GILBERT +TOBIN

BLACKSHIELD LECTURE

THE VOICE: A CALL TO LEADERSHIP

30 NOVEMBER 2022

Tony Blackshield, distinguished guests, ladies and gentlemen.

I acknowledge the Gadigal people of the Eora nation, the traditional owners of the land on which we meet and pay my respects to their elders and leaders present and emerging. I acknowledge all Indigenous people here this evening.

It is an honour to give this lecture bearing the name of the distinguished Australian, Professor Tony Blackshield, and I thank Macquarie University Law School.

In 12 months or so, Australians will be asked to vote in a referendum to change our Constitution.

I am here to explain why this change should be made. Why it is not complicated, difficult or dangerous.

I want to say to you all that this is a call to leadership. This call will only be met when people who want to see this change, understand why this referendum is so important to Indigenous people and why the Voice is an essential step.

Constitutional recognition of the Voice will be our nation's most profound act of reconciliation.

The Voice will empower our First Peoples to have a mature say in matters that concern their future - a mature influence on policy and programs.

The Voice will be a momentous reform, to be sure, but it will not be radical. It overthrows nothing. Changes no direction.

As Robert French, the former Chief Justice of the High Court of Australia, has said:

> "It is a sensible and straightforward proposal."

And former High Court Justice Kenneth Hayne said, as recently as last Friday:

> "I think the simplicity of the proposal is its strength."

It should be seen as another step along the reconciliation journey.

Consider the nation just half a lifetime ago:

+ when the High Court had not yet found that native title did exist - that terra nullius was a 200 year old lie;
+ when no Prime Minister before Paul Keating's Redfern speech – almost 20 years to the day, had acknowledged the realities of colonisation;
+ when the Native Title Act did not exist;
+ when no Prime Minister had acknowledged the Stolen Generations.

The story goes back further.

+ To the Arnhem Land Bark Petition in 1963.
+ The Freedom Ride in 1965.
+ The 1967 Referendum.

And long before those events, to leaders like:

+ William Barak who in 1863 petitioned the Victorian Government for a Wurundjeri homeland.
+ the Wiradjuri men, Jimmy Clements and John Noble who walked from Brungle, near Gundagai, to the opening of Parliament House in 1927.

It goes back to Pemulwuy and Jandamarra for that matter. To the first battles in the frontier wars that lasted 150 years and cost thousands of lives.

More recently, we have the *Uluru Statement from the Heart:* the first ever Indigenous national consensus on how they want to be constitutionally recognised – through a voice in their affairs.

Things we take for granted today were unimaginable forty years ago. Back then, the Aboriginal flag was rarely seen. Then, at the Sydney 2000 Olympics, Cathy Freeman draped herself in it, together with the national flag, in that triumphant moment. The two have gone together ever since.

The world did not end with any of these events. The nation did not crumble. None of those measures brought the fabric of Australia undone. Instead, they amplified our understanding of what Australia is and ought to be. They bound the fabric more firmly.

These days we see Indigenous people on our sporting arenas, in film, television, theatre, galleries, hospitals, universities, business and in our parliaments.

They and their work are woven into the nation's daily life and its public affairs.

The Voice is of this time.

It is another step on that long march to reconciliation. The next station on that long journey.

And the Voice is not ideology. It's not elitist. It does not belong on the battlefields of the culture wars. It belongs in the hearts and minds of all Australians.

The Voice is a response to the facts of continuing profound disadvantage among Indigenous people: disadvantage and

dysfunction that has not responded to policy, or intervention or money spent.

The Voice is an effort to change that. To give Indigenous Australians some modest positioning for a meaningful say in the policies that bear upon them. To bring their experience and knowledge to debate within and between their communities, and the distillation of their deliberations in a Voice to Parliament.

And by establishing a permanent constitutionally guaranteed forum for opinion, debate, negotiation and the presentation of evidence, the Voice will disseminate knowledge and foster the skills that make for good results and good leaders.

Constitutional recognition is an investment in our democracy. It is an investment in our national friendship. It will tell Australia's Aboriginal and Torres Strait Islander Peoples that they belong with us, to be embraced and celebrated.

