THE HENRY PARKES ORATION 2018

‘And remind them that we have robbed them?’

Re-imagining a nation: Indigenous recognition, constitutional reform and a future Australian republic

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Please note: this is an edited version of the oration, based on a transcript of the audio recording. We have added headings, references and footnotes to the best of our ability; however, any errors or omissions in this regard should be attributed to the Foundation, not to Professor Davis.

Thank you Auntie Violet as always for your beautiful Welcome to Country. I feel very honoured to be on your Country as a Cobble Cobble woman.

I want at the outset to acknowledge the apology issued by the Prime Minister today for the survivors of sexual assault in institutions following the Royal Commission. It was very overwhelming to fly down last night with many of the survivors. I suppose it reminded me of flying down to Canberra for the apology to the stolen generations. So I want to acknowledge that apology today. I think those kinds of things are very important in our democratic system.

I also want to recognize any Aboriginal and Torres Strait Islander brothers and sisters who may be here tonight, including my Uluru colleague Auntie Pat Anderson. I'd like to thank the Henry Parkes Foundation for asking me to speak tonight and I acknowledge Ian Thom as the Foundation’s Chair. And of course the Museum of Australian Democracy.

Certainly as a student of Australian history and politics – as a kid, that was my thing in the family – I'm very honoured to be here tonight to deliver the 2018 Henry Parkes Oration, which I've titled ‘And remind them we have robbed them?: re-imagining a nation – Indigenous recognition, constitutional reform and a future Australian republic’.

I want to talk primarily about two things. I want to start with some of the issues that need to be ventilated between the movement for Indigenous recognition and an Australian republic, for unless they are managed and ventilated there are challenging times ahead. So I want to speak first to the incontrovertible interdependence of the Australian republic and Indigenous recognition.

Secondly, I wanted to speak about Aboriginal sovereignty and the sovereignty of the Crown.

Effectively I want to talk about why unfinished business and addressing the Uluru Statement from the Heart are critical to progressing an Australian republic.

And I'd like to defer my comments and observations on Henry Parkes for my conclusion.

Unfinished business and a future republic

It was the 1999 republic referendum that made me interested in the question of whether Australia could become a republic before addressing the unfinished business between Aboriginal and Torres Strait Islander peoples and the Australian State.

This question is in part why I became a constitutional lawyer. And Australian historian Mark McKenna reawakened it for me in *Quarterly Essa*y 69 (2018), titled 'Moment of Truth: History and Australia's Future'.[1]

This essay is an important call for a renewed emphasis on the First Nations of this country, on unfinished business and an Australian republic. It responds to the invitation of the Uluru Statement from the Heart to the Australian people to "walk with us in a movement of the Australian people for a better future". The two are, as I said, interconnected. They are inextricably linked proposals for reform and recognition for two polities in our country: the First Nations of Australia and the Australian people: a Voice to Parliament and an Australian head of state.

McKenna's post-1999 book, *This Country: A Reconciled Republic?,* was instrumental in my becoming a public lawyer and certainly heavily influenced my early thinking on structural reform and Aboriginal people. In particular, the invocation of the phrase 'culture of forgetting' or Stanner's 'cult of forgetfulness' practised on a national scale can certainly be applied to the republican movement in 1999. And certainly that is what Mark McKenna did in that book.

On 1999, he wrote in *Quarterly Essay 69*:

> I had assumed that the whole question of a republic could be advanced through the traditional Anglo-Australian axis – breaking away from Britain and becoming fully independent with our own head of state – with little reference to Indigenous Australia. I had failed to see the connection that seems so obvious: if we remove the sovereignty of the Crown and reconstitute the Commonwealth as a republic, then we must acknowledge "the first sovereign nations of the continent and its adjacent islands". How could we imagine constructing or reconstituting the sovereignty of the Australian people as a republic while ignoring Indigenous Australians yet again?[2]

The general thrust of my argument then is that these two reform proposals are connected, and to move to a republic without addressing unfinished business would be, in excluding Indigenous peoples, unjust. It would also be contrary to the republican conception of democracy – being inclusive of citizenry and, as Philip Pettit might say, giving people "channels of influence that can join to form a river of popular control".[3]

The twin pillars of reconciliation are truth and justice. Both pillars could be irretrievably damaged if such an injustice underpinned the sovereignty of a new republican state. This is no way to herald a new expression of popular sovereignty.

