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Is an Advisory Body for Aboriginal People in Australia Progress to Rectify Past Injustices or a "Toy Telephone"?[1]: Insights from European and Other Experiences

Bertus de Villiers[1]

University of Johannesburg

Abstract

The discussions about the recognition of Aboriginal and Torres Strait Islander People within the Constitution of Australia have entered a new phase with a proposal being made for the establishment of an advisory body to represent the views of Aboriginal People. The 2017 *Uluru Statement from the Heart* and *Final Report of the Referendum Council* aim to address the lacuna in the Australian Constitution since the Constitution does not contain any 'recognition' of Aboriginal People as the original inhabitants and owners of the land. The Advisory Council is envisaged to be an elected body that can give advice to the federal Parliament. There are several international examples where advisory bodies have been used to articulate and represent the views of a particular segment of society. In Europe, for example, one of the best-known examples has been the Sami Parliament in Finland. The experiences of the Sami are of particular importance to Aboriginal People in Australia due to the policy- *cum* law- making function of their parliament. In this article consideration is given to four different advisory bodies that have been established at the international level, respectively in Finland, Germany, South Africa, and Singapore. Based on those experiences, observations are made for the ongoing discussions in Australia.

Keywords: self-determination for Aboriginal people; constitutional recognition of Aboriginal People; advisory council; rights of indigenous people; Sami parliament; Minority Council in Germany; Council of Minorities in Singapore; House of Traditional Leaders in South Africa

[*] Law School of the University of Johannesburg and State Administrative Tribunal of the Western Australia, Visiting Professor and Member. Correspondence details: Bertus de Villiers. Email: bertus.devilliers@justice.wa.gov.au.

> *Let it be repeated that this experiment [Native Representative Council of South Africa] has failed not only because of the difficulties inherent in a policy of dual political control, but also because of the government which alone could put life into this institution to make the Council work – it was just a toy telephone, and today the African baby for whom the toy was intended has passed the stage of playing at parliament-making (Mosaka as quoted in Roth, 2016: 175).*

The claims for constitutional recognition of Aboriginal and Torres Strait Islander People (collectively referred to in this article as 'Aboriginal People') have been making headlines in Australia and across the world for some time, but there seems to be more questions than answers. Part of the challenge is that Aboriginal People do not constitute a single, homogenous group who share a single set of laws and customs; they are not governed by an integrated hierarchical institution; and there is no traditional or elected national leadership who can rightly claim to speak with authority or legitimacy for all Aboriginal People. The diversity of identities, languages, laws, customs and interests amongst Aboriginal People make them a highly heterogeneous community of 'peoples' rather than a single indigenous 'people'.

This raises the question: how can constitutional recognition be given to Aboriginal People that is more than only symbolic?

In recent times, a central theme has been resonating from Aboriginal People, namely recognition of Aboriginal People by way of some form of an elected advisory council (Advisory Council) that could give advice to the federal parliament and federal government about matters that are relevant to Aboriginal law, culture and other interests (Final Report, 2017).

The concept of an advisory body to reflect the views and opinions of a community is not new from an international comparative law perspective. There are several examples in international constitutional law where different forms of advisory institutions have been created specifically to reflect the views of indigenous people or cultural communities; refer for example to the Sami Parliament (Finland), the Houses of Traditional Leaders (South Africa), the Minority Council (Germany), and the Council for Minority Rights (Singapore).

This article aims to explore lessons that can be drawn from the above-mentioned advisory bodies in an attempt to address questions that arise in regard to the proposed

Advisory Council. Although comparative experience must for obvious reasons be assessed within the context of the unique circumstances of each country, insight can nevertheless be gained from the experiences of other countries.

In the following parts an overview will firstly be given of the status of the recognition-debate in Australia; secondly selected case studies where advisory councils have been used will be discussed; and finally, potential lessons that may be of relevance to Australia's endeavours will be identified.

The following issues are considered in light of the experiences of the respective case studies:

- Achieving clarity about the objectives of the Advisory Council;
- The legal instrument to create the Advisory Council;
- The composition of the Advisory Council;
- Traditional versus modernity;
- Powers and functions of the Advisory Council;
- Mainstream versus sideline; and
- Who can speak for Aboriginal People.

1. The 'Recognition Debate' in Australia

The debate about 'recognition' of Aboriginal People has been ongoing for many decades.[2] Although there is strong support in the Australian community for some form of recognition of Aboriginal People, proponents are in disagreement about: what is meant by 'recognition'; in what legal instrument should 'recognition' be contained (for example by way of a treaty, within the Constitution, or by an Act of Parliament); should 'recognition' be principally symbolical or should it form the basis of reparation for past injustices by way of a separate institution or special representation for Aboriginal People; and what practical, monetary and other preferential treatment benefits should flow from 'recognition'?

The recognition debate took a leap forward when on May 26, 2017 delegates from Aboriginal communities across Australia met under the auspices of the Referendum Council (Referendum Council, 2017) at Uluru in the centre of Australia to issue a statement entitled *Uluru Statement from the Heart* (Statement of the Heart, 2017). The Referendum Council made its recommendations after wide-spread consultation with Aboriginal People (Final

Report, 2017: 46-138). The Referendum Council adopted four principles by which to assess a proposal submitted to it, namely that a proposal must: contribute to a more unified and reconciled nation; be to the benefit of and in accord with the wishes of Aboriginal People; be capable of broad support by the Australian people; and be technically and legally sound (Final Report, 2017: 5).

