

**No Winners, No Losers – Just Truth, Justice and Mercy.
Professor Kerry Arabena.**

Good Morning ladies and gentlemen, distinguished guests, fellow speakers. Thank you for coming to this conference and keeping the practice and the spirit of public conversations alive and well. As is our custom, I would like to respectfully acknowledge the traditional owners of the country on which we speak today, and extend the same respect to all of your families and our collective ancestors.

It is these kinds of gatherings that invoke in all of us the right and the responsibility of upholding the foundational principles of democracy. The man after which this Centre is named, Ron Castan, responded to this democratic invocation. Ruthless in his execution of decisions on behalf of justice, and armed with a moral compass that never swayed in the long litigious battle to win land rights recognition in Australia; Ron Castan with Eddie Mabo and other Merriam to whom I am related, held firm in the belief that all men are born equal, and different. This belief, and the challenge of terra nullius that ensued, not only changed the landscape of Australia, but the history of the world forever.

Great things happen when the populous is moved to do something great, to change the course of history, to hold true to the principles of democracy and recognise both equality and diversity. Hence I was humbled to be asked here today but grateful for the opportunity to discuss in the next 30 minutes or so, the importance of doing something great – changing the constitution of Australia to both further the

outcomes achieved for Indigenous Australians in 1967 and to finally recognise in that our country is made up of old and new Australians.

I have titled the speech *No Winners, No Losers: Just Truth, Justice and Mercy*. Whilst we all can and should do something great, I have a growing disquiet that asking, then expecting the majority of Australians to vote Yes in a referendum to include our First Peoples in the body of the Constitution and removing the clause that allows discrimination based on race in the next 3-5 years or so, will fail. A failure in this arena would confuse a lot of Australians about our nations values and about how serious it was in getting rid of racial discrimination to create a level playing field. I also believe there would be a negative impact on Aboriginal and Torres Strait Islander peoples – and for all Australians – for at least a generation.

[SLIDE] I want to explore together three key issues in this speech. The first is to **review the current discourses framing Aboriginal and Torres Strait Islander people and the responses to the reform process.** The second issue will be to **identify a campaign in which every person is precious** and understanding this preciousness, engage in genuine dialogue with other Australians, old and new, about our collective position and place in this nation. Finally I would like to **provide an alternative discourse than that which is currently popularised** and what each of our roles in it could be.

[SLIDE] Now is the time to speak of these things. All over Australia, Aboriginal and Torres Strait Islander peoples and communities are taking

charge of our own lives. We have more resources, better education, technological advancements; we have a depth and diversity of experience with which to enrich national life and identity.

If these things offer hope, so does the fact that Australians are now better informed of our cultures and achievements; better informed of the injustice that has been done, and better informed of our dreams and aspirations than any generation before. All of the leadership are future focused. In our own way, we believe deeply that we all want to move in the same direction – toward a better future for our children and grandchildren.

[SLIDE] So, what does our leadership say about Constitutional Reform?

Leadership in the National Congress of Australia's First Peoples and in the Australian Human Rights Commission have consulted our communities and found widespread support for Constitutional reform¹. There are two points that are consistently important to First Peoples. First, First Peoples state that it is important to reconstruct our national identity to include the oldest living culture in the world. Second, First Peoples state that it is important to remove provisions within the body of the Constitution that permit, enable or anticipate racial discrimination are important points of reform. If these two options are considered in an upcoming referendum then Aboriginal and Torres Strait Islander leaders believe there are opportunities to improve the status and lives of

¹ National Congress Media Statement 19 January 2012 <http://nationalcongress.com.au/australians-must-support-constitutional-reform/> accessed 13 July 2012.

Aboriginal and Torres Strait Islander peoples². Addressing the history of exclusion of our people in the life of our nation; increasing self worth as citizens within Australia and entrenching the protection of human rights for all Australians within the Constitution, it is believed, will build a human rights foundation upon which to build a reconciled nation³.

