

## Supplementary submission in regard to the proposed Consultative Council for Aboriginal People<sup>1</sup>

Prof Bertus de Villiers (Law School, Curtin University)

### Introduction

On 6 July 2018 I gave evidence to the Committee about proposals for the establishment of an Advisory Council for Aboriginal and Torres Strait Islander People ('Aboriginal People'). The Chair invited me at conclusion of the evidence to make a supplementary submission before 16 July 2018. The Chair specifically requested that some of the issues that were raised during evidence, be addressed. In light of the limited time available to make the supplementary submission it is not possible to provide full references, citations or analysis of any case studies. Should the Committee require additional information for an in-depth understanding of particular case study experiences, or if a particular proposal requires further development, please do not hesitate to contact me.

### Questions to answer

#### 1. What is the scope of advice to be sought and given by the Advisory Council?

The Statute<sup>2</sup> which creates the Advisory Council should identify three categories of advices, namely:

*Advice **must** be sought...*

Advice *must* be sought when a subject matter in a bill before Parliament or of an investigation conducted by a Parliamentary committee potentially directly impacts on the cultural, language, traditions, customs and duties of Aboriginal People as custodians of the land.<sup>3</sup> The Speaker of Parliament must certify that a bill or an investigation falls within this category when the bill or the brief of the investigation is referred to the Council. The discretion of the Speaker is final and is not subject to legal challenge or review.

*Advice **may** be sought ....*

Advice *may* be sought from the Advisory Council by any member of the executive, the Speaker of Parliament, or a committee of Parliament on any subject matter in a policy, in an investigation, or in a bill before Parliament.<sup>4</sup> Any minister may seek advice in regard to a policy, and any chair of a committee of either of the houses of Parliament may invite advice in regard to a bill before it or in regard to an investigation conducted by it.

*Advice may be **self-initiated**....*

Advice *may be given at own initiative* of the Council on any policy matter; any investigation by a committee; or any bill before Parliament.<sup>5</sup> Any member of the Council may propose that advice be

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<sup>1</sup> 9 July 2018.

<sup>2</sup> I proposed in my main submission that for several reasons the Advisory Council should be a creature of statute rather than of the Constitution.

<sup>3</sup> See the example of the Sami Parliament and houses of traditional leaders in South Africa.

<sup>4</sup> See the example of the Minorities Council of Germany. This body is appointed, not elected. It has a relatively low profile and seeks to promote good relations between minority communities and the German community.

<sup>5</sup> See the example of Kosovo. In Kosovo any minority may 'veto' legislation that affects its identity, but in light of the Australian constitutional tradition it is not a feasible option to pursue.

given in regard to a policy, investigation or bill. The Council shall decide in accordance with its own rules of procedure if advice is given in regard to the subject matter.<sup>6</sup>

**In summary:** The advices of the Council are divided into three categories: advice that *must* be sought; advice that *may* be sought; and advice may be *self-initiated*.

## **2. What weight should be accorded to the respective categories of advices given by the Council?**

The Statute should contain the following principles to be adhered to when the executive and Parliament respond to advices received from the Council:

### *Sovereignty of Parliament*

The sovereignty of Parliament as the supreme legislative body of Australia pursuant to the Constitution is not fettered by the advices given by the Council in regard to any matter.<sup>7</sup>

### *Policy measures*

Any *policy* measure under consideration by the executive may be referred by the relevant minister to the Council for advice.<sup>8</sup>

### *Draft legislation*

*Draft legislation* that is likely to directly impact on the culture, language, traditions, customs and duties of Aboriginal People as custodians of the land (and so certified by the Speaker) *must* be referred by the Speaker of Parliament to the Council at the earliest opportunity to enable the Council time to properly discharge its functions.<sup>9</sup>

### *Time for advice*

In regard to all advices sought from the Council by the executive or Parliament, the Council shall be accorded not less than .....<sup>10</sup> days to submit the advice. In the case of urgent legislation provision could be made for the Speaker to certify that a bill may proceed to final vote within a shorter timeframe. The certification of the Speaker is final and not subject to legal challenge or review.

### *Appearance in a committee*

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<sup>6</sup> The Council shall develop its own rules to determine when and how it gives advice at its own initiative; how it conducts its own investigations; and how it consults with its electorate.

<sup>7</sup> This is an obvious statement since the Constitution does not allow for the sovereignty of Parliament to be fettered and it is not recommended that the Council's advices should be legally binding on the executive or Parliament.

<sup>8</sup> In my submission mention was made that the scope of advices sought from the Council would inevitably determine the status that is attached to an advice. If the scope is too narrow, the Council may not gain relevance, but if the scope is too wide, the Council may become *de facto* parallel to Parliament. The approach advocated above is a combination of the two approaches: any advice can be sought or given, but if a matter directly impacts on the "core" of Aboriginal Peoples' responsibilities to the land, the advice must be sought.

<sup>9</sup> This principle includes: (a) time to consult with its electors; (b) time to do research and seek expert advice; (c) time to conduct an internal debate; and (d) time to formulate a submission and advice to Parliament.

