# SHOULD THE AUSTRALIAN CONSTITUTION ESTABLISH AN INDIGENOUS ADVISORY BODY?

George Williams*

## I Introduction

Australia's long-running debate on whether to recognise Aboriginal and Torres Strait Islander peoples in the nation's Constitution has been shaped by two central ideas. The first is that Indigenous peoples should be recognised by inserting new text into the Constitution that, by way of symbolic language, acknowledges them and their long and continuing habitation of Australia's lands and waters. For example, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples suggested in its final report that the following words be included in the Constitution to preface a new federal power with respect to Indigenous 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, languages and heritage of Aboriginal and Torres Strait Islander peoples;[1]

The second animating idea of the recognition debate has been to repeal or alter substantive provisions in the Constitution that permit discrimination on the basis of race, in particular, ss 25 and 51(xxvi). Section 25 contemplates that a state may disenfranchise people from voting on account of their race. The latter provision, the races power, enables the federal Parliament to enact laws that differentiate between people on the basis of their race.

It has been suggested that s 25 should be deleted from the Constitution, and that the races power should be replaced with a new power to, for example, permit the Commonwealth to enact laws with respect to 'Aboriginal and Torres Strait Islander peoples'.[2] Without a replacement power, the Commonwealth would lose the capacity to make laws and provide direct funding on a range of topics relevant to Indigenous peoples, including native title and the protection of sacred sites.[3]

A point of contention has been the wording of this replacement power, and whether it should be made subject to further text prohibiting Parliament from discriminating on the basis of race.[4] The Expert Panel on Constitutional Recognition of Indigenous Australians recommended that a new s 116A be inserted into the Constitution, which would provide in part: 'The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.'[5]

These two sets of ideas around symbolic recognition and racial discrimination have largely defined the debate about constitutional recognition over recent years. To this point, no government has succeeded in moving beyond a public discussion about such matters to a specific set of words for constitutional change. As a result, Australia is as yet no closer to a model that might be put to the Australian people at a referendum.

The failure to move the debate on from a high level discussion to a well-developed model reflects ongoing political disagreement. The central problem is the wording of any replacement races power, and whether this ought to be limited so as to prevent it being used to discriminate

against Aboriginal and Torres Strait Islander peoples or other races. Such a limitation would need to be enforced by the High Court. This prospect has raised concerns among conservative leaders and commentators that Parliament's power to legislate would be fettered by 'activist' judges willing to give a broad reading to the new human rights guarantee. Former Prime Minister Tony Abbott evoked such concerns when he dismissed the proposed s 116A as a 'one-clause Bill of Rights'.[6]

Despite numerous reports and consultations,[7] little progress has been made in removing this political roadblock. Frustrated at the lack of progress, and convinced of the need to develop a proposal for recognition that can win the support of conservatives, Cape York Indigenous leader Noel Pearson has put forward an alternative model that challenges the current narrative on how constitutional recognition might occur.[8]

Pearson accepts the need to change the Constitution by way of deleting s 25 and amending the races power to become a power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. On the other hand, he does not propose that the Constitution be changed to include symbolic words of recognition,[9] nor that the replacement to the races power be limited by any guarantee of freedom from racial discrimination. Instead, he argues that a new Chapter 1A should be added to the Constitution establishing an Indigenous body 'to provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples'.[10]

The idea of a constitutionally mandated Indigenous body is an important new element in the recognition debate. The idea is premised upon the notion that Indigenous peoples should have a voice in the lawmaking process in regard to laws that affect them and their interests. This is a welcome idea, and indeed is something that has been identified as being important many times in the past, including in regards to securing dedicated seats in Parliament for Aboriginal and Torres Strait Islander peoples.[11] It is, however, more limited than many such proposals, in that no lawmaking or other power would be vested in Indigenous peoples. As such, while a constitutionally mandated advisory body is consistent with notions of self-determination,[12] it develops only a weak conception of this.[13] The proposal would not grant Indigenous peoples any greater control over their own lives, only an advisory role in regard to the actions of the executive and the laws made for them by the federal Parliament.