Other leaders have sought to define the reforms as a test of national maturity. Maturity would call for preparedness on part of all Australians to recognise the violence and disruption to the lives and cultures of Aboriginal and Torres Strait Islander peoples⁴. This would mean understanding the history of nationhood, the experiences of colonisation, and as a nation, to seek to redress this violence through an act of constitutional reform. This would make it possible to move on to our shared future as citizens of one, united Australia in which our futures are inescapably intertwined and we are, at a fundamental level, one people.

Megan Davis, an advocate and lawyer has spoken of the need to focus the attention of the nation to the fact that Constitutional reform will complete the unfinished business between Indigenous peoples and the State and address the most urgent and immediate priority in Australia – the disadvantage experienced by Aboriginal and Torres Strait Islander peoples⁵. Reform, she says, will come about as a result from engaging Australians who have low levels of civic knowledge in an education

² Human Rights and Equal Opportunity Commission (2011) Constitutional Reform: Creating a Nation for all of us. Aboriginal and Torres Strait Islander Social Justice Commissioner. Accessed 15 July 2012.
http://www.hreoc.gov.au/constitution/reform/constitutional_reform2011.pdf

³ ibid

⁴ <http://www.theage.com.au/national/dodson-defends-racism-law-plan-20120130-1qptb.html>

⁵ Davis, M. (2008) Indigenous Rights and The Constitution: Making the Case for Constitutional Reform [For Educational Purposes Only] Indigenous Law Centre. Accessed 13 July 2012.
<http://www.youmeunity.org.au/downloads/59e49578713aa81c2a59.pdf>

program encouraging them to vote yes. This requires a historic change, Australians have shown in many referendums, that if they don't know, they vote no⁶.

[SLIDE] There is a current conversation among our people on the issue of sovereignty. Some believe that sovereignty is the most important end game in nation building. The establishment of tent embassies all over the country optimises this. Countrymen and women who occupy these tent embassies have a strong message that we should not participate in Constitutional reform; indeed, to participate in Constitutional reform undermines our sovereignty. There are many advocates in our communities who advocate that constitutional reform also holds up sovereign rights⁷ supported by the findings from the Expert Panel who went to great lengths to give advocates confidence that sovereignty could be dealt with through this process⁸. The Sovereignty movement is based on the fact that Aboriginal and Torres Strait Islander people did not sign agreements, did not hand over country, did not extinguish native title and are occupied people living in an occupied country. The leaders of this movement assert the right to sovereignty and desire the opportunity to be recognised through a treaty process premised on equality⁹.

⁶ *ibid.*

⁷ <http://nationalcongress.com.au/wp-content/uploads/2012/01/Congress-Key-Issues-Constitutional-Change.pdf>

⁸ Expert Panel (2012) 'The Question of Sovereignty' in *Recognising Aboriginal and Torres Strait Islander People in the Constitution* <http://www.scribd.com/doc/78708745/Final-report-from-the-expert-panel-on-Constitutional-recognition-of-Indigenous-Australians> pp 205 - 217.

⁹ Anderson, M. 23 June 2012. <http://nationalunitygovernment.org/content/sovereign-treaty-only-constitutional-reform-potential-justice-aboriginal-nations-and-peoples> Accessed 14 July 2012.

Four Dominant Discourses Framing Constitutional Reform.

[SLIDE] As I said, in this first part of the speech I want to review the current discourses framing Aboriginal and Torres Strait Islander people and the responses to the reform process from within our communities. So far, among Aboriginal and Torres Strait Islander leaders there appear to be **four dominant discourses** governing the Constitutional reform.

The first is a **human rights discourse** that posits Indigenous recognition in the Constitution as an opportunity and a human rights entitlement through which there can be a strengthening of the UN Declarations on the Rights of Indigenous peoples in our domestic affairs and a true recognition of equality under the law. The second discourse is on **advancing reconciliation** and currently there seems to be two schools of thought on ways of doing this. The first is to deal with recognition of the title 'First Peoples' in the preamble and offer nothing more. The second way is to include First Peoples in the body of the Constitution to show that we are all citizens in a reconciled, unified nation, we are all equal and our future as citizens of this nation is intertwined. The third discourse is about **achieving national maturity** in which our nationhood recognises our shared history, demonstrates a preparedness to recognise the equality and diversity of its members and all citizens can participate in a deeper appreciation of each other. The fourth discourse, mainly among our own people is the issue of **sovereignty** which recognises that this country was never ceded, self determination in the context of 'country' is the oldest democratic entitlement and these rights cannot be incorporated into a nation state.

