

Indigenous Constitutional Recognition Speech

by Danny Gilbert

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As a child of the 1950s, growing up on a farm in the south-west of NSW I was distantly aware of Aboriginal people. I knew that they didn't live like us. They had nothing. They didn't seem to like us whites and we didn't seem to like them. I remember the unwelcome glances they received.

Those of us with Indigenous relatives ignored them. My grandfather's brother married an Indigenous woman and fathered several children. I had no knowledge of this until I was casually informed of it when I was about 18. One of their children was Kevin Gilbert – the Aboriginal writer, painter and activist. I never met him.

So why is Indigenous Recognition important to me.

Well because I care deeply about Indigenous people.

For me this began in the early 1980s when I became involved with Fr Ted Kennedy and the Catholic parish in Redfern.

Here I met the redoubtable Shirley Smith, better known as Mum Shirl. I met the “goomies” – the Aboriginal street people of the inner city. People suffering the trauma of alcoholism, drug addiction and violence.

There began my friendship with Aboriginal people.

So, my talk this evening is about:

- Why Indigenous people need and deserve constitutional recognition;
- What the Referendum Council has proposed; and
- Why we must support the proposals.

To my main point - Why Indigenous people need and deserve constitutional recognition

Indigenous people are certain in their belief that the call for recognition in our Constitution cannot be understood without an honest assessment of history. I agree.

There are then two parts to this history.

One is the period from 1788 to the 1967 Referendum. The other is post-1967.

It is generally accepted that in 1788 there were 300,000 to possibly 1 million Indigenous people living in Australia. It is thought that Australia could then have supported around 750,000 people. There were more than 500 Indigenous nations and 250 languages.

One hundred years later the Indigenous population of Australia, was around 120,000. That number is not certain, but the reduction was huge by any measure. By 1920 that number may have been as low as 80,000.

I do not want to overreach, but in percentage terms, these numbers can be compared with the decimation of European Jewry under Nazi Germany and the Armenian Genocide.

Of course the destruction of our Indigenous peoples was not systematically designed and occurred in a very different colonial context. Nonetheless it was brutal and its effects profound and lasting.

And we know how it occurred:

- European diseases;
- dispossession, violence and murder.

That Indigenous people died in large numbers from disease is universally accepted. That they were dispossessed is accepted by most Australians. That they were killed in frontier wars and massacred is less accepted.

Today we know more about these matters.

Let me refer to one. It occurred at Myall Creek in Northern NSW on 10 June 1838 when at least 28 peaceful Aboriginal men, women and children were slaughtered by twelve white stockmen.

In single file they were led to a stockyard where they were shot, hacked to death and burned. Amid much opposition from the NSW populace, seven of the stockmen were convicted and hanged. The Governor of NSW was petitioned for the remittance of their sentences.

After their convictions some of the murderers confessed. They said they didn't know they had done wrong. It was nothing more than what landowners had asked people like them to do, and what had occurred elsewhere.

We'll never know how many murders and massacres occurred. It was only at Myall Creek that prosecutions were mounted.

Dispossession and forced removal from land rendered a shocking toll:

- destruction of traditional sources of food;
- destruction of culture and language.

Aboriginal people were forced to live on Church and State missions.

In remote Australia they lived and worked on pastoral properties.

But employment opportunities were largely transitory and unreliable. In some places, their meagre wages were stolen.

Throughout the almost 200 years after white settlement:

- they lived in poverty;
- they were denied their Indigenous identities – their languages and their cultures;
- they died of disease and malnutrition;

- they were hunted, massacred and murdered - in Tasmania, almost wiped out;
- they were incarcerated; and
- they were denied most of the day to day accessories of citizenship – the right to make choices about who they married, where they lived and to enjoy the freedoms of other Australian citizens including the freedom to vote.

While "assimilation" might have been more or less official policy; racism, economic disadvantage and powerlessness ensured that Indigenous people remained outsiders.

They had no name to make them Australian.

Some of us hoped they would die out; we adopted policies to aid that process. We took their children away. Many were taken into domestic slavery.

