

Exchanging Ideas: constitutional reform, nation building and treaty making processes

The Judicial Commission's Ngara Yura Committee, in partnership with the NSW Bar Association, Law Society of NSW and Museum of Applied Arts and Sciences, organised the fourth Exchanging Ideas conference, Muru Ngubadi, the path of respect, held on 4 February 2023.

Aunty Joanne Selfe¹ acknowledged around 160 participants who met together on the land of the Gadigal people of the Eora Nation at the Powerhouse Museum. We came together to hear from legal experts and practitioners and discuss key issues relating to the proposed constitutional referendum to introduce a Voice to Parliament to be held later this year, with processes to implement a Treaty and Truth-telling to follow. A similar symposium held in 2019² discussed the making of the Uluru Statement from the Heart.³ The Uluru Statement is the centrepiece for the proposed constitutional reform and an invitation to the Australian people to walk Muru Ngubadi with First Nations people.⁴

The Honourable Justice Dina Yehia⁵ introduced the symposium with an outline of the work of the Judicial Commission's Ngara Yura program.

The Honourable Justice Rachel Pepper⁶ introduced the first speaker for the day, the Honourable Robert French AC.⁷ His opening address "The Voice — a step forward for Australian Nationhood" outlined the historic and constitutional context to the Voice and how he considers it will operate to provide a practical opportunity for First Nations people to "give informed and coherent and reliable advice to the Parliament and the Executive to assist them in law and policy making". Mr French, and other respected legal experts, directly addressed current concerns regarding the Voice. He emphasised that the Voice will not be a third chamber given Parliament could not make a law to confer on the Voice a legal right to veto a proposed law. Nor could Parliament make a law limiting its own law-making powers by legally requiring prior consultation with the Voice.⁸ Rather than spell out the detail of the Voice beyond what is set out in the proposed amendment, it will ultimately be a matter for the Parliament to decide after a successful referendum.⁹ Enshrining the Voice in the Constitution, rather than using the race power, demonstrates that the Voice is not about race but about First Peoples as the Indigenous people of Australia. The Voice will allow the Australian people to recognise and acknowledge First Peoples as the bearers of the first history of our continent. A successful referendum creates a democratic mandate for the Parliament to create and continue the Voice as a significant institution in our representative democracy.¹⁰ Constitutional recognition of First Nations people will not compromise the Crown's sovereignty for the purpose of the non-Indigenous legal system; nor does it involve any ceding of sovereignty by First Nations people. Mr French explained that sovereignty as spelt out in the Uluru Statement, "a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom", is capable of co-existence with the "colonising legal framework".¹¹ Native title agreements reflect the co-existence of traditional law and custom with the existing legal framework.¹²

Attorney-General of Australia, the Honourable Mark Dreyfus KC MP,¹³ addressed opposition to the proposed reforms including the counter-proposal to extend constitutional recognition to migrants. Recognition of First Nations people and the contribution of immigrants in the form of a preamble was rejected in the 1999 referendum and has been rejected during the consultation processes that culminated in the Uluru Statement. Reservations about the process were addressed: both Robert French and the Attorney-General noted there is no orthodox way to run constitutional reform. The Attorney emphasised that the process has been robust: the Uluru Statement's call for the Voice is the result of multiple processes including the First Nations Regional Dialogues held in 12 locations around the country for six months in 2016 and the 2017 National Constitutional Convention of First Nations Peoples. As such, the request for the Voice is "the considered wish of a consensus of Aboriginal and Torres Strait Islander people when it comes to their recognition".¹⁴ The government has established two groups: the First Nations Referendum Working Group to advise how to achieve success and the Referendum Engagement Group to build First Nations and community understanding about and engagement with the referendum.

A panel comprising the Attorney-General; Professor Gabrielle Appleby,¹⁵ Ms Teela Reid;¹⁶ and facilitator, the Honourable Lucy McCallum,¹⁷ discussed current processes and strategies in place to prepare for the upcoming referendum. The panel discussed how the Voice was chosen as the important first step as there needs to be in place a structure and framework through which to negotiate a treaty which can take many years of work.