What is interesting to me is that these four discourses mirror those found by my dear friend Dr. Rosemary Aldrich who examined speeches and documents delivered by Federal politicians since 1972 and found two things: firstly, that four key ideas about Aboriginal and Torres Strait Islander people pervade official conversations¹⁰. **[SLIDE]** These four ideas concern frames of control and responsibility; capacity and competence; the nature of the problem; and Aboriginal and Torres Strait Islander people as 'not us' or 'the other'.

Secondly, Dr Aldrich found that policies enacted by these Federal politicians - after all enacting policies is what politicians are elected to do - have been consistent with these four key ideas. If language used in the policy environment represents Aboriginal and Torres Strait Islander people as not competent, irresponsible, the source or cause of the problem and 'not us' then it is no wonder that policy emerging from that environment entrenched a limited view of Aboriginal and Torres Strait Islander people¹¹. It is my view that all the current paradigms that govern our way forward in the discussion about Constitutional reform arise from within and in response to these same four discourses. No winners and no losers here people. Just the same old, same old.

What would a new Discourse need to achieve?

[SLIDE] If we as a nation put aside the indigenous question in relation to Constitutional reform, what is the current, compelling case for changing the national Constitution? It is the clause that allows for racial

¹⁰ R Aldrich, A Zwi, S Short 2007: "Advance Australia Fair: Social democratic and conservative politicians' discourses concerning Aboriginal and Torres Strait Islander Peoples and their health 1972-2001". *Social Science and Medicine* 64:125-137

¹¹ R Aldrich 2007 The Language of an Intervention *New Matilda* Issue 162 (2 October): Ibid.

discrimination. The clause that fails to recognise that Australia is one of the most culturally diverse places on Earth, and to a large extent this cultural diversity has been achieved peacefully. In the words of Noel Pearson in reference to whether the Constitution has worked for Aboriginal and Torres Strait Islander peoples, "... it (the Constitution) is broke and has been broken since 1901.¹²"

Therefore it is strategic on our part, not to talk about compromise where some Australians will win and other Australians will lose. We need to come up with a proposal that is a win for all Australians, and the space for Australians to become engaged not with the 'Indigenous issue', but all of us together, across cultures seek to remove racial discrimination in the founding document of our nation. In this way, we have to be unified within our communities, and with other communities across Australia. We will need to have discussions together about how to ensure equal citizenship rights, what Australians both expect and take for granted, are made available for Indigenous Australians. Equality is quite simply everybody's business.

What we need are compelling narratives that will shift the "she'll be right mate," "If it ain't broke, don't fix it".

If we choose as a nation to continue with the view that state '*...that Aboriginal and Torres Strait Islander people have deficits that can be fixed as a result of being included in the Constitution...*', that we are '*...disadvantaged but we will overcome our disadvantage when room is*

¹² Pearson, N. (2011) A fair place in our own country: Indigenous Australians, Land Rights and the Australian Economy. <http://www.law.monash.edu.au/castancentre/public-edu/pearson-paper.html>

made for us in the nation state...'; then we will not get the necessary reform to occur. This is because these kinds of views have already been responded to in very public, political, policy and programmatic ways.

[SLIDE] There are already public responses to our disadvantage, our need to heal and our need to be represented...

For example: We might make an argument that Constitutional reform will deliver a future together in this nation, but in the public sphere we already have the 'Stronger Futures' legislation. We might advocate that recognising First Peoples in the Constitution will produce equality when there is a view that the referendum in 1967, already saw this achieved.