When the missions were dismantled, when pastoral stations no longer employed them, Indigenous people lived in small settlements on the outskirts of country towns and regional cities.

Until the late 1960s and beyond they lived in dwellings constructed from the detritus of the local white community. No running water, no sewerage, no power. They had little access to education, to health facilities and insecure employment, if any. Many moved to our cities where they lived in poverty under the daily grind of police surveillance. And grinding it was.

When reminded about what happened many Australians give a shrugged response - nothing more than the ordinary march of history. Nothing different to what happened to Indigenous people the world over.

But that can't be the way to see it, to make it OK.

Notwithstanding that we look back with 21st century eyes, we are obliged to make the assessment that what happened was wrong. The inevitability of unjust outcomes is no excuse for their passive acceptance.

To the contrary, those outcomes must be a rallying call to make amends. The call for Constitutional Recognition is in itself a call to make amends.

I have already mentioned the late Ted Kennedy of Redfern. He said this more than 20 years ago in a homily on Reconciliation at St Patricks Church Hill, not far from here:

“We must all remember that not one of these good things which we non-Aboriginal Australians enjoy today - benefits which are the envy of the world, which seem to sparkle the more in the Australian sunlight, not one of these good things has been attained without the wrenching distress and the grieving, starvation and dying of Aboriginal people”.

It is unpalatable to many to speak in these ways. Some people are quick to say “get over it”.

I don't want to get into the tiresome debate about guilt and shame. But we must understand that Indigenous people carry the trauma to this day.

Our history is a mix of struggle and triumph, victory and shame. The Enlightenment and our British heritage has produced a nation with extraordinary strengths - economic, social and political. And marvellous institutions.

But this central truth of our history remains undeniable. Egregious wrongs were inflicted on our First Peoples. It is a truth which transcends victimhood. It is a truth which transcends blame.

And it is surely no answer, it is no defence, to say that many Indigenous people worked happily alongside non-Indigenous people, had children with them, and integrated into the settler society.

And it is no mitigation to assert, as some do, that prior to 1788 Indigenous people themselves engaged in inter-tribal conflict and violence.

Let me now turn to the post-1967 world.

After the 1967 Referendum, and in the '70s and '80s, we began to think differently. Thus began the paternalistic attitude to what became an almost household and racist expression, “the Indigenous problem”.

Having cast Indigenous Australians from our sight for more than 180 years, we brought them in a little closer.

No longer would we ignore them. Instead, we would determine what was best for them. We, white Australia would solve the “Indigenous problem”. But in many respects, we further entrenched Indigenous disadvantage and exclusion, largely through inter-generational welfare dependence, what Noel Pearson calls the soft bigotry of low expectations, and in many instances sheer neglect.

As Fred Chaney has said many times, and again recently:

“Across the last four Parliaments all governments have made hasty changes of policies impacting on Aboriginal people and communities. All have occurred in the context of not having heard, let alone listened to, the voices of those in the know, the Aboriginal people themselves.”

In every State and Territory there is a Minister for Aboriginal Affairs. We have large bureaucracies designed to look after their “best interests”.

What other Australians are forced to confront such institutional and paternalistic frameworks? Frameworks and structures impenetrable to so many of them.

Within these structures we decide where and how the Indigenous welfare, education, health, infrastructure, development and well-being dollar should be spent. These decisions are made and imposed by Ministers of the day and by their staff. By bureaucrats with all of the normal prejudices, human weaknesses and vulnerabilities – personal and political.

Indigenous people are sometimes invited in. Sometimes they get good hearings. Many times they do not. But whether or not they get a hearing does not rely upon any legal or institutional

guarantee or entitlement. To the contrary, it relies on the goodwill, integrity, knowledge, interest and expertise of Ministers and their advisers.

Rarely do all these characteristics coalesce to produce the best policy and outcomes. Ministers and their advisers come and go. Their Indigenous audiences remain the one constant.

Sure these decisions and interventions are mostly well-meaning. But that is not the point.

Indigenous people remain massively over-governed.

Most Australians, certainly most Indigenous Australians, would judge the outcomes poorly. Most would say that the money spent is disproportionate to the benefits achieved. And worse, much of this money serves only to disempower Indigenous people and further entrench disadvantage.

