

Transcript of an Extract from the McKinney Lecture

‘An Indigenous Voice’, Truth, Treaty and Reconciliation’

Banyule Churches Together

St George Peace Memorial Church East Ivanhoe

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(appearing with Fr Glenn Loughrey, Anglican priest and Chair of the National Aboriginal and Torres Strait Islander Anglican Council)

Listen at <https://soundcloud.com/frank-brennan-6/mckinney-lecture-on-the-voice>

In 1967 we amended the Australian Constitution. We took out the two adverse references to Aborigines which thereafter meant the Constitution was silent. Now some of you would be old enough to remember that there was a campaign to say ‘Vote “yes” for Aborigines’. But all that was done was to take out the two adverse references to Aborigines, the main one of which was contained in section 51(26) of the Australian Constitution. Prior to 1967 that section said that the Commonwealth parliament had power to make laws with respect to the people of any race, other than Aborigines, for whom it was deemed necessary to make special laws. The thinking of our founding fathers (and they were all men, back in the 19th century) was that Aboriginal affairs would be a matter for the states but that the Commonwealth parliament would have power to make laws with respect to people of any other particular race even if they did become British subjects.

Guess what? That provision back in the 19th century was thought to be a provision which would work adversely against particular racial groups. It wasn’t put in there to allow the Commonwealth parliament to do nice things for the Chinese or the South Sea Islanders who were brought in to the Queensland cane fields. It was a provision which was put in, in order that there might be extra safeguards for the community as it was seen over against the activities of the Chinese and the South Sea Islanders. But by 1967, it was said that those words of

omission in relation to Aborigines should be taken out. So the Commonwealth parliament would now have power to make laws with respect to Aboriginal people.

Since then Aboriginal people have been aware that there is no mention of them in the Constitution. They said: 'we think we should be recognised'. For us as Christians or as citizens of goodwill, the starting point has to be: what is it that Aboriginal and Torres Strait Islanders are asking of us? They're saying: 'we want to be recognised in the Constitution. It's our Constitution as well as yours.' That should be generously conceded by everybody. That's step one: first of all to be attentive to the voice of Aboriginal and Torres Strait Islander people. But guess what? Not all Aborigines and Torres Strait Islanders agree, do they? They're just like the rest of us. It's called democracy. So what do we do then? Sometimes we hear it simplistically said: 'If only all the Aborigines would agree with each other, we'd know what to do. But as they don't all agree with each other, let's just do nothing.' I think that's a cop out. What we're engaged in is democracy. We have to give due respect to Aboriginal and Torres Strait Islander citizens, especially their respected leaders, as they nut out their differences and work out what it is that is being put forward.

For many of us, the only way we'll be able to do that with any authenticity is by having Aboriginal and Torres Strait Islander friends. You will have heard Noel Pearson in his first Boyer Lecture highlighting that one of the problems even in 21st century Australia is that a lot of Australians do not have Aboriginal and Torres Strait Islander friends, and therefore it's necessary for us to be reaching out and to seek inclusion. Perhaps there will emerge a view that we think represents that of the Aboriginal people who we want to be listening to as being an authentic voice. If they say, 'This is how we would like to be recognised in the Constitution', I then unashamedly say as a non-indigenous Australian but as a committed Christian citizen, we need to see how this might be done.

What would then be necessary is to make an assessment of which indigenous aspirations are morally justified. That requires a dialogue between Aboriginal people and the rest of us. Which of those aspirations are morally justified? For example, at the moment with the discussion about a Voice, we've heard some of our political leaders say (and it's being conceded by Aboriginal leaders including Noel Pearson) that for example you wouldn't want something being set up as a Voice which would divide the country. You wouldn't want to set up something which sets up a situation of separatism, that drives apart Australians. You wouldn't want to set

up something which undermined the sovereignty of the national parliament. Issues of that sort are questions about what is morally justified.

