
MODELS FOR 'A MORE COMPLETE COMMONWEALTH'

by Lucy Jackson

INTRODUCTION

The shape that constitutional reform or 'recognition' of Aboriginal and Torres Strait Islander peoples would take (if it happens) is a live issue. Suggestions and recommendations have included recognition in the preamble; a non-discrimination clause; amendment of the 'racism power'; deletion of the 'racism power'; deletion of s 25; recognition of land rights and/or native title, and recognition of the cultures, languages and heritages of Aboriginal and Torres Strait Islander peoples.¹ In his 2014 Quarterly Essay, *A Rightful Place: Race, Recognition and a More Complete Commonwealth*, Noel Pearson outlines a type of constitutional reform in which 'a new body could be established to...ensure that [I]ndigenous peoples have a voice in their own affairs'; and to incorporate a 'requirement that indigenous peoples get a fair say about laws and policies made about us'.² Throughout the text he also discusses the possibilities of bicultural law-making and politics within the framework of self-determination.

Pearson's suggestion raises a number of questions, in particular: what type of law-making body would this be? What sort of power would it have? And how would this fit within the existing or a changed Australian Constitution? This paper makes suggestions as to what the answers to these questions might be. In the first part, an analytical framework based on Nancy Fraser's redistribution-recognition paradigm is set up, against which the qualitative value of each model of 'Indigenous body' will be assessed. The possibility of an executive body, based primarily on the Aboriginal and Torres Strait Islander Commission ('ATSIC') experience, will be discussed, followed by an assessment of models of participation in the legislature, using Aotearoa New Zealand's 'reserved seats' and the US State of Maine's 'tribal delegates' as comparative examples. Finally, the model of a 'third House' of Parliament is introduced, questioning whether such a model would be merely an advisory body or would have 'real' power.

THE REQUIREMENT OF TRANSFORMATIVE CHANGE

To analyse the potential effectiveness or qualitative value of each of the three models of 'Indigenous body', this paper

draws on Nancy Fraser's social justice model of redistribution and recognition.³ 'Redistribution' entails the collapsing of class relations, and 'recognition' in this context (and the way in which it is used throughout this paper) is the collapsing of postcolonial relations.⁴ Redistributive remedies generally require economic restructuring, and recognition is a cultural or symbolic change. Fraser's project is to unite recognition and redistribution to design a remedy that is entirely transformative, and not merely affirmative, of the social structure.

At the core of Fraser's theory is 'parity of participation'.⁵ There are two parts to this: (a) that all participants have a 'voice'; and (b) that social structures and institutions ensure that all can participate as full partners.⁶ This creates a space in these structures for the distinctiveness of individuals and groups to be recognised, in contrast to a misrecognition or othering of groups as 'different' and therefore outside of the social scheme.

Change must be weighed by what Fraser terms 'perspectival dualism'—a standpoint from which structures are assessed in terms of both redistribution and recognition. Rather than holding that there are some things to be challenged on one ground but not the other, this approach requires analysis to be from both sides. The question then is, 'Does the practice in question work to undermine or to ensure both the objective and intersubjective conditions of participatory parity?'⁷

AN EXECUTIVE BODY

Pearson's suggestion seems to be at its narrowest a group of representatives that the government would consult on laws and policies which affect Aboriginal and Torres Strait Islander peoples, and at its broadest an administrative body exercising executive power which might be comparable to the Torres Strait Regional Authority ('TSRA'), or the former ATSIC.

FEATURES OF ATSIC AND THE TSRA

ATSIC's structure included 35 Regional Councils, elected every three years. These Councils were grouped into 16 zones which

each elected one Commissioner to the ATSIC Board, and the Torres Strait electing one Commissioner.⁸ Several hundred public servants were employed to administer ATSIC's programs and to support the Councils. ATSIC's role was to:

- *Advise* governments at all levels on Indigenous issues
- *Advocate* the recognition of Indigenous rights on behalf of Indigenous peoples regionally, nationally, and internationally
- *Deliver* and monitor some of the Commonwealth government's Indigenous programs and services.⁹

It was intended to perform both executive and advocacy roles, which was a source of tension because the executive 'arm' of ATSIC was accountable to the Commonwealth, whereas the representative 'arm' was accountable to the Indigenous people.¹⁰

As with ATSIC, the TSRA has both an administrative arm and a representative arm. The representative Board is made up of 20 elected members, elected every three years, by Aboriginal and Torres Strait Islander people living in electoral wards in the Torres Strait.¹¹ The General Manager oversees the administrative operations of the TSRA, and this position is appointed by the Minister, and like ATSIC, a large number of Commonwealth public servants are employed by the administrative arm.

