CHAPTER NINE

DEDICATED ABORIGINAL SEATS: LEGAL AND CONSTITUTIONAL ISSUES

9.1 INTRODUCTION

This Chapter examines some of the legal and constitutional issues to be considered if dedicated seats for Aboriginal people were introduced in the NSW Parliament.

There are many different ways dedicated Aboriginal seats could be established in either or both Houses of Parliament. Each model or approach would require distinct legal and constitutional reform. The Chapter does not attempt to identify the myriad potential changes that would be required by different approaches. Rather, it demonstrates that, regardless of the particular model adopted, the introduction of dedicated seats would require approval by a majority of voters at a referendum.

This Chapter also looks at whether dedicated seats may contravene discrimination laws or be viewed as undemocratic. The Chapter draws on expert evidence provided to the Committee by two academic lawyers and the NSW Crown Solicitor. Correspondence from Professor Anthony Blackshield from the School of Law at Macquarie University is included at Appendix Eight and an advice from the NSW Crown Solicitor at Appendix Nine.

9.2 THE LEGISLATIVE AND CONSTITUTIONAL FRAMEWORK OF THE NSW PARLIAMENT

The function and composition of the NSW Parliament, including the election of Members, is governed by two pieces of legislation: the *Constitution Act, 1902* and the *Parliamentary Electorates and Elections Act 1912*.

While the *Constitution Act* sets out the general parameters of the electoral system in NSW, much of the detail is contained in the *Parliamentary Electorates and Elections Act*. For example, according to s. 28 of the Constitution, each Assembly electorate is required to have an equal number of electors, plus or minus ten per cent. However, the general requirement for “equal electorates” is further refined by s. 17A of the *Parliamentary Electorates and Elections Act* which stipulates the margin to be no more or less than three per cent.

9.3 FEDERAL LAWS MAY OVERRIDE THE NSW CONSTITUTION

The Australian Constitution determines the issues which the Australian Parliament can make laws about. All other issues are left to State Parliaments. These include public health, education, local government and law enforcement. Generally speaking, the Federal Constitution does not inhibit changes to the state Constitution. However, if a state law is inconsistent with the federal constitution or a federal law such as the *Racial Discrimination Act*, the state law will be invalid to the extent of that inconsistency (s.109, *Constitution Act 1900* (Clth).

9.4 WHAT ARE ENTRENCHED PROVISIONS?

The *Parliamentary Electorates and Elections Act* and some parts of the *Constitution Act* can be changed in the usual way, that is, by passing an Act of Parliament. However, certain parts of the *Constitution Act* can only be changed if they are approved by a majority of voters at a referendum. The sections that can only be changed by a referendum are referred to as "entrenched provisions".

Professor Blackshield informed the Committee that a referendum is required if an Act of Parliament is introduced which "expressly" or "impliedly" affects the entrenched provisions of the *Constitution Act* (Blackshield correspondence, 29 July 1998). The entrenched provisions in the *Constitution Act* are set out in ss.7A and 7B. Section 7A deals primarily with the Legislative Council and s. 7B with the Legislative Assembly (Blackshield correspondence, 29 July 1998). These sections of the *Constitution Act* are included at Appendix Ten.

9.5 THE INTERPRETATION OF THE NSW CONSTITUTION

Acts of Parliament, such as the *Constitution Act*, are often complex and sometimes unclear. Where the meaning or intention of a particular provision is not readily apparent, it may be interpreted by a court. In NSW, the Supreme Court is responsible for interpreting the NSW Constitution. Therefore, the Supreme Court would rule on any challenge to the introduction of dedicated Aboriginal seats. The final avenue of appeal against a decision by the NSW Supreme Court is the High Court of Australia.