Let me remind you how much money is involved. The total money spent on Indigenous people is around \$30 billion a year. Sure the bulk of it, about \$24 billion, is for benefits and services available to all Australians. About \$6 billion is for Indigenous specific services.

Whichever way you look at it, weighed against the outcomes, value for money has not been delivered.

Since 2008 we have had nine Closing The Gap Reports.

The Prime Minister's 2017 Closing the Gap Report tells us:

- the target to halve the gap in child mortality by 2018 is not on track;
- the target to close the gap in life expectancy by 2031 is not on track;
- the target for 95% of all Indigenous 4 year olds to be enrolled in early childhood education by 2025 is not on track;
- the target to halve the gap in reading and numeracy for Indigenous students by 2018 is not on track;

- school attendance for Indigenous children continues to lag behind that of non-Indigenous children; and
- the target to halve the gap in employment by 2018 is not on track.

The position in remote Australia is worse still. In too many communities there are seemingly intractable problems of drug and alcohol abuse, violence, child abuse and neglect, suicide, major health problems, poor education, high levels of incarceration, large scale unemployment and under employment. Too often these problems fall out of poor policy and poor execution, which in turn feed into community disengagement, disempowerment and ongoing poverty.

Over the next decade Australia will continue to face the challenge of narrowing the gap in health, education and economic participation. Meanwhile, the Indigenous population is growing at over twice the rate of the rest of the country.

Indigenous people are massively overrepresented in our prisons. They represent 3% of the population and more than 28% of the Australian prison population. That disproportionate rate of incarceration is growing.

We are heading towards one in two of our prison population being Indigenous. This is a national disgrace.

Uluru Statement From The Heart

“We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future”.

Of course, gains have been made by Indigenous people in the last 40 years. And many Indigenous people live very successful lives by any standard.

And Indigenous people are receiving greater recognition. The truth of our history is emerging and with increasing empowerment, better efforts to improve the lives of Indigenous people are being made.

Nonetheless, the system is not working as it should. It is not producing the desired results. It continues to fail Indigenous people. That is why they need a better say in the decisions made about them.

I now want to talk briefly about the Constitution and how it has ignored Indigenous Australians.

On 1 January 1901 the Australian Constitution took effect. Indigenous people played no role in its formulation and occupied no place in it, except by way of exclusion. The Constitution expressly empowered the Commonwealth to make laws with respect to any race but explicitly excluded “the Aboriginal race”. It provided that in reckoning the numbers of people in Australia “Aboriginal Natives” shall not be counted.

Today it is breathtaking that such provisions should ever have been considered appropriate for inclusion in the nation’s founding document.

Our First Peoples were not at the bargaining table. There was no constitutional role for them in the brand new nation, indeed there was no role for them at all. There was to be no treaty. There was no constitutional protection for them, their land rights, their languages or their cultures. They were denied all recognition of worth in our brand new nation.

This was no mere oversight. To demonstrate the point, in 1902 the Commonwealth Franchise Act specifically excluded any “Aboriginal native” (and others) from voting unless already on a roll before 1901. Similarly excluding legislation followed.

Remember that at this point in our history the number of surviving Indigenous people is fewer than 100,000 - the national mindset was that they were on the way out.

But survive they did.

As I said, prior to 1967, the Commonwealth had the power to make laws with respect to any race but excluding “the Aboriginal race”.

And so in 1967 we amended our Constitution empowering the Commonwealth to make laws for Indigenous people.

Before 1967 we had left Indigenous people to the mercy of the states. The states exercised absolute and, in some cases, merciless control. Indigenous people were, as a group, largely powerless. But, many escaped and avoided or subverted attempts at official control of their lives.

In 1967 we also removed the provision providing that “Aboriginal natives” not be counted as citizens.

Modest though these changes were, they were well celebrated by Indigenous Australians. Never before had the nation shown any interest in their recognition as citizens.

Today one might reflect on the disproportionality of that joyous celebration and what was actually delivered.