Then comes the very difficult part for us to make an assessment: 'I've listened to Aboriginal aspirations. I've determined in good faith what is morally justified.' I then have to ask myself: 'what do I think is politically achievable?' Because particularly in this field, the last thing you'd want is a referendum which is bound for failure. We have to be asking ourselves: what's politically achievable and how might it be done? Now one way it can be done is by public education. That's why I'm now giving a number of talks like this around the country - not to push a particular barrow, but to say there is a hunger in the Australian community to get beyond just the political ideology to say what is it that we think might be achievable.

Then for us as committed Christian citizens comes the final question: which of those aspirations am I prepared to commit myself - to put some skin in the game? I don't think it's good enough just to say: 'Oh well, it's nothing to do with me and I'll just vote on the day.' If too many of us take that attitude, it's destined for failure. How is it that we might commit ourselves and what might we practically do together?

So I put that before you as a bit of a template for the Christian of goodwill as a citizen trying to see their way through this issue. Having said that as a prologue, might I take you to the handout and just briefly explain where we've come with all of this discussion. Could I have a show of hands. How many of you have listened to the first two at least of Noel Pearson's Boyer Lectures? Well a handful - 20%. I would recommend them to you. The third one and any subsequent lecture are not so much on this issue, but the first two very squarely are.

I was surprised with the second one because he spent almost half his time talking about John Howard. So I think a lot of this comes down to how might we find an accommodation if you like between John Howard and Noel Pearson as the body politic tries to deal with these issues. Noel Pearson quite rightly takes us back in the Boyer Lectures to the statement that John Howard made on the eve of the 2007 election:

'[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 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 I may say with all respect to Mr Howard and many others who engaged in this debate at the time: I think it was a bit of a mistake to talk about putting it in the preamble of the Constitution. I have here my little pocket copy of the Australian Constitution. The preamble as it's called is actually the preamble of the imperial act of parliament that says:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Some conservative lawyers say if you put something in a preamble, that can allow judges to take it into account in interpreting other provisions of the Constitution. They claim that if you put anything about Aborigines in the preamble, that could create doubts or uncertainty in the future about other provisions of the Constitution. With respect to Mr Howard, I'd say what he was really getting at was not so much what you might put in the preamble of the imperial act; rather what he was suggesting was that there should be some acknowledgement in our Constitution that we the people of Australia acknowledge the reality about indigenous history, the reality about the indigenous present and the reality, about indigenous aspirations. I think we could've done that and then provided that the Commonwealth parliament would have the power to make laws with respect to those matters. If anyone is interested, I published a book along those lines called *No Small Change* in 2015 but that went nowhere too.

After John Howard's 2007 announcement, we moved on to what was the next stage in 2012. By this stage Noel Pearson, a very active Aboriginal leader and lawyer, was part of the Expert

Panel set up by Julia Gillard in 2012. What they had proposed was: ‘Look if you're serious about recognising us in the Constitution, the problem we're most concerned about is laws and policies which discriminate adversely against us. So why not put in a provision to say thou shalt not discriminate on the basis of race, but you may discriminate affirmatively and you may discriminate in a way to uphold our culture and heritage.’ Their proposed clause 116A read:

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

That created a huge problem because the constitutional conservatives said this was the equivalent of a one clause Bill of Rights. Whether or not they were right or wrong, they definitely raised a major sticking point and it was seen that what the expert panel proposed was not a flyer. So then we had a situation, and I want to emphasise this tonight: until recently there was quite a decent spirit of bipartisanship among the political leaders in Australia.

When Julia Gillard was Prime Minister in 2013 they passed the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* through the parliament and it was supported by the opposition led by Tony Abbott. I think they're a pretty decent statement of words. The Act provided:

(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.

