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# The argument for a constitutional procedure for Parliament to consult with Indigenous peoples when making laws for Indigenous affairs

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*This article argues for a procedural amendment to the Constitution, establishing an Indigenous body to consult with and advise Parliament in its law-making for Indigenous affairs. First, it argues that such a reform would address the unjust omission of the Indigenous constitutional constituency from the check and balance machinery of Australia's federal Constitution. Secondly, this could be an alternative, preventative way of addressing the problem of racial discrimination against Indigenous people, responding to Indigenous concerns for better democratic participation and consultation, as well as to judicial activism and legal uncertainty concerns associated with judicially adjudicated constitutional rights clauses. Thirdly, it could be a practical application of Indigenous self-determination principles within Australia's domestic democratic arrangements. The final section explores practical legal and political considerations: whether the procedure could be drafted to be non-justiciable, the implications of non-justiciability and a discussion of Professor Anne Twomey's proposed draft amendment; what historical lessons can be drawn from the Inter-State Commission and ATSIC that are relevant to the design and success of an Indigenous constitutional body; and what are the possible political objections to this reform proposal.*

## INTRODUCTION

This article argues for and explores Noel Pearson's suggestion of a procedural amendment to the Constitution, to establish an Indigenous body to consult with and advise Parliament in its law-making for Indigenous affairs.<sup>1</sup> First, the article argues that the Indigenous constituency is an important missing element in the check and balance machinery of Australia's federal Constitution. An Indigenous representative voice, working to protect the rights of Indigenous citizens, should be included in the productive interplay of competing constitutional interests. Secondly, it argues that such a reform addresses Indigenous concerns to be better heard in government decisions affecting their interests, while also responding to judicial activism and legal uncertainty concerns associated with constitutional rights clauses. It proposes a political and procedural rather than a judicial solution, involving Indigenous people as democratic participants rather than litigants. Thirdly, the article argues that such a constitutional amendment could be a domestic democratic articulation of the principle of Indigenous self-determination.

This article also addresses some practical legal and political considerations associated with this reform proposal. It considers whether and how the constitutional amendment could be non-justiciable, exploring the characteristics and implications of other non-justiciable constitutional clauses. It also discusses Professor Anne Twomey's draft constitutional amendment giving effect to this type of proposal, and investigates the historical lessons of the Inter-State Commission and the Aboriginal and Torres Strait Islander Commission (ATSIC), which are relevant to the design and success of an Indigenous constitutional body. Finally, the article considers possible political objections to this reform proposal.

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<sup>1</sup> Noel Pearson, "A Rightful Place: Race, Recognition and a More Complete Commonwealth", *Quarterly Essay No 55* (September 2014). The article also seeks to build upon two Cape York Institute publications: Submission No 38 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, October 2014; Supplementary Submission No 38.2 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, January 2015.



## THE ARGUMENT FOR INDIGENOUS REPRESENTATION IN OUR CHECK AND BALANCE CONSTITUTION

Representation of the Indigenous Australian polity is an important missing cog in the check and balance machinery of Australia's federal Constitution.

In creating the Constitution, the parties to the constitutional compact agreed on the best ways to regulate fair future relations within the unified nation. They agreed that the political process should take primacy over judicially adjudicated rights clauses.<sup>2</sup> Australia's Constitution has no bill of rights: it predominantly protects citizens' rights through democratic procedures and federal power-sharing.<sup>3</sup> The federal compact of 1901 recognises and incorporates the geographical, historical and political affiliations of the former colonies. Even the most sparsely populated States are guaranteed an equal voice in the Senate,<sup>4</sup> ensuring that localised interests are always heard by central powers. The Constitution created a balanced web of political restraints and competing interests to ensure a tempering of majoritarian rule by recognised minority concerns.<sup>5</sup> Thus, despite a scarcity of rights clauses, the Constitution can be said to *politically and procedurally* protect citizens' rights, through democratic processes rather than the courts.

Indigenous people, however, were not party to the constitutional compact of 1901.<sup>6</sup> There is no Indigenous check on government power, working within the procedures of Australian democratic federalism to protect Indigenous rights. The Indigenous constitutional cog is missing from Australia's check and balance federalism. The Constitution includes neither political and procedural nor judicially adjudicated protections of Indigenous rights and interests.

The discrimination of the drafting era meant that Indigenous people were excluded not only from the equal citizenship rights established by the Constitution;<sup>7</sup> they were omitted as a legitimate constitutional constituency deserving of recognition and a voice within the protective interplay of interests. Much discrimination against the Indigenous polity occurred as a result, without the procedural tension, public scrutiny or judicial review that occurs when the Commonwealth infringes upon States' rights. Indigenous people have not benefited from constitutional mechanisms for the equalisation of power like those that have balanced interactions between the Commonwealth and the former colonies.

While the former colonies were constitutionally recognised, ensuring longevity of their political identities within the unified nation, the former colonised are still not. Far from recognising the distinct Indigenous historical, political and often geographical identity,<sup>8</sup> the Constitution in a sense encourages the Indigenous polity to disappear. Indigenous people were viewed as a "dying race".<sup>9</sup> Still today, the only constitutional articulation of the relationship between Indigenous people and government is made

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<sup>2</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 196-199; Jeffrey Goldsworthy, "Constitutional Cultures, Democracy and Unwritten Principles" (2012) 3 U Ill L Rev 683, 685-688; Jeffrey Goldsworthy, "The Constitutional Protection of Rights in Australia" in Greg Craven (ed), *Australian Federation: Towards the Second Century* (MUP, 1992) 151, 151-157.

<sup>3</sup> Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (UNSW Press, 2004) 38-42.

<sup>4</sup> Section 7 of the Constitution requires "equal representation" of each State.

<sup>5</sup> JA La Nauze, "The Inter-State Commission" (1937) 9(1) *The Australian Quarterly* 48, 48.

<sup>6</sup> Mick Dodson, "The Continuing Relevance of the Constitution for Indigenous Peoples" (Speech delivered at the National Archives of Australia, Canberra, 13 July 2008).

<sup>7</sup> See removed ss 127 from the Constitution and 51(xxvi) which excluded Indigenous people.

<sup>8</sup> ATSIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) [4.21].

<sup>9</sup> Justin Malbon, "The Race Power under the Australian Constitution: Altered Meanings" (1999) 21 Syd LR 80, 91, quoting Geoffrey Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 FL Rev 17, 18. See also Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 1; Michael Kirby, "Constitutional Law and Indigenous Australians: Challenge for a Parched Continent" (Paper presented at the Constitutional Change: Recognition or Substantive Rights? Forum, Law Council of Australia, Canberra, 22 July 2011) 19.

by implication, via discriminatory references to “race” – implying that the relationship is one of exclusion and subordination.<sup>10</sup> Discrimination is still explicitly allowed.<sup>11</sup>

Now that the discriminatory attitudes justifying Indigenous exclusion have been abandoned, the constitutional omission of the protection of Indigenous rights and interests should be rectified. There is a good argument for the protection being political and procedural, in keeping with the procedural, rather than rights-laden, nature of the Constitution. The Constitution should give Indigenous people a voice in their own affairs.

### **THE ARGUMENT FOR AN ALTERNATIVE, POLITICAL AND PROCEDURAL SOLUTION TO THE RACIAL DISCRIMINATION QUESTION**

The difficulty of constitutional reform in Australia imposes onerous constraints on the types of reforms that are politically achievable. The Expert Panel’s 2012 recommendations for Indigenous constitutional recognition proposed reforms including removal of references to “race”, insertion of a replacement Indigenous head of power incorporating preambular recognition statements, and the adoption of a judicially adjudicated racial non-discrimination clause, restraining governments from enacting racially discriminatory laws and policies.<sup>12</sup>

These recommendations have not all been unequivocally supported. The racial non-discrimination clause proposal, despite its public popularity,<sup>13</sup> was criticised as an undemocratic “one-clause bill of rights” that would unduly empower unelected judges to overturn the decisions of elected representatives.<sup>14</sup> As bipartisan support is crucial for referendum success,<sup>15</sup> modified proposals that might more easily win widespread political support are now being explored.

A commonly suggested alternative to a racial non-discrimination clause is a qualified power to make laws with respect to Indigenous people, with an in-built limitation preventing it from being used to enact discriminatory legislation against them,<sup>16</sup> or a racial non-discrimination clause that applies to Indigenous people only.<sup>17</sup> However, these kinds of reforms would still be judicially interpreted and thus may not adequately address concerns about legal uncertainty.<sup>18</sup> These concerns should be less in relation to a power of this kind, than in relation to a broad prohibition against racial discrimination. A concern already foreshadowed, however, is that an express limitation on an Indigenous power would

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<sup>10</sup> “Race” in the race power carries connotations of the inferiority and passivity of the dark-skinned so-called “races”, referred to as “inferior and coloured” peoples and “undesirables” in the Constitutional Convention debates: see *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January-17 March 1898, 240. See also Sarah Pritchard, “The Race Power in Section 51(xxvi) of the Constitution” (2011) 15(2) AILR 44, 50-51; Marcia Langton, “Why ‘Race’ Is a Central Idea in Australia’s Construction of the Idea of a Nation” (1999) 18 *Australian Cultural History* 22, 26.

<sup>11</sup> See Australian Constitution, ss 51(xxvi), 25.

<sup>12</sup> Expert Panel on Constitution Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) xviii.

<sup>13</sup> Expert Panel, n 12, 82-91, 157; Patricia Karvelas, “Most People Want Racial Discrimination Removed from the Constitution”, *The Australian*, 11 November 2011.

<sup>14</sup> For a full analysis of these objections, see Shireen Morris, “Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition” (2014) 40 Mon LR 488.

<sup>15</sup> ATSIC, n 8, [4.18]; George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 244-246.

<sup>16</sup> Rosalind Dixon and George Williams, “Drafting a Replacement for the Races Power in the Australian Constitution” (2014) 25 PLR 83; Anne Twomey, “A Revised Proposal for Indigenous Constitutional Recognition” (2014) 36 Syd LR 381; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2014) 9-16, 19; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Progress Report* (2014) 4-9.

<sup>17</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015) Recommendation 5.

<sup>18</sup> Conversely, a qualification that only restrains the Indigenous power may not go far enough to properly address Indigenous concerns, and may be considered a “poor trade-off” for the Expert Panel’s much stronger racial non-discrimination clause: see Megan Davis, “Response to Noel Pearson’s Quarterly Essay”, *Quarterly Essay No 56* (2014) 73.

be interpreted to constrain other Commonwealth powers where they are used to legislate for Indigenous people.<sup>19</sup> Similarly, the proposed qualifications use terms that could be considered almost as vague and as susceptible to uncertain interpretation as a racial non-discrimination clause.<sup>20</sup> Similar objections therefore apply to narrower versions of a racial non-discrimination clause as to a broad version. As a result of these difficulties, and despite the fact that the Joint Select Committee recently recommended three versions of a racial non-discrimination clause in its final report, the Chairman of the Committee, Indigenous Liberal MP Ken Wyatt, subsequently stated that a racial non-discrimination clause would be unlikely to win the necessary bipartisan support for a successful referendum, because it was already being opposed in his own party.<sup>21</sup> It is becoming increasingly clear that a racial non-discrimination clause, or variations of it, is politically unviable.

Political and procedural constitutional reform options, designed to increase Indigenous participation in democratic processes as a proactive and pre-emptive way of protecting Indigenous rights and interests, have been proposed as alternatives to judicially adjudicated constitutional rights clauses. While Pearson argues for a new procedural Chapter in the Constitution to establish an Indigenous body to advise and consult with Parliament on matters affecting Indigenous interests,<sup>22</sup> others have argued for reserved Indigenous seats in Parliament.<sup>23</sup> Both these solutions incorporate preventative measures to protect Indigenous interests into the national democratic process itself, rather than transferring power to the judiciary through rights clauses. These solutions could thus be seen as highly respectful of parliamentary supremacy and responsive to judicial activism and legal uncertainty objections.

This article does not explore the possibility of reserved Indigenous parliamentary seats, as this has been explored in detail elsewhere<sup>24</sup> and may be more politically difficult to achieve because it would likely involve highly complex reforms to the composition of the Houses of Parliament.<sup>25</sup> The Indigenous body amendment is explored on the basis that it would not radically alter the composition or operations of Parliament, nor create a veto over Parliament's law-making. Rather, the proposed reform would enhance the procedural fairness, inclusivity and just operation of Australia's democracy with respect to Indigenous affairs, by giving Indigenous people a direct voice in democratic procedures without transferring power to the judiciary. On these bases it is a reform that has the potential to be widely supported.