<sup>10</sup> Eg. at least 60 days to allow time for consultation; expert advice and debate. The Statute may provide that the time to submit an advice may be extended by the referring entity.

The Council may at any stage nominate a person or delegation to convey its advice in regard to any bill or an investigation to any committee of Parliament.<sup>11</sup>

#### *Report to Parliament*

The Council may table a report in Parliament in regard to any advice or submission.<sup>12</sup>

#### *Addressing Parliament*

The Council may at any time nominate a representative to address any of the houses of Parliament in regard to any advice given or any submission made.<sup>13</sup>

### **3. Should the Advisory Council be accountable to the executive or the Parliament?**

The Council should be: (a) established by statute; (b) funded directly by an annual grant by Parliament; and (c) report to Parliament by way of an annual report. The Council may nominate a representative to address any of the houses of Parliament in regard to its annual report or any issue of relevance to the successful functioning of the Council.<sup>14</sup>

### **4. Interaction between the Advisory Council and local communities**

The Statute must acknowledge that the advisory role of the Council does not in any way diminish any rights that a local Aboriginal community may have in regard to the land that it occupies or for which it is responsible.<sup>15</sup>

### **5. What about state-based initiatives?**

The Statute must acknowledge and encourage state-based initiatives whereby state and local governments engage Aboriginal communities in various forms of consultation; policy development; administration; and self-government.<sup>16</sup>

### **6. Aboriginal involvement in policy development: a holistic approach?**

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<sup>11</sup> This will ensure that the Council is actively involved in the committee-system: both in regard to bills and investigations and other reports.

<sup>12</sup> This will ensure that the status of the Council as an advisory body *to Parliament* (not only to government) is recognised.

<sup>13</sup> This will solidify the status of the Council since a representative may speak in either house of Parliament – not just limited to a committee as any other non-governmental organisation or interest group.

<sup>14</sup> This approach will emphasise the importance of the Council as a voice for Aboriginal People *within* the legislative process which is different from the normal procedure whereby a government department tables an annual report.

<sup>15</sup> This highlights the importance for the Council to liaise with local PBC's, Aboriginal corporations and other interest groups. It is essential that the Council retains a cooperative and respectful relationship with local Aboriginal communities and their responsibility to the land. *The advices expressed by the Council should be of a bottom-up nature, rather than top-down.*

<sup>16</sup> This would allow and encourage more state-based initiatives whereby local communities can become involved in governance within the respective states and territories in its widest form and also become self-governing in areas of their own culture and identity. Please refer to my paper: B De Villiers "Self-determination for the Noongar People – potential lessons from Europe?" 2015 *Brief March*: 40-43.

The question that inevitably arises is whether Australia can develop a holistic approach to 'consultation' whereby at all levels of government Aboriginal communities are involved in policy, government and self-determination?

There are two useful examples to consider in this regard for purposes of co-governance and self-government:

#### *Co-governance*

In South Africa provision is made for Integrated Development Councils (IDC) whereby all interest groups in a local government area are involved in long term planning for the area. The IDC-process is key to address poverty and unequal levels of development. In communities where indigenous people reside, their leaders are closely involved in the planning process. This is to ensure that their interests are accounted; that benefits derive to the community and that services are improved. The ideal is that all grants to and spending in a local area are allocated and undertaken on the basis of priorities that have been developed by the local IDC.<sup>17</sup> The holistic approach adopted by South Africa is that the priorities of the IDCs feed into the provincial level (where there are houses for traditional leaders); and from there priorities are fed into the national Parliament (where there is a national house of traditional leaders).<sup>18</sup> It must also be noted that traditional authorities, where applicable, also form part of the system of 'cooperative government' – referred to as cooperative federalism in Australia.

#### *Self-governance*

In some countries provision is made for communities to make decisions about their language, laws, and customs by way of community-autonomy.<sup>19</sup> This principle is also acknowledged in international law about the rights of indigenous people. Cultural autonomy means, in essence, that a community can form a legal entity (eg Aboriginal Corporation) that contracts with a state or local government to provide services for its members as an agent for government; to make inputs in policy on behalf of its members; and who makes decisions about language, culture and customary matters on behalf of its members. *I am of the view that this is the most unexplored yet potentially powerful mechanism to enable Aboriginal communities to take up the challenge and opportunity of self-government.*

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<sup>17</sup> Refer to the following discussion in this regard: Fucini "A critical investigation of the relevance and potential of IDPs as a local governance instrument for pursuing social justice in South Africa" 2013 *PR* available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812013000500006](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812013000500006).

<sup>18</sup> It must be noted that these institutional arrangements do not necessarily operate optimally in South Africa due to a variety of reasons.

<sup>19</sup> See for example Italy (South Tyrol); Belgium (Brussels); Hungary; South Africa; and Canada. Refer to my article: De Villiers "Community Government for cultural minorities – thinking beyond "territory" as a prerequisite for self-government" 2018 *International Journal on Minority and Group Rights* (25) 1-30.