

## HEARING OTHER VOICES FROM ULURU

By Anne Twomey\*

The [Uluru Statement From The Heart](#) was the culmination of consultation of Aboriginal and Torres Strait Islander peoples across the country, in which many voices were distilled into one united voice about how to proceed with the constitutional recognition of Indigenous Australians. While its momentous historical importance is well recognised, attempts to give effect to it have been bogged down in dispute and bureaucratic malaise.

In 2015 I suggested a [draft amendment](#) that would have required there to be an Aboriginal and Torres Strait Islander body which had the function of providing advice to the Parliament and Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples. This advice would have been tabled in both Houses of Parliament, so there was a permanent record of it, and the Houses would have been obliged to take it into consideration in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

This body would have had no power to initiate, delay or block legislation, and no court could have struck down any law on the basis that such consideration had not adequately been given, because the internal considerations of the Houses in their parliamentary debates are non-justiciable. What the amendment would have given, however, was a voice to Aboriginal and Torres Strait Islander peoples directly into the Parliament so that it could be better informed in passing laws that directly affect those peoples. In law, the rules of natural justice require that people have a fair opportunity to be heard before decisions affecting their rights are made. This would have extended that natural justice to the only group of people about whom laws are specifically made under s 51(xxvi) of the Constitution.

The proposal to amend the Constitution to establish an Indigenous ‘voice’ to Parliament, however, was rejected at the political level due to [unfounded concerns](#) that it would become a ‘[third chamber of Parliament](#)’. This seems to be deeply misguided. Even [Barnaby Joyce](#) had the grace to recognise this and [apologise](#).

The above amendment is still my preferred option, as it is simple, clear, fair and non-justiciable. The former Chief Justice of Australia, Murray Gleeson, who is not a man noted for leftist flights of fancy, [accepted](#) that this proposed amendment ‘demonstrated that a constitutionally entrenched Voice can be achieved without legal derogation from parliamentary supremacy’. He too [rejected](#) the notion that it would establish a third chamber of Parliament.

But despite the inherent weakness of the arguments against such an amendment, they appear to have dissolved any political will to act. If these political obstacles cannot be surmounted, it may be time to think about other means of giving effect to the Uluru Statement From The Heart which are consistent with its spirit and offer prospects of success. How else could constitutional amendments be formulated to achieve this outcome?

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## Amending the race power

One option is to amend the race power in section [51\(xxvi\)](#) of the Constitution. It currently provides that the Commonwealth Parliament has power to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’. This power has only been relied upon to make laws with respect to Aboriginal and Torres Strait Islander peoples, such as laws concerning native title and the protection of Aboriginal and Torres Strait Islander cultural heritage. It could be amended to allow Parliament to make laws with respect to:

(xxvi) Aboriginal and Torres Strait Islander affairs; and in relation thereto, the interaction between Aboriginal and Torres Strait Islander peoples and the Parliament and Government of the Commonwealth

The drafting is intended to fit in with other powers conferred upon the Commonwealth Parliament. The reference to ‘affairs’ is consistent with ‘external affairs’ in section 51(xxix) and the phrase ‘and in relation thereto’ is used in the divorce power in section 51(xxii) to clarify the types of things that fall within the power. While technically, it would not be necessary to refer to the making of laws concerning this interaction with the Parliament and Government, as this would fall within the scope of laws with respect to Aboriginal and Torres Strait Islander affairs, it is expressly included to ensure that the intention to deal with this is given political force by the vote of the Australian people in favour of it in a referendum.

The express reference to ‘Aboriginal and Torres Strait Islander peoples’ would also be a form of ‘constitutional recognition’ which would entail recognition of a status that entitles them to interact with the Parliament and the Government. It would be up to Parliament, however, to enact laws to facilitate that interaction.

‘Interaction’ is a broad term, which could be given effect by a variety of means. This provision better reflects the breadth and intent of the Uluru Statement From The Heart by accommodating interaction by way of a Makarrata Commission, treaty-making and agreement-making, truth-telling and a voice or voices to Parliament and the Government, rather than being solely directed to a representative body speaking to Parliament.

No reference is made in the proposed amendment to a representative body. This avoids any perceived problems with constitutionalising its description or nature. Rather, the interaction is between the ‘peoples’ and the Parliament and Government. This could be done through the creation of bodies, or by other means. Critically, there is nothing in the amendment that could be characterised as a third House of Parliament.

There is no legal obligation to create the means of interaction. But the inclusion of a power to make laws with respect to interaction between Aboriginal and Torres Strait Islander peoples and the Commonwealth Parliament and Government, if approved by the people of Australia in a referendum, would create a political imperative for action in achieving this interaction and giving it effect by law.

There are, however, two problems with taking this approach. The first is that the 1967 referendum and the amendments it made to the race power are iconic for Indigenous Australians and there is a distinct reluctance to alter that legacy by amending the provision again. Second, such an amendment does not actually alter the powers of Parliament, as it

already can, under the existing race power, legislate to provide for such interaction, and it has not done so. The amendment facilitates legislative action but the words themselves impose no additional obligation to act – just a political expectation.