### **Doing things in a better way: political and procedural versus judicial solutions**

Indigenous constitutional recognition should provide a preventative answer to the history of racial discrimination suffered by Indigenous people under the Constitution.<sup>26</sup> The Constitution has presided over discrimination against Indigenous people, and has provided no avenues for Indigenous people to

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<sup>19</sup> Dixon and Williams, n 16, 87-88, Twomey, n 16, 409.

<sup>20</sup> See Twomey, n 16, 408-409 for examples of this uncertainty; the Joint Select Committee also noted that the meaning of "discriminate" "in the context of a constitutional legislative power could remain somewhat uncertain": Joint Select Committee, *Interim Report*, n 16, 20.

<sup>21</sup> Joint Select Committee, *Final Report*, n 17, Recommendation 5. See also Natasha Robinson, "Time to Get a Move on with Constitutional Recognition: Ken Wyatt", *The Australian*, 10 July 2015.

<sup>22</sup> Pearson, n 1, 65-67; Cape York Institute, Submission No 38, n 1. For similar ideas, see John Chesterman, "National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council" (2008) 67(4) *AJPA* 419.

<sup>23</sup> Chris Mitchell, "Towards a National Settlement", *The Australian*, 17 September 2014; Rosie Lewis, "Reserved Seats for Aboriginal MPs, Says PUP Senator Jacqui Lambie", *The Australian*, 13 September 2014; Misha Schubert, "Indigenous Want Reserved Seats in Parliament: Congress", *The Age*, 31 July 2011.

<sup>24</sup> See Alexander Reilly, "Dedicated Seats in the Federal Parliament for Indigenous Australians" (2001) 2(1) *Balay: 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 *FL Rev* 261; Brian Lloyd, "Dedicated Indigenous Representation in the Australian Parliament" (Research Paper No 23, Parliamentary Library, 2009).

<sup>25</sup> Reilly, n 24, 102.

<sup>26</sup> Expert Panel, n 12, 82-91, 157. See also Marcia Langton, "Indigenous Exceptionalism and the Constitutional Race Power" (Speech delivered at the Melbourne Writers' Festival, BMW Edge Theatre, Melbourne, 26 August 2012); Marcia Langton, "Get

challenge discriminatory laws. Indeed it provides the opposite: explicit clauses allowing and promoting Indigenous exclusion and discrimination.

Indigenous advocacy for decades has called for “serious constitutional reform”<sup>27</sup> to protect and recognise Indigenous rights and interests.<sup>28</sup> While some do not want judges interpreting constitutional rights clauses and deciding what is discriminatory or not, those who have suffered discrimination tend to place less faith in elected Parliaments and may often prefer that judges were empowered to look out for their minority interests.<sup>29</sup> The majoritarian “Parliament knows best” answer to Indigenous calls for constitutionalised protections therefore presents an unhelpfully circular and dismissive response to legitimate Indigenous concerns.

Pearson’s challenge to those who oppose judicially adjudicated rights clauses in the Constitution is to ask: “what is a better solution?” What can be done to ensure that “*things are done in a better way*”?<sup>30</sup> A racial non-discrimination clause in the Constitution represents one way of addressing the issue. Had Australia’s Constitution contained such a restraint, past discrimination might have been successfully challenged. The threat of legal action might have fostered a different parliamentary and political culture. As Expert Panel member Megan Davis explains, it might have created:

an institutional tension or brake; a requirement to take time and consult; a requirement to go on country and talk to people before doing. That institutional pause is missing from our current political arrangements ... There is no compulsion for parliament to consult or take into account the views of the Aboriginal and Torres Strait Islander communities on any legislation or policy.<sup>31</sup>

Davis’ comment elucidates a key insight with respect to what many Indigenous people hope may result from constitutional recognition: the fostering of *better government and parliamentary attitudes towards, processes for fair consultation and negotiation with, and thus prevention of discrimination against Indigenous people*.<sup>32</sup>

### Indigenous advocacy for a better democratic voice

As a member of the Expert Panel, parliamentarian Ken Wyatt emphasised “the need for public servants and parliamentarians to change their practices in dealing with ... communities. He argued for an approach based on negotiations with communities on a consensual basis.”<sup>33</sup> This has been an ongoing concern for Indigenous people. The Council for Aboriginal Reconciliation (CAR) in 1995 reported a widespread view amongst Indigenous Australians that “the structures of governments ... do not provide adequately for Indigenous peoples to exercise legal powers over matters that were of

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Rid of Race to Stop Racism”, *The Australian*, 31 August 2012; Patrick Dodson, “Too Tolerant of Ugly Racism”, *The Age*, 31 January 2012; Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, 2003).

<sup>27</sup> Yolngu petition in 2008: see Galarrwuy Yunupingu, “Truth, Tradition and Tomorrow”, *The Monthly*, December 2008.

<sup>28</sup> Pearson, n 1, 2, 65; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians, a Submission to the Commonwealth Government* (1995) 35-38; Galarrwuy Yunupingu, “We Know These Things to be True” (Third Vincent Lingiari Memorial Lecture, 20 August 1998); Patrick Dodson, “Until the Chains are Broken” (Fourth Vincent Lingiari Memorial Lecture, 8 September 1999); Noel Pearson, “Next Step for the Nation is to Leave Race Behind”, *The Australian*, 25 May 2013. There is a good history of the advocacy in Reilly, n 24, 82-83.

<sup>29</sup> See n 28, for example, Dodson (at 9): “It may be a harsh thing to say, but many actions of Australian Governments have given Aboriginal people little faith in the promises Governments make in relation to protecting and defending the rights of Indigenous Australians. That is why we need a formal Agreement that recognises and guarantees the rights of Indigenous Australians within the Australian Constitution.” Yunupingu (at 10): “If our Indigenous rights were recognised in the Constitution, it would not be so easy for Governments to change the laws all the time, and wipe out our rights”. See also Davis, n 18.

<sup>30</sup> Pearson, n 1, 65; Cape York Institute, Submission No 38, n 1, 9-10.

<sup>31</sup> Davis, n 18.

<sup>32</sup> Expert Panel, n 12, 92-95, 117-185.

<sup>33</sup> Expert Panel, n 12, 184.



concern to them nor influence major decision-making processes”.<sup>34</sup> A demonstrable hope in Indigenous calls for constitutional rights has been for *greater Indigenous authority in Indigenous affairs*.<sup>35</sup>

Accordingly, a key aspect of Indigenous rights advocacy has focused on ways of achieving a greater Indigenous voice and participation in Australia’s democratic system:<sup>36</sup>

- In 1927, Fred Maynard, President of the Australian Aboriginal Progressive Association, wrote to the New South Wales Premier calling for the control of Indigenous affairs to be transferred to an Indigenous board;<sup>37</sup>
- In 1933, King Barraga called for Indigenous representation in federal Parliament;<sup>38</sup>
- In 1937, William Cooper in Victoria echoed the call in a petition to King George;<sup>39</sup>
- In 1949, Doug Nicholls wrote to Prime Minister Ben Chifley arguing for Indigenous representation in federal Parliament;<sup>40</sup>
- In 1975, the Aboriginal Treaty Commission recommended a national agreement on the “right of Indigenous Australians to control their own affairs and to establish their own associations for this purpose”;<sup>41</sup>
- In 1979, the National Aboriginal Conference called for a Makarrata agreeing to, among other things, “the reservation of several seats in the Commonwealth, State and local governments”;<sup>42</sup>
- ATSIC was the result of Indigenous advocacy for a national Indigenous “consultative organisation”;<sup>43</sup>
- There were many calls in the 1980s, including submissions to the 1988 Constitutional Commission, for Indigenous reserved seats;<sup>44</sup>
- In 1995, ATSIC suggested its chairperson be granted observer status in Parliament and the ability to speak to both Houses on Bills affecting Indigenous interests;<sup>45</sup>

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<sup>34</sup> Council for Aboriginal Reconciliation, n 28, 41.

<sup>35</sup> In 2008, the Yolngu people petitioned then Prime Minister Kevin Rudd calling for “constitutional recognition and protection” of their “full and complete right” to, among other things, “control of our lives and responsibility for our children’s future”: see Yunupingu, n 27. The Sub-Committee on the Makarrata, after consulting widely with Indigenous people, argued that “status is acquired for the Aboriginal people by the management of their own affairs”: National Aboriginal Conference, Sub-Committee on the Makarrata, *Makarrata Report* (1979).

<sup>36</sup> Noel Pearson, “A Structure for Empowerment”, *The Weekend Australian*, 16-17 June 2007. ATSIC also highlighted the vulnerability of the Indigenous minority midst of such political fluctuations: “Indigenous Australians are particularly susceptible to shifts in Government policies and funding priorities because of powerlessness. Political participation would foster greater equity in the provision of services and accountability by Governments. It would enable articulation of indigenous policy perspectives, broader participation in policy development and promote a wider understanding of indigenous issues in the broader community”: ATSIC, n 8, [4.25].

<sup>37</sup> Reilly, n 24, 82.

<sup>38</sup> Reilly, n 24, 82.

<sup>39</sup> Reilly, n 24, 82. The petition was never delivered to the King because the government thought reserved seats were constitutionally impossible.

<sup>40</sup> Reilly, n 24, 82-3.

<sup>41</sup> William Jonas, “Reflections on the History of Indigenous People’s Struggle for Human Rights in Australia – What Role Could a Treaty Play?” (Speech delivered at the Treaty – Advancing Reconciliation Conference, Murdoch University, Western Australia, 27 June 2002).

<sup>42</sup> National Aboriginal Conference, n 35; see also Julie Fenley, “The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981” (2011) 42(3) *Australian Historical Studies* 372.

<sup>43</sup> Especially the work of Lois O’Donoghue, “Proposal for an Aboriginal and Islander Consultative Organisation” (Discussion Paper, Department of Aboriginal Affairs, 1985); Lois O’Donoghue, *An Aboriginal and Islander Consultative Organisation: Report of Consultations* (AGPS, 1986).

<sup>44</sup> Reilly, n 24, 83.

<sup>45</sup> “Representatives of indigenous peoples, including ATSIC, should have legally enforceable speaking rights in legislatures and in Local Government councils on issues relating to indigenous peoples. The Chairperson of ATSIC should be entitled to address the Parliament annually to report on the state of indigenous affairs”: ATSIC, n 8, [4.31].

- In 1995, the CAR called for “recognition and empowerment” through incorporation of the ATSIC chairperson as a “full member of the Ministerial Council” on Indigenous affairs;<sup>46</sup>
- In 1998, a New South Wales parliamentary inquiry investigated reserved seats, but recommended an Aboriginal Assembly to further Indigenous representation in Parliament and to research reserved seats;<sup>47</sup>
- In 2000, Queensland explored the possibility of reserved Indigenous seats and “systems whereby a representative body would provide direct input to Parliament to ensure that issues relevant to Indigenous people are heard”;<sup>48</sup>
- In 2007, Pearson urged mechanisms to better manage the interface between government and Indigenous people,<sup>49</sup> such as the reinstatement of a national representative body to enable Indigenous people to take more responsibility and control of their affairs;<sup>50</sup>
- In 2011, the National Congress of Australia’s First Peoples (Congress) expressed support for reserved Indigenous seats in Parliament;<sup>51</sup>
- In 2011, the Cape York Institute (CYI) in its submission to the Expert Panel called for a Rights and Responsibilities Commission to review special measures and provide Indigenous input into review of Indigenous affairs laws and policies;<sup>52</sup>
- Recently, Michael Mansell advocated for institutional reform to effect a “7th Aboriginal State” to ensure better Indigenous input into Australia’s democratic processes;<sup>53</sup>
- There have been renewed calls for reserved Indigenous Senate seats;<sup>54</sup>
- Pearson proposed that the Constitution be amended to create an Indigenous body to consult with and advise Parliament in its law and policy-making for Indigenous affairs;<sup>55</sup>
- Marion Scrymgour also called for a special advisory body made up of Indigenous representatives;<sup>56</sup>
- The Congress expressed qualified support for the Indigenous constitutional body proposal, pending further consultation with Indigenous people;<sup>57</sup>
- The Aboriginal Provisional Government (APG) also expressed support for the proposal.<sup>58</sup>

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<sup>46</sup> Council for Aboriginal Reconciliation, n 28, 35-45.