We won't undo 200 years of expropriation, discrimination and neglect in a single blow, or half a dozen of them. We can only face it honestly and see to the business of repair and renewal.

This will be a profound, long-overdue symbolic act. It will end the silence in the pages of our Constitution – our rule book of national governance.

It will bring Aboriginal and Torres Strait Islander Australians to their rightful place in our shared understanding of Australian identity and opportunity.

And it will oblige us to acknowledge - formally - the historical and political reality.

It begins with the act of recognition.

RECOGNITION

And what are we saying when we talk about recognition? Why should we support more formal recognition of Indigenous people than exists today?

Because Aboriginal and Torres Strait Islander Peoples are Australia's *First* Peoples. Until 1770 it was their country. They are the descendants of the people who lived on this continent for 65,000 years.

Theirs is the oldest continuing living culture in the world. It is an epic story. A bewildering marvel of human adaptation and endurance.

We should wonder at it, honour it.

And let's be frank, if it were *our* story, if it was the story about white Australia, we would.

The land of Australia and everything upon it was theirs. The land and the people were inseparable. All meaning was rooted in the landscape, all religion, all human relationships.

That is what the British took when they took Australia.

It was taken brutally, without compromise and without compensation. With the land, thousands of lives were taken, entire clans were wiped out and with them their languages.

The loss cannot be overstated. Nor can the miracle of human persistence and adaptation that enabled so much of their culture to survive.

No more need be said. That alone is enough to warrant Constitutional recognition of Australia's Aboriginal and Torres Strait Islander Peoples.

RECONCILIATION

There can be no true reconciliation without constitutional recognition.

To live in a modern, capitalist, liberal democracy, with a strong social safety net, is a rare privilege. A privilege to be treasured and defended.

Our British and European heritage endowed our nation with extraordinary strengths - economic, social and political - with enduring and effective institutions. We rightly celebrate these pillars of our nationhood.

And we are proud of being a hard-working, generous, creative, egalitarian, multi-cultural nation. Australians care about their communities, as we've all seen in the recent catastrophic floods.

But, like all histories, our history, since white contact, has been a mix of struggle, triumph and shame. Australia's abiding shame has been our treatment of Indigenous Australians.

James Cook's claiming of the east coast of Australia for the British crown in 1770 and the arrival of the First Fleet in 1788 is where the great compromise of our national beginning rests: when we excluded Indigenous people from Australian nationhood.

We told them that we would live together but they must live apart. We closed the door on 65,000 years of history.

Egregious wrongs were inflicted on our First Peoples and we can't minimise what happened.

We might say it was the same with all settler societies. We might say that's the way people were then. We might say the Spanish were worse. Or look what happened to the Native Americans.

We might say it was just a case of a more advanced civilisation inevitably overrunning one less advanced.

We might say these things, but they won't wash anymore. Indigenous people know better - most Australians know better.

The fact is, Australia – the admirably democratic, enlightened, tolerant country we love – was founded on falsehoods and wrongs.

Justice Brennan expressed this well when he said in the Mabo case:

> "Their dispossession underwrote the development of the nation."

When the Commonwealth was founded, we locked Indigenous people out. We shunned them.

We invented and imposed a ladder of civilisation, a ladder of race really.

We put Indigenous people on the bottom and the British on top. We excluded them from our national life, rendered them powerless, inflicted systematic humiliation and cruelty, denied them agency.

We failed to offer the most basic tenets of human decency.

We told ourselves they would fade away.

But they didn't fade away. And the racial ladder was a falsehood. We know these things now. Just as we know the truth about the colonial frontier.

I want to emphasise that these truths of which I speak transcend victimhood and blame. This is not a black armband revisionist view. We can't blame ourselves for what happened, but we are obliged to acknowledge that it was wrong.

The legacy of violence and injustice still haunts Indigenous Australians. They carry the scars and trauma, as victims of war and crime.

Most Australians, regrettably not all, now acknowledge the gross crimes and injustices that occurred. There can be no more denials or papering over these things. They are not going away. They will continue to fester if we ignore them.