We could say to the Australian public that a yes vote in a referendum to reform the Constitution will uphold our human rights, in an era when a significant proportion of a commercial radio listeners do not believe in an international human rights framework let alone know about or support the UN Declaration on the Rights of Indigenous Peoples. We could say the Constitution will see us healed, however, we now have a national healing foundation. We seek to be represented in the founding document of this country when we have established the National Congress of Australia's First Peoples, an organisation representative of Aboriginal and Torres Strait Islander members.

[SLIDE] If we continue to argue that Constitutional reform will assist us 'overcome our disadvantage', we already have billions of dollars through

the Council of Australian Governments to 'Close the Gap' and redress disadvantage. If we make an argument that Constitutional reform is a necessary platform for sovereignty, well we now have tent embassies all over the country and recognition through the 40th Anniversary of the Tent Embassy in Canberra. If we talk about country, then in the public's view we already have land rights and an increasing knowledge that 20% of the country is designated Aboriginal land.

We talk of Constitutional reform promoting Unity within the nation at the same time as we have a leadership publicly discussing the need to address the issue of lateral violence in our own un-unified communities; we talk about how Constitutional reform will help us get and keep work while we have Generation 1 advertisements that still resonate with the Australian population and finally if we ask for acceptance and understanding well, the Australian populous, with low civic knowledge might say that this call for understanding is already in the public domain through organisations like Reconciliation Australia. It could appear to those with limited civic knowledge that we are asking for more, above and beyond what is already on offer and turn them off a 'Yes' vote.

What we need to design is a set of messages outside of the 4 discourses that have framed the political, public policy and programmatic options for First Peoples, into discourses that are more readily acceptable to the diversity of people that now call Australia home.

[SLIDE] And so, to the second point I wanted to discuss here today – the need for a program of education about the preciousness of all individuals.

Whichever education program we designed to engage people in the Constitutional reform agenda by increasing civic knowledge about why First Peoples need to be recognised in the Constitution, we should at all times promote that we, the First Peoples of Australia are inestimably precious people to each other, to other cultures and the world.

We need to appeal to the common humanity of our fellow Australians, listen to and respond from the depth of our inner experience, we need to invoke a deep respect for individual preciousness – for I have to believe that among humans, love is often the first and the most appropriate response to the preciousness of others. We need discourses that try to find a point of intuitive satisfaction and equilibrium in all cultures – not by attempting to identify moral principles that we might agree or commit to, rather, we should take the point that some conclusions are just not acceptable, they violate a consensus as to what can even be contemplated as possibly true.

It should be a violation to the consensus view that any race of people can be denigrated or controlled in any way by implementing the powers in a clause in the Constitution. We need to speak to the commonplace truth inherent in all cultures in Australia; otherwise an argument of ‘recognition of First Peoples’ can gain no imaginative grip on its audience.

If we want to invoke in the Australian populous a consensus view that that Aboriginal and Torres Strait Islander people should be recognisable in the Constitution; then we need to name the end game and embody all the ideas available to us, to call this end game into being. And for me, the end game has to be about peace. We as Australians need to embody the ideals of peace, and commit to the journey to get there. We need to engage in genuine dialogue with other Australians, old and new, about our collective position and place in this nation. Understanding the preciousness of any life, hearing and listening to the truth, being accountable through justice and practicing mercy may be what is required in order to reach the end game. Aboriginal and Torres Strait Islander peoples through this campaign will have to make a case for peace. This is a deeply challenging component of our campaign.

Make no mistake. Truth has some unbearable elements, though without it we cannot find peace. And the truth, in its fullness has to be told, heard and respected. As in South Africa, and in other places and in times of conflict, when the truth is found, it sets people free. There is only one truth of the birth of this nation. It is experienced differently. The truth resides in all of us, truth is not ours to own. The truth can only come when the search for truth is genuine and authentic, when each person shares with others what they know of truth.

There have been many attempts at having a dialogue about the truth. Those who have been able to stay in this dialogue have then sought the next step on the journey to peace, which is to embody justice. To take up the task of justice is to make sure that something is done to restore

the damage that has been done, restore relationships and be concerned with accountability. That is to realise the preciousness of Aboriginal and Torres Strait Islander people, and of other cultures, make an effort to restore relationships, and be accountable to the principle of equality in diversity. We are diverse peoples, from diverse cultures, we are different and we are equal. Any instrument that undermines that equality needs to be eradicated, lest it degrades and humiliates us all. Love with accountability is changed behaviour and action. This is the real meaning of restoration. The purpose of justice then, is to bring loving action and accountability to the words: my Fellow Australians.

