Lessons not learnt are lessons repeated

The case for adopting the Uluru Statement from the Heart

An edited version of the article will appear as the May Current Issues in the Australian Law Journal.

ARTHUR MOSES SC President, Law Council of Australia

Note: The full version of this speech, including footnotes, can be found on the Society's website:

lawsocietynt.asn.au/publications/speeches

On 14 February 2019 the Prime Minister tabled the eleventh annual *Closing the Gap Report* in Federal Parliament.

The Report confirmed that for another year, Australia has not succeeded in realising meaningful improvements in outcomes for First Nations Peoples. This paper argues that adopting the Uluru Statement from the Heart and enshrining a First Nations Voice in the Constitution is critical to empower meaningful policy development and progress sound law reform. It was part of a speech that the President of the Law Council of Australia gave to open the 2019 Northern Territory Law Term in Darwin and Alice Springs on 31 January and 1 February. An edited version of the article will appear as the May Current Issues in the Australian Law Journal.

The Don Dale Youth Detention Centre has come to symbolise the devastating impact that consistent policy failings continue to have on Australia's First Nations Peoples. In 2016 the nation was shocked by the confronting Four Corners exposé on the treatment of Australian children, including Indigenous youth, in the Centre. A year after the Royal Commission into the Protection and Detention of Children in the Northern Territory recommended the Centre be closed, the Centre now operates out of a former adult prison which was not fit for use until a new detention centre is built. There has been a series of further incidents at the Centre, including the November riots of 2018. In January, I inspected the facility on behalf of the Law Council of Australia. The staff I observed working at the Centre are attempting to do their best with the limited resources they are provided to rehabilitate the children within their care. During that site inspection, I was struck by the words I saw on a poster in the cell of a child who was being detained there, which read in part "Lessons not learnt are lessons repeated". Those words continued to resonate with me long after the visit concluded and form part of the title of this paper. In a post-Apology Australia, these words serve as a powerful reminder for those entrusted with the responsibility to develop law and policy that we cannot continue to repeat the mistakes of the past. Imprisonment should not be a rite of passage for our Indigenous youth. Aboriginal and Torres Strait Islander affairs in this nation have faltered in a large part because we have not listened to the voices of Aboriginal and Torres Strait Islander People.

As Australians, we have much to be grateful for. We live in a society that values human rights, the rule of law, access to justice, equality and freedom. How then can we accept a reality where justice is least accessible to those most in need? Where chronic underfunding of legal assistance has meant that legal representation is beyond the reach and means of thousands of vulnerable Australians. Where our First Nations People are proportionally the most incarcerated people on earth; where it is normal for almost all young people detained in the NT to be Indigenous; where it is normal for suicide to be the leading cause of death for Indigenous children under the age of 14. The resounding answer is that we can't and we don't. The more difficult question is:

How can we change it?

The NT has one of the most diverse compositions of practitioners across the country: from lawyers who work in private practice to government, to legal aid and community legal centres. The profession and judiciary face unique challenges—the criminal law case load is crushing and distressing, legal aid is scarce and geographically, the jurisdictional area is isolating. What Territorian lawyers have in common though is a resolve to promote the administration of justice, a resolve that has been forged, tested and strengthened by the tyrannies of distance and adversity. Despite being underfunded and under-resourced, the profession does an exceptional job. It is some of the most important legal work undertaken in Australia, as Territorian lawyers are tasked with representing some of our society's

most vulnerable people. You do so with dignity, with hope and in the best spirit of the profession.

You are not alone. The challenges faced in jurisdictions across Australia may differ in form but we are united by a common duty to promote the rule of law, human rights and equality for all Australians. We are strongest as a profession when we stand together. The Law Council is a voice for all lawyers and we speak in defence of the rights of all Australians. As President, I pledge my support and my commitment to working with all lawyers this year to serve the administration of justice and agitate for meaningful reform, including adopting the Uluru Statement and enshrining a First Nations Voice in the Constitution. Promoting access to justice for all Australians must be one of our critical concerns. Legal rights and representation should not be only for the wealthy or privileged. Australians in rural, remote and regional areas deserve equal access to justice, as do our First Nations Peoples.

