

CONSTITUTIONALISING AN INDIGENOUS VOICE IN AUSTRALIAN LAW-MAKING: SOME INSTITUTIONAL DESIGN CHALLENGES

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I Introduction

There is currently bipartisan support for Indigenous recognition in Australia. A poll released by Recognise in May 2015 indicates that 75 per cent of Australian voters would support constitutional recognition for Indigenous peoples.¹ However, there remains division over the proposed model for constitutional recognition. It is generally accepted that recognition must be more than symbolic. A positive statement of recognition must be accompanied by a guarantee in some form that the Commonwealth will not be able to discriminate against Indigenous peoples. Discrimination and failure of recognition scar Australia's history and it is important that the amendment prevents this from occurring in the future.

How can the Commonwealth retain power to make laws that protect and promote the interests of Indigenous peoples – including, for example, the power to make laws about native title,² and the protection of Indigenous cultural heritage³ – but not be given power that allows it to discriminate against them in a detrimental way? The Expert Panel suggested that this could be achieved by a legal limitation on the power of the Commonwealth and the States to enact racially discriminatory laws. This is the proposed 's 116A'.⁴ A second, narrower proposal put forward by the Joint Select Committee, has been to include an internal limitation within a legislative power, so that the Commonwealth will not be able to use such a power in an adversely discriminatory way.⁵ There have been concerns expressed by commentators and politicians that both of these proposals for a legal limitation would effect a power shift to the judges from the elected parliamentary representative to determine tricky questions about whether a particular measure is 'adversely' discriminatory.

In response to these concerns, Noel Pearson and the Cape York Institute have suggested that the limitation could be achieved within the parliamentary process itself.⁶ That is, they have proposed a *political* limitation on the power. The general idea is that the Constitution could provide for an Indigenous representative body that must be consulted by Parliament during the passage of laws that affect Indigenous peoples. In this way, Indigenous people are given a 'voice' in the parliamentary process. This answers concerns that the limitation will result in derogation from parliamentary sovereignty. It provides Indigenous representatives with an ongoing voice in the parliamentary process.⁷

The purpose of this article is not to express a preference for one model over another – be that for a legal limitation or a political limitation – or even a preference for the design of the political limitation. Rather, my purpose is to explore the challenges around the constitutional design of the political limitation model, and more specifically, explore the questions that need to be considered in determining which aspects of the design of such a body should go into the Constitution and which into legislation.

II Drafting for Success

There are two ways of thinking about constitutional drafting for 'success' at a referendum. The first is success at the referendum itself. Will the design garner the necessary support to secure constitutional amendment under s 128 of the Constitution? The proposal needs to gather the support of Indigenous and non-Indigenous Australians, across the political divide and across the Australian States. This requires a prediction about how the model will be perceived by the electorate and the people who shape their opinions – including the media and politicians.

The second is success of the operation of the design to achieve the objectives of constitutional recognition. This requires an understanding of what the objectives of recognition are. Drawing from the work of the Expert Panel and the Joint Select Committee, the objectives of the constitutional recognition movement can be stated as follows:

1. to remove those provisions in the Constitution that divide the people of Australia by the concept of race;
2. to include an appropriate recognition of the historical and ongoing place of Indigenous people and their culture; and
3. to give the Commonwealth power to make laws with respect to Indigenous peoples whilst limiting that power so as to ensure its use is for the benefit of Indigenous peoples and their culture.⁸

This article will consider only the constitutional design of the proposed political limitation in the Cape York Institute proposal. It assumes, without considering the constitutional detail and design, the following amendments would accompany these amendments:

- section 25 of the Constitution will be repealed; and
- section 51(xxvi) of the Constitution (the races power) will be repealed and replaced with a power for the Commonwealth Parliament to make laws with respect to Indigenous peoples.

The article will not consider whether the political limitation would or should also accompany a legal limitation clause of some description.

The political limitation would seek to *include* and *empower* Indigenous people as a constitutionally recognised constituency, giving them a say on government and parliamentary decisions that affect Indigenous affairs and thus contribute to the success of the third objective. To achieve this objective, the body must be designed to give it the best possible chance to wield real political power: it must be listened to by Parliament and the government *and* it must have a real connection with and credibility among Indigenous people.

The two concepts of success are interrelated. George Williams and David Hume have developed a 'list' of factors that are known to increase the chance of referendum success.⁹ One aspect of garnering the necessary support for

a referendum to introduce an Indigenous representative body will be proving to the electorate that the design is going to make a difference, that it will achieve the objectives of recognition. Another important aspect is that it is supported across party lines; that it is not too closely associated with either progressive or conservative positions so as to alienate the other side of politics.

III The Key Design Questions

A key design question will be the role of the different actors in the body's creation, structural design, and operation. These actors will include the Parliament, the Government, the Courts, and Aboriginal and Torres Strait Islander leaders and community (which should be considered both as a whole and in relation to different groups within the community). Decisions about the appropriate role of each of these actors will determine the answer to the most fundamental, pervading design question: to what extent will the structural and operational design be included in the Constitution, and to what extent will these design features be left to Parliament or the body itself to determine?

On the one hand, too much detail in the Constitution may lead to a rejection of the model by the electorate because it may instigate a negative publicity campaign by those who disagree with some aspect of that detail. So initial success might be threatened by too much detail. Too much detail may also mean the design will not be flexible enough to change and evolve under different Parliaments/governments, and also as the issues that confront Indigenous peoples may shift in the future. Finally, the Cape York Institute has expressed a desire that the amendment be 'handsome and elegant',¹⁰ so that it can be symbolic, meaningful and understood, rather than lost in technical, detailed rules.

