

Professor Tom Calma AO FAA delivers 2022 Annual Goldring Lecture

27 Oct 2022

University of Wollongong Law School

Title:

“The fungibility of First Nation politicians and a Voice to Parliament – unpacking the myths and mis-information and what’s needed to get the Referendum over the line.”

Synopsis:

There has been considerable commentary that “eleven First Nation politicians” can adequately represent the hopes and aspirations of Indigenous Australians so we do not need a Voice to Parliament and consequently do not need a Referendum to enshrine a Voice mechanism in the Australian Constitution. Professor Calma will explore whether this is a fungible proposition or whether a Voice to Parliament is essential and long overdue. In so doing Professor Calma will also address the [Rights of Indigenous peoples](#) and will unpack many of the myths and mis-information that are currently being presented by the conservative media and those who support a “No campaign”.

There is much work to be done including the provision of civics education for the community to ensure that voters realise the effort needed for a successful Referendum and why every vote counts. For example, how do we mobilise our youth and young people who have never experienced a Referendum?

It is essential that all members of society are mobilised and informed and the role of the university sector and the legal sector to help guide the community to realise a successful Referendum cannot be undervalued. It is imperative that the rights, responsibilities, dignity and voices of First Nations peoples are realised and where appropriate, First Nations voices are sought, heard, explored and entrenched in laws, policies and practices by the Australian Parliament.

The Speech

Good evening and thank you Professor Trish Mundy who originally invited me to present the Jack Goldring 2022 Lecture tonight. Before I start, I thank Aunty Barb for your important Welcome to Country and I acknowledge the owners of the country on which I am speaking today; the Wodi Wodi and Dharawal peoples who have lived, loved, raised their families and cared for this country for millennia before the arrival of the British that saw the subsequent dispossession of lands, cultures and languages across the nation.

I would also like to acknowledge all youth who will be our future leaders, and the custodians of our stories, languages, histories and cultures. I emphasise youth because in the [2021 ABS census](#), 33.2% of the Aboriginal and Torres Strait Islander population was under 15 years of age.

I also recognise;

- Professor Patricia Davidson, Vice-Chancellor and President,
- Professor Colin Picker, Executive Dean, Faculty of Business and Law,
- Dr Niamh Kinchin, Acting Dean, School of Law,
- Aunty Barbara Nicholson, Elder, Dharawal Country (pronounced “*Darawal*”) and Honorary Fellow, School of Law,
- Ms Susan Kirby, life partner of Prof Goldring, and
- all of you joining us this evening in person and virtually.

It is great to see so many here today, in 3 dimensions, rather than one dimension on a screen as we’ve had to endure over the past couple of years.

On receiving the invitation to present the 2022 Goldring Lecture in March I did a bit of research to better understand Jack Goldring and I was so taken by the high degree of respect and recognition people had of Professor Goldring. Much is written about his academic and judicial career but I was taken by a succinct reference in the Sydney Morning Herald in October 2009 and I quote an extract;

“...foundation dean of law at the University of Wollongong from 1990 to 1995. He made this new law school a critical part of the region.

Goldring's sense of social justice led to new programs and policies to support equal opportunity entry into law for Indigenous students and people from disadvantaged backgrounds.”

I share similar values so I accepted the invitation and in recognising Jack’s interest in social justice and human rights and his compassion for Aboriginal and Torres Strait Islander and minority peoples, tonight I will not be addressing a topic of Law per se, but I will focus on social justice through the lens of the upcoming referendum for an Indigenous Voice to the government and Parliament of Australian. I am confident

Prof Goldring would be right behind the movement and in fact would advocate for the Voice.

I have titled and themed my presentation;

“The fungibility of First Nation politicians and a Voice to Parliament – unpacking the myths and mis-information and what’s needed to get the Referendum over the line.”

Some might be asking “what is fungibility?” Simply it is where items are interchangeable because they are identical to each other for practical purposes.