Indigenous leaders by this stage were saying: ‘we don't want just symbolic statements of words; we want something more substantive which is to be put into the Constitution’. So in July 2015

you might remember there was a big meeting of Aboriginal leaders which took place at Kirribilli House in Sydney when Tony Abbott was Prime Minister. This time Abbott reciprocated as Gillard had done. Abbott invited Shorten to the meeting. They met together with the Indigenous leaders and they made a joint statement and then after that it was decided that a Referendum Council would be set up. By then, Abbott had been given the heave-ho. Turnbull came in, but once again the Prime Minister of the Day cooperated with the Leader of the Opposition. Turnbull and Shorten together set up the Referendum Council. Turnbull and Shorten together chose the members of the Referendum Council. Turnbull and Shorten together met with members of the Referendum Council as they plotted their way forward. So ultimately the Referendum Council put out this recommendation:

*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 (xxvi) and section 122.*** The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.*

They said the voice to the parliament should primarily be about the special laws which parliament makes for Aborigines and Torres Strait Islanders on issues such as native title, heritage protection, and things of that sort.

One of the Referendum council members was Murray Gleeson who been a very respected Chief Justice of Australia. He was ten years Chief Justice NSW, 10 years Chief Justice of the High Court, and a constitutional conservative. Even he supported the idea of a voice to parliament and he gave a speech in 2019 saying there was nothing threatening about having an indigenous voice to the parliament. However he did warn, and wisely: ‘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.’

But we need to track back to what happened after the Kirribilli House meeting in July 2015. Unfortunately we had the situation in August 2015 when Tony Abbott as Prime Minister said:

* 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.

‘No I won't wear a voice being put into the Constitution.’ Turnbull then said: ‘No I won't wear a voice being put into the Constitution. Legislate one if you like but don't put it in the Constitution.’ Morrison did the same thing. So what we came to then was a standoff where we had three Liberal prime ministers in a row say: ‘Whatever the Referendum Council members said, we will not countenance a Voice to parliament being put in the Constitution. We could look at having one set up by legislation.’

I was put on the Senior Advisory Group chaired by Marcia Langton and Tom Calma and which the Morrison government set up. There were 18 of us - 15 indigenous and three of us non-indigenous. We worked for a year or two - lots of consultations, putting forward models for whatever a voice might look like.

But then some of the key indigenous leaders who were at Uluru came forward and said that even though the Uluru Statement had simply said ‘We call for the establishment of a First Nations Voice enshrined in the Constitution’ and even though the Referendum Council’s main recommendation had spoken only of a Voice to the Commonwealth parliament, they proposed that it should be a Voice that could make representations to parliament AND executive government on matters related to Aboriginal and Torres Strait Islander peoples. They submitted to a parliamentary committee:

(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.

So this has become quite complex as to whether it would be a Voice just to parliament or a Voice to parliament AND government, and whether it would be a Voice that would look only at special laws in relation to Aborigines or whether it would be a Voice in relation to any matter of concern to Aborigines and Torres Strait Islanders. The Referendum Council appreciated the latter problem of scope but did not provide an answer. They observed:

[I]t would not be realistic to provide advice on all matters ‘affecting’ Aboriginal and Torres Strait Islander peoples because most laws of general application affect such peoples. On the other hand, it may be too narrow to limit the subject matters to laws with respect to Aboriginal

and Torres Strait Islander peoples because some laws of general application have particular impact on or significance to such peoples.

In the 21st century Aborigines and Torres Strait Islanders are perfectly entitled to be concerned about anything and everything which parliament or the government is dealing with. So that has become the problem.

We're left with these questions: Can we design a Voice which does not divide the nation? Can we design a Voice which doesn't mean you're going off to the High Court every second day? Can we design a Voice which doesn't clog up the system of government? These are the difficult, practical and complex questions that need to be addressed.

Let me conclude just by looking at what has happened over the last week or so with the second of the Boyer lectures and with the response by Mr Howard. Noel Pearson in his second Boyer Lecture said this:

Howard's 2007 proposal for constitutional reform was subjected to the democratic processes of the national government and parliament ... Aboriginal and Torres Strait Islander communities and their leaders submitted to these processes and sought to advocate and influence the evolving proposals for recognition.It could not be the case that the personal preference of an individual whether a past leader or citizen could so peremptorily discard the outcome of 15 years of democratic process. That some leaders have changed their minds from support to opposition while others have changed from opposition to support is not really the point. Aboriginal people are entitled to expect that Australia's Westminster system obliges the former Prime Minister to respect the outcomes of serious democratic deliberation undertaken with hope and sincerity by the least powerful community in that system.

