
THE PROBLEM OF AUTHORITY AND THE PROPOSAL FOR AN INDIGENOUS ADVISORY BODY

by Fergal Davis

INTRODUCTION

Proposals for the establishment of an Indigenous advisory body within the Australian Constitution are genuinely innovative and exciting.¹ Designing such a body is a challenge. Aboriginal and Torres Strait Islander Australians have long sought better political representation.² Indigenous Australians constitute approximately 3 per cent of the population, therefore—even with proportionate reserved seats—such a micro-minority will struggle to assert itself in the Federal Parliament. For this and other reasons, the Cape York Institute rejected proposals for reserved seats in the Federal Parliament as unworkable.³ Noel Pearson expressed the dilemma well:

There's no way that we're going to regularly have members to speak on our behalf in the parliament, and yet parliament is regularly making laws about us. So a provision which makes us part of the formal process of parliament, I think that has got to be part of the discussion.⁴

A constitutional Indigenous advisory body is one way of resolving that dilemma.

THE PROPOSAL

A crucial feature of the proposed body is that it would be non-binding:

[T]he new Chapter [of the Constitution] could be drafted such that the advice of the Indigenous body is highly persuasive and authoritative, but not binding on Parliament. It would not constitute a veto over Parliament's law making. It would therefore not derogate from parliamentary sovereignty in any way.⁵

Professor Anne Twomey has put forward a draft chapter 1A which would be inserted into the Constitution following a referendum.⁶ Twomey's draft definitively demonstrates that it is possible to constitutionally realise the Cape York Institute's vision for a body that would 'not derogate from parliamentary sovereignty in any way.'⁷ The proposed article 60A would 'fit' within the Australian Constitution.

Twomey has noted that:

[t]he critical provision in the chapter is sub-section 60A(4). It imposes the obligation on the two houses of parliament of giving 'consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.'⁸

In terms of constitutional design, the beauty of this proposal is that it grants Indigenous Australians a voice in the parliamentary process whilst respecting the democratic will of Parliament. Some have questioned the potential for a non-binding advisory body to have any material impact.⁹ I have argued that '[a] representative body – correctly constituted – could deliver meaningfully for Indigenous Australians. Undoubtedly such a body would lack legal authority – its advice is non-binding – but it could have political authority.'¹⁰

THE DIGNITY OF THE INSTITUTION

The architects of this proposal envisage a body which is 'highly persuasive and authoritative, but not binding on Parliament.'¹¹ It is a core tenet of the proposal that Parliament ought to be free to set aside the advice of the body after careful consideration. The body's advice cannot be made binding because it would lack the democratic mandate to impose its will on the Parliament. On the other hand, there is no point in seeking to establish a body which would be routinely ignored. If the proposed system was functioning appropriately we would expect to see polite interactions between the Parliament and the body. There should be an expectation that Parliament will comply with the recommendations of the body. On those occasions when the Federal Parliament exercises its right to set aside the advice of the body, there ought to be a respectful explanation when it opted to set aside that advice.

Professor George Williams is sceptical about the potential for a non-binding body to gain traction in our parliamentary democracy. He says:

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.¹²

Professor Cheryl Saunders is more positive, but she too is concerned. She argues that in ‘reality... the Australian political culture is very bad indeed at genuine consultation either with the public at large or with groups affected by particular proposals.’¹³

Professors Saunders and Williams raised valid concerns. Statutory bodies and even parliamentary committees are routinely ignored by the Parliament. The strong cohesion and discipline of the Australian political system mitigates against in-depth debate on the floor of Parliament.¹⁴ To counteract these concerns it will be important to ensure that there is a political cost associated with ignoring the advice of the body.

The UK House of Lords (‘House’ or ‘Upper House’) provides an instructive lesson in political authority. The Upper House of the UK Parliament differs from the Australian Senate in three key ways, which might be said to impact on its political authority.