<sup>47</sup> Reilly, n 24, 83;

<sup>48</sup> “This direct input could take many forms including asking questions on notice of ministers, reporting to Parliament on the implications for Aboriginal and Torres Strait Islander peoples of bills, and addressing Parliament on bills directly affecting Indigenous interests ... A joint parliamentary / community committee might be another mechanism to provide direct input into Parliament”: see Karen Struthers, “Hands on Parliament: A Parliamentary Committee Inquiry into Aboriginal and Torres Strait Islander Peoples’ Participation in Queensland’s Democratic Process” (2003) 5(22) *Indigenous Law Bulletin* 6. Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to the Acts and Laws that Relate to the Queensland Constitution* (2000).

<sup>49</sup> Pearson, n 36.

<sup>50</sup> Pearson argued, “There’s got to be some kind of structure in which we interface with government”: ABC, “Noel Pearson Discusses the Issues Faced by Indigenous Communities”, *Lateline*, 26 June 2007 <<http://www.abc.net.au/lateline/content/2007/s1962844.htm>>.

<sup>51</sup> Schubert, n 23.

<sup>52</sup> Cape York Institute, Submission No 3479 to the Expert Panel, September 2011, 27-29; see also Expert Panel, n 12, 149.

<sup>53</sup> Michael Mansell, “A 7th State: Michael Mansell on Another Way Forward for First Nations Self-rule”, *New Matilda*, 13 June 2015.

<sup>54</sup> Lewis, n 23.

<sup>55</sup> Pearson, n 1; Cape York Institute, Submission No 38 and Supplementary Submission No 38.2, n 1.

<sup>56</sup> Marion Scrymgour, “Looking Back and Looking Forward After the Intervention” (Nugget Coombs Memorial Lecture, Charles Darwin University, 8 October 2014).

<sup>57</sup> Public Consultation for Constitutional Recognition by Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Sydney, 20 February 2015, 13-18.

<sup>58</sup> Aboriginal Provisional Government, “Support for Noel Pearson’s Proposal for Aboriginal Representation on Aboriginal Issues” (Press Release, 8 July 2015).

That Indigenous Australians have consistently sought mechanisms for their representation, consultation and a voice in their affairs is unsurprising. It is now well established that proper consultation with Indigenous people is key to effective Indigenous policy and integral to closing the gap.<sup>59</sup> There is widespread acknowledgment that without proper Indigenous input, government measures for Indigenous people will continue to be ineffective and inefficient at best,<sup>60</sup> and unjust and discriminatory at worst.<sup>61</sup> Davis suggests that a racial non-discrimination clause was supported by Indigenous people largely because it was hoped that the clause would lead to better consultation before and in parliamentary action concerning Indigenous affairs.<sup>62</sup> Perhaps this can be achieved *without* a racial non-discrimination clause, taking into account objections to judicial review. It could be achieved through political and procedural limitations, rather than substantive and justiciable, limitations on Parliament's power to legislate for Indigenous affairs.

This could be an Australian democratic expression and recognition of the principle of Indigenous self-determination, and the related Indigenous right to be consulted.

### THE ARGUMENT FOR A CONSTITUTIONAL ARTICULATION OF INDIGENOUS SELF-DETERMINATION PRINCIPLES

James Anaya explains the right to self-determination as deriving from a "philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality".<sup>63</sup> Anaya's explanation evokes the values articulated in the American Declaration of Independence, which proclaimed:

that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Self-determination is the right to freely pursue personal and community development: especially political, economic, social and cultural development and determination.<sup>64</sup> In the context of Indigenous peoples, self-determination tends to refer to the right to self-govern,<sup>65</sup> exercise autonomy and political agency and make free choices about their futures as peoples within post-colonial nation states.<sup>66</sup> Self-determination seeks to carve out space within the post-colonial nation's institutional and political structures for Indigenous peoples to exist and to exercise authority over their lives and directions as peoples.<sup>67</sup> It provides a respectful and inclusive approach, in direct opposition to colonial and past policies often based on paternalism, compulsion and discrimination, which limited Indigenous free choice through draconian and unilateral exercise of government force and power.<sup>68</sup>

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<sup>59</sup> Pearson, n 1, 48.

<sup>60</sup> See Bill Shorten, "Closing the Gap" (Speech delivered to House of Representatives, Parliament House, Canberra, 15 February 2015); Tony Abbott established an Indigenous Advisory Council to provide advice on Indigenous affairs and to engage with Indigenous communities <<http://iac.dpmc.gov.au/terms-of-reference>>. See also *Maloney v The Queen* (2013) 252 CLR 168, [318] (French CJ).

<sup>61</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 135; Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples* (18 August 1997) [4(d)]; Australian Human Rights and Equal Opportunities Commission, *Social Justice Report 2007* (2008) Recommendations 7, 14; Shireen Morris, "Indigenous Constitutional Recognition, Non-discrimination and Equality before the Law: Why Reform is Necessary" (2011) 7(26) *Indigenous Law Bulletin* 7, 10-11.

<sup>62</sup> Davis, n 18.

<sup>63</sup> S James Anaya, *Indigenous Peoples in International Law* (OUP, 2nd ed, 2004) 98.

<sup>64</sup> See Art 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

<sup>65</sup> Anaya notes that "self-government is the overarching political dimension of ongoing self-determination": Anaya, n 63, 150.

<sup>66</sup> *Declaration on the Rights of Indigenous Peoples*, Arts 3, 4. See also Australian Human Rights Commission, *Right to Self Determination* <<https://www.humanrights.gov.au/right-self-determination>>.

<sup>67</sup> Pearson, n 1, 6-7.

<sup>68</sup> Some might argue that such treatment of Indigenous people continues today. For example, "at many consultations, it was suggested that current policies have limited capacity of Aboriginal and Torres Strait Islander people to exercise self-determination. Issues raised in this context included the Northern Territory Emergency Response, non-recognition of



How can Indigenous self-determination be realised within democratic nations that are run by elected governments who wield all the political authority, particularly when Indigenous people only constitute an extreme minority of the population and lack a significant voice within mainstream majoritarian arrangements?<sup>69</sup>

### **Indigenous self-determination as a matter of domestic democratic process and procedure**

Pearson concludes that “Indigenous self-determination is a domestic democratic question”, requiring nations to accommodate Indigenous peoples within national frameworks, and articulate mechanisms for self-determination within democratic and institutional arrangements.<sup>70</sup> Understood in this inclusive way, Indigenous self-determination should not frighten governments fearing secession and separatism.<sup>71</sup> Rather, the project of Indigenous self-determination – in the context of constitutional recognition at least – seeks recognition, accommodation and expression of Indigenous self-determination principles within existing constitutional and institutional arrangements.<sup>72</sup> It seeks an inclusive, domestic self-determination, compatible with democracy and national unity.<sup>73</sup>

Guarantees and processes for fair engagement, consultation and negotiation between Indigenous peoples and government are of practical necessity in Indigenous peoples articulating their domestic self-determination within postcolonial nations.<sup>74</sup> The Indigenous right to self-determination is therefore often associated with the right of Indigenous peoples to be consulted where laws affect their rights and interests.<sup>75</sup>

The right of Indigenous peoples to be consulted and to give free, prior and informed consent where legislative action affects their rights is also incorporated into racial non-discrimination principles at international law. Special measures or positive measures to ensure disadvantaged groups – including Indigenous groups – equal enjoyment of their human rights, particularly in a context where there has been past or historical discrimination,<sup>76</sup> are supposed to be implemented with the informed consent of the beneficiaries.<sup>77</sup> The Australian High Court has noted that proper consultation and the “wishes of the beneficiaries” may be an important factor in ascertaining whether a particular law or measure is a special measure.<sup>78</sup> French CJ said in *Maloney* that:

it should be accepted, as a matter of common sense, that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical

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governance structure and of customary law, and administrative practices in the funding and delivery of programs to ... communities. Many participants saw constitutional recognition as a way to return some self-governance to individuals and communities”: Expert Panel, n 12, 93-94.

<sup>69</sup> Pearson, n 1, 66.

<sup>70</sup> Pearson, n 1, 41-46.

<sup>71</sup> Anaya, n 63, 102.

<sup>72</sup> Davis agrees, “it is internal domestic political arrangements that accommodate indigenous peoples voice, that give full expression to the right to self-determination... self-determination is no symbolic, wishy washy idea. It is about giving people control over their lives. It is not viewed as separatist but as enhancing democracy”: Davis, n 18.

<sup>73</sup> “Internal self-determination” as described by Russell A Miller, “Collective Discursive Democracy as the Indigenous Right to Self-determination” (2006-7) 31 *Am Indian L Rev* 341, 346; Anaya, n 63, 105.

<sup>74</sup> Anaya, n 63, 153-156.

<sup>75</sup> *Declaration on the Rights of Indigenous Peoples*, Arts 18, 19. See also Dylan Lino, “The Politics of Inclusion: The Right of Self-determination, Statutory Bills of Rights, and Indigenous Peoples” (2010) 34 *MULR* 829, 868.

<sup>76</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) Art 1(4).

<sup>77</sup> Committee on the Elimination of Racial Discrimination, n 61, [4(d)]; Australian Human Rights and Equal Opportunities Commission, n 61, Recommendations 7, 14; Morris, n 61, 10-11.

<sup>78</sup> “The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them”: *Gerhardy v Brown* (1985) 159 CLR 70, 139 (Brennan J).

implementation of that measure. That is particularly so where ... the measure ... involves the imposition on the affected community of a restriction on some aspect of the freedoms otherwise enjoyed by its members.<sup>79</sup>

However, despite noting the practical importance of consultation in the effective implementation and acceptance of special measures, the High Court in *Maloney* found that consultation is not a *decisive* legal requirement of a valid special measure under Australian law (this is discussed further below).

Nonetheless, there is a clear logical and practical link between non-discrimination and consultation. Processes for genuine consultation and negotiation can prevent discriminatory action by government and are a common expression of the Indigenous self-determination principle internationally.<sup>80</sup> Miller thus proposes a practical “interpretation of indigenous peoples’ self-determination that insists upon the reality of and managing the discourse between ... collective entities” – Indigenous peoples and the State.<sup>81</sup> This requires an expression of Indigenous self-determination through national institutions.<sup>82</sup>

Dylan Lino argues that the self-determination principle is best expressed by establishing rules and procedures for fair negotiation, engagement and consultation between the State and Indigenous peoples.<sup>83</sup> Rather than “juridification” of the ambiguous right to self-determination in a bill of rights, leaving courts the authority to determine the content of the right, Lino argues that the:

law may be better put to use indirectly in structuring negotiation systems and balancing negotiating power between parties ... elaborating the terms of the Indigenous-state relationship or establishing procedures for negotiation between Indigenous peoples and the state.<sup>84</sup>

These arguments are compelling.

According to Anaya, Indigenous self-determination within post-colonial States seeks to enable “effective participation in the larger political order”, thus “allowing indigenous peoples to achieve meaningful self-determination through political institutions and consultative arrangements ... that permit them to be genuinely associated with all decisions that affect them on an ongoing basis”.<sup>85</sup>

### Consent versus consultation

This article does not explore constitutional mechanisms for facilitating the Indigenous right to “free prior and informed consent” under Art 19 of the *Declaration on the Rights of Indigenous Peoples* (DRIP). Indigenous “free prior and informed consent” at the constitutional level may be practically unworkable and politically unviable. Consent is very strong. Russell Miller describes it as engaging a “level of discourse” that may go so far as granting Indigenous people “a veto in the covered fields”.<sup>86</sup> A constitutionalised veto would likely be opposed by many on the grounds that it undermines and is an abdication of parliamentary sovereignty.<sup>87</sup> Given that the purpose of this article is to consider constitutional reform options that speak to Indigenous concerns, and also respond to concerns about the compromising of parliamentary supremacy through constitutional rights clauses, options for a constitutionalised consent requirement are omitted in favour of softer, practical and politically more

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<sup>79</sup> *Maloney v The Queen* (2013) 252 CLR 168, [318].

<sup>80</sup> Anaya, n 63, 156.

<sup>81</sup> Miller, n 73, 358.

<sup>82</sup> Anaya, n 63, 99.

<sup>83</sup> Lino, n 75, 867-868.

<sup>84</sup> Lino, n 75, 867-868.

<sup>85</sup> Anaya, n 63, 153-156.

<sup>86</sup> Miller, n 73, 369.