That our democracy could move to a revision of sovereignty prior to the conclusion of, at least, the first of the Uluru reforms – a constitutionally enshrined Voice to the Parliament – would be a grave injustice to the First Peoples. The illegitimacy of the Australian state would continue in the eyes of many Aboriginal and Torres Strait Islander peoples.

So the two are inextricably linked, but this link has very low visibility – probably deliberately so.

There are some lessons to be learned from the 1999 referendum campaign – lessons we would do well not to replicate. To begin with, some of the more problematic antecedents of Indigenous recognition lay in the 1999 republic referendum campaign, and there are two key observations to be made about this.

[1] McKenna, Mark: 'Moment of Truth: History and Australia's Future'. *Quarterly Essay 69*, Black Inc. 2018
[2] ibid
[3] Pettit, Philip: *On the People's Terms: A Republican Theory and Model of Democracy*. Cambridge University Press, 2012

The first is about the notion of recognition as expressed by John Howard in a new preamble to the Australian Constitution. The problem was not so much that it was symbolic; it was that it wasn't agreed to by the cultural authority of this country.

The second observation is about the arm's length distance the republican movement kept Aboriginal issues and unfinished business – so as not to 'contaminate' their campaign.

On the first issue, the notion of recognition, one of the lessons that the Aboriginal political domain learned from 1999 was that regardless of whether we agree to reform or not, there is a risk that the state may proceed without us.

In the case of the preamble, there was no agreement by the cultural authority – the land councils or the Aboriginal and Torres Strait Islander Commission – that the language used in the one line proposed to recognise First Peoples was appropriate or accurate. The word 'kinship' had been chosen to describe the relationship of Aboriginal people to the land, despite the fact this is not how the word kinship is used.

The leadership – who included at the time Gatjil Djerrkura, Pat O'Shane, Lowitja O'Donoghue, Mick Mansell, Peter Yu, Mick Dodson – preferred the word 'custodianship'. However, the response was that it was better to have something rather than nothing, and that it would make a positive contribution to reconciliation.

This is a refrain we hear a lot in recognition. We heard it prior to Uluru on symbolism: it's better to have something rather than nothing. We are hearing it already in the suggestion to legislate a Voice to Parliament instead of constitutionalise it: it's better to have something rather than nothing.

But I digress.

The fact that in 1999 the government put the language to the people despite the disagreement of the Indigenous peoples is one of the alarming characteristics that concerns so many of the leadership with respect to constitutional reform and recognition today.

By about 2015, following a process that Julia Gillard ran in 2011, there was serious concern that the government and opposition had crystallized agreement around the most minimalist form of recognition – one that the community by and large did not agree with.

This concern drove the exigency of a meeting with the prime minister and opposition leader at Kirribilli House in mid 2015 that in no uncertain terms stated that Aboriginal and Torres Strait Islander peoples did not want symbolism or minimalism.

The notion, therefore, that we had overreached with the reforms agreed to at Uluru could only be sustained if one had paid zero attention to what Indigenous leaders were saying prior to the Referendum Council.

At that 2015 Kirribilli meeting, our leadership stated the following:

> [Any] reform must involve substantive changes to the Australian Constitution. It must lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future. A minimalist approach – that provides preambular recognition, removes section 25 and moderates the race power, section 51(xxvi) – does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.[4]

The Kirribilli leaders recommended that there be an ongoing dialogue between Aboriginal and Torres Strait Islander peoples and the government to negotiate a proposal to be put to a referendum. This was how the Referendum Council was formed later in 2015 under Malcolm Turnbull and eventually the Referendum Council rolled out the First Nations Regional Dialogues and the National Constitutional Convention at Uluru.

So you can see that one of the manifestations of the Australian republican campaign in 1999 is for the Aboriginal and Torres Strait Islander leadership to be very cautious, because we do not have the

[4] Final Report of the Referendum Council (Canberra, June 2017), Appendix G. www.referendumcouncil.org.au/final-report.html

numbers or the political power, and the state has demonstrated it is willing to move on a reform issue that it is satisfied with, without the consent of us, the to-be-recognised.

The second observation I wanted to make about that campaign was that Aboriginal leaders at the time felt that the republican movement and the campaign were dismissive of Aboriginal issues. Although the republican convention was imbued with Aboriginal culture and sentiments – platitudes about selecting Aboriginal words for a head of state, for example – the republican campaign proper well and truly decoupled the First Peoples from its cause.

