

Supplementary Submission to the Joint Select Committee

Establishing an Indigenous Body in
the Constitution

January 2015



CAPE YORK INSTITUTE

CAPE YORK PARTNERSHIP

Responsibility • Opportunity • Freedom



Contents

Contents

| | | |
|-----|---|----|
| 1 | Summary of recommendations | 3 |
| 2 | Purpose of this supplementary submission..... | 3 |
| 3 | The argument for an Indigenous body in the Constitution | 4 |
| 3.1 | Why in the Constitution?..... | 4 |
| 3.2 | Why an Indigenous body?..... | 5 |
| 3.3 | Two possible solutions..... | 6 |
| 3.4 | Non-justiciability | 8 |
| 3.5 | Indigenous advocacy for a better democratic voice | 9 |
| 3.6 | Indigenous litigants or participants in parliamentary democracy?..... | 12 |
| 4 | A more detailed look at the relevant law | 13 |
| 4.1 | The Indigenous right to be consulted | 13 |
| 4.2 | Current law in Australia | 15 |
| 4.3 | International examples | 17 |
| 4.4 | Insights from New Zealand | 18 |
| 4.5 | The duty to consult in Canada..... | 19 |
| 4.6 | Minimising uncertainty..... | 20 |
| 4.7 | Learning from ATSIC..... | 22 |
| 5 | Design principles for a new Chapter 1A..... | 23 |
| 5.1 | Design principles for the legislation setting up the body | 25 |
| 6 | Conclusion..... | 25 |



1 Summary of recommendations

We recommend the following package of reforms.

Constitutional reforms:

- Remove s 25 of the Constitution (provision for disqualification of races from voting);
- Amend s 51 (xxvi) of the Constitution (the Race Power) to become a power to make laws with respect to Aboriginal and Torres Strait Islander Peoples;
- Add a new Chapter 1A to the Constitution (establishing an Indigenous body that Parliament must consult with and receive advice from when making laws affecting Indigenous interests).

Legislative and other reforms:

- Enact a *Declaration* and/or *Statute of Reconciliation* to set in place high level principles or ethics that should govern Indigenous affairs, the relationship between Indigenous people and the government, and reconciliation into the future; this would contain the symbolic recognition and poetry: recognition of history, culture, languages and heritage;
- Legislation to set up the mechanisms of the Indigenous body established in the Constitution;
- Empowered Communities legislation and related institutional arrangements;
- A language and culture revitalisation agenda.

Political process:

- Indigenous constitutional conventions should be conducted around the nation so that Indigenous Australians can grapple with the political and legal challenges at hand and form considered views on what constitutional and other reform proposals they support;
- Bipartisan support for this package should be built and maintained.

2 Purpose of this supplementary submission

The purpose of this supplementary submission is to explain in greater detail the proposal to create an Indigenous body to advise and consult with Parliament, in a new Chapter 1A of the Constitution.

The submission will explain the Indigenous right to be consulted as it arises in international law, and how it currently plays out in Australian domestic law. It will also explore how some other nations ensure that Indigenous voices are heard in their institutional arrangements. Finally, this submission will outline important design



principles which should guide how the new Chapter is drafted. The aim should be to draft a procedural Chapter to the Constitution that is non-justiciable and therefore does not transfer any power to judges, but that creates a real platform for Indigenous people to be heard by and engage with the democratic processes of Parliament.

It should be a handsome, authoritative Chapter of the Constitution that Indigenous people can believe in, that will make a real difference to the way Indigenous affairs operates in the nation.

3 The argument for an Indigenous body in the Constitution

Indigenous constitutional recognition should guarantee Indigenous people a better say in the nation's democratic processes with respect to Indigenous affairs. A new Chapter 1A should be inserted into the Constitution to create an Indigenous body to advise and consult with Parliament on matters affecting Indigenous interests. While the body's advice would not be binding, Parliament should be constitutionally required to consult with and consider the advice of the Indigenous body when debating proposed laws.

This could be an Australian constitutional expression of the Indigenous right to be consulted.

Indigenous Australians have for decades sought a greater voice in Australia's democratic system. In a very practical sense, this is what Indigenous recognition is all about – being heard and being recognised in the nation's institutional arrangements. Through constitutional recognition, Indigenous people seek an enduring promise for a better relationship with governments into the future. This would be an enduring promise that Indigenous views will be heard.

3.1 Why in the Constitution?

The Constitution clarifies and defines important national power relationships, like that between the Commonwealth and the States. It should also ensure that the relationship between government and Indigenous people is just and fair, rather than characterised by exclusion and discrimination as has been the case in the past.

The Constitution sets out the rules of government: it gives Parliament its powers and also defines, limits and places conditions upon that power. The Constitution is full of procedural rules and constraints on the exercise of Parliamentary power. By restraining the arbitrary exercise of power, the Constitution protects the rights and freedoms of Australian citizens. We have no bill of rights: our Constitution mostly



offers procedural and political protection of rights and freedoms. This is also reflected in the nature of our federation. A carefully balanced federal structure ensures that national power is not overly centralised; the Senate provides a political check on Commonwealth power.

In creating the federation, the drafters chose to protect even the most minority States from the ‘tyranny of the majority’. The Constitution ensures that even the most sparsely populated States get an equal voice in the Senate.¹ Our institutional arrangements also over time have made provision for Territory senators to be heard in Parliament.² The drafters did not adhere to strict majoritarianism in this respect. Rather, the drafters knew it was important to recognise the former colonies as historically, politically and geographically distinct polities, warranting recognition and a voice within the democratic system.³

Indigenous Australians are also a historically, politically and sometimes geographically distinct polity within the nation. Yet, the Constitution contains no guarantee that the Indigenous voice be heard by Parliament, even on matters directly concerning us. Far from ensuring fair recognition, the Constitution initially explicitly excluded Indigenous people. Even now, the Constitution allows and promotes discrimination against us.