On the other hand, if too much detail is left to Parliament to determine, the body may be weakened in its design, and therefore only able to play a tokenistic role in parliamentary debate. If not enough detail is contained in the Constitution, Indigenous voices may be sidelined in Parliament's design of the body and the determination of the extent of its powers. It may be then be considered a 'puppet' body that gives legitimacy to government proposals in Indigenous affairs without giving them a real voice, thus lacking credibility within the Indigenous community.

If important design features are left to Parliament, the Constitution might include a provision that requires Parliament to consult with Indigenous peoples in determining these features. However, it would be difficult to see how such an obligation could be made justiciable and it may rely on its moral and political force for compliance. Once the body has been initially established, it would have an opportunity to be heard on any amendment proposals, but this does not overcome the difficulty of ensuring Indigenous peoples have a genuine say in its initial establishment.

If a constitutionally minimalist approach is adopted, it is worth remembering that the High Court may be called on to interpret broad, undefined constitutional terms and 'fill' them with meaning. For example terms such as 'Indigenous', or 'consult' will be open to more or less restrictive readings, at least if the operational *design* of the body is justiciable.

This leads to a second important preliminary question over the justiciability of the body's structural and operational design. There is a desire to make the *operation* of the body non-justiciable (it is argued this can be done relatively easily by referring to the body's functions in regard to 'proposed laws', making it an intra-mural parliamentary matter¹¹). This desire is underpinned by an intention of keeping the courts out of the legislative process and to address concerns that the legal limitation proposal effected too great a power shift between Parliament and the courts. Making the operation of the body non-justiciable will shift a greater obligation on the Parliament to self-police its obedience to the Constitution. In this respect, I have previously written (with Adam Webster) that, in situations where non-justiciable questions arise:

'raw power' is not given to Parliament to ignore the restrictions of the Constitution. Rather, a heavy responsibility is placed on Parliament to interpret constitutional provisions. The framer of the Constitution, in drafting s 53, noted that by placing intramural questions beyond judicial review, the questions must be 'settled by the Houses themselves.'¹²

There is a danger, however, that if the body's operation is made non-justiciable, the body will not have sufficient power/moral authority to negotiate with Parliament in the event that disagreement arises over the interpretation of, or compliance with, the clause. In this respect, the body's position should be contrasted to that of the Houses of Parliament in s 53 of the Constitution, an example of an existing non-justiciable clause in the Constitution. Section 53 operates to regulate the powers

of the Houses of Parliament over money bills. It operates in a context where there is rough equality of bargaining power between the two Houses of Parliament that supposedly creates sufficient tension to ensure compliance with the provision to the satisfaction of both Houses. In contrast, an Indigenous advisory body would have few real powers that would allow it to negotiate compliance with the Parliament. As Jennifer Schmidt has observed based on her analysis of the Sámi Parliaments in Sweden, Norway and Finland, it is easy for mere advisory bodies to be ignored.¹³ In this way, consultation may turn out to be formalistic only, which raises similar concerns to those expressed in relation to ensuring substantive, not symbolic, recognition.

The same concerns over judicial interference with parliamentary process do not arise in relation to the justiciability of the structural design of the body. Indeed, it would appear that there are a number of advantages in making the structural design requirements justiciable. Justiciability of these requirements will provide minimum guarantees for the status and independence of the body, which would increase its capacity to achieve the moral and political authority on which its operation will ultimately rely (particularly if its operation is non-justiciable). Further, as a matter of drafting, it is more difficult to see how structural design requirements could be made non-justiciable without including an express non-justiciability clause, which is considered unattractive, symbolically undesirable and detrimental to the overarching objectives of recognition.

IV Design Features and Options

Moving from the key design questions to the design features and options. In this part of the article, I have drawn on the work of a number of people and organisations: the submissions of the Cape York Institute,¹⁴ John Chesterman,¹⁵ Shireen Morris,¹⁶ Eric Sidoti at the Whitlam Institute,¹⁷ and the Aboriginal and Torres Strait Islander Social Justice Commissioner.¹⁸ More recently, Professor Anne Twomey has attempted to draft constitutional words around the body.¹⁹ I have also drawn from legislation establishing the Sámi Parliaments of Finland, Norway and Sweden where relevant and of assistance,²⁰ and also that establishing existing parliamentary committees.

This discussion is divided into three parts that consider:

1. the placement of any new provision/s;

2. the structural design of the body; and
3. the operational design of the body.

In each part, I will introduce and explain the particular design feature, the key questions that need to be answered in relation to that feature, possible design answers to these questions, and what considerations might support the adoption of one design answer over another.

A Constitutional Placement of New Provision/s

A threshold question arises as to where in the Constitution to include any new constitutional provisions establishing the body: whether a new chapter should be inserted into the Constitution (for example, Chapter 1A) or whether the provisions ought to be included within Chapter 1 (entitled, 'The Parliament')?

A proposal arose before the Joint Select Committee to insert any recognition clause, head of power and limit on power into a new chapter.²¹ The reasoning behind this appeared to be that if symbolic recognition was intended to be coupled with a new federal head of power, the provisions would be something unique, going beyond a conferral of legislative power.²² A new Chapter would distinguish such a provision from the other heads of power in Chapter 1, and prevent its underlying purpose from being lost.