This was the subject of much criticism among our leaders. Leading up to that referendum, Peter Yu argued:

> We are not monarchists, but we are the First Peoples of Australia, and the republicans have failed to articulate a position which gives us any level of recognition. … As in 1901, we are excluded: … all a Yes vote will do is further institutionalise our disadvantage.[5]

The fact that the minimalist reform of an Australian head of state is not structural change that can impact upon the powerlessness of our people in Australian democracy was not lost on our leaders back then and it's not lost now. Without structural reform for Indigenous peoples an Australian head of state is, to put it crudely, putting lipstick on a pig. That is to say, on the morning we wake up after a successful referendum on a republic, the public institutions remain the same. Nothing will have changed in terms of power relations.

Following the resounding defeat of the referendum, it was noted by McKenna in his book that the devastating defeat did not seem to upset Indigenous leaders. He said they had argued consistently that the advocates of the republic and the preamble had largely excluded the concerns of Indigenous people.

The Aboriginal and Torres Strait Islander Commission chair, Gatjil Djerrkura, said:

> A lack of proper consultation with the Australian people sank the referendum on the republic and the preamble. This is a clear lesson from referendum results at all levels, national state and territory. The preamble, which was meant to be an aspirational document to unite the nation, had been drafted behind closed doors without any meaningful consultation with the Australian people, Indigenous and non-Indigenous. It did not promote reconciliation or advance our aspirations.[6]

Djerrkura goes on to say:

> I welcome its resounding defeat. The republic question suffered a similar fate for similar reasons and I look forward to a new era of proper consultation between the major political parties and the Aboriginal and Torres Strait Islander peoples.[7]

These concerns expressed by the leadership – of the republican movement disassociating itself from Indigenous issues – aligned very much with my memory of the referendum. I was always, as I've written in *The Monthly*,[8] a republican, and I followed very closely the momentum towards an Australian republic. I recall as a child being glued to the television coverage of the Republican Convention and the prominence of some of our great leaders including Gatjil Djerrkura and Lowitja O'Donoghue.

The year of the 1999 referendum, I was in fact in Geneva, as a United Nations fellow at the Office of the High Commissioner for Human Rights. I recall the day: waking up and going to vote very proudly at the Australian mission to the United Nations. I still have all the photos out the front posing with my friends who had also voted.

These were the days when the internet wasn't very common and certainly not reliable, and we'd missed entirely the tenor of the nation: we were really really shocked when the vote was lost. I mean I cried; I was that devastated. And we could not understand why. I mean, of course I do now – once I got home I

[5] Cited in McKenna, Mark: *This Country: A Reconconciled Republic?* UNSW Press, 2004.
[6] Cited in *This Country: A Reconconciled Republic?* op. cit.
[7] Cited in *This Country: A Reconconciled Republic?* op. cit.
[8] Davis, Megan: 'The republic is an Aboriginal issue', *The Monthly*, April 2018. www.themonthly.com.au/issue/2018/april/1522501200/megan-davis/republic-aboriginal-issue

realised I was completely out of the loop. Not long after the referendum vote though, there was an Aboriginal meeting at the UN and when I spoke to many elders and leaders who came to that meeting, I discovered I was probably the only Aboriginal person in the country who voted Yes. It seems that all of the leadership in the community were resolute on this topic: that Australia could not become a republic before addressing unfinished business.

Many people in the late 1990s and the early 2000s, and even now after Uluru, will still say get a republic first and then we'll deal with Indigenous issues later.

But as McKenna skillfully expounded in his book,[9] the matter just isn't that simple. He argues it's neither rational nor just to replace the sovereignty of the Crown without addressing the Constitutional position of Aboriginal Australians.

This was the position too at the First Nations Regional Dialogues and at Uluru: the Crown, the Monarch, a republic and Aboriginal sovereignty were all issues raised by dialogue participants. They see, as I do, the republic as an Aboriginal issue.

I agree with you, Auntie Violet, about Meghan and Harry [the Duke and Duchess of Sussex had just completed a visit to Australia]. A lot of the old people have a great affection for the Queen, and faced with an era of reform inertia – an era described by Mick Gooda as one of the worst eras in Australian history in terms of the impacts of law and policy on Indigenous peoples – one of the options that came up continually at the dialogues was: can't we go and talk to the to the Crown in England about our issues?

In any event many of our people see the republic as an Aboriginal issue, and it is an Aboriginal issue.

And I have to say too that we're very proud of the Uluru deliberative decision-making process, which was conducted in a very great republican tradition.