This injustice should be rectified. There are two ways this can happen. One, the potential for adverse discrimination against Indigenous people can be rectified through a judicially adjudicated racial non-discrimination clause, as was proposed by the Expert Panel, or as a weaker option, a judicially adjudicated qualified Indigenous power. Or two, it can be rectified politically and procedurally, by guaranteeing that the Indigenous voice is heard in Parliament’s democratic processes.

Either way, a constitutional solution is required to what is a constitutional problem.

3.2 Why an Indigenous body?

It is true that Indigenous Australians are not the only minority group that might lack a voice in Australia’s democratic system. There are other ethnic and political minorities within Australian citizenship. But Indigenous people occupy a historically, politically and legally distinct position within the nation, different to any other sub-category of citizen.

¹ Section 7 requires ‘equal representation’ of each State.

² E.g. *Northern Territory Representation Act 1922* (Cth); *Senate (Representation of Territories) Act 1973* (Cth).

³ See also Chris Mitchell, ‘Towards a national settlement’, *The Australian*, 17 September 2014.



Indigenous people are the only group that was dispossessed and displaced to make way for British settlement and the establishment of the nation. We are the only group that was uniquely excluded and discriminated against by the constitutional arrangements of 1901. We are therefore the only group requiring legislative solutions to address and articulate the rights and interests arising out of this unique history – for example, Native Title and Indigenous heritage laws. No other minority group requires legislative responses to the unique rights and interests arising out of a history of dispossession in Australia. Indigenous people are therefore the only group requiring a specific legislative power for this purpose.

It is only right that Indigenous people should get a say in Parliament's legislative solutions with respect to these distinct rights and interests. The Constitution should make provision for this.

Constitutions around the world adapt their institutions to recognise Indigenous peoples as politically, legally and historically distinct groups of citizens. This is also reflected in international law, under the Declaration of the Rights of Indigenous Peoples (DRIP) and the Convention to Eliminate all forms of Racial Discrimination (CERD).

As well as being equal citizens, Indigenous peoples have unique rights and interests that warrant recognition within nations.⁴

3.3 Two possible solutions

The Expert Panel's proposed racial non-discrimination clause has not yet won political consensus. As a result, the Joint Select Committee is considering narrower, weaker versions of the racial non-discrimination clause, perhaps in the form of a qualified Indigenous power.⁵

⁴ For example, the preamble to DRIP affirms "that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such," and "that indigenous individuals are entitled without discrimination to all human rights recognized in international law, *and* that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples..." This is also explicitly reflected in the Articles.

⁵ The Joint Select Committee stated: "The committee has received evidence of community support for a prohibition of racial discrimination, however it notes mixed levels of support for proposed new section 116A and the potential for divisive debate about its merit. The committee considered whether prohibiting racial discrimination against Aboriginal and Torres Strait Islander peoples could be achieved without the need to enact section 116A... The committee has also heard evidence that highlights the risks and implications that might flow from the Expert Panel's proposed new section 116A." See Joint Select Committee on Constitutional Recognition of



These types of remedies would create substantive and judicially adjudicated limitations on Parliament's power. They would create legal and justiciable constitutional protections for Indigenous people. That is why these types of proposals are sometimes criticised by constitutional conservatives, who often oppose constitutional reforms that may derogate from parliamentary sovereignty and transfer decision making power to unelected judges.⁶

Rather than creating a judicially adjudicated racial non-discrimination clause to protect Indigenous people, another solution would be to address the problem politically and procedurally, by increasing Indigenous participation in Parliament's democratic processes and ensuring that Indigenous views are better heard by Parliament when it makes laws and policies for Indigenous affairs. After all, this is arguably why the discrimination of the past has occurred – because Parliaments have never been good at listening to the Indigenous minority. It is now acknowledged that proper consultation with Indigenous people is the key to a non-discriminatory, just relationship with government. Yet there are no formal processes for this to happen.

A reform like this – to guarantee the Indigenous voice in Parliament's law and policy making for Indigenous affairs – would also be more in keeping with the view that the Australian Constitution is a procedural, practical and pragmatic charter of government, and not an appropriate vehicle for rights, values and aspirations.⁷

Aboriginal and Torres Strait Islander Peoples, 'Interim Report', July 2014, 19-21; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 'Progress Report', October 2014, 7-9; see also Rosalind Dixon and George Williams, 'Drafting a replacement to the races power in the Australian Constitution' (2014) 25 *Public Law Review* 83; Anne Twomey, 'A revised proposal for Indigenous recognition' 36 (2014) *Sydney Law Review* 381.

⁶ Dan Harrison, 'Dodson shows support for constitutional ban on racial discrimination', *Sydney Morning Herald*, 12 July 2012; Greg Sheridan, 'Constitutional change will divide not unite the nation', *The Australian*, 20 September 2014; Greg Craven, 'Keep the constitutional change simple', *Australian Financial Review*, 6 February 2012; Greg Craven, 'The con-cons constitutional conundrum', *The Australian*, 19 February 2014. Patricia Karvelas 'Historic Constitution vote over Indigenous recognition facing hurdles', *The Australian*, 20 January 2012; James Allan, 'Constitutional fiddling brings inherent danger', *The Australian*, 9 December 2011; For example Anne Twomey, 'Indigenous recognition explained: the issues, risks and options', (2012) *Constitutional reform unit, University of Sydney Law School*.

