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EDDIE KOIKI MABO

LECTURE SERIES

The Voice: How the Final Co-Design Report Enables an Effective Design for Indigenous Advice to the Parliament and Executive Government (2023)

Professor Tom Calma AO
2023 Senior Australian of the Year

Well, good evening, and thank you all for coming along. It's fantastic and there's too many, too many very distinguished people here to try and acknowledge any because you definitely will miss out and I'll miss out on naming. But the Indigenous academy is alive and well here tonight. So thank you all. And to Professor Nakata for your generous introduction. Before I start, I thank Aunty Gracelyn for your important Welcome to Country and I acknowledge the Bindal people, Mabo family members and all Aboriginal and Torres Strait Islander people joining us today, people who have lived, loved, raised their families and cared for this country and waters for a millennia before the arrival of the British, they saw the subsequent disposal of lands, cultures, languages and identities across the nation. I'd also like to acknowledge all youth who will be our future leaders and the custodians of our stories, languages, histories and cultures. I emphasize youth because in the 2021 ABS census 33.2% of Aboriginal and Torres Strait Islander peoples were under the age of 15 years and the referendum is about the future.

Thank you JCU for hosting this important lecture. And also I wanted to acknowledge your statement of support for the Voice that's up there, and it's great to see so many here today in person and online. What a brilliant time to convene this lecture. We have just witnessed the investiture of Chancellor Professor Ngiare Brown, and we have just closing off on National Reconciliation Week. On Saturday, we celebrate the 31st year anniversary of the 3 June 1992 Australian High Court Mabo decision that overturned the legal fiction of *terra nullius* that is land belonging to no one, and this led to the legal recognition of Aboriginal and Torres Strait Islander peoples as the traditional owners and custodians of lands now called Australia.

We now have to formalise that decision in the Australian Constitution and that is why the voice referendum is so important. We will be recognising Aboriginal peoples and for the first time Torres Strait Islanders in the Australian Constitution. Tonight, I'll focus my talk on the upcoming referendum for the Indigenous Voice to the Parliament and the Executive Government of Australia.

I've titled and themed my presentation *The Voice: How the Final Co-Design Report Enables an Effective Design for Indigenous Advice to the Parliament and Executive Government*. I chose this theme in response to the claims that the Government's proposal lacked details and this will influence how people will vote. I believe the information is readily available and I note that the current and former governments have endorsed the Calma & Langton final co-design report as guiding the potential structure and operation of the Voice.

Guiding is the operative word as the detail of the structure. Et-cetera of the Voice will not be determined until after a successful referendum. Here is an extract of Minister Linda Burney's speech in the Parliament on the Constitutional Alteration Bill last week. She said "legislation to establish the voice will then go through the normal parliamentary processes to ensure thorough scrutiny". Everyone agrees that the voice needs to be connected to the grassroots communities.

That's why regional voices that can plug into the national voice are so important and why investments set by the former Liberal government for the regional arrangements remain in the budget. The referendum will work to link the national voice in at the regional levels in a way that works for local communities and will make sure there is a process for talking with local First Nations peoples first. We will build on the progress that has been made by states and territories, and I note that all states and territory premiers and chief ministers have supported the Voice.

She went on to go. "We will build on the important foundational work done by Calma and Langton, and we will build on the virtue of the vital listening and respect for community, local communities

that were laid down in the Uluru Dialogue”. That said, and contrary to some commentary, the referendum question is a question based on principle, and subsequent legislation will contain the details. So upfront details before the referendum is not appropriate or necessary, and I'll elaborate on this a little later.

Before I start to delve into the specifics of the theme, I think it's important to recognise some of the history and initiatives that have led us to this point in our shared history and why the referendum evoked so much passion amongst people, and I must say, passionate debate. The call for a Voice actually started soon after the arrival of the First Fleet, but I'm not going to go back that far. I'll start from the 50s. In 1957, the Federal Council for the Advancement of Aborigines and Torres Strait Islanders or FCAATSI was established and it had a central role in the success of the 1967 referendum.

