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Dr Anne Twomey
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30 September 2014

Ms Toni Matulick
Committee Secretary
Joint Select Committee on Constitutional Recognition
of Aboriginal and Torres Strait Islander Peoples
Parliament House
Canberra, ACT, 2600

Dear Ms Matulick,

Request for Advice

I refer to your request of 26 September 2014, on behalf of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, for my views as an academic in relation to the following questions. My views are expressed under each question below.

1. Can the Commonwealth Constitution be amended in such a way as to require the further enactment of legislation by the Parliament (an Act of Recognition)?

Section 128 of the Commonwealth Constitution sets out the mechanism for amending the Constitution. It sets no limits on the type of amendment that can be made. So far Australian courts have not followed their counterparts in countries such as India by developing a 'basic structure' doctrine that limits the type of amendments that can be made to the Constitution. Hence the technical answer to your question is that the Constitution could be amended in such a way (subject to the High Court developing a doctrine that imposes implied limits on the nature of constitutional amendments that can be made).

However, the appropriateness, effectiveness and the point of such an amendment must be queried. The Commonwealth Constitution is structured in such a way

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that it confers powers and imposes limits on those powers. For example, it confers legislative power on the Commonwealth Parliament and imposes certain limits on those powers, including express limits (eg s 51(ii), s 51(xxxi) and s 92) and implied limits (eg, limitations flowing from the separation of powers, federalism, responsible government and the implied freedom of political communication). The Constitution does not, however, impose positive obligations upon the Parliament.[1] It does not require the Parliament to enact laws to do particular things. To do so would be contrary to the doctrine of parliamentary sovereignty.

It would also entail practical problems. How long would the Parliament have to enact such a law before it was regarded in breach of the Constitution? How would it be enforced if the Parliament did not enact such a law? Would the obligation be regarded as justiciable or a matter internal to the Parliament that cannot be the subject of outside interference? Could an interested person bring an action in a court seeking an order requiring the Parliament to enact such a law? What if the two Houses cannot agree on the terms of such a law? Could a court order a House to pass a bill? Could a court require Members of Parliament to vote against their consciences? Could it imprison Members of Parliament until they enact a law that the Court believes satisfies the relevant obligation? Would the court have to draft the law if the Members of Parliament could not agree upon its terms?

Further difficulties would arise about what is meant by an 'Act of Recognition'. Who would decide what amounted to 'recognition'? What if Parliament passed a law that it entitled an 'Act of Recognition', but a court decided that it did not involve adequate recognition, or it included other matter that should not be 'tacked on' to a special law of this nature?[2] What if the law was amended in the future in a way that lessened the nature of the 'recognition'? Would the

[1] There are two general positive obligations in the Constitution, but neither expressly requires a Parliament to enact and maintain particular laws. Section 101 of the Constitution provides that 'There shall be an Inter-State Commission…' and s 120 provides that 'Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth…' I am not aware of any legal action ever being taken to require Parliament to implement these positive obligations.

[2] Compare the anti-tacking provision in s 55 of the Constitution.

obligation only be to enact such a law once, or would there be a perpetual obligation to maintain it in existence? Could it be amended or repealed, and if repealed, would it have to be replaced by another Act of Recognition at the same time?

Because such an approach would be unprecedented and contrary to the way the Constitution currently operates, it would give rise to these and many more questions which could not be adequately answered in advance of a referendum. The uncertainty would be such that it seems to me to be highly unlikely that such a proposed amendment would ever be passed.

2. If the Constitution can be amended to require the enactment of an Act of Recognition, what would be the status of that Act? For example, how and when would the Parliament be able to amend that Act?

The status of such an Act would be unclear. It would depend upon what was intended and (hopefully) made clear in the Constitution itself. If it were intended that such an Act of Recognition had to continue in existence, then presumably it could not be repealed unless replaced by another Act of Recognition. It could presumably be amended, but probably not in a way that stopped it from being able to be classified as an Act of Recognition. To that extent it would have a quasi-constitutional status.

3. What effect, if any, would an Act of Recognition have on future constitutional interpretation?

Again, this is unknown as there are no precedents. As the Act of Recognition would be an Act of Parliament, not part of the Constitution itself, it would seem unlikely that it would affect constitutional interpretation, but this would be a matter for the High Court.

4. If the proposed Act of Recognition prohibited discrimination by the Commonwealth, State and Territory legislatures in making laws about Aboriginal and Torres Strait Islander peoples, would the Act have an

invalidating or limiting effect on other Commonwealth, State and Territory laws or executive action?

It is not clear to me how the prohibition of discrimination would amount to 'recognition' and therefore how it could be included in an 'Act of Recognition'. If such a provision could be included in an Act of Recognition, then under s 109 of the Constitution it would prevail over inconsistent State laws, just as the *Racial Discrimination Act* 1975 (Cth) currently does so. Equivalent inconsistency provisions apply in self-government legislation concerning the territories.

Whether or not it would prevail over a subsequent Commonwealth law (overcoming the doctrine of implied repeal by a later law) is, again, unclear. It would depend upon whether the implied repeal of the anti-discrimination provision would result in the Act of Recognition ceasing to be an 'Act of Recognition' for the purposes of the Constitution. Given that discrimination and recognition are two different things, it would seem unlikely that the implied repeal of an anti-discrimination provision in an Act of Recognition by a later Commonwealth law would prevent the Act of Recognition from continuing to fulfill the constitutional requirement that there be an 'Act of Recognition', unless the recognition elements were also removed.

5. Are there other Commonwealth laws that have a similar status to the proposed Act of Recognition?

No.

Further observations

While it is unclear to me what is actually intended by this proposal, if what the Committee is wishing to do is to find a way for the enactment of a quasi-constitutional, semi-entrenched Act of Parliament, then it could be done by using s 15(1) of the *Australia Acts* 1986 to amend the *Australia Acts* by adding a new Declaration of Recognition as a schedule to them. It would then be recorded in all copies of Australia's constitutional documents and could only be amended by following the method set out in s 15 of the *Australia Acts.*

Alternatively, s 51(xxxviii) of the Constitution could be used to enact an Act of Recognition at the request or with the concurrence of all the State Parliaments, which contained express constraints upon its amendment (i.e. that it could only be amended with the request or concurrence of all the State Parliaments).[3]

A third option would be to pass a constitutional amendment similar to s 105A of the Commonwealth Constitution. Section 105A was inserted into the Constitution in 1929 to give constitutionally binding effect to financial agreements that had already been made between the Commonwealth and the States. It not only gave the Commonwealth the power to enter into such agreements and conferred upon the Commonwealth Parliament the power to make laws validating agreements already made, but it also provided:

> Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

If this type of precedent were to be employed, an agreement concerning recognition could be reached by the Commonwealth and the States and could be made binding in a way that overrode State and Commonwealth laws and constitutions. The agreement could be reached in advance and then later validated, as under s 105A, so that the people when voting in the referendum would know the terms of the agreement to which they were giving constitutional effect.

[3] Note that uncertainty remains about whether laws enacted pursuant to s 51(xxxviii) can only be amended or repealed by laws enacted in the same manner (i.e. with the request and consent of State Parliaments). The issue has never been tested in the High Court.

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These three methods, while no doubt still controversial and probably unlikely to pass at a referendum, would at least be more consistent with the structure of the Constitution and with precedent than any constitutional obligation placed upon Parliament to enact an Act of Recognition.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law