Then, it will be acts of mercy that will create for us the new beginning, a healed relationship between Australians and the First Peoples; a fully reconciled and unified nation. To be merciful on the road to peace, is to know the frailty of the human condition and because of this, stand beside each other with acceptance, compassion and support. Acts of mercy are reciprocal acts of peacemaking in which forgiveness is possible. The combination of truth, justice and mercy will see us on the road to reconciliation which is only possible to the degree that each person sees the place and need for each other.

[SLIDE] Reliance on the law is not sufficient to reform the Constitution – we need a campaign that promotes all Australians living their lives free from discrimination, achieving respect and realise their aspirations founded in citizenship principles of recognition, security and certainty, and a stake in the country. A campaign toward peace is one in which we empower each other through acts of truth, justice and mercy. The

campaigns that endure are those in which each voice and the social energy it produces are incomplete without the other. And so, into dialogue we must go.

This is not a campaign in the media, this is a person-to-person campaign and it needs time to grow, evolve, startle, educate and revolutionise a system intent on stifling creativity, individuality and imagination.

At this juncture, action and authentic engagement with life is required of all of us, our sense of who we are and sense making of who we are together has to be justified through action (bringing up children, morality, professional traits and engagement with culture) as only through action does life gain a proper direction and become filled with intentions and sense imparting projects.

So what is a sense-imparting project that can build support for a 'Yes' vote in a Referendum?

Nation Building seems to be a project through which Australians can re-evaluate their views and gain insight into themselves. Creating these personal connections- through friendship or cooperation – is one of the goals of human life. We do not live life only on the surface, lightly. No human can be excused from taking part in life. We are here, and we are now and it is our nation to build and our story to make.

So, upon reflection, what would Ron Castan QC AM say was required of us, at this juncture of our nation-story building? What would he suggest would get a successful referendum in which Australia's Constitution is

changed? This is worth reflecting on because there he was a deft advocate who achieved so much for the cause of human dignity and equality. Ron Castan QC AM was an unreserved believer in the need for and entitlement of indigenous Australians to share in the wealth of our own country. Not only was he was a great champion and fighter for Aboriginal and Torres Strait Islander people's rights, but he understood the material needs of people stuck in poverty and disadvantage.

In this context then, nation building and the resultant story would need to incorporate our leadership and influence. The consequent public discourses on nation building, take on quite different connotations. Which brings me to the third and final component of my talk.

I want to provide an alternative discourse than that which is currently popularised and discuss what each of our roles in it could be.

First Peoples are not afraid of diversity or a divergence of views, we are capable of accepting and nurturing a diversity of views, each equal to another. We now have national agencies capable of harnessing the collective views of peoples, and have framed national discourses that are traditional and innovative, collaborative, entrepreneurial and visionary.

We are Australia's original innovators and inventors – this is a tradition we continue still. These notions can be germane to a discourse that will see Constitutional reform achieved as a necessary component of the

nation building enterprise. **[SLIDE]** Leadership from within my communities needs to contribute to something bigger than the sum of our individual ambition, and be greater than all the differences of birth, community or faction. And whilst our effort should be to engage with and direct resources to people in poverty, we do have cause for celebration.

Among our number are professors, lawyers, barristers, judges, teachers, health workers, doctors, nurses, academics, politicians, dancers, athletes, public servants, people who are trained in governance, business, entrepreneurial thinkers and actors. We have people in decision-making and powerful positions. We have Chief Executives, Chairmen and women, we have Marine Biologists, Social Scientists, Rangers, researchers, we have people working in corrections, youth agencies as lecturers, representing us locally, nationally and internationally. We have done our teething in health, education, academia, natural resource management, in regional autonomy, leadership development, organizational management, youth empowerment, media marketing and public policy, land purchasing, business development, economic development, human rights and political strategy. We must also celebrate those that kept their children and families alive and despite great challenges in their lives helped them thrive. Some of us have been working in our affairs now for at least 20 years and are in positions to mentor others. We are and will be at the forefront of the nation building exercise.