ELECTED VS APPOINTED

According to Marcia Ella Duncan, former Chair of the ATSIC Sydney Regional Council, '[i]t's not necessarily important to keep ATSIC, but it's incredibly important for the Aboriginal community to have a representative voice.'¹² And, amongst Larissa Behrendt's 'lessons from ATSIC' is the statement that 'it will never be satisfactory to hand pick advisors to represent the interests of Aboriginal and Torres Strait Islander [people].'¹³

The point is that any 'Indigenous body' must be representative of Indigenous people, and its members selected by Indigenous people to represent their views. A group selected by 'government'—whether under a Minister, Prime Minister, or otherwise—is only representative of what that Minister thinks Aboriginal interests are. This would be an example of a response that is affirmative, not transformative.

If Pearson's body were to incorporate the administrative arm of the ATSIC model, by which I mean to merely perform the responsibilities of the Commonwealth according to Ministerial direction, it could not avoid these problems of maldistribution without significantly changing its relationship with government and governmental structures. For this reason, a body of this kind cannot further the goal of 'a more complete Commonwealth'.

PARTICIPATION IN THE LEGISLATURE

For Pearson, the status of Aboriginal and Torres Strait Islander people as an 'extreme minority' in Australia (three per cent of the total population, in contrast to, for example, the 15 per cent of the population of Māori people in Aotearoa New Zealand)¹⁴ is the 'defining feature' of the barriers to political participation at present.¹⁵ According to Pearson, this explains why the Australian parliaments and executive governments simply do not work for Aboriginal and Torres Strait Islander peoples.¹⁶ It may be that transformation of the dominant governmental system in such a way that Indigenous people are represented and have a level of control within that changed system, could provide a model for a 'more complete Commonwealth' which effects both redistribution and recognition.

Although operating in different constitutional settings, the electoral and governmental systems of Aotearoa New Zealand 'reserved seats' and the US State of Maine 'tribal delegates' are examples of systems that ensure not that Indigenous people are *in* parliament, but that Indigenous voters are *represented* in parliament.

AOTEAROA NEW ZEALAND

The *Māori Representation Act 1867* (NZ) designated four seats in the House to Māori representatives from the North, South, East and West.¹⁷ Since 2002 there have been seven geographically-defined Māori electorates.¹⁸ Māori people choose at census time whether to be on the Māori roll (and vote in that electorate) or the General roll (and vote in this electorate).

An important part of how 'reserved seats' operates in Aotearoa today is the electoral system. The use of mixed-member proportional representation ('MMP') promotes participation by minority groups as each voter casts two votes—one in their electorate and one for a party. This system increases the accessibility to participation in government for Māori people because, 'Māori electors can vote not just for a Māori representative in their Māori electorate but...also... for a party that has other Māori candidates on its list.'¹⁹ The effect of the 'reserved seats' model is that Māori electors are represented in Parliament. The effect of the MMP system is that Māori interests are represented in Parliament. When using the Aotearoa example as a point of comparison for the Commonwealth Government, it is important to keep in mind that Aotearoa New Zealand has only one House of Parliament, and for this reason my discussion here focuses only on the Australian House of Representatives, and not the Senate.

A 'reserved seats' model for the House of Representatives presents a number of challenges. The first are the constitutional requirements in relation to elections, the second is the geographical spread of

a country of this size, and the third is the 'extreme minority' status highlighted by Pearson, and what qualitative value Indigenous electorates might have given that status.

The constitutional challenges are those created by ss 7 and 24 which require that Senators and Representatives are 'chosen directly by the people', and that electorates must be 'in proportion to the respective members of their people'.²⁰ However, the Constitution leaves substantial discretion to Parliament in respect of these sections—providing that the stated formula for electorates is only to be used 'until the Parliament otherwise provides'.²¹ For this reason, there is scope for a reserved seats model to be constitutionally possible.

