INDIGENOUS CONSTITUTIONAL RECOGNITION: THE CONCEPT OF CONSULTATION

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Introduction

I was asked to make some remarks about the concept of 'consultation' in the proposal for indigenous constitutional recognition put forward by the Cape York Institute. My understanding of what presently is proposed is taken from the two submissions by the Institute to the Joint Select Committee[1] and from Anne Twomey's very helpful piece in the *Conversation,* translating these proposals into constitutional form.[2]

The essential elements, as I understand them, are these:

- An indigenous body would be required by the Constitution, with its composition, roles, powers and procedures provided in legislation
- The body would provide 'advice' to the Commonwealth Parliament and Government on what are described as 'matters relating' to Aboriginal and Torres Strait Islander peoples.
- The advice would be required to be tabled in the Parliament as soon as practicable, by the PM or the Speaker (in principle, I prefer the latter)
- Both Houses would be required to 'give consideration' to the advice in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples
- The 'advice' would not be binding and the provisions would be drafted so as to be non-justiciable (although without expressly saying so)
- The indigenous body could be proactive as well as reactive, in the sense of offering advice on any matters as it considered fit.
- This new provision would be added to the Constitution in a new Chapter IA, immediately following the chapter on the Parliament and preceding the chapter on the Executive.

Observations

In my view, this is a helpful and constructive proposal, offering a new and quite different approach to constitutional recognition, which has some potential to be both effective and broadly acceptable. It fits with the distinctive focus of the Australian Constitution on institutions and the organisation of power as the principal tools for ensuring compliance with principles of constitutionalism. It is vastly

[1] Cape York Institute, Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2014; Cape York Institute, Supplementary Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2015.
[2] Anne Twomey, 'Putting words to the tune of indigenous constitutional recognition', *The Conversation* 20 May 2015.

preferable to a watered down, purely symbolic version of the Expert Committee's proposals, if that proves to be the only alternative on offer.

I should make it clear, however, that I profoundly disagree with the description of the Constitution as a 'procedural, practical and pragmatic Charter of Government' that accompanies the justification for this proposal. That description denies the dignity and significance of the institutions that the Constitution establishes, drawing on the potentially rich conception of Australian federal democracy. And I also disassociate myself from the concerns about the effects of a non-discrimination clause in the Constitution, which are not only exaggerated but which pay insufficient regard to the well-founded fears of indigenous Australians about placing their faith in the Australian political process alone.

I agree with Anne Twomey that the proposal for an indigenous constitutional body can be drafted so as to be non-justiciable, at least as far as the giving and taking of advice are concerned, on the basis that this occurs within the law-making process. In the absence of justiciability, however, the political process bears a heavy burden, which must be discharged effectively, if this form of constitutional recognition is to be meaningful. To attempt to ensure that the political process is up to the task, the proposal relies on the transparency that would accompany the tabling of the indigenous body's advice in the Parliament, coupled with the respect that the views of the indigenous body should attract, initially and over time. There are Australian precedents for strategies of this kind. In its early years, the former Administrative Review Council relied entirely on the persuasive quality of its tabled advice for its considerable influence over the direction of development of the administrative law system. In a sense, the legislative bills of rights in Victoria and the ACT also rely on transparency to ensure that the protected rights are taken into account when new legislation is made.

Nevertheless, if this proposal is to go forward it should be carefully designed in full understanding of the reality that the Australian political culture is very bad indeed at genuine consultation either with the public at large or with groups affected by particular proposals. The history of dealings with indigenous peoples is testament to this reality, which may be attributable to a shortfall in understanding of what effective consultation involves, in skills, or in commitment. The recent fate of self-government in Norfolk Island is a recent illustration in a different context.

Several other aspects of the proposal also deserve further consideration from the standpoint of its reliance on consultation or advice.

First, in its present form, the proposal does not adequately take account of the range of actors making decisions that affect Aboriginal and Torres Strait Islander peoples, at various points in the policy development cycle.