9.6 WOULD DEDICATED ABORIGINAL SEATS REQUIRE CONSTITUTIONAL CHANGE?

The Committee was told that, legally speaking, it is not strictly necessary to amend the *Constitution Act* in order to introduce dedicated Aboriginal seats:

> *...leaving aside the entrenched provisions, the Constitution Act is not a superior enactment overriding and limiting the powers of the NSW Parliament, but is itself an enactment made by that Parliament, and freely subject to amendment by it. Any subsequent legislation expressed as a formal amendment to the unentrenched provisions of the Constitution Act will therefore simply take effect according to its terms* (Blackshield correspondence, 29 July 1998).

For example, provided that the entrenched provisions were not affected, the introduction of dedicated seats to the Assembly could be achieved by amending the *Parliamentary Elections and Electorates Act* (Waugh evidence, 27 October 1997).

However, both Waugh and Blackshield argued that, even if it were *legally* possible to introduce dedicated Aboriginal seats without changing the NSW Constitution, this would not be *appropriate:*

> *The spirit of the amendments that have been made to the Constitution Act in the past is that the key features of the electoral system are set out in the Constitution Act. It would be consistent with the spirit of the act...if the amendments were made in the Constitution Act itself, rather than trying to avoid that and put them somewhere else* (Waugh evidence, 27 October 1997).

Blackshield argued that any proposal for dedicated Aboriginal seats should be framed as a formal amendment to the *Constitution Act*, for two reasons:

> *......such an approach would be consistent with the general spirit of the Constitution Act, 1902, and with the particular combination of representative and direct democracy which the Constitution Act embodies..... equally, such an approach would be appropriate to both the symbolic and the practical significance of any system of dedicated Aboriginal representation* (Blackshield correspondence, 29 July 1998).

9.7 IS A REFERENDUM REQUIRED TO APPROVE DEDICATED SEATS?

As mentioned above, certain parts of the *Constitution Act* can only be changed by referendum. The following section discusses some of the amendments to the *Constitution Act* that would almost certainly be required to allow for dedicated seats in either House of Parliament and that would require a referendum.

It is the view of the NSW Crown Solicitor that, regardless of the model adopted, a referendum would be required to introduce dedicated Aboriginal seats to either House of Parliament. While Professor Blackshield and Mr Waugh generally concurred with this view, it should be noted that both were keen to acknowledge the possibility, albeit slight, that a court may take a different view.

9.7.1 DEDICATED SEATS IN THE LEGISLATIVE COUNCIL

According to John Waugh the introduction of dedicated seats in the Legislative Council would require significant amendments to the Sixth Schedule of the *Constitution Act* (a schedule is an appendix to an Act). The Sixth Schedule includes a description of the method of election to the Legislative Council: proportional representation (also referred to as optional preferential proportional representation). Under this system there is one electorate-the State of NSW-and candidates have to receive a quota, or proportion of the total votes, to win a seat. There is a total of 42 members in the Council, but only half of the Members (21) are elected at each election. The quota is 4.55% of the total vote. The quota for the 1995 election was 153,600 votes and it is unlikely this figure will

vary significantly at the forthcoming State election in March 1999.

The maximum number of Aboriginal voters in NSW is 49,739[1], well below the quota required to elect a Member of the Legislative Council (MLC). As Waugh argued, the voting system would probably have to be modified to facilitate the election of an Aboriginal member to the Upper House. For example, the quota could be reduced for the Aboriginal candidate. This would require amending the Sixth Schedule of the *Constitution Act*, an entrenched provision which can only be changed by holding a referendum.

Waugh also pointed out that a referendum would be required if the dedicated seat(s) varied the size of the Council (currently 42 Members). This is because the part of the *Constitution Act* which regulates the size of the Council (section 17(2)) is also an entrenched provision (Waugh evidence, 27 October 1997).

Professor Blackshield also argued that the introduction of dedicated Aboriginal seats would "most likely" involve a formal amendment of the Sixth Schedule. He suggested that even if it did not involve an *express* amendment of the Sixth Schedule, it would "almost certainly" involve an *implied* amendment, thus requiring approval at a referendum.