This article examines Pearson's proposal for an Indigenous advisory body. It does so with a view to determining whether it is an appropriate change in the context of a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. After identifying a number of design issues relating to the proposal, the article suggests a way forward.

## II The Model

Pearson has argued for his model, and in particular the idea of an Indigenous advisory body, forcefully and on a number of grounds,[14] including that it could 'guarantee Indigenous people a better say in the nation's democratic processes with respect to Indigenous affairs'.[15] He has said that Aboriginal and Torres Strait Islander peoples must be heard in this way because: 'Top down government measures do not work. Indigenous people live the Indigenous predicament. It is we who are best placed to provide the solutions to the problems that confront us.'[16] Building upon such advocacy, Pearson has set out the key characteristics of his proposal as follows:

> A new Chapter 1A should be inserted into the Constitution:
>
> - establishing an Aboriginal and Torres Strait Islander body to provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples;
> - providing Parliament with the power to make laws with respect to the composition, roles, functions and procedures of the body;
> - requiring that a copy of the body's advice be tabled in each House of Parliament;
> - requiring the House of Representatives and the Senate to give consideration to the body's tabled advice in debating proposed laws relating to Aboriginal and Torres Strait Islander peoples.[17]

He has further suggested that:

> The Chapter should therefore be drafted such that:
>
> - it is handsome and elegant: it provides a meaningful constitutional Chapter that Indigenous people can believe in;

- it provides a real, detailed procedure for Parliament to follow;
- it is non-justiciable: it does not transfer power to the courts (but it should not contain an unattractive 'non-justiciable' or 'no legal effect' style clause) and it therefore does not diminish parliamentary sovereignty;
- it is efficient: the procedure should not slow down or hold up the machinery of Parliament;
- it is not open to abuse: Parliament must keep running if no advice is delivered by the body on a particular law;
- it is certain and clear: it is precise enough to be understood easily by all parties.[18]

As this shows, Pearson conceives that new text would be added to the Constitution establishing a broad framework for an Indigenous advisory body. It would mandate that the body must exist, as well some basic procedures involving its advice. Otherwise, key aspects would be left to Parliament to determine and develop over time. Indeed, almost every significant aspect of the body would lie within the control of Parliament, as it would be empowered to 'make laws with respect to the composition, roles, functions and procedures of the body'.[19]

Anne Twomey has provided an example of how Pearson's approach might be drafted. She suggests that the new Chapter 1A of the Constitution might contain the following section:

> 60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], 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.[20]

This drafting is consistent with the notion that the Constitution would contain only the bare essentials needed to establish the body and its role, with all other matters being left to Parliament. It is also consistent with the idea that the body would not itself possess powers or authority other than the capacity to provide advice. Such advice could not be provided on all matters, but only in regard to 'matters relating to Aboriginal and Torres Strait Islander peoples'. Presumably, whether or not a subject answers this description would be left to the advisory body itself to determine. It would also be open to the advisory body to decide whether to direct its advice to Parliament or the executive. The draft text suggests a means by which such advice may be provided to the former, but is silent in regard to any procedures for the latter.

An important aspect of Pearson's description of his model, and Twomey's draft constitutional text, is the notion that the advisory body would not give rise to litigation, that is, that it would fulfil a political function and its key functions and activities would be non-justiciable.[21] It is proposed that the Constitution set out only in broad terms the role of the body in advising the legislature and executive, the former in relation particularly to the making of new laws. The possibility of judicial review of such actions cannot be completely discounted. No clause would be inserted directing the courts not to engage in such review. In addition, it is proposed that the Constitution would contain text that mandates that certain things must occur, such as that the 'House of Representatives and the Senate shall give consideration to the tabled advice of the [body]'.

Constitutional directives are normally enforced by the High Court, by way of a writ of mandamus or otherwise, though on this occasion it is unlikely that this would occur given that the directive relates to internal affairs of Parliament. The High Court has traditionally avoided ruling on matters internal to Parliament, including in regard to deliberations on proposed laws, on the basis that it regards those matters as being non-justiciable .[22] In any event, such clauses may be unenforceable in practice as it is difficult to see how a court could frame an effective order requiring that 'consideration' be given to the body's advice. After all, 'consideration' may amount to no more than a cursory reading or tabling followed by a rejection of the advice. It is not otherwise possible to

force as a matter of law that particular advice somehow be taken into account. All this points to the conclusion that the Court would likely take a deferential approach in regard to those aspects of the body set out in the Constitution.