The 1967 referendum did not empower Indigenous people with any say whatsoever. It did not implement any positive constitutional guarantee of Indigenous rights. Although the Commonwealth now had the power to make laws about them, there was no guarantee that these laws would be fair or non-discriminatory.

We can now see the manifest wrong in all of this. We can see why in the very same nation founding document which in 1901 excluded them, Indigenous people want that position turned on its head.

Our First Peoples want proper and respectful recognition of their place in the nation. Their place in our primary instrument of national governance - our Constitution. Not for them some shabby unfinished Constitution, but a Constitution which gives them pride in their recognition.

So for me there are two standout reasons why Constitutional Recognition is so important to Indigenous people:

The first is to correct the barefaced wrongs of the 1901 Constitution and then the shortcomings of the 1967 Referendum.

The second is to give Indigenous people a stronger say in how the nation treats them and makes decisions about them.

I will now speak about what the Referendum Council has proposed following the ULURU Statement – what is asked for.

Valuable efforts have been made in recent years to find an answer to Indigenous Constitutional Recognition.

Symbolic recognition was rejected because Indigenous people want both actual recognition and practical change. They want respectful change, but not change that could damage the Constitution through uncertain language.

A racial non-discrimination clause was rejected as a politically unacceptable “bill of rights” intrusion.

Rather, the Uluru Statement From The Heart says:

“We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to the country”.

There are two recommendations. The first:

“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.”

This was the preferred constitutional change nominated by Indigenous leaders at Uluru after a careful process of regional dialogues and a national convention. It is the single constitutional change recommended by the Referendum Council.

As the final report of the Referendum Council makes clear, the representative body is to advise the Parliament. It cannot compel and it cannot veto. It can only advise.

The Referendum Council has left to the Parliament the further work around the structure and functions of this body.

In that sense, no specific demand is made as to how the body should function, how people might be appointed to it, the kind of legislation and policies that should be referred to it, etc. Except of course that it should be appropriately representative of Aboriginal and Torres Strait Islander people.

One thing is clear, and I repeat it. This is not a body with any veto power over the primary functions of the elected parliament. Neither is it a third chamber or house of the Parliament. It will be set up by the Parliament on terms set by the Parliament.

It is a proposal that fully respects parliamentary supremacy and legal certainty. It is entirely reasonable, fair, wise and above all doable. It is a change that can be of great historic significance – both practical and symbolic. It creates an extraordinary opportunity for our nation.

And is not a big ask. It will not change the structure of our polity. It will simply give Indigenous Australians a voice and a place at the table.

We have nothing to fear here.

That said, concerns have been expressed.

- It has been said the Report is too short on detail. An understandable concern. But at this stage, not such a bad thing. The Referendum Council has deliberately left those details to the Parliament, in confidence that with good process and goodwill and in consultation with our First Peoples these issues can be resolved.
- Some insist that the Australian people will want to see more detail before they vote on the proposal at a referendum. No disagreement from me here.

- Some say a preferred approach would be to establish the body by statute, and if it works well, then make the constitutional change. What I say to this is that institutional change takes time to work well. There will be ups and downs for sure. But for God's sake, our own parliamentary democracy hardly works well after more than 300 years of effort.

What's more, this approach tells Indigenous people that they are not worthy of our trust and confidence to make it work, even if it takes time.

A further defect of this statutory first approach or statutory only approach, is that such a body could be abolished by the Parliament. It would give no guarantee of the stability of the body itself.

And a body established by legislation alone with no constitutional backing will not demand the commitment to make it work. A provision in the Constitution is more demanding in every respect. It would be an endorsement by the Australian people carrying great legal, moral and political weight.

- Some say that Indigenous support for the proposal is not unanimous and that a treaty is required. Some continue to call for a racial non-discrimination amendment. But Uluru was a strong and serious majority consensus – and it asked for a Makarrata process as well. It shows that any perceived dichotomy between Constitutional Recognition and a treaty is false.

In my view, we can take the Uluru Statement as a clear and strong reflection of First Peoples views on the reforms they want.

To insist on complete unanimity is as unfair as it is unrealistic – we don't expect it of white people – and if we make it a pre-condition to constitutional reform it will paralyse Indigenous recognition for evermore.