The need for change

Indigenous Australians continue to face significant disadvantage and injustice in twenty-first century Australia, not only in the NT but across the country. It is not the problem of Territorians, nor is it an issue of their making: it is Australia's problem and national shame.

The criminal justice system has taken a disproportionate toll. Indigenous people represent less than three percent of Australia's population, but more than 27% of Australia's prison population. The decision by Administrator O'Halloran AM to reduce the sentence for Zak Grieve last year was a stark reminder that mandatory sentencing fails the Territorian community, disproportionately hurts our First Nations Peoples, and will continue to produce unfair and unjust outcomes. The Law Council is greatly concerned by allegations the Territory Government has misused funds intended to improve the lives of Indigenous people. This money should be used for justice reinvestment, rehabilitation and early intervention. These claims need thorough investigation and stringent accountability measures must be put in place to ensure money slated for Indigenous communities makes it to them.

The minimum age for criminal responsibility in the Northern Territory is 10 years. This has been proven to be too low, with devastating impacts upon Indigenous communities. The UN Committee on the Rights of the Child has twice recommended that Australia should be raised the age of criminal responsibility. The Royal Commission gave the Territory government a mandate to increase this age to 12, and with the Law Society NT, the Law Council will continue to press for this change. The Law Council considers that the minimum age of criminal responsibility should be increased to at least 12 years of age, subject to the rebuttable presumption that children aged between 10 and 14 years are incapable of committing a criminal act remaining in place; and that children under 14 should not be detained, except in the most serious of cases.

The Productivity Commission's Report on Government Services 2019 paints a grim picture of the over representation of Aboriginal and Torres Strait Islander Australians in criminal courts. In the Territory, average figures across all criminal courts showed more than 75% of cases involved Aboriginal and Torres Strait Islanders, while in the Children's Court this ballooned to 93.3%.

Imprisonment for fine default disproportionately impacts Aboriginal and Torres Strait Islander Peoples, who we know are over-represented as fine recipients. This issue has caused particular concern in Western Australia this year, and the Law Council with the state Law Society has called on the Western Australian Government to repeal laws that provide for imprisonment as a result of unpaid fines.

Over-policing continues to haunt Indigenous communities and undermine confidence in law enforcement. For example, last year the NSW Police Force faced accusations of "racist policing" when it was revealed that more than half of the children on a "Suspect Target Management Program" were Indigenous. Those on the list received "proactive" police attention, including being stopped, searched and questioned.

Juvenile justice practices continue to contribute to the criminalisation of Indigenous youth. A year after the Royal Commission recommended the Don Dale Youth Detention Centre be closed, the centre remains open and there have been further incidents, including the November riots. Grave fears continue to be held about child protection and the appropriateness of youth justice systems and facilities.

Our justice system is failing Indigenous victims. In the NT there are myriad examples of inadequate policing leading to victims being denied justice. Cases like that of a 25-year-old Aboriginal mother of two who died in Tennant Creek in 2013 after bleeding out from a stab wound. The case "languished for four years" without reasonable explanation, and it was not until 2017, after pressure from the family, that a coronial inquest was finally held. No one has been prosecuted in relation to the death. Judge Cavanagh described the police investigation as "so poor that prosecution would only have been possible if the killer confessed".

Sadly, this case is not isolated. Three Aboriginal children were murdered in Bowraville on the NSW mid-north coast some 30 years ago. A conviction for these murders is yet to be recorded. In September last year the NSW Court of Criminal Appeal declined an application by the State Attorney-General for the retrial of a person for two of the murders. The High Court has declined an application for special leave to appeal.

Aboriginal and Torres Strait Islander People under guardianship in the NT are disproportionately represented and make up over 50% of new applications, compared with 26% of the general population. There is a concerning trend that the Territory's tribunal system is moving away from →

best practice, including removing the provision for representation of the represented person from current legislation, resulting in a shift toward substituted decision making and away from the trend in other jurisdictions.

Sadly, youth suicide is particularly acute in Australia's Indigenous population. In January there was a powerful editorial in The Australian about the tragic rates of suicide amongst Australia's Indigenous youth following a spate of deaths in Queensland and Western Australia. The editorial made the point that for too long, the issue of suicide has been taboo. But failure to confront the issue head-on has had a devastating impact on all communities, indigenous and non-indigenous. "Honest discussion," the piece concluded, "is the first step".