Even if spare drafting of this kind is effective in insulating the constitutionally mandated aspects of the body from judicial scrutiny, other aspects of the work of the body and its composition would be open to litigation. The body will need to be supported by legislation dealing with matters such as its composition. If this were to provide for elections to the body, unsuccessful candidates might seek judicial review of the electoral process. Similarly, people denied the right to vote or participate in the selection of representatives on the basis that they are not Indigenous, might challenge this in the courts. Indeed, it is to be expected that every aspect of the body's composition and operation would be subject to judicial oversight. As a public body, this is to be expected, and indeed is consistent with the rule of law, which requires all public officials and holders of public power to be subject to the possibility of judicial examination.

The possibility of judicial review of such legislative matters arises under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It is also provided for by s 75(v) of the Constitution, which states that the High Court has jurisdiction over 'all matters … [i]n which a writ of Mandamus or Prohibition or an injunction is sought against an officer of the Commonwealth'. In *Plaintiff S157/2002 v Commonwealth*,[23] members of the High Court described this provision as entrenching 'a minimum provision of judicial review' for those seeking redress against administrative action by an officer of the Commonwealth, thereby 'secur[ing] a basic element of the rule of law'. What is as yet unclear is whether the members or secretariat of the Indigenous advisory body would be regarded as officers of the Commonwealth so as to give rise to this constitutionally entrenched jurisdiction. This will depend upon the form in which the body is created.

The attempt to exclude judicial review to the maximum extent possible is consistent with the political character of the advisory body, and its modest powers. The body poses a greater challenge to Australia's system of Westminster governance in other respects. The executive arm of government in Australia often employs advisory bodies of this kind. On the other hand, it is not common to find such bodies advising Parliament, especially where their membership is chosen by some means external to Parliament. Not surprisingly, the Indigenous advisory body could as a result give rise to a number of tensions and questions of political accountability. These include:

- how are parliamentarians to reconcile their responsibilities as representatives of their electorate with the advice they might receive from the advisory body of Indigenous peoples?
- how are parliamentarians to reconcile their obligations to their party, which in the case of the caucus rules of the Australian Labor Party prevent a member from crossing the floor to vote against the Party's position, and advice from the advisory body of Indigenous peoples?
- if it is thought that there needs to be one Indigenous view on a particular law or policy, what should happen if the elected Indigenous members of Parliament take a contrary view to the Indigenous advisory body? Which perspective should be preferred?
- if the advisory body is representative of Indigenous peoples because its members are elected from a broad franchise of the community, does this negate arguments for greater Indigenous representation in Parliament? If not, what is the basis for Indigenous members of the Australian community being represented both by members of Parliament and by the members of a body created to advise that institution?

There are no straightforward answers to such questions, and indeed answers may need to be developed over time through the development of new conventions and practices. Much will depend upon how Parliament determines that the body is to be composed, such as in regard to its size and the method of selection of its membership. Such issues cannot be resolved in the absence of this information. What can now be examined in more detail are some of the larger issues of design and practice raised by the framework for the body that would be inserted into the Constitution.

## III Problems of Design

The advisory body is being proposed on the basis that it will 'guarantee Indigenous people a better say in the nation's democratic processes with respect to Indigenous affairs'.[24] This is a worthy goal, but it is questionable whether the model in its current form will enable this to occur in a substantive and meaningful way. There are a number of reasons for this

that apply especially in regard to the advice that the body might provide to Parliament.

