The Path to a Referendum:

From Uluru via Garma to Canberra and on to the People

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Newman Lecture

Mannix College

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The Patrimony of Daniel Mannix

I wish to acknowledge the people of the Kulin Nation, on whose land we are gathered today. I pay my respects to their Elders, past and present. I'm delighted to be back here at Mannix College to deliver the annual Newman Lecture. I was privileged to deliver this annual lecture in 1993 on the topic 'Catholic Social Teaching and Human Rights'. I'm pleased to return, this time as the Rector of Newman College, honouring both Newman and Mannix. I acknowledge the

presence of Mannix College alumnus Inala Cooper who has just published *Marrul: Aboriginal Identity and the Fight for Rights*.[1]

Daniel Mannix arrived in Melbourne from Ireland in 1912. He became Archbishop of Melbourne in 1917 – a role he fulfilled for 56 years, until 1963. Mannix was always his own man and he had an innate Irish sense of justice, especially when it came to adverse discrimination practised by those who exercised power together with privilege. Given tonight's topic, ***The Path to a Referendum: From Uluru via Garma to Canberra and on to the People***, it's worth tracing some of Mannix's steps, recalling just how far we have come as well as how far we still need to go, addressing the outstanding claims of First Australians to justice and recognition.

In 1933, there were still serious suggestions of a punitive expedition to Arnhem Land to deal with Aborigines alleged to have killed some whites. Archbishop Mannix had cause to send a telegram to the Catholic Prime Minister Joe Lyons on 5 September 1933. It read: 'Prime Minister, Canberra: With I hope majority of Australians I would regard the punitive expedition with grave misgivings and the possible result with horror. Archbishop Mannix.'[2] The punitive expedition did not go ahead.

In January 1938, Mannix attended the opening of the Pallotines' missionary college in Kew, just a short distance from the archbishop's residence Raheen. The Pallotines had opened Aboriginal missions in the Kimberley. Prime Minister Lyons was in attendance. *The Argus* newspaper reported: 'Mr. Lyons said that a wonderful story had been told of the sacrifices made by the missionary fathers in working for the conversion of the aborigines. He was present to show the appreciation of the Government to the Pallottine Fathers for their work. There had been much criticism of the Government in regard to the treatment of the blacks, and it had aroused the conscience of the public to the necessity for doing more for the aborigines than had been done previously. In the near future the Commonwealth Government would deal with the question. In a few days a conference of the aborigines would be held in Sydney, and, following the conference, a deputation of aborigines would wait on him. The Ministry would do its best to wipe out whatever reproach remained in regard to the treatment of the blacks.'

[1] Inala Cooper, *Marrul: Aboriginal Identity and the Fight for Rights*, Monash University Publishing 2022
[2] James Franklin et al (eds.), *The Real Archbishop Mannix from the Sources*, Connor Court, 2015, p. 179

The newspaper report continued: 'Some who claimed to be experts said the blacks should not be interfered with so far as religious matters were concerned, said Mr. Lyons. Religion was their most precious possession, and surely Australians would not deny to the aborigines, to whom they owed so much, participation in it.' [3] Prime Ministers of all political persuasions have been saying this sort of thing for almost a century.

Archbishop Mannix also spoke at the opening of the Pallotine college. He 'said that Australia was beginning to make reparation to the aborigines for all the wrongs, wittingly or unwittingly, they had inflicted upon them. It was encouraging that Australian youths were already offering themselves for service in the Kimberley mission fields. The blacks should be encouraged to live according to their own culture, and to be a credit to White Australia.'[4] Our bishops have been saying these sorts of things for almost a century.

In April 1940, the Catholic Bishops of Australia issued their first social justice statement. Every year since then, the bishops have chosen a topic for the statement which is circulated in all parishes on Social Justice Sunday in September. The launch of the first statement on capital and labour was a grand affair in Melbourne. Mannix's opening remarks were quite arresting. He said: 'We have come here tonight to talk about social justice, or to listen to others talking about it. I wonder if anybody else in the hall who talked and thought of social justice thought that we owed something in the matter of social justice to the aborigines of Australia. I believe in social justice, but I believe in it all round. I do know that the aborigines of Australia would be able to furnish a very strong indictment against the present rulers and inhabitants of Australia and those who have gone before us. I hope, if social justice ever comes, that it will reach them as it reaches the rest of us.'[5]

A year later he was back at the Pallotine College for their annual fete. *The Argus* reported: 'White people in Australia had committed the original sin against the aborigines Archbishop Mannix said …. The original sin he was afraid had not yet