⁷ See Jeffrey Goldsworthy, 'Constitutional cultures, democracy and unwritten principles', (2012) 3 *University of Illinois Law Review* 683, 688; Damien Freeman and Julian Leaser's argument in, 'The Australian Declaration of Recognition: capturing the nation's aspirations by recognising Indigenous Australians' (2014), (Submission 29); Greg Craven, *Conversations with the Constitution: not just a piece of paper* (UNSW Press, 2004), 1-59.



3.4 Non-justiciability

A procedural requirement in the Constitution for Parliament to consult with and consider the advice of an Indigenous body, properly drafted, could be non-justiciable. It would therefore not derogate from parliamentary sovereignty or transfer power to judges. It could be drafted like other non-justiciable sections of the Constitution, and would therefore be treated like internal instructions to Parliament rather than clauses which create justiciable issues.

For example, sections 53 and 54 of the Constitution provide procedural instructions to Parliament with respect to the passage of ‘proposed laws’. Both the drafters of the Constitution⁸ and the High Court have treated these sections as non-justiciable. In general, the High Court will not interfere with the ‘intramural’ or internal workings of the Houses.⁹

This however does not mean that Parliament just ignores these types of constitutional clauses. As Appleby and Webster explain:

“In these situations, ‘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.’”¹⁰

If drafted to emulate these kinds of non-justiciable clauses, a procedural requirement for Parliament to consult with and consider the advice of the Indigenous body would have to be interpreted and applied by Parliament. It would therefore not derogate from Parliamentary sovereignty or transfer interpretative power to the judiciary.

⁸ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, 473 (Edmund Barton).

⁹ The non-justiciable character of section 53 was discussed in *Osborne v Commonwealth* (1911) 12 CLR 321, 336, and *Western Australia v Commonwealth* (1995) 183 CLR 373, 482. See also Geoffrey Lindell, ‘The Justiciability of Political Questions: Recent Developments’ in H P Lee and George Winterton (eds) *Australian Constitutional Perspectives* (Lawbook, 1992) 180–1.

¹⁰ Gabrielle Appleby and Adam Webster, ‘Parliament’s role in constitutional interpretation’ (2013) 37 *Melbourne University Law Review* 255, 269–270.



It would also not diminish in anyway Australia's representative democracy. Parliament would still be accountable to the people, and every citizen would still have one vote for each House.

Rather, this proposal would create an additional process to complement representative democracy by ensuring that an Indigenous body is empowered to share its views on Indigenous affairs with elected Parliamentary representatives. It would provide Indigenous people a real platform on which to be heard in the democratic processes of Parliament.

3.5 Indigenous advocacy for a better democratic voice

It is now well established that proper consultation is key to effective Indigenous policy – it is integral to closing the gap.¹¹ Without proper Indigenous input, government measures for Indigenous people will continue to be ineffective and inefficient. Top down government measures do not work. Indigenous people live the Indigenous predicament. It is we who are best place to provide the solutions to the problems that confront us.

This is why, for decades, Indigenous Australians have called for better political representation and democratic participation, and better input into parliamentary processes with respect to Indigenous affairs:

- In 1927, Fred Maynard, President of the Australian Aboriginal Progressive Association, wrote to the then NSW Premier, JT Lang, calling for the control of Indigenous affairs to be transferred to an Indigenous board made up of selected Indigenous representatives;¹²
- In 1933, King Barraga in NSW called for Indigenous representation in federal Parliament;¹³
- In 1937, William Cooper in Victoria echoed the call in a petition to King George (the petition was never delivered to the King because the government thought reserved seats were constitutionally impossible);¹⁴
- In 1949, Doug Nicholls wrote to Prime Minister Ben Chifley arguing for Indigenous representation in federal Parliament;¹⁵

¹¹ See Noel Pearson, 'A rightful place: race, recognition and a more complete Commonwealth' *Quarterly Essay* (2014, Black Inc), 48.

¹² Alexander Reiley, 'Dedicated seats in the Federal Parliament for Indigenous Australians' (2001) 2(1) *Balay: Law, Culture and Colonialism* 73, 82.

¹³ *Ibid.*

¹⁴ *Ibid.*



- There were many calls in the 1980's, including submissions to the 1988 constitutional commission, for Indigenous reserved seats;¹⁶
- ATSIC was the result of Indigenous advocacy for the need for Indigenous political representation;
- In 1995, ATSIC called for reserved Indigenous seats in Parliament, and as an interim measure, suggested that the ATSIC chairperson to be *granted observer status in Parliament, and ability to speak to both houses on bills affecting Indigenous interests*, and to make an annual report on Indigenous affairs;¹⁷
- In 1998, a NSW parliamentary inquiry looked into reserved seats, but recommended instead an Aboriginal Assembly to further representation in Parliament and to look into reserved seats;¹⁸
- In 2007, Noel Pearson urged greater Indigenous participation in democracy, as well as mechanisms to better manage the interface between government and Indigenous people, to ensure a more equal partnership;¹⁹
- In 2011, Congress called for reserved Indigenous seats in Parliament;²⁰
- In 2011, CYI in its submission to the Expert Panel called for a Rights and Responsibilities Commission to be part of constitutional reform, to review special measures and provide Indigenous input into review of laws.²¹

Recently, in 2014:

¹⁵ *Ibid*, 82-3.

¹⁶ *Ibid*, 83.

¹⁷ 'Recognition, rights and reform : a report to Government on native title social justice measures', ATSIC, 1995; Peter Niemczak, 'Aboriginal Political Representation: a review of several jurisdictions' (2008) Parliamentary Information and Research Service, Law and Government Division, Canada, 7.

¹⁸ Alexander Reiley, 'Dedicated seats in the Federal Parliament for Indigenous Australians' (2001) 2(1) *Balay: Law, Culture and Colonialism* 73, 83;

¹⁹ Noel Pearson, 'A structure for empowerment' (The Weekend Australian) 16-17 June 2007.