Firstly, it was not established by plebiscite and lacks any claim to a popular constituent act. Compounding that fact, the House of Lords is unelected—it therefore lacks democratic legitimacy. Finally, since the *Parliament Act 1911* (UK), the House does not possess a legislative veto, it can only delay legislation.

If a body emerges as the preferred model it is crucial that Indigenous Australians have a sense of ownership over it.

In 1997, there were 749 hereditary peers who sat in the Upper House due to accident of birth. The *House of Lords Act 1999* (UK) reduced the number of hereditary peers to 92. Professor Meg Russell has noted that since that reform the House has acted with greater confidence and has been more active in amending and delaying legislation. She attributes that increased confidence, in part at least, to the increased legitimacy stemming from the 1999 reforms.¹⁵ The influence of the House Lords is derived from its political authority.

The political cost of ignoring the body will also correlate with its political authority. In part that will derive from the extent to which the body is able to insert itself into the political life (and imagination) of the nation. The procedures of the body and the manner in which its members interact with the government and opposition will need to be worked through so that it can present itself as an institution of the Constitution and integrated element of the parliamentary process. Building up gravitas and the necessary

parliamentary conventions will take time, but the body will have some distinct benefits in this regard.

THE CONSTITUENT ACT

Professor Gabrielle Appleby has explored various potential mechanisms for establishing bodies such as the proposed body.¹⁶ No matter which precise mechanism is adopted it is crucial that the body be placed on a constitutional footing. While it might be possible to create an advisory body by way of ordinary legislation, this body should not be established in that way. To have authority—political authority—the body must be established by referendum. Carl Schmitt powerfully argued, ‘[d]emocratic theory knows as a legitimate constitution only the one which rests on the constituent power of the people.’¹⁷ Schmitt’s reasoning points at the collective origin of constitutional laws. In a democratic regime, the legitimacy of the fundamental norms and institutions depends on how inclusive the participation of the citizens is during the extraordinary and exceptional moment of constitution making.

The Australian Constitution itself was the result of the participation of citizens in a moment of constitution making:

The Australian nation itself was brought about in a special way. When the Constitution came into force on 1 January 1901, it had a unique claim to popular authority. In what for the time was a radical experiment in direct democracy, the Constitution was approved by the people of the colonies in a series of referendums.¹⁸

To have real authority the body must benefit from a similar constituent act of the Australian public. It is vital that the body be able to point to the moment of its creation as a conferring legitimacy—it must be able to point to a constituent act of the Australian people. Disregarding the body will require the Parliament to actively ignore an institution uniquely created by the express will of the people. There will be a political cost to disregarding the advice of this body which does not apply to other scrutiny committees or statutory bodies. Unlike the Human Rights Commission or the Parliamentary Joint Committee on Human Rights, this body will derive its authority from the people.

THE NEED FOR AN ENGAGED CONSTITUENCY

To have any meaningful authority the body must be a creature of the Constitution established by referendum. But being a constitutional institution brings no guarantees. Section 101 of the Constitution provides for an Inter-State Commission. Despite that constitutional footing the Inter-State Commission no longer exists. The Constitution had sought to vest the Commission with the power to ‘administer and adjudicate’ as to ‘the execution and maintenance ... of the provisions of the Constitution relating to trade and commerce.’¹⁹ In the *Wheat Case* the High Court ruled that

vesting the Inter-State Commission with judicial power constituted a breach of the separation of powers and was constitutionally invalid.²⁰ As a result of that ruling, the Commission lost purpose and it was gradually allowed to wither on the constitutional vine. Some fear that the Indigenous advisory body would face a similar fate. However the proposed body is different to the Inter-State Commission. As the Twomey draft demonstrates it will have no legislative or judicial power.²¹ It is fully compliant with the separation of powers.

