"Altering the Constitution of the Commonwealth of Australia - Easier said than Done"

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Malcolm McCusker AC KC

INTRODUCTION

Thank you for inviting me to speak to you about the proposed referendum to amend the Constitution, a referendum to be held on a date not yet proclaimed, but some time between October and December this year. It has become customary, if not mandatory, in Australia to preface any speech or meeting by a respectful acknowledgment of the people who had lived in this country for thousands of years before the arrival of Europeans. That is very fitting. It is, I think, also fitting to respectfully acknowledge the pioneers who, over the following 250 years, established modern Australia, as a stable and prosperous democracy, an envy of the world, and the visionary leaders who strove to create a society which grants equal citizenship to all its citizens in a vibrant multicultural country.

I am delighted to see Fred Chaney here. That is serendipitous, as to-day's "The Australian" newspaper featured an article co-authored by Fred, a former Minister for Aboriginal Affairs, and Bill Gray, former Secretary, Department of Aboriginal Affairs, headed "Indigenous Voice to Forge Partnership of Equals, not Division".

In this speech, I do not propose to advocate either FOR or AGAINST the proposed amendment, but simply to inform you of what, to the best of my knowledge, are some relevant facts, and some of the reasons advanced for and against it - reasons which will appear in pamphlets to be delivered to all of us soon.

So, I do not propose to tell you how I intend to vote. That is irrelevant; but I will confess to some personal views about the basis on which any decision should, or should not, be made. You may, or may not, agree:

1. The opinions and intentions of notables, be they sporting heroes, politicians, ex-politicians, retired judges, film stars, or anyone else whose views have been publicised, and the pronouncements of corporations, professional bodies, charities, etc. in the hope of persuading us voters to vote Yes or No: Sure, if any offer reasons, consider the reasons, and do so critically. We are

not sheep, to vote in a particular way simply because someone we may admire intends to vote that way.

2. Feelings of guilt for past treatment of Aborigines: It is, sadly, true that in the past many Aborigines have been subjected to oppression, and for years treated as second-class citizens. That is lamentable; but I don't think those present were responsible for that, nor were our ancestors. But even if some were, that does not make their descendants guilty. A decision on this Referendum should not be based on misplaced feelings of guilt. Emotion should play no part in the making of such an important decision as an amendment to our Constitution, only careful thought. We cannot undo the past, but we can try to avoid making mistakes of the past, and ensure, as far as possible, that everyone in this country is treated fairly, and is given equal opportunity. And with due respect to our PM, telling us to vote yes, because "It is the right thing to do", begs the question, why? Why is it "the right thing to do?" Just to make us feel good?

3. Likewise, a concern about what the rest of the world may think if the referendum fails should play no part in a rational decision. Anecdotally, it seems to me most unlikely that there are many foreign citizens who are even aware of this proposed referendum, much less care about its outcome. But even if there were any overseas interest, is it seriously to be suggested that whether the Voice is, or is not, in the Australian Constitution will have any impact on Australia's international relations? Take, for example, our major ally, the USA. Its Supreme Court has recently struck down, as racially discriminatory and therefore invalid, Harvard University's longstanding policy of positive discrimination in favour of African Americans for admission to that prestigious body, to the disadvantage of other better qualified applicants. Some Asian American students, with superior qualifications for entry, persuaded the US Supreme Court that such a discriminatory policy is wrong in law and in principle. It discriminated against them, and others who were not African Americans. Whenever there is discrimination in favour of a group, there may be discrimination against others, as a consequence. Is the USA likely to think the less of Australia for not including in our Constitution a special provision for the exclusive benefit of one race?

Amending the Constitution

This is not easily done, nor is it cheap. Section 128 provides that the Constitution shall not be altered unless first, the proposed alteration is passed

by an absolute majority of each House of Parliament; secondly there must be approval by (a) a majority of the electors in a majority of States; and (b) a majority of all Australian electors. Votes cast in the Northern Territory, ACT and other territories of the Commonwealth are counted for a majority of all Australian voters; but they are not counted, of course, for the purpose of determining whether a majority of voters in a majority of States have approved. So, even if a majority of all Australian voters combined approve a proposed amendment, unless a majority of voters in at least 4 of the 6 States approve, it must fail. Suppose, for example, a majority of the voters in the two most populous States, New South Wales and Victoria, and in one other (say) South Australia, vote in favour of an amendment, but not a majority of voters in any of the other 3 States, Western Australia, Queensland and Tasmania, then the amendment fails, even if a majority of all of the Australian voters were in favour.