²⁰ Misha Schubert, 'Indigenous want reserved seats in Parliament: Congress', The Age, 31 July 2011.

²¹ Cape York Institute 'Submission to the Expert Panel' (2011), 33-35; see also Expert Panel on the Constitutional Recognition of Indigenous Peoples, *Final Report* (2012) 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution', 149: "The Cape York Institute submission also contained a proposal for a new section...to provide a mechanism for periodic review of special measures... The proposed text... provides: *In assessing the effectiveness of laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, the views and aspirations of Aboriginal and Torres Strait Islander people affected by the laws shall be taken into account.*"



- Michael Mansell advocated for institutional reform to effect a '7th Aboriginal State' to ensure better Indigenous input into Australia's democratic processes;²²
- There have been renewed calls for reserved Indigenous senate seats;²³
- Noel Pearson and CYI proposed that the Constitution be amended to create an Indigenous body that Parliament must consult with and receive advice from when passing laws that affect Indigenous interests;²⁴
- Marion Scrymgour also called for a special advisory body made up of Indigenous representatives.²⁵

Increased Indigenous participation in democracy, through various models, has been the subject of much Indigenous advocacy. Similarly, an Indigenous representative or review body to participate in Parliament's processes has also been proposed by non-Indigenous commentators and scholars, as a way of effectively addressing many of the challenges in Indigenous affairs.²⁶

CYI's view is that an Indigenous body to consult with and advise Parliament would be preferable to, as well as more politically achievable, than reserved Indigenous seats in Parliament. However, we propose that representatives of the body should be able to address the Parliament and answer questions on relevant matters, as well as observe Parliament sitting.

²² Aboriginal Provisional Government website: <http://www.apg.org.au/>.

²³ Chris Mitchell, 'Towards a national settlement', *The Australian*, 17 September 2014; Rosie Lewis, 'Reserved seats for Aboriginal MPs, says Jacie Lambie', *The Australian*, 14 September 2014.

²⁴ See also Noel Pearson, 'A rightful place: race, recognition and a more complete Commonwealth' *Quarterly Essay* (2014, Black Inc); Cape York Institute, 'Submission to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (October 2014).

²⁵ Marion Scrymgour (2014)(NT Legislative Assembly) 2014 Nugget Coombs oration <http://blogs.crikey.com.au/northern/2014/10/12/marion-scrymgour-on-stronger-futures-and-constitutional-reform/>

²⁶ John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *Journal of Public Administration* 419; Eric Sidoti, 'Indigenous Political Representation concept paper' (2008) *The Whitlam Institute*; Shireen Morris, 'Agreement-making: the need for democratic principles, individual rights and equal opportunities in Indigenous Australia' (2011)36(3) *Alternative Law Journal* 187; Shireen Morris, 'Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary' (2011) 7(26) *Indigenous Law Bulletin* 7, 10-11 argued: "A built-in review requirement for all special measures and race-based laws, whether based on socio-economic need or pre-existing Indigenous right, should be incorporated into a new constitutional protection against racial discrimination, to ensure compliance with non-discrimination principles and to ensure all special measures are legitimate, effective and agreed to."



3.6 Indigenous litigants or participants in parliamentary democracy?

A key question in finding the appropriate constitutional reform solution for Australia is to decide whether Indigenous constitutional recognition should involve Indigenous people primarily as litigants when crisis arise, or as participants in the everyday procedures of our parliamentary democracy.

As noted, the Constitution provides Parliament with its powers and also provides restraints and limitations on those powers. The Constitution can provide substantive and justiciable limitations on power, or it can provide procedural and political limitations on power.

The Panel's proposed racial non-discrimination clause and the Committee's proposed qualified 'but not so as to adversely discriminate' power both impose substantive and justiciable limitations on Parliament's power. Under these reform options, the judiciary decides what is discriminatory or not, because the clauses will ultimately be judicially adjudicated.

On the plus side for Indigenous people, this might mean that the court strikes down a discriminatory law that is in operation. On the negative side, however, court cases are long and expensive. Constitutional protections against racial discrimination provide retrospective and reactive protection, and are therefore a *defensive* option. The discriminatory law would already be passed by Parliament and would already be in operation. Then it has to be challenged by a litigant who might feel the law is in breach of the new racial non-discrimination clause. Then the case has to get to the High Court. Then the litigant challenging the law might win or lose. The Court may say the law is discriminatory, or they may say it is a valid special measure. There are no guarantees.

It is likely that a law would only get struck down where it involves egregious and blatant racism. This is probably unlikely to happen regularly in the contemporary setting. Most current racial discrimination cases involve high levels of subjectivity around whether the law is an acceptable special measure or discriminatory. It is likely the courts will defer to Parliament in most cases, as happened in *Maloney* (discussed in more detail below).

Such solutions provide an avenue for the Indigenous voice, but as litigants in the courts, reacting retrospectively to discrimination. And these options leave it to judges to decide what is discriminatory or not in particular circumstances.



By contrast, procedural and political constitutional limitations – as opposed to substantive, justiciable limitations on Parliamentary power – do not limit Parliament's power itself. Rather, such procedures specify the way that power must be exercised. An Indigenous body in the Constitution, to consult with and advise Parliament on laws and policies that affect Indigenous interests, would be a political and procedural, *non-justiciable* solution to the problem of racial discrimination against Indigenous people. Not being a veto, it would provide no guarantee that Parliament must follow the body's advice – just as there are no guarantees that the High Court will find a particular law discriminatory in a given set of circumstances.