It comprised of Indigenous and non-Indigenous peoples, but it was dissolved soon after the referendum and it was followed by the National Aboriginal Consultative Committee, or NACC, from 1973 to 1977. The NACC was an advisory body made up of 41 nationally elected Aboriginal people who advised the Minister for Aboriginal Affairs on Aboriginal policy. The NACC was closed and followed by the National Aboriginal Conference, or NAC, from 1977 to 1984.

Then there was a lapse until 1988 when a new body was proposed. A Senate committee investigated the proposed Aboriginal and Torres Strait Islander bill and suggested over 40 amendments, most of which were incorporated. Subsequently, over 90 amendments were made to the bill during its passage through the Parliament. So we can clearly understand why detail up front is not relevant as the parliamentary process prevails. This bill led to the formation of the Aboriginal and Torres Strait Islander Commission or ATSIC from 1989 to 2005.

Following the closure of ATSIC, The National Indigenous Council, or NIC, was formed as a Prime Minister's pick group. The NIC was dissolved in early 2008. In February 2008, Prime Minister Rudd, in his apology speech to Parliament, calls for a new partnership with Indigenous peoples to underpin policy development. He states that

“Our challenge for the future is to embrace a new partnership between Indigenous and non-Indigenous Australians. The core of this partnership for the Future is closing the gap between Indigenous and non-Indigenous Australians on life expectancy, educational achievement and employment opportunities. This new partnership on Closing the Gap will set concrete targets for the future.”

In March 2008, the Labor Government and Federal Opposition signed a statement of intent with the Indigenous health sector for a new partnership to close the gap in life expectancy within a generation. This statement provides bipartisan support to develop a comprehensive, long term plan of action that is targeted to need, evidence based and capable of addressing the existing inequalities in health services in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander people and non-Indigenous Australians by 2030.

Ensure the full participation of Aboriginal and Torres Strait Islander people and their representative bodies in all aspects of addressing their health needs. Respect and promote the rights of Aboriginal and Torres Strait Islander peoples and measure, monitor and report on our joint efforts in accordance with benchmarks and targets to ensure that we are progressively realising our shared ambitions. In the Budget 2008 nine Ministerial Statement on closing the gap between Indigenous and non-Indigenous Australians. The Honorable Jenny Macklin stated that

“The Australian Government's reform agenda, both in Aboriginal and Torres Strait Islander affairs and across governments, is to address the structural and systemic problems that are producing appalling outcomes for Aboriginal and Torres Strait Islander people... Indigenous Australians must be involved in developing and driving solutions. Actions like the National Apology are working to build the trust needed to work together on getting results. Our ‘closing the gap’ commitments require effective engagement with Aboriginal and Torres Strait Islander peoples at all levels. Governments need to involve Indigenous peoples in the design and delivery of programs locally and regionally and share responsibility for outcomes. Solutions developed on the ground must be driven by the communities that will ultimately determine their success or failure... The Government went to the election with a commitment to set up a national representative body to provide an Aboriginal and Torres Strait Islander voice within government. We will soon begin formal discussion with Indigenous peoples about the role, status and composition of this body”.

This is back in 2008. As the Aboriginal and Torres Strait Islander Social Justice Commissioner. In July 2008, I presented to the Government an issues paper titled *Building a Sustainable National Indigenous Representative Body: Issues for Consideration*. An extract from the introduction to this issue's paper stated that

“Barely a day goes by without another chilling and heartbreaking story of abuse, violence or neglect, or of demonstration of the impact of entrenched poverty and despair amongst our communities. Without proper engagement with Aboriginal and Torres Strait Islander peoples, governments will struggle in their efforts to make lasting progress in improving the conditions of Indigenous peoples and in our communities”.

Further, in the speech, in a speech I presented to the National Native Title Council in 2008, I said “much of the failure of service delivery to Indigenous peoples and communities, and the lack of sustainable outcomes, is a direct result of the failure to engage appropriately with Indigenous peoples and of the failure to support and build capacity of Indigenous communities”.