In contrast, the provisions for the proposed Indigenous representative body are likely to simply establish the body and set out its functions. It is intended to form part of the federal parliamentary process. Unless the provisions establishing the body are accompanied by a statement of recognition, or extend in some other way beyond the parliamentary process (for example, there is a proposal to confer on the body powers beyond review of legislation), there appears to be no similarly strong justification for its inclusion in a separate chapter.

B Structural Design of the Body

The following design features will be considered in this part: the body's establishment, membership, funding, powers and privileges and internal processes. As we have already seen, the fundamental questions in relation to each of these structural design features is the extent to which that feature is included in the Constitution (if at all), whether the constitutional provisions are intended to be enforceable

in the courts, and what matters are left to Parliament or the body itself to determine. The answers to these questions must be guided by the need to ensure the body is not able to be weakened as a mechanism of genuine review and independent advice, or lose its legitimacy because not seen as appropriately representative of the Indigenous community.

(i) Establishment of the Body

The Constitution currently provides for bodies to be established in different ways. How the Constitution establishes the Indigenous representative body may be of little practical consequence. Nonetheless, it may be symbolically relevant as the different constitutional procedures for establishing bodies often represent their level of constitutional importance. The Constitution can itself establish the body (although, of course, the actual mechanics of establishing these bodies will be left to Parliament and the Government). This occurs, for example, in relation to the fundamental constitutional institutions of the Senate and House of Representatives (s 1), the Federal Executive Council (s 62) and the High Court (s 71). The Constitution can also authorise, without requiring, Parliament to establish certain bodies (eg, Federal Courts in s 71).

Paradoxically, the constitutional establishment of a body is not a guarantee of its existence. Section 101 of the Constitution establishes an Interstate Commission, but Australia has not had a separate Interstate Commission since the 1980s. While this provides a comparative example, in relation to an Indigenous representative body there are three important differences: one legal and two political. Legally, a provision that establishes and confers functions on an Indigenous representative body would differ from s 101 of the Constitution, in that s 101 creates an Interstate Commission but does not confer any functions on it, leaving this entirely at the discretion of the Parliament. It has not been suggested that this is an appropriate model for an Indigenous representative body. Second, there would appear to be, at least in the initial period following a successful referendum, moral and political pressure for an Indigenous representative body to be established. Finally, there is little danger that the body would suffer the same fate as that of the Interstate Commission, at least for the reasons behind its initial demise: its initial failure is explained by the loss of many of its most important dispute-settlement powers when the High Court found them to be in breach of the separation of powers doctrine. While this particular issue may be unlikely to arise,

the establishment of an Indigenous representative body may give rise to protracted and ultimately unresolved political differences – for example, over how its members are elected (if this question is left to Parliament) – that might mean its establishment may be delayed or even wholly frustrated.

An alternative to establishing the body in the Constitution would be to include a constitutional direction that the body be established by Parliament within a specified time (eg, within 12 months of the provision coming into operation). This would reflect the reality that the body would have to practically established by Parliament before coming into operation. While such a provision might appear to create an enforceable obligation on Parliament, it is not entirely clear how this might occur. It raises complex constitutional questions about whether an individual could demonstrate standing to bring a case against Parliament, whether the provision would be considered by the Court as justiciable, and even if it was justiciable, whether any remedy beyond a declaration could be provided by the Court.

(ii) **Membership of the Body: Representativeness, Number, Disqualification, Removal**

Representativeness: I use the term ‘representativeness’ to refer to how members might be selected to the Indigenous representative body to ensure that it is appropriately representative of the Indigenous community. Representativeness raises some of the most difficult questions of structural design. For the body to be credible, it must be connected and accountable to Indigenous peoples. Article 18 of the Declaration on the Rights of Indigenous Peoples (‘DRIP’) indicates that representatives ought to be chosen in accordance with procedures themselves established by the Indigenous community:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. (emphasis added)

Election or appointment: There are strong arguments that the body’s credibility and legitimacy will rest on it having democratic credentials, that is, being elected. However, there are also some arguments in favour of it being constituted by delegates from existing Indigenous organisations, or

appointed by a panel of eminent Indigenous peers,²³ or by a mixture of elected and appointed members. These arguments might be particularly strong during the first years of the body’s operation, to ensure its members have sufficient political experience, and clout, to establish the status of the body.

The Constitution might not specify whether the body is to be elected, leaving the detail of how the body is made ‘representative’ to Parliament – in a similar way that it leaves to the Parliament how members of Parliament are chosen by the people. Indeed, the provision might adopt the same wording as currently seen in ss 7 and 24 of the Constitution, that the body be ‘directly chosen by the Indigenous people of the Commonwealth’. One advantage of pitching the dictates of representativeness by reference to the language of ss 7 and 24 is that the High Court’s approach to interpretation of the phrase is already known. In *Roach v Electoral Commissioner*, the High Court accepted that ss 7 and 24 required Parliament to have a ‘substantial reason’ before denying an Australian citizen the vote.²⁴ Even if the terms ‘elected’ or ‘directly chosen’ are avoided, the Court may use terms such as ‘Indigenous representative body’ or even ‘Aboriginal and Torres Strait Islander body’ to mandate a minimum constitutional franchise for Aboriginal people in the election of its members.