We can't ever make adequate amends for what happened. But we can repair the relationship. After almost 240 years, it's time to take that step.

It's time for an unequivocal statement of recognition levered into place as a cornerstone of our 21st century nationhood.

And what more appropriate place to manifest that recognition than in our Constitution? The place where this enduring structural commitment can be made.

As Murray Gleeson, the former Chief Justice of the High Court of Australia, said on 18 July 2019 when discussing the Voice:

> "Behind the broad political acceptance of the need for some form of constitutional recognition of Indigenous people is a readiness to address, with appropriate formality, the historical fact of dispossession and its consequences. If this can be done in the nation's foundational legal instrument, in a manner that is consistent with the nature of that instrument, and that confers substantive benefit upon Indigenous people, then it seems a worthwhile objective."

A worthwhile objective indeed.

Constitutional recognition will tell Indigenous Australians that their 65,000 year history, their cultures and their futures are inextricably part of who we are.

That is reconciliation.

WHY THE VOICE?

The process of resolving difficult problems in our democracy is through the collective wisdom of well-established democratic structures. Two houses of parliament, ministers and ministries, parliamentary committees, etc.

And yet, no structure exists to solve the intractable problems besetting our First Peoples.

No Australians, to this day, experience more disadvantage than our First Peoples. They are rightly demanding to be heard in the laws and policies intended to solve their disadvantage.

And why is this empowerment so necessary?

We need look no further than the 14 Closing the Gap Reports. In his Closing the Gap address to the Parliament today, Prime Minister Albanese said:

> "… those realities of disadvantage and inequality, stare up at us from every page of the Closing the Gap report.
>
> … in some areas the word "gap" feels wholly inadequate, a softening of the truth that what we face is a chasm."

Indigenous people remain vastly over-represented in our jails. They have shorter life spans than non-Indigenous Australians. They endure higher levels of unemployment and poorer educational attainment. Too many live in severe poverty. Indigenous children continue to be removed from their families in obscene numbers. And, as so many Indigenous people will tell you, they confront racism as a daily occurrence.

The position in remote Australia is particularly dire. Too many communities are struggling against the odds. Too many children live with unacceptably high levels of infectious diseases, anaemia, and atrocious dental health. They have some of the highest rates of rheumatic heart disease and diabetes in the world. The link between poor child health and chronic adult health problems is strong. Problems of overcrowded houses, violence, incarceration, drug and alcohol abuse and suicide. Thousands miss out on education, and therefore on economic opportunity. These are the notorious and seemingly immovable facts.

The Voice will empower local and regional communities to devise place-based solutions to these problems, enabling those communities to unite nationally when appropriate. It will empower those communities to address issues like the unanswered challenge of welfare reform or the need for targeted action on family violence.

Nowhere is the need for a Voice more evident than in the scourge of alcohol addiction.

In many Indigenous communities and towns across Northern Australia alcohol consumption is a problem of major dimensions. It is a continuing tragedy with deep roots in the history of European contact. Alcohol abuse leads to community dysfunction, violence, mental disorders, injuries, poisonings and chronic diseases of the heart, liver and respiratory systems. It distorts every effort to close the gap.

Last year I led a review about alcohol in the Northern Territory. What that review revealed to me is that governments do not listen to the people on the ground as they seek to deal with this shocking issue. Governments rush ahead winding back alcohol bans for ideological reasons without properly considering the views of local communities.

Although she opposes the Voice, Senator Jacinta Price was spot on when she said in The Australian on 24 October:

> "The lifting of alcohol bans, despite the warnings from elders, will see the scourge of alcoholism and violence return to those communities."

This is yet another issue on which the Voice can help deliver change. It must empower local Indigenous leaders to decide what measures best address these problems.

Some commentators say the answer is for Indigenous people to take greater responsibility and step-up to these challenges. Certainly Indigenous people need to take responsibility. Indeed, my own wide experience tells me that they have been stepping up for a long time now. But too often they are shackled by structural impediments - by poor government intervention and policies.