There have been 44 different matters proposed for amendment to the Constitution in 17 different referendums. Only 8 have been passed. The most successful was in 1967, when 91% of Australian voters, and the majority of voters in every State, approved an amendment to section 51 (xxvi), which stated that the Commonwealth had the power to enact laws with respect to the people of any race, with the exception of the Aboriginal race. The amendment removed that exception, so that the Commonwealth thereafter had the power, which it has since exercised in a number of ways to pass legislation specifically to assist people of the Aboriginal race. (It also deleted section 127, which had provided that, in taking a Census, members of the Aboriginal race were not to be counted). To this day, many people, including aborigines, mistakenly believe that the 1967 referendum gave aborigines the right to vote. Before 1967, without any referendum, aborigines already enjoyed full voting rights, both Federal and State, as well as the right to stand as a candidate for election, not by referendum, but by Commonwealth and State legislation.

The proposed amendment

In the referendum Australians will be asked:

"A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

Do you approve this proposed alteration?

If the referendum is successful, a new chapter will be inserted into the Constitution as follows:

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of 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 the 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 matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures".*

Who are "Aboriginal and Torres Strait Islander Peoples"?

There is no definition in the proposed new Section 129, or in the Constitution, even though the term "aboriginal race" previously appeared in the (now amended) section 51(xxvi). Its meaning has led to some debate. In a High Court decision, *Commonwealth v Tasmania* (1983) 158 CLR 1 (known as the Franklin River Dam case) the question was whether certain sites proposed to be flooded by a dam on the Franklin were of particular significance to "people of Aboriginal race" – a term not defined in the statute. Deane J. (p.274) said it meant *"a person of Aboriginal descent, albeit mixed, who identifies as such and is recognised by the Aboriginal community as aboriginal"*. In the famous case of *Mabo v Queensland* (No.2) (1992) 175 CLR 1, a so called "three pronged" definition was given by Brennan J. He said, *"Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person, and by the elders or other persons enjoying traditional authority among those people"*. Brennan J. did not specify what degree of aboriginal ancestry is required for "biological descent". A former Labor Government Minister, Dr Gary Johns, was recently the subject of vitriolic attack when he suggested that there may need to be a DNA test of anyone claiming to be of aboriginal ancestry, a suggestion condemned as "insulting", contemptible, and "racist". Where there may be

cause for some doubt as to whether a person claiming to be aboriginal is in fact of "Aboriginal decent" (Deane J.) or "biological descent from Aboriginal people" (Brennan J), it will not be resolved by a DNA test. Pauline Hanson's One Nation once also proposed a minimum requirement of 25 percent Aboriginal blood, but that has never been adopted, and it is considered not to be feasible.

The "tripartite test" for aboriginality enunciated in the Mabo case has often been used. The Australian Law Reform Commission has reported that governments have used no less than 67 different classifications, descriptions or definitions to determine who is an Aboriginal person. A number of Commonwealth agencies accept self-identification by statutory declaration. (Incidentally, in the course of this address, when I use the term aboriginal, take it to include Torres Strait Islanders even though they are a different ethnic group).

Love v The Commonwealth (2020) 270 CLR 152, is a High Court decision which has excited much criticism. Mr Love was born in PNG and was at all times a PNG citizen, never an Australian citizen. He came to live in Australia at a fairly early age, and lived here for substantial periods, holding a visa which allowed him to reside in Australia. While here, he committed a serious offence carrying a prison sentence of more than 12 months and became liable to deportation under the *Commonwealth Migration Act.* That Act was made pursuant to s.51 (xix) of the Constitution empowering the Commonwealth to make laws with respect to naturalisation and aliens. Mr Love contended that because he was an Australian aboriginal, he could not be an "alien". The Court had to decide whether, on the assumption that he was an Australian aboriginal, he was an alien. It didn't have to decide whether in fact he was an Aboriginal person; and it did not. Nevertheless, there was some discussion of that question. The agreed facts were that Mr Love's paternal great grandfather and great grandmother were born in Queensland and (I quote) "descended in a significant part" from people "who inhabited Australian prior to European settlement". Mr Love, it was said, "identifies as a descendant of the Kamilaroi tribe" and "is recognised as such a descendant by an elder of that tribe" (a woman to whom he was in fact related). The judges referred to the "tripartite test". Bell J. noted that test "appears to accord with the Commonwealth working definition applied in connection with the provision of special benefits to Aboriginal persons"; but added that the question of in what *"circumstances a person who does not meet the Mabo test may nonetheless establish that he or she is an Aboriginal Australian"* was not required to be resolved.