The Referendum Council considered and consulted Aboriginal People about 5 distinct options for recognition, namely:

- A joint statement that recognizes Aboriginal and Torres Strait Islander Peoples as the First Australians.
- Amending the existing 'race power' of the Constitution (s61(xxvi)) or deleting it and inserting a new power for the federal parliament to make laws for Aboriginal and Torres Strait Islander Peoples.
- Inserting a guarantee against racial discrimination into the Constitution.
- Deleting s25 of the Constitution (which contemplates the possibility of a state government excluding some Australians from voting on the basis of their race).
- Providing for a First People's Voice to be heard by federal parliament and the right to be consulted on legislation and policies that relate to Aboriginal and Torres Strait Islander Peoples (Final Report, 2017: 6).

The Statement issued by the Referendum Council contains the framework of what 'recognition' could entail, namely: (a) a form of constitutional recognition that recognizes and acknowledges the ancient and ongoing linkage of Aboriginal People to the land; (b) a commitment to address the socio-economic deprivation Aboriginal People suffer; and (c) a model for more effective consultation and co-governance for Aboriginal People. One of the options that has been proposed is the creation of an elected, consultative body through which Aboriginal People can express their views, be consulted by government and Parliament, and make inputs in legislation and policies that affect Aboriginal People.

The Referendum Council, after extensive consultation, opted for a 'constitutionally entrenched voice' to be given to Aboriginal People (Final Report, 2017: 14). The Referendum Council preferred for the Advisory Council to be enshrined in the Constitution (hence requiring a referendum) since the likelihood of the advice being treated seriously by Parliament would be enhanced by a constitutionally provided institution (Final Report, 2017: 35).

The Final Report, which was handed to the Government and Leader of the Opposition on June 20, 2017, made two major recommendations. The recommendations are for the Constitution to be amended to provide for a 'representative body' for Aboriginal People and that a symbolic statement of recognition is adopted by federal and state parliaments.

The general outline proposed by the Referendum Council for the Advisory Council can be summarized as follows: (Final Report, 2017: 8)

- The Council would be elected and not appointed;
- The detail of the Council, its powers and its functioning would be contained in legislation to be enacted by the federal Parliament;
- The Council would have advisory, not legislative powers;
- The exact scope of advice given is yet to be formalized; and
- The Council would not have a veto in regard to federal legislation thereby leaving the doctrine of parliamentary sovereignty intact.

In the following part consideration is given to selected case studies where advisory councils are used to represent the views of indigenous people or to represent the interest of cultural communities.

2. Selected case studies: Finland, Germany, South Africa and Singapore

In the following four case studies consideration is given to several institutions with advisory and consultative powers that have been established in recent times to accommodate and reflect the interests of indigenous people and cultural communities in their interaction with governmental institutions.[3] Each of these institutions has a unique set of powers and functions that may bear relevance to the issues identified in the Introduction that face the proposed Advisory Council.

Four institutions are considered, namely:

- Minority Council of Germany: principally a public education and advisory body
- Sami Parliament of Finland: a 'Parliament' that is not a parliament
- House of Traditional Leaders of South Africa: a quasi-legislature
- Council for Minorities of Singapore: scrutineering of legislation

2.1 *Minority Council of Germany: Public Education and Advisory Powers*

In Germany there has been since 2005 a Minority Council (a similar council was recently installed in Georgia) that provides advice about the cultural and language interests of four main minority groupings in Germany: the Frisians, Sinti and Roma, Sorbian, and Danish minorities (Minority Council). The members of the Council are appointed by the federal government after consultation with the respective language communities. The composition of the Council is limited to the four main minority communities who have had a long association with Germany.

The Council gives advice to the federal government and federal parliament about matters that affect those communities, particularly in regard to the protection and promotion of their language and culture. The Council does not formally interact with the respective states or local governments, but it may on an ad hoc basis make submissions or lodge petitions with second and third tier governments. The Council also interacts with European Union institutions where consideration is given to the rights and interests of cultural minorities in Europe in general and Germany in particular. There is no obligation on state or federal parliaments to submit any legislation or policies to the Council for consideration or comment.

Funding for the Minority Council is made up of a combination of federal and state grants. The Minority Council operates an office in Berlin from where it coordinates activities and makes petitions to federal and other authorities, in particular the federal ministry dealing with the protection of language minorities (Minority Council Media Release, 2017). The Council coordinates an annual conference with government agencies about the status, rights and interests of the four minorities in Germany.

The Council also makes representations to the joint federal-state intergovernmental meetings where language and cultural issues are discussed. In a recent debate in the federal Bundestag proposals were made about ways to strengthen the political participation and influence of the Council in the federal parliament (Minority Council debate, 2017).

One of the main objectives of the Council is to protect and promote the language and cultures of the communities and to comment on legislation and policies that may impact on their identities. There is no obligation for bills of the federal parliament to be referred to the Council for comment or inputs, but the Council is afforded status in the legislative process of the federal parliament as a specialized non-governmental entity. It is said that the Council has

been particularly successful four areas: being a forum for the four minority communities in regard to matters of common concern, particularly vis-à-vis government institutions; being a platform of communication to the broader community; setting an example for inter-communal cooperation and tolerance; and initiating and coordinating civil cultural events (European Centre for Minority Issues, 2016: 25).

The German Council's functioning and initiatives are not aimed at support for the interests of a specific language community, but rather to promote a culture and atmosphere that is in general conducive to tolerance and language diversity in Germany. The Council has 'soft' powers which aim to influence policy and to create an atmosphere to promote the interests of the four communities, but with no legislative or formal consultative powers. There is no statutory obligation on any tier of government to consult with the Council, or to submit draft legislation to the Council for comment, but in practice there have been wide-ranging efforts by the federal government to build the capacity of the Council and to assist in its operations. The Council in essence is akin to a specialized non-governmental organisation that enjoys unique standing in Germany, but without it being part of the legislative or executive process.

