Change and Maturation

Tony McAvoy SC reflects on his own career at the Bar, and the opportunity presented by the Voice Referendum

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David Townsend (DT): What was your path to the Bar? What motivated you to become a lawyer, and to become a barrister specifically?

Tony McAvoy SC (TM): I fell into the legal profession accidentally. I went into the Aboriginal Legal Service in Brisbane for some work over the summer when I finished high school, prior to starting an arts degree, and was offered articles of clerkship and changed my university preferences to study law. It took me some time to find my place at university, but eventually, as I matured a bit, I figured it out and got through my degree, studying part-time. I worked as a solicitor for a number of years and did some overseas travel before coming to Sydney to work in a policy position in the Department of Aboriginal Affairs.

It was the advocacy side of the law that interested me, but also the ability to bring matters to some conclusion and have some finality. Many of the matters which I was working on in the Department of Aboriginal Affairs were matters which were handed to me when I arrived and I handed on to the next person when I left – very longstanding, difficult policy issues. One of them was the reform of the *National Parks and Wildlife Act 1974* (NSW) to remove Aboriginal cultural heritage management from legislation dealing with flora and fauna. We tried incredibly hard, we got as far as a green paper, but that was spiked. It still hasn't been removed: we're still managed under flora and fauna.

Also, before coming to the Bar, I had the benefit of attending the Full Federal Court and seeing John Basten QC (as his Honour then was) arguing a matter. I remember the matter: it was *Anderson v Wilson* (2000) 97 FCR 453. I was incredibly impressed by his capacity to turn a judge or two, who appeared to be against him, around on issues with excellent advocacy. That was one of the things that helped me form the conclusion that I would come to the Bar. But I was full of doubt, as we all are when we commence, that I had the right skills, but as it turns out I've done okay.

DT: Well, you've done more than, okay! You are a leading silk in various practice areas, including native title claims in particular. How has native title practice changed in the years that you've been practising?

TM: When I first started at the Bar, I really avoided doing any native title work because I had earlier been an advisor to government on native title matters. However, eventually the flood of native title work carried me along with it. What I think we have seen, since about 2010, is a shift in the willingness of most State governments to enter into negotiations to recognise native title, and, in response to some repeated and pointed judicial criticism by Jagot J among others, the speed with which such negotiations are carried out.

Another change is that most courts, and the Federal Court in particular, are much more willing to take evidence on Country. In the early days, it was often quite difficult to get a judge to leave the major city and go sit in 35- or 40-degree heat, under canvas, to hear evidence! There is a very important aspect in the judicial officer being able to experience the *depth* of the story and the evidence firsthand, where a witness cannot easily travel to the city. That is something that everyone understands. But there is an additional element which decision-makers have come to understand more clearly over time, which is that it is far easier for an Aboriginal knowledge-holder to give evidence about Country when you're standing on Country. It's not only a matter of being able to explain places or things: it's being able to point them out to a judge, or point out the smell of a particular tree or plant at a particular time, or the flight of a particular type of bird. There's also an element of 'cultural safety' when speaking about these often quite important spiritual matters in a place where you are surrounded by your own spirits as opposed to in the sterile environment of a courtroom. It's an entirely different level of evidence from witnesses themselves, and it's an entirely different experience for the judicial officer. I wholeheartedly support taking evidence on Country.

DT: You are also the Chair of the Bar Association's First Nations Committee. What are some of the issues that confront First Nations barristers?

TM: There's not a lot of First Nations barristers around, something like 15 of us, of which I think five are at the NSW Bar. For the most part, Aboriginal people come to the Bar without the network of connections to solicitors, particularly outside areas such as native title itself. One of the things that I really struggled with at university was cultural isolation, and the fact that there weren't visible pathways of progression through the legal profession by First Nations people. I believe collegiate support from the Aboriginal Bar is important. In 2006, Chris Ronalds SC and I, with the support of the NSW Bar Association, set up a National Indigenous Legal Conference, which has since been held annually around the country for Indigenous practitioners to come and catch up, to make new friends and connections, and, particularly for the law students, to show them that there's a pathway through the profession for them. The last one was in 2019, pre-COVID, and then next one will be here in Sydney in October. The handful of Indigenous practitioners who were my contemporaries have all become leaders in the profession, so I say to young Indigenous law students and graduates, 'These other Indigenous lawyers you see around you, your cohort, these are the people you are going to be able to call on as your careers all progress together, and lean on if you need to. These are the people who are going to understand your experience, so make sure you get to know your colleagues.'

Another of the issues that comes up from time to time is the need, within the wider legal profession, for compulsory cultural awareness training, whether as part of annual CPD requirements or even as early as at undergraduate law degree level. In New Zealand and here, there has been some fantastic work done on the 'Indigenisation' of the undergraduate law degree. In New Zealand, work has been done to instil in students the notion that the system of law that exists there is 'bi-jural', by which is meant that Māori law (*tikanga*) is an aspect of the law which ought to be understood and applied by New Zealand courts. In Australia, I would say we are perhaps a 'multi-jural' system. There are systems of law that exist as part of the larger Australian legal system, which should

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be recognised as sources of law, such as was recognised in *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3, when the High Court recognised that membership of an Indigenous cultural group, and the rights attached thereto, are determined by that group itself. That's what I think the legal profession and the justice system need to understand and embrace: the reality of the co-existence of legal systems in a 'multi-jural' framework.