So, the question of who is "an Australian Aborigine" may not always be beyond dispute. Consider the 3 parts of the "tripartite test".

Test 1 – "of Aboriginal descent".

That cannot be based on skin colour (or DNA), and it is not necessary to prove that one's entire ancestry is aboriginal. One distant ancestor is enough. There has been significant intermarriage since European (and Asian) people came here (remember Deane J's description "aboriginal ancestry, albeit mixed"). The claim of aboriginality may be, and sometimes is, disputed. For example, in 2019, an aboriginal woman accused Bruce Pascoe (author of the book "Dark Emu") of fraudulently claiming to be aboriginal. He has confessed that his aboriginal roots are "distant", but still maintains that he is an aborigine. And there have been complaints by some aborigines about people falsely claiming to be aboriginal, so as to obtain benefits and concessions not available to non-aboriginals.

Test 2 – "self-identifying" as aboriginal.

This is a fairly simple test – or is it? Does it entail observing the traditional ways, customs and lifestyles of a specific tribe to which belonging is claimed? Or is it enough, to meet this test, to assert that you consider yourself to be an aborigine?

Test 3 – recognition by Elders of that tribe (or community) to which the person claims to belong, "or by other persons enjoying traditional authority amongst those people". How is this proved? Suppose "the Voice" is in the Constitution and suppose that only aborigines can be appointed (or elected?) to the Voice. The proposed new s.129 doesn't stipulate that, but later legislation might, as the PM has foreshadowed. If someone is elected (or appointed) to the Voice, could that be challenged, on the ground that he/she is not truly aboriginal, as failing to meet all 3 parts of the tripartite test?

Or suppose a person sought appointment, and the application (or nomination for election) was rejected, or challenged, on the ground of non-aboriginality. Could that be fought by contending that the applicant did meet the 3 tests; or (say) met the first 2 but not the 3rd, because there was no "Elder" or other person from the particular tribe or community to which the claimant allegedly belonged prepared to vouch for the claimant.

And could a rejection of a non-aborigine's claim to be appointed or elected to the Voice be challenged with the argument that rejection on the ground of race, or preferment of a person less qualified or suited, because that person was aboriginal, breached the *Racial Discrimination Act*?

It is not necessarily an answer to say that this will be all dealt with by legislation later. Suppose a law is passed, that only person meeting the tripartite test of aboriginality can be appointed to the Voice. May that law be challenged, on the ground that it is unconstitutional or racially discriminatory?

Numbers of Aboriginal persons

In the 2021 Census, 812,728 people identified as being aboriginal, an increase of 25.2% over the 5 years since the 2016 Census. In 2021 they represented 3.2% of the total population of Australia.

In 2022 the highest proportion of aborigines lived in New South Wales (33.2%) followed by Queensland (28.2%) and WA (12.5%). The ACT has the smallest proportion (1%). There are at least 250-300 different tribes, with different customs and different language groups.

Approximately 35% of Australian aborigines live in major cities and 45% in regional areas and about 20% live in so-called "remote communities". So, most people identifying as Aboriginies live in urban areas. Many live lifestyles not dissimilar to the rest of the Australian population. Over the last 200 years there has been considerable inter-marriage between Aboriginal people and people of European or Asian descent. There are now 11 members of Federal Parliament who identify as aboriginal (or indigenous) in disproportion to their numbers. That is to be applauded and runs counter to the furphy that Australia is "racist".

Expenditure on Aboriginal services

According to the 2014 Productivity Commission report, in the year 2012-2013, $30.3 billion was the estimated Government expenditure on services for Aborigines in Australia. In addition, significant but unknown millions of dollars are paid by mining companies each year to aboriginal corporations in the form of royalties or rent. It is estimated that over the past 15 years approximately ½ Trillion ($500,000 Million) has been spent on provision of services for aborigines.

In 2016 there was a total of 109 separate Aboriginal agencies in Australia, 17 relating to indigenous art, sport, dance and NADOC, supported by government funding.

