Melville Miranda

Legal case Analyst/Legal case Researcher

[redacted]

25 Feb 2019

Date Submitted: 25 Feb 2019

Date Closed: 28 Feb 2019

The Joint Standing Committee on Northern Australia

Email: jscna@aph.gov.au

Scholarly Analysis On The Opportunities and Challenges Of The Engagement Of Traditional Owners in The Economic Development of Northern Australia

Terms of Reference

1. *Strategies for the enhancement of economic development opportunities and capacity building*
2. *Opportunities are be accessed and that can be derived from Native Title and statutory tiles such as the Aboriginal Land Rights (Northern Territory) Act*.
3. *Oppression and Exploitation of Aboriginals*

Hon'ble Justice Kirby "*symbolism is important in law and life. More tokenism is empty. The problem with many proposals for symbolic acknowledgment of Australia's Aboriginal people in our Constitution is that many supporters want it to be purely symbolic. Some even propose an express disclaimer of any legal consequences".*

1. Studies of Dr Shireen Morris

Damien Freeman and Julian Leeser are stalwart defenders of Australia's Constitution, because it adapts the smart aspects of the hugely successful British Westminister system- a system whose historical power and success is self evident – to the unique historical circumstances.

Shireen supports the view of Freeman and Leeser, and many other constitutional conservatives, that the Australian Constitution is primarily a rulebook. It is procedural and pragmatic charter of government. It may not be the appropriate place for symbolic statements and expressions of aspirations. But it is the place for rules. Just as the Magna Carta, by restraining the arbitrary power to tax, helped protect the liberty of the king's subjects, so too the Australian Constitution, by setting out rules and democratic procedures that the

government must follow, has successfully protected the freedoms and liberties of all Australians.

It did not successfully protect the rights and liberties of our most disadvantaged minority. Perhaps, in this respect, too the Constitution has been triumph of founding objectives, the historical intent of its framers towards indigenous Australians, understandably informed by the attitudes of the time, has played out mostly consistently with drafting intentions. Just as our Constitution was shaped by our pre-Federal history and the politics of the day, our Constitution has shaped how our post-Federation history and politics have unfolded.

Morris (2018) in her scholarly paper '*The torment of our powerlessness ': addressing indigenous constitutional vulnerability through the Uluru statement's call for the first nations voice in their affairs'*, mentions, *first*, a First Nations voice is a suitable solution: it cohers and align with Australian culture and design which recognises, represents and gives voice to the pre-existing political communities , or constitutional constituencies, *second*, evaluates, compares and attempts to refine drafting options to give effect to a First Nations constitutional voice , by reference to principles of constitutional suitability, responsiveness to concerns about parliamentary supremacy and legal uncertainty, and assessment of political viability, and *third*, concludes that the proposal for a constitutionality enshrined First Nations voice strikes the right conceptual balance between pragmatism and ambition, for viable yet worthwhile constitutional change. With appropriate constitutional drafting and legislative design, such a proposal offers a modest yet profound way of meaningfully addressing Indigenous constitutional vulnerability by empowering the First Nations with a voice in the affairs (Greg Craven, *'Noel Pearson's Indigenous Plan Profound and Practical'*).

In the Indigenous constitutional recognition debate, the concern to avoid legal uncertainty and maintain supremacy has regularly been expressed through the inclusion of 'no legal effect clauses' in state constitutions that have recognised Indigenous peoples in preambles or specific clauses (For example, the *Constitution Act* (Vic) recognises Indigenous peoples in section 1A. Section 1A (3) provides , '[t]he Parliament does not intend by this section – (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria'. The *Constitution Act 1902* (NSW) recognises Indigenous peoples in section 2. Section 2(3) provides '[n]othing in this section creates ant right or liability or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or in force in New South Wales. However, it has been previously established that 'no legal effect' clauses would not be supported by Indigenous people (Expert Panel on constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution Report of the Expert Panel '(Report, January 2012). And there is no need for such a clause. There are non-justiciable provisions in the federal *Constitution* (ss53-4, 56) which can be emulated. These clauses do not include explicit 'non-justiciable' or 'no legal effect' specifications, but are nonetheless generally treated by the High Court as non-justiciable (Twomey , 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (online) , 20 May 2015) . Both the drafters of the *Constitution* (*Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, 473 (Edmund Barton), have treated these sections as non-justiciable because the provisions refer to the 'proposed laws', indication that they are internal rules to govern Parliament's law making processes (Chief Justice Griffith). The High

Court stays out of such matters, because the judiciary role is to deal 'with what is the law rather than proposals to make law' (Glenn Worthington, 'How Far Do Section 53 and 56 of the *Australian Constitution* Secure a Financial Initiative of the Executive/' (Parliament Studies Paper 12, Australian National University, 4). The non-justiciability of such clauses reflects the fact in the words of McTiernan J, 'Parliament is master in its household '(*Victoria v Commonwealth* (1975) 134 CLR 83, 138).