<sup>87</sup> Goldsworthy explains that the transfer of decision-making authority to another body would be a breach of parliamentary sovereignty: “by forbidding Parliament to enact law without the approval of an external body—namely, the electorate—it plainly limits its substantive authority”: Jeffrey Goldsworthy, “Abdicating Parliamentary Sovereignty” (2006) 17 *Kings College Law Journal* 255, 276.

feasible options<sup>88</sup> to give Indigenous people an authoritative, but not necessarily binding, say in democratic procedures affecting Indigenous rights and interests.<sup>89</sup>

### **International examples of Indigenous consultation mechanisms**

Nations around the world find unique ways to articulate Indigenous self-determination principles within institutional arrangements and ensure that Indigenous minority voices are heard in democratic processes.<sup>90</sup> This is integral to the task of Indigenous constitutional recognition.<sup>91</sup>

In the United States there is the National Congress of the American Indian<sup>92</sup> and the State of Maine has reserved seats for Aboriginal people.<sup>93</sup> In Sweden, Norway and Finland there are Sami Parliaments that act as advisory bodies to the national Parliaments.<sup>94</sup> In Canada there is the Assembly of First Nations, which acts as a national Aboriginal advocacy organisation.<sup>95</sup>

#### ***The duty to consult in Canada***

The protection of Aboriginal rights in the Canadian Constitution led courts to develop a Crown duty to consult with Aboriginal people.<sup>96</sup> This has arisen through judicial interpretation of s 35 of the *Constitution Act 1982* (Can), which protects existing Aboriginal rights and titles. The courts have said that the duty to consult with Aboriginal peoples arises where there is proven Aboriginal title,<sup>97</sup> or where the Crown contemplates that an Aboriginal right may be adversely affected by certain conduct, even if the right has been claimed but not yet proven.<sup>98</sup> The finding that a duty to consult exists in certain circumstances by implication under the Constitution has resulted in some confusion and uncertainty as to the scope and content of the duty to consult.<sup>99</sup>

It is interesting that the Canadian courts had to imply the duty to consult from the Aboriginal rights recognised in the 1982 Charter. In 1994, Canadian Aboriginal advocate James Henderson observed that s 35 helped “define a new constitutional context of self-determination for Aboriginal peoples” by recognising property rights and treaty rights as important sources of constitutional law.<sup>100</sup> But:

The affirmation of these constitutional acts did not resolve the existing structural, political problems in Canadian federalism or Canadian democracy... no changes in the political order have occurred ... the conventional political order continues to deny Aboriginal peoples full participation in Canada’s political

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<sup>88</sup> See also Miller, n 73, 371: “The discursive commitment provided by ‘consultation and cooperation’ is weaker than ‘free, prior and informed consent,’ particularly because it lacks a consensual element ... This may be justified to some extent in order to promote efficiency with respect to practical decision-making.”

<sup>89</sup> See also Chesterman, n 22, 424.

<sup>90</sup> Pearson, n 1, 41-43.

<sup>91</sup> ATSC, n 8, [4.22]-[4.24].

<sup>92</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, “Building a Sustainable National Indigenous Representative Body” (Issues Paper, 2008).

<sup>93</sup> Peter Niemczak, “Aboriginal Political Representation: A Review of Several Jurisdictions” (Background Paper, Canadian Library of Parliament Research Branch, 2008) 19-20; Lloyd, n 24.

<sup>94</sup> Niemczak, n 93, 7; Lloyd, n 24.

<sup>95</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, n 92.

<sup>96</sup> E Ria Tzimas, “Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation” (1998) Sup Ct L Rev 461; Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39 UBC Law Rev 139.

<sup>97</sup> *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511.

<sup>98</sup> Zena Charowsky, “The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals” (2011) 74 SLR 213, 214.

<sup>99</sup> Tzimas, n 96, 463-464; Charowsky, n 98, 214. For clarity, the government has issued guidelines regarding how to fulfill the duty to consult and a Consultation and Accommodation Unit was established to facilitate practical achievement of the duty: see Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfil the Duty to Consult* (March 2011).

<sup>100</sup> James Henderson, “Empowering Treaty Federalism” (1994) 58 SLR 241, 244.

and economic federalism. Aboriginal peoples have no voice to assert these rights in Parliament or in the legislative assemblies. They are still organized lobbyists or plaintiffs outside the formal structure of government.<sup>101</sup>

Henderson seems to suggest that the recognition of Aboriginal rights in the Canadian Constitution, while a positive step forward, did not formally include Aboriginal peoples as active participants in the “political order”, nor enable the Aboriginal voice in Parliament. The comments help support Lino’s insight that entrenchment of a high-level right to self-determination in a bill of rights might not give Indigenous people the political agency and practical involvement they seek.<sup>102</sup> Henderson effectively points out the remaining institutional and democratic deficiency, which Canadian courts arguably have tried to later remedy.

### ***Institutional recognition New Zealand***

New Zealand, by contrast, has no entrenched Constitution and Maori rights under the *Treaty of Waitangi* are not legally binding unless explicitly incorporated into legislation.<sup>103</sup> New Zealand has a particularly practical and process-driven approach to Maori recognition, which ensures the Maori voice is heard through specific national institutional arrangements. There are reserved Maori parliamentary seats,<sup>104</sup> and the New Zealand Maori Council is a national representative body that provides a national Maori voice in Maori policy affairs.<sup>105</sup> Maori people are also heard through the negotiation and settlement mechanisms of the Waitangi Tribunal.<sup>106</sup> Additionally, Maori is declared an official language in legislation.<sup>107</sup> The Maori Language Commission and related institutional arrangements promote New Zealand as a bicultural nation.<sup>108</sup>

The New Zealand model demonstrates how mechanisms to give Indigenous people a better voice in national democratic processes can work in complementary conjunction with other recognition measures. It may also be helpful to think of Indigenous recognition in Australia as a package of constitutional, legislative and other reforms that should form a framework for effective Indigenous participation in the political and cultural life of the nation.

### ***The (lack of a) duty to consult in Australia***

While Australian courts have acknowledged the practical importance of consultation in the implementation of special measures, recent case law demonstrates that there exists no clear-cut legal duty to consult in Australia.

Australia has incorporated the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) into domestic law through the *Racial Discrimination Act 1975* (Cth) (RDA).<sup>109</sup> Section 8 of the RDA makes an exception to the non-discrimination rule for “special

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<sup>101</sup> Henderson, n 100, 244.

<sup>102</sup> Lino, n 75, 867-868.

<sup>103</sup> Noel Cox, “The Treaty of Waitangi and the Relationship between the Crown and the Maori in New Zealand” (2003) 28 *Brook J Int’l L* 123, 132.

<sup>104</sup> See Catherine J Iorns Magallanes, “Indigenous Political Representation: Identified Parliamentary Seats as a form of Indigenous Self-determination” in Barbara A Hocking (ed), *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005) 106-117; Lloyd, n 24; Sarah McClelland, “Maori Electoral Representation: Challenge to Orthodoxy” [1997] 17(3) *NZULR* 272.

<sup>105</sup> New Zealand Maori Council, *Our History* <<http://www.maoricouncil.com/2013/02/02/our-history>>.

<sup>106</sup> Carwyn Jones, “Strengthening Partnership between States and Indigenous Peoples: Treaties, Agreements and Other Constructive Arrangements” (Paper presented at the Office of the United Nations High Commissioner for Human Rights, Geneva, 16-17 July 2012).

<sup>107</sup> *Maori Language Act 1987* (NZ).

<sup>108</sup> New Zealand Human Rights Commission, *Human Rights in New Zealand* (2010) 47-48; Jones, n 106.

<sup>109</sup> The preamble to the *Racial Discrimination Act 1975* (Cth) states: “WHEREAS a Convention entitled the ‘International Convention on the Elimination of All Forms of Racial Discrimination’ (being the Convention a copy of the English text of which is set out in the Schedule) was opened for signature on 21 December 1965.” The Convention is explicitly referred to in s 8.

measures” as defined by CERD.<sup>110</sup> The CERD Committee has advised that special measures should be implemented with the informed consent of the beneficiaries.<sup>111</sup> However, the RDA does not explicitly incorporate any duty to consult into its legal definition of “special measures” under s 8. Likewise, Australia has acceded to DRIP, but its principles, including those requiring consultation with Indigenous peoples, are not incorporated into Australian law. Therefore, the High Court in *Maloney* said that:

government consultation is not a legal requirement for a measure to be characterised as a “special measure” under s 8(1) of the RDA. There is no textual or other basis in the RDA or the convention for imposing such a requirement.<sup>112</sup>

Australia’s law does not require proper consultation with Indigenous people where special measures are enacted for their supposed benefit, or where laws and measures affect their rights and interests. This is a clear deficiency in our current system.

It would be unwise to rely on the judiciary to imply a duty to consult from a new constitutional right, as happened in Canada. First, Australian case law demonstrates that courts are unlikely to read in a duty to consult from racial non-discrimination principles unless the duty is explicitly stated in law. Secondly, the Canadian example demonstrates how confusion can arise if procedural obligations are created by the judiciary.<sup>113</sup> To avoid this uncertainty, the nature and scope of the duty to consult needs to be clearly stated in Australian law.

### **The argument for a constitutional duty to consult with Indigenous peoples**

If it is agreed that Parliament should consult with Indigenous people when making laws for Indigenous affairs, then the Constitution is the right place for a consultation process to be clearly articulated. The Constitution clarifies and defines important national power relationships. As ATSIAC argued: “The Constitution sets the foundation for the system of Government of the country and the relationships within.”<sup>114</sup> It sets out the rules of government and gives Parliament its power. But it also creates rules to limit Parliament’s powers. The Constitution is full of procedural constraints on the way Parliament’s power is exercised. This is also reflected in the “fundamentally concurrent” nature of the Australian federation,<sup>115</sup> which ensures national power-sharing.<sup>116</sup>

Currently, the Constitution allows and promotes racial discrimination against Indigenous people. While the RDA offers important protection, it does not bind the Commonwealth. Being an ordinary Commonwealth Act, the RDA binds the States, corporations and individuals, while the Common-

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<sup>110</sup> Section 8(1) provides: “This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention.” Article 1(4) of the Convention states: “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.”

<sup>111</sup> Committee on the Elimination of Racial Discrimination, n 61, [4(d)]; Australian Human Rights and Equal Opportunities Commission, n 61, Recommendations 7, 14; Morris, n 61, 10-11.

<sup>112</sup> *Maloney v The Queen* (2013) 252 CLR 168, [334].

<sup>113</sup> In *Tsilhqot’in Nation v British Columbia* (2014) SCC 4, the Canadian Supreme Court confirmed and to some extent clarified the content of the Crown’s duty of consultation and accommodation, without removing all the associated uncertainty.

<sup>114</sup> ATSIAC, n 8, [4.18].

<sup>115</sup> Paul Kildea and Andrew Lynch, “Entrenching Co-operative Federalism: Is it Time to Formalise COAG’s Place in the Australian Federation?” (2011) 39 FL Rev 103, 105; see also Brian Galligan, *A Federal Republic: Australia’s Constitutional System of Government* (CUP, 1995) 199-203.

<sup>116</sup> Owen Dixon, “Two Constitutions Compared” in Severin Woinarski, *Jesting Pilate and Other Papers and Addresses* (Law Book Co, 1965) 102.



wealth is only bound by the Constitution,<sup>117</sup> which allows and promotes racial discrimination through ss 25 and 51(xxvi). As such, the RDA can be amended, repealed or suspended at any time.<sup>118</sup> The Commonwealth is the only entity in Australia's federal structure that is legally entitled to racially discriminate, and has an explicit power to do so. This anomaly should be rectified. The relationship between Indigenous peoples and the state should be addressed and articulated in the Constitution to ensure the relationship is just and fair, rather than characterised by discrimination and exclusion as was the case in the past.

There are two ways this can happen. One option is to create justiciable, legal limitations on Parliament's power through a constitutional racial non-discrimination clause, or the weaker option of a judicially adjudicated qualified Indigenous power. Another option is to address the problem procedurally and politically: by ensuring Indigenous people participate and have a fair say in parliamentary processes affecting their interests, thus helping to prevent the enactment of laws that discriminate against Indigenous people. Whatever the appropriate solution, the answer must lie in constitutional reform. Whether legal and justiciable or political and procedural limitations on Commonwealth power are preferred, a constitutional solution is required to what is, at its heart, a constitutional problem.