I think it's called poking the bear!

John Howard on the weekend gave an interview to Paul Kelly in *The Weekend Australian*. Kelly is the best informed journalist in the country on this issue. He's followed it from day one. The fact that Howard decided to give an interview to Paul Kelly is indicative because to date Howard has basically held his fire. Let me quote you a few things Howard said:

I think there are substantial arguments against the voice....

Among people I see as part of the Liberal base I don't find any reaction to the voice other than one of hostility.

Not everyone talks about it. But those who talk about it are critical.

My sense is that people are suspicious of the idea of a voice. I don't get the impression the voice is something that is going to unite the country the way the 1967 referendum did because that was just so palpably fair, whereas people are suspicious of the voice. People saw the 1967 referendum as a demonstration of our good faith. But people see the voice as creating potential divisions.

Ladies and gentlemen, we have a lot of work to do if there is to be any prospect of a successful referendum which can be said to be true towards indigenous people who have put to us the mode by which they want to be recognised in the Constitution. They have said they want a Voice. Now we can debate whether it be a Voice to parliament or a Voice to parliament AND government, or a Voice just about particular laws or a Voice about all manner of things. But Mr Howard seems to be saying that a Voice of any sort in the Constitution is not on. I dare say he hasn't lost all his political clout. So we've got a lot of work to do with our fellow citizens if we are serious about responding to the call which has been made in good faith to us by the indigenous leadership now over a considerable period of time. That's why I welcome an opportunity like this evening, and I look forward to your questions and discussion after we've heard from Glenn. Thank You.

HANDOUT
The Path to a Referendum:
From Uluru via Garma to Canberra and on to the People

1. JOHN HOWARD, 11 October 2007

‘[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 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.

2. EXPERT PANEL, January 2012

Section 116A Prohibition of racial discrimination

- (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

3. *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*

- (4) 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.
- (5) 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.
- (6) 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.

4. ULURU STATEMENT FROM THE HEART, 27 May 2017

We call for the establishment of a First Nations Voice enshrined in the Constitution.

5. REFERENDUM COUNCIL 2017 RECOMMENDATION, 30 June 2017

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 (xxvi) and section 122**.^{*} The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

^{*} 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.

6. PRIME MINISTER ALBANESE AT GARMA, 30 July 2022

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.

(In his first Boyer Lecture 2022, Noel Pearson said, 'We know the nation's leader must be joined by all his counterparties in the federal parliament'. In his second Boyer Lecture, Noel Pearson said: 'Davis, Anderson and myself submitted a more streamlined draft that omitted the tabling procedure of the earlier draft to the Leaser-Dodson Joint Select Committee in 2018. This provision drafted by Davis became the basis for the words now proposed by Prime Minister Anthony Albanese.')

7. INDIGENOUS LAW CENTRE UNSW (incl. Megan Davis), September 2022

Chapter 9

FIRST NATIONS

Section 129 The First Nations Voice

(1) There shall be a body, to be called the **First Nations Voice**.

(2) The First Nations Voice: (a) shall make representations to Parliament and to the Executive Government of the Commonwealth **on matters it deems relevant** to Aboriginal and Torres Strait Islander peoples; and (b) may perform such additional functions as the Parliament provides, including, at the request or with the concurrence of the Parliament of a State or Territory, the function of making **representations to the Parliament or government of that State or Territory**.

(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, and matters incidental to the execution of the powers vested by this Constitution in the First Nations Voice.

8. MY SUGGESTION

Section 127

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.

** Query: Would s.75(v) of the Constitution render the process of representation to Executive Government justiciable? S. 75(v) provides: 'In all matters in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction.'