Twomey explains that, though the requirement for Parliament to consider advice is non-justiciable, it would operate as 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 (Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (online) , 20 May 2015). Morris (2018) goes further than this; she argues the obligation would be a constitutional requirement. It would not be justiciable, because Parliament is immune to review of its internal procedures. But Parliament would be bound by the law of the *Constitution* to fulfil this requirement, and the requirement would be enforced and adjudicated by Parliament, rather than the judiciary.

Importantly, the procedure is designed so that it cannot delay Parliament if no advice is received from the body, '[h]ence, the responsibility is on the Indigenous body to provide advice, if it wants it considered. Failure to provide advice cannot hold up the process' (Ibid). This is important, because it means that the procedure cannot operate as a veto for inaction. This means the amendment is fully respectful of parliamentary supremacy., in line with the strong parliamentary supremacy established by the *Constitution*. It cannot be considered a radical proposed change, and aligns with the Referendum Council's intention in this regard.

Twomey's proposal is balanced because it empowers Indigenous peoples with a constitutional voice, without the downsides and legal uncertainty created by justiciable, the High Court adjudicated guarantees. This avoids the risk of laws being struck down, which is often cited as a concern for parliamentarians anxious to retain their power in this constitutionality relationship (Morris, '*Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial No-discrimination Clause as Part of the Constitutional Reforms for Indigenous Recognition'* 2014, 40 *Monash University Law Review* 488). It also strikes a balance between the need for legislative flexibility in body design, and the Indigenous desire for the security and stability of a constitutional guarantee – the Twomey provides both.

The approach is also balanced in its handli8ng of the issue of scope – what matters the body can advise on- in line with Referendum Council's suggested approach. Section 60A (1) provides that the body may advise on matters 'relating to' Indigenous peoples- creating abroad scope – so the body would need to use discretion on which matters it wishes to advise on. This broad scope is justiciable because there is no veto and the mechanism cannot delay Parliament: if there is no advice provided, nothing need to be tabled and there is nothing for parliamentarians to consider. Further, parliamentarians, under section 60A(4), must only consider advice on matters that are ' with respect to' Indigenous peoples, which seems to indicate a very narrow range of issues under section 51 (xxxvi). This provides a narrow obligation to consider advice 'with respect to Indigenous peoples, and additionally, the obligation is non-justiciable (Twomey, Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (online), 20 May 2015).

An obvious reality of this proposal, of course, is that there is no veto, the advice can be ignored by the state. This accords with the Referendum Council's direction which according to Morris, is justifiable. It is unlikely that a veto would practically workable, let alone politically accepted: a constitutionalised veto would be opposed by many on the grounds that it undermines parliamentary supremacy. It could also be considered an abdication of parliamentary sovereignty (Jeffrey Goldsworth, 'Abdicating and Limiting Parliament's Sovereignity' (2006) 17 *King's College Law Journal* 255, 279). As noted the purpose of this proposal is a noble compromise. As the Referendum Council notes, it is intended to achieve Indigenous aspirations as articulated in the Uluru Statement but also to address concerns about parliamentary supremacy and legal uncertainty. This, the aim should be an authoritative but non-binding indigenous voice in democratic decisions about Indigenous rights and interests. After all the Uluru Statement is request to be heard, not a demand to command. S It asks for a voice, not a veto. As Miller explains, though 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 (Miller, R.A. ' Collective Discursive Democracy as the Indigenous Right to Self -Determination' (2006) 31 *American Indian Law Review* 341, 371).