[3] *The Argus*, 24 January 1938, p.4
[4] Ibid
[5] 'Capital and Labour Both Victims of a System', Archbishop Mannix's Address, *The Advocate*, 25 April 1940, p.5

been blotted out. The Pallottine Fathers were doing their part to bring redemption to us from our original sin which had brought suffering to the black people.' [6]

When Mannix received reports that bomb tests were to be conducted on Aboriginal lands in the Kimberley he took the opportunity at the 1946 Pallotine fete to express his displeasure. Once again, *The Argus* reported: 'The fear that bomb experiments might harm aborigines in the Kimberley areas was expressed by Archbishop Mannix when he opened a fete at the Pallottine Missionary College, Kew, on Saturday. The aborigines were not likely to take kindly to the destruction of their old haunts, he said. The Government should be "careful with the experiments, and not remove natives from their old roaming ground, where apparently they found happiness and contentment".' [7]

Mannix would be well pleased that the recently concluded Plenary Council of the Australian Catholic Church 'affirmed overwhelmingly the Uluru Statement from the Heart and the calls for bipartisan constitutional recognition of Indigenous Australians'[8].

The Poetry of the Uluru Statement

On 26 May 2017, Aborigines and Torres Strait Islanders gathered at Uluru issued their Statement from the Heart saying, 'We call for the establishment of a First Nations Voice enshrined in the Constitution.' After the gathering, the Uluru Dialogue co-chaired by Pat Anderson and Megan Davis was set up with the call to the public: 'We call on all sides of politics to support a First Nations Voice to Parliament, so that we can finally have a say on policies and laws that affect us.'[9]

Before discussing the law and politics of our response to the Uluru Statement, I draw attention to the two sentences in the Uluru Statement which appear in italics. The architects of the Statement speak of their sovereignty as 'a spiritual notion'. They tell us: '[The] ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.' I

[6] *The Argus*, 17 November 1941, p.6
[7] *The Argus*, 9 December 1946, p.3
[8] Plenary Council, *Concluding Statement – A Final Word from the Second Assembly*, 9 July 2022
[9] See https://ulurustatement.org

don't know about you, but none of my Aboriginal friends speak that way – being born therefrom, remaining attached thereto, and returning thither.

These exact words appear in two of the judgments of the High Court of Australia in the *Mabo* Case[10], since immortalised by the movie *The Castle* as the vibe in the Constitution. Those judges were quoting Judge Fouad Ammoun from Lebanon who was a judge of the International Court of Justice determining a land dispute in the West Sahara.[11] Ammoun in turn was quoting the Congolese Mr Bayona-Ba-Meya who was intervening in the case for Zaire to argue that 'Until the recent past, Europe believed itself to be the centre of the world: and still today there are living after-effects of this Europeocentrism. It is only gradually that Europe realizes that there are other forms of civilization, sometimes superior, whose moral and spiritual strength she admires and tries to imitate.'

In 1885, the European powers had carved up large swathes of Africa for themselves on the basis that the lands were *terra nullius* – land belonging to no one, and land not subject to any form of political organisation. Mr Bayona-Ba-Meya invited the court to make some comparisons between the European and the African:

'The peasant African does not have running water in his hut or thatched cottage; he has neither electricity nor telephone; perhaps he can neither read nor write; but on the other hand, he hardly suffers from hypertension nor chronic insomnia; he does not suffer heart attack nor liver failure; he has no problems with pollution of all kinds; when he feels a little uneasy, he goes into the forest nearby picking the right plant, which nature has endowed with powers that reveal themselves only to the man living in conscious contact with it.'

Mr Bayona-Ba-Meya was joined by Mr Mohammed Bedjaoui from Algeria who put arguments about native rights to land which were first put by the Spanish Dominican priest Vittoria in the sixteenth century. Judge Ammoun wrote: 'Anyone familiar with the philosophy of Zeno of Sidon or Citium and his Stoic school cannot but be struck by the similarity between the ideas of that philosopher and the views of Mr. Bayona-Ba-Meya as to the links between human beings and nature, between man and the cosmos. Further, the spirituality of the thinking of the representative of Zaire echoes the spirituality of the African Bantu revealed

[10] *Mabo* v *Queensland (No 2)* (1992) 175 CLR 1 at p. 41 (Brennan J, with Mason CJ and McHugh agreeing) and p. 181 (Toohey J)
[11] *Advisory Opinion on Western Sahara* [1975] ICJR, at p.85

to us by Father Placide Tempels, a Belgian Franciscan, in his work *Philosophie bantoue.* The author sees therein a "striking analogy" with "that intense spiritual doctrine which quickens and nourishes souls within the Catholic Church".[12]

