AN INDIGENOUS ADVISORY BODY:
ADDRESSING THE CONCERNS ABOUT JUSTICIABILITY AND PARLIAMENTARY SOVEREIGNTY

by Anne Twomey

INTRODUCTION

The proposal for the establishment in the Constitution of an Indigenous advisory body has given rise to two main concerns. The first is that it will have the power to delay or prevent the enactment of legislation by Parliament, setting itself up as an equivalent of a third House of Parliament. Under this scenario, the constitutional provision would involve an abdication of legislative power, causing some commentators to fear that it would undermine parliamentary sovereignty.

The second issue concerns the role of the courts and justiciability. It raises the concern that there will be constant litigation about the jurisdiction of the Indigenous advisory body to give advice on matters and about whether Parliament has considered that advice or whether the nature of its consideration has been sufficient to satisfy constitutional requirements, leading to the invalidation of the law if it has not.

It has always been intended that both of these problems would need to be avoided. The key to doing so lies in the drafting of the proposed constitutional amendment. The purpose of this article is to explain how an amendment could be drafted to ensure that these problems do not arise.

PARLIAMENTARY SOVEREIGNTY

The first problem arises from a perceived threat to what will loosely be described here as 'parliamentary sovereignty'. The principle of parliamentary sovereignty derives from the United Kingdom, where the Westminster Parliament can make laws that cannot be struck down by the courts or any other body.[1] Australia has never had this form of parliamentary sovereignty. This is for two reasons. First, Australian legislatures, when created, were colonial legislatures that were subordinate to the Crown of the United Kingdom. The laws of these legislatures could be held invalid by the courts if they were inconsistent with certain British laws that applied by paramount force.[2] Those constraints have since been removed during Australia's passage to independence.[3] However, the second source of constraint remains. Australia is a federation with an entrenched Constitution that distributes power between the Commonwealth and the states. Hence, courts may hold laws of the Commonwealth Parliament to be invalid if they are not supported by a head of constitutional power or if they breach express or implied constitutional prohibitions.

While the Commonwealth Parliament therefore is not sovereign in the British sense, it has a form of sovereignty to the extent that, within the realm of its jurisdiction and the limits imposed by the Constitution, it can freely choose to enact the laws it wants, when it wants, without external interference or any need to seek permission. This form of sovereignty is both limited and preserved by the fact that Parliament cannot abdicate the legislative powers conferred upon it to the control of another body. It is this, perhaps, that is meant by those concerned with parliamentary sovereignty—that another institution (other than the courts) should not have the power to determine what laws the Parliament may or may not make, and should not have the power to frustrate it by controlling a condition-precedent to the enactment of laws by Parliament.

Instead of abdicating its powers, a legislature may seek to consult relevant bodies before making laws that affect those that the body represents. A good example is section 77 of the *Constitution of Queensland 2001* (Qld) which requires the Minister for Local Government to provide a summary of relevant bills to the body representing local governments within the State within a reasonable time before the Bill is introduced. The purpose is to allow time for the consultation of local government before the Bill affecting local government is introduced and debated.

In relation to the Indigenous advisory body, however, while the same intention to achieve consultation is proposed, it is not necessary to include a constitutional requirement that notification be given of bills in advance to the body. Such a practice is likely to develop as a measure of good sense and comity, but there is no need for it to be entrenched in the Constitution. Nor is it necessary that there be a constitutional requirement that the body give advice in relation to a bill before the bill can be passed. Instead,

one could insert a constitutional provision along the following lines that would turn upon the tabling of the relevant advice in the Parliament:

- 60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.
- (2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].
- (3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.
- (4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

The obligation on Parliament is to give consideration to the tabled advice of the Indigenous advisory body. If no advice is given, or if it is not given before a bill is debated, then there would be no tabled advice that could be debated and hence no obligation to consider it. There would be no prospect that the failure of the Indigenous advisory body to give advice could prevent the Commonwealth Parliament from considering and debating any bill and there would be no obligation to achieve the approval of the body to any law before it was enacted. The onus would be on the Indigenous advisory body to provide the advice if it wanted it to be considered by Parliament. There would also be a political (but not legal) onus on the government to ensure that the Indigenous advisory body was properly consulted well in advance of the introduction of bills concerning Indigenous matters, so that it can fulfil its constitutional mandate.