It would be arguably unworkable to give three percent indigenous minority a constitutional veto over the decisions of the majority (Even when such political decisions appear only to affect Indigenous interests, the vast majority of such decisions are about resources and land- and so involve competing interests)

Likewise, the reality of this non-justiciable constitutional amendment is that there would be no recourse to the High Court where it was felt that advice was not properly considered by Parliament, or if the advice is rejected (Megan Davis and Rosalind Dixon, '*Constitutional Recognition through a (Justiciable) Duty to consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation* '(2016, 27 *Public Law Review* 255). Nonetheless, a constitutional voice would carry special authority (Fergal Davis, '*The Problem of Authority and the Proposal for an Indigenous Advisory Body'* (2015, 8 (19) *Indigenous Law Bulletin* 23), and there is a variety of mechanisms, that can be built legislatively into the design and processes of the body that can enhance its impact and effectiveness in influencing policy decisions.

On balance, Twomey's proposal for a constitutionally guaranteed indigenous advisory provides a modest and constitutionally conservative way of achieving the Uluru Statement's aspirations for constitutional recognition that aligns with the Referendum Council's broad guideline. It is an amendment that cohers with Australia's political process driven by constitutional culture and accords with Australia's strong parliamentary supremacy. It is thus likely politically viable.

Allens Linklaters, proposed the following draft alongwith the following :

'There shall be a First Peoples' Council established by Parliament and with such powers as may be determined by Parliament from me to time. Parliament shall consult with and seek advice from the First Peoples Council on legislation relating to Aboriginal and Torres Islander peoples '(Allens Linklaters, Submission No 97 to Joint Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Inquiry into Constitutional

Recognition Aboriginal and Torres Strait Islander Peoples, 30 January 2015 (‘*Allens Linklaters Submission’*). This drafting would create a constitutional obligation on Parliament to ‘consult with and seek advice from’ the body on legislation relating to Indigenous peoples.

The drafting can be improved to better fulfil its stated aims, by amending it to read as follows:

‘There shall be a First Peoples Council established by Parliament to advise Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander peoples, under procedures to be determined by Parliament, and with such powers, processes and functions as may be determined by Parliament’.

Such a revised amendment would be non-justiciable due to its focus on ‘proposed laws’, thus avoiding the risk of laws being struck down by the high Court due to failure to consult, and better upholding parliamentary supremacy. Yet it would still constitutionally empower Indigenous peoples with a voice in their affairs in a significant and meaningful way, as requested by the Uluru Statement. The revised version also refers to advising the Executive, which would constitutionally empower Indigenous input into policies as as well laws. The addition of ‘under procedure to be determined by Parliament’ clarifies that Parliament must articulate the rules and processes for consultation and advice, as well as the issue of scope of advice. The Allens Linkateers approach is more modest than the Twomey amendment because it omits requirements for tabling advice or a specific obligation for parliamentarians to consider advice, it may be politically attractive for its comparative simplicity. With the refinements suggested, it would fulfil the Referendum Council’s guidelines and is an amendment the cohers with Australia’s process-driven constitutional culture and strong parliamentary supremacy.

2. **Studies of Professor George Williams**

Our leaders have not even taken the step of backing a model of reform. They have ignored or rejected every proposal put before them. It is telling that the most complete and thorough report, delivered in 2012 by widely representative expert panel, has yet to elicit a formal response from any federal government.

To impose an outcome, or take Aboriginal views for granted, would be to continue the patronising and disempowering stance so often adopted by governments in Indigenous affairs.

The failure to lead has been compounded by a failure to listen. It should go without saying that the starting point should be to ask Aboriginal people how they would like to be recognised in the Constitution. To impose an outcome, or take their views for granted, would be to continue the patronising and disempowering stance so often adopted by governments in indigenous affairs.

Unfortunately, the debate has proceeded without Aboriginal people being given the opportunity to express a collective view. In fact, federal politics have frustrated this. Most importantly, the Abbott government defunded Australia’s only peak Aboriginal organisation, the National Congress of Australia’s First Peoples.

As a result, Aboriginal leaders have played a prominent, individual role, without the authority to speak on behalf of their community. This is finally changing. The Prime Minister's Referendum Council, though formed has no teeth.

Over the course of generations, Indigenous people have been denied the vote, had their children removed, been prevented from marrying, told where they could live and had their wages confiscated.

Having endured such discrimination, Aboriginal people are calling for a broader resolution to their grievance, including by way of treaty. The case for this powerful and has been made repeatedly over recent years. Not surprisingly, it has resurfaced now in response to a long-running, but inclusive debate constitutional recognition that has often been framed by political leaders in narrow, symbolic terms.