This involved a civic engagement with a sample of our people from across the country in 12 sites (all we could afford on the budget). It was a bottom-up process in which we engaged AIATSIS (the Australian Institute of Aboriginal Torres Strait Islander Studies), and auspiced them to then engage land councils and other organisations on the ground out in the regions to run First Nations dialogues for us, And to run a sample of our people through a deliberative process that involved intensive civics education, intensive legal education, and lectures on the key reforms that the Prime Minister and opposition leader had signed off on. And then a deliberative process – a dialogue process – where everybody engaged in a discussion about which reforms were the priority in their region and which reforms constituted meaningful recognition to them.

And the outcome, as we know, was that a constitutionally enshrined Voice to Parliament was ranked highest in all of the 12 regional dialogues and the truncated version run here in Canberra – that is to say, an enabling provision in the Constitution, which sets up the power for the federal Parliament to create such a body at a later time after a referendum.

Understanding sovereignty

In the second part of this oration, I want to talk about what is sometimes referred to as the elephant in the room: the unresolved matter of sovereignty. Because this will be the key issue with respect to Aboriginal and Torres Strait Islander peoples and an Australian republic, and sovereignty can be very confusing to talk about.

How has sovereignty played out during the recognition project from 1999 to now?

It's always been a primary issue but in terms of the formal processes of Indigenous recognition in the Constitution, it emerged immediately in 2011 when Prime Minister Julia Gillard constituted an Expert Panel on the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. She had set up that panel off the back of the hung Parliament: in negotiating a power arrangement the Greens and the independent Rob Oakeshott asked her to progress recognition, which had multi-party support.

[9] McKenna, Mark: *This Country: A Reconconciled Republic?* UNSW Press, 2004.

It is well known also that the Expert Panel adopted a methodology for determining what referendum recommendations it would make to the federal government, and that methodology was then adopted by the Referendum Council in 2015. This methodology has very much influenced the reforms for constitutional recognition since 2011.

Under this methodology, any recognition recommendation for a referendum must do four things:

1. It must contribute to a unified and reconciled nation.
2. It must be of benefit and accord with the wishes of Aboriginal and Torres Strait Islander peoples.
3. It must be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums.
4. It must be technically and legally sound.

So those four criteria have driven both the Expert Panel and the Referendum Council.

From the outset the Referendum Council honed in on the second criterion – to be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples.

This was because until 2015, we actually didn't know what it was that Aboriginal and Torres Strait Islander peoples wanted. And I'm talking about those people who don't normally get to participate in formal government processes of reform. That's why the dialogues were designed the way they were – to allow those who aren't normally invited to talk to talk.

The problem the Expert Panel had back in 2011 was that the Panel had chosen the options for constitutional recognition. They weren't driven by the Australian community; they weren't selected by Aboriginal and Torres Strait Islander peoples. And when we went out to consultations all the communities wanted to talk about were two issues: sovereignty and treaty. That's why in the Expert Panel report there are chapters devoted to these issues.[10]

It's also true to say, however, that when you go back and look at the submissions in the work of the Expert Panel, you can see people making suggestions for enhanced participation in the democratic life of the state. People are actually talking about their powerlessness, their voicelessness – about wanting designated seats or a new ATSIC and other ways of participating in democracy.

But given its methodology, the Expert Panel didn't proceed with anything in relation to a treaty or sovereignty. It came as no surprise to the leadership that 'recognising the sovereign status of Aboriginal and Torres Strait Islander peoples in the Constitution would be highly contested by many Australians and would absolutely jeopardize broad support for the Expert Panel's recommendations'.[11]

The qualitative research we did at the time found that sovereignty and self-determination were very poorly understood in the Australian community, and there were also very diverse understandings of what these words mean in our own community.

The most important work of the Expert Panel, I think, was to seek formal legal advice on the status of Aboriginal sovereignty in the Australian democratic system – in the Australian Constitution. This advice states that:

> … the sovereignty of the Commonwealth of Australia and its constituent and subordinate polities, the States and Territories, like that of their predecessors, the Imperial British Crown and its Australian colonies, does not depend on any act of original or confirmatory acquiescence by or on behalf of Aboriginal and Torres Strait Islander peoples.[12]

The Constitutional position is this:

[10] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (Canberra, 2012) https://www.pmc.gov.au/resource-centre/indigenous-affairs/final-report-expert-panel-recognising-aboriginal-and-torres-strait-islander-peoples-constitution

[11] ibid, p 213

[12] ibid, p. 212

> … recognition of Aboriginal and Torres Strait Islander peoples in the Constitution as equal citizens could not foreclose on the question of how Australia was settled. Nor should constitutional recognition in general have any detrimental effect, beyond what may already have been suffered, on future projects aimed at a greater place for customary law in the governance of Australia.[13]

Many lawyers have cautioned against any constitutional activity that recognises sovereignty. For example, my colleague Sean Brennan argues that the High Court has developed its own working definition of sovereignty and Australia's legal system continues to operate accordingly.[14]

The judiciary is only one arm of government, however, and questions of settlement and legitimacy continue to be agitated in the Parliament and in discussion with government and in the public arena.