In short, there would be no limitation on the *power* of Parliament to make such laws as it wishes, when it wishes. The aim of the provision is not about limiting the powers of Parliament, but rather giving Aboriginal and Torres Strait Islander peoples a voice in parliamentary proceedings so that they can influence the development of laws and policies and persuade Members of Parliament to better tailor laws to meet the needs of Aboriginal and Torres Strait Islander peoples.

The Indigenous advisory body would not be a third House of Parliament or a body to whom legislative power had been abdicated. It would instead be a source of counsel and advice, aiding the Parliament in its understanding of the potential impact of proposed laws on Indigenous Australians and helping with the development of better targeted and more effective laws. This proposal would not harm the capacity of Parliament to make laws, but it could very well aid and support Parliament in making better laws by ensuring that it is fully informed.

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THE COURTS AND JUSTICIABILITY

The second issue that is often raised is that of justiciability—whether the courts will become involved in enforcing any new provisions and whether this will lead to unanticipated consequences. If the aim is to avoid costly and time-consuming litigation on the subject, then there are two different approaches that may be taken. One approach is to include an express non-justiciability clause. For example, the *Constitution of Queensland 2001* (Qld) states in section 79 that the issue of compliance with certain listed provisions of the Constitution 'is not justiciable in any court'.

Following the Howard Government's failed attempt to insert both a preamble and a non-justiciability clause in the Constitution in 1999,[4] a number of states have changed their Constitutions to insert recognition of Indigenous Australians either in a preamble or a substantive provision. In each case, however, a non-justiciability clause was included.[5] Such clauses have been criticised as being disingenuous and undermining the symbolic value of constitutional recognition.[6]

The other way that provisions will be treated as non-justiciable is if they concern the internal proceedings of Parliament. The courts have shown deference towards Parliament by not interfering with its exercise of its own procedures. An example arises in the Commonwealth Constitution with regard to money bills. While the Constitution stipulates in section 53 that 'proposed laws' appropriating revenue or moneys or imposing taxation shall not originate in the Senate, and sets out the powers of the Senate with respect to such proposed laws, the courts have chosen to leave such matters to the Houses to determine and have regarded section 53 as non-justiciable.[7] In contrast, the courts have regarded section 55 of the Constitution as justiciable, because it refers to 'laws imposing taxation', rather than 'proposed laws'.[8] Section 55 also sets down a consequence if a law breaches its requirement that laws imposing taxation shall deal only with the imposition of

taxation. That consequence is that any other matter in the law shall be of no effect. Because the provision deals with laws and their effectiveness, it is justiciable. In contrast, provisions that deal with the internal proceedings of parliament in relation to 'proposed laws' have been regarded as non-justiciable.

For this reason the draft amendment set out above only imposes obligations in relation to matters internal to Parliament. It contains two proposed obligations. The first, in proposed section 60A(3) is upon the Prime Minister (or Presiding Officers, whichever is preferred) to table a copy of advice provided by the body 'as soon as practicable'. There are many legislative examples of similar obligations using the same terminology.[9] It is neither an arduous obligation, nor one that gives rise to difficult judgments. The responsible person simply tables the advice when Parliament next sits after the advice is received. Administrative mechanisms are already in place for routinely tabling other documents.

The second and more serious obligation in proposed section 60A(4) is for the Houses to give consideration to the tabled advice 'in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples'. The words 'debating' and 'proposed laws' and the reference to 'tabled advice', as well as the word 'consideration' are all intended to make it clear that this is a matter of internal parliamentary proceedings involving the deliberation of the Houses and that it is not an area into which the courts may interfere. A court would not have the jurisdiction to tell a House what it must or must not do or take into account during its deliberation upon the passage of bills. While this is abundantly clear on the face of the provision, it could also be made clear in the parliamentary debate upon the referendum bill, to ensure that the 'intent' of the provision is publicly recorded.

It is a form of living recognition, rather than mere words, and it therefore deserves consideration.

Hence, there is no basis for any concern that a court would distort what was meant by 'consideration' or seek to invalidate laws on the ground that consideration had not been given to relevant tabled advice. These would be matters for the Houses to enforce, not the courts.

The proposed provision also avoids the vexed issue of what laws would or would not be regarded as having an impact upon Aboriginal people. It does this by balancing the *power* of the body in section 60A(1) against the *obligation* of consideration in section 60A(4), with the pivot point being the obligation in section 60A(3) to table the advice.

