SUBMISSION TO JOINT SELECT COMMITTEE ON VOICE PROVISIONS

Summary

The Committee has invited submissions directed to the Bill for a referendum on the Aboriginal and Torres Strait Islander Voice. The provisions include a proposal to recognise First Peoples of Australia through a body to be called the Voice with power to make representations to Parliament and the Executive Government of the Commonwealth on matters relating to ATSI peoples.

This submission points to a lack of good and sufficient reasons to proceed with these provisions. It says that a Voice should not be enshrined in the Constitution in the form proposed. It critiques the Voice proposal for confusing social reform and constitutional purposes and for creating an impractical body defined by race.

A Confusion of Purposes

As a consequence of dispossession and collateral deprivations, remedial action is required to improve the situation of Indigenous peoples in contemporary times. But this should be carried out not by changes to the Constitution but by reforms directed to improving communal attitudes and opportunities, a purpose which is now being addressed via advocacy and legislative action. It is confusing and therefore unwise to link this ongoing social purpose to the enshrinement of a Voice with broad but vaguely expressed powers, a special privilege based on race that is bound to complicate the workings of government. The underlying purpose of the Constitution is to provide stability by defining, clearly and specifically, the role of various governmental institutions and agencies.

To say, as some have said in recent months, that the Voice should be enshrined simply as a matter of ‘good manners’ is a shallow and misleading line of argument. It confuses the matters in issue by suggesting that people who vote against the Voice lack the decency usually associated with good manners. An emotive plea of this kind seeks to shame people into voting for the Voice. A profound change to the structure of government by constitutional amendments should only be made in response to well-reasoned debate on both sides of the question.

Objections on Grounds of Principle

The central issue is enshrinement. A profound and essentially irreversible change to the structure of government by vesting an influential advisory privilege in a section of the community defined by race is contrary to democratic ideals reflected in the Constitution, a document underpinned by conventions referable to the rule of law and the notion that *all* citizens, high and low, are to be treated equally.

The Australian Constitution established a system of federal government. It doesn't include a Bill of Rights. It sets out a workable distribution of powers and responsibilities between governmental institutions and the various States. The federal government, elected by citizens of Australia, including Indigenous peoples, is there to service the general needs of the national community. In a parliamentary democracy of this kind a Voice defined by race will be a divisive and complicating anomaly.

The importance of equality is underlined in the Australian context by the fact that constitutional change can only be accomplished by a referendum measuring the response of individual voters throughout the land. It is underlined also by provisions requiring that electorates be of the same size so that the voting powers of individual citizens, of any race or ethnic background, are treated as equal.

Quick and Garran's widely-respected work on the Constitution includes this passage concerning the House of Representatives (at p448): *It gives particular force and expression to what may be described as the national principle of the Commonwealth. In that great assembly, the national people will find full scope and representation. Its operation and tendency will be in the direction of the unification and consolidation of the people of the Commonwealth into one integrated whole, irrespective of State boundaries … The natural bent and inclination of its policy will, therefore, be to regard its constituents as one united people; one in community of rights and interest; one in their entitlement to the equal protection of the law; one in their claim to fair and beneficent treatment; one in destiny … The House of Representatives is not only the national chamber, it is the democratic chamber and embodiment of the liberal principles of government which pervade the entire constitutional fabric.*

In 1961 the various Australian governments approved a general policy aimed at ensuring that all Aboriginals and part-Aboriginals would live as members of a single Australian community, enjoying the same rights and opportunities as other Australians, and accepting the same responsibilities. This approach was widely accepted. The push for integration was driven by a feeling that Australia needed cohesion, a single clear focus of loyalty that stood above sectional or racial preoccupations.

Respect for one government under the rule of law, and a body of law applying equally to all citizens, seemed essential. It was against this background that the 1967 referendum approved an expansion of Commonwealth powers over Aboriginal affairs. This was probably due to a belief that more should be done to help Indigenous peoples and to redress the wrongs they had suffered. The constitutional change did not imply that there should be two systems of law in Australia or two different classes of Australian. The vote accepted the sole sovereign authority of the institutions established by the Constitution but went some way towards removing any differentiation between citizens on the ground of race.

As a matter of principle, the Voice should be rejected on the grounds that our democracy is built on the foundation of all Australian citizens having equal civic rights, all being able to vote for, stand for and serve in either of the two chambers of our national parliament. A constitutionally enshrined body defined by race, as to which only Indigenous Australians can vote for or serve in, is inconsistent with this fundamental principle.

