that brings few tangible benefits to the community.

PROTECTION AGAINST RACIAL DISCRIMINATION

The proposal for an advisory body has been put as an alternative to including protection in the Constitution against racial discrimination. As the above analysis of its design shows, the body would not offer anything akin to such protection.

This is a significant problem because preventing such discrimination has been repeatedly identified by Indigenous peoples as being a necessary part of the recognition process. For example, a survey conducted by the National Congress of Australia's First Peoples of its membership, which is drawn from the Aboriginal and Torres Strait Islander community and their peak organisations from across Australia, found that 97 per cent favoured an amendment to the Constitution that would prohibit racial discrimination or provide a guarantee of equality.[8]

Support for such change is also very strong in the broader community, with independent polling conducted by the Expert Panel on Constitutional Recognition of Indigenous Australians finding that 80 to 90 per cent of respondents favoured amending the Constitution to insert a general guarantee against laws that discriminate on the basis of race, colour or ethnic origin.[9] Indeed, I think it is fair to say that some form of racial discrimination protection is the single most popular part of the package of reforms that might constitute a recognition referendum.

The Pearson proposal may appeal to constitutional conservatives, but it runs counter to community sentiment. It would not provide legal protection against racial discrimination. Indeed, Pearson suggests that his proposal for an advisory body be accompanied simply by replacing the races power with new wording that would permit laws to be made generally for 'Aboriginal and Torres Strait Islander peoples'. Such wording would retain the prospect that racially discriminately laws could be enacted. Not surprisingly, it has been suggested that any such change would merely be an exercise in 'semantics'. This is hardly a saleable proposition at a referendum. It is open to the charge that Australians will be voting to support the continued power of the federal Parliament to discriminate on the basis of race.

In fact, the legal position of Indigenous peoples would actually be inferior if the current races power were replaced with an advisory body and a power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. The difficulty with this replacement

power is that it provides no basis for arguing that it cannot be used to discriminate against Indigenous peoples.

On the other hand, such an argument is possible in regard to the current races power. It enables the federal Parliament to pass laws with respect to: 'The people of any race for whom it is deemed necessary to make special laws'. In the *Native Title Act Case*,[10] six judges of the High Court left open the question of whether the phrase 'deemed necessary to make special laws' means that the Court 'retains some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power'.

This issue arose again in the *Hindmarsh Island Bridge Case*.[11] There, the Court split on the whether the races power can be used to enact laws that discriminate against Indigenous peoples. Two judges said that this is possible, two others said it is not and the final two judges did not deal with the issue. The absence of a majority on any position means that the scope of the races power remains unresolved.

As a result, it thus remains open for Indigenous peoples to argue that the races power is constrained, and that a future High Court should follow the lead, for example, of Justice Gaudron who stated that 'it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid' under the power.[12] Similarly, the Court might adopt the view of Justice Kirby 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.'[13]

In essence, Pearson proposes to delete a power that the High Court might one day determine cannot be used to enact racially discriminatory laws, and to replace it with another power that could not be subject to any such limitation. In legal terms, Indigenous peoples would go backwards.

A WAY FORWARD

The advisory body suffers from problems of design and political positioning. I believe that these might be overcome by developing the model further. In particular, we need to overcome the notion that an advisory body and racial discrimination protection are mutually exclusive. In fact, the best model may involve aspects of both of these.

In particular, the replacement of the races power needs to be constrained by words that indicate that, for example, it cannot be used to enact laws that discriminate adversely against Indigenous peoples. I support a freedom from racial discrimination being inserted into the Constitution to protect all Australians. An example of this is the proposed section 116A drafted in 2012 by the Expert Panel on Constitutional Recognition of Indigenous Australians. It would provide in part that: 'The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.'[14] However, recognising conservative objections to that section, other compromise options exist.