It is a result of a failure to develop priorities and programs in full participation with Indigenous communities. Put simply, governments risk failure and will continue to do so if they develop and implement policies about Indigenous issues without engaging with the intended recipients of those services. Bureaucrats and governments can have the best intentions in the world, but if their ideas have not been the subject of the reality test of the life experience of local Indigenous peoples, who are the intended beneficiaries of this, then government's efforts will fail.

This need for participation exists at the local, regional and national levels. Processes are needed to ensure Indigenous inputs in a systemic manner at the regional level and linking up to the state and national levels. Again, this was said in 2008. In August 2008. The Australian Government allocates funds for the commencement of consultations with Indigenous peoples on the establishment of a new Indigenous representative body. As the Aboriginal and Torres Strait Islander Social Justice Commissioner I was appointed to lead these consultations.

To cut a long story short, following extensive consultations and a deliberative dialogue that took place in Adelaide, the National Congress of Australia's First Peoples was formed as a public company limited by guarantee in November 2009, and establishment funding was provided by the Labor Government. However, a change of government and lack of subsequent funding forced the National Congress to go into voluntary administration in June 2019.

So my friends, you can see that there has been a chequered history of Aboriginal and Torres Strait Islander peoples attempts to establish a national Voice and have meaningful engagement with governments and bureaucrats on matters that affect us. We have been the passive recipients of government policies and programs that have mostly not addressed the wicked problems that confront us. Over the past 65 years, we've had successive national representative bodies created and funded by the community and non-government sector, as well as government initiated and funded representative bodies.

They have been voluntary bodies, incorporated entities, a company limited by guarantee, a grant funded entity and entities created by legislation. Their roles have also varied, as has their impact on policies and programs. And a constant has been the exhaustive reviews that their structures and operations have had to endure. We are now on the cusp of substantial and substantive change in the political and community environment that is conducive to consider and support such change.

The consistent waxing and waning of representative bodies at the behest of the government of the day is the prime driver for a constitutionally enshrined body over a legislative body or legislated body. So let's explore where we're at, and I'll also unpack some of the myths and disinformation and what's needed to get the referendum over the line. To address some of the myths and disinformation currently in circulation. I'll pose a question or state the claim and respond accordingly.

So the first issue is the Uluru Statement From the Heart and the referendum for a Voice the same thing? The *Statement From the Heart* references three key reforms: Voice, Treaty, Truth. The statement calls for the establishment of a First Nations voice enshrined in the Constitution. The proposed referendum will only be about amending the Australian Constitution to enable the establishment of a Voice to Parliament and the executive government. It is about the Commonwealth Parliament, Commonwealth government departments and entities and Commonwealth legislation. It will have no influence or involvement with state and territory affairs unless invited to by the relevant authorities.

The national Voice will seek inputs from state and territory voices on matters of national application, and a successful referendum will result in the creation of local and regional voices that I'll discuss later. The referendum will not address Treaty or Truth, Treaty and Truth. Truth telling at the national level will commence after the referendum is held. However, at the state and territory level processes have commenced, with treaty discussions occurring in Tasmania, New South Wales, here in Queensland and South Australia.

Treaty commissions have been established in the Northern Territory and Victoria, and on the 10th of May Queensland's path to treaty was set into law with the passing of landmark legislation. Premier Palaszczuk said "all Queenslanders will benefit from a reconciled Queensland and we are committed to working with Aboriginal and Torres Strait Islander peoples towards reconciliation, truth telling and healing and reframing the relationship".

Victoria is the most advanced jurisdiction through enacting the advancing the treaty process with Aboriginal Victorians Act 2018. The establishment of a voice mechanism known as the First Peoples Assembly of Victoria in 2019 and a truth telling mechanism called the Yoorrook Justice Commission in 2021, and South Australia now has a legislated voice and the ACT has effectively had an elected Voice since 2008 and in the ACT it's reaping benefits for the whole community. I'm confident that other jurisdictions will soon follow ACT, Victoria, South Australia and Queensland's lead.

