An Indigenous Advisory Body – Addressing the Concerns about Justiciability and Parliamentary Sovereignty

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In this paper I wish to address two main concerns raised in the media about an Indigenous advisory body. 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, raising the concerns of some commentators that it will undermine parliamentary sovereignty.

The second issue concerns the role of the courts and justiciability. Under this scenario there would be constant litigation about whether or not a bill affects Aboriginal and Torres Strait Islander peoples and, as a consequence, whether consultation is constitutionally required and whether such consultation has taken place, leading to the invalidation of the law if it has not.

Neither of these scenarios is intended to arise in practice and in my view there are ways of drafting an appropriate constitutional provision to prevent them from arising.

Parliamentary Sovereignty

The first problem is one I will describe loosely as the 'parliamentary sovereignty' issue, as this is the term that is commonly used to describe it. The constitutional lawyers in the room may cringe at that description, because we know that in Australia, unlike the United Kingdom, parliamentary sovereignty as such does not exist. The Parliament is subject to the Constitution and the courts have the power in Australia, unlike in the United Kingdom, to strike down laws enacted by Commonwealth or State Parliaments if they breach the Constitution. This is the price we pay for a federal Constitution that distributes power between the Commonwealth and the States and imposes limits upon the exercise of legislative power.

Nonetheless, within the realm of its jurisdiction and the limits imposed by the Constitution, the Parliament has a form of sovereignty. 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.

Similar issues have arisen at the State level concerning the abdication of power. For example, in NSW s 4 of the *Parliamentary Contributory Superannuation Act* 1971 (NSW) provides that:

> It is not lawful for the Legislative Assembly to originate or pass any vote, resolution or Bill for the amendment of this Act unless a certificate approving the amendment

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> made by the vote, resolution or Bill has been first issued by the Parliamentary Remuneration Tribunal, or any successor Tribunal, during the Session in which the vote, resolution or Bill is proposed to be passed.

Such a provision is unlikely to be regarded as legally effective, as the NSW Parliament cannot abdicate its legislative power. It would, however, have considerable political force by giving rise to significant controversy if the Parliament legislated upon superannuation for MPs without such a certificate. It also shows that such provisions are not unprecedented. There are times when Parliaments have wished to place fetters on their powers, be it by way of an entrenched bill of rights or the requirement that another body be consulted or approve before certain action is taken.

Another example comes from Queensland where s 77 of the *Constitution of Queensland* 2001 (Qld) provides that where a Bill would be administered by a Minister who administers a provision of the *Local Government Act* 2009 and would affect local governments generally or any of them, then the Member introducing the Bill must, if practicable, arrange for a summary of the Bill to be given to a body representing local governments in the State a reasonable time before the Bill is introduced in the Legislative Assembly. 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, 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. While such a practice is likely to develop, there is no need for it to be entrenched in the Constitution. Nor is it necessary that there be a requirement that the body give advice in relation to a bill before the bill can be passed.

Instead, one could simply include an obligation on a suitable person, be it the Prime Minister, or the presiding officers, or a relevant Minister, to table in the Parliament any advice provided by the Indigenous advisory body so that the advice may be considered in debate by the Houses in relation to relevant bills. It would be similar in effect to the tabling of a report of a parliamentary committee on a bill or the tabling of a report by a statutory officer, such as the Ombudsman or the Auditor-General. If no advice was given, or if it wasn't given in sufficient time before a bill was debated, then there would be no tabled advice and hence no need to consider it. There would be no prospect that the failure to give advice could prevent the Commonwealth Parliament from considering and debating a bill and there would be no need to achieve the approval of the body to any law before it was enacted.

There would be no limitation on the *power* of Parliament to make such laws as it wishes, when it wishes. The point of the provision would be to give Aboriginal and Torres Strait Islander peoples a voice in parliamentary proceedings – not a veto or a delaying mechanism.

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. In short, the 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, just as parliamentary committees, officers such as the Auditor-General

and bodies such as the Productivity Commission and the Parliamentary Budget Office already aid Parliament by ensuring that it is better informed in relation to other subjects.

The difference, however, would be that as a constitutionally entrenched body with a direct mandate provided by the votes of the people in a referendum, it would have far greater moral and political authority than any body established by statute. There would therefore be great political pressure on Parliament and the Government to consult this body and listen to its advice well before bills are introduced into the Parliament.

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 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 s 79 that the issue of compliance with certain listed provisions of the Constitution 'is not justiciable in any court'.

This approach was also taken by the Howard Government in relation to the 1999 referendum to insert a preamble in the Commonwealth Constitution. It proposed the addition of a s 125A of the Constitution which would have provided:

> The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.

As we know, the referendum failed and neither the preamble nor the non-justiciability clause was inserted in the Constitution.

Since then, 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.[1] Such clauses have been criticised as being disingenuous and undermining the symbolic value of constitutional recognition.

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 s 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 s 53 as non-justiciable. In contrast, the courts have regarded s 55 of the Constitution as justiciable, because it refers to 'laws imposing taxation', rather than 'proposed laws'. 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

[1] *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).

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, I have suggested that the provisions to be inserted in the Constitution concerning the Indigenous advisory body only impose obligations in relation to matters internal to Parliament. There are two proposed obligations. The first obligation in proposed s 60A(3) is upon the Prime Minister (or Presiding Officers) 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.[2]

The second and more serious obligation in proposed s 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.

Hence, concerns 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 are unfounded and unnecessarily alarmist.

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 s 60A(1) against the *obligation* of consideration in s 60A(4), with the pivot point being the obligation in s 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 narrow. 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 new

[2] 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).

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). Given that the existing head of power in s 51(xxvi) only supports a very small number of laws (being those regarding native title, cultural heritage and Aboriginal corporations), the formal obligation to consider that advice is very limited, meaning that even if the courts were to consider the provision justiciable, there would be scarcely any opportunity for the courts to become engaged in enforcing this provision unless the Houses were to behave very foolishly in dealing with this very small 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 tiny category of laws. The point is that 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. Once that advice is tabled, that voice will be heard, regardless of the fact that the formal legal obligation to consider it is narrow. 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

In my view, this is a balanced proposal that 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.

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. The beauty of this proposal 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.