2.2 *Sami Parliament of Finland: a 'Parliament' that is not a parliament*

The Sami are a small, indigenous group of which the members are scattered through Finland, Norway, Sweden and Russia.[4] Although their traditional territories are situated in the north of Finland, they do not form a majority in any part of the countries in which they reside (Aikio and Pekka, 1994: 1).

In Finland about 60% of the Sami live in their traditional areas with the remainder of about 40% reside in other parts of Finland, including in the capital Helsinki. In the areas where the Sami live they are fully integrated in respect of their residential patterns with the rest of the population (Aikio-Puoskari and Pentikainen, 2001: 4).[5]

The Sami 'culture' is given a wide expression by the Constitution of Finland including the traditional livelihoods of the Sami (fishing, hunting), the use of their language, and promoting their lifestyle.[6] The Sami Language Act (Sami Language Act, 1991) is a key mechanism to protect and promote the Sami language and culture across Finland.[7] More elaborate language rights exist within the Sami homeland (Sami Language Act, 1991:

Chapter 3). The national government makes available funds and resources to promote and protect the Sami language.

Finnish legislation establishes the legal basis upon which the Sami are identified: firstly, self-identification which entails the subjective expressions and intentions of an individual to associate and be associated with the Sami people; and secondly, an objective element whereby the closeness of a person to the Sami community is dependent on whether one or both of his/her parents spoke the Sami language or one or both parents learnt Sami as their first language (Research Centre of Wales, 2016). Membership of the Sami is therefore flexible and 'soft' around the edges.[8]

The Sami got their own elected representative body (called the Sami Delegation) in 1973 (Aikio-Puoskari and M Pentikainen, 2001: Annex 1) and the Constitution of Finland recognizes the right of the Sami to 'maintain and develop their own language and culture' (a17). The Sami Delegation existed until the end of 1995 when it was replaced by the Sami Parliament (Finnish Official Gazette SSK 17/7/1995/974). The establishment of the Sami Parliament was a watershed to acknowledge collective rights of the Sami (Josefen, 2010: 6).

The Sami Parliament, with its 21 elected members, has a territorial and non-territorial (De Villiers, 2014: 16)[9] jurisdiction (Act on Sami Parliament). An executive is appointed from the members of the Parliament and it is responsible to organize the affairs of the Parliament. Parliamentary committees consider matters of interest to the Sami, for example language, education, and resource use.[10] The main focus of the Sami Parliament's jurisdiction is what is known as the Sami-homeland, but its decisions about culture, language and education are also applicable to the Sami where ever they live in sufficient concentrations in Finland (Tkacik, 2008: 375). Elections for the Sami Parliament are held every 4 years.[11] Any Sami on the Sami Electoral Register[12] can stand for election in the Sami Parliament (Hannikainen, 2002: 189). Participation in the Sami elections or Parliament does not exclude a Sami from participation in general elections with the rest of the population.

The Sami Parliament is not created by constitutional or statutory instrument but arises from an executive order of the ministry of justice. Although called a 'Parliament', it does not form part of the official governance and administrative institutions of Finland. It is also not a second house of Parliament. It is however funded by the national Parliament of Finland. The status of the Parliament is described as follows:

> The Sami Parliament lacks real political influence as shaped through participation in decision making, the right of co-determination in legislative matters, the right of

> veto in administrative decisions or, the status of compulsory referral body in matters that concern the Sami interests (Ombudsperson, 2008: 23).

The Sami Parliament does not have a formal legislative function although it is responsible to advocate for the interests of the Sami and to allocate the funds set aside by the national Parliament of Finland, for specific projects to promote the Sami identity such as production of language materials, interpretation services, publication of books and teaching material, and other cultural needs.

Reference to Sami 'autonomy' when speaking about the Sami Parliament, is therefore 'somewhat misleading' (Aikio-Puoskari and Pentikainen, 2001: 24), but the Sami Parliament does have discretion when allocating grants for purposes of the cultural development of the community.

The main functions of the Sami Parliament are to give advice to government institutions about matters that affect the Sami and to allocate and administer the grants awarded to the Sami People (s8 Act Sami Parliament no. 731/1999).

An important (potential) influence of the Sami Parliament lies in the statutory obligation of the national, regional and local authorities in Finland to negotiate with the Sami about matters that affect their lives (s9 Act Sami Parliament no 731/1999). This contrasts with arrangements in Sweden where there is no statutory obligation to consult with the Sami. The obligation to consult with the Sami Parliament requires public authorities to 'negotiate with the Sami Parliament in all far-reaching and important measures which may directly and in a specific way affect the status of the Sami as an indigenous people' in regard to the following matters: community planning; management of public lands; mining; culture; teaching and education in Sami language; and any other matter that impacts on the status of the Sami language and culture (s9 Act Sami Parliament no 731/1999).[13]

Failure by a government institution or authority to negotiate does, however, not affect the legal validity of a decision or legislation (Aikio-Puoskari and Pentikainen, 2001: 25). The criticism is therefore often heard that the duty to negotiate does not have sufficient sanction since no penalty or legal consequence arises if consultation does not take place.[14]

In practice the Sami are given an opportunity to attend and address committees of Parliament; public authorities are aware that the obligation to 'negotiate' requires more than to 'consult'; and administrative decisions have been set aside due to a lack of negotiation (Scheinin, 2001).

As far as the efficiency and compliance with the consultative rights of the Sami Parliament are concerned, the evidence presents as mixed bag.[15] Consultation by government agencies with the Sami Parliament continues to be sporadic and the impacts of representation and advice on the parliamentary process have been limited. Queens University has described the limitations of the Sami Parliament as follows:

> …given the inadequate authority for executive governance, the Sami Parliament is more an advisory body to the Finnish government than a body for the administration of Sami affairs (Queens University, 2015).