So why do we need to have this referendum? The referendum is a chance for Aboriginal and Torres Strait Islander peoples to be recognised in the Constitution and enshrining a First Nations voice giving strength and status to the principles of respect and partnership. We need a Voice so that future governments will make better policies and implement programs that will make a practical difference for First Nations peoples. The Voice will mean that First Nations people will be advising governments when decisions are made about laws and policies impacting Aboriginal and Torres Strait Islander Australians.

It will heal our nation and lead to better policies and practical outcomes as First Nations peoples know what governments need to do when it comes to things like education, health, housing and family violence. This is a once in a generation opportunity to change our Constitution and place our nation on a pathway to a better future. It will formalise the relationship through local and regional voices between the Commonwealth Government and state and territory and local governments.

And it's important to recognise that 80% of all the effort in Indigenous affairs happens at the state and territory jurisdictional level. It also creates an element of redress post the 1992 High Court Mabo decision that overturned the fiction of *terra nullius* by recognising Aboriginal and Torres Strait Islander people in the Australian Constitution.

So how would the Constitution change? The Voice would be a representative advisory body enshrined in the Constitution. The question to be put to the Australian people in the 2023 referendum, assuming it gets through, it's got through the lower house, but it's going up to the Senate. It will be debated very shortly but I think the Government's pretty confident that they've got the numbers and it'll be a proposed law to alter the constitution to recognise the first peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. And simply, I put and simply, do you approve this proposed alteration? And the response is either a yes or a no.

The proposed law that Australians will be asked to approve at the referendum would assert a new chapter and section into the Constitution. Chapter nine Recognition of Aboriginal and Torres Strait Islander peoples is the new chapter and Section 129 Aboriginal and Torres Strait Islander Voice, and it'll go

“In recognition of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia. There shall be a body to be called the Aboriginal and Torres Strait Islander Voice. The Aboriginal and Torres Strait Islander Voice may make representation to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples. The Parliament shall subject to this Constitution have powers to make laws with respect to matters relating to Aboriginal and Torres Strait Islander Voice, including its composition, function, powers and procedures”.

Now, if successful, the Government will then propose a bill or legislation to address the Voice composition function, powers and procedures, that will be tabled in the House of Representatives, where it will be debated and typically referred to a joint parliamentary committee for public consultations.

And it is at this stage that we'll get to know the details of what is being proposed and if history is any indicator, the introduced bill will be amended multiple times so that it is so what's proposed is not necessarily what will eventuate. And I referred to the ATSIC legislation where there were about 130 amendments to that to that legislation. But that's the democratic process that that we have to follow. Now some commentators are suggesting that the Voice is not needed as there were 11 First Nations representatives in Parliament.

We must know that parliamentarians are elected to represent all of their constituents and parties, not just First Nations peoples, and to make decisions about issues impacting all Australians. First Nations parliamentarians bring with them an insight into the issues affecting Aboriginal and Torres Strait Islander people that others do not, but ultimately they represent their electorates. Now we've also seen recently where Aboriginal constituents have declared that the elected member does not represent their views, does not represent their community and does not follow cultural protocols.

So we can't even think that any Aboriginal member is a representative of Aboriginal Torres Strait Islander people. Also, First Nations parliamentarians are an instrument of political parties unless of course they are independents with positions on a broad range of issues impacting Australians. And their view may be impacted by the party not solely in the interest of First Nations peoples. First Nations parliamentarians cannot, nor should they be expected to represent all Aboriginal and Torres Strait Islander Australians.

And whilst there's currently 11 First Nations representatives to Parliament, there's no guarantee that this will remain the same in the next term of Parliament. Permanent change that is not party politically driven is needed to deliver better and sustainable outcomes for Aboriginal and Torres Strait Islander peoples. Now, you'll also remember the original claim that's still being promoted by opponents that the voice will operate like a third or fourth chamber of Parliament. Now, this disinformation is disingenuous and disturbing when it's promoted by politicians considering that they know better.