First, the effectiveness and influence of institutions within Australia's system of government can depend upon the powers to be exercised by that body. When it comes to shaping laws and policies on contentious matters of social and economic policy, such powers can be decisive. In this case, it is proposed only to:

> create an Indigenous body to advise and consult with Parliament on matters affecting Indigenous interests. While the body's advice would not be binding, Parliament should be constitutionally required to consult with and consider the advice of the Indigenous body when debating proposed laws.[25]

It is questionable whether, in the absence of any determinative powers, such advice or consultation will have much effect on the making of laws by the federal Parliament. In particular, it is hard to see how the advice of Aboriginal people will be sufficient to overcome the demonstrated willingness of the federal Parliament to enact laws to their detriment. It is notable that such laws have been enacted even over the vocal opposition of Indigenous peoples. A prominent recent example is the Northern Territory intervention, which was brought about by legislation including the *Northern Territory National Emergency Response Act 2007* (Cth).

Another example relates to native title. In 1996, the High Court handed down Wik Peoples v State of Queensland,[26] which held that pastoral leases do not necessarily extinguish native title. The Howard government responded with the *Native Title Amendment Act 1998* (Cth). It implemented a 'ten point plan' that, in the words of Deputy Prime Minister Tim Fischer sought to pour 'bucket-loads of extinguishment' on the native title rights of Indigenous Australians.[27] In order to wind back these rights, the new Act overrode the *Racial Discrimination Act 1975* (Cth).

The problem for Indigenous peoples is not only that parliamentarians have been willing to ignore them, but that they and their political parties can *gain* popularity in the broader electorate by being seen to act contrary to the wishes of minorities and their advocates, such as asylum seekers and Indigenous peoples. There may thus be a political upside for a government seen to act contrary to the views of an Indigenous advisory body. It is not clear whether such a body, even one that is constitutionally mandated, could overcome this dynamic.

Second, the influence of the body will depend upon its capacity to speak with one voice. If it does not, it will enable the government to either ignore the advice on the basis that it is incoherent, or to pick and choose between the perspectives of the advisory body in order to find support for its own policy preference. However, it is unrealistic to expect Indigenous members on the advisory body to act unanimously. As with the rest of the community, Aboriginal Australia contains deep divisions on a range of political and ideological lines, and it is to be expected that these would be reflected on the advisory body.

A related issue is whether the body will actually enable Indigenous voices to be heard in Parliament, whether or not they speak with one voice. Unless the reform mandates that this must occur in some way, there is no guarantee that this will be the result. The draft text prepared by Twomey suggests that the body's advice will be tabled in each house of Parliament, and also that those houses would need to give 'consideration' to that advice in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.[28] It is not possible to go further than this to require parliamentarians to engage with the substance of the advice, and indeed it is possible that the advice would be tabled and then ignored. Such an outcome would not be surprising, given that the work of other advisory bodies is frequently ignored in parliamentary debate. This includes even advisory bodies comprised of parliamentarians, such as the Parliamentary Joint Committee on Human Rights. Its reports are typically tabled in Parliament without further engagement, as indeed the Pearson proposal would also permit.

Where greater attention is paid to the findings and advice of advisory bodies, it is because the advice provided coincides with the already established views of parliamentarians. Such advice is thus used to confirm a position, rather than to change it. It is to be expected that parliamentarians will avoid reference to, or reliance on, material contrary to their own perspective or political interests. The result is a weak form of participation in parliamentary democracy that may enable Indigenous voices to appear to be heard, but will do little to change outcomes.

Third, it has been suggested that the advisory body would be effective and listened to because it will be included in the text

of the Constitution by way of a referendum. It is a mistake to overstate the effect of this proposal being supported in this way.[29] Whether something is in the Constitution, as opposed say to in a statute, does not tend to be a significant consideration. What matters is whether the Constitution provides powers or compels an outcome.

Referendum outcomes can be ephemeral unless they subsequently receive political backing. This was true even for the landmark 1967 referendum that deleted discriminatory references to Aboriginal people from the Constitution. Expectations were high after that referendum that the Commonwealth would move to use its new power to make laws for Indigenous peoples. This did not happen, leading one of the champions of that referendum, Faith Bandler, to state that the government had made 'a mockery of the referendum … It is as if the electorate had never made any moral commitment to do a great deal more for Aborigines.'[30] Substantive change only came five years later in 1972 when the Whitlam government came to power with a mandate and a desire to act.