But an Indigenous body in the Constitution would provide a *proactive and pre-emptive* process for Indigenous engagement with Parliament. It would ensure Indigenous involvement right at the start, when the Indigenous affairs laws are being debated in Parliament. It would provide a clear, constitutionally mandated procedure for Indigenous people to have a say and to articulate their views on what is in the interests of Indigenous people or not, in particular circumstances. But rather than establishing courts and judges as the ultimate retrospective decision-makers on these issues, Parliament would remain supreme.

The procedural and political solution would involve Indigenous people as *participants in Australia's democratic and parliamentary processes*, rather than as litigants. It would provide a direct link between Indigenous people and the Parliament. It would guarantee for all time that Indigenous people participate in Australia's democracy.

We believe that a procedural requirement in the Constitution for Parliament consult with and consider the advice of an Indigenous body would be significantly better than the current situation, which provides no formal processes for Indigenous people to be heard.

It would also arguably be a better solution than having a racial non-discrimination clause in the Constitution, and would most certainly be better than a narrower, weaker, and more uncertain qualified power.

4 A more detailed look at the relevant law

4.1 The Indigenous right to be consulted

Australia has signed up to both the UN Declaration on the Rights of Indigenous Peoples (DRIP) and the Convention to Eliminate all forms of Racial Discrimination (CERD).



DRIP states in Article 18:

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

Article 19 provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The right of Indigenous peoples to be consulted where legislative action affects Indigenous rights and interests is also backed up by racial non-discrimination principles under CERD. Racial non-discrimination principles allow for special measures: positive measures targeted at a particular group in order to promote equal opportunities and to address past discrimination. Special measures are intended to ensure disadvantaged groups – including Indigenous groups – equal enjoyment of their human rights, particularly where there has been past or historical discrimination.²⁷

The CERD Committee has said that special measures should be implemented with the informed consent of the beneficiaries.²⁸ Proper consultation is therefore an important indicator of a valid special measure. This makes logical sense, because if a disadvantaged group does not want a particular measure, how can that measure truly be of benefit to that group? And how can a measure intended to benefit the group and

²⁷ CERD Article 1(4) 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.”

²⁸ CERD, General Recommendation No 23, ‘Indigenous Peoples’, 18/08/97 [4(d)]; Australian Human Rights and Equal Opportunities Commission, *Social Justice Report 2007*, Recommendations 7, 14; see also 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.



address the group's disadvantage be expected to be effective, if the group opposes and resists the measure, and views it as unjust discrimination?

In 1985, when discussing what makes a valid special measure, Justice Brennan said:

"A special measure must have the sole purpose of securing advancement, but what is 'advancement'? ... 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."²⁹

More recently, Chief Justice French said:

"...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 implementation of that measure."³⁰

Proper consultation is crucial to effective implementation of special measures to address disadvantage. There is a clear logical link between non-discrimination and proper consultation. Genuine consultation can prevent discriminatory actions by government. International law confirms that measures designed to assist Indigenous people should be designed and implemented in partnership and consultation with Indigenous people.

Unfortunately, however, the current Australian law does not require proper consultation with Indigenous people on matters affecting Indigenous interests. As a result, Australian Parliaments have too often forged ahead without properly considering Indigenous views. Much discrimination and suffering has resulted.

4.2 Current law in Australia

Recent case law demonstrates that no clear-cut legal duty to consult exists in Australia.

²⁹ *Gerhardy v Brown* (1985)159 CLR 70, 135.

³⁰ *R v Maloney* [2013] HCA 28, 318.



Australia has signed up to both DRIP and CERD, but has so far only incorporated CERD principles into domestic law through the *Racial Discrimination Act 1975 (Cth)* (RDA). This binds the States, corporations and individuals – but the Commonwealth is allowed to racially discriminate under the Constitution, which allows and promotes racial discrimination through sections 25 and 51(xxvi).

The principles of DRIP are not incorporated into Australian law at all. And Indigenous rights to proper consultation under both CERD and DRIP are similarly not incorporated into Australian law. While the RDA offers some important legislative protections against racial discrimination and allows for special measures, it does not explicitly incorporate a duty to consult into its legal definition of ‘special measures’ as established under s 8 (which refers to Article 1(4) of CERD). This means that Australian governments do not have an explicit legal duty to consult before implementing special measures.

Recently, the High Court in *Maloney* said that proper consultation, while a persuasive indicator as to whether a particular law or measure is a valid special measure, is nonetheless not a legal requirement. This is because the duty to consult is not an expressly stated requirement of a special measure in the RDA or in the text of CERD:

“...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. ... At most, the fact that consultation has taken place may assist, in some cases, in determining whether a particular law meets the statutory criteria for a “special measure.”³¹

The fact that our law and institutions do not require proper consultation with Indigenous people where laws and measures affect their rights and interests is a clear deficiency in our current system.

A new Chapter 1A, containing a procedural requirement for Parliament to consult with and consider the advice of an Indigenous body when passing laws that affect Indigenous interests, would address this. It could be an Australian constitutional expression of the Indigenous right to be consulted.

³¹ *R v Maloney* [2013] HCA 28, 334.



4.3 International examples

Nations around the world find unique ways to recognise Indigenous peoples in their institutional arrangements, and to ensure that Indigenous minority voices are heard in the nation's democracy. Each nation must come to its own accommodation of how to effect, in a real and practical way, the principles of Indigenous self-determination within the post-colonial circumstances of the nation.³² As Professor Megan Davis wrote in her response to Noel Pearson's recent *Quarterly Essay*:

"How have other jurisdictions dealt with the elephant and the mouse conundrum? Reserve seats or parliamentary designated seats, Indigenous parliaments, constitutionally entrenched rights, treaty making long after colonisation (post-colonial treaty making) and other constructive arrangements. In my role on United Nations Permanent Forum on Indigenous Issues, I am always struck by the creative ways in which almost all nation states with indigenous populations have accommodated their voices in domestic political arrangements. It is the subject of much literature. As Pearson suggests, it is internal domestic political arrangements that accommodate indigenous peoples voice, that give full expression to the right to self-determination. If you perused some of this literature you would see that 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."³³

In the USA, the native peoples have been recognised as having "domestic dependent sovereignty" status – exclusive of State jurisdiction – since the 1820s. They also have the National Congress of the American Indian,³⁴ and the State of Maine has reserved seats for Aboriginal people.³⁵

³² See Noel Pearson, 'A rightful place: race, recognition and a more complete Commonwealth' *Quarterly Essay* (2014, Black Inc), 41-43.