Prime Minister Albanese has said the Voice would not have a veto over the decisions of Parliament. It will be an unflinching source of advice and accountability, not a third chamber nor a rolling veto. The body will be an advisory body. It will have no ability to hinder parliamentary processes. It will not have any veto powers and could not introduce legislation or change it. The Parliament will be under no obligation to follow the Voice's advice. The House of Representatives and the Senate will continue to make laws, regulations and pass motions regardless of what the Voice may advise.

Some then say, well, it's a toothless tiger without any influence, so why have it? Well, it's important to know that there's a vast array of advisory bodies to the government and the parliament covering all sorts of issues. And sometimes their advice is taken, but too often it's ignored. And they include the Attorney General, the Australian National Audit Office, the Australian Law Reform Commission, the Australian Human Rights Commission and the Commonwealth Ombudsman, whose reports are all tabled in Parliament.

And so this is just the way the democracy works and that's something that we discussed at length at the various committees that have been advising the Government. You'll also note that former High Court judges and constitutional law experts support the PM's claims, but also note that some others don't. So we have 1 or 2 other, or one other High Court judge, and a couple of constitutional lawyers.

But, you know, they're changing. Some of them are changing their views already. Now, social media and some Indigenous commentators claim that not all Indigenous people support the Voice. And this is true as there are a wide range of views amongst First Nations peoples, just like any group of Australians, Aboriginal and Torres Strait Islander peoples are diverse and don't all think the same way as we don't all look the same, do we, Mick? Mick and I often get confused about each other.

However, the Voice proposal is a result of successive processes of consultation and engagement involving thousands of individuals and engaging with communities right across the country. As I cited earlier, First Nations leaders have been calling for this reform for decades. Now, I'm confident there is

overwhelming support within First Nations communities which will only continue to grow, and through Reconciliation Australia and the survey that we're doing, is showing it's in excess of 85% support by Aboriginal and Torres Strait Islander peoples for the Voice.

Now while this is important, the reality is that the 96% of the non-Indigenous voting population, that's most of you guys out there, will determine the outcome of the referendum. And this is why allies play a crucial role in having conversations with families, friends, colleagues and through writing to politicians and newspapers, dispelling disinformation and explaining why they should support change for a better future. There is also there isn't enough detail about what it would look like.

It's like signing a blank cheque. You would have heard that one. There have been numerous reports on constitutional recognition and the Voice model, most recently the model Professor Langton and I put forward in the Indigenous Voice co-design final report in 2021, after extensive national consultations with both Indigenous and non-Indigenous communities. And they weren't just in urban areas, they were across, across the board in some of our remotest communities, had massive numbers of community people participating. And what's important is also that all of that has been recorded. So, you know, none of this, he said she said.

And we don't know if you're interested in finding out what happened in any community, just go to the website. And there's a report that we wrote post every one of those consultations.

Now details relating to the Voice are being further discussed with Aboriginal Trusted on the people through the First Nations engagement processes established by Minister Burney and a Civics education and information dissemination campaign by the Australian Electoral Commission. That's commenced and that's directed to the whole population and that's really about civics education. What's in a referendum and how it should be run. The NIAA has also launched a new website, <https://voice.gov.au/> that is the go to reference point for accurate, up to date, factual and unbiased information. Over the coming months, both the yes and no campaigns will be filling the airwaves with information and disinformation that will be challenging to navigate. But my advice is to not lose sight of the fact that if we want to see substantial and sustainable change, we need to listen to and meaningfully engage with Aboriginal and Torres Strait Islander peoples.

And remember there will be appropriate oversight for the Australian people on the details of the Voice through the normal parliamentary processes. And the Voice will be established by legislation post a referendum that will be considered by the Parliament and subject to the normal parliamentary scrutiny and debate processes.

Another claim is that it would divide us by race. It would give First Nations peoples more rights than others. Well, this is not about race, politics or dividing Australians. It's about uniting Australia and making our history stronger. Well, making our nation stronger. The Voice is not about a special right. It's a basic right. All Australians will remain equal in the eyes of the law. The only thing that changes is that there will be a permanent new body to provide advice on Commonwealth laws, policies and programs that affect First Nations peoples. So you might ask, why should this be the case? Well, simply.