DT: Moving to the Voice Referendum, how did you come to be appointed member of the Referendum Working Group?

TM: I received a call from Minister for Indigenous Australians Linda Burney I think in August last year, asking me if I would join the Referendum Working Group. Prior to that, I would say I had been a peripheral player. I certainly supported the Uluru Statement and the objectives of Constitutional reform, including recognition of the Voice, but I was much more vocal in relation to the need for a Makarrata Commission for truth-telling and treaty-making. I still see those as the main mechanisms for delivering localised self-determination. So it was a bit of a surprise when the Minister rang, and I had to think about it for a little bit, but in the end I decided that the referendum was coming, and if I had skills and knowledge that would assist, I should serve on the Referendum Working Group.

DT: Has the debate on the proposed alteration proceeded in the way you'd foreseen? Were there things that you thought would be controversial but haven't been, or that you thought wouldn't be controversial that have been?

TM: I was a little bit surprised at the extent to which certain sectors have campaigned against the provision of advice to the Executive Government. From my perspective, if the Voice doesn't have the capacity to make representations to the Executive, then it's barely worth doing.

There is a huge cost to First Nations people in even having the referendum. There is a pain involved in big social reform – see the resignation of Stan Grant from the ABC. I have heard about Aboriginal people being abused in public, being spat on. There is a huge cost to us in having this open discussion.

There has been some comment about the *breadth* of the power to make representations being 'matters relating to Aboriginal and Torres Strait Islander peoples'. I had thought that that might attract more attention than it has. It has received some attention, but only in the context of the power to make representations to the Executive. The reality is that the Voice will have to focus on the matters of real importance and prioritise those matters if it is to make any substantial change. As to the spectre that has been put up about the Voice being used for nefarious political purposes to hold up legislation, I can't help but feel that this is people projecting their own views about how the political process should be manipulated. The reality is, that's not going to happen. The Voice will have to stand or fall on its own reputation and credibility. If it misuses the power it has, it would be burning its own credibility. It will have to be very judicious about the representations it makes, otherwise it will devalue those representations.

DT: The argument has been made that, to obviate concerns about the Voice making representations to the Executive, the power to make representations to *Parliament* should be entrenched in the Constitution but the power to make representations to the *Executive* simply added by Parliament later (and thus subject to Parliamentary modification later on, if need be). What would you say to that?

TM: I would say, and I have said it before, 'What guarantee do we have that that right [to make representations to the Executive] won't be legislated away?' What I do know is that whenever the national representative bodies that we have had have become 'troublesome', they've been abolished. And we know that our interests often become collateral damage in other political exchanges. I have no confidence whatsoever that an antagonistic government would not exercise the power provided in clause three [of the proposed s 129 of the *Constitution*] to minimise the role of the Voice as much as possible. If there's no constitutional guarantee to be able to advise the Executive, then I think it's lost.

This isn't about scoring political points. The whole point of being able to make representations to the Parliament and Executive is for the Voice to engage in the debate and win by the power of argument.

I don't think there will need to be a lot of cases heard by the High Court to sort out where the lines are in terms of the legal effect of the Voice. Look at 1982, when Canada legislated the *Constitution Act 1982* (Can) s 35, for the recognition and protection of the existing aboriginal and treaty rights of the aboriginal peoples of Canada. That has led to a reasonable amount of litigation, but it certainly hasn't brought the Canadian legal system and business of government to a standstill. It's just become part of the normal course of government, and has allowed, in certain parts of Canada, very forward-thinking and robust treaty-making processes to begin, which may provide great guidance to us here in Australia.

DT: What do you make of the argument that by constitutionally entrenching a Voice for only one ethnicity – or one set of ethnicities – the Constitution institutionalises indefinitely a racial or ethnic division in the Australian people?

TM: Well, I've been fairly public about my view that the process is one which is intended to reflect a special status for First Nations as the first peoples, as opposed to Aboriginal and Torres Strait Islander peoples *as a racial or ethnic group*. The distinction is very important. We are aligning ourselves with the United Nations Declaration on the Rights of Indigenous Peoples, and the right of self-determination by Indigenous peoples, which should be uncontroversial. Any arguments about separate races are ones which are intended to be divisive and we should steer well away from all that.

DT: No one under 42 has ever voted in an Australian referendum before. That's about 38% of the national electorate, and about 25% of the NSW Bar. Do you have a message for all those hundreds of us at the Bar and millions of us across the nation who fall into that category about what our role is in this, our first referendum?

TM: I think we are entering a period of change and maturation in this country. This proposed reform is an integral part of this country coming to terms with its own self and setting a balanced and respectful path for its future. We all have the opportunity to be involved in something that is much larger than in any of our interests, and we should not be driven by fear of it not being perfect in our own eyes. We should be willing to accept that it is something that is, on the whole, a great opportunity for our nation. BN

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