The Crown Solicitor was also of the view that the introduction of dedicated seats in the Council would require amendment of the Sixth Schedule, as well as ss. 22 and 22A:

> *The provisions in question provide for a single constituency for Legislative Council elections undivided by question of race. Any measure which created multiple electoral districts for the Legislative Council or which provided for the election of an aborigine or aborigines [sic] as a member or members of the Legislative Council; by aborigines in a single electoral district comprising the whole State would be inconsistent with the system established by ss 22, 22A and the Sixth Schedule of the Constitution Act* (NSW Crown Solicitor correspondence, 20 October 1998).

9.7.2 DEDICATED SEATS IN THE LEGISLATIVE ASSEMBLY

Unlike the Legislative Council, a referendum is not required to vary the number of Members in the Legislative Assembly. The recent electoral redistribution which will

[1] 1996 Census of Population and Housing , Australian Bureau of Statistics. This is the number of Aboriginal people in NSW 18 years and over. It represents the maximum number of Aboriginal voters in NSW because a proportion of these people may not be registered to vote or will not vote at election time. This number would be reduced further if Aboriginal voters were required to choose to vote for either the Aboriginal candidate or the general candidate, but not for both, as is the case for Maori voters in New Zealand.

reduce the number of seats in the Lower House from 99 to 93 at the next State election was accomplished by passing an ordinary Act of Parliament. Nevertheless, the Committee heard convincing evidence that a referendum would also be required to introduce dedicated seats to the Legislative Assembly.

Waugh told the Committee that, while it may be *possible* to avoid changing the *Constitution Act* to establish a dedicated seat in the Lower House, it would not be *desirable*:

> *One possibility is to try to confine the amendments to the Parliamentary Electorates and Elections Act...It might be attempted to change only that Act and not the Constitution Act if the seat were added to the Assembly. However, I see several problems with that* (Waugh evidence, 27 October 1997*)*.

One of the problems identified by Waugh is the requirement for “equal electorates” contained in s. 28 of the *Constitution Act*. This section requires that each electorate must have an equal number of electors, plus or minus ten per cent. The principle behind this provision is that each person’s vote should have the same value, regardless of where they live.

At the forthcoming State election in March 1999 it is estimated that each of the 93 electorates will have between approximately 42,000 and 45,000 electors (information supplied by the Electoral Districts Commissioners, 4 June 1998).

Given the maximum number of Aboriginal voters in NSW is estimated to be 49,739, no single electorate would hold enough Aboriginal voters to secure a seat for an Aboriginal candidate. One way around this requirement could be to amend s. 28 so that Aboriginal electorates did not have to satisfy the equal enrolment requirement. As Waugh pointed out to the Committee, s. 28 is an entrenched provision and could only be changed by referendum.

Another response to the restrictions imposed by s. 28 would be for an Aboriginal electorate to encompass the whole State. There are at least three potential problems with this proposal. Firstly, if Aboriginal people were required to choose to vote for the Aboriginal candidate in the dedicated seat or the general candidate, but not both, and a significant number of Aboriginal people opted to vote for the general rather than the Aboriginal candidate, there may not be enough Aboriginal electors across the entire state to satisfy the requirement for equal enrolments.

Secondly, even if an Aboriginal electorate did meet the requirement for equal enrolments at a particular point in time, the seat would have to be abolished if enrolments fell more than ten per cent below the target enrolment, unless s. 28 was amended (Waugh evidence, 27 October 1997). A population increase would also pose a problem if the increase was not large enough to justify the creation of an additional

seat.

The third obstacle identified by Waugh is that ss. 26-28 of the *Constitution Act* were written on the assumption that electoral districts for the Assembly would not overlap whereas an Aboriginal electorate which spanned the whole State would overlap with every other electorate in the State:

> *It might be possible to reconcile that with the precise wording of sections 26-28, but it would not be consistent with the assumptions behind those sections and it would be safer to avoid problems of that kind and simply amend sections 26-28 to make it clear that the changes fit in with what is in the Constitution Act* (Waugh evidence, 27 October 1997).