And why should be the case? Having the law for or giving the Voice to Aboriginal and Torres Strait Islander people simply because Aboriginal and Torres Strait Islander peoples are the only Australian citizens who have laws specifically written for them. Further, the Constitution already references race through section 25 and section 51(xxvi), and that section, 51(xxvi) is also known as the race power.

It's in the Constitution. And what's important to know is that Section 51(xxvi) has only ever been exercised on Aboriginal and Torres Strait Islander people and not always positively.

Now we don't need the other question. We don't need to change the constitution for this. Just set up an advisory body. Well, as mentioned, was that for me or what? Somebody's phone. First Nations peoples have had legislative bodies in the past with the most prominent being ATSIC. The issue of recognising Australia's first nations in the constitution has been considered and debated for over a decade now by the Australian Public Parliamentary committees, constitutional experts and First Nations leaders and communities. Legislation alone cannot create a permanent partnership or enduring change to improve outcomes for First Nations peoples.

It's important to recognise Australia's First Nations peoples who have been on this continent for over 65,000 years, and who have historically been excluded from Australia's constitution. For too long, the process of how First Nations peoples are heard has been determined by the whim of ever changing governments and ministers an enshrined Voice will be a permanent means to partner and advise the Australian Parliament and Government on the views of First Nations peoples on matters that are important to us.

Will the Voice help me at the community level? And we hear this said, oh, well, you know, the Voice is just, you know, the Canberra elites, etcetera. Well, the answer is definitely yes. If the referendum is successful and only if it's successful through the establishment of the local and regional voice structure that will be supported by a secretariat. That's important across the 35 or so proposed regions to identify priorities and develop regional strategies that will be actioned through the state and territory governments, local governments and the Commonwealth Government in a coordinated way.

If the referendum is not successful, then nothing will change in a meaningful way. Is that what we really want? Nothing to happen? There is much more that I could say, but my time is up. I was up a few seconds ago. I guess I've endeavoured to demonstrate that Aboriginal and Torres Strait Islander peoples have over the past 65 years attempted to have a Voice that could guide governments and parliaments on how to effectively design and implement policies and programs that will have a positive impact to achieve equality for all First Nations Australians.

We are experiencing advancements but not at the pace experienced by other Australians and this has resulted in the gaps not closing. And we hear that said all the time. Now. I've also endeavoured to shine light on the way forward and how all the voting population needs to become informed of the facts and not be swayed by the myths and disinformation that are being promoted by pundits who are ill informed or have malice intent. Thank you for your interest in learning about the referendum and Voice to Parliament and executive government processes and the next steps post to referendum.

In closing, I wonder what Eddie Koiki Mabo's position would be on The Voice? Koiki inspired a nation to confront the injustices endured by Aboriginal and Torres Strait Islander peoples. His activism and advocacy empowered Indigenous communities across the country to reclaim their cultural heritage, assert their rights to self-determination and forge a path towards a more inclusive and equitable society. Eddie Mabo believed that the voices of Indigenous Australians should be heard and valued.

He recognised the strength and resilience of his people and he once stated. "We have survived and we will continue to survive and any problems that come, we will survive. We must have a say on how this country is run". Now these powerful words reflect his unwavering belief in the importance of

Indigenous voices in shaping the future of Australia. So I'd be very confident that Koiki would vote yes and he would be a strong and active advocate for a successful referendum.

As we look to the skies each night, may Koiki the Mabo star illuminate a path to a successful referendum and a bright future for Aboriginal and Torres Strait Islander peoples. Thank you.

James Cook University (JCU) celebrates the history-making Mabo decision with the long established **Eddie Koiki Mabo Lecture Series**, an annual public commemorative presentation by a prominent person who has made a significant contribution to contemporary Australian society.

JCU Library has collaborated with the JCU Indigenous Education and Research Centre to archive and present the Lecture Series via the online repository for the Special Collections - NQHeritage@JCU making it available for future researchers and all Australians.

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