I chose fungibility in response to a Senator and conservative media commentators suggesting that having eleven Indigenous politicians in the Australian Parliament *is the Voice*, but I will argue later that Indigenous politicians and a Voice are not interchangeable.

Last Thursday I attended the NSW Council of Civil Liberties annual fundraising dinner where numerous people approached me knowing that I was presenting tonight and they encouraged me to explain how the proposed referendum complemented or differed from the Uluru Statement from the Heart as they had just heard Thomas Mayor compassionately orate the story of the Uluru Statement from the Heart. I had intended to do this as it is a common confusion so their encouragement and guidance is appreciated.

Before I start to delve into the specific of the theme I think it is important to recognise some of the [history and initiatives](#) that have led us to this point in our shared history. The call for a Voice actually started soon after the arrival of the First Fleet but I will start from the 1950’s.

In 1957 the Federal Council for the Advancement of Aborigines & Torres Strait Islanders (FCAATSI) was established independently of government. FCAATSI evolved as the major organisation promoting Indigenous interests from the 1950s. While FCAATSI played a central role in the success of the 1967 referendum, its leadership was largely non-Indigenous and this became a very contentious issue. It dissolved soon after the National Aboriginal Consultative Committee (NACC) was established in 1973.

The NACC was the first unified national Indigenous organisation that represented Indigenous views. The NACC was an advisory body made up of 41 nationally elected Aboriginal people who advised the Minister for Aboriginal Affairs on Aboriginal policy.

Following a number of reviews, in 1977 a successor body, the National Aboriginal Conference (NAC) was established however it was abolished in 1984 following the O’Donoghue and Coombs reviews. The NAC had an advisory function that the report by Lowitja O’Donoghue concluded;

- produced “politicians” rather than advisors,
- had not adequately represented the diversity of Indigenous interests, and
- had not realised coherent policy positions.

Further, the body was unable to work with other Indigenous organisations or government departments.

The report recommended that a more regionalised organisation be created to give greater voice to the broader Indigenous constituency. This was backed by a separate report by Nugget Coombs in 1984 that again recommended greater regional representation.

In 1988 a Senate Select Committee investigated the proposed *Aboriginal and Torres Strait Islander Bill* and suggests over 40 amendments most of which are incorporated. Subsequently over 90 amendments were made to the Bill during its passage through parliament.

This led in 1989 to the “legislation” establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) on the principle that the new organisation should be built around regional mechanisms.

Between 1993 and 2003 a number of internal and external initiated reviews of ATSIC were conducted culminating in the abolishing of ATSIC in 2004.

The government then established the National Indigenous Council (NIC) with 14 members appointed by government as experts, with a purely advisory function. They had no representative role.

In 2007 Labor shadow Minister Macklin announces at the 44th Australian Labor Party National Conference the intention to establish a new National Indigenous Representative body.

Following the election of the Rudd Government, Minister Macklin decides not to reappoint NIC members and on expiry of their term, the NIC was abolished.

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.

Incidentally, I delivered the [formal response on behalf of the Stolen Generations](#) peak bodies to the PM’s Apology.

In March 2008, the Labor Government and federal Opposition signs 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 inequities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non- Indigenous Australians by 2030.

- ensure the full participation of Aboriginal and Torres Strait Islander peoples 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.

At the time I stated that these are welcome commitments and ‘first steps’ to a new partnership in Indigenous affairs.

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 of the issues paper stated that:

“Barely a day goes by without another chilling and heartbreaking story of abuse, violence or neglect; or of demonstrations of the impact of entrenched poverty and despair among our communities.

Without proper engagement with Aboriginal and Torres Strait Islander peoples, (Indigenous peoples) governments will struggle in their efforts to make lasting progress in improving the conditions of Indigenous people and in our communities.”

That same month in the *Budget 2008-09: Ministerial Statement on Closing the gap between Indigenous and non-Indigenous Australians* The Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs 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.