There are no easy solutions to these issues. But all solutions begin with a conversation. And our history tells us that a conversation cannot be a solution so long it excludes a First Nations Voice.

A first nations voice

It is a critical priority of the Law Council to advocate for the implementation of the Uluru Statement from the Heart and Indigenous recognition in the Constitution this year. Not because the Uluru Statement or the Voice will solve all the policy problems that impact upon our Indigenous community—of course it cannot and it will not. We are the first to acknowledge that. Much work needs to be done to fine-tune legal assistance, to better resource our justice systems and develop meaningful reform. But this work can only come by listening to the Indigenous community and will only succeed if we let them lead.

One of the most powerful lines in the Uluru Statement reads "This is the torment of our powerlessness". As advocates, we recognise there is power in having a voice. Justice comes not necessarily from the outcome of a case but from the process and the act of being afforded a fair opportunity to be heard. Our duty every day is to ensure our clients' voices are heard—that their case, their story, their experience be taken into account in the administration of justice. It is incumbent upon us to use our skills to promote discussion to advance the Uluru Statement and such a voice.

Indigenous Australians have already waited 249 years for justice. First Nations citizens should not be forced to wait any longer for a referendum on constitutional recognition. For Australia's First Nations, the old adage that justice delayed is justice denied is more than a saying; it is a reality that has engrained intergenerational trauma and frustration for two and a half centuries.

The speed of justice has been a prominent concern in recent years. It has occupied the attention of Attorneys-General, heads of jurisdiction and the media alike, and attracted community concern. The problem with this conversation is it continues to ignore the voice of those who have suffered perhaps the greatest injustice and certainly the longest delays.

We cannot move forward as a nation whilst our First Nations People continue to be denied a voice. As a legal profession we cannot claim to champion equality and human rights if we are participants in a deafening silence or delay that allows such a voice to go unheard or out-shouted. The process of achieving Constitutional reform that recognises First Nations Peoples has been lengthy. The Uluru Statement itself, and its acceptance amongst the Australian legal community, is proof that the exclusion of First Nations citizens from our national decision-making is no longer tolerated. The Statement is a document that speaks to all Australians. Its wording is succinct yet powerful. It tells us that Indigenous sovereignty is a spiritual notion, the ancestral tie between land and sea Country, and the custodians who continue to care for it. It recognises that sovereignty was never ceded or extinguished.

The Uluru Statement is important to our nation because it speaks of our past but more importantly because it speaks of a promise for our future. A future in which First Nations have a constitutionally enshrined Voice to Parliament and a Makarrata (or peace making) Commission is established to facilitate treaty making and truth telling. In a profound generosity of spirit, the Uluru Statement invites all Australians to work together and walk together "in a movement of the Australian people for a better future". An inclusive future to which we can all aspire and partake regardless of whether our ancestors have called Australia home for 65 000 years, six generations or in my case one generation. This invitation has been on the table now for almost two years.

So why aren't we there yet?

The Uluru Statement was born in the NT from one of the most significant, comprehensive consultations of Aboriginal and Torres Strait Islander Peoples in our history. The Statement has been endorsed by the Referendum Council, the Law Council, the Australian Bar Association, and many others, including BHP and Rio Tinto. Regrettably, misinformation has been allowed to breed confusion and misunderstanding over a fundamentally uncontroversial proposal. The recommendation of a First Nations Voice is not onerous or overly prescriptive. Contrary to assertions made by former Prime Minister, the Hon Malcolm Turnbull MP, it does not impact on the sovereignty of the Parliament, create a third chamber of Parliament, or undermine democracy. It is no more radical than the Prime Minister's Indigenous Advisory Council which the Prime Minister and Minister for Indigenous Affairs appoint. It strengthens, rather than undermines, the rule of law. Many legal minds, including the former Chief Justice of the High Court of Australia, Murray Gleeson AC QC, have lent their formidable strengths to this important task. But our work is not yet done.