In addition, the body will be different from the Inter-State Commission and other statutory and parliamentary bodies because it will have a constituency: Aboriginal and Torres Strait Islander peoples. Indigenous Australians will rightly insist that their representative body be treated respectfully by the Parliament.²²

CONCLUSION

In truth, the existence of a constituent act and a constituency do not guarantee the effective operation of the body. As was noted earlier, Prof Williams has pointed out that all too often '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.'²³ The risk, as articulated by Prof Williams, is that ignoring the body will provide a perverse boost to government popularity. That is a depressing prospect. The referendum process, the constituent act and the existence of an engaged constituency should all be marshalled to counter that prospect.

On 3 August 2015 the Prime Minister rejected calls by Indigenous leaders to establish community conferences to consider the best way forward for constitutional reform.²⁴ That opposition is regrettable. If a body emerges as the preferred model it is crucial that Indigenous Australians have a sense of ownership over it which will come with a strong input to its design. That will contribute to the sense of constituency for the resulting body. The positivity surrounding such a process could be utilised in the referendum process to convince the wider public of the merits of this proposal—one which delivers meaningfully for Indigenous Australians whilst fitting into the existing constitutional structures. The political authority of a body will rest upon the existence of a constituent act and an engaged constituency. Without those features Prof Williams' fears are likely to be realised. But there is an alternative vision:

Constituent politics might be seen as the explicit, lucid self-institution of society, whereby the citizens are jointly called to be the authors of their constitutional identity and to decide the central rules and higher procedures that will regulate their political and social life.²⁵

A referendum is an opportunity to recast political and social life in Australia. An Indigenous advisory body is an opportunity to recast

our democratic institutions so that Indigenous Australians are given a place in the Constitution and a voice in the parliamentary process.

Fergal Davis is a Senior Lecturer in Law and Director of the Parliaments Project in the Gilbert + Tobin Centre of Public Law, UNSW, Sydney.

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- 2 Ibid 9-11.
- 3 Cape York Institute, Submission No 38.1 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, August 2014, 5.
- 4 ABC Radio National, 'Noel Pearson urges re-think on constitutional recognition for Indigenous Australians', *PM*, 13 April 2015 (Noel Pearson) <<http://www.abc.net.au/pm/content/2015/s4215597.htm>>.
- 5 Cape York Institute, above n 1, 15.
- 6 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>>.
- 7 Cape York Institute, above n 1, 15.
- 8 Anne Twomey, above n 6.
- 9 George Williams, Submission No 133 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 12 June 2015, 1.
- 10 Fergal Davis, Submission No 135 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 15 June 2015, 2.
- 11 Cape York Institute, above n 1, 15.
- 12 George Williams, above n 9, 1-2.
- 13 Cheryl Saunders, Submission No 136 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 2015, 2.
- 14 Fergal Davis, 'The Politics of Counter-Terrorism Judicial Review: Creating Effective Parliamentary Scrutiny' in Fergal F Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press, 2014) 142, 147-155.
- 15 Commonwealth, *Reforming the British House of Lords How a Little Reform Can Go a Long Way*, Parl Paper No 47 (2007).
- 16 Gabrielle Appleby, Submission No 132 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 12 June 2015, 6.
- 17 Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) *Constellations*, 223, 237.
- 18 George Williams and David Hume, *People Power: the History and Future of the Referendum in Australia* (UNSW Press, 2010) 2.
- 19 *The Australian Constitution*, s 101.
- 20 *New South Wales v Commonwealth* (1915) 20 CLR 54.
- 21 Anne Twomey, above n 6.
- 22 Fergal Davis, above n 10, 5.
- 23 George Williams, above n 10.
- 24 Michael Gordon, 'Tony Abbott scuttles Indigenous plan on constitutional recognition', *The Sydney Morning Herald* (online) 3 August 2015 <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-scuttles-indigenous-plan-on-constitutional-recognition-20150803-giq6bs.html#ixzz3hpYZdCnS>>.
- 25 Andreas Kalyvas, above n 17, 237.