The Sami's experience highlights that policy inputs by an advisory body to government agencies are complex to manage since agencies that formulate policy in regard to the Sami are scattered over several government departments. There is no centralized agency or department that deals with Sami interests, which often leave the Sami to play catch-up once policies are announced or implemented. The expertise and resources required to influence government departments is often not available to the members of the Sami Parliament. In policy areas such as resource utilization, forestry, mining, and infrastructure the 'consultation' is sporadic, often conflictual and generally ineffective (OECD, 2017: 86). The Sami Parliament is frequently in catch-up mode since it can only comment on policies once public announcements are made.[16]

The Sami have been able to make submissions to the national parliament via parliamentary committees. The consideration given by national politicians to Sami-related issues are influenced by a range of factors but, more often than not, the needs of the Sami are not high on the national political or policy agenda. The low level of representation of the Sami within the ranks of mainstream political parties further limits the Sami's ability to exert influence in national policy developments. There is also a concern that parallel institutions for the Sami may, in effect, give rise to a 'two-speed' system where they are treated differently (for better or for worse) to other citizens.

In a recent submission to the United Nations the Vice-President of the Sami Parliament expressed the concerns of the Sami in the following way:

> I'm deeply concerned, that yet again, we are in a position where we have to report serious violations on our rights as Sami people, as indigenous peoples. The government of Finland has lately year by year decided to go more further on making decision in different forms or legislations that are not for the benefit of Sami culture survival, implementation of our rights as indigenous peoples nor fulfilment on the commitment to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples or just saying it simply to

> implement it especially nationally (Letter by Mr Tuomas Aslak Juuso to United Nations Permanent Forum on Indigenous Issues, April 26, 2017).

2.3 *House of Traditional Leaders of South Africa: a quasi-legislature*

The negotiations leading up to the enactment of the South African Interim Constitution in 1993 were characterized by serious divisions about the recognition, if any, to be given to traditional leaders and tribal authorities. It was ultimately resolved to allow traditional leaders as an institution to participate directly in the constitutional process.[17] Constitutional Principle XIII contained in the 1993 Constitution, and to which the 1996 Constitution had to comply,[18] secures the future of traditional authorities. The current Constitution (s211(1)) recognizes the institution, status and role of traditional leadership in South Africa (Du Plessis and Scheepers, 1999).

The Constitution mandated the enactment of legislation to regulate the institutions of traditional authorities and in addition, the Constitution allows the judiciary to take into account and apply traditional law in appropriate circumstances (s211(3)).[19] The Constitution makes particular reference to the recognition of traditional authorities and the important role they fulfil at the level of local government (s212(1)). These constitutional provisions contrast sharply with those who argued during negotiations that traditional authorities have been so discredited by the *apartheid* system that they had lost all relevance to contemporary South Africa (Sithole and Mbele, 2008: 16).

The Minister of Provincial and Local Government in 2002 succinctly put the position of the Government in regard to the place of traditional authorities in South Africa:

> It is the Department's considered view that the institution [of traditional authorities] has a place in our democracy, and has a potential to transform and contribute enormously towards the restoration of the moral fibre of our society and in the reconstruction and development of the country, especially in rural areas (White Paper, 2002: 4).

The Traditional Leadership and Governance Framework Act, 2003 provides for the recognition, organization of traditional institutions and matters related thereto as mandated and required by the Constitution. Traditional authorities are required, however, to adjust their laws and customs so as to comply with the Bill of Rights contained in the Constitution (s2(3)). At least one third of the members of a traditional council must be women and 40% of the traditional council must be elected by popular vote of the traditional community (s3(2)).

Some of the typical functions of a traditional council are to: administer the affairs of the traditional community; support local governments to identify and understand the needs of traditional communities; make recommendations to local, provincial and national government about service delivery to traditional communities; participate in policy discussions at local level; and work closely with local governments about any matter affecting traditional communities (ss4 and 5).[20]

Houses for traditional communities are instituted at national and provincial levels (s17), with consultation rights also at a local level.[21] These houses are quasi-legislatures—on the one hand they have some of the characteristics and procedures of a legislature,[22] but constitutionally they are not 'parliaments'.[23] No house for traditional leaders may use its resources to promote the interests of a political party so as to ensure that the authorities do not become politicized (s16(2)).[24] Any legislative arrangement that may affect traditional communities, at the national or provincial level, must be referred to the relevant house of traditional leaders for advice and comment (s18). The provincial houses for traditional leaders are, however, not formal chambers of the provincial parliament.

A National House for Traditional Leaders is established by legislation (s2). The National House of Traditional Leaders comprises 20 members and is formed by the provincial Houses of Traditional Leaders electing three senior traditional leaders from the province (s3).[25] At least a third of the representatives must be women unless a lower quota is set by the relevant minister (s3(4)). The House must meet at least once per quarter while the national Parliament is in session, but more regular meetings can be convened (s8). The National House of Traditional Leaders is not a third chamber of the national parliament.

Some of the functions of the House of Traditional Leaders is: to consider draft legislation referred to it for comment; to give advice the government in regard to customary law and customs; the House must be consulted on national development programmes that affect traditional communities; the House must form cooperative relationships with other spheres of government to assist in service delivery (s11);[26] and it must investigate matters referred to it by a provincial house of traditional leaders (s15 of the National House of Traditional Leaders Act).

At a local government level provision is made for traditional leaders to participate in meetings of the local government councils and to make submissions on behalf of their community (s81 of the Local Government Municipal Structures Act no. 117 of 1998). The

provincial Minister responsible for traditional authorities is responsible to appoint the traditional leaders who may attend meetings of local governments, provided that the traditional leaders may not constitute more than 10% of the number of local government councillors. If a local government intends to make a decision that affects traditional communities, it must first give notice to the traditional representatives and given them an opportunity to comment (s81(3) Local Government Municipal Structures Act).