As a legal profession, we have a professional and moral obligation to press for timely recognition and social justice. The Australian Law Reform Commission's 2018 Pathways to Justice Report acknowledged what Aboriginal and Torres Strait Islander People have known and lived for generations—that "the legacy of historical dispossession and dislocation from land, culture and family has ongoing harmful effects". The lack of a voice—the kind called for by the Uluru Statement—continues to manifest in tangible ways that impact upon identity and connection to culture, country and kin.

The lack of a voice continues to manifest through the dispossession of Country prolonged by slow and complex processes to recognise land and native title rights. The average national time for a consent determination is around six years and three months. Last year, the Mirarr People received a native title determination over parts of Jabiru in Kakadu National Park two decades after their application was filed.

The lack of a voice continues to manifest through the prolonged dispossession of freedom and basic rights. Importantly, the Uluru Statement profiles the nexus between the denial of sovereignty, dispossession and criminal justice. Sovereignty and dispossession, recognition and representation of interests, they are different facets of the same problem.

The lack of a voice continues to manifest through the dispossession of quality of life and life itself. The average life expectancy for Indigenous Australians is approximately one decade lower than non-Indigenous Australians.

The lack of a voice continues to manifest through dispossession of culture and heritage prolonged through ineffective Commonwealth, State and Territory laws that are more permissive of destruction than protective. →

Uluru Statement from the Heart

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

Source: www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF

The lack of a voice continues to manifest through infrastructure deficits, inequitable distributions of tax and GST revenue and underspending on recognised areas of need, which in turn exacerbate and perpetuate a cycle of disadvantage in Indigenous communities.

In the months following the Uluru Statement and the Final Report by the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, political momentum has stalled. In the eleventh annual Closing the Gap Report, the Prime Minister, the Hon Scott Morrison MP, admitted the report reflects a "need to change the way we work". The report indicated that only two of the seven "Closing the Gap" targets are on track. In presenting the report to Parliament, Prime Minister Morrison spoke of the importance of developing a deeper partnership with states, territories and First Nations Peoples. In response, the Opposition Leader, the Hon Bill Shorten MP, noted that:

if we seek to see real change in the lives of our First Australian people, then we need to change—change our approach, change our policies and, above all, change the way we make decisions, and we need to let First Nation people have real control on how decisions are made.

Mr Shorten reiterated the Opposition's commitment to enshrining a Voice for First Australians in the Constitution through a referendum to be held in its first term, if elected to Government.

The Closing the Gap Report reinforces the need to listen to the voice of Indigenous communities to develop meaningful policy reform, including to address Indigenous incarceration rates which are a national shame, and significant disparities in health, education and employment. In the lead up to the 2019 Election, the Law Council will call for swift, decisive action to achieve constitutional recognition because the opportunity to remedy the omission of First Nations Peoples from the Constitution and from a proper place in our society must not be passed up.

Much has been taken from our First Nations, yet remarkably they seek still to give. "When we have power over our destiny," the Statement reads, "our children will flourish. They will walk in two worlds and their culture will be a gift to their country." It is the view of the national profession that accepting the Uluru Statement will make us stronger. The Uluru Statement offers the Makarrata Commission to supervise a process of agreement-making and truth-telling to make peace and share all our stories—yes stories of brutality, the Stolen Generation, and shame, but also stories of survival, resilience, and kinship. Stories that when shared and understood can forge a stronger national bond and re-energise our commitment to democracy and the rule of law as tools to empower, not oppress. We cannot lecture other countries on abuses of human rights if we do not confront our own past.

The invitation posed by the Uluru Statement is not an invitation to Canberra. It is an invitation to all Australians to come together after the struggle that has been our experience of nationhood to walk with First Nations People in a movement for a better future. I encourage you to accept that invitation, and to talk to your colleagues, families and friends about the Statement. It is critical that the Uluru Statement and what it stands for be properly understood and explained to political leaders and the community. We should never underestimate the decency and intelligence of Australians when it comes to dealing with such sensitive issues. And we must be willing to accept our responsibility as lawyers to promote the administration of justice and the public good, which at times means speaking out against delay. Because never again should injustice be the norm for our First Nations Peoples. **It is time that lesson was learnt.** ■