Cases like the 1975 *Western Sahara Case* in the International Court of Justice and the 1992 *Mabo* Case in the Australian High Court brought and represented great changes – changes wrought by the imaginations, dreams, hard thinking, and basic decency of a line of individuals across the centuries, across cultures, and across disciplines, including theology – from the pre-Christian Stoic philosophers, from the sixteenth century Spanish Vittoria, to the eighteenth century Swiss Vattel, to the twentieth century Congolese Bayona-ba-Meya, the Algerian Badjaoui, the Lebanese Fouad Ammoun, the Belgian missionary Tempels, the Australian High Court judges, and the contemporary Aboriginal leaders.

Contemporary Australian Catholics might detect a 'striking analogy' between the Uluru Statement from the Heart and the 'intense spiritual doctrine which quickens and nourishes souls within the Catholic Church', as the Belgian Franciscan missionary to the Congo once put it.

Let's always be attentive to the poetry and the symbolism at play in this area of legal and political discourse. The *Western Sahara* Case was heard by the International Court of Justice in the Hague in the spring of 1975. Let's relish the closing submission by Mr Bayona-Ba-Meya:

'When you travel through this city of The Hague, you cannot fail to notice that everywhere the natural surrounds you and keeps you company; the flowers, of fairy beauty, fighting over the balconies of houses and hotels, not to mention those that sing along the houses and villas, and even in the most unsuspected corners of the city; groves and lush green gardens are scattered throughout the city, providing real natural lungs for the inhabitants. The impression of rest, calm and inner peace one feels when living in this city is therefore not surprising. And, it is in this city, which practises with so much fervour the cult of nature, and therefore of life, that the International Court holds its hearings, precisely at this time of the year when all nature is in full bloom. One could not wish for a better

[12] [1975] ICJR at pp. 77-8

omen, for I have full faith and confidence in the wisdom of the Court which, in giving its advisory opinion on the two questions put to it by the General Assembly of the United Nations, can only hear and speak the language of nature, which is none other than that of authenticity.[13]

Is it any wonder that Indigenous Australians gathered at Uluru decided to quote him as they did. In the demanding political days ahead, educated Catholics should keep a discerning eye for the 'striking analogy' between the Uluru Statement from the Heart and (as the Belgian Franciscan missionary to the Congo once put it) the 'intense spiritual doctrine which quickens and nourishes souls within the Catholic Church'. Let's speak the language of nature and authenticity to each other.

There has been a lot said about the Uluru Statement in the last three months since the election of the Albanese Labor Government. Speaking at my father's funeral in June, Senator Patrick Dodson, Special Envoy for Reconciliation and the Implementation of the Uluru Statement from the Heart, said, 'Today's invitation by First Nations "to walk with us" in the Uluru Statement from the Heart holds up to all Australians the need for Voice, Treaty and Truth as the way to redress the tyranny of our indigenous dispossession. Injustice and illegality as the foundational pillars of our nationhood can perhaps be discarded to the wastebasket of history.'

The Call for a Voice to the Parliament

The issue of the moment is Uluru's call 'for the establishment of a First Nations Voice enshrined in the Constitution'. This call from Indigenous Australia is the definitive response to the initial offer made by John Howard to recognise Aborigines and Torres Strait Islanders in the Australian Constitution.

In the week before the dissolution of the House of Representatives and the issuing of the writs for the 2007 election, Prime Minister John Howard had announced:

'[I]f re-elected, I will put to the Australian people within 18 months a referendum to formally recognise Indigenous Australians in our Constitution - their history as the first inhabitants of our country, their unique heritage of culture and

[13] International Court of Justice, Pleadings, Oral Arguments, Documents, *Western Sahara*, Volume IV, Oral Statements, p. 447 (12-16 May 1975)

languages, and their special (though not separate) place within a reconciled, indivisible nation. My goal is to see a new Statement of Reconciliation incorporated into the Preamble of the Australian Constitution. If elected, I would commit immediately to working in consultation with Indigenous leaders and others on this task. It would reflect my profound sentiment that Indigenous Australians should enjoy the full bounty that this country has to offer; that their economic, social and cultural well-being should be comparable to that of other Australians. I would aim to introduce a bill that would include the Preamble Statement into Parliament within the first 100 days of a new government. A future referendum question would stand alone. It would not be blurred or cluttered by other constitutional considerations. I would seek to enlist wide community support for a 'Yes' vote. I would hope and aim to secure the sort of overwhelming vote achieved 40 years ago at the 1967 referendum.'[14]

Howard lost that election. His declaration remains the high water mark of what has been promised by any Liberal Prime Minister on the issue of Indigenous constitutional recognition. But he did confine himself only to the prospect of a preamble being inserted into the Constitution, what nowadays is labelled as minimal symbolic change. He never envisaged more substantive change to the Constitution.