An advantage of leaving the representativeness of the body to Parliament, and not dictating it within the Constitution, would be that its composition could change and evolve as it matured, and people gained more knowledge and understanding of its role. So it might start as a partially elected/appointed body, but evolve into a fully elected body. *Determining Aboriginality:* An issue in relation to both qualification for appointment to the body and for determining the franchise will be the test employed to determine whether an individual is Indigenous.

In New Zealand, a simple, singular test of self-identification of voters for Maori seats is used. This works in that context because there is no ‘advantage’ to be gained by an individual choosing to self-identify.²⁵ Identifying as Maori gives an individual no additional representation, but changes the seats that person is eligible to vote for. Under the proposed Indigenous representative body, there is what might be called an ‘advantage’ to self-identifying as Indigenous: an individual would gain a voice in electing a body that they otherwise would not have.

In Australia, a 2003 Australian Law Reform Commission reported that ‘since the time of white settlement, governments have used no less than 67 classifications, descriptions or definitions to determine who is an Aboriginal person’.²⁶ A three-step process for identification as Aboriginal was developed by the Commonwealth government in the 1980s, and has been adopted as a working definition within government and by some members of the courts. It requires that the person self-identify as Indigenous, to have some Indigenous ancestry and be accepted as an Indigenous person by an Indigenous community. This definition, developed and applied by non-Aboriginal institutions, has generally been accepted, although has been the subject of some criticism. Article 33 of the DRIP stipulates that Indigenous peoples have a right to self-determine their own identity or membership according to their own customs and traditions, and that:

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Merkel J in *Shaw v Wolf* said:

It is to be hoped that one day if questions [about defining Aboriginality] such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.²⁷

In the Finnish and Norwegian Sámi Parliaments, self-identification is coupled with a requirement of having Sámi language, a parent or grandparent or forefather with Sámi language or a parent on the Sámi Parliament’s electoral register (or eligible to be).²⁸ The Norwegian Sámi Parliament has an adjudicative function, being vested with the power to determine petitions for inclusion on the electoral roll, which provides an important Indigenous voice in the determination of this often issue.

It might be considered most appropriate for the Constitution to authorise Parliament to determine the details of any test for determining Aboriginality. Leaving the question for Parliament would provide flexibility within the test, allowing change to occur, for example, if it is considered to have become outdated, controversial within the Indigenous community, or difficult to implement in practice. However, in recognition of the rights articulated in article 33 of the DRIP,

any constitutional provision should at the least stipulate that Parliament must consult with Indigenous peoples in determining this issue.

Even if it was intended to leave this question to Parliament, without an express non-justiciability clause, it may be that the Courts ultimately decide the outer parameters if the terms ‘Indigenous’ or ‘Aboriginal and Torres Strait Islanders’ are included in the Constitution.

Representation of geographic and/or cultural groups: A further question about representativeness and qualification is whether it is intended for the body to be constituted by members that represent different geographical regions and/or cultural groups, including traditional owners, Stolen Generations, women, Torres Strait Islander peoples and youth?²⁹ This might suggest that Parliament should be given some flexibility to determine the constitution of the body (again, preferably in consultation with Indigenous peoples), as the desirability of dedicated representation for different groups might change in the future.

If the body is to be elected, questions about the design of the electoral system arise: would a preferential voting system be adopted? Would compulsory voting be implemented? Would members be drawn from single-member electorates (which might be drawn along geographical or cultural lines) or proportionate representation? The Constitution currently leaves these questions to Parliament in relation to the House of Representatives and the Senate. Presumably this would be left to Parliament in relation to the Indigenous representative body as well, even if only because of the level of detail required to set out these systems.

Number: The desirable number of members of the Indigenous representative body will be dictated by how it is to be constituted – that is, whether it needs a certain number of members to represent different constituencies – and also the breadth of its functions – to ensure it has sufficient members to discharge its obligations. There is a danger if there are too many members the body will become unwieldy and difficulties will arise in relation to its internal governance.

These considerations would suggest that Parliament should be given at least some flexibility to determine the number of members (again, preferably in consultation with the Indigenous community). In relation to the houses of Parliament and the High Court, the Constitution currently

provides for a minimum number of members, but gives Parliament the power to increase the size of these bodies. This combination of a constitutional minimum ensures the body is able to function at least at some level, while also conferring discretion to allow the Parliament to alter the body in light of any future developments.

Disqualification: There must be some instances where individuals are no longer eligible to be a member of the body, whether that is because they have engaged in conduct that is so unbecoming it cannot be tolerated, or because they have a conflict of interest in remaining on the body. The Constitution currently provides disqualification criteria for parliamentarians in s 44:

Any person who:

- (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or
- (ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or
- (iii) is an undischarged bankrupt or insolvent; or
- (iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or
- (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

...

It would appear desirable and logical that similar, if not the same, disqualification provisions would apply to members of the body. This could be included within any constitutional provision simply by cross-referencing s 44. It may also be desirable that members of the House of Representatives and the Senate are not eligible for appointment to the body.

Removal: The question of removal of the members will be important for guaranteeing the real and perceived

independence of the body from the government/Parliament. Independence will boost the legitimacy of the Committee's advice, and its ability to meet the expectations of the Indigenous community.³⁰ It may be appropriate to include a provision similar to s 72 of the Constitution that guarantees independence for judicial officers by allowing their removal only 'on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.