National Indigenous Australia Agency (NIAA) and the Voice

NIAA was established on 1 July 2019 by an executive order made by the Coalition Government. It is answerable to the Minister for Indigenous Affairs, then the Honourable Ken Wyatt, himself an aborigine. Linda Burney (also aboriginal) became the Minister in June 2022. NIAA's stated task is to inform the Minister of "policies and services required to address the unique needs of aborigines at a community level". Its publicly stated "vision" is "to ensure that Aboriginal and Torres Strait Islander people are heard, recognised and empowered. We recognise that each First Nations community is unique. We work in partnership with community to make sure policies, programs and services meet their unique needs". It had a budget of $3.8 billion last year.

The Executive Order gives NIAA a number of functions, including.

- to lead and co-ordinate Commonwealth policy development program design and implementation and service delivery for (ATSIC) people.
- to provide advice to the Prime Minister and Minister for indigenous Australians on whole of Government priorities for (AQSCIS) people.
- to lead and co-ordinate the development and implementation of Closing the Gap targets.
- to lead Commonwealth activities to promote reconciliation.

They are very similar to what we are told will be the objectives and functions of "the Voice".

The present CEO, Jody Broun (appointed January 2022) is an aboriginal woman from the Pilbara, with strong connections to Aboriginal community and culture, an artist and creative producer. A very talented and experienced person. Although based in Canberra, NIAA has 32 offices throughout Australia (including one at Port Hedland) and a staff of about 1,300. The Government has not yet said whether NIAA will be dissolved if "the Voice" becomes a reality. That is unlikely.

Why is the Voice needed, when there is the NIAA?

A question often asked, and you may ask: Why, given the existence of NIAA and its purpose, is there a need for "the Voice"?

5 answers to that question have been given to me by supporters of the Voice:

1. NIAA is not "independent". The Voice would be. NIAA is ultimately accountable to the executive government. The Voice would "sit outside" the executive government and able to advise the parliament and the executive, whereas NIAA can only advise the executive. You may ask: *Could that not be readily amended, to provide that NIAA may make submissions by way of a report and recommendations to Parliament as well as to the Executive? There are many examples of bodies created by statute, which are (and are seen to be) independent of government, which produce reports and make recommendations to the Parliament. One obvious example is the Corruption and Crime Commission and its counterparts in various States, but there are many other examples. In short, it is not essential, for a body to be independent, that it be created by an amendment to the Constitution*.

2. Professor Wood of ANU (a Voice supporter) points out that public servants (referring to NIAA) are "not responsible for decisions as the Minister is ultimately responsible and makes the final decision". You may comment: *But the Voice cannot make decisions either. It can only advise (or make "representations") or so we are informed*.

3. NIAA advice is generally "confidential", whereas the Voice advice would be "public and potentially highly political". *You may comment: This is not actually stipulated in the proposed s.129, but if it is important, an amendment could be made to the Order, under which NIAA operates, to allow it to make its advice public*.

4. The Voice would be composed entirely of indigenous people, whereas the NIAA 2022 Annual Report says that only 22% of its staff are indigenous. You may *comment: Nothing in the proposed s.129 requires that all (or any) staff of the Voice be indigenous, nor even that the members of the Voice itself must be indigenous. In any event you may ask, why is it necessary to have only indigenous staff on the Voice? It should, surely, be a question of choosing staff best suited for the particular position, just as a number of indigenous corporations have, within their staff, non-indigenous people chosen for their*

particular ability. However, if there is a valid reason for having more, or even all, staff being aboriginal, NIAA staff could be progressively changed. To date, neither of the aboriginal CEOs of NIAA has reported, in their published reports, that its task would be better performed by having a larger proportion of aborigines on staff; nor, significantly, that not being established by Constitutional amendment has been a problem in performing its duties.

5. NIAA could be abolished by legislation. As Minister Linda Burney dramatically (but incorrectly) puts it, removed "*by the stroke of a pen*", whereas the Voice could never be abolished, other than by Constitutional amendment. You may perhaps *comment: First, the NIAA was established by the previous Coalition government, which never made any move to abolish it. Secondly, its predecessor, ATSIC, was abolished, with the support of both major parties, because it had proved to be an expensive (and allegedly corrupt) failure. If the Voice turns out to be a failure, like ATSIC, it could only be abolished by Constitutional amendment. Is that desirable? Might it not lead to complacency? And thirdly, in any event NIAA could not be abolished "by the stroke of a pen" (as Minister Burney says) only by legislation approved by both Houses.*

Why is it necessary to make "the Voice" part of the Constitution?