In 2012, Patrick Dodson co-chaired the Expert Panel set up by Prime Minister Julia Gillard to look at the question of constitutional recognition. He and his co-chair Mark Leibler said, 'An essential pre-condition to gaining the support needed for a successful referendum is cross-party parliamentary support.'[15] That expert panel which included Indigenous leaders like Marcia Langton, Ken Wyatt, Patrick Dodson, Noel Pearson, and Megan Davis said, 'The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.'[16]

They were surely right when they adopted four principles to guide their assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander peoples. They insisted that any proposal must

- contribute to a more unified and reconciled nation;

[14] John Howard, Address to the Sydney Institute, 11 October 2007 at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FL41P6%22;src1=sm1
[15] Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 2012, p. v.
[16] Ibid, p. 227

- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound.[17]

The Gillard government together with the Abbott Opposition attempted to build on the work of the Expert Panel. The Parliament unanimously passed the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* providing:

(1) The Parliament, on behalf of the people of Australia, recognises that the continent and the islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples.

(2) The Parliament, on behalf of the people of Australia, acknowledges the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

(3) The Parliament, on behalf of the people of Australia, acknowledges and respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.[18]

Prime Minister Gillard told Parliament:

'At the election of 2007, it seemed that the prospect of constitutional recognition was very close at hand, supported as it was by both major parties. But, in difficult and volatile times, we have not found the settled space in our national conversation to make the promised referendum a reality. So the government has advanced this bill for an act of recognition, to assure Indigenous people that our

[17] Ibid, p. 4

[18] s. 3, *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013.* This echoed the recommendations of the Expert Panel which thought there should be a new provision in the Constitution:

- Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
- Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
- Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

purpose of amendment remains unbroken and to prepare the wider community for the responsibility that lies ahead.'[19]

In response, Tony Abbott said:

'There is much hard work to be done. It will, as the Prime Minister candidly admitted, be a challenge to find a form of recognition which satisfies reasonable people as being fair to all. It will not necessarily be straightforward to acknowledge the First Australians without creating new categories of discrimination, which we must avoid because no Australians should feel like strangers in their own country. I believe that we are equal to this task of completing our Constitution rather than changing it.'[20]

Shadow Attorney General George Brandis had the carriage of the Bill for the Opposition in the Senate. He said that the foreshadowed referendum could be the necessary bookend to the 1967 referendum, warning:

'But it will only succeed—and this is acknowledged by all participants—if it has widespread community support; not just bipartisanship— for referendums have sometimes failed despite having bipartisan support—and not just support from the Aboriginal and Torres Strait Islander communities but support across the whole of the Australian community. Which means that it is just as important that people with conservative views be persuaded as people who consider themselves to be progressives. If that is to happen the proposal must be modest and the tone of the debate must be respectful.

'Nothing is surer to defeat the referendum than if the public discussion of the proposal is conducted in a hectoring, angry or righteous manner.'[21]

Brandis was Deputy Chair of the 2013 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples chaired by Labor's Northern Territory Senator Trish Crossin which spoke of the need for 'a strong multi-partisan parliamentary consensus on the specific content, wording and timing of a referendum proposal'.[22]

[19] House of Representatives, *Hansard*, 13 February 2013, p. 1121
[20] Ibid, p. 1123
[21] Senate, *Hansard*, 26 February 2013, pp. 868-9
[22] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, June 2013, para. 3.19

Julia Gillard was replaced by Kevin Rudd. Rudd then lost to Tony Abbott. And Abbott was replaced by Malcolm Turnbull. The Turnbull Government set up the Referendum Council which once again included a stellar line up of Indigenous leaders including Pat Anderson, Megan Davis, Tanya Hosch, Noel Pearson, and Galarrwuy Yunupingu. For some time, Patrick Dodson, Mick Gooda and Stan Grant also served on the Council.