A further example that underlines the point that inclusion in the Constitution is not determinative is a section already within the Constitution. Section 101 sets out what was thought to be a key institution of Australia's federal architecture in stating that:

> There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

According to the Constitution, that body 'shall' exist, but no attempt has been made to constitute it for decades. It is a very different institution to what is being proposed here,[31] but it nonetheless demonstrates how undue significance can be placed upon a body being put within the Constitution.

Fourth, the advisory body is misdirected in terms of where it might have the most impact. The record of a range of bodies in Australia and internationally within Westminster systems reveals the reluctance of governments to change course once a bill is within Parliament. One only has to examine the recent experience of the Parliamentary Joint Committee on Human Rights, which was enacted in 2011[32] with high hopes of it having an impact upon the making of laws that infringe upon human rights. It has an advisory role in regard to human rights, and has proved unsuccessful in having governments change course despite numerous recommendations and findings about rights having been breached. This is because the finding of an advisory body is not sufficient to lead a government to back down on a policy or a draft law, especially if it is popular or an election commitment.

One reason such bodies are ineffective is because governments do everything they can to avoid altering their substantive policy position once a Bill is in Parliament. To do so is to be seen to back down, and hence to suffer a political defeat. Governments avoid this by enforcing party discipline so as to impose the desired outcome. In this case, there is no reason to expect that a government would be any more willing to back down from its position, as agreed to in cabinet and the party room, based upon the view of an advisory body of Indigenous people. If a government were to change course, it would more likely be because its policy faces defeat at the hands of a hostile Senate. Of course, it is possible that the position of a majority of the Senate might coincide with that of the Indigenous advisory body, but this could not be relied upon.

Even if the advisory body is determined to make a difference, the pace at which legislation can be made in the contemporary era would prove a formidable obstacle. One example is provided by the legislation that brought about the Northern Territory intervention. The *Northern Territory National Emergency Response Act 2007* (Cth) and associated proposal were extraordinary laws with significant human rights ramifications designed to remedy a devastating social problem.

The Bills—running to 604 pages—were introduced in the House of Representatives on 7 August 2007; the first at 12.32pm, the last at 1.47pm. This was the first opportunity that most parliamentarians had to read them, yet all five Bills were passed by the House at 9.34pm that same day. The Bills were subjected to greater scrutiny in the Senate, where the government did not hold a majority. The legislation was debated in the Senate, but was ultimately passed without amendment on 16 August. As this example shows, the window for advising on laws such as these may be extremely short.

If there is scope for an advisory group to make an impact, it is not likely at the parliamentary stage. It is at the stage at which laws are drafted and policy developed, that is, within the executive. This is why governments have set up advisory bodies at this level of government. Such bodies however would not likely be put in the Constitution because they need to be flexible and adaptable to the processes and needs of the government of the day. A body at this level will also typically operate behind closed doors, as that maximises its chances of bringing about changes in policy.

It is hard to see that such a body could advise both the executive and Parliament, as is the case with Pearson's proposal. If advice is provided at the executive stage on a policy or proposed law, and this is taken into account or rejected, it is not likely to be appropriate to have a second opportunity to provide advice at the parliamentary stage on the same matters. Indeed, the possibility that this might occur is likely to compromise the relationship of the body with the executive, especially if the body subsequently proves willing to reveal its discussions with the executive or to criticise decision-making by the executive on the basis that its advice had not been heeded.

The sum of these problems is that there cannot be confidence that this new advisory body would be effective in the sense of having an impact upon the making of laws. Certainly, it could not be described as being a check upon the capacity of Parliament to enact laws that discriminate against Indigenous peoples on the basis of their race.

## IV Problems at the Ballot Box

An Indigenous advisory body can only be inserted into the Constitution if Australians vote for it at a referendum. However, a weakness of this model from a strategic viewpoint is that it has been cast so clearly by Pearson and others as being championed and owned by 'constitutional conservatives'. Indeed, the model reflects Pearson's publicly expressed view that: 'A successful referendum on Indigenous recognition requires a meeting of minds between Indigenous people on the one hand, and constitutional conservatives on the other.'[33]

This raises a problem that has beset many referendums in the past.[34] When a proposal is publicly identified as being connected to one part of the political spectrum, typically a major political party, it has tended to alienate others and has met defeat at the ballot box. Whether proposal is cast as conservative or progressive, Labor or Liberal, signalling its political alignment bears the significant risk that people will oppose it simply because it runs counter to their own political outlook. Political labelling of this kind can provoke a visceral reaction that leads people to oppose it without even developing the barest understandings of the idea.