Some people have responded by rejecting the idea of the treaty out of hand. They see it as beyond the realm of the possible, and alien to our legal traditions. Neither view is correct. All comparable countries have treaties in place with their indigenous peoples, including Canada, New Zealand and United States. Some of these agreements have been negotiated in recent years.

Surveys of the Australian public show a disturbing lack of knowledge about the Constitution and Australian government. Rather than being engaged and active citizens, many Australians know little of even the most basic aspects of government. The problem has been demonstrated over many years. For example, a 1987 survey for the Constitutional Commission found that almost half the population is not realise Australia had a written Constitution, with the figure being, nearly 70 per cent of Australians aged between 18 and 24.

These problems can be telling, during a referendum campaign. A lack of knowledge, or false knowledge, on the part of the voter, can translate into a misunderstanding of a proposal, a potential to be manipulated by the Yes or No cases and even an unwillingness to consider change on the basis that 'don't know', vote No' is the best policy. Overall, the record shows that when voters do not understand or have opinion can be headed off, and so that voters in embracing the change.

3. **Studies of Sarah Pritchard**

The opinion of the proposed Constitutional Commission and Chief Justice French, would be replace section 51 (xxvi) of the Australian Constitution with a power of the Commonwealth Parliament to make laws 'with respect to Aboriginal and Torres Strait Islander peoples'. Such laws would be based not on race, rather, as French has suggested, '*on special place of those peoples in the history of the nation'*. The one difference between this proposal and that put forward by the Constitutional Commission and French is use of language and legislation such as the *Native Title Act 1993* (Cth) and since repealed *Aboriginal and Torres Strait Islander Commission Act 1990* (Cth).

Some have expressed concern that replacing section 51 (xxvi) with a new power to make laws with respect to Aboriginal and Torres Islander people would leave open possibility of a future High Court holding that such power permits the making of laws detrimental to, or discriminatory against, Aboriginal Torres Strait Islander peoples. In order to address such concerns, there have been various proposals for a new head power with respect to 'laws

beneficial to Aboriginal and Torres Strait Islander peoples' or with respect to 'laws for the befit of Aboriginal and Torres Islander peoples' , or the like, to make clear that the constitutional text is confined express limitation. A similar approach was proposed by the Rights Committee which reported to the Constitutional Commission, however was not adopted by the Commission (Commonwealth Constitutional Commission, *Final Report of the Constitutional Commission*, vol 2, 720 [10.410].

A difficulty with such approach is that it leaves for later argument as to the scope of the Commonwealth Parliament's legislative power. However, the contrary view is that this would be necessary consequence of a decision by the Australian people in a constitutional referendum that there be *judicial* protection of the rights and interests of Aboriginal and Torres Strait Islander peoples, and the powers of Commonwealth Parliament with respect to Indigenous Australians be limited in accordance with international standards. Pritchard is of the view, the insertion of a general guarantee of racial equality or racial non- discrimination could achieve the same result. Thus one option would be to subject a power to legislate with respect to Aboriginal and Torres Strait Islander peoples to a general racial equality or non-discrimination guarantee.

The insertion of a general guarantee of racial equality or racial non-discrimination would not only confirm that the power to make laws with respect to Aboriginal and Torres Strait Islander peoples is confined to laws advantageous to them based on recognition of their place in the history of the nation. It could also be expressed to secure protection of rights which have been negotiated or recognised in the past (such as land rights, native title rights, heritage protection rights), but also those which might be negotiated or recognised in the future (or example, through agreements and decisions of the High Court). In this regard it is to be recalled the Constitutional Commission also recommended a guarantee against discrimination on various grounds including race (not, however, a general guarantee of equality) ((Commonwealth Constitutional Commission, *Final Report of the Constitutional Commission*, Vol 1, ch 9). As Godfrey Lindell points out in his article for this special issue, the concept of equality was seen by the Constitution Commission as provoking long-standing and continuing controversies in countries which had such a guarantee, whereas discrimination was a judicially workable and manageable concept with which are used to dealing. Lindell's wise words of caution are to contrasted with Hilary Charlesworth's and Andrea Durbach's arguments for the inclusion of an equality guarantee in the *Constitution*, which would draw upon relevant jurisprudential developments since 1988-both international and comparative - and which might lead to a settling of some of the controversies to which the Commission referred.

A further significant matter to consider in connection with proposals for a real equality or non-discrimination guarantee is that it is one thing to prevent the singling out Aboriginal and Torres Strait Islander people for adverse treatment by a general guarantee of racial equality or non-discrimination, but quite another to ensure that special or advantageous or beneficial treatment is not susceptible to invalidation on the ground of infringing such a general guarantee.