A generation of Aboriginal and Torres Strait Islander children — Australian children — is at stake. Time is fast running out. This fact is acknowledged by Indigenous elders and leaders, as well as by government...

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 people at all levels. Government needs to involve Indigenous people 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 discussions with Indigenous people about the role, status and composition of this body.

In August 2008 the Australian Government allocates funds for commencement of consultations with Indigenous peoples on the establishment of a new National Indigenous Representative Body.

As the Aboriginal and Torres Strait Islander Social Justice Commissioner I was appointed to lead the consultations.

To cut a long story short, following extensive consultations and deliberative dialogues the [National Congress of Australia's First Peoples \(NCAFP\)](#) 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 NCAFP to go into voluntary administration in June 2019.

So my friends you can see that there has been a checkered history of Aboriginal and Torres Strait Islander peoples' attempts to establish a 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 have 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 regular reviews of their structures and operations. So, we are now on the cusp of substantial and substantive change in a political and community environment that is conducive to consider and support such change.

So, let's explore where we are at and address the theme of today;

"The fungibility of First Nation politicians and a Voice to Parliament – unpacking the myths and mis-information and what's needed to get the Referendum over the line."

Professor Marcia Langton and I with the support of the National Indigenous Affairs Agency (NIAA) have been analysing print and electronic media commentary, including Facebook and Twitter, since 2019 when we were appointed to Co-Chair the Senior Advisory Group to lead the [co-design of an Aboriginal and Torres Strait Islander Voice to Government](#). I was tempted to, but I will not, go into the details or the process or the findings of the final report suffice to say that the recommendations of our final report have been accepted by the previous and current governments with the latter confirming that it will form the foundation of the Voice to Parliament to be established post a successful Referendum. Further, a significant number of the

findings are picked up in the following commentary that addresses the myths and mis-information currently in circulation.

To address some of the myths and mis-information currently in circulation I will pose the question or state the claims and respond accordingly:

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 Government. It will not address Treaty or Truth.

Why do we need to have this Referendum?

The Referendum is a chance for our First Nations peoples to be recognised in the Constitution and enshrining an Aboriginal and Torres Strait Islander Voice gives strength and status to the principles of respect and partnership.

We need a Voice so that future Governments will make better policies that will make a practical difference to First Nations people.

The Voice will mean that First Nations people will be advising Government 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 people know what Government needs 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.

How would the Constitution change?

The Voice would be a representative advisory body, enshrined in the Constitution.

As a starting point, the Prime Minister has put forward the [following draft words](#) to be included in the Constitution:

There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.

The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples.

The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.

It would be a voice **to** Parliament and Government, **not in** Parliament.

The composition, role and membership selection of the Aboriginal and Torres Strait Islander Voice would be legislated by Parliament.

What are the Referendum Working Group and Referendum Engagement Group?

The first meetings of the First Nations [Referendum Working Group and the Referendum Engagement Group](#) were held in Canberra in September.

The Referendum Working Group is made up of more than 20 First Nations leaders who will advise Government on how best to deliver a successful referendum to enshrine an Aboriginal and Torres Strait Islander Voice in the Constitution.

It is co-chaired by the Minister for Indigenous Australians, Linda Burney MP, and Special Envoy for Reconciliation and the Implementation of the Uluru Statement from the Heart, Senator Patrick Dodson.

The Referendum Working Group is providing advice to the Government on matters including:

- The timing to conduct a successful referendum;
- Refining the proposed constitutional amendment and referendum question; and
- The information on the Voice that is necessary for a successful referendum

On 29 September 2022, the First Nations Referendum Working Group discussed [common principles for the Voice](#) drawn from the work already done to define the Voice.

Those principles identify the Voice as a body that:

- Provides independent advice to the Parliament and Government.
- Is chosen by First Nations people based on the wishes of local communities.
- Is representative of Aboriginal and Torres Strait Islander communities.
- Is empowering, community led, inclusive, respectful, culturally informed and gender balanced, and includes youth.
- Is accountable and transparent, and
- Works alongside existing organisations and traditional structures.