A different, but related problem is that this model suffers from some of the same problems that beset the minimalist models during the 1990s republic debate. Australians have shown that they are wary of voting for something cast as a minimal attempt to deal with a problem. They want a proposal that deals with an issue in a substantive, meaningful way. The fact that the 1999 republic model had a number of these hallmarks was a key reason why it was defeated by the combination of monarchists and republicans who were opposed to such a minimalist change.

The same possibilities for opposition are evident here if the advisory body is proposed as an alternative to more substantive change in the form of providing protection against racial discrimination. In such a case, an advisory body would be inserted into the Constitution while Parliament would retain the same power to discriminate on the basis of race. This outcome is vulnerable to attack on the basis that it is a largely symbolic change that brings few tangible benefits to the community.

## V Protection against Racial Discrimination

The proposal for an advisory body has been put as an alternative to including protection in the Constitution against racial discrimination. As the above analysis of its design shows, the body would not offer anything akin to such protection. This is a significant problem because preventing such discrimination has been repeatedly identified by Indigenous peoples as being a necessary part of the recognition process. For example, a survey conducted by the National Congress of Australia's First Peoples of its membership, which is drawn from the Aboriginal and Torres Strait Islander community and their peak organisations from across Australia, found that 97 per cent favoured an amendment to the Constitution that would prohibit racial discrimination or provide a guarantee of equality.[35]

Support for such change is also very strong in the broader community, with independent polling conducted by the

Expert Panel on Constitutional Recognition of Indigenous Australians finding that 80 to 90 per cent of respondents favoured amending the Constitution to insert a general guarantee against laws that discriminate on the basis of race, colour or ethnic origin.[36] Indeed, some form of racial discrimination protection has proved to be the single most popular part of the package of reforms that might constitute a recognition referendum.

The Pearson proposal may appeal to constitutional conservatives, but it runs counter to community sentiment. It would not provide legal protection against racial discrimination. Indeed, Pearson's proposal for an advisory body would be accompanied only by replacing the races power with new wording that would permit laws to be made generally for 'Aboriginal and Torres Strait Islander peoples'. Such open-ended wording would leave Parliament free to enact positive or discriminatory laws for this group, and so would retain the prospect that racially discriminately laws could be enacted. This is hardly a saleable proposition at a referendum. It is open to the charge that a yes vote by Australians will continue the power of the federal Parliament to discriminate on the basis of race.

In fact, the legal position of Indigenous peoples would actually be inferior if the current races power were replaced with an advisory body and a power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. This is because the replacement power would provide no basis for arguing that it cannot be used to discriminate against Indigenous peoples. On the other hand, such an argument is possible in regard to the current races power. It enables the federal Parliament to pass laws with respect to: 'The people of any race for whom it is deemed necessary to make special laws'. In the *Native Title Act Case*,[37] six judges of the High Court left open the question of whether the phrase 'deemed necessary to make special laws' means that the Court 'retains some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power'.

This issue arose again in the *Hindmarsh Island Bridge Case*.[38] The six-member court split on the whether the races power can be used to enact laws that discriminate against Indigenous peoples. Two judges said that this was permissible; two others said it was not and the final two judges did not deal with the issue. The absence of a majority on any position meant that the scope of the races power remained unresolved.

As a result, it remains open for Indigenous peoples to argue that the current races power is constrained, and that a future High Court should follow the lead of either of the two judges in the *Hindmarsh Island Bridge Case* who developed a limited conception of the power. In that case, Gaudron J stated that 'it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid' under the power.[39] Similarly, Kirby J held that the races power 'does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race.'[40]

In essence, Pearson proposes to delete a power that the High Court might one day determine cannot be used to enact racially discriminatory laws, and to replace it with another power that could not be subject to any such limitation. In legal terms, Indigenous peoples would go backwards.

