This voice would have us shouting over the walls

Henry Ergas 12:00AM July 26, 2019

As the debate on the proposal to enshrine an indigenous voice in the Constitution gathers momentum, the proposal's supporters have advanced four arguments in response to its critics.

The proposal, they say, simply addresses past injustices which, in the words of Murray Gleeson, a former chief justice of the High Court, create a "case for special treatment of indigenous people".

Moreover, the mere fact of such special treatment is unobjectionable, as there is nothing in the Constitution that commits us to a principle of political equality.

As for the claim that the proposed special treatment would entrench a further distinction based on race in the Constitution, it is incorrect because it is based not on race but on indigeneity.

And the critics' concerns are in any event overblown, since the voice would simply be one advisory body among the many that can be found in every area of government.

That those arguments deserve to be taken seriously is obvious, but closer examination suggests they are unconvincing.

To say that is not to dispute the historical injustices Gleeson emphasises, but it hardly follows that the remedy lies in constitutional provisions that accord indigenous Australians rights that go above and beyond "the ordinary democratic process", as he contends.

On the contrary, if the injustices occurred, it was precisely because

indigenous Australians were not entitled to participate as political equals in Australian society and were excluded from the equal protection of the laws.

As a result, far from taking "dispossession to its logical, and unattractive, conclusion", ensuring that those rights are fully and equally available to all Australians strikes at the heart of the injustices we lament.

And far from ignoring what the nation owes its indigenous people, achieving a truly colour-blind constitution is an indispensable step in correcting the errors of the past.

It is scarcely sensible to respond to those points, as constitutional law professor Anne Twomey has, by noting that the Constitution does not guarantee political equality, as if that made it legitimate to establish a new form of unequal representation.

Yes, "the Constitution has always provided for distinctions based upon race", but that cannot justify perpetuating the distinctions, much less adding to them.

As for Twomey's observation that "Tasmanians have, per head of population, far greater representation in the federal parliament than voters from NSW", it misses the point.

With Australia being, as the Constitution specifies, a "Federal Commonwealth" that was constituted by the people of the several colonies, our system of government involves two bases of representation: equal representation of the people as citizens of the various states in the Senate; and equal representation of the people in the House of Representatives as citizens of the "indissoluble Federal Commonwealth".

There are, in other words, two co-ordinated schemes of equal

representation, not a single scheme of unequal representation. Indeed, in the classic texts on federalism, Australia and the US are invariably presented as among the purest instances of the dual principles of federal symmetry and representational equality.

It is therefore impossible to see how such a system, with two forms of equality at its core, could be used to justify introducing into the Constitution a representative institution that is unequal by design.

It in no way makes that inequality more acceptable to say, as supporters of the proposal have, that it is based on indigeneity rather than on race.

The fact of the matter is that the provision would entrench in the Constitution rights of representation that were made available to some Australians but not others solely on the basis of biological identity. That is, and has always been, the hallmark of racial classification; changing the label does nothing to alter the substance.

After all, were the provision denying representation on the basis of indigeneity, instead of granting it, it would undoubtedly be condemned as an appalling instance of racial discrimination, and rightly so. It may be that the proposed voice is a case of racial discrimination which its supporters find desirable; if so, they should state that plainly instead of pretending it is something else.

Finally, to claim that the proposed voice would be an advisory body like any other is disingenuous. The reality is that, almost uniquely, it would represent a particular group in the population and specifically exclude others; and with the exception of the Inter-State Commission (which the High Court decided improperly exercised judicial powers and hence is otiose), it would be the only such body provided for in the Constitution, with all that implies in stature, permanence and immutability.

Ultimately, it is hard to avoid the impression that rather than being

swayed by arguments that are flawed and feeble, many of the proposal's well-intentioned supporters view it as a largely symbolic gesture that might help and cannot hurt.

But there have been far too many policies in this area that set out to build bridges and ended up building walls. And it is not unreasonable to fear that this proposal, which is entirely untested, would set off a dynamic whose effects are starkly at odds with its supporters' objectives.

At least over the longer term, participating in the periodic selection of the representative body and in its operation would deepen the sense of indigenous separateness, both in its electorate and even more so in the indigenous elite. When its recommendations were rejected by parliament, as might well happen with some regularity, separateness would become resentment; and were parliament to seek to reform or abolish that body, as it had to do with the Aboriginal and Torres Strait Islander Commission, the resentment would become fury, unleashing a row made especially complex and damaging by the body's constitutional status.

Nor would the consequences be felt only in the indigenous community. As relations soured, the goodwill that has underpinned the enormous investment that is being made in reconciliation would weaken and eventually evaporate. Trapped by a constitutional provision it was impossible to repeal, we would, in the end, be a country united only in its disappointment.

These are difficult issues, and to raise them is neither pleasant nor comfortable. But if the errors of the past and our collective responsibility for the future mean anything, it is that in the common search for solutions we must talk to each other unhindered by illusions and free of soothing deceptions.

That is why the concerns need to be addressed squarely and honestly. The alternative is once again to rush off, enveloped in a steam bath of

emotions, toward likely failure, with the certainty of a great deal of heartache along the way.