A further Constitutional problem is s 29, which states that electorates cannot be made up of parts of different states.²² This section also includes the 'until the Parliament otherwise provides' proviso though, and so it is possible that this can be overcome by Parliament. Additionally, it is possible that electorates could be comprised of different states in their entirety to overcome this restriction.²³

The second and third challenges operate together. The geographical size of Australia in combination with the small percentage of the population that Indigenous people constitute might result in Indigenous electorates being too geographically large for the constituents to be adequately represented. However, in addition to ensuring that Indigenous electors are represented in Federal Government, a reserved seats model also ensures that Indigenous representatives have access to the privileges, powers and resources associated with being a Member of Parliament.²⁴ For this reason this model has more 'teeth' than, for example, an advisory body.

MAINE

The Maine government has reserved seats for Indigenous representatives,²⁵ but in contrast to the Aotearoa model, these are non-voting seats, known as Tribal Government Representatives.²⁶ Their role is to represent the interests of the two largest First Nations Tribes in the state, but they are not Members of Parliament and are not elected through the state election process.²⁷ A notable difference between Aotearoa and Maine is that the Indigenous population of Maine is only 0.4 per cent of the total population,²⁸ and this may account for the 'advisory' role of the delegates in this context.

The 'tribal delegate system' is often defended as promoting self-determination.²⁹ This is because the delegates' position in Parliament is representative of a government-to-government relationship, and therefore emerges out of First Nations

sovereignty.³⁰ However, the other side of the debate is that the full voting power of a Member of Parliament is necessary for effective representation of Indigenous people.

To return to Pearson's call for a 'voice' for Indigenous Australians in government, a 'reserved seats' model seems to be a method which could achieve this, given its success in Aotearoa New Zealand. One important difference between the Indigenous populations of Aotearoa, Maine and Australia is that the first two are both relatively homogenous,³¹ in contrast to the more diverse language groups and nations within Australia's Indigenous population. For this reason 'reserved seats' might not be an effective way of representing the interests of Indigenous people across the country, as only a small number of seats would likely be dedicated Indigenous seats in the House of Representatives.

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A THIRD HOUSE

In the Canadian context, Schmidt has suggested that an advisory third House made up of representatives from every First Nation could operate at the federal level.³² On this option, Canada's Royal Commission on Aboriginal Peoples ('RCAP') suggested two models: one which is an advisory body to provide advice or reports to the House and/or Senate,³³ and the other which has 'the power to initiate legislation and to require a majority vote on matters critical to the lives of Aboriginal peoples'.³⁴

The RCAP suggestion was that, because the creation of a third House (the second model) would require constitutional amendment, the advisory body (the first model) should be created first by Parliament through legislation, and then later the second model could be put to a referendum.³⁵ In Australia, the legislation to create the first model could presumably be made with respect to s 51(xxvi) of the Constitution.

The third House should be directly elected by Indigenous voters, and more work would need to be done to determine what the geographical and population electorates would be. One potential challenge here will be that there are geographical areas in Australia with much higher Indigenous populations than in other areas, and geographically large or state-wide electorates cannot adequately represent the interests of all voters in that area.

The powers of the third House must be more than merely advisory in order for the third House to be a mechanism of transformative change. The role of the Senate might be a good model to work from to determine what the third House's powers might be, and additionally, in this context, there might be a place for the creation of a treaty, or a *makarrata*, inasmuch as a treaty could form the basis for a parliament-to-parliament partnership, and could outline the mandate of the third House, its powers and its structure.

A third House is the preferable option for transformative change. It ensures that Indigenous people have a voice in government, and also that social institutions are changed in such a way that all can participate as full partners.

CONCLUSION

In order to achieve a 'more complete Commonwealth', the political and social system needs to be subjected to transformative change, incorporating remedies of redistribution and recognition. In this way, the model for a 'more complete Commonwealth' must challenge the existing structure and norms of our governmental system. Constitutional reform is only to be welcomed in the furtherance of these aims, as a Constitution—the basis of our governmental, legal, and social system—that does not speak for every member of the Commonwealth, is not an acceptable basis for our nation at all. Negotiation of a treaty may be a more appropriate way to promote parity of participation.