## VI Conclusion: A Way Forward

Pearson's proposal for an Indigenous advisory body has merit. The Constitution should be changed to provide Aboriginal and Torres Strait Islander peoples with an active, ongoing say on the laws and policies that affect them. The absence of bodies and procedures to enable this is a major weakness of Australia's system of government. Unfortunately, the model as developed so far suffers from problems of design and political positioning. Changes need to be made by way of developing the idea further, so as to overcome these problems. The starting point ought to be to move beyond the notion that an advisory body and racial discrimination protection are alternatives, or even mutually exclusive. In fact, the best model may involve aspects of both of these.

In particular, the replacement of the races power needs to be constrained by words that indicate that, for example, it cannot be used to enact laws that discriminate adversely against Indigenous peoples. Ideally, a freedom from racial discrimination should be inserted into the Constitution to protect all Australians. An example of this is the proposed section 116A drafted by the Expert Panel.

This however is not the only option. The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has suggested a more modest outcome. It has proposed words of limitation (that a law may

not 'discriminate adversely against' Indigenous peoples) within the replacement to the races power itself, rather than a freestanding guarantee.[41] This has the effect of quarantining the scope of the protection from racial discrimination so that it only protects Indigenous peoples, and would remove many of the concerns conservative people have about this reform. Without some form of change of this kind, the referendum is not likely to be viable as it will run counter to strong community sentiment in favour of removing the possibility of racial discrimination by the federal Parliament.

Making this change would represent an important compromise on behalf of the conservative backers of Pearson's proposal. This will be crucial, not only in terms of producing a viable model, but also in broadening out the range of people who are able to support the referendum. Including some form of limitation on racial discrimination in the model could build a bridge to people who do not identify themselves as being conservative.

Developing the model is also necessary because in its current form it does not meet the concerns of Indigenous peoples, as identified by Pearson himself. As he has stated, Indigenous peoples are seeking 'secure and stable protection of their rights and interests that is shielded from short-term political fluctuations'.[42] An advisory body may provide a voice for Indigenous peoples, and even improve deliberation within Parliament, but it will not provide an effective and predictable form of protection.

There remains the capacity, indeed even the likelihood, that Aboriginal and Torres Strait Islander interests would continue to be affected by short-term political fluctuations, including by way of measures such as the Northern Territory intervention. Without more, Pearson's model delivers on the aspirations of constitutional conservatives for minimal change and no additional substantive protection of Indigenous rights and interests, without providing corresponding benefits to Indigenous peoples. In doing so, the Pearson model speaks to the 10 to 20 per cent of the community that does not support including protection from racial discrimination in the Constitution.

A further advantage of including modest racial discrimination protection is that it would improve the operation of the advisory body. The body would have something in the Constitution to advise on, that is, whether a law made by Parliament might be seen as discriminating adversely against Aboriginal people. It would give the body a meaningful role, and Parliament would be minded to listen to the body on this question given the possibility that the issue might be tested in the High Court. This also reflects the experience overseas of advisory bodies. Where they are effective, it is usually because they can advise within the context of a legal framework that recognises Indigenous rights, through a Constitution, treaty or otherwise.

Of course, Australia is different from all of these nations. It is now the only democracy to lack some form of national Human Rights Act or Bill of Rights. In addition, unlike New Zealand, Canada and the United States, Australia has never signed a treaty with Indigenous peoples.[43] It is hard enough for an advisory body to be effective with such things, let alone in the context of a legal framework that contains nothing of this kind. It is for this reason that the change to the Constitution must also deal with the problem of racial discrimination. Doing so would ground the advisory body in a legal framework that gives meaning to its work.

---

* Anthony Mason Professor, Scientia Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar. This article is based upon an earlier publication by the author in the *Indigenous Law Bulletin* and a presentation at a Symposium on Indigenous Constitutional Recognition held at the University of Sydney on 12 June 2015. The author thanks the referee for their constructive criticisms of an earlier draft.

1 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015), xiii.

2 Ibid xiv.

3 See for examples of existing federal laws on these subjects: *Native Title Act 1993* (Cth) and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

4 Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 88.

5 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander*

*Peoples in the Constitution: Report of the Expert Panel* (2012) 173. See also for more recent recommendations of this kind: Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 1.

