
AN INDIGENOUS ADVISORY BODY: SOME QUESTIONS OF DESIGN

by Gabrielle Appleby

INTRODUCTION

Debate over appropriate constitutional recognition for Aboriginal and Torres Strait Islander peoples continues. There is overwhelming public support for recognition, but there remains division over its form. There is agreement that it must be more than symbolic. There must be some limitation on the Commonwealth's power to enact adversely discriminatory laws. It has been suggested that a constitutional limitation on racial discrimination would achieve this. However, constitutional conservatives have expressed concern that this proposal would inappropriately shift power from Parliament to the court. In response, Noel Pearson and the Cape York Institute have developed an alternative, politically based limitation:¹ an Indigenous advisory body operating within the parliamentary process. This article raises a series of design questions posed by this proposal.

KEY DESIGN QUESTIONS

'Successful' constitutional amendment will take two forms. First, the referendum must gain support. Second, the design must achieve its objective: to give Indigenous peoples a politically powerful and credible voice in the legislative process. Both forms of success will depend, to an extent, upon careful constitutional design.

The most fundamental design issue to be determined is the respective roles that Parliament, the government, the courts, and the Aboriginal and Torres Strait Islander communities will play in the body's creation, structural design and operation. This raises questions about which design aspects will be included in the Constitution and which will be left to Parliament or the body itself to determine. Too much constitutional detail may lead to rejection of the model at a referendum or a lack of flexibility in its future operation. Insufficient detail, however, may allow Parliament to emasculate the body, leaving it unable to perform a meaningful role in legislative debate. Where matters are left to the Parliament to determine, will it have to consult with the Aboriginal and Torres Strait Islander community, and if so, how?

What role should the court play? It has been suggested that the provision be non-justiciable, at least in relation to its operational design.² There is, however, a danger that if the body's operation is made non-justiciable, it will have insufficient political power to negotiate with the Parliament should disagreement arise about the interpretation of its role. There is a strong argument that the *structural* design of the body should be justiciable, which may help in assuring its constitutional status and political power.

MORE SPECIFIC DESIGN QUESTIONS³

The final part of this article suggests a series of more specific design features that must be addressed in any attempt to model the Indigenous advisory body proposal. These should be considered in light of the above discussion about success, constitutional detail and justiciability. This part will first consider the structural design of the body and the second its operational design.

As a threshold design issue, thought must be given to whether the model is considered sufficiently constitutionally distinct to require the insertion of a new chapter or whether it ought to be included within Chapter 1 ('The Parliament').

STRUCTURAL DESIGN OF THE BODY

Constitutional bodies can be established in different ways: the Constitution can itself establish the body, or it can be left for the Parliament to do so. The constitutional establishment of the body may be of little practical consequence, but it may be symbolically significant.

How will the body be 'representative' of Aboriginal and Torres Strait Islander peoples? Will the body be elected, and if so, how will the electoral system be designed? Should the body consist of appointed delegates? Will the body represent different geographical regions and/or cultural groups, including traditional owners, stolen generations, women, Torres Strait Islanders and youth?⁴ Should it consist of a mixture of elected and appointed members? Will members have to be Indigenous and, if the body

is elected, will electors have to be Indigenous? What test of identification will be employed?

The number of members of the body is likely to vary depending on how it is constituted; that is, whether it needs a certain number of members to represent different constituencies, and also the breadth of its functions, to ensure it has sufficient members to discharge its obligations. When will an individual be disqualified from being a member of the body, either because of their conduct or a conflict of interest? Guarantees against removal of members should be included to ensure the real and perceived independence of the body. Other design questions relating to membership that must be considered include the appropriate length of members' terms and how casual vacancies will be filled.

The sustainable funding of the body will be pivotal for its ongoing operational success.⁵ Leaving the determination of funding entirely at the discretion of the government and Parliament carries with it very real dangers. A related question is whether members of the body will be remunerated or provided with allowances.

Will the body be empowered to summon witnesses, require production of documents and take evidence under oath? What will the internal processes of the body be? For example, must it conduct public consultations, how will decisions be made, and will it be able to issue dissenting reports?

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OPERATIONAL DESIGN OF THE BODY

The body is intended to be an advisory body, without the power to veto or hold up the passage of legislation. Nonetheless, the body's functions should be expressed clearly and strongly; this will allow it to draw upon the description of its functions in the event of disagreement as to its role. The proposed advisory function could make reference to 'advice',⁶ or other descriptors: 'counsel' or 'consultation'. It might also describe how Parliament should respond to the body's advice, for example, Parliament must 'consider' the advice or 'respond' to it. Should the advice be tabled in Parliament?⁷ Should the body have a right to address the Parliament?

On what Bills must, or can, the body advise? The Bills could be described narrowly: those Bills that come under the proposed head of power. A broader approach would be to give the body power to

advise on 'all matters relating to Indigenous peoples' or 'all matters that affect Indigenous interests', or 'have a more significant effect on Indigenous peoples than non-Indigenous peoples'.⁸ Even more broadly, the advice function could be conferred with no restriction.

Bills might be referred to the body from Parliament or the body might be empowered to advise on whichever Bills it determines fall within its jurisdiction. Will the body have set criteria (terms of reference) against which it must scrutinise Bills? An important issue that must be resolved is that of timing. How will it be ensured that the body has adequate time to report on Bills?

In addition to its advisory function, the Cape York Institute has suggested that the body be given the power to be proactive, developing its own policy proposals. Other roles the body could perform include reporting on government policy, monitoring and reporting on the operation of current legislation and government departments and agencies, and advising on state and territory laws.

THE NEXT STEP: CONSULTATION AND DELIBERATION

This article identifies a number of design features that must be settled in drafting a provision for the proposed Indigenous advisory body. While not purporting to offer answers, it is hoped that the article has raised a number of important design issues for future deliberations on the model.

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- 1 See, eg, Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (September 2014) 55 *Quarterly Essay*.
- 2 It is believed this can be done relatively easily by referring to its functions in relation to 'proposed laws', making it an intra-mural parliamentary matter: *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).
- 3 This part draws on the consideration already given to some of these questions in, for example, Cape York Institute, Submission No 38 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2014; Cape York Institute, Submission No 38.2 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2015; John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *Australian Journal of Public Administration* 419; Shireen Morris, 'Agreement-making: The need for democratic principles, individual rights and equal opportunities in Indigenous Australia' (2011) 36(3) *Alternative Law Journal* 187; Shireen Morris, 'Indigenous Constitutional Recognition, Non-discrimination and

Equality before the Law: Why reform is necessary' (2011) 7(26) *Indigenous Law Bulletin* 7; Eric Sidoti, Whitlam Institute, *Indigenous Political Representation: A Parliamentary Option* (A Concept Paper for the Consideration of Indigenous Leaders, 21 January 2008); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Building a Sustainable National Indigenous Representative Body: An Issues Paper* (2008); Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (online), 20 May 2015, <<http://theconversation.com/putting-words->

[to-the-tune-of-indigenous-constitutional-recognition-42038](http://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038)>.

- 4 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 3, 64, 92-96.
- 5 Ibid 64.
- 6 On the last suggestion, see further Twomey, above n 3.
- 7 See further Twomey, above n 3.
- 8 See John Chesterman, above n 3, 426.

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