On the one hand, the power of the body is very broad. It has the 'function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples'. It is not confined to bills or legislative proposals. It may initiate advice on matters that are not yet on the Government's agenda or it may advise on government policies or bills.

Any advice that the body gives must be tabled in the Parliament. This is the mechanism that gives Aboriginal and Torres Strait Islander peoples a voice directly into the Parliament. It puts their views on the public record. It gives them the solemnity of an official parliamentary document. It protects the advice by parliamentary privilege and it makes those views available to all members of Parliament as well as including them in an enduring historic record.

When it comes to the constitutional obligation to give consideration to the advice, however, this is deliberately narrower. It is confined in its application to 'proposed laws with respect to Aboriginal and Torres Strait Islander peoples', meaning those that are supported by the proposed new head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples (assuming for present purposes that a power is included in such terms). This ties the obligation back to the justification—that if the Parliament is to have the power to make laws directed at one specific group only, then that group ought to, at the very least, be entitled to give its views on the nature and extent of those particular laws. Singling out Aboriginal and Torres Strait Islander peoples for special laws entails a reciprocal moral obligation to listen to and consider their views with respect to the substance and application of those laws.

Given that the existing head of power in section 51(xxvi) of the Constitution only supports a very small number of laws (such as those regarding native title, cultural heritage and Aboriginal corporations), the formal obligation to consider the body's advice would therefore also be limited to debate upon a very small category of bills. This means that even if the courts were to consider the provision justiciable, there would be scarcely any opportunity for them to become engaged in enforcing this provision unless the Houses were to behave very foolishly in dealing with this limited category of bills. This should satisfy those who are concerned about the scope of the obligation on the Parliament and its potential for judicial interference.

From an Indigenous point of view, however, this does not mean that consideration will be limited to a small category of laws. Aboriginal people and Torres Strait Islanders will still have their voice

at the parliamentary table in relation to the wide range of matters relevant to them, as authorised by proposed section 60A(1). Once that advice is tabled, that voice will be heard, regardless of whether or not there is a formal obligation to consider it under proposed section 60A(4). If the Indigenous advisory body has given tabled advice about a bill and its likely impact, of course that advice will be picked up by Members and Senators and debated, even though there will be no formal legal obligation to do so.

The key is to balance broad powers against narrow obligations and to rely on practice and procedure to deliver the outcomes that everyone wants.

CONCLUSION

One of the most notable aspects of this proposal is that it gives Indigenous Australians an active, rather than a passive, form of recognition by providing them with a direct voice into Parliament in relation to the matters that affect them, while imposing minimal and non-justiciable obligations on the Houses in relation to the consideration of that advice. It is based upon a shrewd assessment of how power operates in practice, rather than reliance on the legal system to enforce rules of behaviour.

Other proposals for Indigenous constitutional recognition tend to focus on laws and the actions of politicians, lawyers and judges, leaving most Indigenous people on the sidelines. What makes this proposal different is that it puts Indigenous Australians at its core, giving them an ongoing primary role in constitutional recognition that has the potential to improve the effectiveness and value of the laws and policies that directly affect them. It is a form of living recognition, rather than mere words, and it therefore deserves consideration.

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1 See further, A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959); Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999).

2 *Colonial Laws Validity Act* 1865 (Imp).

3 *Statute of Westminster* 1931 (Imp); *Australia Acts* 1986 (Cth) and (UK).

4 The preamble question achieved less than 40 per cent support overall and failed to achieve a majority in any state.

5 *Constitution Act 1902* (NSW), s 2(3); *Constitution of Queensland 2001* (Qld), s 3A; *Constitution Act 1934*, s 2(3) (SA); *Constitution Act 1975* (Vic), s 1A(3).

6 Alex Reilly, 'Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values' (1998) 21(3) *University of New South Wales Law Journal* 903, 904; Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24 *University of New South Wales Law Journal* 382, 396; Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) *University of New South Wales Law Journal* 239, 261.

7 *Osborne v Commonwealth* (1911) 12 CLR 321, 336, 352 and 356; *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 578; *Western Australia v Commonwealth* (1995) 183 CLR 373, 482; *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388, 409.

8 *Osborne v Commonwealth* (1911) 12 CLR 321; *Air Caledonie International v Commonwealth* (1988) 165 CLR 462; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450.

9 See, eg, *Public Governance, Performance and Accountability Act 2013* (Cth), s 549(4); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64B(3); and *Family Law Act 1975* (Cth), s 385(3).

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