President of the NSW Bar Association, Ms Gabrielle Bashir SC introduced Mr Thomas Mayor.¹⁸ In his session, Yenmalalibyila (let's walk together), Mr Mayor read from his book *Dear Son*,¹⁹ a collation of letters written by First Nations men to their fathers and sons about life, masculinity, love, culture and racism.

The Honourable Justice Sarah Pritchard²⁰ introduced Professor Megan Davis²¹ who has led the work of the Uluru Statement. Professor Davis reiterated that the Regional Dialogues leading to the Uluru Statement were Constitutional Conventions; that the Voice is concerned with empowering First Nations people and is central to self-determination.

The second half of the symposium focused on Treaty and Truth telling. Mr Tony McAvoy SC²² spoke about his work as the Northern Territory's Acting Treaty Commissioner and the Final Report he handed to the Northern Territory government in June 2022. He said that a treaty will allow First Nations people to take some control of their own destiny.

His Honour Judge Warwick Hunt²³ introduced the final session for the afternoon, a panel discussion with contributors Mr Tony McAvoy SC and Commissioner Sue-Anne Hunter, Deputy Chair of the Yoorrook Justice Commission of Victoria. The Commission was established in May 2021 as part of Victoria's process to establish an official public record based on First People's experiences of systemic injustice since the start of colonisation; to develop understanding about the impacts of colonisation and the diversity, strength and resilience of First Nations cultures; and make recommendations for healing, reform and practical changes to laws, policy and education.²⁴

Words and photograph: Kate Lumley, Manager, Publications and Communications, Judicial Commission.



Pictured (l-r) the Hon Robert French AC; Ms Gabrielle Bashir SC, the Hon Lucy McCallum, Chief Justice (ACT), the Hon Justice Dina Yehia, the Hon Justice Rachel Pepper and Mr Thomas Mayor

- 1 Gadi Nura woman and the Judicial Commission's Ngara Yura Project Officer.
- 2 See U Doyle, First Nations consensus in constitutional reform, nation building and treaty making processes" (2019) 31 *JOB* 51.
- 3 Referendum Council, accessed 8/2/2023.
- 4 Thomas Mayor, Torres Strait Islander man, author and one of the speakers at the symposium, describes the Uluru Statement as "a road map to find the heart of the nation": accessed 8/2/2023.
- 5 Supreme Court of NSW justice and chair of the Judicial Commission's Ngara Yura Program committee.
- 6 Land and Environment Court, NSW.
- 7 Former Chief Justice of Australia.
- 8 R French, "The Voice — a step forward for Australian Nationhood, accessed 8/2/2023 at [47].
- 9 *ibid* at [51].
- 10 *ibid* at [50].
- 11 *ibid* at [33]–[38].
- 12 *ibid* at [35].
- 13 M Dreyfus KC MP, "First Nations 'Exchanging Ideas' Symposium", accessed 8/2/2023.
- 14 *ibid*.
- 15 Professor of Law UNSW.
- 16 Lawyer and activist.
- 17 Chief Justice, Supreme Court of the ACT.
- 18 Custodian and signatory to the Uluru Statement and author.
- 19 Published 2021.
- 20 Land and Environment Court, NSW.
- 21 Cobble Cobble woman of the Barunggam Nation, Co-Chair of Uluru Dialogue, Pro Vice-Chancellor Society and Professor of Law UNSW.
- 22 Wangan and Jagalingou traditional owner, barrister at Frederick Jordan Chambers.
- 23 Judge of the District Court of NSW.
- 24 Yoorrook Justice Commission, Letters Patent, accessed 8/2/2023.

The Judicial Commission acknowledges the Gadigal people of the Eora Nation, the traditional custodians of the land on which the Commission is based, and pays respect to their Elders past, present and emerging.