I have asked this question of a number of Voice supporters. These are the reasons that have been given: -

1. Acknowledgment: The Law Council of Australia, which has announced that it is in favour of the Voice, says this (misusing that word "enshrined" again):

   It is important to amend the Constitution to provide for the Voice, as opposed to simply providing for it through legislation, because:

   - *A constitutionally enshrined Voice was the means called for by Aboriginal and Torres Strait Islander peoples in the Uluru Statement. This followed careful and longstanding deliberation of the options available, to recognise and empower them and is therefore an expression of self-determination.*

   - *Constitutional enshrinement of the Voice would provide it with an enduring mandate. This would distinguish it from previous advisory bodies representing Aboriginal and Torres Strait Islander peoples (such*

as the Aboriginal and Torres Strait Island (Commission), which were able to be established and dissolved, and were consequently subject to the changing political landscape.

You may comment: Could not that be done by including an acknowledgment to that effect, in a Preamble to the Constitution? (The response to that suggestion is that it would be a more meaningful acknowledgment and symbol if it were done by including the Voice, as proposed by the Uluru "Statement from the Heart". But it must be accepted that "the Voice" is much more than just an "acknowledgment").

2. "Independence: because it could only be abolished by Constitutional amendment": I have addressed this point earlier. Many bodies created by statute are "independent".

3. That if it is not put into the Constitution, it would be a severe setback and disappointment to all aboriginal people. *You may comment that this view is not based on any survey and is open to question. Senator Jacinta Price, an Aboriginal/Celtic woman (as she truthfully describes herself) says she has spoken to many aborigines, a significant number of whom have never heard of "The Voice" (some has asked, is it "that TV show"?). And many who have heard of it, like many people in our society, do not understand what it means or what it is supposed to do. Prime Minister Albanese has said, in an interview, that 80 percent of aboriginal people are in support. But that was a figure resulting from a poll of only 300 aboriginal people taken shortly after the Uluru Statement. And, as Warren Mundine, an Aboriginal businessman, and former chairman of the Aboriginal Advisory Council, has observed, these are between 250-300 different aboriginal groups across Australia, widely diverse in customs, language and lifestyle. It is a mistake to apply a "one size fits all" approach, as if aborigines were a homogenous group, which they are not, and never have been.*

In a moving and moderate speech in February this year, a highly respected Western Australian, former judge, and advocate for the Voice, addressed what he said is an important question some have asked: *"Why not just use the race power in s.51(xxvi) to create a statutory body called "The Voice", with the same objects and power to advise of the proposed constitutional Voice?* You may comment that could be done easily, and this year, by legislation (although why create a new statutory body when we already have the established and well funded and staffed NIAA?). The millions saved in the cost of holding a

referendum ($75 million has been allocated) and the cost of advocacy for and against – including those generous $2m donations to support the Voice made by the CEOs (or Chairs) of such corporations as Wesfarmers, Woodside, BHP et al – could be far better applied in improving the living and social conditions of those in need in the community, aboriginal and non-aboriginal alike].

The answer given was threefold. First, he said, *"The Voice is not about race, but about "our First Peoples as the indigenous people of Australia"*. No doubt the late former PM Bob Hawke would be pleased to hear that, for it was he who, in stirring terms, in a memorable speech delivered on the bicentenary of the landing of the First Fleet, in January 1988 said, ***"in Australia, there is no hierarchy of descent; there must be no privilege of origin"***. And this is, with respect, fundamentally a race-based proposal. The PM's promised legislation, if the Voice is approved, will be directed only to people of Aboriginal descent. However way it may be presented, this proposal is "race-based".

Would not the proposed new s.129 give a special and enduring right ("the Voice") to a small percentage (about 3.5%) of Australians who only qualify for that right if they have some aboriginal ancestry? That is (to use Bob Hawke's phrase) a "privilege based on origin", however mixed.

The second reason given was that it would be *"an act of recognition"* – But as many say, why must the recognition be by "The Voice" and embedded for all time in the Constitution? Why not a permanent acknowledgement - if one is really desired – in a Preamble?

