Clear voice without the repercussions of a third chamber

MARK LEIBLER

Mark Leibler, Mutitjulu community and park chairman Sammy Wilson and Noel Pearson at Uluru in May 2017

Time, and the better angels of our natures, will deliver what we need

In the weeks since the federal election, Scott Morrison has taken several important steps in the pursuit of meaningful reconciliation.

He has appointed Australia's first Aboriginal minister for indigenous Australians to cabinet, expressed strong, unequivocal support for constitutional recognition of Australia's first people, and committed to giving his minister the time and space he needs to get the model right.

The Prime Minister is doing absolutely the right thing by his fellow Australians in saying the government will not countenance a constitutionally enshrined advisory voice for Aboriginal and Torres Strait Islander Australians that could amount to a third chamber of parliament. Even if the body did not have the power to veto proposed legislation, the risk of a "third chamber" is real if what is established has any capacity to delay or interfere in parliamentary processes or to use the High Court to challenge them.

However, this need not be the case. In a report commissioned by the Referendum Council, which I co-chaired, the Cape York Institute explored several approaches to a constitutional amendment enshrining the voice to parliament, including a proposal put forward by respected constitutional lawyer Professor Anne Twomey.

Twomey's draft constitutionally guarantees a First Nations advisory body to provide non-binding and nonjusticiable advice to parliament and government, which the parliament would be required to table and consider.

The draft enables the body to provide advice on broad matters relating to indigenous people but requires parliament to consider the advice only where proposed legislation specifically

relates to indigenous people. And whether this consideration has been given would be a matter for parliament, not the High Court, to determine.

Twomey's approach constitutionalises a national advisory body and constitutionally mandates some of its interaction with parliament, but leaves all the detail of how it would be formed and how it would function to be legislated by parliament.

The Cape York Institute also canvassed a more modest constitutional amendment that could omit any specific advisory function and that could simply require parliament to establish a First Nations body, leaving all its functions to be articulated outside the Constitution in legislation.

I am not promoting any specific model for the advisory body. I am simply trying to illustrate that there are options for a constitutionally guaranteed voice for Aboriginal and Torres Strait Islander Australians which I believe no fair-minded person could describe as a third chamber of parliament.

In a powerful address on Thursday, former chief justice of the High Court Murray Gleeson also remarked that the approach "hardly seems revolutionary" yet "has the merit that it is substantive, and not merely ornamental … It would give indigenous people a constitutionally entrenched, but legislatively controlled, capacity to have an input into the making of laws about indigenous people or indigenous affairs."

Let's not forget that the intellectual drive behind the constitutional amendment for an advisory voice emanates from constitutional conservatives, including Liberal MP Julian Leeser, who co-chaired the joint select committee on constitutional recognition relating to Aboriginal and Torres Strait Islander people alongside Labor senator Patrick Dodson.

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MURRAY GLEESON
FORMER CHIEF JUSTICE

In commentary during the past fortnight, there has been minimal reference to the work of the joint select committee, which tabled its final report to parliament in November last year.

The committee, which comprised five Liberal parliamentarians, four Labor, one from the Greens and one independent, concluded its deliberations giving clear unanimous support to the concept of an advisory voice. (Greens senator Rachel Siewert was in favour of the voice but released a minority report.)

The central recommendation from the joint select committee was for a more detailed model of the voice to be co-designed by Aboriginal and Torres Strait Islander representatives and the Australian government.

Following that process, the committee recommended that proper consideration should be given as to whether the body would be incorporated into the Constitution. While Liberal senator Amanda Stoker issued some additional comments to the report expressing reservations about the practical value of constitutional recognition, she advised that "we should be open-minded about whether a voice is best delivered legislatively or constitutionally".

In a recent media interview, the senator made a similarly wise comment: “If it is some form of grand gesture or a proposal for a third chamber, that is going to be a lot more complex. It really does depend wildly on what the model looks like.”

At the time the report was tabled, I commented that the committee had followed the only path available to it to discharge its resolution of appointment: to recommend a process to build bipartisan support around the model of recognition presented in the Uluru Statement from the Heart.

There is no value in a model of constitutional recognition that does not accord with the wishes of the people who are being recognised. Let’s be mindful that the consultation process that culminated in the national convention at Uluru, undertaken with bipartisan support from the government and the opposition, engaged 1200 Aboriginal and Torres Strait Islander people, from a total population of about 600,000.

It was the most proportionately significant consultation process that has been undertaken with Aboriginal and Torres Strait Islander people, engaging a greater ratio of the relevant population than the constitutional convention debates of the 1800s, from which Aboriginal and Torres Strait Islander people were entirely excluded.

I was one of very few nonindigenous Australians who was privileged to observe the national convention, and took part in the closing ceremony where the Uluru Statement from the Heart was endorsed and released to the Australian people.

The sentiment generated among the delegates left me in no doubt about the historic importance of the statement and the path it set out for a better future.

If every non-indigenous Australian had the opportunity I did, I doubt we would be debating the direction of constitutional recognition at all.

Because what the voice proposal boils down to is providing Aboriginal and Torres Strait Islander Australians with a constitutional opportunity, and a responsibility, to help overturn the tragic failure of indigenous policy designed and delivered by successive governments of both political persuasions.

We should follow the advice Josh Frydenberg delivered on last Sunday’s ABC Insiders program and allow the co-design process to work through the detail of what the advisory voice might look like.

As Gleeson said this week: “The process itself will display indigenous representation and decision-making in action.”

In the meantime, we must continue to respect and preserve the bipartisan approach to recognition, and avoid the temptation of imposing arbitrary deadlines on ourselves.

Australians of goodwill, who make up the vast majority of our population, should follow Stoker’s lead in retaining an open mind, regardless of the inevitable nay-sayers who had equally dire predictions for native title and the apology to the Stolen Generations.

Like the Prime Minister, I believe in miracles.

And, like Noel Pearson, I also believe that if the Australian people are encouraged to draw on their “better angels”, we will achieve something of real value to our nation and future generations.

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Australians.