Reliance upon this basic point of principle is entirely consistent with the changes effected by the 1967 Referendum. These changes were in keeping with the existing democratic parliamentary structure, the move towards a greater understanding of Indigenous needs that had been gradually taking place throughout the country and the case for general equality. Both then, and in later years, the main thrust of debate has been towards ensuring that the Constitution wasn’t disfigured by provisions mentioning race. The Voice provisions are out of step in that regard and may well be used eventually to fuel demands for co-government. Divisive demands of this kind will weaken the nation to the disadvantage of all.

Practical Objections

Debate in recent times has proceeded as if this were simply a 'Voice to Parliament', but it is now clear that supporters of the present Bill are in fact pressing for a 'Voice to Government'. This goes well beyond the recommendation of the Referendum Council. Significantly, Professors Davis and Appleby have outlined the vast scope of representations that could be made by the proposed Voice to 'Parliament and the Executive Government of the Commonwealth.'

They reportedly said: *The Voice will be able to speak to all parts of the government, including the cabinet, ministers, public servants, and independent statutory offices and agencies – such as the Reserve Bank, as well as a wide array of other agencies including, to name a few, Centrelink, the Great Barrier Marine Park Authority and the Ombudsman – on matters relating to Aboriginal and Torres Strait Islander people.*

There is room for debate as to what extent governmental bodies will be obliged to foreshadow and consult with the Voice before advice is formulated and as to whether any controversial steps in the process can be brought to the High Court for adjudication. But it is difficult to see why the Voice would not proceed on the basis that it has an entitlement as to both these matters. A former Chief Justice of the High Court, Robert French, recognises that there is indeed a risk in that regard and this is put, more firmly, by other constitutional experts. This is bound to complicate and delay the workings of government, as will controversies about the Aboriginal identity of those comprising the Voice and the range of matters as to which they are entitled to provide advice.

The Voice will almost certainly become a lightning rod for protracted debate about a vast array of current issues. Nearly every matter of current concern on the national agenda will be seen as having an Indigenous component of some kind. The paralysis of the parliamentary process induced by endless debate about a multiplicity of issues might not amount in law to a formal power of veto within the parliamentary process, but that could well be the effect of multifarious debates in practical terms. In many cases the approval of the advisory body will have to be obtained before a

parliamentary bill can be enacted. Approval could well be difficult to achieve in contentious cases, with or without political horse-trading or financial sweeteners.

In contemporary times, in an era of identity politics and corrosive political correctness, practical difficulties are bound to emerge. These days, when it comes to any matter involving race, politicians, citizens and commentators have to be very cautious in voicing opinions and this will certainly be so in opposing, even for good reasons, advice submitted to government by the Voice.

At any given moment, Orwell observed, there is an orthodoxy, a body of ideas which it is assumed that all right-thinking people will accept without question. It is not exactly forbidden to say this, that, or the other, but it is "not done" to say it. Anyone who challenges the prevailing orthodoxy finds themselves silenced with surprising effectiveness. If the intellectual liberty which, without a doubt, has been one of the distinguishing marks of western civilisation means anything at all, it means that everyone shall have the right to say and to print what they believe to be the truth, provided only that it does not harm the rest of the community in some quite unmistakable way.

If parliamentarians and public servants can be shamed into silence by a prevailing orthodoxy, or an inclination to avoid controversy by always approving the Voice's advice, it will be difficult for ordinary citizens and commentators to test the adequacy of the advice in question by asking pertinent questions about the way in which the course recommended will work in practice. The likelihood is that many members of the proposed Voice will feel obliged to conform to whatever is the current orthodoxy favoured by their leaders, from demands for treaties to claims for ownership or actual sovereignty over portions of the continent. They may not feel obliged to review collateral issues or to listen to citizens generally or to look closely at what is best for the country as a whole before speaking with their special voice. They will, essentially, be focused upon outcomes that suit their indigenous constituency because that is the purpose of the advisory body.

The other side of individual rights and special privileges is individual responsibilities. This means, of course, that when an attempt is made to vest special entitlements in a

particular group, the nature of the group's responsibilities will be problematic, especially when the group is diverse, ranging in this case from people living in remote communities with limited resources to people of Aboriginal descent living in suburbs or working in universities. The largest population centres for Indigenous peoples in modern Australia are not in remote regions but in centres such as Sydney, Melbourne and Brisbane. Warren Mundine has pointed out that the entire concept of the Voice is based on a false assumption of homogeneity of Aboriginal people across the nation, as one race. This is something Indigenous Australians have tried to counter for decades. Divisions of opinion within the Voice and amongst its constituents will add to the complexity of responding to the Voice's advice.