In particular, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has suggested a more modest outcome. It has proposed words of limitation (that a law may not 'discriminate adversely against' Indigenous peoples) within the replacement to the races power itself, rather than a freestanding guarantee.[15] This has the effect of quarantining the scope of the protection from racial discrimination so that it only protects Indigenous peoples, and would remove many of the concerns conservative people have about this reform. Without some form of change of this kind, I do not see this referendum as being viable.

Making this change would represent an important compromise on behalf of the conservative backers of this proposal. This will be crucial, not only in terms of producing a viable model, but also in broadening out the range of people who are able to support the referendum. Building a bridge by way of some form of limitation of racial discrimination is the key to this.

Developing the model is also necessary because in its current form it does not meet the concerns of Indigenous peoples, as identified by Pearson. As he has stated, Indigenous peoples are seeking 'secure and stable protection of their rights and interests that is shielded from short-term political fluctuations'.[16] An advisory body might provide a voice for Indigenous peoples, and even improve deliberation within Parliament, but it does not provide protection.

There remains the capacity, indeed even the likelihood, that Aboriginal and Torres Strait Islander interests would continue to be affected by short-term political fluctuations, including events like the NT intervention. Without more, this model delivers on the aspirations of constitutional conservatives for minimal change and no additional substantive protection of Indigenous rights and interests, without providing corresponding benefits to Indigenous peoples. In doing so, the Pearson model speaks to the 10 to 20 per cent of the community that does not support including protection from racial discrimination in the Constitution.

An advantage of including modest racial discrimination protection is that it would improve the operation of the advisory body. The

body would have something in the Constitution to advise on, that is, whether a law made by Parliament might be seen as discriminating adversely against Aboriginal people. It would give the body a meaningful role, and Parliament would be minded to listen to the body on this question given the possibility that the issue might be tested in the High Court. This also reflects the experience overseas of advisory bodies. Where they are effective, it is usually because they can advise within the context of a legal framework that recognises Indigenous rights, through a Constitution, treaty or otherwise.

Of course, Australia is different from all of these nations. We are now the only democracy to lack some form of national Human Rights Act or Bill of Rights. In addition, unlike New Zealand, Canada and the United States, Australia has never signed a treaty with Indigenous peoples. It is hard enough for an advisory body to be effective with such things, let alone in the context of a legal framework that contains nothing of this kind. It is for this reason that the change to the Constitution must also deal with the problem of racial discrimination. Doing so would ground the advisory body in a legal framework that gives meaning to its work.

George Williams AO is the Anthony Mason Professor, a Scientia Professor and the Foundation Director of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, UNSW. This is based upon a presentation at a Symposium on Indigenous Constitutional Recognition held at the University of Sydney on 12 June 2015.

1 Cape York Institute, 'Supplementary Submission to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (January 2015) <http://capeyorkpartnership.org.au/wp-content/uploads/2015/02/Supplementary-Submission-to-Joint-Select-Committee-January-2015.pdf>. See also Anne Twomey,: 'Putting Words to the Tune of Indigenous Constitutional Recognition' *The Conversation* (20 May) <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>.

2 Cape York Institute, above n 1, 4.

3 Ibid 4.

4 *Native Title Amendment Act 1998* (Cth); *Northern Territory National Emergency Response Act 2007* (Cth).

5 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed 2007), 62.

6 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

7 See George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

8 National Congress of Australia's First Peoples, *Statement to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 7 September 2011, <nationalcongress.com.au/wpcontent/uploads/2011/09/CongressStatementtoExpertPanel.pdf>.

9 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, 16 January 2012).

10 *Western Australia v Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373, 460 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

11 *Kartinyeri v Commonwealth* (*Hindmarsh Island Bridge Case*) (1998) 195 CLR 337, 367.

12 Ibid 367.

13 Ibid 411.

14 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012), 173.

15 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples *Progress Report* (2014).

16 Cape York Institute, Submission to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (October 2014), 10.

Garlimburla People of the She Oak, 2014
Alison Williams
Acrylic on linen
1200mm x 1800mm