³³ Megan Davis, 'Response to Noel Pearson's *Quarterly Essay*' (2014).

³⁴ Australian Human Rights Commission, 'Building a sustainable national Indigenous representative body' (2008) *Issues Paper*.

³⁵ Peter Niemczak, 'Aboriginal Political Representation: a review of several jurisdictions' (2008) Parliamentary Information and Research Service, Law and Government Division, Canada, 19-20; Brian Lloyd, 'Dedicated Indigenous representation in the Parliament' (2009) *Parliamentary Library research paper*.



In Sweden, Norway and Finland there are Sami Parliaments which act as advisory bodies to the national Parliaments.³⁶

New Zealand and Canada, discussed in more detail below, also provide good comparable international examples for us to draw upon.

4.4 Insights from New Zealand

In June 2014 CYI undertook a research trip to New Zealand. The detailed learnings from this trip are explained in CYI's New Zealand research report, which has also been submitted to the Committee.

The main insight is this: *effective Indigenous recognition can happen at the institutional, legislative and non-legal levels, as well as at the constitutional level.* Much can be achieved through legislation and institutional arrangements.

New Zealand ensures the Indigenous voice is heard through reserved Maori parliamentary seats and the Maori Council, a national representative body to provide a national Maori voice in Maori affairs. Maori people are also heard through the negotiation and settlement mechanisms of the Waitangi Tribunal.

Additionally, New Zealand promotes Maori as part of the national heritage. Maori is declared an official language in legislation. The Maori Language Commission and related institutional arrangements promote New Zealand as a bicultural nation.

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, for example to promote Indigenous culture and language, as well as adherence to certain agreed principles that should govern the relationship between Indigenous people and governments.

In Australia, we should think of Indigenous recognition as a package of constitutional, legislative and other reforms. Measures to promote and revitalise Indigenous culture and language will be important additions to the constitutional reforms being discussed.

³⁶ Peter Niemczak, 'Aboriginal Political Representation: a review of several jurisdictions' (2008) Parliamentary Information and Research Service, Law and Government Division, Canada, 7; Brian Lloyd, 'Dedicated Indigenous representation in the Parliament' (2009) *Parliamentary Library research paper*; Australian Human Rights Commission, 'Building a sustainable national Indigenous representative body' (2008) *Issues Paper*.



4.5 The duty to consult in Canada

In Canada there is the Assembly of First Nations: the national organisation representing First Nations citizens in Canada which acts as a national Aboriginal advocacy organisation.³⁷

Canadian courts have also developed a Crown duty to consult with Aboriginal people in certain circumstances. This has arisen through judicial interpretation of s 35 of the *Canadian Constitution Act 1982*, which protects existing Aboriginal rights and titles.

The courts have said that the duty of the Crown to consult arises where Aboriginal title has been proven in the court, 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. The courts built upon the historical duty of the Crown to act honourably, which has been used in Canada to help interpret treaties and obligations with respect to Aboriginal peoples.³⁸

But the judicial finding that a duty to consult exists by implication under s 35 of the Canadian Constitution in certain circumstances – where Aboriginal title has been proven and sometimes where it has been claimed – has resulted in some confusion and uncertainty as to the scope and content of the duty and when the duty applies.³⁹ For clarity, the Canadian government has issued guidelines on how to fulfil the duty to consult. A Consultation and Accommodation Unit was established to facilitate practical achievement of the duty.⁴⁰

For Australia, it would be better to outline clearly and explicitly in the Constitution a procedure that both the Parliament and the Indigenous body can follow, to ensure proper consultation on laws and policies that affect Indigenous interests. A clearly articulated procedure will minimise confusion and uncertainty. This way, it will not be left to the judiciary to imply a duty to consult from the Constitution as it is, or from new

³⁷ Australian Human Rights Commission, 'Building a sustainable national Indigenous representative body' (2008) *Issues Paper*.

³⁸ *Taku River* [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, para 24; quoted in E. Ria Tzimas, 'Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation' (1998) *Supreme Court Law Review* 461, 469-70.

³⁹ E. Ria Tzimas, 'Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation' (1998) *Supreme Court Law Review* 461, 463-4; Zena Charowsky, 'The Aboriginal law duty to consult: an introduction for administrative tribunals' (2011) 74 *Saskatchewan Law Review* 213, 214.

⁴⁰ Government of Canada, 'Aboriginal consultation and accommodation – updated guidelines for federal officials to fulfil the duty to consult' (March 2011).



constitutional provisions (for example, a racial non-discrimination clause with a special measures sub-clause, or a qualified power), or potentially from legislation like the RDA.

Relying on the judiciary to imply a duty to consult has thus far not worked for Australia, as demonstrated in *Maloney*. And if the judiciary were left to imply such a duty from new racial non-discrimination provisions, it is likely that uncertainty would arise. A better solution is to state the duty to consult explicitly as part of the constitutional reform package.

