# Submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018

H C Burmester, AO QC

Achieving appropriate constitutional recognition of Aboriginal and Torres Strait Islander peoples has proved difficult. This is in part because there has been no broad consensus as to the objective to be achieved. Another reason has been the general reluctance to propose any substantive change to the Constitution because certain influential lawyers meet any proposal with calls of 'unintended consequences'. Regrettably it seems the good faith of the High Court of Australia is not to be presumed even though those same lawyers advocate reliance on the good faith of Parliament.

As a member of the former Expert Panel on Constitutional Recognition of Indigenous Australians I continue to support efforts to find an acceptable form in which to secure constitutional recognition. However, circumstances change and I do not see the same groundswell of support in the community for recognition that I saw back in 2012. I am not convinced that the latest proposals by the Referendum Council at present provide a basis for a successful referendum. In this submission I briefly outline the shortcomings I see and suggest a way forward.

*Statement of Recognition*

Certain lawyers have convinced proponents of recognition to pursue a statement of recognition as an extra-constitutional statement. This seems a disappointing outcome based on a dubious set of arguments to the effect that inclusion of a statement of recognition in the Constitution is inappropriate because the Constitution is only a 'rule-book'.

At the same time these same lawyers wish to insert in the Constitution a non-justiciable provision for an advisory body that Parliament can establish if it chooses. It is far from clear that this is a 'rule' that is appropriate for constitutional enshrinement.

There was a non-constitutional declaration of recognition in the form of s3 to the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*. Parliament has allowed the Act in which this declaration was made to lapse (from 28 March 2018 according to the Federal Register of Legislation). This does not auger well for any extra-constitutional statement of recognition being treated with the significance it deserves.

*Voice to Parliament - it is premature to take it to a referendum*

Most recently, proponents of recognition have put forward a proposal for a constitutional amendment to confer a power on Parliament to create a body for Indigenous Australians to advise the Parliament on laws that affect them. This has

emerged in the *Uluru Statement from the Heart* and report of the Referendum Council as a proposal for a 'Voice to Parliament'. Indigenous Australians have apparently been persuaded to embrace a proposal for constitutional change that relies on the good faith of the Parliament, the same body that has consistently disappointed Indigenous Australians. The latest proposal envisages voters amending the Constitution to give Parliament a vague power to create a 'Voice', without any of the voters (including Indigenous Australians) knowing how such a body might be composed or how it might operate. The design would come after a successful referendum.

This to my mind puts the cart before the horse. It is a 'top-down' approach of the worst kind. It holds out the promise of something that may never eventuate, or at least not in a form that Indigenous Australians would support.

I consider that work needs to be done from the grass roots up rather than from the top down to design and demonstrate how an advisory body could work before considering whether any proposal is put to a referendum. There is an argument for first establishing any 'Voice' with legislative support and demonstrating to both Indigenous Australians and other Australians that the body is viable, worthwhile and supported before considering constitutional enshrinement.

While the recent proposal for a 'Voice to Parliament' has received Indigenous support following grass roots consultation, its future implementation relies on top down action by the Parliament, the very body that has let down Aboriginal and Torres Strait Islanders over many years. While the proponents envisage major Indigenous involvement *after* a referendum in implementing the 'Voice' this seems the wrong way around.

I understand the motivation that has led to support for an advisory Indigenous body. However, I am not at present convinced that this latest proposal for constitutional recognition is ready to be taken to a referendum. The design and operation of any such body needs to be the result of detailed input from Indigenous people. It will not succeed if it is left to the government of the day to design and impose/implement any such a body. For this reason, there needs to be a process to secure the support of both government and Indigenous people for the detail of any such proposal before any referendum. If this process results in establishment of a successful body, this may serve as a foundation for considering successful substantive constitutional recognition of such a body in the future.

*Voice to the Parliament- constitutional shortcomings*

Apart from the need to put 'skin on the bones' of the proposal for a 'Voice' before holding any referendum, I believe that the constitutional amendment for a 'Voice' as currently proposed has serious legal shortcomings. This means that if it were to be included in the Constitution it runs the real risk of being a very hollow form of recognition.

It does not, in my view, ensure the substantive recognition that I believe is desirable.