Some of the specific categories of functions that may be decentralized to traditional councils for decision-making or administration are: land administration;[27] arts and culture; health; welfare; administration of justice; environment; tourism and safety and security (s20 Traditional Leadership and Governance Framework Act). Whichever sphere of government is responsible for the decentralization, must also endeavour to ensure that the traditional council has the capacity to discharge the functions allocated to it.

The respective national and provincial houses of traditional leaders are operating with varied success (or failure). Although the institutional framework within which they operate is advanced compared to many other constitutions and statutory arrangements, at the operational level there are often complaints about mismanagement, corruption, political patronage, cronyism, and lack of consultation by national, provincial and local governments (Oomen, 2005). The concern is also often expressed that legislation passes through Parliament without the comment of traditional houses having been sought, while others are critical and contend that traditional leaders have 'abused' their position to influence government for their own purposes and that political factions have used and abused their relationship with traditional leaders (Ntsebeza, 2006: 289).

During the 2017 opening of the National House of Traditional Leaders, the Deputy Chairperson of the House, Chief Sipho Mahlangu, made the following observation about the lack of consultation:

> Some legislation doesn't pass muster because we were not involved in conducting public participation which is an inherent requirement of law-making. We need to amend our legislation and give more powers and functions of law-making processes to traditional leaders. If this institution remains grossly incapacitated as it is now, its dignity will continue to be at stake.[28]

The recognition of traditional authorities in South Africa remains a source of controversy. Some are of the view that the recognition given to traditional authorities is too weak and that the quasi-legislative status of the traditional houses does not do justice to the important institution of traditional leaders, while others are of the view that the recognition of

traditional leaders in such an elaborate way is an anachronism with a modern, democratic constitution and that excessive power is given to what amounts to an undemocratic institution.

The following observations can be made about the houses of traditional leaders and possible relevance to the subject of this article:

First, it remains an unresolved question whether traditional authorities should be treated as a fourth level of government or rather as a special category of non-governmental organization.

Second, accountability (of lack thereof) of the houses of traditional leaders to the electorate in general and to their communities in particular is of concern.

Third, the formal interaction between the houses of traditional leaders and constitutional parliamentary institutions remains weak and discretionary. Traditional systems do not regularly form part of intergovernmental meetings at the executive level, and their policy inputs into legislation are limited.

Fourth, the lack of clarity of functions and responsibilities of traditional houses and the absence of enforceability of their advice undermine the credibility of the institutions, enhancing the perception that the institutions are more concerned with talking than policy development.

Fifth, the interaction between the traditional houses and local governments remains complex,[29] particularly in light of the perceived closeness of traditional authorities to local communities in contrast with local and provincial governments which are often seen as 'remote'.

2.4 *Scrutineering: the Council for Minorities of Singapore*

The Presidential Council for Minorities of Singapore scrutinizes legislation to ensure it does not offend minorities. The Council has its origins in the 1970 Constitution of Singapore (Mien, 1973). The Constitutional Committee on Minority Rights (Constitution (Amendment) (Presidential Council for Minority Rights) Bill, Bill 42 of 1972) that made recommendations for a new constitution advised that such a Council could play an indispensable role in a multi-cultural set-up such as Singapore (Protection of Minorities, 1965). The Council, in effect, is

tasked to scrutinize and comment on legislation and subsidiary legislation that may impact on the rights and interests of minorities.

The Council comprises 16 members who are appointed by the President on the advice of the cabinet (s69 Constitution of Singapore).[30] The powers of the Council are advisory in nature (a81B Constitution of Singapore; Tan, 2011: 203). The recommendations or advice of the Council are not binding, but certain procedural rights arise in regard to bills or subsidiary legislation to which the Council objects (s81A Constitution of Singapore; Thio and Tan, 2009). The Council does not have any role to ensure that legislation complies with other civil rights as protected in the Constitution (Neo, 2017: 47). The Council cannot receive representations from the public in regard to concerns about the discriminatory intent or effect of legislation.

The mandate of the Council is broad, namely to consider all legislation to ensure there is no disadvantage to minority communities (ss68-96 Part VII Constitution of Singapore; Tan, 2015: 102). A 'differentiating measure' is an item that raises concerns of the Council due to its potential discriminatory nature (s81 Constitution of Singapore).[31] Three categories of bills are excluded from comments by the Council, namely the budget, urgent legislation and security-related legislation (s81K(7) Constitution of Singapore).

The Council reports to Parliament on any matter it views appropriate, but particularly in regard to legislative provisions that may be discriminatory or offensive to minorities. The Council submits an annual report to Parliament (a81V Constitution of Singapore).[32]

The advice of the Council is requested after a bill had been voted upon by Parliament but before the President assents to it (s81K Constitution of Singapore). The approved bill is submitted to the Council for its consideration. The Council must consider the bill and report to the speaker of Parliament within 30 days, unless the time is extended due to the complexity of the bill.

Parliament may deal with advice from the Council in two ways: it may amend the bill and re-submit it to the Council to consider; or it may go ahead and submit the original bill to the President for assent regardless of the adverse comments that may have been received (s81K(6) Constitution of Singapore; Tan, 1999: 43). If Parliament decides to ignore the advice of the Council, a two-thirds majority of all members of Parliament is required to override the opinion expressed by the Council. Even if Parliament opts to proceed with a bill

and present it to the President regardless of the recommendations of the Council, the President may pursuant his veto powers refuse to assent.

The same process is essentially followed in regard to subsidiary legislation (s81M Constitution of Singapore). All subsidiary legislation must be submitted by the relevant minster to the Council within 14 days of it being published. The Council must form an opinion within 30 days of having received the subsidiary legislation. If the Council identifies a discriminatory or offensive element in legislation, the minster may amend or withdraw the legislation within 6 months, or in the alternative Parliament may pass a resolution that affirms the legislation.