The proposed amendment for an Indigenous body in the Constitution could potentially provide a better outcome, practically speaking, than inserting a racial non-discrimination clause in the Constitution. The Indigenous body proposal seeks to provide a *proactive and pre-emptive* process for Indigenous engagement with Parliament. It would involve Indigenous people as democratic participants, rather than as litigants. Under a racial non-discrimination clause, Indigenous litigants would have to reactively battle in the courts to try to get legislation struck down, after it has already been enacted – and there would be no guarantees that they would win. In contrast, the constitutional body proposal would ensure Indigenous involvement right at the start, when the Indigenous affairs laws are being debated in Parliament. Understanding this key difference, the APG recently expressed its support for “a parliamentary body elected by Aboriginal people” because it would provide a “sword”, while a racial non-discrimination clause would provide a “shield”. They argued: “We need to be proactive, not reactive and defensive.”<sup>119</sup>

While the APG propose that the body should have veto powers, Pearson's proposal is for the body's advice to be non-binding in order to be compatible with parliamentary supremacy. Therefore, under Pearson's proposal, there would be no guarantee that Parliament will follow the body's advice, just as there are no guarantees the High Court will agree with Indigenous litigants when interpreting a racial non-discrimination clause. But the procedural and political solution would provide rules and processes for formal engagement, negotiation and dialogue between Indigenous people and the Parliament, thus ensuring that things are done in a better way. Even where advice is ignored, the body would still be there, part of the constitutional framework of the nation, arguing its case for reform. Indigenous affairs laws and policies would benefit from engagement with the Indigenous body.

## PRACTICAL LEGAL AND POLITICAL CONSIDERATIONS

### Non-justiciability

In order to fully take on board judicial activism and legal uncertainty concerns, the constitutional procedure for parliamentary engagement with the Indigenous body could be drafted in a way that is non-justiciable, avoiding the uncertainty of judicial interpretation. Non-justiciability is a way of

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<sup>117</sup> Julie Taylor, “Human Rights Protection in Australia and Parliamentary Supremacy” (2004) 32 FL Rev 61; Jeffrey Goldsworthy, “Manner and Form in the Australian States” (1987) 16 MULR 403; Gerard Carney, “An Overview of Manner and Form in Australia” (1989) 5 QUTLJ 69.

<sup>118</sup> For example, the *Northern Territory Emergency Response Act 2007* (Cth) s 132. See also the proposed amendments to the s 18C protections against racial vilification: Australian Human Rights Commission, “Two Freedoms: Freedom of Expression and Freedom from Racial Vilification” (Issues Paper, November 2013).

<sup>119</sup> Aboriginal Provisional Government, n 58.

recognising “the primacy of the political process, and the subsidiary role of the judiciary”.<sup>120</sup> However, as CYI advocates, the constitutional amendment “must not be mealy-mouthed and meaningless. Ugly, explicit ‘non-justiciable’ and ‘no legal effect’ clauses should be avoided”,<sup>121</sup> as such clauses would not be supported by Indigenous people.<sup>122</sup> Fortuitously, there are non-justiciable constitutional provisions which can be emulated. These clauses do not include explicit “non-justiciable” or “no legal effect” specifications, but are nonetheless treated by the High Court as non-justiciable.<sup>123</sup>

Professor Geoffrey Lindell defines justiciability as describing “whether, as a matter of strict law, a court has authority to determine an issue”.<sup>124</sup> Non-justiciability may arise when an issue presents a “political question”,<sup>125</sup> best dealt with by the Parliament or another political department.<sup>126</sup> But not every political issue will be non-justiciable.<sup>127</sup> The real question is whether there are compelling reasons for treating a particular constitutional issue as non-justiciable.<sup>128</sup>

It is sometimes said that non-justiciability is “textually demonstrable”.<sup>129</sup> The United States case of *Baker v Carr* noted that explicit referral to a non-judicial political department indicates that it may be inappropriate and perhaps a breach of the doctrine of the separation of powers for the judiciary to intervene.<sup>130</sup> Secondly, a “lack of judicially manageable standards” can indicate non-justiciability.<sup>131</sup> And thirdly, non-justiciability may arise where judicial adjudication of a matter would result in a lack of appropriate respect for another branch of government,<sup>132</sup> again under the separation of powers doctrine.<sup>133</sup>

There are examples of non-justiciable clauses in the Australian Constitution. Sections 53, 54 and 56 provide procedural rules for Parliament with respect to the passage of “proposed laws” for appropriation and tax. These clauses set out the “constitutional procedure” that Parliament must follow in raising and spending public money.<sup>134</sup> Both the drafters of the Constitution<sup>135</sup> and the High Court

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<sup>120</sup> Henry Burmester, “Locus Standi in Constitutional Litigation” in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 178.

<sup>121</sup> Cape York Institute, Supplementary Submission No 38.2, n 1, 24.

<sup>122</sup> Expert Panel, n 12, 113-115.

<sup>123</sup> Thanks to Professor Anne Twomey for advice on the characteristics of non-justiciable constitutional clauses, which have been developed in this article.

<sup>124</sup> Geoffrey Lindell, “Judicial Review and the Dismissal of an Elected Government in 1975: Then and Now?” (4th George Winterton Memorial Lecture, Supreme Court of New South Wales, Sydney, 14 February 2013) 5; see also Geoffrey Lindell, “Justiciability” in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001) 391; Cheryl Saunders, “The Concept of Non-justiciability in Australian Constitutional Law” in Denis Galligan (ed), *Essays in Legal Theory: A Collaborative Work* (MUP, 1984) 29.

<sup>125</sup> Jesse H Choper, “The Political Question Doctrine: Suggested Criteria” (2005) 54 Duke LJ 1457, 1461.

<sup>126</sup> See Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) Ch 8, “Non-justiciability or Political Questions”, 177-189.

<sup>127</sup> As Sir Owen Dixon described, “the Constitution is a political instrument” and “nearly every consideration arising from the Constitution can be so described”: *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 82.

<sup>128</sup> Geoffrey Lindell, “The Justiciability of Political Questions: Recent Developments” in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 180.

<sup>129</sup> *Baker v Carr* 369 US 186, 217 (1962).

<sup>130</sup> *Baker v Carr* 369 US 186, 217 (1962); Choper, n 125, 1462-1463; Jared P Cole, *The Political Question Doctrine: Justiciability and the Separation of Powers* (Congressional Research Service, 2014).

<sup>131</sup> James A Thompson, “The Judicial Branch: Non-justiciability and the Australian Constitution” in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 58.

<sup>132</sup> Thompson, n 131, 58.

<sup>133</sup> Lindell, n 128, 193-194.

<sup>134</sup> See Glenn Worthington, “How Far Do Sections 53 and 56 of the Australian Constitution Secure a Financial Initiative of the Executive?” (Parliamentary Studies Paper No 12, Australian National University, nd).

have treated these sections as non-justiciable<sup>136</sup> because the provisions refer to “proposed laws”, indicating that they are internal instructions to govern Parliament’s law-making.<sup>137</sup>

As Glenn Worthington states, the judiciary’s role is to deal “with what is law rather than proposals to make law”.<sup>138</sup> Accordingly, in Lindell’s view, the court will “not normally interfere with the internal proceedings of the Parliament in order to prevent the enactment of an invalid law”. This provides “a reasonable compromise between the privileges of the House of the Parliament and the court’s role in exercising judicial review”.<sup>139</sup>

The High Court has also denied its authority to determine the validity of laws enacted pursuant to the joint sitting procedure set out by s 57, to resolve disagreement between the Houses of Parliament, at least “until the processes of enacting those laws are completed”.<sup>140</sup> This also demonstrates the deference given by courts to the fact that, in the words of McTiernan J, “Parliament is master in its own household”.<sup>141</sup> Section 55, by contrast, talks about “laws” rather than “proposed laws” and is considered justiciable because it requires a legal consequence: that “the law shall be of no effect” if s 55 is breached.<sup>142</sup> It articulates a role for the judiciary in striking down a law that breaches the requirements of s 55.

The general rule that the High Court will not interfere with procedural issues regarding the “intramural” workings of Parliament<sup>143</sup> is also reflected in the doctrine of parliamentary privilege, which operates under s 49 to protect from litigation speech that is delivered in parliamentary debates or in the proceedings of Parliament.<sup>144</sup> Courts must determine whether the privilege applies, but once that determination is made, the court loses its jurisdiction, and how the privilege operates becomes a matter for the Parliament to resolve.<sup>145</sup>

<sup>135</sup> *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, 473 (Edmund Barton).

<sup>136</sup> The non-justiciable character of s 53 was discussed in *Osborne v Commonwealth* (1911) 12 CLR 321, 336, 339; *Western Australia v Commonwealth* (1995) 183 CLR 373, 482. Lindell, n 128, 180-181; Gabrielle Appleby and Adam Webster, “Parliament’s Role in Constitutional Interpretation” (2013) 37 MULR 255, 272; Thompson, n 131, 57.

<sup>137</sup> With respect to s 53, Sir Samuel Griffith explained, “[s]ecs 53 and 54 deal with ‘proposed laws’ – that is, Bills or projects of law still under consideration and not assented to – and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law”: *Osborne v Commonwealth* (1911) 12 CLR 321, 336, 339; see also *Western Australia v Commonwealth* (1995) 183 CLR 373, 482; Worthington, n 134, 4.

<sup>138</sup> Worthington, n 134, 4.

<sup>139</sup> Lindell, n 128, 186.

<sup>140</sup> Lindell, n 128, 185.

<sup>141</sup> However, Barwick CJ discussing s 57 stated, “[t]he Court, in my opinion, not only has the power but, when approached by a litigant with a proper interest so to do, has the duty to examine whether or not the law-making process prescribed by the Constitution has been followed”: *Victoria v Commonwealth* (1975) 134 CLR 81, 138, 118. See also Kirsty Magarey, “Alcopops Makes the House See Double: ‘The Proposed Law’ in Section 57 of the Constitution” (Research Paper No 32, Parliamentary Library, May 2009).

<sup>142</sup> *Osborne v Commonwealth* (1911) 12 CLR 321.

<sup>143</sup> Lindell, n 128, 180-181; Appleby and Webster, n 136, 272.

<sup>144</sup> Section 49 was taken as arising from Art 9 of the *Bill of Rights 1969* (UK), which established parliamentary privilege, and so Art 9 is taken to apply to the Houses of the Commonwealth Parliament and their members: see Matthew Groves and Enid Campbell, “Parliamentary Privilege and the Courts: Questions of Justiciability” (2007) 7 OULJ 175; Lindell, n 128, 184.

<sup>145</sup> *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 171. Note however, Kirby J’s comments that “while it is true that Australian courts will ordinarily permit parliamentary procedures to be completed before they intervene, the power of intervention by the courts cannot be seriously doubted. It is the nature of a federal polity that it constantly renders the organs of government, federal and State, accountable to a constitutional standard”: *Egan v Willis* (1998) 195 CLR 424, [133], pt 4. See also McHugh J, “[n]o doubt there are cases – those arising under the federal Constitution for example – where a court is compelled to make a formal declaration concerning the internal affairs of a legislative chamber. But, as a general rule, courts should eschew making such declarations even when the validity is incidental to the determination of the plaintiff’s legal rights”: *Egan v Willis* at [111]. Both quotes appear in Christos Mantziaris, “Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege” (Research Paper No 12, Parliamentary Library, December 1999) 20-23, 25.

Section 47, which gives the Houses of Parliament jurisdiction to resolve whether a person is qualified to sit in Parliament and to resolve disputes as to their election, similarly sets out internal instructions for Parliament. Both ss 47 and 49 have been considered non-justiciable because their “determination is expressly vested in legislative bodies, instead of courts of law”.<sup>146</sup>

Section 72, which gives the Parliament the power to determine whether a judge has demonstrated “incapacity” or “proved misbehavior” to a level that justifies the judge being removed, is also usually considered non-justiciable.<sup>147</sup> Similarly, the dismissal of Ministers has traditionally been considered a non-justiciable action which “could not be reviewed by any authority but the Sovereign”.<sup>148</sup> However, Lindell argues that the dismissal of former Prime Minister Gough Whitlam could have been justiciable because the High Court could have been called upon, in its original jurisdiction,<sup>149</sup> to resolve the interpretation of s 64.<sup>150</sup> According to Lindell, the justiciability question turns on whether s 64 imposes any “legal constraints upon the exercise of the legal power to dismiss Ministers”, requiring judicial resolution.<sup>151</sup>

In ascertaining justiciability, legal limitations on parliamentary power that require judicial resolution are to be contrasted with political and procedural limitations on the way parliamentary power is internally exercised in the process of law-making. Internal parliamentary processes in the making of laws are usually non-justiciable.