The third reason was that it would be *"a democratic mandate for Parliament to create and continue the Voice as a significant institution in our representative government"*. But, as a number, including eminent aboriginal Warren Mundine, have said, if the purpose of the Voice is better to address the undoubted problems of poor diet, poor sanitary conditions, lack of employment, education and crime that plague a proportion (not all, by any means) of our aboriginal population, is the Voice to continue even when, as hoped, those problems have been met and overcome? Are we to assume that will never happen, and that is why the Voice must be permanent? Does that not place aboriginal persons into a permanent, separate group from the other 97% of Australians forever, treating them as a race apart, permanently disadvantaged? Some say that to do this is to insert racism into our Constitution, and create division, not unity, amongst the Australian people.

Unanswered Questions

The proposed s.129 is very short on detail, you may well think. That is undeniable. Many have said they don't understand what is intended or meant by "the Voice". Fifteen questions have been publicly put to the PM. They are: -

1. Who will be eligible to serve on the body?
2. What are the prerequisites for nomination?
3. Will the government clarify the definition of Aboriginality to determine who can serve on the body?
4. How will members be elected, chosen or appointed?
5. How many people will make up the body?
6. How much will it cost taxpayers annually?
7. What are its functions and powers?
8. Is it purely advisory, or will it have decision-making capabilities?
9. Who will oversee the body and ensure it is accountable?
10. If needed, can the body be dissolved and reconstituted in extraordinary circumstances?
11. How will the government ensure that the body includes those who still need to get a platform in Australian public life?
12. How will it interact with the Closing of the Gap process?
13. Will the government rule out using the Voice to negotiate any national treaty?
14. Will the government commit to local and regional Voices, as recommended in the report on the co-design process led by Tom Calma and Marcia Langton?
15. If not, how will it [the government] effectively address the real issues that impact people's lives daily on the ground in the community?

Those questions are all, in my opinion, reasonable. They have not been answered. The PM and others (e.g. Minister Burney) has said that these are

details which will be addressed by legislation later, and it is not appropriate for such detail to be in the Constitution. The Australian Law Council agrees.

But the Constitution does descend to detail, in many respects and in particular where it creates a new constitutional body. For example, it does not merely say that there shall be a body called the Senate, with the Parliament having the power to make laws with respect to its composition, functions, powers, and procedures. It provides for the composition of the Senate, qualification of electors, method of election, rotation of Senators, casual vacancies, voting. Similar detail is contained in Sections 24 – 40 of the Constitution for the House of Representatives.

So why not provide such detail for this proposed new (and absolutely novel) body, "The Voice"? Is it out of a concern that to provide the detail will cause Australians to vote against it?

"Representative"?

In late 2014, Yes campaigner and aborigine, Noel Pearson, was interrupted at a lecture in Queensland by an aboriginal Murri man who shouted *"You are standing here talking up like you support all the black people in this country. You do not speak for me and my family, you're standing here, speaking like you are the chosen voice. You are not the chosen voice.*

Mr Albanese's assertion that the Referendum is a response to "a gracious and generous offer that comes from First Nations people themselves" is no more than that – an assertion without evidence. Last month, on an ABC radio program, the PM was asked whether he thought that aborigines actually wanted the Voice, to which he said, *"First Nations people certainly want this, we know that all the figures show that up to 90% of First Nations people want it"*. He was unable to say where he got that figure. As I have said, earlier, it was based on a poll of only 300 aborigines.

It has been observed by Nick Cater that the fluid and distributed leadership structure of traditional Aboriginal society, described by a 19th century anthropologist, renders the notion of a unified world viewed by aboriginal people absurd. Do the high-profile leaders speak on behalf of the elders, the clan leaders, the lawmen or lawwomen, the spiritual leaders or the soul men and soul women of all of the 250 tribes? *"Or do they merely speak on behalf of that more recent creation, the National Aboriginal Intellectual Class, the "knowledge keepers" of an abstract notion of aboriginality, complete with its totems and rituals that serve as a*

mere representation of the diverse and complex beliefs systems held by those who remain attached to country? How can one Voice, however comprised, possibly purport to represent them?

Will the Voice adversely affect the functioning of the democratically elected Government?

There have been different opinions expressed on whether decisions made by Executive or the Parliament may be justiciable – i.e. subject to challenge in the Courts – if, for example, a decision is made on a matter which, arguably, affects aboriginal people, without the Voice being given the opportunity to make representations, or (arguably) is given insufficient time to make representations; or the Voice makes representations which are (arguably) given insufficient consideration? Some very eminent commentators (including former judges) say that it would be open to the Voice to take action in the Courts to have such a decision declared invalid, or its operation suspended pending a determination by the Courts. Other eminent commentators disagree. I do not intend to express an opinion on this question, other than to note that whether or not it would be justiciable is controversial. If it is justiciable, clearly there is a potential for delay and disruption of the parliamentary process. The proposed s.129 could have stated that such decisions would not be justiciable. But it does not.