The Presidential Council for Minority Rights is a unique institution which has served as an important check and balance in Singapore regardless of it not having objected to legislation on a regular basis. It serves as a scrutineering, technical institution rather than a political, representative forum. The scope of its functions is limited, which may on the one hand be criticized for lack of 'teeth', but on the other hand it has not evolved into a costly or controversial bureaucracy. The members are appointed and not elected which raises questions about their representativeness and accountability. The advisory capacity of the Council is limited since it cannot make general recommendations about the promotion of multiculturalism and it cannot investigate or receive submissions about general human rights issues and equality of treatment of individuals.

3. Assessment of advisory functions in light of the Australian debate

The four advisory institutions reflected on in this article provide useful points of reflection for the Australian debate about the proposed Advisory Council for Aboriginal People.

The following observations may be of particular relevance in response to the questions raised in the Introduction:

3.1 *Be clear about objectives*

It is essential that clarity be achieved about the objectives of the Advisory Council. The objectives will determine: the scope and functions, the instrument that creates it, accountability and representation, check and balances, and judicial oversight. Unless the objectives are clear and widely accepted, diverse public expectations may ultimately erode

the functioning of an Advisory Council. The Sami Parliament serves as an example of an under-performer since it is called a 'parliament', while in effect a much weaker institution has eventuated. Similar criticism can be expressed about the houses of traditional leaders in South Africa. Frustration at those houses continues because it is not clear whether these houses are in effect co-parliaments, or whether they are merely expensive fora whereby the majority party expands its influence over traditional communities. The German Council has less impressive powers, but it performs well within those that are allotted, whereas the Singapore Council has been mainly silent since its inception.

It appears from these case studies that unless objectives of the proposed Advisory Council are agreed and well-defined in advance, disappointment and frustration may ultimately erode the Council's credibility and legitimacy. The Referendum Council does not propose which draft legislation or policy measures ought to be submitted by the federal Parliament to the Council for advice. In fact, it is not clear whether there would be an obligation on Parliament to invite comment from the Advisory Council (thus giving rise to judicial review if comment is not sought); whether the Council would self-initiate advice (which potentially puts it in no stronger legal position any other non-governmental lobbyists); or whether Parliament would be required to 'consider' the advice received (which can give rise to judicial review if Parliament fails to give recommendations adequate weight or attention).

3.2 *Advisory council created by constitutional or legislative instrument?*

The instrument that creates an Advisory Council inevitably sends an important signal about the status of the Council vis-à-vis other public law institutions. Account must be taken, however, that the credibility of the Constitution can be diminished if it creates institutions that ultimately over the long term do not perform properly or lack credibility. The Singapore Council seems impressive from a constitutional perspective, but from a functional perspective it has been largely inactive. The same can be said of the traditional houses in South Africa that resemble third chambers of Parliament, but in effect have become very expensive meeting and talking chambers with little practical benefits to the nation. It is contradictory to have a 'Parliament' being created administratively without effective legislative powers as happened in Finland. As a general proposition it can be said that unless the Advisory Council exercises significant and important governance and legislative functions, it should preferably

be a creature of statute, regulation or executive act rather than the Constitution (De Villiers, 2017).

The Referendum Council proposed a constitutionally elected Advisory Council but with limited advisory powers. This creates the potential for frustration since: (a) an elected body's advice may not be followed by Parliament and this may cause frustration in the electorate; (b) the failure by Parliament to heed to advice could enhance rather than diminish feelings of marginalization by Aboriginal People; or (c) if by law or judicial construct Parliament is bound by the advice received, the doctrine of parliamentary sovereignty would be compromised.

3.3 *Composition of the Advisory Council*

The composition of an Advisory Council goes to the heart of the objectives of the council. If the Council is democratically elected, the expectation will inevitably be that the institution would have more powers of substance than the case may be when the members are merely appointed. This is part of the frustration experienced by the Sami people who elect their representatives but end up with an institution with weak powers. The Minority Councils of Germany and Singapore are appointed, which is consistent with their relatively weak powers. The membership of the houses of traditional leaders in South Africa is in effect hereditary (with an elected element), but this raises the question of accountability and lack of legitimacy. It can be argued that *representation* and accountability go hand in hand with legislative powers, whereas *appointments* are associated with advisory functions. If the Advisory Council is elected, but with weak powers, it might struggle to build and retain credibility; it could lose legitimacy as the initial enthusiasm weakens and it may turn into a very expensive talking forum.

The proposed Advisory Council is to be elected, but the details are left for legislation yet to be enacted. The details for elections, keeping of separate voter rolls, and dealing with disputes about 'Aboriginality'—all potentially thorny issues—remain to be resolved by way of legislation.[33]

3.4 *Traditional vis-à-vis modernity*

There is wide support that indigenous and traditional authorities must, in order to be recognized as part of the democratic institutions of governance, submit themselves to modernization and internal democratization. The risk of a parallel system created where individuals are treated differently merely because the system is 'traditional' or 'indigenous', should not be underestimated. In South Africa large sections of the community reside in areas that are under the influence of traditional authorities, and yet many feel removed or excluded from traditional authorities, view the authorities as archaic and out of date, assess them as ineffective, experience them as discriminatory, and reject their authority. The credibility and legitimacy of the Advisory Council may be susceptible to challenge unless proper democratic checks and balances are in place.