### ***The practical effect of non-justiciable constitutional clauses***

Non-justiciability affects who is charged with interpretation of the constitutional clause. Where an issue is non-justiciable, the judiciary is “constitutionally precluded from an interpretative or adjudicatory role”.<sup>152</sup>

The High Court, however, is the ultimate authority on what parts of the Constitution are justiciable and non-justiciable.<sup>153</sup> So while the judiciary is not the authority to decide non-justiciable constitutional issues, the judiciary decides whether a constitutional matter is justiciable or not in the first place.<sup>154</sup> Importantly, a constitutional provision being non-justiciable does not mean that Parliament just ignores it:

“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 framers 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.”<sup>155</sup>

In interpreting non-justiciable constitutional clauses, there is an expectation that the Parliament decide upon a “sensible and practical view” of the procedural provisions, which is in line with the “the broad policy of the section” and consistent with its drafting history, parliamentary precedent, and the actual words,<sup>156</sup> plus other considerations in “the general spirit of the provision”.<sup>157</sup> Gabrielle Appleby and Adam Webster note that non-justiciable constitutional clauses such as s 53 are sometimes

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<sup>146</sup> Lindell, n 128, 184.

<sup>147</sup> Appleby and Webster, n 136, 269; Lindell, n 128, 180-181; Thompson, n 131, 58.

<sup>148</sup> *R v Governor (SA)* (1907) 4 CLR 1497, 1511; Lindell, n 124, 5.

<sup>149</sup> Australian Constitution, s 76.

<sup>150</sup> Lindell, n 124, 6. See also George Winterton, “The Evolving Role of the Governor-General”, *Quadrant*, March 2004, 42. However Thompson argues that s 64 could be an example of a constitutional issue which, for “prudential reasons”, to show appropriate respect to “a coordinate branch of government”, could be considered non-justiciable: Thompson, n 131, 58.

<sup>151</sup> Lindell, n 124, 9.

<sup>152</sup> Thompson, n 131, 57.

<sup>153</sup> Choper, n 125, 1462.

<sup>154</sup> Louis M Seidman, “The Secret Life of the Political Question Doctrine” (2004)37 *J Marshall L Rev* 441, 442.

<sup>155</sup> Appleby and Webster, n 136, 269-270.

<sup>156</sup> This was the advice given by the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Third Paragraph of Section 53 of the Constitution* (1995) 56-58, regarding s 53 of the Constitution: Appleby and Webster, n 136, 271-272.

manifestations of “political compacts”.<sup>158</sup> Section 53 was born out of negotiation and agreement between the Houses of the British Parliament. Therefore, they argue that the terms of s 53 should be interpreted such that it “continues to reflect the intention of this initial compact, and the practice and intention of the Houses of Parliament as to their interrelationship”.<sup>159</sup>

It is useful in the context of Indigenous reconciliation to think of a possible constitutional procedure for Parliament to consult with an Indigenous body as something that – providing the formal processes leading to a referendum are effective – would arise out of negotiation, compromise and constructive agreement between Indigenous people and government. The constitutional procedure under discussion would also be a political compact or compromise in a conceptual and bipartisan sense: between judicial activism and legal uncertainty objections previously discussed and Indigenous concerns that “*things are done in a better way*”.<sup>160</sup> If the parties can agree upon a constitutional procedure for adapting the practical mechanics of Parliament to better hear Indigenous views in law-making for Indigenous affairs – then the constitutional procedure should be interpreted by Parliament in light of that agreement.

As with all manifestations of an agreement, there may be times when parties’ interpretations of the terms of the agreement, as articulated in the constitutional procedure, will differ.<sup>161</sup> Just as there has been disagreement about the scope of ss 53 and 56,<sup>162</sup> there may be disagreement as to the scope of the Indigenous consultation procedure and when it is enlivened. With respect to a constitutional procedure authorising the Indigenous body to provide advice to Parliament on matters relating to Indigenous peoples, for example, “matters relating to Indigenous peoples” could be given a wide or a narrow meaning.

Given that the procedure should be carefully drafted so that it is not a veto, the advice would not be binding, and the procedure would not compromise parliamentary supremacy, there should be no reason to limit the scope of the matters that the body can advise on if it wishes to do so. The constitutional procedure should be clearly drafted so that it establishes a wide interpretation of the matters for which the body can provide advice. This can also be made clear in legislation setting up the body. If drafted appropriately, the proposed constitutional procedure should be detailed and precise to minimise interpretational ambiguity and procedural disputes. Nonetheless, where disputes do arise, Parliament – rather than the judiciary – would have the final say in their resolution.

### **Possible draft of a new Chapter 1A**

Twomey has put forward possible constitutional drafting that could give effect to the proposal for a constitutionally mandated Indigenous body to advise Parliament on laws and policies for Indigenous affairs, in a way that would be non-justiciable.<sup>163</sup> Twomey’s proposed new Ch 1A of the Constitution would read:

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].

<sup>157</sup> Appleby and Webster, n 136, 272.

<sup>158</sup> Appleby and Webster, n 136, 272.

<sup>159</sup> Appleby and Webster, n 136, 272.

<sup>160</sup> Pearson, n 1, 65.

<sup>161</sup> Worthington, n 134.

<sup>162</sup> Because Parliament itself was divided over the interpretation and application of s 53(3), the matter was referred to the Standing Committee on Legal and Constitutional Affairs: see House of Representatives Standing Committee on Legal and Constitutional Affairs, n 156, Recommendation 12; Worthington, n 134.

<sup>163</sup> Anne Twomey, “Putting Words to the Tune of Constitutional Recognition”, *The Conversation*, 20 May 2015.



(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.

Twomey explains:

Sub-section 60A(1) requires the establishment of a body and gives it a function. It does not itself establish the body, as legislation will be needed to set up the mechanism for how members of the body are chosen. That mechanism will then need to operate (eg by holding an election for members of the body) before it can exist ...

Sub-section 60A(1) gives this body a broad function – the “function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples”. It is deliberately drafted in broader terms than sub-section 60A(4). It is intended to permit the Indigenous body not only to comment and provide advice in relation to bills before the parliament, but also to initiate advice on matters that it considers that the parliament or the executive government should address.<sup>164</sup>

The proposed draft constitutionally empowers the Indigenous body to advise both the Parliament and the Executive. Professor George Williams incorrectly interprets Twomey's draft to mean that the “body will advise on the making of laws not when they are drafted by government, but when they are debated in parliament. This is too late in the process”.<sup>165</sup> Williams' assertion is inaccurate because the proposed drafting specifically provides the Indigenous body with a constitutional mandate to advise the Executive, which would empower it to advise on Indigenous policies in the course of development, as well as on proposed laws before the Parliament. While s 60A(4) spells out only Parliament's constitutional obligation to consider the body's advice with respect to proposed laws in the Parliament, s 60A(1) would give the body constitutional authority to advise the Executive, as well as the Parliament. Legislation or internal parliamentary practice could set in place further processes for the body to engage with government on Indigenous policy development, and these processes would in an important sense be underpinned by the constitutional right of the body to provide its views.

The tabling of the advice is an important element in Twomey's draft procedure, because it provides the formal mechanism for engagement between the Indigenous body and the Parliament. As Twomey explains, ensuring the advice is tabled:

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 should give consideration and 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.<sup>166</sup>

Once tabled, the Houses of Parliament would have a non-justiciable duty, under s 60A(4), to consider the advice in the debating of proposed laws with respect to Aboriginal and Torres Strait Islander peoples. Twomey advises that “there would be a political and moral obligation upon members of parliament to fulfil their constitutional role in giving consideration to such advice, but it would be for the houses, not the courts, to ensure that this obligation is met”. Importantly, the procedure is designed so that it cannot delay Parliament if no advice is received from the body: “Hence, the responsibility is on the Indigenous body to provide advice if it wants it considered. Failure to provide advice cannot hold up the process.”<sup>167</sup>

Twomey's proposed s 60A(2) delegates power to Parliament to legislate for the composition and design of the Indigenous body, rather than articulating such details in the Constitution:

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<sup>164</sup> Twomey, n 163.

<sup>165</sup> George Williams, “Pearson Proposal at Odds with Reality”, *The Sydney Morning Herald*, 14 June 2015.

<sup>166</sup> Twomey, n 163.

<sup>167</sup> Twomey, n 163.

It is not appropriate to set out in the Constitution the detail of how such a body is to be chosen. Just as the Constitution leaves it substantially to legislation to determine how members of parliament are elected and the powers and procedures of the parliament, so too this amendment would leave such matters to the parliament to determine, in collaboration with Aboriginal and Torres Strait Islander people.<sup>168</sup>

The design and method of election of the body are matters Indigenous Australians should decide if the proposal is taken further. Further details of the body can then be articulated in legislation.

At the constitutional level, a procedural duty for Parliament to consult with and consider the advice of an Indigenous body before enacting laws with respect to Indigenous matters would carry constitutional authority in the same pervasive ways that other noted non-justiciable sections carry authority, despite non-justiciability. However, there are practical ways of enhancing the effective operation of the procedure and the authority of the body.

For example, the enabling legislation, subject to political will, could specify that the body should be given other functions in addition to its constitutional role. It should not just be reactive to Parliament's proposals; it could be proactive with its own proposals for reform, for parliamentary consideration. Similarly, for the Indigenous body's advice to carry political force, the legislation could specify that body representatives be authorised to address the Parliament and answer questions from Parliament with respect to advice, and to observe the proceedings in Parliament.<sup>169</sup> John Chesterman further argues that where the Parliament does not follow this kind of body's advice on proposed laws, the responsible Minister should have to state why the Parliament is proceeding contrary to the body's recommendations.<sup>170</sup> The approval or disapproval of the body could even be stated in the preamble to relevant Indigenous Acts. These kinds of rules could increase political pressure on Parliament to give the body's advice appropriate weight.

It should also be remembered that this new procedure will need to be approved by the Australian people at a referendum to be inserted into the Constitution. This would create an onerous political imperative for Parliament to follow the constitutional procedure because it has been inserted and endorsed by the people. Further, the procedure would be articulated in the Constitution, the nation's highest law. Even though the body's advice would not be binding, the proposed constitutional procedure would be a significant improvement on the current situation, which provides no procedures or rules whatsoever for Parliament to consult with Indigenous people before passing laws which affect them. As Dr Fergal Davis argues:

A consultative body of Indigenous Australians would offer non-binding advice. At the same time it could wield political authority. The people, through a referendum, would have established the consultative body. It would derive some authority from that fact alone. It could use its position as an institution of the constitution to demand an explanation whenever government seeks to ignore one of its reports ...

A micro-minority is unlikely to have a significant voice in a majoritarian parliament. An innovative solution to that problem is required. This proposal has the twin benefits of not disturbing the central tenet of parliamentary supremacy and simultaneously offering the prospect of meaningful reform.<sup>171</sup>

Indeed, parliamentary supremacy would not be disturbed by this proposal, which means that Parliament would remain the dominant partner in the political relationship. The effectiveness of the Indigenous body in practice will therefore depend greatly on the design of the body and the political will that allows it to function effectively. Two historical bodies are relevant to the discussion of an Indigenous body established in the Constitution:

1. The Inter-State Commission was a body that was mandated by the Constitution, but failed to operate for most of Australia's history.

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<sup>168</sup> Twomey, n 163.

<sup>169</sup> Cape York Institute, Supplementary Submission No 38.2, n 1, 25.

<sup>170</sup> Chesterman, n 22, 424.

<sup>171</sup> Fergal Davis, "Noel Pearson's Proposal Could Deliver Real Authority for Indigenous Australia", *The Guardian*, 14 April 2015.

2. ATASIC was a legislative Indigenous representative body which was eventually abolished.

It is important to draw lessons from the intent, design and eventual demise of these two bodies.