### **A stand-alone amendment**

An alternative approach would be to enact a stand-alone provision which does contain an obligation, but leaves to Parliament and the Government flexibility about the means by which it is achieved. Such an amendment could provide as follows:

127 The Commonwealth shall make provision for Aboriginal and Torres Strait Islander peoples to be heard by the Commonwealth regarding proposed laws and other matters with respect to Aboriginal and Torres Strait Islander affairs, and the Parliament may make laws to give effect to this provision.

This has been modelled upon the approach taken in sections 119 and 120 of the Constitution. In [section 119](#) an obligation is imposed upon ‘the Commonwealth’, as a polity, rather than the Parliament or the Executive, to protect every State against invasion. [Section 120](#) imposes an obligation on every State, that it ‘shall make provision for the detention in its prisons’ of persons convicted under Commonwealth laws ‘and the Parliament of the Commonwealth may make laws to give effect to this provision’. Both show that the Commonwealth Constitution accommodates provisions that impose an obligation upon a polity to act, which may be facilitated by the exercise of legislative power.

This places the obligation in the right place. It is the Commonwealth of Australia – the nation as a whole – which is obliged to ensure that Aboriginal and Torres Strait Islander peoples are heard in relation to matters with respect to their own affairs. But it leaves open the means of giving effect to that obligation – it could be by Government action, or by a statute enacted by Parliament or by the action of a House to establishing a parliamentary committee, or possibly a combination of all of them. It could also encompass cooperative Commonwealth and State action so that Aboriginal and Torres Strait Islander peoples have their voices heard by all constituent parts of the nation.

This draft provision has the same advantages as the proposed race power amendment, in that it provides constitutional recognition of Aboriginal and Torres Strait Islander peoples and it would permit those peoples to be heard in a range of different ways, from a voice or voices to Parliament to treaties, agreements and a Makarrata Commission, as proposed by the Uluru Statement From The Heart. Parliament would retain flexibility in determining how this should be done, but there would still be an obligation to act.

That obligation would be a constitutional duty and a political obligation, but not a legally enforceable one. In legal terms, it would be described as a ‘duty of imperfect obligation’. Again this is a concept already applied in the Commonwealth Constitution. Edmund Barton, one of the drafters of the Constitution, has pointed this out. When he was a High Court judge, he considered the duty of a State Governor to issue the writs in a half-Senate election under s 12 of the Constitution. He noted that this duty was not enforceable by the courts and observed: ‘Instances of such duties – duties of imperfect obligation – are familiar to students of Constitutional Law’ ([R v Governor of South Australia](#) (1907) 4 CLR 1497, 1511).

Other examples would include the duties imposed with respect to money bills in ss 53, 54 and 56 of the Constitution and the duties imposed on polities in ss 119 and 120 of the Constitution. The ‘duty of the Crown’ to protect its subjects has also long been considered a duty of imperfect obligation (*Love v Commonwealth* [2020] HCA 3, [107]; *Hicks v Ruddock* (2007) 156 FCR 574, [61]-[67]).

Under this proposed new s 127, a court would have no power to instruct the Parliament to enact a law to give effect to the duty or to compel the Government to act in a particular way to give effect to the duty. These would be matters for the Parliament and Government to decide. But a political and constitutional duty would nonetheless exist, which a responsible government could not ignore.

In terms of the legacy of 1967, such an amendment would retain untouched the race power in section 51(xxvi), but could fill the gap resulting from the repeal of [section 127](#) in 1967. This was the provision that had excluded Aboriginal people from being counted in reckoning the numbers of the people of the Commonwealth for certain purposes. It is fitting that it should be replaced with a provision that instead of excluding Aboriginal people from being counted, counts their value by insisting that they be heard.

It would also be appropriate to change the title of [Chapter VII](#) of the Constitution, in which it would be contained, to ‘The Commonwealth of Australia’, rather than ‘Miscellaneous’, as the Chapter is directed at matters concerning the Commonwealth as a polity, including the seat of Government and the representation of the Governor-General around the country. This would indicate that Australia’s relationship with Aboriginal and Torres Strait Islander peoples is a matter of importance for the nation as a whole – The Commonwealth of Australia – rather than something which is merely ‘miscellaneous’.

### **The way forward**

There are many different ways the Constitution might be amended to give effect to the Uluru Statement From The Heart. Failure to convince the Government as to the merits of one of them does not mean all hope should be abandoned. There are other options yet to be explored. For example, ‘Australians for Indigenous Constitutional Recognition’ and ‘Uphold and Recognise’ are both groups that are working on proposals for constitutional change, which need to be considered.

Above are two draft amendments that can serve to re-open the debate. It is time for people of good will to come to the table with proposals to see if the Uluru Statement From The Heart can be taken to heart by the Commonwealth of Australia and reflected by one means or another in the heart of its Constitution.

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