The Referendum Council abandoned the call for words of recognition being placed in the Constitution. Following the lead from Uluru, they confined their focus to the Voice, recommending:

'That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (26) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.'[23]

They went on to recommend: 'That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.'[24]

Eighteen months later, three of the key leaders from Uluru, Pat Anderson, Megan Davis and Noel Pearson proposed to a parliamentary committee that there be a First Nations Voice to present its views to government as well as to the Parliament. This was a significant change. They suggested that the Voice be able to present views not just on proposed laws made under ss 51(26) and 122 but on all 'matters relating to Aboriginal and Torres Strait Islander peoples'.[25] Their suggested amendment to the Constitution was proposed well after the cut-off date for receipt of submissions. This meant that there was little opportunity for other

[23] *Final Report of the Referendum Council*, 30 June 2017, p. 2. Section 51(26) allows the Commonwealth Parliament to make laws with respect to the people of any race for whom it is deemed necessary to make special laws. Section 122 allows the Commonwealth Parliament to make laws for the government of any territory surrendered by any State to the Commonwealth.
[24] Ibid.
[25] Pat Anderson, Noel Pearson, Megan Davis et al., Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Submission 479, 3 November 2018, p. 6

citizens to scrutinise their suggestion and put forward changes. The parliamentary committee noted:

'The Committee has received 18 models of potential constitutional amendments. The fact that there are so many different provisions proposing to constitutionalise The Voice and that a new provision was suggested in a late submission received by the Committee on 3 November 2018, nearly two months after submissions had closed, indicates that neither the principle nor the specific wording of provisions to be included in the Constitution are settled. More work needs to be undertaken to build consensus on the principles, purpose and the text of any constitutional amendments.'[26]

Eight months after these Indigenous leaders put their submission to Parliament, Murray Gleeson who had been Chief Justice of Australia and a member of the Referendum Council said: 'It is difficult to see any objection in principle to the creation of a body to advise Parliament about proposed laws relating to Indigenous affairs, and specifically about special laws enacted under the race power which, in its practical operation, is now a power to make laws about Indigenous people.'[27] But note he was speaking about a body with a far more confined purpose than that now being proposed by the key advocates from Uluru.

Gleeson also sounded a salutary warning note: 'I think it very likely that Australians, and Parliament itself, would want to see what the body looks like, and hear what the Voice sounds like, before they vote on it'.[28]

On 17 March 2021, Noel Pearson delivered a significant address at the National Museum, appealing to the better instincts of the Liberal Party and invoking their senior statesman, John Howard. He put this question to his national audience: 'What is it that we are engaged in, and have been ever since Prime Minister John Howard made the commitment at the beginning of the 2007 Federal Election campaign?'[29] Pearson conceded that Howard had never signed up to an Indigenous Voice recognised in the Constitution. Howard was merely proposing what the advocates would now describe as symbolic recognition through the insertion of a preamble in the Constitution acknowledging 'their history as the

[26] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report*, November 2018, para 3.143
[27] Murray Gleeson, *Recognition in Keeping with the Constitution: A Worthwhile Project*, Uphold and Recognise, 2019, p. 12
[28] Ibid.
[29] Noel Pearson, *It's time for constitutional recognition*, 17 March 2021, available at https://capeyorkpartnership.org.au/its-time-for-true-constitutional-recognition/

first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, indivisible nation.'[30]

Noel Pearson put his faith in John Howard. On 21 April 2021, Pearson told the ABC audience that Abbott, Turnbull and Morrison had dropped the ball. Harking back to earlier times, Pearson said, 'It's 13 years since John Howard launched constitutional recognition as an agenda. He said on the eve of the election that his party if re-elected would act within 18 months of the election. So had Howard won in 2007, this would all be history.'[31] Back in 2007-8, it's unlikely that the Parliament would have agreed to much more than the Gillard Recognition Act of 2013. Like his three successors, Howard has never endorsed the idea of the Voice to Parliament being inserted into the Constitution. If he were to do so, that would be a real game changer. The key now could be to invite Pearson and Howard to work on a joint proposal! This would require Howard to affirm the need for a Voice and for Pearson to concede the constitutional limits on the Voice.[32] The terms of any such agreement would be sure to honour the four principles first enunciated by the expert panel. Tony Abbott has indicated that he is open to some recognition of Indigenous people in the Constitution, while continuing to ask: '[B]ut does this really entail the constitutional entrenchment of a new entity giving some, but not others, their own unique "voice" to parliament?'[33] It's that question that now deserves an answer.