### Learning from the Inter-State Commission

Section 101 of the Constitution requires the existence of an Inter-State Commission with adjudicatory powers,<sup>172</sup> but despite the constitutional imperative, no Inter-State Commission has existed for most of Australia's history.<sup>173</sup> Though the Constitution came into force in 1901, the Commission was not successfully legislated until 1912 and did not start operating until 1913.<sup>174</sup>

The Commission was intended as a piece of “constitutional and economic machinery”<sup>175</sup> to regulate inter-state relations particularly in relation to railways and rivers,<sup>176</sup> prevent inter-state discrimination<sup>177</sup> and encourage federal free trade. The Commission was to be a constitutional watchdog<sup>178</sup> of s 92,<sup>179</sup> an “independent critic,”<sup>180</sup> or “policing body,” to help manage interstate rivalry as well as promote economic prosperity.<sup>181</sup> It was an intended constitutional check on Commonwealth and State power;<sup>182</sup> designed as a non-judicial and non-parliamentary compromise solution to trade regulation.<sup>183</sup> Some considered it the intended “fourth arm” (a combined administrative and adjudicatory arm)<sup>184</sup> of Australian government.<sup>185</sup>

The Commission's utility quickly waned. The 1915 *Wheat Case*,<sup>186</sup> concerning whether the Commission could exercise the judicial power, was a key reason for its failure.<sup>187</sup> The establishing Act allocated the Commission many judicial-sounding powers.<sup>188</sup> But the High Court decided that the powers conferred on the Commission were not of a judicial nature.<sup>189</sup> The Commission became

<sup>172</sup> Sections 73, 101, 102 and 103 of the Constitution also deal with the Interstate Commission.

<sup>173</sup> Bell says the Commission's non-existence is “a somewhat remarkable fact” given “the mandatory language of s 101”: Andrew Bell, “The Missing Constitutional Cog: The Omission of the Inter-State Commission” [2009-2010] *Bar News* 59.

<sup>174</sup> Ian Radbone, “The Inter-State Commission” (1982) 41(4) *AJPA* 323, 324; Michael Coper, “The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission” (1989) 63 *ALJ* 731, 733.

<sup>175</sup> Bell, n 173, 59.

<sup>176</sup> La Nauze, n 5, 48.

<sup>177</sup> See Australian Constitution, s 102.

<sup>178</sup> Bell, n 173, 70.

<sup>179</sup> Section 92 provides that “intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free”.

<sup>180</sup> Quoting Mr Hughes, introducing the Bill in 1909: La Nauze, n 5, 50.

<sup>181</sup> Coper, n 174, 746; Bell, n 173, 70.

<sup>182</sup> For example, under s 102, the Commonwealth had the power to forbid discriminatory State railway laws, but only if the Commission found that such laws were “undue and unreasonable”.

<sup>183</sup> Coper, n 174, 733.

<sup>184</sup> Damien J Cremean, “The Inter-State Commission: Rethinking the Wheat Case” (2009) 83 *ALJ* 765, 765.

<sup>185</sup> Coper, n 174, 731-733.

<sup>186</sup> *New South Wales v Commonwealth* (1915) 20 *CLR* 54.

<sup>187</sup> Bell, n 173, 68; Coper, n 174, 734.

<sup>188</sup> For example, “it could hear and determine complaints, award damages, inflict heavy fines for disobedience of its order and commit to prison for failure to pay. It could compel witnesses to attend and examine them on oath”: La Nauze, n 5, 209.

<sup>189</sup> Andrews argues that “Isaacs's conclusion was totally at odds with not only the express reference to ‘adjudication’ in s 101 but also with the constitutional commentary of Quick and Garran to the effect that s 101 ‘clearly enables part of the actual judicial power of the Commonwealth to be vested in the Inter-State Commission’... The net effect of this decision coincided with aspirations Isaacs expressed some eighteen years previously as a young Victorian delegate in the Melbourne Convention Debates: ‘I want to eliminate the constitutional creation of the Inter-State Commission. I think it a great mistake that we should erect this body – a fourth branch of Government’”: Bell, n 173, 68. Cremean similarly contends that the case “could well have been decided differently. The minority view could well have prevailed, in the face of the Constitution's provisions”: Cremean, n 184, 765. In Zines' view, the decision read s 101 narrowly in order to apply the “important and fundamental” implications from Ch III of the Constitution, relating to the separation of powers. “The judgement of Isaacs J is more rigid and dogmatic in its

“merely a body of inquiry without any power of enforcing its decisions”<sup>190</sup> and operated only from 1913 until 1920. The Commission started operating again in 1984,<sup>191</sup> but not for long.<sup>192</sup>

While constitutionally established, the Commission depended “for its existence and practical operation on legislative definition of its powers and executive action in relation to appointments”. As Michael Coper explains, “the peremptory command in s 101 ... that there ‘shall be’ an Inter-State Commission is not self-executing and no doubt is unenforceable, at least to bring a non-existent Commission into being”.<sup>193</sup> Similarly, while s 101 obliges the Commonwealth to create the Commission, there may be standing issues preventing a private individual from holding the Parliament to account.<sup>194</sup> In Damien Cremean’s view, the States would have had standing,<sup>195</sup> though evidently they lacked the political will to insist upon the Commission’s existence.<sup>196</sup>

There is a key lesson here. It is true that the existence of a Constitution does not always entail the existence of the institutions mandated by it. Nor do constitutional clauses always guarantee that Parliament will follow the rules contained in them.<sup>197</sup> Institutions, and the authority of constitutional provisions, depend on political will, sometimes along with judicial enforcement (though the authority of the High Court itself depends on political will and respect for the rule of law). How would we create the political will for the Indigenous body to operate effectively?

This is why the body being constitutionally mandated is so important. The political mandate and the endorsement of the Australian people, derived from a successful *contemporary* referendum, will place a high onus on the Parliament to follow the procedure, just as it follows other non-justiciable procedures with respect to the dealings between the Houses in the making of laws. There are several reasons to be optimistic about the operation of the proposed Indigenous body, and logical reasons why the Inter-State Commission was perhaps unviable and became unnecessary over time. The Indigenous body is distinguishable from the Commission on a number of grounds.

First, the *Wheat Case* controversy was a primary reason for the Commission’s demise.<sup>198</sup> Part of the problem was the wide powers given to the Commission under s 101, which meant that other institutional authorities were threatened by the Commission’s existence.<sup>199</sup> This was demonstrated by Parliament’s “unappreciative and, at times, hostile reception” of commission reports, revealing “resentment at the apparent erosion of a staple parliamentary function”.<sup>200</sup> (An important related

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application of the doctrine of the separation of powers and it is obvious that it was not merely the textual arrangement that influenced him”: Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 209-211. See also La Nauze, n 5, 55.

<sup>190</sup> La Nauze, n 5, 55.

<sup>191</sup> Coper, n 174, 731.

<sup>192</sup> Cremean, n 184, 765; Bell, n 173, 71.

<sup>193</sup> Coper, n 174, 733, 738.

<sup>194</sup> Cremean, n 184, 772.

<sup>195</sup> Citing Gavan Duffy CJ, Starke and Evatt JJ in *Anderson v Commonwealth* (1932) 47 CLR 50; Cremean, n 184, 772.

<sup>196</sup> Coper, n 174, 740.

<sup>197</sup> This is equally true for constitutionalised rights clauses. Goldsworthy argues that Australia’s human rights record, while “far from perfect”, is at least “as meritorious as that of the United States”, where a constitutional bill of rights has been in operation: see Goldsworthy, n 2, 687. Ratnapala similarly notes that “over 130 countries have a bill of rights in one form or another, but only a minority of them can truly claim to have a reasonable record of respect for human rights”: Suri Ratnapala, “Bills of Rights in Functioning Parliamentary Democracies: Kantian, Consequentialist and Institutional Scepticisms” (2010) 34(2) MULR 592, 609.

<sup>198</sup> La Nauze, n 5, 57.

<sup>199</sup> “That the Inter-State Commission was a threat, real or perceived, to other established power bases, either because of its wide constitutional jurisdiction or its guaranteed independence, is perfectly plain. The enormous grant of power in s 101 of the Constitution, reflecting the important role the Inter-State Commission was intended to play in the federal compact, was paradoxically responsible for its weakness”: Bell, n 173, 70.

<sup>200</sup> Bell, n 173, 70.

lesson is that a body can become useless if the Parliament never implements its recommendations.)<sup>201</sup> The High Court itself was probably also threatened by the Commission for impinging upon its role.<sup>202</sup> Even the States seemed to be threatened.<sup>203</sup> The Commission's intended role as a "fourth arm" of government may not have been politically viable due to "possible opposition from State governments, interest groups, elements within the Federal government itself and possibly the High Court".<sup>204</sup> So who was lobbying to keep the Commission? Perhaps only the Commissioners, and their voices were evidently not politically strong enough – they did not represent a real interest group.

Indigenous people are a real interest group. The proposed Indigenous body would provide a deeply political and representative voice in the federal parliamentary process. The intention is not, from the scope of current proposals, for the body to have adjudicatory powers. Therefore its operation would not be complicated by separation of powers issues. The Indigenous body would represent the Indigenous voice to Parliament and would stand for specific Indigenous interests, just as the States represent State interests. While there may be oppositional tension from other interests (the same productive tension on which a check and balance federal system is based), Indigenous Australians would be the interest group driving the body's existence.

Secondly, following the *Wheat Case*, the Commission was stripped of its key powers and thus prevented from exercising its constitutional functions.<sup>205</sup> The "constitutional vacuum"<sup>206</sup> this created was over time legislatively filled. The Commission's functions were "taken over by specialist statutory bodies created for the task", including the Tariff Board, the Grants Commission,<sup>207</sup> the Trade Practices Commission, and others.<sup>208</sup> But unlike the Commission whose role was eventually filled by other legislative bodies, there currently exists no *national Indigenous representative body with a legal mandate to formally engage and consult with Parliament in its law-making processes*. There is the Prime Minister's Indigenous Advisory Council, chaired by Warren Mundine. But that is a non-representative advisory body, comprising both Indigenous and non-Indigenous government-appointed advisors. It is not an Indigenous representative voice to Parliament. Congress is a national Indigenous representative body, but it is not a legislated public body in that sense. It is a private corporation,<sup>209</sup> and there is no constitutional (nor any weaker legislative) imperative for Congress to advise and consult with Parliament in its law-making for Indigenous affairs. The proposed body is intended to be part of the public institutional and parliamentary machinery of the nation. It may therefore make sense for Congress to evolve into the proposed constitutional body, if Indigenous people wish this to happen.

Thirdly, the Commission's legislative scope may have been too broad. It was "over burdened with a veritable miscellany of tasks", and so perhaps could excel at none.<sup>210</sup> It is doubted that the proposed Indigenous body would suffer this weakness, for it would be clearly focused on matters relating to Indigenous affairs. Nonetheless, there is a good lesson here. While the Indigenous body should be empowered to advise on broad matters if it wishes to do so, the body members will need to exercise

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<sup>201</sup> Bell, n 173, 68.

<sup>202</sup> According to Bell, "the High Court's decision in the *Wheat Case* is susceptible of an interpretation of institutional rivalry and a concern on the part of the majority of the High Court to prevent an encroachment into its jurisdiction": Bell, n 173, 71.

<sup>203</sup> "[T]he Commission's rebirth in 1984 received a rather lukewarm reaction from the States: perhaps they saw little to gain and much to lose from the potential impact of a national perspective on local interests, especially when that perspective would be taken by a body over which the States had no direct control": Coper, n 174, 740. The "States ... originally had little or no interest in its creation": La Nauze, n 5, 49.

<sup>204</sup> Radbone, n 174, 324.

<sup>205</sup> Bell, n 173, 68-69.

<sup>206</sup> Bell, n 173, 68.

<sup>207</sup> La Nauze, n 5, 57.

<sup>208</sup> Radbone, n 174, 333.

<sup>209</sup> National Congress of Australia's First Peoples, *About Us* <<http://nationalcongress.com.au/about-us>>.

<sup>210</sup> Bell, n 173, 70.



acuity and discretion by focusing on the proposed legislation that is most important to Indigenous interests, so they do not get inundated with too many tasks.

Fourthly, the Commission was just one part of the 1901 Constitution, which, as a whole, was endorsed by the people through a referendum. While the 1901 Constitution mandated the existence of the Commission, the Commission did not operate until 12 years later. Arguably, this was able to happen because there was no special or particular endorsement directed at the Commission, because the people endorsed the Constitution as a whole. There was little popular demand for it to exist. A contemporary Indigenous recognition referendum would be fundamentally different. If the Australian people vote to amend the Constitution to establish an Indigenous body, then there will be a highly specific, contemporary mandate from the Australian people for the Indigenous body to function and operate effectively. This mandate would need to be capitalised upon. It would be important for the body to begin on the right foot, to avoid the loss of political momentum and constitutional authority that the Commission suffered. The legislation setting up the body should arguably be drafted – with Indigenous people leading the design and drafting process – and ready to come into force in synchronicity with the constitutional changes.