4.6 Minimising uncertainty

A racial non-discrimination protection in the Constitution would engage special measures principles in judicial interpretation of the clause. But special measures can be very subjective. Some might say the Intervention was discriminatory;⁴¹ some might say it was a valid special measure to address disadvantage, and certainly some felt that some sort of intervention was necessary.⁴² Some might say Alcohol Management Plans are discriminatory; some might say they are valid special measures to address alcohol abuse and related violence.⁴³

We can look at Australian case law to predict which way the court might go in a given case.⁴⁴ It is likely that, since *Maloney*, Alcohol Management Plans in alcohol-affected Indigenous communities will be valid special measures.⁴⁵ Native Title and land rights laws would be valid special measures, as demonstrated by *Gerhardy v Brown*.⁴⁶ Measures like Abstudy have also been held as valid special measures.⁴⁷ However, laws mandating lower wages for Indigenous people would likely be in breach of a racial non-discrimination clause.⁴⁸

⁴¹ See Australian Human Rights Commission, 'Social Justice Report 2007', Chapter 3.

⁴² See Marcia Langton, 'Trapped in the Aboriginal reality show', (2007) *Griffith Review*; see also Lateline, 'Noel Pearson discusses issues faced by Indigenous communities' 26/6/2007, <http://www.abc.net.au/lateline/content/2007/s1962844.htm>.

⁴³ See Noel Pearson, 'Base alcohol curbs on community need, not false concept of race', *The Australian*, 22 June, 2013.

⁴⁴ 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' (2015) forthcoming in *Monash Law Review*.

⁴⁵ *Maloney v The Queen* [2013] HCA 28.

⁴⁶ *Gerhardy v Brown* (1985) 159 CLR 70.

⁴⁷ *Bruch v Commonwealth* [2002] FMCA 29.

⁴⁸ *Bligh and others v State of Queensland* [1996] HREOCA 28.



But while past case law flowing from the RDA provides a good guide, there can be no clear guarantees as to which way the court will go in a given case interpreting constitutional racial non-discrimination clauses. This is especially true when the clauses proposed differ in structure and wording from the RDA.⁴⁹

Uncertainty increases when we consider a qualified power as opposed to a standalone racial non-discrimination clause. The proposed 'but not so as to adversely discriminate' qualification adapts the wording of 'but not so as to authorize any form of civil conscription' in s 51(xxiiiA)⁵⁰ and also seems to adapt the s51(ii) power with respect to taxation: 'but not so as to discriminate between States or parts of States'. Professors Williams and Dixon argue that because the High Court has interpreted express qualifications to other powers such that they apply to qualify Commonwealth powers generally,⁵¹ the court would probably interpret a new non-discrimination qualification to the new Indigenous power in a similarly broad way, such that it constrains Commonwealth legislative power generally,⁵² thus making the prohibition on racial discrimination stronger and broader than may appear on a literal reading of the qualified power. While this is a reasonable prediction,⁵³ it relies on predicted judicial implication and so cannot be totally certain.

The only clear and certain way to prevent Parliament from using its broad powers in a racially discriminatory way would be to establish the broad limitation explicitly, by adopting a broad racial non-discrimination clause, such as that proposed by the Expert Panel. The qualified power option provides much narrower explicit protection, and relies on judicial interpretation to broaden the scope of the protection.

All these types of substantive limitations ask the judiciary to decide what is discriminatory or not in the circumstances. And importantly, *proper consultation will probably not be a considered a legal requirement* in deciding what is discriminatory or not. Since *Malonely*, it is likely that the courts will not incorporate any requirements for

⁴⁹ Anne Twomey, 'Entrenching racial discrimination? The proposed constitutionalisation of not so special measures', (2012) *Constitutional Critique, the Constitutional Reform Unit blog*, Sydney University.

⁵⁰ Rosalind Dixon and George Williams, 'Drafting a replacement to the races power in the Australian Constitution' (2014) 25 *Public Law Review* 83, 87.

⁵¹ Citing *Bourke v State Bank (NSW)* (1990) 170 CLR 276 with respect to the s 51(xiii) power.

⁵² Rosalind Dixon and George Williams, 'Drafting a replacement to the races power in the Australian Constitution' (2014) 25 *Public Law Review* 83, 87-8.

⁵³ Twomey agrees that qualified the Indigenous power would in effect qualify the other Commonwealth powers, giving the qualification a broad scope. Anne Twomey, 'A revised proposal for Indigenous constitutional recognition' (2014) 36 *Sydney Law Review* 381, 409.



proper consultation with Indigenous people by implication from racial non-discrimination principles, *because the Indigenous right to be consulted is not stated in Australian law.*

If proper consultation is important, we need to say so clearly in our highest law and establish the appropriate procedures. We cannot rely on the courts to imply a right to be consulted from a racial non-discrimination clause, a qualified power, the RDA, or otherwise. The procedure for consultation with the Indigenous body should be spelt out clearly and explicitly in the Constitution, where it will carry political and moral authority and won't be struck down or ignored at whim.

The design and details of the body can be articulated in legislation and can evolve over time as needed.

4.7 Learning from ATSIC

In designing the body, it will be important to learn from ATSIC. ATSIC was an institutional arrangement that allowed Indigenous people to have a voice and to be represented in national affairs. ATSIC of course had problems, which we are fortunate to be able to learn from. But the ATSIC model also had strengths.

Unlike ATSIC, the Indigenous body we propose should be aimed at facilitating Indigenous participation in democracy, not creating bureaucracy. The body should also be designed so that it is connected and accountable to Indigenous people at a local level.⁵⁴

The easy axing of ATSIC demonstrates why it is important for Indigenous people that this body is established in the Constitution. 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 will be flexibility for Parliament to evolve and improve the institution over time. But when

⁵⁴ See comments by Marion Scrymgour (2014)(NT Legislative Assembly) 2014 Nugget Coombs oration <http://blogs.crikey.com.au/northern/2014/10/12/marion-scrymgour-on-stronger-futures-and-constitutional-reform/>



problems do arise, there should be a constitutional imperative for Parliament to sort them out.