What is not, I think, in doubt is that there would be an obligation to give the Voice the opportunity to make representations on matters relating to aboriginal people (and, almost everything may, arguably, relate to them, as s.129 does not say "only" relating to them). So that, in itself, and the obligation to give the Voice adequate time to consider a proposal in a representation, or proper consideration to its representations, would have the potential to cause significant delays.

The Effect of the Voice

In the Law Council's paper in support of the Voice it is asserted that the Voice would lead to substantive change for Aboriginal and Torres Strait Island people because, it said, a Voice which makes representations to Parliament and the Executive as to how policies, programs and laws would affect Aboriginal and Torres Strait Islander peoples would lead to more informed decision making, and therefore improve the lives of Aboriginal and Torres Strait Island peoples and communities.

However, in the same paper it is asserted that the amendment would not create any obligation on Parliament or the Executive to consult the Voice or follow its

representations (although some months ago Prime Minister Albanese opined that it would be a "brave government" that did not follow the Voice's representations).

You may think, too, that surely the duty of ATSIC, and now NIAA, and of course, past and present ministers for Indigenous Affairs, has been to obtain and research information (to be provided to the Parliament via the Minister) has been to do just that, so why do we need another body to do the same thing? Although it has not been stated, if it were thought that NIAA (or the Minister) has not performed that duty properly, surely the answer is to find out why not, and do whatever is necessary to ensure that the duty is performed. Minister Burney has, on many occasions, identified the matters which need to be addressed: poor education, housing, domestic violence, sexual abuse, job opportunities. There is no need for a Voice to identify those problems, but a need for those with the responsibility to address them to perform their duty.

In the paper by Mr Chaney and Mr Gray I mentioned earlier, it is said, as a reason to support "the Voice" that *"Having in the Constitution that Government must listen before acting is a necessary corrective to the customary arrogance that 'We always know best'."*

Mr Chaney was the Minister for Aboriginal Affairs in 1978 – 1980, and a particularly diligent and conscientious one. I have no doubt he not only learned what the problems of aborigines were, and what was needed to address them, but endeavoured to ensure that they actually were addressed.

A Voice is not needed for that – just an efficient and devoted Minister and Department. The Voice would only have the power to make "representations" to the Executive and Parliament. It would not, as Messrs. Chaney and Gray suggest, have the authority to make the Government, or the Executive, listen, or to act on its representations.

"The Voice, Sovereignty and Treaty"

The Prime Minister has said many times that he supports the implementation in full of the Uluru Statement from the Heart. So has Minister Linda Burney. That calls for the establishment of a Makarrata Commission to oversee a process of agreement making and "truth telling", in addition to the creation of a Voice to Parliament. The Uluru Statement has 3 elements. First, a Voice to Parliament, followed by truth telling and agreement making (meaning "treaty"). (A photograph of the PM wearing a "T shirt" with those three words was published not long ago). The referendum

question is not, of course, specifically directed to a "treaty"; but it is clear that a number of aboriginal leaders, at least, see it as just a first step towards a so-called treaty. That is a subject which I will put to one side, other than to remark that I believe that most Australians aspire to Australia being a unified, undivided nation of which the aboriginal people are part. How can such a nation make a treaty with itself? Are we to become two nations?

A Permanent, Race-Based Body?

Suppose that, by (say) 2080, problems of unemployment, domestic violence, poor education, child sexual abuse, alcoholism, poor housing, problems which have been identified for many years, more recently by Minister Burney, have been addressed adequately. (Such problems are presently endemic in many remote communities where about 20% of aboriginal people presently choose to live, despite the absence of any employment). The Voice would still exist. It cannot be abolished without a referendum. Nor, arguably, could its funding and staff be reduced to a level that made it no longer functional.

Conclusion

In common with (I believe) the overwhelming majority of Australians, I would support any proposal which has a reasonable prospect of improving the lives of disadvantaged Australians, no matter of what race. The question for all of us to consider is whether this proposal, an amendment to our Constitution and the creation of a permanent bureaucracy, is reasonable, necessary, and the only realistic way of addressing such disadvantages. Is there a better, cheaper, less divisive alternative? That is for you to decide, and to think carefully about, before casting your vote.