Other issues regarding membership: The Constitution currently makes provision for a number of other issues in respect of members of Parliament, including length of term and casual vacancies. It might be considered desirable that the length of term of members of the body is aligned to one of the House of Representatives or the Senate. From an efficiency perspective, this would allow any elections to be held on the same day. Senators currently hold a six-year constitutional term and members of the House of Representatives a three-year term. The Senate's role as a house of review, and (at least when it was first drafted) as a house representing State interests, means it perhaps provides the best model for the Indigenous representative body. Further, by creating a six-year term, this reduces the administrative burden of more frequent elections. Terms longer than six years might raise questions about the accountability of the members.

While they may appear less important, the issues of length of term and casual vacancies can be manipulated by the Parliament or Government to undermine the independence of the body. As such, serious consideration ought to be given as to whether they are included in the Constitution.

(iii) Funding

The Aboriginal and Torres Strait Islander Social Justice Commissioner has warned that 'sustainable funding options' for a representative body are required 'to reduce the vulnerability of the organisation to the political process and the threat of budget cuts if the advice provided is not to the liking of the government.'³¹

The Social Justice Commissioner's comments highlight that there is a very real danger of leaving the determination of funding entirely at the discretion of Parliament. History demonstrates these dangers: the National Congress of Australia's First Peoples, when it was initially established in 2010, was initially provided with government funding,

but this was cancelled in the 2014 budget.³² Also in 2014, the Office of the Australian Information Commissioner was defunded and rendered operationally defunct, even though it remained statutorily provided for because the government could not garner parliamentary support to abolish it.³³

Is it possible to guarantee the body's funding? Could a constitutional provision include wording to the effect of: Parliament must provide the body with 'necessary staff, facilities and resources' (this wording is taken from current Senate Standing Orders regarding committees). While such a provision might prove difficult to enforce judicially, it might provide political and moral pressure to maintain appropriate levels of funding to the body.

A further question related to funding would be whether members of the body will be provided with any form of remuneration, or at the least funding to allow members to travel to meetings of the body and any relevant sittings of Parliament. Whether salaries should be provided to members will be influenced by the breadth of functions the body is expected to undertake and whether members will need to devote such time to their membership such that the positions should be properly regarded as a full-time or part-time job. As is often argued in relation to public servants and politicians, salaries set at appropriate levels provide incentives for well-qualified individuals to nominate for the body.

Depending on whether it is intended to provide a salary to members of the body, consideration could be given to providing constitutional protection for the salaries of the members: for example, as the Constitution currently provides in relation to the Governor-General (s 3) and judges (s 72). An alternative way of achieving this, as suggested by Eric Sidoti, is to tie the remuneration, benefits, staff allocation, electoral allowances and provisions and access to parliamentary services, to those provided to Senators.³⁴

(iv) Powers and Privileges of the Body

Currently, parliamentary committees have the power to summon witnesses, require production of documents and take evidence under oath, and parliamentary privilege – including the privilege of freedom of speech – applies to evidence taken before a committee. This assists these committees in their inquiries and receiving full and frank advice in its public consultations. It would appear desirable that the Indigenous representative body have similar

powers, which might be achieved relatively easily within the Constitution itself, by referencing the powers and privileges of the Body to those conferred on the Parliament under s 49 of the Constitution.

(v) Internal Processes of Body

By internal processes of the body, I mean the appointment of a chair, quorum requirements, whether the body can or must conduct public consultations, how often it will meet and where, how decisions are to be made, conflicts of interest, and whether it can issue dissenting reports or whether it must issue a single, 'majority' report. The way these features are designed can impact whether the body can operate effectively, and whether its decisions are seen as credible and legitimate.

Internal procedures set either in the Constitution or by Parliament, and not by the body itself, avoids the possibility that some members of the body might use their powers to establish internal processes that favour their interests. However, there might also be a concern that if the Parliament is able to determine the body's internal processes, it may manipulate them to further its, or the government's interests, thus undermining the independence, or at least the perceived independence, of the body. Under the Sámi Parliament Acts, the Sámi Parliaments adopt some of their own rules of procedure, but other matters are stipulated in the governing statute.³⁵

Dissenting Reports: Resolving whether it is desirable to allow the body to issue dissenting reports on the Bill(s) under consideration is vexed. The Aboriginal and Torres Strait Islander population in Australia is not homogenous, and it is likely that, often, different and sometimes opposing views on new policies and legislation will exist. Indeed, lack of cohesion and agreement within representative Indigenous bodies has been identified by the Social Justice Commissioner as one of the problems with previous Indigenous bodies.³⁶ There is a danger that if dissenting reports are allowed, Parliament and government will be able to either cherry pick a sympathetic 'Indigenous' view that supports and legitimises its position, play off different views that have come out of the body against each other, or ignore all of the views of the body on the basis that the body was itself divided on the question, which would effectively sideline the body.

However, if dissenting reports are not provided for in the legislation, there is a danger that any dissenting members within the body will go to the media or directly to Parliament with their views, also undermining the authority of the body, the legitimacy of its advice, and leading to the other detrimental effects outlined above in relation to dissenting reports.

C Operational Design of the Body

This part has been written on an assumption that the operational design of the body will be made, as far as possible, 'non-justiciable' (see discussion of key design questions, above).

(i) Description of Primary Function to Advise on Bills

The body is intended to be an advisory body, providing a political check on Parliament's power to enact legislation with respect to Aboriginal and Torres Strait Islander peoples. It is not intended for the body to have a veto power over legislation, nor is it intended to have power to hold up the passage of bills so as to impinge on government efficiency. But it is still important that the role is described in such a way that the body has strong words to draw upon in any future disagreement over its role. This is particularly important if the provision is going to be non-justiciable, as the strength of the description of its role will assist the body in the political and moral enforcement of its mandate.