Pearson's argument is that Indigenous participation needs to occur 'within the democratic institutions already established'.³⁶ However, to effect transformative change the institutions themselves need to be challenged and to go beyond merely accommodating Indigenous participation. Pearson's statement also seems to be at odds with his call for a new 'Indigenous body'. Instead, a more complete Commonwealth is one in which all Australians can participate in government and society, and in order to do this, "government and society" needs to be transformed. An 'Indigenous body' could be the mechanism for this transformative change, but only if it challenges the existing structures, including the Constitution and the system of government, and it is my suggestion that a large, elected body with actual (as opposed to symbolic, or advisory) Commonwealth power is the best model.

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1 See eg Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Commonwealth of Australia, 2012); *Constitutional Reform and*

Indigenous Peoples: Options for Amendment to the Australian Constitution, Indigenous Law Centre Research Brief No 3, 2011.

- 2 Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay*, pp 66-67.
- 3 Eg Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' (Lecture delivered at the Tanner Lectures on Human Values, Stanford University, 30 April - 2 May 1996).
- 4 Thalia Anthony, 'Is There Social Justice in Sentencing Indigenous Offenders?' (2012) 35(2) *Sydney Law Review* 563, 565.
- 5 Fraser, above n 3, 30.
- 6 *Ibid.*, 31.
- 7 *Ibid.*, 42-43.
- 8 Angela Pratt and Scott Bennett, 'The end of ATSIC and the Future Administration of Indigenous Affairs' (2004) Parliament of Australia Current Affairs Brief no 4 2004-2005, 11.
- 9 *Ibid.*, 10.
- 10 *Ibid.*
- 11 Edwina MacDonald, 'The Torres Strait Regional Authority: Is it the Answer to Regional Governance for Indigenous Peoples?' (2007) 11(3) *Australian Indigenous Law Review* 43, 47.
- 12 'ATSIC rally attracts 100 protesters' *AAP News Wire* (22 May 2004) quoted in Pratt and Bennett above n 21, 30.
- 13 Larissa Behrendt, 'Learning the Lessons from ATSIC' (2009) 10 *Journal of Indigenous Policy* 78, 79.
- 14 Pearson above n 2, 38.
- 15 *Ibid.*
- 16 *Ibid.*, 39.
- 17 Michelle Deshong, 'Our Seat at the Top: Institutional Challenges to Inclusion for Aboriginal Women in the Federal Parliament' (2012) 8(1) *Indigenous Law Bulletin* 3.
- 18 New Zealand Parliament, *The Origins of the Māori Seats* (Parliamentary Library Research Papers, updated May 2009).
- 19 John Chesterman, 'Chosen by the People? How Federal Parliamentary Seats Might be Reserved for Indigenous Australians Without Changing the Constitution' (2006) 34(2) *Federal Law Review*, 261, 268.
- 20 *Constitution of Australia*, ss7, 24.
- 21 *Ibid.* See also Chesterman above n 19, 272-3.
- 22 *Constitution of Australia*, s 29.
- 23 Chesterman, above n 19, 277.
- 24 Alexander Reilly, 'Dedicated Seats in the Federal Parliament for Indigenous Australians: The Theoretical Case and its Practical Possibility' (2001) 2(1) *Balaya: Culture, Law and Colonialism* 73, 95.
- 25 See S Glenn Starbird Jr, Donald Soctomah and Sue Wright, *A Brief History of Indian Legislative Representatives*, Maine State Law and Legislative Reference Library.
- 26 Jennifer Schmidt, 'Aboriginal Representation in Government: A Comparative Examination', Law Commission of Canada, December 2003, 11.
- 27 Catherine Iorns Magallanes, 'Indigenous Political Representation: Identified Parliamentary Seats as a form of Indigenous Self-Determination' in BA Hocking (ed.) *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005), 113.
- 28 *Ibid.*
- 29 Catherine Iorns, 'Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination' (2003) 10(4) *E Law: Murdoch University Electronic Journal of Law*, 13.
- 30 Iorns Magallanes, above n 27.
- 31 Schmidt, above n 26, 16.
- 32 Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Supply and Services Canada, 1996) (RCAP), 377, in Schmidt above n 26, 5.
- 33 *Ibid.*, 379-380.
- 34 *Ibid.*, 377-378.
- 35 Schmidt, above n 26, 6.
- 36 Pearson, above n 2, 66.