The Referendum Council is not clear where the Advisory Council's focus of advice should be—should it be on traditional laws and customs or should it include all legislation that may possibly impact on the general socio-economic circumstances of Aboriginal People. On the one hand the Referendum Council is of the view that a power to comment on matters 'affecting' Aboriginal and Torres Strait Islander Peoples may be too general in scope since it may practically mean all legislation, while on the other hand if advice sought were limited to legislation 'with respect' to Aboriginal and Torres Strait Islander Peoples it may be too narrow (Final Report, 2017: 36). The answer to this question goes to the heart of the proposed Advisory Council jurisdiction since failure by Parliament to comply with the obligation to seek advice may give rise to litigation and frustrated expectations.

3.5 *Powers and functions of the Advisory Council: advisory, consultative or legislative*

The case studies illustrate the importance of clarifying at the outset what powers and functions an Advisory Council should have. The powers and functions are inevitably linked to the objectives and composition of a council. Generally speaking, a proposition can be put forward that a decision-making/legislative body ought to be elected and ought to be recognized in the constitution, whereas an advisory body can be appointed and be established pursuant to legislation or executive act. The range of powers and functions may vary, for example: on the one side of the spectrum there are the Council of Germany with predominantly educational functions and the Council in Singapore with limited power to comment on legislation; whereas on the other side of the spectrum are the Sami Parliament

and the Houses of Traditional Leaders which, at least on paper, have quasi legislative functions albeit more so in theory than in practice.

In practice, the formal powers of traditional authorities are often limited to advisory and consultative aspects. This means that the traditional authorities generally do not have the ability to veto legislation; their approval is not required for legislation of a general nature to be enacted; their advice to parliament is not binding; legislation cannot be legally challenged due to advices not being invited or accommodated; but their views may carry informal political weight depending on the matter under consideration.

The Referendum Council does not provide a definitive answer to this question. One the one hand it speaks about the Advisory Council being an elected voice, but on the other hand it is cautious to give assurance that parliamentary sovereignty would remain unaffected. The case studies referred to demonstrate that unless this question is dealt with in greater clarity, the Advisory Council runs the risk of either losing credibility amongst its electorate (if its advice is not sought or heeded by Parliament) or of it becoming involved in protracted litigation with Parliament about the adequacy of referrals or the question whether due consideration had been given to its advice.

3.6 *Mainstream versus side-line*

The separate accommodation of Aboriginal People in an advisory body is a matter that potentially goes to the centre of the body polity. One the one hand there is the risk of an 'us-versus-them' culture arising from separate accommodation of an ethnic minority,[34] while on the other hand historic inequality often requires special treatment and measures to rectify past injustices against indigenous people. The case studies show that it is a fine and difficult balance to achieve equilibrium. The Sami Parliament illustrates how even a formal institution that is called a 'parliament' can be side-lined unless the cause of the indigenous community is taken up by mainstream political parties; while on the other hand the houses of traditional leaders in South Africa are examples of how political patronage and financial incentives and exploitation can be used by mainstream parties to exert control over traditional communities.

The Referendum Council set as one of its benchmarks for any proposal that the broad Australian community must accept the proposal. The Referendum Council proposed a constitutional amendment but this has been rejected by the current government. The political acceptability of an Advisory Council within the general public and also within the Aboriginal

community is yet to be tested. The Referendum Council finds itself in an unenviable position because on the one hand it wishes to leave some questions unanswered until Parliament enacts legislation to give effect to the Advisory Council, while on the other hand the public response to the proposal may be influenced by the questions raised above being properly answered. Underlying the concept of the Advisory Council is the belief (hope?) that Parliament would, for generations to come, act in good faith towards the Council by seeking its advice and giving due consideration to it. This belief may be well intended, but it leaves the Council legally weak and therefore exposed to criticism from within its constituency if advice is not sought or heeded.

3.7 *Can the Advisory Council speak for all Aboriginal People?*

Since Aboriginal People are not a single, mono-ethnic community with a hierarchical or elected leadership structure, the question is whether the Advisory Council could with credibility speak on behalf of all Aboriginal People, particularly if account is taken of different language communities, native title claim groups, native title land holding corporations and so on. Account must also be taken that Aboriginal People in urbanized areas may outnumber or exert greater influence than those in rural areas and this in itself may contribute to internal disharmony and fragmentation. The experience of the Sami and more so in the case of traditional leaders in South Africa show that there are many and diverse local interests as well as an urban/rural divide that are not necessarily reflected by national, elected traditional representatives.

This is a complex question because it provides an intersection to all the issues raised above. An elected Advisory Council inevitably means that the majoritarian principle applies to elections and to decision-making. Some Aboriginal communities, especially those in rural areas where traditional laws and customs may be more closely adhered to than in urban areas, may therefore be out-voted in popular elections. The same may happen within the Advisory Council since majoritarianism would likely be the basis of the Advisory Council's operations and decision-making. Majority decision-making may not be consistent with the traditional arrangements of the respective Aboriginal and Torres Strait Islander peoples.

Conclusion

The advisory arrangements in Finland, Germany, South Africa and Singapore cover a wide spectrum and yet stand in sharp contrast with each other. The four approaches show how a statutory body could be used to involve Aboriginal People more closely in legislation and policy matters that affect their lives. The experiences also highlight, however, the complexity of creating separate consultative institutions and how disappointment may arise if those institutions ultimately turn out to be little more than a 'toy telephone'.

Notes

[1] In the mid-1930s a special council was formed for the African people of South Africa to express their views to government and the (White) Parliament. It was called the Natives' Representatives Council or more commonly, the 'third house' to the existing two-house Parliament. It comprised elected and appointed persons. The Council ultimately failed in its objectives—its advice was not heeded or taken seriously, it did not evolve into a co-legislature, and its members became discredited and disillusioned. ZK Mathews, a senior African leader at the time, compared the Council to a 'toy telephone' with a lot of talking on the one side, but no one listening at the other end. The Council was ultimately dissolved in 1959.