- All levels of government exercise public power in ways that affect indigenous peoples: the Commonwealth, the States, the territories and local government
- Indigenous peoples are affected by policies given effect through executive, as well as legislative action. Executive schemes reliant on spending, or contract, or intergovernmental agreement are endemic in the Australian system of government. The proposal to close down indigenous communities in the north of Western Australia, for example, involved funding decisions taken by both levels of government.
- Within the executive branch, decisions are taken by a wide range of actors, including Ministers, both individually and in Cabinet, and bureaucrats.
- And even if consultation with the indigenous body is confined to legislation, governments are committed to the form and purpose of legislation well before proposals hit the parliamentary floor

Secondly, it is not entirely clear to me when the consultative mechanisms will be triggered, on the proposal as it presently stands. I accept that the proposal is drafted so as to confer a broader authority on the indigenous body to give advice than on the Commonwealth Parliament to take the advice into account. I assume that the former would entitle the body to give advice on any initiative affecting indigenous Australians in any way as long as, at least, the body obtained information about the initiative early enough for its advice to have a chance of being effective. In relation to the obligation on the Commonwealth Parliament, there are several possible interpretations. One is that the obligation is triggered only when legislation relies (solely?) on whatever head of power to legislate for indigenous peoples replaces the 'race' power in section 51(xxvi). This would not, however, catch the legislation authorising the intervention in the Northern Territory. A second interpretation, which would do so, would require the Commonwealth Parliament to consider any relevant advice in making any law specifically for indigenous peoples, whatever the source of power for the legislation. A third (but on the face of the text less likely) interpretation, would trigger the obligation to consider whenever legislation affected indigenous people in company with others albeit, perhaps, in a particular way.

A third point, to some extent consequential on the earlier two, is the proposed placement of the new provision in Chapter IA of the Constitution. I acknowledge that this placement gives the provision a prominence that fits with its significance. To the extent that the consultative mechanism

is associated solely with proposed legislation passing through the Commonwealth Parliament, there also is some logic in placing the new provision immediately after the chapter on the Parliament. Interspersing a new chapter amongst the first three chapters of the Constitution on which the separation of powers depends is inelegant, however, from the standpoint of constitutional design. More significantly for present purposes, to the extent that the consultative mechanism ultimately has wider effect, at all levels of government and on all public decision-makers, this placement also may be misleading. Most significantly of all, it may also be impolitic; encouraging (spurious) claims that the indigenous body gives an unfair advantage to indigenous peoples in the legislative process or that, in some unexplained way, it amounts to a third chamber of the legislature.

An alternative placement might be in a new Chapter VIIA, in a new section 127, replacing the discriminatory provision that was removed in 1967 (and thus having a symbolism of its own). The chapter heading might specifically refer to recognition. The new section 127 might include the new power to legislate for indigenous peoples, in lieu of section 51(xxvi), followed by the requirement for the establishment of the indigenous advisory body and an obligation on the Parliament to consider its advice, when it proposed to exercise the new power.[3] This arrangement would make it clear that the power and the obligation to consult were linked; an impeccable arrangement, on any view. The indigenous body should still have the authority to advise on any aspect of Australian governance affecting indigenous people, and its advice should still be required to be tabled in the Parliament, but the package might more readily be perceived as directed solely to the imperatives of recognition.

Comparative experience

Some insights into ways in which an approach to recognition that constitutionalised a mechanism for consultation might be both justified and strengthened can be drawn from comparative experience.

Many parts of the world already have in place much more formalised procedures for consultation with indigenous peoples and other structural minority groups, not only in order to give effect to international obligations but, even more importantly, as an obvious way of providing good governance. These include:

[3] I owe this point to discussions with Michael Crommelin, following the symposium to which these remarks initially were delivered.