The Morrison Government which was opposed to placing any Voice in the Constitution set up a Senior Advisory Group to advise on the co-design of a Voice which could be set up by legislation. The Group was chaired by Indigenous Leaders Marcia Langton and Tom Calma who said: 'The national voice would provide advice to both the Australian parliament and government. This is important because it allows the national voice to engage fully with laws and

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[30] John Howard, Address to the Sydney Institute, 11 October 2007 at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FL41P6%22;src1=sm1

[31] Noel Pearson, *ABC TV Breakfast*, 21 April 2021available at https://www.youtube.com/watch?v=8tXUYfARAIA at 4:25-

[32] On ABC *7.30*, 16 August 2022, John Howard when asked about the forthcoming referendum in light of his 2007 stance, said, 'I would prefer to have a referendum that would put into our Constitution the preamble, however you want to express it, something which recorded the undeniable historic truth that the first people living on the land mass of the Commonwealth were Aboriginals and Torres Strait Islanders. I think that would be something that all Australians could unite behind. The Voice is far more problematic than that.' When asked how history and the voters would judge the Coalition were they to campaign against the referendum, Howard said, 'I think it will depend very much on what they say and what reasons are given. If they're convincing reasons, I think history will judge them either benignly or positively.'

[33] Tony Abbott, 'Teaching for best selves not governments', in Greg Craven, *Shadow of the Cross*, Kapunda Press, 2021, p. 64

policies at different stages of development. This dual advice function reflects the different roles of government and parliament in making laws and policies.'[34]

The Senior Advisory Group (of which I was a member) reported that the National Voice would be 'an advisory body to the Australian parliament and government. These relationships would be two-way interactions with either party able to initiate advice or commence discussion around relevant policy matters'. The Senior Advisory Group insisted that the National Voice 'would not have a service delivery function or manage Australian government funding or programmes.'[35]

There are many issues that need to be resolved as we seek a way forward realising the promise of the Uluru Statement. In January 2022 Noel Pearson told ABC Radio, 'We need a new constitutional hook inserted into the Constitution on which we can hang this structure of the voice'.[36] This week, constitutional lawyer Greg Craven told the Sydney Institute that there is no point in putting a referendum to the people proposing a constitutional hook unless you first provide a legislative coat so that voters will have a sense of what they are being asked to approve.[37]

All voters need to know what the body will look like and what the Voice will sound like. Will the body have distinctive constitutional functions and will it be possible to invest the body with additional functions by way of legislation? Should the new representative body which will be the Voice be primarily a voice to Parliament or a voice both to Parliament ***and*** to Government? Should this body be primarily concerned with the scrutiny of proposed laws specific to Aborigines and Torres Strait Islanders – laws on topics such as land rights and cultural heritage? Or should it be charged with the monitoring of all laws and policies which affect Aborigines and Torres Strait Islanders – laws and policies on matters such as education, health, taxation and welfare reform? Would that not include most if not all laws and policies made by Parliament and Government? Remember, for example, that the government is already committed to 'a First Nations foreign policy that weaves the voices and practices of the world's oldest

[34] Indigenous Voice Co-Design Process, *Final Report to the Australian Government*, July 2021, p. 11
[35] Ibid, p. 109
[36] Noel Pearson, 22 January 2022, ABC Melbourne, Mornings at https://www.abc.net.au/radio/melbourne/programs/mornings/mornings/13704870
[37] Greg Craven, 'The Voice to Parliament – Past and Present', Sydney Institute, 15 August 2022

continuing culture into the way we talk to the world, and the work of the Department of Foreign Affairs and Trade (DFAT)'[38].

These are all legitimate questions in light of the various suggestions which have been put by a variety of Indigenous leaders over the last 10 years.

One thing is certain. There will be no point in the Labor Government proceeding with a referendum unless and until all major political parties in our Parliament are agreed on the shape and scope of the Voice. If in any doubt about that, just remind yourself that the Labor Party has made 25 attempts to amend the Constitution since federation, and they have failed on 24 of those occasions. Anyone who voted in the one successful Labor referendum is now over 97 years of age.

I agree with George Brandis's 2013 observation that 'it is just as important that people with conservative views be persuaded as people who consider themselves to be progressives.' We need to be respectful of each other as we seek clarification of these questions and as we do the hard work so that injustice and illegality as the foundational pillars of our nationhood can be discarded to the wastebasket of history. This will be no small change. We need to be able to do more than simply give notional assent to the Uluru Statement. We need to be able to contribute to the hard thinking and difficult discussions to be had if the overwhelming majority of our fellow Australians are to be convinced of the need for a Voice in the Constitution.