In every state and territory there is a Minister for Indigenous Affairs - and bureaucracies to look after their so-called "best interests". Within these structures, governments decide on the next policy intervention, where and how the dollars are spent. Indigenous people are sometimes invited in. Often they insist on being at the table. Sometimes they get a good hearing. Often, they do not. It depends entirely on the goodwill and inclinations of government.

Too often Indigenous people are trapped in an ineffective web of top-down one-size-fits-all Canberra-based decision-making.

These obstacles are more than institutional - they're psychological. They contain in their bones all the humiliation, paternalism and condescension of old - the memories of brutality, contempt and exclusion.

Constitutional recognition will signify the death knell of this humiliation, paternalism and condescension.

The Voice will empower Indigenous communities with a seat at the table - albeit a modest seat. It will go a long way to guaranteeing that Indigenous Australians will be heard, *as a matter of course*. *As a matter of course*, they will have a say in deliberations about their welfare and their future. This should include the *delivery* of policy, the *delivery* of services, the keeping of promises.

I'm not saying there have not been improvements over the years. There clearly have. It's just that the Voice will be a palpable step-up on what happens now. And while the presence of 11 Indigenous people in our Federal Parliament is a very significant development, the first allegiance of these Parliamentarians is rightly to their parties and constituents.

On the other hand, a constitutionally enshrined Voice will be an instrument secured by the will of the Australian people. The will of the Australian people will encourage politicians and their bureaucrats to change their mindsets and change their behaviours. Their consideration of Indigenous issues will be more effective for this very reason.

Working with on-the-ground grassroots people, led by informed local and regional Indigenous organisations, the Voice will empower Indigenous people to have a practical, stronger and more effective influence in the policies and laws that come from government and which daily impact their lives.

We already know how this could work from the *Co-Design* Report of Professors Marcia Langton and Tom Calma, delivered in July last year.

The Voice will increase our combined ability to close the economic and social gaps that exist between us. It will help Indigenous people to become embedded in the national economy - and Indigenous culture to feel its way deeper into the broader Australian culture.

This is not just the right thing to do - it will save the country money as well. All Australians should be concerned about how much money is spent every year. I know Indigenous leaders are. They see first-hand where the money goes and that much of it never reaches the people on the ground. They are demanding greater accountability from government to ensure the money is well spent.

Let the Voice be a mechanism for that.

WHAT SHOULD THE VOICE LOOK LIKE?

At the Garma Festival on 30 July 2022, Prime Minister Albanese announced that his Government would hold a referendum on constitutional recognition of the Voice in this term of Government. He offered the following as possible words to be included in our Constitution.

"In recognition of Australia's Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

(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 of the Commonwealth 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."

These words were not plucked out of the air by the Prime Minister. They had been worked on for several years by many people, including Professor Megan Davis and her team at UNSW, Pat Anderson, Noel Pearson and Professor Anne Twomey. While they may not be final. I hope that they will be close.

They meet the essential requirements of recognition, reconciliation and empowerment.

And what's more, they are modest; they don't demand too much.

Paragraph 1 provides for the establishment of a body to be called the "Voice".

Paragraph 2 provides a brief and easily understood description of the functions of the Voice. To make representations to the Parliament and to the Executive Government of the day on matters relating to Aboriginal and Torres Strait Islander Peoples.

Paragraph 3 makes it clear that it is for the Parliament to pass the legislation to establish the Voice in the first instance and to determine its operational structures and functions. And it will be left to the Parliament to change and amend the Voice as Parliament may, as needed.

These words are functional, sensible and safe.

I use the word "safe" because they will do no harm to our Constitution. No harm to the workings of our constitutional arrangements. No harm to the workings of our body politic. Rather, the amendment will improve law and policy-making in Indigenous affairs.

And these are the opinions of leading constitutional law experts Professors Anne Twomey, Cheryl Saunders and Greg Craven. Opinions shared by former High Court Chief Justice Robert French and former High Court Justice Kenneth Hayne.

No political party, no Commonwealth government wants to entertain the possibility that Parliament be circumscribed and overridden by the courts. These words do no more than guarantee a Voice and its essential characteristics, leaving the detail of its operations to the Parliament.