The proposed advisory function could be drafted in any number of ways. It could make reference to 'advice', such as the body must 'advise' Parliament, or Parliament must 'receive advice from' the body. Twomey has argued it would be preferable to avoid the use of the phrase 'advising Parliament' so as to distinguish the role of the body from that of Ministers advising the Governor-General, which has a very particular constitutional meaning different from what is intended here. She has suggested the wording: the body 'has the function of providing advice to Parliament'.

In addition to referring to 'advice', it might include reference to actions that Parliament has to take in relation to that advice:

- Parliament to 'receive *and consider* advice from'
- Parliament to 'receive, *consider and respond to* advice from'

- Parliament to '*consult with* and receive advice from'

Other alternatives that avoid reference to 'advice' include:

- Parliament to 'consult with' ...
- To 'provide counsel to' Parliament ...
- Parliament 'receive and consider counsel from'
- The *Sámi Parliament Act* of Finland § 9 provides that government authorities must 'negotiate' with the Sámi Parliament, and this is defined to mean providing the Sámi Parliament 'with the opportunity to be heard and discuss matters. Failure to use this opportunity in no way prevents the authority from proceeding in the matter.'
- To 'consent to': although this is much stronger than the other proposed wording, it is worthy of consideration. It reflects Morris' argument that the body could provide an avenue through which 'all special measures are legitimate, effective, and agreed to.' It also reflects article 19 of the DRIP that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- A requirement for consent raises concerns that, if the Court attempted to enforce the power, it would amount to a veto.

Twomey has also suggested that advice should be required to be tabled in Parliament for the following reasons:

- 'it provides a permanent public record of that advice,
- it gives the advice the status of a privileged document,
- it provides certainty for the parliament as its members will know and have a formal record of the advice to which they must give consideration,
- it provides a direct channel from the Indigenous body into the parliament, providing a constitutional means for Aboriginal people and Torres Strait Islanders to have a voice in parliamentary proceedings concerning their affairs.'

A requirement for the Committee's advice to be tabled raises two questions. First, who would table the advice? Twomey suggests tabling should be performed by the Prime Minister. This would reinforce the status and gravity of the process.

As an alternative, she suggests the Speaker of the House and President of the Senate. Another alternative would be the Minister responsible for Indigenous Affairs, howsoever called under a particular government. One advantage of relying upon the Speaker and President is that the report would thus be tabled in both houses. Second, would tabling, in effect, give the body a veto power over Bills, because Parliament would have to wait for the body to report and that report to be tabled? Twomey suggests a way around this: ‘the Houses are only obliged to consider advice that has been tabled. If no advice has been tabled, then there is nothing the house is obliged to consider. Hence, the responsibility is on the Indigenous body to provide advice if it wants it considered.’ This position leaves open the danger that Parliament may rush legislation through with no reasonable opportunity for the body to provide a considered report.

(ii) Breadth of Advice Function

The description of the Bills over which the body has the jurisdiction to advise, and that Parliament must respond to, will influence its capacity to be an effective voice for Indigenous peoples. How the Bills are described is also likely to dictate whether the issue is left to be determined between Parliament and the body or by the body alone.

The Bills could be described narrowly: those Bills that come under the proposed power. Such a narrow description, however, raises the risk that Bills that look on their face neutral in their application but have a particular relevance and effect on Indigenous peoples – such as those in relation to health, housing or social welfare, or those that apply exclusively to the Northern Territory – fall outside the body’s jurisdiction. A description that refers to the head of power will also require the Parliament and the body to consider sometimes difficult questions of constitutional characterisation, which may lead to disagreements about complex questions of constitutional and statutory interpretation to determine which Bills fall within the body’s jurisdiction.

A broader approach to describing the advice function is to give the body power to advise in relation to ‘all matters relating to Indigenous peoples’ or ‘all matters that affect Indigenous interests’, or ‘all matters that particularly affect Indigenous interests’ (this wording is used in the *Sámi Parliament Act of Norway* § 2.1) or ‘have a more significant effect on Indigenous peoples than non-Indigenous peoples’.³⁷ Such a description will not remove the possibility of disagreement about the

scope of the advisory function, but it does remove the need to undertake a process of constitutional characterisation. Even more broadly, the advice function could be conferred without reference to any type of Bill. For example, the provision might give the body the power to advise on all bills where the body considers it is in the interests of Aboriginal Australians that it do so. This may appear to provide, in effect, an absolute discretion to the body to determine which Bills it seeks to advise on – although whether this is the case will also depend on the notification mechanism that is adopted.

(iii) Notification and Time for Review

How the body becomes aware of Bills and the time it is given to review Bills will influence its ability to scrutinise and report on Bills effectively. Bills might be referred to the body from Parliament. This would mean that the body will be reporting on Bills that the *Parliament* decides fall within its jurisdiction, which might undermine its capacity to bring an Indigenous voice on Bills that affect Indigenous interests. It might therefore seem preferable to allow the body to conduct inquiries and reports into whichever Bills it determines fall within its jurisdiction, although Parliament may decide not to accept advice on Bills (or table them, if this is one of the requirements) that it does not believe fall within the body’s jurisdiction.