As noted above, s. 28 is an entrenched provision which can only be amended by referendum. The Crown Solicitor suggests that ss. 26-28 would need to be amended to allow dedicated Aboriginal seats in the Legislative Assembly:

> *The provisions in question appear to establish a system in which the State is divided into multiple electoral districts and each member is elected to represent one district only ie a member represents an electoral district and not merely so many of the voters in it as consist of the people of one race. Any measure which created an electoral district for the Legislative Assembly consisting of the entire State or which provided for the election of an aborigine by aborigines in one or more of a number of multiple electoral districts would be inconsistent with the provisions in question* (NSW Crown Solicitor correspondence, 20 October 1998).

9.8 ARE DEDICATED SEATS UNDEMOCRATIC?

One of the issues considered during the course of this Inquiry is whether Aboriginal voters, in an election where there was one or more dedicated Aboriginal seats, would be restricted to voting for an Aboriginal Member; be able to choose which vote to exercise; or be able to exercise two votes.

A fundamental principle of a democratic system of government is equality of voting power, often referred to as “one vote, one value” or “equal suffrage”. This principle requires that all electors are able to cast the same number of votes and that all votes cast in an election are of equal value.

Given the relatively small number of Aboriginal electors in NSW, the introduction of dedicated seats to either House of Parliament would most likely require departure from a strict interpretation of the principle of equal suffrage, even if Aboriginal voters only had one vote. As discussed above, the number of Aboriginal voters is insufficient to allow for the election of an Aboriginal candidate without significant changes to the

voting system of either House of Parliament.

In evidence and submissions to the Inquiry it was argued that exceptions to this rule could be justified:

> *...equality of voting value should not be the only criterion when the choice of options is made. The principles that would lie behind the creation of a dedicated seat would give some justification for departing from strict equality of voting (*Waugh evidence, 27 October 1997).

The former Social Justice Commissioner, Michael Dodson, argued that an apparently unequal voting system could be justified under certain circumstances:

> *In finalising the International Covenant on Civil and Political Rights (ICCPR), the United Nation's General Assembly acknowledged that the preferred preference was an electoral system which guaranteed that all votes were of equal value. However, it acknowledged that there may be an exception to this rule where there was a reasonable basis for the inequality. One example of what might be considered a reasonable basis for an unequal voting system would be the need to guarantee the political representation of regional interests....Distinct Indigenous representation need not, in fact, contravene the requirement of strict equality (*Submission 24).

Dodson also argued that a recent High Court Case, *McGinty v State of Western Australia* (1996)186 CLR 140, suggests that the NSW Parliament has the constitutional ability to create an electoral system which gives some electors greater voting power because there is no guarantee of equal suffrage in the federal Constitution and the states are not bound by such a principle (Submission 24).

Waugh suggested that it might be easier to preserve "rough equality in the value of votes" for the dedicated and non-dedicated seats if they were introduced to the Assembly rather than the Council:

> *The number of voters on the roll for a dedicated seat in the Assembly is more likely to be roughly the same as the other seats. In the Council the creation of a dedicated seat would probably mean a much smaller number of people voting for that Member than for each of the other Members of the Council, in other words the value of the votes for the holder of a dedicated seat in the Council is likely to be much greater than the value of the votes for most of the Members of the Council* (Waugh evidence, 27 October 1997).

According to Waugh, there are no real legal obstacles to allowing Aboriginal people to have two votes. However, he envisaged significant political problems:

Of course it would be possible to create a dedicated seat and give the indigenous people a second vote which they could exercise for the indigenous seat at the same time as they exercise a vote for the other seats in the House. I can imagine that the argument about that would be furious if that dedicated seat carried a vote in the House, because that would mean the reintroduction of plural voting, which was bitterly fought in the past...I can see strong objections to that (Waugh evidence, 27 October 1998).