The maintenance of parliamentary supremacy rightly remains a key overarching objective to this constitutional change. Indigenous leaders themselves have insisted on it.

CONCERNS AND CRITICISMS

It is difficult to see how the enshrinement in our Constitution of a body to make representations to the Parliament and the executive on matters relating to Indigenous Australians will somehow impair the operations of government or otherwise inflict harm on our nation.

Having said that, it is important that there be public debate and some commentators have raised concerns.

It is pleasing that the criticism of the Voice as a third chamber of parliament seems to have run its course - but not completely. John Howard is concerned that the Voice will have undue coercive influence.

Two things to say about that.

If coercive means to be influential with better policies and laws then the Voice will be doing its job.

If the Voice gets in the way of the workings of the Parliament and the executive, then the solution lies with the Parliament and the executive. Elected representatives have no legal obligation whatsoever to heed or follow the advice of to the Voice. Nothing in the Prime Minister's language requires that.

Some critics still insist that the Voice will have a veto over government policy and legislation. This is clearly untrue.

Then there are concerns about equality. Concerns about giving one group of Australians some benefit or advantage over others.

But equality is not about treating everyone the same. It is about lifting people to the same level so that they can enjoy the same rights and opportunities. After all, remedying injustice does not injure or disadvantage others.

I hope that the Voice can be seen by our fellow citizens as one step to help improve the lives of one group of Australians as we continue our efforts to eradicate disadvantage and unfairness across our nation. The Voice will not be the end of this road. To the contrary, it will shine a light on disadvantage more generally. And our nation will be the better for it.

Concerns around equality segue into questions of race - that no race should have preferential treatment. That there is no place for race in our national discourse. No place for race in our Constitution.

Lofty as these aspirations are, they are historically set; ill-informed and unreflective of reality.

As I said earlier, when the British Crown settled our continent, we were from the outset divided by race. In 1901 the founding fathers entrenched race into our Constitution and those provisions remain, even after some tinkering in the 1967 Referendum.

Journalist Chris Kenny put it very well, when writing in *The Australian* on 3 September 2022. He said opponents cannot:

> "pretend this proposal injects race into the Constitution; it has included race powers, race-based language and racial exclusions from day one - a voice does not establish this constitutional history, it aims to repair it."

In any event, it is not about race. It is about the descendants of the original inhabitants of our country.

Another concern of the Voice is that it is a distraction. That the Government is avoiding its responsibilities to Indigenous Australians by committing to a constitutional referendum on the Voice. That the Voice will have no utility. That we should be expending all our national efforts, time and money on closing the gap. All our energy on remedying the dysfunction and poverty affecting too many of our Aboriginal communities.

This is a false dichotomy. We need to do both. And, as I've explained, the Voice will help solve the urgent problems that Senator Jacinta Price rightly draws to our attention.

Then there are people who say, 'But Indigenous people can't agree on anything. They will disagree and never speak with one voice'. But it's disagreement and debate that make for good democratic processes.

Some critics worry that the Voice will shift power from the Parliament and the executive to the courts - that it will be justiciable. They argue that there will be endless legal challenges to all aspects of the Voice and its operations.

I don't have the time in this talk to respond to every point that is made about justiciability. But these concerns are unfounded. In fact, the Voice was conceived in collaboration with constitutional conservatives precisely to address concerns about uncertain judicial interpretation. As a result, it is the only proposal for Indigenous constitutional recognition that was specifically intended and designed to be non-justiciable.

As former High Court Judge Kenneth Hayne said last Friday:

> "I do not share these fears. I think they are baseless.
>
> "The courts have always shown great reluctance to interfere in the internal affairs of parliament. I think that litigation about what parliament does or does not do in response to representations would fail."

The only requirement in the proposed wording is that the Voice exist and be able to make representations to the Parliament and the Executive Government. There is no legal requirement that either the Parliament or the executive do anything with those representations.

It is the very absence of any such legal requirement that will make the provision non-justiciable.

I am not saying that there will never be legal challenges. What I am saying is this - it is highly unlikely that the courts will make rulings which limit the powers of the Parliament or the executive or which impose rules and obligations not contained in the Prime Minister's words.