The body must have adequate time to report on Bills. The experience of the Parliamentary Joint Committee on Human Rights during the passage of national security legislation in 2014 underscores the importance of this requirement.³⁸ The statutory mandate of the PJCHR is to ‘examine Bills for Acts, and legislative instruments, that come before either House of Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue’.³⁹ However, during 2014, the Committee was often unable to report before the Bills were passed, in some cases because of the short time frames that were imposed by the government/Parliament.

It would appear important, therefore, that some sort of guarantee of sufficient time to report is provided. However, any such guarantee would have to be framed so as to not slow down or hold up the parliamentary process so as to act, in effect, as a veto. The *Sámi Parliament Act of Norway*, § 2.2 uses the language of ‘giving the [body] an opportunity to [advise, counsel etc]’. While this language is unlikely to create an enforceable obligation, it might provide political and moral pressure to ensure that adequate time is provided

for the body to advise, without giving it too much power to slow down the process.

(iv) Criteria for Reporting

Most parliamentary committees have set criteria (terms of reference) against which they must report.⁴⁰ What criteria, if any, should the Indigenous representative body use in its scrutiny of Bills? Should this be made explicit (either in the Constitution or set by the Parliament in legislation), or should it be left for the body to determine and change, for example, as its priorities and Indigenous interests change?

One solution to this question might be to include in the Constitution or the statute establishing the body that it must advise by reference to the general principles in the DRIP or those set out in the Barunga Statement.⁴¹ This would provide for the body to undertake its scrutiny function by reference to very broad principles that would enable it to adapt them to changing circumstances.

(v) Right to Address Parliament

There has been some suggestion that the body should be provided with a right to address the Parliament on its reports. It would be highly unusual in our Constitution to guarantee any individual or group a right to address Parliament. The powers of the Houses of Parliament under s 49 are wide, and include the power to call witnesses to speak to the House and answer questions. This would, no doubt, extend to inviting members of the Indigenous representative body to provide a statement and answer questions on any report. It might be considered desirable that a provision be included to provide expressly for such an invitation to be made. The conferral of a right, in contradistinction to a privilege to address Parliament at its invitation, would be unusual in our constitutional system.

(vi) Other Roles

In its submission, the Cape York Institute suggested that the body be given the power to be proactive, developing its own policy proposals. In addition the body could be given a number of other, additional roles:

- Reporting on policy as well as Bills (although this raises questions about how the body will become aware of policy that is being developed);

- Developing its own policy ideas for consideration by government/Parliament;
- Monitoring and reporting on the operation of current legislation and recommending amendments;
- Monitoring and reporting on government departments and agencies – or at least those that are responsible for Indigenous affairs;
- Advising on State and Territory laws in addition to Commonwealth laws. There is a good argument that the body should only advise on Commonwealth laws, as it is intended to be a limit on the (proposed) grant of federal power. However, the proposed s 116A would have applied to Commonwealth and State/Territory laws, and there is no doubt that State/Territory laws can affect Indigenous peoples. Should, therefore, this proposal be equivalent in its scope? How could this mechanism also apply to State and Territory laws? Would the body be required to report to State/Territory Parliaments on relevant laws? Or, more plausibly, would it report to the Federal Parliament on these laws. This would (a) provide publicity for any concerns, and (b) alert the Commonwealth to whether federal legislation might be required to redress concerns with State/Territory laws.

Many of the possible additional roles may create conflicts of interest for the body in its primary constitutional role of providing an Indigenous advisory voice on Bills before Parliament. For example, if the body is involved in the policy development of Bills and Amendments, it would be difficult to see how it could, credibly, provide independent advice to Parliament on those Bills. On the other hand, involvement at the policy formation level is more likely to give the body influence in the design of programs, as by the time bills are introduced, much of the policy detail has been finalised and it is difficult for Parliament to achieve any meaningful change at this stage.

If it was considered desirable for there to be additional roles, who would determine them? Would they be included as possible roles in the Constitution? Would they be mandated in the Constitution? Would the question of additional roles be to Parliament, or determined by the body itself? There is a risk that the conferral of too many additional roles on the body may overburden its members, giving them insufficient time to perform the body's primary function of legislative review properly.

V Concluding Remarks

This article identifies a number of questions that must be answered in the course of the institutional design – structural and organisational – of a proposed Indigenous representative body. It does not purport to provide the answers to these questions. Indeed, it would be inappropriate for me to offer anything more than guidance around the possible design options and some advice on the consequences of adopting one form of design over another. The Cape York Institute has recommended that Indigenous constitutional conventions are held around the nation to determine a final form of words and package of reforms. If the proposal is to be considered as a serious alternative to the legal limitation proposals, this appears to be a sound way forward. After a meeting with a number of Aboriginal and Torres Strait Islander leaders in July 2015, then Prime Minister Tony Abbott and Opposition Leader Bill Shorten announced three steps to facilitate greater community consultation before a referendum: first, the establishment of a series of community conferences, second, the release of a discussion paper developed by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples to facilitate community debate, and finally, the establishment of a representative referendum council to determine the process for settling the question, timing and constitutional issues.⁴² Abbott and Shorten did not rule out a constitutional convention. The push for greater consultation and deliberation over the form of recognition should be welcomed. What I hope to have achieved in this article, is to have highlighted some of the issues with which deliberation over a proposal for an Indigenous representative body must grapple.

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1 See further You Me Unity, Recognition Australia, 'Indigenous Australians say recognition could help to safeguard

culture' (Media Release, 17 October 2012) <<http://www.recognise.org.au/wp-content/uploads/shared/uploads/custom/4f98ded9ded74a6c3494.pdf>>.