So what is the key issue here?

The issue is that there has been no settlement between Aboriginal peoples and the Australian State.

What is the core grievance here?[15]

We know that when the British arrived the continent was already occupied by Aboriginal people. We also know that at the time when Empires were exploring the world and claiming for themselves territories not claimed by others, they had to justify it. And they justified it according to their own domestic law or according to the law of nations.

So how the British asserted sovereignty over this land is really significant to this issue of Indigenous recognition and the Australian republic.

We know that at the time of the arrival – or, as was decided at Uluru last year to formally call it an invasion – the British were very influenced by the writings of many 16th century lawyers such as Emer de Vattel, and the great jurist English jurist of the 18th century, Sir William Blackstone. Their theories influenced how the British expanded and colonized countries: by settlement, by conquest or by cession.

Put simply Aboriginal people lived on the land when the British arrived but they did not own it in a way that the British recognized as ownership and they did not cultivate it in a way that they recognized as cultivation. Of course, we know that is not the case from the magnificent work of Bill Gammage at the ANU[16] and the brilliant work of Bruce Pascoe[17].

But while we were here and present living on the land, we did not possess it in a way that the British saw as relevant.

What matters then is how they proceed in terms of the theory or the legal basis – whether [the dispossession] was by settlement or conquest or cession – because each has significant implications for the reception or not of British law. Settlement occurs where the land is desert and uncultivated and inhabited by backward people – that is the definition. Conquest means it's a forcible invasion of occupied land. Cession means that there is treaty over occupied land.

In the case of conquest, the laws of people who are conquered apply until the Crown or other foreign power laws apply, and in regard to cession, a treaty is entered into but the Crown or foreign power abrogates them.

In regard to settlement, the settlers' laws apply automatically, and that's a very key issue here when people use the word 'settlement' to explain the British arrival.

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[13] ibid, p. 212

[14] For example: Sean Brennan, Brenda Gunn and George Williams, 'Treaty – What's Sovereignty Go to Do With It', Issues Paper No. 2. Gilbert and Tobin Centre of Public Law, UNSW, 2004. https://apo.org.au/sites/default/files/resource-files/2004/01/apo-nid8249-1190821.pdf

[15] Megan Davis's analysis of sovereignty that follows here has also been published in her chapter, 'Ships that pass in the night', in *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform*, edited by Megan Davis and Marcia Langton, Melbourne University Press, 2016

[16] Gammage, Bill: *The Greatest Estate on Earth: How Aborigines Made Australia*. Allen & Unwin, 2012. https://www.allenandunwin.com/browse/books/general-books/history/The-Biggest-Estate-on-Earth-Bill-Gammage-9781743311325

[17] Pascoe, Bruce: *Dark Emu*. Magabala Books, 2014. https://www.magabala.com/culture-and-history/dark-emu.html

Two years ago on the front page of the *Daily Telegraph*, UNSW was criticized for contesting the notion of settlement and I remember reflecting at the time that since 1992 – since Mabo – there might have been a better understanding in the Australian community about why settlement is contested – about the nature of the sovereignty of the state.

What did Mabo do?

In Mabo the plurality argued that international law recognises conquest and cession and the occupation of territory that was *terra nullius* as three ways of effectively acquiring sovereignty. However, there are competing views about what applied in Australia, and the decision in Mabo didn't really clear things up because it involved a very uneasy combination of unsettled/settled. It found that the land was occupied and there was a sophisticated system of laws in place – it assimilated the rules of settlement with the rules for a conquered colony to the extent of their rights and interests in the land.

This combination of conquered and settled has been the subject of much criticism, not just by lawyers, but by Aboriginal and Torres Strait Islander peoples. Many people, including many Aboriginal people, would argue it's not for the courts to resolve that which Parliament must.

As the advice to the Expert Panel stated, sovereignty was not passed from the Aboriginal people through any significant legal act: the British did not ask permission to settle, Aboriginal people did not consent and no one ceded.[18]

This is the source of the disquiet. This is the grievance that must be addressed.