The Northern Territory Senator Jacinta Price in her maiden speech said: 'This government has yet to demonstrate how this proposed Voice will deliver practical outcomes and unite rather than drive a wedge further between Indigenous and non-Indigenous Australia… It would be far more dignifying if we were recognised and respected as individuals in our own right who are not simply defined by our racial heritage but by the content of our character.'[39]

Many conservatives like Tony Abbott continue to say: 'Everything about the proposed voice drips with entrenching separatism as an atonement for

[38] 'Labor's First Nations foreign policy looks like real, substantive change', *Canberra Times*, 28 Mary 2022, available at https://www.canberratimes.com.au/story/7756003/labors-first-nations-foreign-policy-promises-real-change/
[39] Senate *Hansard*, 27 July 2022, p, 84 also available at https://www.jacintaprice.com/maiden-speech

dispossession even though Indigenous people can never expect to achieve Australian outcomes without also embracing Australian standards.'[40]

The challenge is to convince conservatives that a constitutional advisory body is desirable, and perhaps even necessary, because it will not drive a wedge further between Indigenous and non-Indigenous Australia and will not entrench separatism.

Conservative critics of the Voice seem to be suggesting that there is never a need to make special laws for Aborigines and Torres Strait Islanders and thus there is never a need to make special provision for the way they are to be consulted. Nothing could be further from the truth. Constitutional conservatives should agree that section 51(26) of the Constitution which allows the Parliament to make laws 'with respect to the people of any race for whom it is deemed necessary to make special laws' is a fairly outdated provision. Aborigines and Torres Strait Islanders are the only Australians subject to such special laws in the twenty first century.

Usually these are laws in relation to specifically Aboriginal issues such as land rights, native title, cultural heritage, and Indigenous languages. If parliament is to make such special laws, surely those Australians who are the custodians of this heritage and the holders of these distinctive rights should be consulted.

Sometimes these 'special laws' are enacted on other issues which are not uniquely Indigenous, such as laws restricting access to alcohol. But then these laws are made applicable only to Aborigines and Torres Strait Islanders, being classed as special measures under the *Racial Discrimination Act*. For example the recently lapsed *Northern Territory National Emergency Response Act 2007* which established grog bans on remote communities in the Northern Territory provided: 'The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975* , special measures'. Such special measures do not get extended to any other racial groups in contemporary Australia. If such measures are to be enacted in the twenty first

[40]Tony Abbott, 'Entrenching race in Constitution drives us further apart, *The Australian*, 3 August 2022 available at https://www.theaustralian.com.au/commentary/entrenching-race-in-constitution-drives-us-further-apart/news-story/7795a21d3ff052b2fd4a89f90a62e36f

century, there ought be some constitutional mechanism for ensuring consultation with the affected racial group.

The primary constitutional function of the Voice should be to provide a means by which Aboriginal and Torres Strait Islander peoples are consulted prior to the enactment of laws which apply especially to them, either because the laws relate to distinctive Indigenous issues such as land rights, native title, cultural heritage, and Indigenous languages, or because the laws are special measures targeted at Aborigines and Torres Strait Islanders – laws which on their face are racially discriminatory but which are designed to enhance the situation of a disadvantaged racial group (under the *Racial Discrimination Act* consistent with the *Convention on the Elimination of All Forms of Racial Discrimination).* Unlike the situation at the turn of the twentieth century, no other group in the community today is subject to the Commonwealth's distinctive law making power under section 51(26) and no other group in the community is subject to the special measures regime under the UN Convention. This 'special' regime of law making applies only to Aborigines and Torres Strait Islanders.

Even constitutional conservatives, perhaps especially constitutional conservatives, should be attentive to the Indigenous cry: 'No more special laws about us unless we are consulted.'

As the Indigenous leadership has abandoned any call for amending the 'race' provisions in the Constitution (sections 25 and 51(26)), the only issue on the table for consideration is the addition of a new constitutional provision for a Voice. However it should be noted that the 2018 parliamentary joint committee did record its belief that 'there would be broad political support for recognition of Aboriginal and Torres Strait Islander peoples comprising:

- the repeal of section 25; and
- the rewording of section51(26) to remove the reference to "race" and insert a reference to "Aboriginal and Torres Strait Islander peoples".'[41]

At the Garma Festival last month, Prime Minister Anthony Albanese started the ball rolling by suggesting a three sentence addition to the Constitution:

[41] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report*, November 2018, para 4.59

1. There shall be a body, to be called the **Aboriginal and Torres Strait Islander** Voice.
2. The Aboriginal and Torres Strait Islander Voice **may make representations** to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples.
3. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.