The Voice will **not** have a program delivery function, administer program funds or have a veto power.

The other group working on this is the Referendum Engagement Group that is made up of more than 60 First Nations leaders and representatives of key organisations from across Australia.

The Referendum Engagement Group is working with the Government and other key stakeholders towards a successful referendum for an Aboriginal and Torres Strait Islander Voice enshrined in the Australian Constitution.

An important part of the Referendum Engagement Group's role is to engage with First Nations communities and the broader community to build understanding, awareness and support for the referendum.

The Referendum Engagement Group will also advise on how Government can respond to issues being raised by First Nations communities about the referendum.

So what are people saying about the Voice?

Research from a number of sources shows a majority of Australians support the Voice.

Fundamentally, the Voice is a reform I believe all Australians can embrace, from all walks of life, in every part of the country, from every faith and background and tradition because the Voice speaks to values that we all share and honour – fairness, respect, decency.

However, there is already some misinformation circulating in the community which will need to be countered effectively to ensure Australians can make an informed decision.

*As indicated earlier pundits are suggesting that **The Voice is not needed as there are eleven (11) First Nations representatives in Parliament***

Parliamentarians are elected to represent all of their constituents and parties – not just First Nations people, 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 state or Electorate.

Also, First Nations Parliamentarians are an instrument of political parties with positions on a broad range of issues impacting Australians – their views may be impacted by the party, not solely by First Nations peoples.

Uluru Statement leader Roy Ah See said: “we don't want a green voice, we don't want a red voice, we don't want a blue voice: we want a black voice.”

First Nations Parliamentarians cannot, nor should they be expected to, represent all Aboriginal and Torres Strait voices in Australia.

While there are currently eleven (11) First Nations representatives to Parliament, there is no guarantee this will remain the same in the next term of Parliament.

Permanent change that is not party politically driven is needed to deliver better outcomes for Aboriginal and Torres Strait Islander people.

*You will all remember the original claim, that is still being promoted by opponents, that **The Voice will operate like a third chamber of Parliament.***

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 power 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.

There are a vast array of advisory bodies to the Government and the Parliament covering all sorts of issues. They include:

- the Auditor-General,
- the Australian National Audit Office,
- the Australian Law Reform Commission,
- the Australian Human Rights Commission, and
- the Commonwealth Ombudsman, whose reports are tabled in Parliament.

This is just democracy at work.

Social media and some Indigenous commentators claim that Not all Indigenous people support the Voice

This is true as there are a wide range of views among First Nations people. Just like any group of Australians, Aboriginal and Torres Strait Islander Australians are diverse and don't all think the same way.

However, the Voice proposal is the 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.

I am confident there is overwhelming support within First Nations communities, which will only continue to grow.

There isn't enough detail about what it would look like (its like signing a blank cheque)

There have been numerous reports on constitutional recognition and the Voice model, most recently on the model Professors Langton and I put forward in [the Indigenous Voice Co-design Final Report in 2021](#).

Details relating to the Voice are being further discussed with Aboriginal and Torres Strait Islander people through the First Nation's engagement processes established by Minister Burney and a civics education and information dissemination campaign will commence soon with the whole population.

More [information on the Voice](#) will be available prior to the Referendum.

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

What Australians are being asked to vote on *is the principle of whether there should be a Voice*. It will be for the Parliament and future Parliaments to determine the detail of how this works, through the normal legislative processes.

Others claim It won't achieve practical outcomes

The Voice is not just symbolic. It is a structural change that will deliver a permanent advisory body on issues affecting First Nations people.

The Voice is all about advising on how best to improve practical outcomes on the ground, and delivering better outcomes. It is a practical change that will empower First Nations people to advocate for the solutions that they know are effective. Work on the Voice does not come at the expense of expanding economic opportunity or improving community safety or lifting education standards or helping people get the health care they deserve or find the housing they need.

