AN INDIGENOUS VOICE: THE ISSUES

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I have chosen the title of this paper as a tribute to Sir Harry Gibbs, who in the earlier years of the Society delivered several typically erudite papers on topical constitutional matters, such as '*A Republic: The Issues*' (to the eighth conference) and '*A Preamble: The Issues*' (to the eleventh conference). Indeed, in the first of these papers, Sir Harry began by saying:

> I remain unconvinced that the Constitution of Australia would be made more democratic, efficient or just by breaking the existing links with the Crown, and I regard as fanciful the suggestion that under a republic the Head of State would give Australia a sense of unity and would heal the divisions that are said to exist in our society. However, this is not the occasion to press arguments of that kind. My present purpose is to discuss what issues would have to be decided before our Constitution could be converted.

It is in this spirit that I approach the subject of a proposed 'Indigenous Voice' to the Commonwealth Parliament, and in so doing highlight some of the many issues that will need to be addressed if this proposal is to be progressed, let alone succeed at a referendum.

In so doing, there are three key issues I wish to traverse. The first is to offer some reflections on the concept of indigenous 'Reconciliation'. What does it actually mean? What has it meant? What may be the implications of an Indigenous Voice?

Second, I will outline some of the issues relating to the details of the proposed Voice, or more precisely, the current lack of details.

Finally, I will offer some hard-headed and pragmatic views on the prospects of success for 'the Voice' at a referendum.

I RECONCILIATION

In considering the debate around a 'Voice', it is important to recognise its origins, which means going back to the concept of 'Reconciliation, which has been a topical issue for over some decades.

Reconciliation begat constitutional Recognition, which, according to its advocates, became necessary to achieve Reconciliation in its desired form. Recognition in turn begat the Voice, which, according to its advocates, is now the only way to achieve Recognition in a form acceptable to Indigenous Australians.

Reconciliation is highly desirable but can mean many things to many people. The New Shorter Oxford English Dictionary defines 'reconciliation' as: '*The action or act of reconciling a person to oneself or another, or estranged parties to one another; the fact or condition of being reconciled; harmony, concord*.'

In the context of the current debate, I think it is timely to illustrate two approaches to reconciliation and constitutional recognition. The first was articulated by Nelson Mandela, who said: '*Take your guns, your knives and your pangas and throw them into the sea; If you are negotiating you must do so in a spirit of reconciliation, not from the point of view of issuing ultimatums*.'

An alternate, and rather different, approach was articulated earlier this month by Indigenous leader Galarrwuy Yunipingu, when he made what he describes as a final demand for substantive constitutional change, threatening that the '*Yolgnu people of Arnhem Land will throw the constitution into the sea if change does not come soon*.'

The quest for Reconciliation has a long history. The *Council for Aboriginal Reconciliation Act 1991* (Cth) was based on the objective of reconciliation by the centenary of Federation. Its legislation empowered the Council to consult Aboriginal and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document or documents of reconciliation. There was no suggestion that such a document should have constitutional status.

The Council was replaced in 2001 by 'Reconciliation Australia', which still exists today. On its website are a number of helpful links, including one entitled '*What is Reconciliation*'. Sadly, at the time of writing, the link was broken so I was not able to inform myself as to how Reconciliation Australia currently defines the concept.

Reconciliation in Australia has at various times meant various things. It can be a temporal concept, with what we would now term a 'hard deadline'. It can be an ongoing, and presumably indefinite process of living together in greater harmony. It can mean the achievement of specified goals, such as 'Closing the Gap' on quantifiable social and economic measures. It can be 'symbolic', 'practical' or a combination of the two.

In 1991, it was felt that Reconciliation could be achieved through a non-constitutional document. By 1999, discussion had moved beyond this to the concept of constitutional recognition. Indeed, a referendum was held to amend the Preamble to include a modest statement of recognition. Prime Minister Howard described it as: '*a fair attempt to say what everybody wants to say*.'

Notwithstanding the defeat of this proposal, since 1999, proposals for constitutional Recognition have become more ambitious, to now include a Voice, and the concept of what is required to achieve Reconciliation has also become more expansive.

The Uluru Statement from the Heart states that 'Makarrata is the culmination of our agenda', and that this ought to include 'agreement-making', commonly understood as treaties, the recognition of first nation's sovereignty, and 'self-determination', all of which is now presumably the new yardstick for the achievement of Reconciliation.

II THE DETAILS

The most important issue to consider in relation to the proposed Voice concerns the details of how it would look and function in practice. So far, no advocates of a 'Voice' have, to my knowledge, put forward with specific detail how such a body would be constituted, or made any attempt to outline what its powers or procedures might be. It is over two years since the release of the Uluru Statement from the Heart first proposing the Voice, and still no details have emerged.