This suggestion is a slight modification of the proposal put belatedly by Noel Pearson, Megan Davis, Pat Anderson and their academic collaborators to the joint parliamentary committee chaired by Patrick Dodson and Julian Leeser in November 2018. The Albanese draft drops the term 'First Nations', and rather than stipulating that the Voice 'shall present its views', it provides that the Voice 'may make representations'.[42]

So to date, the government is unilaterally tinkering with just one of 18 suggestions which were put to the joint parliamentary committee in 2018, this one having been submitted nearly two months after the closing date for submissions, and just 26 days before the committee was required to submit its final report.

Already, respected political commentators like Paul Kelly have pointed out that the second sentence 'is open-ended, unqualified and unlimited. It means the voice can make representations to the parliament on bills, to the executive government on ministerial decisions, but is not limited to matters before the government or parliament. The voice can make representations on virtually anything or even initiate its own agendas. Given this provision, it will be a brave and probably foolhardy parliament that tries to restrict the voice acting under the third sentence in Albanese's constitutional provision where the parliament can make laws with respect to the "composition, functions, powers and procedures" of the voice.'[43]

[42] Submission 479 of N Pearson, M Davis and P Anderson et al, 3 November 2018, to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, p.6x
(1) There shall be a First Nations Voice.
(2) The First Nations Voice shall present its views to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples.
(3) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice.
[43] Paul Kelly, 'Conviction not enough for PM on the voice', *The Australian*, 3 August 2022 available at https://www.theaustralian.com.au/commentary/conviction-not-enough-for-pm-on-the-voice/news-story/46431a2cecd2eb58440168588c85a1ca

Clearly there is a need for greater precision in the suggested wording of any constitutional amendment.

I suggest a simplified amendment to provide: 'There shall be an Aboriginal and Torres Strait Islander Voice with such structure and functions as the Parliament deems necessary to facilitate consultation prior to the making of special laws with respect to Aborigines and Torres Strait Islanders.' [44] This would be a way of completing the Constitution, not changing it, and consistent with the Uluru Statement.

The Voice could be given additional functions by legislation. Those additional functions could include representations to parliament on laws other than special laws with respect to Aborigines and Torres Strait Islanders, as well as representations to government on laws and policies impacting on Aborigines and Torres Strait Islanders. But these would not be constitutional functions of the Voice. The Voice's structure would be determined by legislation and could be varied from time to time by legislation.

For a national Voice to have utility, credibility and legitimacy, it needs to be resourced with a comprehensive system of local and regional ears which can listen to the local and regional voices. A national Voice without numerous ears and the means for transmitting local and regional voices to the national stage would be a clashing cymbal, or, as Noel Pearson once described the proposed Congress of Australia's First Peoples, 'a blackfella's wailing wall', a forum for victimhood.[45] A Voice with ears could be the ideal body to complete the Constitution so that special laws applying only to the First Australians and their heritage would be enacted only after due consultation with them.

This is not the stuff of wedges; it's the glue to consolidate the unity of the Australian polity in the twenty-first century. I think Mannix would approve. So should we. And I would hope that Tony Abbott and Jacinta Price could approve too. This is the absolute minimum of what a constitutional Voice to Parliament should include. The question will be whether it is sufficient to satisfy the advocates from Uluru. In the end, there will be little point in proceeding with a

[44] I first proposed this suggestion in a Letter to *The Australian*, 27 January 2022 See https://www.theaustralian.com.au/commentary/letters/most-australians-are-tolerant-and-inclusive-so-stop-the-hectoring-on-our-national-day/news-story/5df6d8d9cce30994761c822899f19281

[45] 'New indigenous 'company' structured to keep politicians at arm's length', *Sydney Morning Herald*, 3 May 2010 at https://www.smh.com.au/national/new-indigenous-company-structured-to-keep-politicians-at-arms-length-20100502-u1hx.html

referendum unless the words for insertion in the Constitution win the support of both Noel Pearson and John Howard. My suggested draft may be the starting point for finding that sweet spot. The Parliament now needs to provide a process for all persons of good will to submit their suggested wording so that the Parliament might land on that sweet spot, agreeing on 'the specific content, wording and timing of a referendum proposal',[46]enhancing the prospects of winning the support of the majority of voters in the majority of states.

[46] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report*, June 2013, para. 3.19