Overview

The Australian constitution was cast in a form that was intended to serve the country as a whole and to endure. It was designed to resist the plasticity of transient ideas or prevailing orthodoxies. The referendum process, involving *all* voters in *every* corner of the Commonwealth, is there to ensure that proposals for change are defined exactly and, by seeking to improve the workings of government, that changes will help to secure the sense of cohesion upon which a nation-state depends.

In addition to its undemocratic nature, the Voice will erode the federal structure established by the Constitution, especially when advice is submitted not only to parliament but also to anyone exercising governmental power. The Voice and its supporters are bound to arouse support for its advice wherever it can, including from State governments, until the national government gives way. This will fuel divisive controversy and unsettle the efficient workings of the federal government and its agencies.

History, including the unique Indigenous history, must be carefully reviewed, but it cannot be rewritten. The form of government established by the Constitution, and the laws made pursuant to it, have become a long-standing fact of life on this continent, and underlie the Australian achievement. They are a source of benefits for the entire community. Policies and related laws can be revised as circumstances may require but the Constitution is based on the will of the people as a whole whom it was designed to

unite and govern. It was cast in a form that allows for change but is resistant to proposals or entreaties from sectional interests. It assumes that parliamentary institutions will not act as a voice for any particular group but as a voice for all.

Conclusion

A remedial mood is afoot and this has led to significant changes in governmental policies and practices over the years. But a remedial mood, of itself, or a display of 'good manners', is not enough to justify a profound change to the structure of the parliamentary process established by the Constitution.

The central issue is enshrinement. A body of the kind proposed by the provisions of the Bill in its present form should not be enshrined in the Constitution for the reasons provided above. The crucial issue to be resolved is not whether the Indigenous constituency should simply be given what it wants, as set out in the Uluru Statement, and as a matter of goodwill. There is far more at stake. The central issue is whether a group within the community defined by race should be given a constitutionally enshrined privilege to participate in the parliamentary process and the workings of the executive government in a way not open to other citizens.

A Voice defined by race with an untested and powerful advisory role is contrary to the democratic spirit of the constitution which is based on all citizens having equal democratic rights. Further, and in any event, although the Voice will not technically be a third chamber of parliament (because it will lack a formal power of veto) it will be seen as such and its presence will probably impede or at least seriously complicate the parliamentary process. This is because, as a matter of political reality, its approval will probably have to be constantly negotiated. If its advice is consistently accepted in the course of negotiations this will suggest that it has a special power or influence of some sort and that benefits can be obtained on the ground of race which may not be available to the wider community. If its advice is consistently ignored this will, understandably, not be acceptable to the Indigenous community and may lead to unwanted friction also.

The Voice proposal is a flawed and divisive concept. Moreover, as matters stand at present, it is certainly far too vague to be put to a referendum as a proposed

amendment to the constitution. This is partly due to the legal complexities, and partly to broader concerns. The case for constitutional recognition is rooted in the unique history of Indigenous peoples and the privations they have endured in the wake of European settlement, but weight must also be given to the ideals reflected in the Australian constitution in its present form and to the achievements facilitated by its institutions, bearing in mind that the realities of modern life and the identity of the parties to any new arrangement are not as they once were at the time of European settlement. These concerns have not yet been fully debated or the appropriate balance worked out.

A careful appreciation of the realities suggests that at a constitutional level the challenges of the future cannot be solved by a return to grievances of the past or by the creation of a body that may have the long-term adverse effect of characterising Indigenous peoples as confined to a permanent state of victimhood, as if always in need of special attention, when they are now, increasingly, in all areas of Australian communal life, playing a significant and respected role in matters requiring leadership. This is shown by the increasing presence of Indigenous members in the federal parliament and in the ministry, and in other governmental roles including service on land councils throughout the country. It is shown also by a wide variety of Indigenous achievements in the commercial world, the professions and the arts. If Australia is to solve its differences peacefully it should stay true to what its Constitution represents: a stable framework of government within which reforms for all can be advanced by advocacy and legislation, including reforms for the benefit of Indigenous peoples.

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