In the interests of the discussion, I simply put forward a range of practical questions to ponder for any such 'Voice' and how it will be constituted and how it will function:

1. If such a body was to exist, who would be eligible to be a member of it? How would indigeneity be defined? In the event of any disputes, who would be the arbiter?
2. Would its jurisdiction be limited to simply 'Indigenous issues', or would it also have a say on broader national issues?
3. Will it be elected or appointed?
4. If the former, who gets to nominate for election, and who gets to vote?
5. If the latter, who does the appointing, what are the qualifications to be appointed and what will the term of appointment be?
6. If elected, what will be the constituencies? Electorates, states, regions, relevant 'First Nations' or something else?
7. If elected, will parties or other organised groupings endorse candidates with particular platforms? Will public funding be provided, as in Parliamentary elections?
8. Where will it meet, how often and on what terms? Will its members be paid like Parliamentarians? Will they be free to hold dual citizenship or offices of profit under the Crown? How will potential conflicts of interest be dealt with? Will they also be entitled to paid staff, Comcars and travel allowances whilst on official 'Voice' business?

These questions relate only to the establishment of the Voice. There are a range of equally important questions that will need to be addressed in relation to its operation.

In raising these questions, I wish to borrow the approach used by Chief Justice French in his presentation to the Society's twenty-ninth conference, by starting with 'an anodyne statement of the blindingly obvious', namely that Indigenous Australians are a very diverse people with a range of views on a range of issues, who are unlikely to adopt a monolithic consensus position on any given matter. On this basis, we should ask proponents of the Voice:

1. What will the procedures be for debate and voting with the Voice on particular questions?
2. Will there be caucuses and whips to manage such debates and 'do the numbers'?
3. Will the Voice appoint one of its members as the 'Prime Voice' to speak on its behalf? Will other members be allocated particular portfolios on which they will speak (ie, the Voice Ministry)?
4. In the event of disagreement, will there be scope within the Voice for Her Majesty's Loyal Opposition Voice?
5. If the Voice cannot reach a consensus in its advice to Parliament, what form, if any, will such advice then take? Will the Parliament receive a Majority Voice report and potentially multiple Dissenting Voice reports? If so, what if anything would the Parliament be expected to do?
6. If the Voice cannot reach a view on a particular issue in a timely manner, or not at all because opinion is divided, what should the Parliament do?
7. Will the Voice only consider issues before the Parliament, in response to proposals put to the Parliament, or will it have the ability to put 'own motion' proposals to the Parliament?

8. In either case, what checks and balances, if any, will exist to stop the system being gamed by Members of the Parliament who refer matters to the Voice which have no realistic prospect of being enacted by the Parliament, or by members of the Voice itself in proposing measures that the Government of the day would clearly not support?

III PROSPECTS OF SUCCESS

Having flagged these real live issues I turn to make some observations on the prospects of success at a referendum for either Recognition or the Voice.

A *Recent Attempts*

We are now in the forty-sixth Commonwealth Parliament. By my reckoning, every Parliament since the thirty-ninth Parliament, bar one, has entertained some idea of Recognition.

The thirty-ninth Parliament passed legislation to provide for a referendum to amend the Preamble of the *Constitution* to, in part, recognise the history of Indigenous Australians. It was soundly defeated in all states and nationally.

In the forty-first Parliament, Prime Minister Howard took a proposal to the 2007 election to put a referendum on Indigenous recognition in the life of the next Parliament if he was re-elected.

In each subsequent Parliament, the issue re-emerged, with the in-principle support of the Government of the day.

Now, in the forty-sixth Parliament, Prime Minister Scott Morrison and Minister for Indigenous Australians Ken Wyatt have committed to putting a referendum on recognition during the life of the Parliament, which may not include a

constitutionally-entrenched Voice. Instead, they have floated the possibility of a legislated Voice.

During this time, there have been four specially constituted bodies to progress the issue and design a model for constitutional recognition:

1. After the 2010 Federal Election, Prime Minister Julia Gillard established an Expert Panel on Constitutional Recognition of Indigenous Australians. The Expert Panel then delivered its report on the Constitutional Recognition of Indigenous Australians in January 2012.
2. In November 2012, the forty-third Parliament established a Joint Select Committee on Constitutional Recognition to consider the issues that remained unresolved following the Expert Panel process, and in December 2013, the forty-fourth Parliament resolved to continue that committee. The Joint Select Committee delivered its Final Report on 25 June 2015.
3. In December 2015, the Australian Government established a bipartisan 16-member Referendum Council (a second Expert Panel by another name) to consult widely and take steps to achieve constitutional recognition. The Referendum Council released a discussion paper in October 2016 and delivered a final report to the Prime Minister in mid-2017. The proposal for a Voice emerged from this final report.
4. In response, the Turnbull Government established a second Joint Select Committee to consult on the design of a Voice. It delivered its report in late 2018.