9.9 ARE DEDICATED SEATS DISCRIMINATORY?

The Racial Discrimination Act, 1975 (Commonwealth) (RDA) embodies some of the protections guaranteed in international treaties, such as the International Covenant on Civil and Political Rights. It prohibits discrimination on the basis of race and it cannot be amended or repealed by state laws. However, the RDA recognises that, in certain circumstances, it may be necessary to take "special measures" which may appear to be discriminatory, in order to achieve equality.

A concern was expressed in several submissions to the Inquiry that the provision of dedicated Aboriginal seats would constitute racial discrimination. Therefore, the Committee asked the Human Rights and Equal Opportunity Commission to provide advice on whether dedicated Aboriginal seats in the NSW Parliament would breach the provisions of the RDA.

In providing this advice, the Commission stressed that it was not giving an opinion regarding the merits or otherwise of dedicated seats. It also noted that the answer to this question would depend on the exact provisions of any proposal. Nevertheless it concluded that "it is possible that such a measure would qualify as a special measure" and therefore not constitute unlawful racial discrimination. A copy of the advice is located at Appendix Eleven. The Crown Solicitor also suggested that dedicated seats could constitute a "special measure" as defined by the *Racial Discrimination Act*. He argued that while dedicated seats would appear to contravene certain sections of the International Covenant on Civil and Political Rights:

the Commonwealth does not appear to have implemented the Covenant in such a way as to give legal force to the rights contained therein or to render invalid any State law which is inconsistent with the Covenant (NSW Crown Solicitor correspondence, 20 October 1998*).*

He also suggested that dedicated seats would be unlikely to contravene the NSW *Anti-Discrimination Act 1977* because this Act does not make it unlawful to discriminate in the area of Parliamentary representation.

9.10 NON-VOTING SEATS MAY ALSO REQUIRE A REFERENDUM

One of the options to improve Aboriginal participation in Parliament considered by the Inquiry was non-voting indigenous seats, as exist in the state of Maine in the United States. Maine has provided representation for two of the state's largest Indian tribes since early last century. These representatives are not entitled to vote (for further details see Chapter Three).

The Committee asked the NSW Crown Solicitor whether the introduction of a dedicated Aboriginal seat in either House of Parliament would require approval at a referendum, if the person in the dedicated seat was not entitled to vote. He advised:

> *even if the aboriginal [sic] representatives do not have the right to vote, I assume the intention is that they would be members of the House and would occupy a seat in the House; they would not be strangers who by arrangement address the House or participate in other ways in some proceedings of the House. If that is so, the measure would still expressly repeal or amend the entrenched provisions...and for that reason would have to be approved by the electors* (NSW Crown Solicitor correspondence, 20 October 1998).

John Waugh suggested that, while it might be possible to establish non-voting seats without changing the *Constitution Act*, it would be *safer* to admit a non-voting member by legislation:

> *Certainly, if the indigenous representative were merely admitted to proceedings and allowed to speak, without having a vote, that could be done without an amendment to the Constitution. If the indigenous representative is said to hold a seat as such, there would be more problems with that. The closer the representative is assimilated to an ordinary member of the House, the greater the problems with inconsistency with the Constitution* (Waugh evidence, 27 October 1998).

9.11 CONCLUSION

It is very difficult to map with certainty, the multitude of legal and constitutional issues that may be generated by the introduction of dedicated Aboriginal seats. As noted in the Introduction, this would depend on the features of a particular "model" of dedicated seats and the Committee was not asked to consider a specific model or approach.

The expert legal advice received by the Committee was that the introduction of dedicated Aboriginal seats to either House of Parliament would require approval, by a majority of voters at an election, regardless of the particular model adopted. The only caveat to this is that the NSW Supreme Court and the High Court have the final say on this question.

As Blackshield and Waugh suggested, regardless of the legal requirements, there are compelling reasons to suggest any proposal to introduce dedicated Aboriginal seats *should* be framed as a formal amendment to the *Constitution Act* and put to the people of NSW at a referendum. This would be in keeping with the general spirit of the Constitution of NSW, which embodies many elements of our system of government. It would also serve to underline the significance of such an initiative.