- 2 *Native Title Act 1993* (Cth).
- 3 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
- 4 The Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) Recommendation 4.
- 5 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2012), see proposed ss 80A or 60A..
- 6 See, eg, Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' *Quarterly Essay No 55* (September 2014).
- 7 Anne Twomey has also presented an alternative limitation, suggesting, rather than a people power, the adoption of a narrower power: either in the form of a subject-matter power or a purposive power. See further Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36(3) *Sydney Law Review* 381. See also Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 88.
- 8 See further Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 4, particularly chapters 5 and 6, and the five recommendations made by the Panel; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report* (2014) 29; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 5, 2.
- 9 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 239.
- 10 Cape York Institute, Submission No 28.2 (Supplementary to Submission) to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, August 2014.
- 11 Section 53 already uses this terminology and has been interpreted as being a non-justiciable clause on the basis that the Court will not interfere in the intramural activities of Parliament: *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). Twomey has suggested that the provision could also refer to internal parliamentary processes – 'debating' and 'consideration' – to indicate it is not intended to be justiciable.
- 12 Gabrielle Appleby and Adam Webster, 'Parliament's Role in

- Constitutional Interpretation' (2013) 37 *Melbourne University Law Review* 255, 269.
- 13 Jennifer Schmidt, 'Aboriginal Representation in Government: A Comparative Examination' *Law Reform Commission of Canada* (2003) 14-16. See also Peter Niemczak and Celia Jutras, 'Aboriginal Political Representation: A Review of Several Jurisdictions' *Background Paper, Parliamentary Information and Research Service* (27 October 2008) 3.
- 14 Cape York Institute, Submission No 38 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2014; Cape York Institute, above n 10.
- 15 John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *Australian Journal of Public Administration* 419.
- 16 See Shireen Morris, 'Agreement-making: The need for democratic principles, individual rights and equal opportunities in Indigenous Australia' (2011) 36(3) *Alternative Law Journal* 187; Shireen Morris, 'Indigenous Constitutional Recognition, Non-discrimination and Equality before the Law: Why reform is necessary' (2011) 7(26) *Indigenous Law Bulletin* 7.
- 17 Eric Sidoti, Whitlam Institute, *Indigenous Political Representation: A Parliamentary Option* (A Concept Paper for the Consideration of Indigenous Leaders, 21 January 2008).
- 18 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Building a Sustainable National Indigenous Representative Body: An Issues Paper* (2008).
- 19 Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation*, 20 May 2015, <<http://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>>.
- 20 Sámi Parliaments are elected bodies that represent the Aboriginal Sámi population of Fennoscandia. Sámi Parliaments provide advice to the national parliaments of Finland, Sweden and Norway, as well as a number of other different functions.
- 21 See, eg, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2014) 11-12.
- 22 See, eg, Public Law and Policy Research Unit, University of Adelaide, Submission Number 42 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.
- 23 See Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 18, 88-89.
- 24 *Roach v Australian Electoral Commissioner* (2007) 233 CLR 162.
- 25 See explanation in Brian Lloyd, 'Dedicated Indigenous Representation in the Australian Parliament' (Parliamentary Library Research Paper, 18 March 2009) 6.
- 26 See explanation in Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003), Ch 36 <<http://www.alrc.gov.au/publications/36-kinshipand-identity/legal-definitions-aboriginality>>.
- 27 *Shaw v Wolf* (1998) 163 ALR 205, 268.
- 28 See further Sámi Parliament Act of Norway §2.6; Sámi Parliament Act of Finland §3).
- 29 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 18, 64, 92-96.
- 30 *Ibid* 24, 64.
- 31 *Ibid* 64.
- 32 See further National Congress of Australia's First Peoples, *Congress 2014 Budget Response* (15 May 2014) <www.nationalcongress.com.au/congress-2014-budget-response/>.
- 33 See further Paul Farrell, 'Budget 2014: Freedom of Information Framework Faces Radical Surgery' *The Guardian* (online) 13 May 2014 <www.theguardian.com/world/2014/may/13/freedom-of-information-framework-radical-surgery>.
- 34 Sidoti, above n 17, 6 and 7.
- 35 *Sámi Parliament Act* of Finland - § 5(3). Sámi Parliament adopts its own rules of procedure (although many of the internal processes, including election of chair, and quorum, are set out in the Act). *Sámi Parliament Act of Sweden*, §2- §7 leaves some matters to the Sámi Parliament (eg, appointment of chair, regularity of meetings) and other matters (eg, quorum, recording of meetings, conflict of interest) are stipulated in the legislation itself.
- 36 See Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 18, 24.
- 37 See John Chesterman, above n 15, 426.
- 38 Gabrielle Appleby, 'The 2014 Counter-Terrorism Reforms in Review' (2015) 26 *Public Law Review* 4.
- 39 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(a).
- 40 See, for example, the terms of reference of the Senate's Standing Committee on Regulations and Ordinances in Senate Standing Order 23 and the Senate's Scrutiny of Bills Committee in Senate Standing Order 24, and the functions of the Parliamentary Joint Committee on Human Rights set out in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.
- 41 Barunga Statement presented to Prime Minister Bob Hawke (1988), available online at <www.australia.gov.au/about-australia/australian-story/bark-petition-barunga-1988>.
- 42 Prime Minister and Leader of the Opposition, 'Indigenous Recognition' (Press Release, 6 July 2015).