In less than a decade, we have seen two Expert Committees and two Joint Select Committees attempt to design an achievable model for Recognition, yet we are no closer to having one. In fact, with each succeeding Panel or Committee report, we seem to have moved further away.

The most recent of these reports, from the Second Joint Select Committee, included some observations on how the discussion has drifted to ever-more expansive proposals, stating that 'the Uluru Statement from the Heart changed the direction of the debate on constitutional Recognition' and that 'the debate about the form of Recognition has widened to include local and regional Voice proposals.'

The report also concluded, in somewhat diplomatic language:

> In its interim report, the Committee suggested that … addressing questions of details would assist in the development of a proposal … The Committee sought further evidence from stakeholders, outlining a series of approximately 100 questions in relation to the design and implementation of local, regional and national voices. Very few submissions took the time to respond to the questions raised.

The Committee therefore recommended a further 'process of co-design' to consider 'national, regional and local elements of the Voice.'

The challenge is now for this process, being the fifth such process since 2010, to make progress where the previous four processes have not.

B *Conditions for Success*

Finally, it is worth stepping through the process that would need to be traversed for any referendum proposal to succeed. There are two conditions precedent that are required for any successful referendum to be put in the first place. First, a degree of public impetus for such a change. Second, an Executive Government that considers the issue important enough to warrant pursuing, and which believes that such a change has some prospect of success.

Then there are five necessary conditions for it to succeed, namely a specific proposal that: (i) is endorsed by the Executive, (ii) can attract the support of a majority of the House of Representatives, (iii) can attract the support of a majority of the Senate, (iv) can attract the support of a national majority of voters, and (v) can attract the support of a majority of States.

In this case, the history of this debate since the thirty-ninth Parliament shows that the first precedent has been satisfied for some time. That, however, is the easy bit.

The difficulties in satisfying the second condition precedent should not be underestimated. Of the seven proposals floated in the last eight Parliaments, only one achieved the first two conditions (1999), the others did not even get to first base.

Under Prime Ministers Gillard, Abbott and Turnbull, serious attempts were made to initiate processes to come up with a model for recognition that could attract widespread support. In each case they failed because it was clear that the Government of the day did not have confidence it could proceed with a model likely to be supported at a referendum.

Even if a Government was sufficiently confident, and introduced legislation under section 128 of the *Constitution*, there is no guarantee that it would even pass the Parliament.

Under a Coalition Government, each Coalition party would undertake its own, separate processes of evaluation to determine whether it could support a specific proposal. There is no guarantee they each would.

In the past 25 years there have been three bills to amend the constitution that were put to the Parliament. For the first two in 1999 (Republic and Preamble), Coalition MPs and Senators had a free vote. In the third in 2013 (Local Government Recognition), a number of Coalition MPs exercised the right bequeathed by the parties to cross the floor on significant matters and opposed the bill, notwithstanding the official position of their parties.

On this basis, and given the numbers in the House of Representatives, it is not assured that the Executive Government could even get a bill as far as the Senate. This is especially the case when the Opposition's most recent position is that constitutional recognition must include a constitutionally entrenched 'Voice' or else.

Given this reality, let alone the challenges of securing anything close to consensus in the Senate, then a majority of voters and a majority of States, no one who supports a 'Voice' should be under any illusions about the size of the challenge they face.

One could also add that at any point in the five-stage process outlined above, when it comes to securing consensus, or even a bare majority, the argument that, for example, 'Qantas, BHP and the AFL all think it's a good idea' is hardly going to be very effective.

IV CONCLUSION

Advocates of a Voice to Parliament need to be clear on what they are ultimately seeking from a Voice. Is it to bring Australians closer together regardless of race? Is it desirable to have a permanent, separate structure for one race? When we speak of Reconciliation, does it now mean using the Voice as a vehicle to achieve treaties and sovereignty?

As John Farnham once said, '*You're the Voice, try to understand it*.' I am very confident that the Australian people won't vote for a Voice they don't understand. The onus is on its advocates to fully explain what it all means to their fellow Australians.

In terms of devising the basic necessary details of the proposed Voice and achieving sufficient public confidence for it to succeed at a referendum, I would estimate that, thus far, barely 1 per cent, if that, of the work that will need to done has been done.

And finally, will the advocates of the Voice be able to persuade practical Australians exactly how the Voice will lead to any better outcomes in social, economic, health, housing, employment and education indicators for those Australians for which it purports to speak?

What we need is as many statements from the head as we've been getting from the heart.