### Learning from ATSIC

In designing an Indigenous body, it will be important to learn from the strengths and weaknesses of ATSIC.<sup>211</sup> ATSIC was a representative institution that allowed Indigenous people to have a voice in national affairs, though it is usually remembered for its weaknesses, rather than its strengths.<sup>212</sup>

An arguable weakness in the design of ATSIC was its wide mandate and the tension within its competing dual roles. It was both an administrative body and a representative body, at once tasked with administering programs and being an independent national Indigenous voice.<sup>213</sup> Similarly, it was ultimately answerable to the government of the day, rather than the Indigenous people it represented, which was in tension within its representative role.<sup>214</sup> ATSIC, like the Commission, was arguably given too wide a spectrum of tasks. Secondly, ATSIC may have been too far removed in its accountability structures from Indigenous people at the regional level.<sup>215</sup> Thirdly, ATSIC was intended to be a national Indigenous representative body to influence government policy, but there were few formal structures for productive interaction with government.<sup>216</sup> While ATSIC was intended to be a “corner-stone of national Indigenous representation and the source of advice to government”, this was “neither mandated nor facilitated by required process”. In Kingsley Palmer’s view, “a more robust system needs to be designed to effect the desired outcome”.<sup>217</sup>

There are several ways the proposed constitutional procedure seeks to improve upon the ATSIC experience. First, unlike ATSIC, the proposed Indigenous body is intended to have a relatively narrow focus, aimed at facilitating Indigenous participation in the processes of democracy, not creating an administrative bureaucracy. Secondly, the body design can learn from the ATSIC experience by

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<sup>211</sup> There is not scope here for a detailed analysis of ATSIC, but see: Aboriginal and Torres Strait Islander Commission, *Review of the Operation of the Aboriginal and Torres Strait Islander Commission Act 1989: Report to the Minister for Aboriginal and Torres Strait Islander Affairs* (AGPS, 1998); Angela Pratt, “Make or Break? A Background to the ATSIC Changes and the ATSIC Review” (Current Issues Brief No 29, Parliamentary Library, May 2003); Kingsley Palmer, “ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials” (Research Discussion Paper No 12, AIATSIS, 2004); Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to the Review of ATSIC, August 2003; Will Sanders, “ATSIC’s Achievements and Strengths: Implications for Institutional Reform” (Topical Issues Paper No 10, Centre for Aboriginal Economic Policy Research, 2004); Patrick Sullivan (ed), *Shooting the Banker: Essays on ATSIC and Self-determination* (North Australia Research Unit, 1996).

<sup>212</sup> Sanders, n 211.

<sup>213</sup> See Chesterman, n 22, 422.

<sup>214</sup> Palmer, n 211, 5-6, 22.

<sup>215</sup> Palmer, n 211, 22-23.

<sup>216</sup> Palmer, n 211, 5-6, 23.

<sup>217</sup> Palmer, n 211, 5-6, 23.

ensuring the decentralisation of its power.<sup>218</sup> The body should be connected and accountable to Indigenous people at a local level.<sup>219</sup> Thirdly, this proposal would set in place a constitutionally established procedure for the Indigenous body to engage with Parliament. Subject to political will, such procedures should be extrapolated in legislation. The constitutional engagement procedure, and any legislative procedures, would address the concern that ATSIC did not have clear, mandated procedures for effective government engagement.

Finally, the easy axing of ATSIC demonstrates why it is important that this body has a constitutional imperative. The body should not be abolished the moment there are difficulties. All institutions are made up of, run and designed by imperfect human beings who inevitably make mistakes and must learn and improve over time. Institutions themselves are imperfect and must evolve. The details of the Indigenous body institution would be articulated in legislation (though its existence will be required by the Constitution); therefore there would be flexibility to evolve and improve the institution over time. But when problems do arise, there should be a constitutional imperative for Parliament to sort them out.

When there are corrupt or incompetent politicians in Parliament, no one seriously calls for the institution of Parliament to be abolished.<sup>220</sup> Similarly, just because ATSIC had problems and was ultimately abolished, does not mean Indigenous representative bodies are a bad idea. The success of the Indigenous body will depend not only on its Indigenous members; it will also depend on how well it is supported and respected by the arms of government.<sup>221</sup>

Nicholas Rothwell argues that since ATSIC was abolished, nothing has filled the representative gap to give Indigenous Australians a real voice in national affairs. He notes that Indigenous disadvantage is best addressed when “power is returned to leaders ... by giving them the reins, and asking them to have a hand in shaping their own fate”<sup>222</sup> – enabling Indigenous self-determination. The proposed constitutional procedure seeks to enable Indigenous people to exercise leadership in their affairs. If such a proposal succeeded, Indigenous people would forever more be able to exert political pressure, with a constitutional mandate, to ensure the body exists and operates effectively.

### Addressing possible objections

A common political objection to any form of Indigenous constitutional recognition is to ask why Indigenous people should have special recognition.<sup>223</sup>

It is true that Indigenous people are not the only minority group that might lack a voice in the democratic system. But Indigenous people occupy a unique place within Australian citizenship that is historically, politically and legally distinct to any other group of citizen. As ATSIC argued in 1995:

The indigenous peoples of Australia are a very special constituency, quite unlike other minorities, with unique interests and special claims to participation in Australia’s political processes ... a democracy

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<sup>218</sup> Palmer, n 211, 22-23.

<sup>219</sup> Scrymgeour, n 56; HC Coombs also argued that “any organisation designed to give Aborigines an effective influence on government policies must be firmly based on, derive its authority from, and be accountable to, local groups and communities and their organisations”: HC Coombs, *Aboriginal Autonomy* (CUP, 1994) 141-142.

<sup>220</sup> As Sanders argues, “[t]o get rid of ATSIC as a way of pushing aside a particular chairperson is like abolishing Parliament to push aside a particular Prime Minister”: Sanders, n 211, 6.

<sup>221</sup> As Pearson has noted with respect to ATSIC, government bureaucracies and other industries were also responsible for ATSIC’s deficiencies: Noel Pearson, “Recent Indigenous Policy Failures Can’t Be Pinned on Aborigines”, *The Australian*, 15 June 2013.

<sup>222</sup> Nicholas Rothwell, “A Decade After ATSIC Was Axed, Aborigines Still Have Little Say”, *The Australian*, 27 September 2014.

<sup>223</sup> See, for example, Andrew Bolt, “I Am, You Are, We Are Australian”, *Herald Sun*, 29 January 2014; Greg Sheridan, “Constitutional Change Will Divide Not Unite the Nation”, *The Australian*, 20 September 2014; Gary Johns, “Special Treatment is the New Black”, *The Australian*, 2 February 2012; Gary Johns, “History Yes, Culture No”, *The Australian*, 8 October 2013.

based only upon electoral majorities will inevitably be skewed towards the promotion of majority interests and will tend to deny participation of indigenous peoples.<sup>224</sup>

Indigenous people are the only group requiring legislative solutions to address and articulate the rights and interests arising out of their unique status as descendants of the pre-colonial peoples of Australia – for example, native title and Indigenous heritage laws. Indigenous people are also the only group requiring a specific head of power to enable the Commonwealth to legislate for this purpose.

It makes sense that Indigenous people should get a say in Parliament's exercise of this power and in legislative solutions with respect to their distinct rights and interests. It is logical that there should be Indigenous input into Indigenous laws and policies. The Constitution should make provision for this. This would not undermine the status of Indigenous Australians as equal citizens, just as the recognition of minority state interests in the constitutional structure does not mean those state residents are unequal in terms of their individual citizenship. As well as being equal citizens, Indigenous peoples have unique rights and interests that warrant constitutional recognition in the federal system.

Another objection may be that a procedural right to be consulted is too weak. It would not be a veto, and so there would be no guarantee that Parliament will follow the body's advice. Perhaps, therefore, the Expert Panel's proposed racial non-discrimination clause is to be preferred? Would it yield better outcomes for Indigenous people?

First, the Expert Panel's racial non-discrimination clause has not yet won political consensus. Accordingly, narrower and weaker non-discrimination options are being considered.<sup>225</sup> But even these proposals are probably not politically viable.<sup>226</sup> Secondly, a key practical question is to decide whether Indigenous constitutional recognition should involve Indigenous people primarily as litigants through the courts, or as political participants in the everyday procedures of Australian parliamentary democracy. A racial non-discrimination clause or a qualified Indigenous power would create judicially adjudicated constitutional limitations on Parliament's power. The judiciary would ultimately decide what is discriminatory or not. The court may strike down a discriminatory law that is in operation. However, court cases are long and expensive. The discriminatory law would already be passed by Parliament and would be in operation, before it can be legally challenged. The challenging litigant might win or lose. The court may say the law is discriminatory, or it may find the law is a valid special measure. The process can take years, and there are no guarantees.

It is likely that a law would only get struck down where it involves egregious racism. In most contemporary cases, the court will be likely to defer to Parliament with respect to appropriate special measures.<sup>227</sup> Most current racial discrimination cases involve high levels of subjectivity around whether the law is an acceptable special measure or discriminatory. It is also likely that, since *Maloney*, courts will not view genuine consultation with Indigenous people as a decisive legal requirement of a valid special measure. This is because the consultation requirement is not stated explicitly in Australian law.

It would be unwise to rely on the judiciary to read in a duty to consult with Indigenous people from a racial non-discrimination clause, the RDA, international law or otherwise. Relying on this has not worked thus far in Australia, and in Canada it has resulted in uncertainty and confusion.<sup>228</sup> If proper consultation is considered important, then it should be stated – clearly and explicitly – in the Constitution, the rule book for government, where the requirement cannot be repealed or amended at whim.

The proposed amendment for an Indigenous body in the Constitution seeks to provide a *proactive and pre-emptive* process for Indigenous engagement with Parliament. It would involve Indigenous

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<sup>224</sup> ATSIIC, n 8, [4.21].

<sup>225</sup> See Joint Select Committee, *Interim Report*, n 16, 19-21; *Progress Report*, n 16, 7-9; *Final Report*, n 17, Recommendation 5.

<sup>226</sup> Robinson, n 21.

<sup>227</sup> Lindell, n 128, 203-7.

<sup>228</sup> Tzimas, n 96, 463-464; Charowsky, n 98, 214.

people as democratic participants, rather than as litigants. It would ensure Indigenous involvement right at the start, when the Indigenous affairs laws are being debated in Parliament. There would of course be no guarantee that Parliament will follow the body's advice, just as there are no guarantees the High Court will agree with Indigenous litigants when interpreting a racial non-discrimination clause. But the procedural and political solution would provide rules and processes for engagement, negotiation and dialogue between Indigenous people and the Parliament, thus ensuring that things are done in a better way.

## CONCLUSION

As Professor Mick Dodson observes:

Indigenous peoples were not included in the self-governing peoples that came together in the lead-up to 1901 to negotiate Australia's Constitution and to form a "federated Australia". We were excluded from that act of nation-building. We had no delegates at the constitutional conventions in the 1890s. We were not asked to send representatives to engage in the negotiations of how power would be distributed and order maintained.<sup>229</sup>

It is time Indigenous Australians are given the opportunity to engage in negotiations on how power is distributed and order maintained. Indigenous people should have the opportunity to be represented in the federal constitutional compact. If not for the racism of the era, perhaps this would have happened long ago. The founders might have seen Indigenous people as equal citizens *and* peoples with distinct political and group identities, deserving of a voice within the dynamic interplay of relationships established by the Constitution, just as the minority States were deserving of a voice.

A constitutional procedure requiring Parliament to consult with and consider the advice of an Indigenous body when debating proposed laws and policies for Indigenous affairs would be in keeping with the practical, pragmatic and procedural nature of the Constitution. It would represent the establishment of a process for day-to-day "practical reconciliation" within the institutional and political life of the nation, in a much richer sense than former Prime Minister John Howard's somewhat narrow use of the phrase.<sup>230</sup> It could be the procedural promise that should come after "sorry",<sup>231</sup> arising, hopefully, out of agreement between the parties on how to regulate fairer future relations.

Such a constitutional procedure could establish a process for practical self-determination of Indigenous peoples within Australia's democratic institutions, by providing Indigenous people a constitutionally mandated platform on which to have a voice and exercise leadership in their affairs.

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<sup>229</sup> Dodson, n 6.

<sup>230</sup> Howard used the term "practical reconciliation" to refer to policies which focus on addressing Indigenous socioeconomic disadvantage rather than pursuing symbolic reconciliation: see John Howard, "Towards Reconciliation" (Address to Corroboree, Sydney, 27 May 2000).

<sup>231</sup> Pearson, n 28.