[2] The Referendum Council was appointed on December 7, 2015 by Prime Minster Turnbull and Leader of the Opposition Shorten.

[3] These case studies are chosen since they represent a spectrum of advisory institutions, ranging from a 'parliament' for traditional hunter gatherers and herders, a chamber for traditional leaders and chiefs, to more recent mechanisms with an appointed council scrutinized policies and legislation to reflect the views of cultural communities.

[4] Although the Sami are treated as a homogenous community, they comprise several subgroupings with clearly distinguishable dialects and interests. Norway and Sweden also have a Sami parliament (together they form the Sami Parliamentary Council), but for purposes of this article the Sami Parliament of Finland is most relevant due to the extent of its powers and functions.

[5] Only one municipality in Finland has a Sami majority.

[6] s17(3) Constitution of Finland recognizes the Sami as the traditional people of the land and s121(4) recognizes linguistic rights of the Sami.

[7] Some of the key provisions of the Sami Language Act are as follows: the right to use the Sami language in dealings with public authorities; promotion and teaching of the Sami language; publication of Government announcements in the Sami language if it affects the Sami community; and registration as a Sami.

[8] There is some complexity to define at a practical level who is a Sami and who is not a Sami.

[9] By 'non-territorial' is meant that the Sami Parliament may arrange for services to be delivered on a community basis rather than a geographical basis.

[10] For the wide-ranging activities of the Sami Parliament see http://www.samediggi.fi/index.php?option=com_content&task=blogsection&id=14&Itemid=111.

[11] The whole of the country is a single constituency. Due to the relatively weak political organization of the Sami there is an absence of strong party-political structures to agitate for policies that could benefit the Sami.

[12] For a discussion about the process of 'Sami identification' refer to Joona (2016: 159) and the discussion how 'inclusion' as a Sami and 'exclusion' from being a Sami has become 'problematic'.

[13] s9 determines that: 'The authorities shall negotiate with the Sami Parliament regarding all far-reaching and important measures, that directly or indirectly may affect the Sami's status as an indigenous people.'

[14] The limited powers of the Parliament have been criticized as being more of a 'policy' nature than a legislative forum (Myntii, 2000).

[15] The Government of Finland acknowledged in a submission to the United Nations in 2016 that there were 'challenges to reconcile the views of the Government and the Sami Parliament'. Statement by Finland to the United Nations Human Rights Council on September 30, 2016.

[16] See in contrast the Council for Minorities in Singapore (discussed below) which must receive all bills after parliament had enacted it but before the president assents to it.

[17] The Congress of Traditional Leaders of South Africa (CONTRALESA) was established and continues to promote the role of traditional leaders. See http://contralesa.org/.
[18] A multiparty agreement was reached in 1992/3 that the Interim Constitution would contain fundamental constitutional principles that had to be adhered to when the final constitution was drafted. For more information about the back to the Constitutional Principles and how they operated refer to De Villiers, 1994.
[19] Customary law is recognized insofar as it is not inconsistent with the Constitution.
[20] See also the succinct discussion in Centre for Law and Society 'The official recognition of traditional councils and the legal standing of community members' (February 2015), at http://www.cls.uct.ac.za/usr/lrg/downloads/FactsheetRecogTCandLegalStanding_Final_Feb2015.pdf.
[21] Provision is made that traditional leaders may attend and participate meetings of local government to ensure that their views are adequately reflected within elected local institutions (s81 of Local Government: Municipal Structures Act, 1998).
[22] Examples of parliament-like features of the Traditional Houses are: elected basis; salaried members; annual opening address by President or Premier; created by the Constitution; annual budget; and consultative rights.
[23] The traditional Houses cannot initiate or enact legislation; they do not have an own tax base; they are not recognized by the Constitution as third houses of Parliament; they sit only a few times per year and even then, for very short sessions; and their resolutions are not binding.
[24] This provision has not prevented the houses from becoming highly politicized—an occurrence that brings further disputes within the communities that are supposed to be served by the 'non-political' traditional houses.
[25] Six of the 9 provinces have established houses for traditional leaders (Rautenbach and Malherbe, 2003: 271).
[26] The integration of traditional authorities within elected systems is easier said than done (Cousins and Claassens, 2004).
[27] The influence of traditional authorities over land access, control and management is substantial and is often the subject of criticism because they can control access to land; they can award land in exchange for favours; and they can settle dispute through the control of land (Ntsebeza, 2006).
[28] https://www.parliament.gov.za/news/traditional-leaders-have-role-play-realisation-radical-economic-transformation.
[29] The relationship between traditional authorities and local government is often compared to 'two bulls in the same paddock', but yet according to President Zuma the traditional authorities 'with regards to rural development in particular, we have emphasized that traditional leaders have a critical role to play' (Zuma, 2010).
[30] There is no statutory requirement for the president to consult with minority communities when members of the Council are appointed.
[31] A 'differentiating measure' is 'any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by prejudicing persons of that community or indirectly by giving advantage to persons of another community'.
[32] See for example Annual Report 2015 according to which 41 bills and 434 subsidiary pieces of legislation were considered, with no 'differentiating measures' identified. https://www.parliament.gov.sg/lib/sites/default/files/paperpresented/pdf/2015/Cmd.%201%20of%202015_0.pdf.
[33] There is an ongoing debate following the release of the recommendations by the Referendum Council whether the process to establish the Advisory Council should be a two-step process whereby the Constitution is amended with legislation to follows, or a one-step process whereby the detail is worked out and all put to the public for a vote in a referendum to amend the Constitution. See, for example, 'PM putting race cart before horse'. *The Australian*, July 21, 2017, 6.
[34] For example: separate voters' rolls; separate elections; separate financial and other benefits; separate policy agenda's and priorities; separate support systems; and a separate bureaucracy.

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