It is important to remember that just because an institution has the potential to harbour corrupt or incompetent individuals from time to time, does not necessarily mean the institution itself is flawed. We should all be aware of our own subtle prejudices when discussing the merits of an Indigenous representative body. When there are corrupt or incompetent white politicians in Parliament, as has happened with relatively regularity throughout Australia's history (and indeed the history of the world), no one seriously calls for the institution of Parliament to be abolished; and no one insinuates that white Australians somehow cannot be trusted to hold public positions of authority, responsibility and influence. Instead, we trust citizens to vote out the offending individual, we trust the processes and procedures of our institutions to weed out corruption and incompetence over time, and we modify the institution's procedures as needed.

Similarly, just because ATSIC had problems and was ultimately abolished, does not mean Indigenous representative bodies are a bad idea. Such institutions need to be designed better and be supported to improve over time. We need to persevere to overcome problems, just as we do with any important national institution.

Importantly, however, the imperative for the body to exist and operate will remain in the Constitution. Indigenous people will forever more be able to exert political pressure, with a constitutional mandate, to ensure that the body exists and operates effectively. They will forever more have a platform on which to take better responsibility for Indigenous affairs.

5 Design principles for a new Chapter 1A

A new Chapter 1A should be inserted into the Constitution:

- establishing an Aboriginal and Torres Strait Islander body to provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples;
- providing Parliament with the power to make laws with respect to the composition, roles, functions and procedures of the body;
- requiring that a copy of the body's advice be tabled in each House of Parliament;
- requiring the House of Representatives and the Senate to give consideration to the body's tabled advice in debating proposed laws relating to Aboriginal and Torres Strait Islander peoples.



The following design principles should apply when formulating the precise words of the new Chapter 1A, giving effect to the requirements above.

Firstly, the new Chapter must be meaningful to Indigenous people. It must genuinely make a difference to the position of Indigenous people within the nation. It must create a real constitutional imperative for Parliament to consult with and consider the advice of the Indigenous body. It must fundamentally change for the better the way Indigenous affairs runs in this country. It must guarantee a better way for the Parliament to operate its law and policy making for Indigenous affairs – for all time.

Secondly, this constitutional amendment must have bipartisan support. It should be drafted in a way that responds to the objections of constitutional conservatives. It must therefore not undermine parliamentary sovereignty, it must not transfer power to the High Court, and must not create legal uncertainty.

Thirdly, in order to not derogate from parliamentary sovereignty by transferring power to the High Court, this procedural Chapter in the Constitution should be drafted to operate through political and moral, rather than legal and judicial, force. It needs to be drafted in a way that is non-justiciable, but it also must not be mealy-mouthed and meaningless. Ugly, explicit ‘non-justiciable’ and ‘no legal effect’ clauses should be avoided. Such clauses would not be supported by Indigenous people.⁵⁵ Our legal consultations indicate that it is possible to draft a handsome, non-justiciable, procedural Chapter without using an explicit ‘no legal effect’ or ‘non-justiciable’ clause.

The Chapter should therefore be drafted such that:

- it is handsome and elegant: it provides a meaningful constitutional Chapter that Indigenous people can believe in;
- it provides a real, detailed procedure for Parliament to follow;
- it is non-justiciable: it does not transfer power to the courts (but it should not contain an unattractive ‘non-justiciable’ or ‘no legal effect’ style clause) and it therefore does not diminish parliamentary sovereignty;
- it is efficient: the procedure should not slow down or hold up the machinery of Parliament;
- it is not open to abuse: Parliament must keep running if no advice is delivered by the body on a particular law;

⁵⁵ See Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: report of the Expert Panel* (January 2012), 113-115.



- it is certain and clear: it is precise enough to be understood easily by all parties.

5.1 Design principles for the legislation setting up the body

As discussed, legislation will need to be enacted to set up the body and outline its procedures, powers and functions in more detail.

We recommend that in addition to the duties and procedures specified in the Constitution, the body should be given other functions in addition to its constitutional role in advising on Parliament's proposed laws. The body should not just be reactive to Parliament's proposals; it should be proactive with its own proposals. The body should be legislatively authorised to give advice to Parliament on laws or policies that it thinks should be enacted, or to suggest amendments to existing laws that may not be under current consideration by the Parliament.

Similarly, for the Indigenous body's advice to carry political and moral force, we recommend that the legislation setting up the body should:

- specify that the body's advice is always made public and published;
- specify that body representative/s be authorised to address the Parliament and answer questions from Parliament with respect to tabled advice;
- specify that body representative/s be authorised to observe the proceedings in Parliament, so that the body is properly informed and up to date;
- specify that the meaning of 'with respect to Aboriginal and Torres Strait Islander people' in the Chapter should be given a wide meaning by Parliament, and that the body should have wide discretion as to the matters it advises on. Given that the procedure is not a veto and does not have the potential to unduly hold up Parliament, there is no reason the body should not be able to advise on a wide range of matters if it wishes to do so.

6 Conclusion

This supplementary submission has articulated in greater detail the arguments for a constitutional amendment to establish an Indigenous body to consult with and advise Parliament on matters affecting Indigenous interests. We recommend that the Committee seriously consider this proposal.

Widespread Indigenous support also needs to be established. Bipartisan support for this idea needs to be built and maintained.



We recommend that Indigenous constitutional conventions are held during 2015, so that Indigenous Australians can grapple with the many ideas currently being considered and decide which reform solutions they support. These conventions will enable Indigenous reform preferences to be ascertained.