Returning to the Prime Minister's second sentence:

> "The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander Peoples."

Critics worry these words are too open ended, unqualified and unlimited. They worry that the Voice will be free to make representations on any subject it chooses. But the Voice should be able to make representations on laws and policies which apply to most, even all, Australians. The simple reason is that policies and laws of general application are often those which most affect Indigenous Australians.

And in any event, if the Voice, once established, makes representations immaterial or irrelevant then surely it won't be listened to and will not be influential. As Professor Anne Twomey has said, in answer to this concern:

> "There is nothing in there that requires a government to respond in any way. There is no obligation to consult before it makes a policy or law …"

This point is worth emphasising – there is absolutely no obligation on the Parliament or the Executive to consult with the Voice.

Critics say that the matters on which the Voice can have a say should be limited in the words of the actual constitutional amendment. But any attempt to define or limit the matters on which the Voice may make representations will inevitably lead to definitional arguments - about what's in and what's out.

Any words attempting to do that are far more likely to give rise to litigation, much more than anything in the Prime Minister's suggested words.

Then there is the criticism that more information is needed - how the Voice will be structured, how it will operate, etc. I think sufficient information is already available in the suggested words of the Prime Minister.

How the Voice will be designed is of course a matter for the Parliament and future governments. Neither the Government nor the Parliament can bind a future parliament on how it exercises its legislative powers. It would be like demanding, prior to the 1967 referendum, to know the detail of every law that Parliament might pass in the future with respect to Indigenous people before agreeing to support the amendment.

CONCLUSION

Let me conclude.

Dean Parkin, Director of From the Heart, sums it up very well:

"Our call for a Voice is animating that fundamentally Australian idea of a fair go".

Even though polling suggests that more than 50% of Australians support the Voice, there is still much work to be done to achieve a successful referendum.

Our representatives in Parliament need to pick up their phones and engage with each other across the aisle in a moment of nation-building. These conversations should be much more than, much deeper than, the usual bipartisan negotiation. And we need a good parliamentary process or mechanism to produce a bipartisan outcome.

These conversations should be about the fundamental truths of who we are as a nation. After all, most if not all, of our Parliamentarians share the national aspiration of recognition and reconciliation. All share the national desire to bring Indigenous Australians to the table of opportunity. These are the building blocks of political consensus.

This is too important to fall over at the hurdle of failed agreement between our political parties. We all hope that the Government and the Coalition, Anthony Albanese and Peter Dutton, can come together very soon on the basis of this truth:

> That the Voice intends no threat to the nation or its governance.

No one need feel threatened by it. The words in which it is expressed recognise the great disadvantage in which Indigenous people continue to live, and the great wrongs committed against them. They grant no one an advantage relative to anyone else - and seek no recompense.

Senator Price and the Nationals should engage in the Voice design rather than spoiling from the sidelines. I urge them, in the interests of our nation, to reconsider their too hasty rejection of the Voice.

As for ordinary citizens, what can you do?

Firstly, as I have already said, anyone who supports the Voice needs to have some basic understanding of the issues I've addressed today.

Second, they should spread the message. To their families and friends, in their places of work and in the organisations of civil society.

It is very pleasing that there is good support from Corporate Australia and many of them want to do more. So, those of you here this evening who work for those companies, I encourage you to keep this issue front of mind. You can be persuasive with your own people and persuasive with your own customers and suppliers.

The proposal for the Voice is straightforward and modest. It should be seen for what it is - recognition, reconciliation and empowerment. Change to address our country's unfinished business.

We need to approach this subject with humility and respect, with generosity and with courage. We need to understand that there are many Australian citizens yet to be convinced or who might never agree.

But my hope is that the great majority of Australians will see this change for what it is - the opportunity for Indigenous Australians to live better lives.

The Uluru Statement from the Heart is, as Pat Anderson has said many times, "an invitation to walk with us on a journey for a better future".

It's time we accepted that invitation.

Fair-minded people might disagree, but it's my belief that most Australians, in possession of the facts, will not deny them this.

Thank you.



Danny Gilbert
Managing Partner, Gilbert + Tobin

30 November 2022


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