A Voice is underpinned by principles of First Nations empowerment and self-determination – it will enable First Nations people to have a say on laws, policies and programs affecting their day-to-day lives; driving change to close the gap.

Australia does not have to choose between improving peoples' lives and amending the Constitution. We can do both.

No one can deny that real change is needed to close the significant gaps for First Nations people. The Voice is the change that is needed.

It is important for us to support ways for First Nations people to have a say on what matters most to them - including practical action to Close the Gap.

Another claim is that It would divide us by race / it would give First Nations people more rights than others

This is not about race politics or dividing Australians. It is about uniting Australia and making our nation stronger.

The Voice is [not about a special right](#) – it is 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 laws, policies and programs that affect First Nations people.

A Voice would recognise Australia's First Nations people have been on this continent for over 65,000 years.

Australia's First Nations people are a small percentage of the population, just under 4%, dispersed through the country. This has consequences for whether the system of democracy and government enables them to participate in a fair way.

The scope of the Voice is too broad

Ensuring First Nations people have a say in the laws and policies that affect them is the right and fair thing to do and it will deliver more effective outcomes – better targeting government spending.

The Voice will be able to decide the matters that are most important to First Nations people, and where it is best placed to make constructive representations.

Parliament will be responsible for making laws with respect to the composition, functions, powers and procedures of the Voice.

The suggestion to limit the Voice to issues that distinctively concern Aboriginal and Torres Strait Islander people or 'special laws' within the meaning of [s 51\(xxvi\)](#) (the 'races power') would not capture the range of legislative and administrative actions that affect Aboriginal and Torres Strait Islander people.

There might be future unknown legal implications

The constitutional amendment will be carefully scrutinised by Australia's most senior constitutional law experts and advisors to ensure it is legally sound.

Any form of Constitutional recognition will be open to legal interpretation through our normal and well-established judicial systems and processes.

The draft amendment is very clear that this is an advisory body.

We don't need to change the Constitution for this – just set up an advisory body

As I opened tonight, First Nations people have had legislated 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 more than 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 people.

It is important to recognise Australia's First Nations people 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 people are heard has been determined by the whim of ever-changing governments. An enshrined Voice will be a permanent means to partner and advise the Australian Parliament and Government on the views of First Nations people on matters that are important to them.

A Voice is both symbolic and pragmatic. It is symbolic as it includes all of our First Nations in the founding document of our country. It addresses the injustice of their past exclusion, and provides healing for the future.

It is also pragmatic as there is currently no systematic process for First Nations people to provide advice to the Australian Parliament or Government, meaning that policy is often made **for** First Nations people rather than **with** them/ us.

There is much more that I could say but my time is up. I have endeavoured to demonstrate that Aboriginal and Torres Strait Islander peoples have for over 65 years attempted to have a Voice that could guide government and the parliament 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 to close the gaps but not at a pace experienced by other Australian.

I have also endeavoured to shine a light on the way forward and how all of the voting population needs to become informed of the facts and not be swayed by the myths and mis-information that are being promoted by pundits who are ill-informed or have malicious intent.

Universities have a role to play and it can be diverse and should be both inward facing and outward facing. Universities Australia is working with the University Chancellors Council to develop strategies to provide guidance.

It is also very important to understand that the Referendum will only be about a Voice to Parliament.

Let me close with a quote that captures the spirit on why Aboriginal and Torres Strait Islander peoples need a Voice through a successful referendum.

I quote Vice Chancellor Professor Davidson, who earlier this year said the [University was honoured to support the Uluru Statement from the Heart](#) and was committed to the change needed to ensure an equitable and fair society for all.

“The rights of our First Nations people as a whole, as well as the staff and students here at UOW, are absolute and indelible. The Uluru Statement is a necessary step to ensuring we move forward as a nation and that First Nations people finally receive the Voice to Parliament and the Voice in the Australian Constitution that they need and so richly deserve.”

Thank you.