There are many instances where Aboriginal and Islander people very

successfully embrace new technology and often take the lead in innovative policy and practice. Aboriginal medical services have pioneered some of the most innovative methods of delivering primary health care in the world, and were at the table in 1978 when the Alma Ata declaration was made. In the NT it has been AMSANT that has been one of the most vocal advocates for the introduction of e-health and this innovation will benefit all Territorians; mobile telephony has been embraced by Aboriginal people across the country, old and young from the streets of Redfern to the back blocks of Cape York; Mobile messaging is even now being introduced as an essential health promotion tool by small Aboriginal and Islander organisations in FNQ; adoption of sustainable water use energy; the research currently underway examining possible Aboriginal burning practices being used as carbon mitigation put Aboriginal and Torres Strait Islander people at the forefront of innovative thinking and design in Australia. In businesses we now have young Aboriginal men and women working in private enterprise managing their own companies that turn over millions of dollars of products and services every year. Not only can we help build the nation, but we can also contribute to the wealth and prosperity that Australia prides itself on, creating employment, using national and international partners, harnessing the opportunities and creating the capacity of many others in Australia and the world. We have not had 8 Australians of the Year for no reason.

This innovation makes us leaders in our own fields and recognizable achievers and contributors to society at large. Our way forward into Australian society will come about from our own actions, and a change

in the way we use discourses to frame our contribution. In this the final part of this speech, I want to share some signposts that mark the journey toward a dialogue so needed to reconcile this country, one in which we take responsibility to contribute, and invite the contribution of others. This dialogue then mitigates against any group of people being the 'acceptable loss' for the greater good. Evoking excellence in our society therefore requires a deep appreciation of the necessity for diverse thinking, and of competence in co-creating a society that is safe and accepting on the one hand and honest and challenging on the other.

[SLIDE] From these dialogues might come new discourses that are drawn to peace that do much much more than structure us as simply disadvantaged and allows us to each have our own individual life pattern and responsibilities and choose the way in which we contribute to Australian society as collectives, in ways that are richly diverse. We cannot doubt that we have been given the intellectual vision, the spiritual insight and even the physical resources we need for transitioning our mindsets, and our language and our views of each other, and who we can be together, that is demanded in these times. In the end, then, what is called for is nothing more, and nothing less, than what all the world's great religions demand - that we do unto others as we would have them do unto us. Let us be our brother's keeper, Let us be our sister's keeper. Let us find that common stake we all have in one another, and let our politics reflect that spirit as well.

For we have a choice in this country.

It is not enough to give health care to the sick, or jobs to the jobless, or

education to our children. But it is where we start. **[SLIDE]** It is where our union grows stronger, that is where the perfection begins. When we greet each other as equals, when we are celebrated for the what we all do to enrich the nation, then we invest in a future for our children on terms that are celebrated in the foundational document of this country. One in which Aboriginal and Torres Strait Islanders are recognised as the Indigenous peoples, and a document that celebrates equality and despises discrimination. This is how we build a nation, 24 000 000 stories and counting.

Regardless of what combination of policies and proposals get us to this goal, we must reach it. We must act. And we must act boldly. We no longer have an excuse for caution. Leaders no longer have a reason to be timid. And Australia can no longer afford inaction. That's not who we are - and that's not the story of our nation's improbable progress.

Never forget that we have it within our power to shape history in this country. It is required of all of us here today to be mindful of how our own language either reproduces the dominant tired anti-vision discourses, or engages with the new paradigms of Aboriginal and Torres Strait Islander leadership, community and identity. It is not in the character of many First Peoples to sit idly by as a victim of fate or circumstance, and neither should it be any of ours in this room. For we are a people of action and innovation, forever pushing the boundaries of what's possible. Changing the Constitution is possible. Making us all equal is possible. We here, together, today.