4. Studies by Fr Frank Brennan SJ AO

Australians will not vote for a constitutional First Nations Voice until they have heard it and seen it in action. The work needs to begin immediately on legislating for that First Nations

Voice, so that it is operating as an integral part of national policy and law making, attracting national support for constitutional recognition. Presumably this new legislated entity would replace the existing National Congress of Australia's First Peoples which boasts *'As a company the Congress is owned and controlled by its membership and is independent of Government. Together we will be leaders and advocates for recognising our status and rights as First Nations Peoples in Australia.'*

One desirable change would be to section 51 (26) of the Constitution which could be amended to provide that the Commonwealth Parliament have power to make laws with respect to the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples, and their continuing relationship with their traditional lands and waters. These are distinctively Indigenous matters which warrant Indigenous peoples having a secure place at the table. Section 51 (26) of the Constitution could go on to provide that the Parliament have power to make laws with respect to the constitution and functions of an Aboriginal and Torres Strait Islander Council which may request the Parliament to enact a law or advise the Parliament of the effect of a law proposed law relating to any of those matters.

One thing is certain following the cry from the heart at Uluru. There is no quick fix to the Australian Constitution. Successful constitutional change acceptable to the Indigenous leaders gathered at Uluru won't be happening anytime soon. We need to take time to get this right. First Nations Voice.

5. **Studies by Julian Burnside QC**

Australia should be shameful of its past. Emmanuel Ortiz published a poem. He presented it at a public gathering, and apparently had been asked to observe a moment's silence before he began. It is a fine poem. It is too long to read in its entirety, but I think you will understand why I choose to read it.

It is called:

A MOMENT OF SILENCE, BEFORE I START THIS POEM

Before I start this poem, I'd like to ask you to join me

In a moment of silence

In honor of those who died in the World Trade Center and the

Pentagon last September 11th.

I would also like to ask you

To offer up a moment of silence

For all of those who have been harassed, imprisoned,

disappeared, tortured, raped, or killed in retaliation for those strikes,

For the victims in both Afghanistan and the U.S.

And if I could just add one more thing...
A full day of silence
For the tens of thousands of Palestinians who have died at the
hands of U.S.-backed Israeli
forces over decades of occupation.
Six months of silence for the million and-a-half Iraqi people,
mostly children, who have died of
malnourishment or starvation as a result of an 11-year U.S.
embargo against the country.

Before I begin this poem,
Two months of silence for the Blacks under Apartheid in South Africa,
Where homeland security made them aliens in their own country.
Nine months of silence for the dead in Hiroshima and Nagasaki,
Where death rained down and peeled back every layer of
concrete, steel, earth and skin
And the survivors went on as if alive.
A year of silence for the millions of dead in Vietnam - a people,
not a war - for those who
know a thing or two about the scent of burning fuel, their
relatives' bones buried in it, their babies born of it.
A year of silence for the dead in Cambodia and Laos, victims of
a secret war ... ssssshhhhh....
Say nothing ... we do not want them to learn that they are dead.
Two months of silence for the decades of dead in Colombia,
Whose names, like the corpses they once represented, have
piled up and slipped off our tongues.

So you want a moment of silence?
And we are all left speechless

Our tongues snatched from our mouths

Our eyes stapled shut

A moment of silence

And the poets have all been laid to rest

The drums disintegrating into dust.

And still you want a moment of silence for your dead?

We could give you lifetimes of empty:

The unmarked graves

The lost languages

The uprooted trees and histories

The dead stares on the faces of nameless children

Before I start this poem we could be silent forever

Or just long enough to hunger,

For the dust to bury us

And you would still ask us

For more of our silence.

You want a moment of silence

Then take it NOW,

Before this poem begins.

Here, in the echo of my voice,

In the pause between goosesteps of the second hand,

In the space between bodies in embrace,

Here is your silence.

Take it.

But take it all...Do not cut in line.

Let your silence begin at the beginning of crime. But we,

Tonight we will keep right on singing...For our dead.

Australia has fallen into a great and ominous silence, a silence of forgetting. You, who care about human rights, must help break that complacent silence, and resolve that you will keep on singing for all those whose human rights need protection.

Conclusion

Studies have shown there is no political will to give recognition to the First Nations Peoples even after 60000 years. There needs to be change of heart.