Of course, the further we are from 1788, the less inclined the state is to address this and that's why we talk about agreements and treaties and settlement, because it's those agreements that give Aboriginal and Torres Strait Islander peoples as the First Peoples of this country, a form of legitimacy in public institutions, in public law, in public debate. We were one of the few Commonwealth countries not to enter into a treaty and we have never gained that public legitimacy as a consequence.

That is part of what Uluru is trying to arrest.

The Uluru Statement from the Heart

The Uluru Statement from the Heart isn't just the first one-page statement; it's actually a very lengthy document of about 18 to 20 pages, and a very powerful part of this document reflects what happened in the dialogues. On the first day each region shared really specific nuanced stories about Australian history and Aboriginal history in their region and together we drafted what we called 'Our Story', which is the Aboriginal version of Australian history. I'm just going to share the initial part that talks about the issue of sovereignty, and why we can't move to an Australian republic before addressing this issue.

The Uluru Statement, 'Our Story', starts as follows:[19]

> Our First Nations are extraordinarily diverse cultures living in an astounding array of environments, multilingual across many hundreds of languages and dialects. The continent was occupied by our people and the footprints of our ancestors traverse the entire landscape. Our songlines covered vast distances, uniting peoples in shared stories and religion. The entire land and seascape is named and the cultural memory of our old people is written there. This rich diversity of our origins was eventually ruptured by colonization, violent dispossession and the struggle to survive a relentless inhumanity that has marked our common history.
>
> The First Nations Regional Dialogues on constitutional reform bore witness to our shared stories.
>
> All stories start with our Law.

[18] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (Canberra, 2012) https://www.pmc.gov.au/resource-centre/indigenous-affairs/final-report-expert-panel-recognising-aboriginal-and-torres-strait-islander-peoples-constitution, p 22

[19] Available in Section 2.2 of the *Final Report of the Referendum Council*, June 2017; www.referendumcouncil.org.au/final-report.html

The Law

We have coexisted as First Nations on this land for at least 60 thousand years. Our sovereignty pre-existed the Australian state and has survived it.

> *"We have never ever seated ceded our sovereignty."* (Sydney)

The unfinished business of Australia's nationhood includes recognizing the ancient jurisdictions of First Nations law.

> *"The connection between language, the culture, the land and the enduring nature of Aboriginal law is fundamental to any consideration of constitutional recognition."* (Ross River)

Every nation has its own word for the Law: Tjukurrpa is the Anangu word for the Law; the Meriam people of Mer refer to Malo's Law. With substantive constitutional change and reform, we believe this surviving and underlying First Nations sovereignty can more effectively and powerfully shine through as a fuller expression of Australia's nationhood.

The Law was violated by the coming of the British to Australia. This truth needs to be told.

Invasion

Australia was not a settlement and it was not discovery. It was an invasion.

> *"Cook did not discover us because we saw him. We were telling each other with smoke, yet in his diary, he said 'discovered'."* (Torres Strait)

> *"Australia must acknowledge its history, its true history. Not Captain Cook. What happened all across Australia: the massacres and the wars .If that were taught in schools, we might have one nation where we are all together."* (Darwin)

The invasion that started at Botany Bay is the origin of the fundamental grievance between the old and new Australians – that Australia was colonized without the consent of its rightful owners. Now is an opportunity for the First Nations to tell the truth about history in our own voices and from our own point of view, and for mainstream Australians to hear those voices and to reconsider what they know and understand about their nation's history. This will be challenging, but the truth about invasion needs to be told.

> *"In order for meaningful change to happen Australian society generally needs to work on itself and to know the truth of its own history."* (Brisbane)

People repeatedly emphasized the need for truth and justice and for non-Aboriginal Australians to take responsibility for that history, and this legacy it has created.

> *"Government needs to be told the truth of how people got to there; they need to admit to that and sort it out."* (Melbourne)

They're just two of the early extracts on the law and the invasion. The invasion leads on to the chapter on resistance and so forth.

The Uluru Statement from the Heart – emerging from the Uluru dialogues, the convention, the regional dialogues – is an offer to the Australian people to sort this out. It is a very generous roadmap to peace. It's a call for peace and it's a call for unity.

Acknowledgement of history is the foundation of durable solutions. When we talk about a 'settlement', we're not, of course, talking about Empire theories. We're talking about it in the context of settling the matter between First Peoples and the Australian people – to agree to disagree on many facts of settlement and history, and to work out an agreed way of engaging with each other into the future.