While a 'Voice to Parliament' can certainly be a form of self-determination, its adoption in the form of a constitutional amendment that leaves its form, operation and funding entirely in the hands of Parliament does not appear to me to be a real exercise of the power of self-determination.

There are two main reasons for my view that there are serious legal shortcomings in the constitutional provision for a 'Voice to Parliament' as proposed by the Referendum Council and Uluru statement.

First, from a legal perspective the proposal achieves nothing substantive. Parliament already has the power to establish and support exactly the same body by legislation. As the proposal makes clear, the advisory body has no enforceable powers and Parliament can choose to disregard any advice from the body. Its funding is entirely dependent on Parliament. Why would you have a referendum to give Parliament the power to do what it already can do?

It may be argued that enshrining a provision for a 'Voice' in the Constitution will give the 'Voice' greater weight and that it will be much harder for Parliament not to create and maintain such a body if it is constitutionally mandated. That, however, leads to the main reason why I see legal difficulties with the proposal.

While the proposal may be couched in mandatory language -'Parliament shall establish…', or 'There shall be a body called…' there is to be no enforceable obligation on Parliament to do this or to maintain and fund into the future any such body. It is left entirely to Parliament to determine how the body is constituted, if at all, and how it is funded. Whether Parliament gives any consideration to any advice from the body is also completely discretionary.

The proposal appears in its effect essentially the same as inserting in the Constitution a provision modelled on existing s101 of the Constitution. That says "There shall be an Interstate Commission with such powers…as the Parliament deems necessary…". There is no such body in existence and in 118 years such a body has only existed for 2 short periods.

It seems to me such a fate could easily befall any indigenous 'Voice' based on a constitutional provision along the same lines as s101. Yet that seems to be exactly what is envisaged. No doubt, the appeal of the latest proposal to some lawyers is precisely because it would not impose any enforceable requirement on Parliament to establish the body, maintain it, have any regard to its work, or fund it adequately. It seems, in this form, very much like a symbolic form of recognition that in fact does not guarantee anything of substance in relation to Australia's Aboriginal and Torres Strait Islander peoples.

Another major objection, flowing from the legal shortcomings, relates to the process for adopting and implementing the proposed amendment. It involves a referendum, the holding of which has apparently gathered Indigenous support. However, as pointed out above, once the constitutional amendment is adopted the establishment, maintenance and funding of the body depends on Parliament. The only Indigenous involvement in those decisions will be by lobbying and shaming the Parliament into doing what is appropriate.

I suggest that a much better foundation for establishing a body such as a 'Voice to Parliament' would be for its establishment, its membership and its functions to be a component in a mutually agreed outcome, such as a Makarrata, which the Commonwealth, meaning both the Executive and Parliament, would be obliged to implement. The Makarrata could include funding commitments and obligations as to how government would need to consult with the body. As part of an agreed 'bargain', a requirement for a 'Voice' and agreement on its operation may provide an important element of substantive recognition and be a true form of self-determination by Australia's First Peoples.

By contrast, under the current proposal for a constitutional provision giving power to Parliament to establish such a body, all the detail is left to the good faith of Parliament. This seems a misplaced faith, given the difficulty in recent years in getting any bipartisan support for particular policies in relation to Indigenous issues. It also does not seem to me a genuine form of self-determination to rely entirely on the good faith of the Parliament with no guaranteed input from Indigenous Australians.

*Conclusion*

For the above reasons, I submit that instead of a referendum in the immediate future to include a power to establish a 'Voice to Parliament' in the Constitution, effort would be better expended on seeking to develop the detail of such a body from the grassroots up, possibly as part of a Makarrata process.

At least initially a legislative approach resulting from a dialogue between government and Indigenous Australians is to be preferred. This may ensure that the Australian people can see the possible shape of such a body. It would also enable both Indigenous Australians and Parliament to see how such a body can play an important function in speaking for Aboriginal and Torres Strait Islander peoples in relation to legislation that directly affects them.

Only after this has occurred should attention turn to a possible referendum. Only then might there be sufficient basis for the future good faith of Parliament to be presumed. Only then will it be possible to say whether the interests of Indigenous Australians will be able to be properly recognised in the Constitution by a 'Voice to Parliament'.

The proposal for a referendum now to give Parliament a power that it already has with no more than a blank sheet of paper as to what it establishes and with no substantive rights given to the Indigenous people is not something I presently support.