- Scandinavia, where consultation occurs with Sami Parliaments in Finland, Norway and Sweden[4]
- Europe, pursuant to the Framework Convention on National Minorities[5]
- NZ, where there is a developed understanding of what consultation with Maori involves, for decision making both within and outside the Treaty of Waitangi[6]
- Canada, where an obligation to consult associated has been associated with the 'honour of the Crown', given apparent impetus by the 1982 constitutional changes (section 35).[7]

Ideas and techniques that can be extracted from this experience with potential relevance for present purposes include the following:

- Consultation can be equated with (effective) participation and active involvement in public decision making. It should be measured **both** by the opportunity to make substantive (and timely) contributions **and** in terms of the effect of the contributions on the final decisions made.
- The rationale for consultation, thus understood, lies in good governance, understood from the perspective of both government and governed. Public policy based on consultation is likely to be both adequately informed and accepted by those to whom they apply.
- Consultation should be undertaken 'in good faith, with the objective of reaching agreement'.
- The obligation to consult, understood in this way, extends to all public agencies, at all levels of government, exercising public authority through all available instruments, ranging from legislation through regulations through funding decisions to soft law.
- The obligation to consult applies when indigenous interests are affected 'directly', but not in relation to 'matters of a general nature…assumed to affect the society as a whole', to quote the understanding in relation to the Sami Parliament.
- Public authorities are obliged to inform an indigenous body about all matters in this category, as early as possible in the decision-making process.

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[4] See, for example, 'Procedures for consultation between State Authorities and the Sami Parliament (Norway): http://nationalcongress.com.au/wp-content/uploads/2012/11/ProceduresforConsultationsState-AuthoritiesandSami-Parliament.pdf

[5] Council of Europe, Framework Convention on National Minorities, article 15: http://conventions.coe.int/treaty/en/Treaties/Html/157.htm; eg Lund Recommendations on Effective Participation of National Minorities in Public Life, paras 12, 13: http://www.osce.org/hcnm/32240?download=true

[6] Ministry of Justice, New Zealand, *Guide for Consultation with Maori,* http://www.justice.govt.nz/publications/publications-archived/1997/guide-for-consultation-with-maori

[7] *Manitoba Metis Federation (Inc) v Attorney-General (Canada)* [2013] SCC 14

- Information about both agreement and lack of agreement should be included in Cabinet documents and in parliamentary proceedings
- Regular meetings should be held between government leaders and the indigenous body (or representatives of it).

Insights for Australia

The lessons of these insights for the Australian proposal are obvious. At the risk of repetition, however, they include the following.

- A principal rationale (perhaps the rationale) for achieving constitutional recognition in this way lies in the contribution that it makes to good government.
- 'Consultation' (or giving and receiving advice) involves a rich and genuine process that is concerned with outcome as well as input; that is pursued in good faith; and that is undertaken with the goal of reaching agreement (even if the goal is not always realised).
- Consultation should take place whenever indigenous interests are affected in a way that is distinctive and not shared by society as a whole, or other groups of it.
- Consultation should be undertaken by any public actor making decisions that affect indigenous peoples in this way, at any level of government.
- For consultation to be effective, information should be provided to the indigenous body at the start of a policy process
- If agreement is not reached, and a decision is to be made without or against the advice of the indigenous body, this should be publically disclosed.
- Regular meetings should occur between government or parliamentary leaders and representatives of the indigenous body
- In the Australian context, it might be useful to establish a committee of the Senate or of both Houses of the Commonwealth Parliament, to report on the advice and its implications for public policy, including legislation.

These insights suggest the way in which the arrangements should operate in practice. They do not necessarily, however, dictate the scope of the formal obligations to be placed on the Parliament by the constitutional provisions. For reasons suggested earlier, it might be politic for these to be expressed more narrowly, to formally oblige the Houses of the Commonwealth Parliament to take account of the indigenous body's advice only when a law is made pursuant to the head of power that authorises law-making with respect to indigenous peoples or, (perhaps), when a law can be characterised as one with respect to indigenous peoples even if it could be supported by another

law as well. If this were done, the de facto influence of the body might nevertheless grow over time, through the wider range of matters on which it chooses to give advice, the quality of its advice and the respect that the body attracts.