The framework for this settlement, this agreed settlement, should be time limited and it should be a relatively simple text, but a mutually agreed philosophical framework that should set down the guidelines, the principles for how we engage with each other.[20]

The Uluru Statement from the Heart provides, I think, the most contemporaneous framework. It starts by saying that:

> Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands and possessed it under our own laws and customs.
>
> This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science for more than 60,000 years.
>
> This sovereignty is a spiritual notion, the ancestral tie between the land or 'mother nature' and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished and it co-exists with the sovereignty of the Crown.
>
> How could it be otherwise? That peoples possessed land for 60 millennia and this sacred link disappears from world history in merely the last 200 years?
>
> With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.[21]

This is the significance of Uluru. It has started the process of peace and it has invited the Australian people to join us, to join the First Nations.

Patrick Dodson famously wrote years ago in a lecture, a Wentworth lecture called *Beyond the Mourning Gate*:

> From a cultural position, the only way that the mourning period can be ended is when the proper protocols and practical arrangements have been carried out. When the people who have had a wrong or an injustice done to them have been accommodated by the action of those responsible. Then we can come together as friends and mates.[22]

Similarly, my colleague Referendum Council member Dr Galarrwuy Yunupingu said:

> Makarrata is for the future but it's based on truthfulness about the past. We have legitimate grievances and these grievances need to be carefully worked out and then resolved. With Uluru, the process of Makarrata has just started. The aggrieved party has just called the party that it alleges has done it wrong to come forward and meet with it.[23]

The road ahead

Mark McKenna argues that whatever form they finally take, recognition and reconciliation must take place before the republic. He says to do otherwise, regardless of when the Queen dies, would be to suggest that the position of Indigenous Australians in our Constitution and national life is secondary to severing ties with the Crown. We should not contemplate such an insult.

Similarly Patrick Dodson asks the question:

> Will we again fail as a nation to grasp this opportunity to change the political architecture of the country? Will we again fail to rise above the mediocrity that ties us to seeking incremental change

[20] Davis, Megan: 'Ships that pass in the night', in It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform, edited by Megan Davis and Marcia Langton, Melbourne University Press, 2016

[21] https://www.referendumcouncil.org.au/final-report#toc-anchor-ulurustatement-from-the-heart

[22] Dodson, Patrick: *Beyond the Mourning Gate: Dealing with Unfinished Business*. The Wentworth Lecture 2000. Australian Institute of Aboriginal and Torres Strait Islander Studies, 2000

[23] Cited in 'Speech by Megan Davis', *The Australian Law Journal 90thAnniversary Celebrations in Banco Court, Sydney*. Available athttps://legal.thomsonreuters.com.au/product/AU/files/720502195/Speeches_from_ALJ_90th_Anniversary_Event_(all).pdf

> through short-term stopgap bureaucratic solutions? Or can we work towards realigning the relationship between us?[24]

The Uluru Statement from the Heart was issued to the Australian people. It was not issued to politicians and it was not issued to parliamentarians. We uninvited them to the Rock.

We deliberately issued the Uluru Statement to the Australian people, because it is we who can change the Constitution. The Constitution is built to change. The amendment mechanism placed into the Constitution was for us.

We knew after the Uluru work – and we were getting the vibe from Canberra that they weren't happy with recognition – we knew that we had to work now with our fellow Australians and ask them to help us persuade them of the exigency of reform.

It sounds strange emphasizing this exclusion of politicians, given that the Oration is for Henry Parkes, but I do see great synergies with him, and as a constitutional lawyer, I enjoyed reading the multiple articles and biographies that have been devoted to his life and his work.

Of course, there's not a lot of mentions in relation to Aboriginal people, or Aboriginal rights, which is a relic of the time. But he shares much in common with the struggle.

His frustration at the amount of time it takes to explain to people law reform proposals.

The length of time that it takes to understand vision.

The most difficult thing that happened in the dialogues was walking into the regions and into communities – communities that had been devastated by policies like the Indigenous Advancement Strategy. They did not want to talk to us. It was not an easy thing to do. It was so difficult that we had to build in an extra day to manage the anger.

We had to ask people to suspend their disbelief that the country can't change, and that's a difficult thing to do out there in the regions. We had to say to people, law reform is about vision and you have to imagine that Australia can be a better place. You have to imagine a reform and you have to imagine that we can achieve it.

