

CONSTITUTIONAL LAW SYMPOSIUM

INDIGENOUS CONSTITUTIONAL RECOGNITION AND THE IDEA OF AN INDIGENOUS CONSTITUTIONAL BODY

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Session 2: Indigenous democratic participation or judicial review: what is the best way to protect indigenous rights?

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Introduction

It should not be necessary to choose between indigenous democratic participation and judicial review in order to protect indigenous rights in the achievement of indigenous constitutional recognition. . Both are desirable. Both should be possible.

Experience confirms that amendment of the Commonwealth Constitution presents formidable challenges. The proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples must therefore be modest, simple, direct and readily explicable, if it is to succeed.

In particular, the proposal for constitutional recognition must impose clear limits on both indigenous democratic participation and judicial review, limits that respect the established functions of the three branches of government at the national level of the Australian federal democracy.

Proposal

Like the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution, I favour the repeal of sections 25 and 51(xxvi) of the Constitution. However, I do not support the Panel's recommendations for new sections 51A, 116A and 127A of the Constitution.

Instead, I suggest the insertion of a new chapter in the Constitution comprising all provisions relating specifically to Aboriginal and Torres Strait Islander peoples:² a preamble and two new sections.

My preamble provides the context for and justification of the new chapter, as did the preamble suggested by the Expert Panel for its new section 51A. Constitutional provisions that confer special governmental authority relating to particular peoples are exceptional, and warrant explanation.

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² The Centre for Constitutional Studies at Melbourne Law School recommended to the Expert Panel, during the consultation process undertaken by members of the Panel in March 2013, that any amendments to the Constitution for the recognition of Aboriginal and Torres Strait Islander peoples be included in such a chapter. Cheryl Saunders has suggested that the new chapter be Chapter VIIA of the Constitution: Saunders, 'Indigenous Constitutional Recognition: The Concept of Consultation'. I adopt this suggestion.

The preamble includes the three paragraphs proposed by the Expert Panel for its new section 51A together with a fourth paragraph relating to Aboriginal and Torres Strait Islander languages, a matter that the Expert Panel included in its new section 127A.³

The first section adopts the suggestion made by Noel Pearson and the Cape York Institute⁴ for the establishment of an indigenous representative body, as an essential ingredient of indigenous constitutional recognition. I accept that such a body is required to advise the Commonwealth Parliament upon the exercise of its exceptional power to make special laws with respect to the recognition and advancement of Aboriginal and Torres Strait Islander peoples. In accordance with established constitutional principles and practice in Australia, the duty to establish this body, together with the authority to do so, should be placed on Parliament, as it is in relation to the High Court of Australia.⁵ The Parliament may, of course, confer other functions on the body as it sees fit.

The second section confers power on the Commonwealth Parliament to make special laws with respect to the recognition and advancement of Aboriginal and Torres Strait Islander peoples. It declares that this section is the only source of such legislative authority,⁶ and provides for the indigenous representative body to advise the Parliament prior to its exercise of that authority.

My specific proposal for the new chapter of the Constitution is set out below. This draft attempts to reflect familiar constitutional principles, structures and language, to the greatest extent possible.

Chapter VIIA Aboriginal and Torres Strait Islander Peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples:

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters:

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples:

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage:

Aboriginal and Torres Strait Islander Assembly

127A. There shall be an Aboriginal and Torres Strait Islander Assembly established by the Parliament to advise the Parliament on proposed laws with respect to the recognition and advancement of Aboriginal and Torres Strait Islander peoples.

Power of the Parliament to make special laws

127B. The Parliament shall, subject to this Constitution, have power to make special laws for the peace, order and good government of the Commonwealth with respect to the recognition and advancement of Aboriginal and Torres Strait Islander peoples.

This section provides the only power of the Parliament to make such laws.

³ This adopts another recommendation by the Centre for Comparative Constitutional Studies in its submission to the Expert Panel in March 2013.

⁴ Cape York Institute, Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2014; Cape York Institute, Supplementary Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2015.

⁵ Constitution, s 71.

⁶ Again, this draws heavily upon a recommendation made by the Centre for Comparative Constitutional Studies to the Expert Panel in March 2013, albeit with significant modifications which adopt helpful suggestions made at the Symposium by Rosalind Dixon and Jeffrey Goldsworthy.

A proposed law with respect to the recognition or advancement of Aboriginal and Torres Strait Islander peoples shall not be passed unless the proposed law has been referred by the Governor-General in Council to the Aboriginal and Torres Strait Islander Assembly for advice at least three months before the proposed law is passed by the House of Representatives or the Senate and any advice provided by the Assembly on the proposed law has been tabled in the House of Representatives and the Senate before it is passed by the House of Representatives or the Senate.