- Others say one section of the population should not be privileged over others. This proposal does not do that. It simply recognises the reality that Indigenous Australians are unique as the descendants of people who have lived here for 65,000 years.

Until 1788 this was their country. They have suffered, and continue to suffer, the collateral damage of nation-building like no others.

No other group of Australians has so many people at every level of government influencing and, in many cases, controlling their lives. As I have said, many interventions have benefited Indigenous people - native title, heritage laws and close the gap initiatives to mention a few. But many haven't and they deserve a better say in these things.

- Some people think that only a minimal and symbolic change to the Constitution should be sought, because anything more ambitious will not pass the referendum process. They fear that a failed referendum will be disastrous for the relationship between Indigenous and non-Indigenous Australians. Sure, a failed referendum would be very unsettling. But Indigenous people are resilient.

What's more, there is no reason to assume this will fail. With political leadership, it can succeed.

- Another objection is that to engage in this process of Constitutional Recognition is to engage in identity politics.

To so diminish this plea for such a limited constitutional voice is an insult. It is to deny the facts of history, and it is to deny the reality of Indigenous sensibility. It is to reject any notion that our First Peoples have any special place in who we are as a nation. It is an outrage.

And of course the special place of Indigenous Australians is already well beyond identity politics – it is already part of the law of the land. I refer to Mabo and the native title regime which followed.

- Others argue we would be better off remediating Indigenous disadvantage than focussing on Constitutional Recognition. Well this is precisely what constitutional change can better achieve.

A constitutionally enshrined voice for Indigenous input and advice, to produce fairer and better processes and more effective outcomes to address the well-known challenges and obstacles facing Indigenous Australians today.

I now turn to the second recommendation of the Referendum Council.

“That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.”

A statement of recognition in the Constitution has been on the table for a long time. It has been supported by both sides of politics for more than fifteen years. It was first put to the Australian people in the 1999 republic referendum as a change to the preamble.

Like the republic, it was rejected. We have no reason to believe that such a statement of recognition would not be rejected again.

So a statement of recognition in the Constitution has been rejected by the Referendum Council. It is too difficult to achieve and too contentious. There is also the risk of unknown and unintended legal consequences.

What is now proposed is a Declaration removed from the Constitution giving a more embracing and nationally uplifting account of Aboriginal and Torres Strait Islander culture and history. This is legally sensible and safe – provided, and this is a must, provided it is accompanied by the Constitutional proposal now in front of the Commonwealth.

Why should Australians support this proposal?

While today's Australians may not be personally responsible for 200 years of exclusion, suffering and neglect, we are most certainly responsible for what we do now.

Our response should be big-hearted and generous. We should do the work to progress this proposal.

A powerful vision of the nation we could be is set out in the Introduction to the Final Report of the Referendum Council. I commend it to you.

The first part of Australia's history, a history of at least 65,000 years, is an Indigenous story. A story of the oldest living culture on earth. It is at the very least deeply shameful that our instrument of national governance – our Constitution, gives no recognition of this.

The second part of our history is a British story and the establishment of our most precious democratic institutions.

The third part is a multicultural story, probably the most successful and harmonious story of immigration of any nation.

Let us celebrate Australia's complete story, replete in all its splendour. Our Indigenous heritage, our Anglo-Celtic heritage and our multicultural heritage.

Let's give our Indigenous heritage its proper recognition in that rich smorgasbord. It is surely only this heritage that makes us Australian, unique among the nations of the world.

My challenge to Malcolm Turnbull and to Bill Shorten is to get behind this proposal with courageous determination and show us the way.

Let's not engage in legal nit-picking, or in national handwringing.

Let's not engage in derisory and parsimonious discourse about 'what will they ask for next?'

Let's not have our national goodwill set aside by worries that it might not work. Let's work to make it work.

Let's understand why Indigenous people must have a better say. Let's win the hearts and minds of Indigenous people.

Let's embrace and celebrate an opportunity for true reconciliation.

For once, let's give our First Peoples what they ask for - we will all be richer for it.

Thank you.

Danny Gilbert
23 October 2017