So I really enjoyed reading about how exhausting it can be to continually have to argue and prosecute the same arguments until eventually people understand what it is that you're trying to say. About his frustrations at the setbacks that come with legal and political reform.

But on the other hand, as we try to teach our young people who've come along on this journey and were devastated after Turnbull's rejection, you just have to pick yourself up and keep going, which is what we've done.

Don't settle for no.

There were a lot of things about Parkes and law reform and policy reform, about his tiredness and exhaustion, that I could relate to. But also it made me feel hopeful about Uluru and the reforms from Uluru, because Uluru did bring together decades and decades of advocacy for reform. None of the options for reform from Uluru were remotely original in terms of constitutional reform. They'd all been prosecuted by our people, by our ancestors, for decades and decades and decades. It's just that no one seems to hear.

I think the importance of Uluru Statement from the Heart and issuing it to the Australian people is that it's had a very different impact from things we've done before. And I think and we hope that, in a similar way to 1967, we will be able to work together. And we will be able to persuade the Australian politicians that this is the roadmap forward.

[24] ibid

Writing in *The Empire* Henry Parkes once said: "It is the most reckless of all wrongs to neglect the power which we possess to make a difference to Aboriginal peoples lives. Why do we not aid them and give them a place among our brethren?"

It sounds very much like the Uluru Statement from the Heart.

> We seek constitutional reforms to empower our people and take a *rightful place* in our country. When we have power over our destiny our children will flourish and they will walk in two worlds and their culture will be a gift to their country.
>
> We call for the establishment of a First Nations Voice enshrined in the Constitution.
>
> Makarrata is the culmination of this agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the Australian people and a better future for our children based on justice and self-determination.
>
> In 1967 we were counted; in 2017 we seek to be heard. We leave base camp and start our trek across this vast country and we invite you to walk with us in a movement of the Australian people for a better future.[25]

We're hearing two things in relation to the republic referendum: a plebiscite and then a referendum.

For such a large piece of law reform like that which culminated in Uluru after eight years – eight years of taxpayer-funded formal law reform processes – to be ignored, and for an Australian republic to be prosecuted ahead of constitutional recognition, will make things very difficult.

But more than that – and I say this as an Australian republican – will it be another process in which Australians aren't properly consulted about what a republic means to them? What if my republic vision is much bigger than just a head of state? What if our republic vision can be bigger and smarter and more inclusive?

All Australians must be given an opportunity to say how they view our democracy in 2019, not 1999, and an Australian republic can be so much more than just an Australian head of state.

In finishing I was reading an article on Henry Parkes in preparation for this speech, where he's preparing for the dedication of Centennial Park. He's preparing this grand banquet for leading citizens, which I think means wealthy landed citizens, paid for by the government, and when he was asked what he would do for the poor and needy, Sir Henry offered to distribute food parcels on the day. And a radical, Thomas Walker, interjected and said, "Then we ought to do something for the Aborigines", to which Parkes replied, "And remind them that we have robbed them?"

I cannot but think he would say the same thing here. To have a referendum on a republic before addressing Indigenous recognition will mean continuing the normative framework that is the torment of our powerlessness. When I read suggestions such as ideas for Aboriginal words for a head of state or Aboriginal motifs or symbols on the flag, I think: is this the most that this country can muster for its First Peoples? It's patronising.

A constitutionally enshrined Voice to the Parliament is in fact a very republican proposal – a very democratic proposal aimed at enhancing Aboriginal and Torres Strait Islander participation in democratic decision-making. It is a model of political empowerment. And not only is it utterly consistent with our democratic system and Constitution, but it is consistent with republican ideals.

Moreover the process that led to the Uluru outcomes was a deliberative decision-making process that was at its core republican. It sought to give the voiceless a voice and it sought to minimize the influence and dominance of government and elites in the process.

To have a republic before addressing unfinished business is to taunt. In the words of Henry Parkes, it would be to remind them that we have robbed them.

[25] https://www.referendumcouncil.org.au/final-report#toc-anchor-ulurustatement-from-the-heart

I was going to end on that depressing note, but I do have one positive thing leave you with. When I was sitting in the cab coming up here, I was reflecting on the marvellous Tenterfield Oration and how it triggered a most marvellous process that led to the democratic system that we have today.

I can't help but think that maybe this is what the Uluru Statement from the Heart is: it is an invitation to the Australian people. It's an important statement that will kickstart a reform so that perhaps finally after decades and decades and decades my people, our people, will find their rightful place in our own country.

Thank you.