6 Patricia Karvelas, 'Historic Constitution Vote over Indigenous Recognition Facing Hurdles' The Australian (online), 20 January 2012, <www.theaustralian.com.au/national-affairs/policy/historic-constitution-vote-over-Indigenous-recognition-facing-hurdles/story- fn9hm1pm-1226248879375>.

7 In particular, those conducted by the Expert Panel on Constitutional Recognition of Indigenous Australians and the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. See Expert Panel on Constitutional Recognition of Indigenous Australians, above n 4 and Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 1.

8 As Pearson acknowledges, this is drawn from ideas for constitutional reform developed by Damien Freeman and Julian Leeser: Noel Pearson, 'Australian Declaration of Recognition launch speech' (Speech delivered at the State Library of New South Wales, 13 April 2015) <https://upholdandrecognisedotcom.files.wordpress.com/2015/03/noel-pearson-declaration-launch-speech-13-april-2015.pdf>.

9 Symbolic recognition would instead be brought about by way of legislative and other reforms: Cape York Institute Submission No 38.2 (Supplementary to Submission) to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, August 2014, 3.

10 Ibid 3.

11 See, for example, Alexander Reilly, "Dedicated Seats in the Federal Parliament for Indigenous Australians' (2001) 2(1) *Balayi: Law, Culture and Colonialism* 73; John Chesterman, 'Chosen by the People? How Federal Parliamentary Seats Might be Reserved for Indigenous Australians without Changing the Constitution' (2006) 34 *Federal Law Review* 261.

12 For a definition of self-determination in this context, see United Nations Declaration on the Rights of Indigenous Peoples, arts 3 and 4.

13 Compare Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8(19) *Indigenous Law Bulletin* 15; Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs' (2015) 26 *Public Law Review* 166, 173-175. See also Megan Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and its Exercise through Democratic Participation' (2015) 8(19) *Indigenous Law Bulletin* 10.

14 See, for example, Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', *Quarterly Essay No 55* (September 2014). See also Morris, above n 13.

15 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 1, 34.

16 Ibid 34.

17 Cape York Institute, above n 9, 23.

18 Ibid 24-25.

19 On these matters see Gabrielle Appleby in this volume and Gabrielle Appleby, 'An Indigenous Advisory Body: Some Questions of Design' (2015) 8(19) *Indigenous Law Bulletin* 3.

20 Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition' *The Conversation* (20 May 2015) <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>.

21 See Cheryl Saunders, 'Indigenous Constitutional Recognition: The Concept of Consultation' (2015) 8(19) *Indigenous Law Bulletin* 19, 19; Anne Twomey, 'An Indigenous Advisory Body: Addressing the Concerns about Justiciability and Parliamentary Sovereignty' (2015) 8(19) *Indigenous Law Bulletin* 6.

22 See *Osborne v Commonwealth* (1911) 12 CLR 321, 336, 339; *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (*Native Title Act Case*).

23 (2003) 211 CLR 476, 513, 482.

24 Cape York Institute, above n 9, 4.

25 Ibid 4.

26 (1996) 187 CLR 1.

27 Robert Manne, 'The Howard Years: A Political Interpretation' in Robert Manne (ed) *The Howard Years* (2004), 3, 18.

28 Twomey, above n 20.

29 Compare Fergal Davis, 'The Problem of Authority and the Proposal for an Indigenous Advisory Body' (2015) 8(19) *Indigenous Law Bulletin* 23.

30 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed 2007), 62.

31 See also Morris, above n 13, 186-189.

32 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

33 Pearson, above n 8.

34 See George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

35 National Congress of Australia's First Peoples, Statement to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 7 September 2011, <nationalcongress.com.au/wpcontent/uploads/2011/09/CongressStatementtoExpertPanel.pdf>.

36 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 4.

37 *Western Australia v Commonwealth* (1995) 183 CLR 373, 460

(Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (*Native Title Act Case*).

38 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 367 (*Hindmarsh Island Bridge Case*).

39 Ibid 367.

40 Ibid 411.

41 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 1, xv.

42 Cape York Institute, Submission No 38 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, October 2014, 10.

43 See Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (Federation Press, 2005).