Megan Davis, Pat Anderson from the Referendum Council with a piti holding the Uluru Statement from the Heart, and Noel Pearson, during the closing ceremony in the Mutitjulu community of the First Nations National Convention held in Uluru, on Friday 26 May 2017. Photo: Alex Ellinghausen / Fairfax Photos

A special Bar Association seminar

The Uluru Statement

Professor Megan Davis, Associate Professor Rosalind Dixon, Associate Professor Gabrielle Appleby and Noel Pearson

On 24 October 2017 the Bar Association, in conjunction with the NSW Judicial Commission and the Law Society, hosted a seminar on the Uluru Statement from the Heart. The following is an edited transcript of that historic event.

Introduction by President Arthur Moses SC

We've gathered to discuss a matter of considerable national importance. Five months ago, delegates gathered at Uluru for the 2017 First Nation's National Constitutional Convention and made the historic Statement from the Heart regarding constitutional recognition to Australia's Aboriginal and Torres Strait Islander peoples. The wording of the Uluru statement is succinct and powerful. It tells us that Indigenous sovereignty is a spiritual notion, the ancestral tie between the land and the people who remain attached to it. That sovereignty was never ceded or extinguished and co-exists with the sovereignty of the Crown. It is of no small import to note that after annunciating this view of sovereignty, the Uluru Statement precedes to the matter of criminal justice.

As members of the legal profession, we need no reminding the indigenous Australians are proportionately speaking the most incarcerated on earth. Sovereignty and dispossession, recognition and representation of interests, they are different facets of the same problem. It is something that we as lawyers have a duty to help solve. Whilst it remains unsolved, we are diminished as a nation.

In the months following the Uluru statement the political momentum in parliament seems to have drained away, our purpose

tonight is to discuss what can be done to put it back on the agenda. What does the establishment of a First Nation's voice in the Constitution mean, and what are the implications of the sovereignty of parliament?

The Uluru Statement calls for a First Nation's voice to be enshrined in the Constitution and a Makarrata Commission to supervise a process of agreement, making between governments and First Nations. Aboriginal and Torres Strait Island affairs in this nation has faltered in a large part because we have not listened to the voices of Aboriginal and Torres Strait Islander people. The Uluru Statement is a roadmap that allows Aboriginal and Torres Strait Islander people to be heard and it is an invitation to all Australians to walk that road together. And the notion of being head must resonate with us as lawyers and it's why the three branches of the profession are hosting this evening, and we have this evening four speakers, Professor Megan Davis, Professor Rosalind Dixon, Associate Professor Gabrielle Appleby and Noel Pearson. Thomas Mare will also join us this evening to unveil The Uluru Statement from the Heart.

Professor Megan Davis is a Cobble Cobble woman from Queensland who is a pro vice-chancellor and professor of law at the University of New South Wales. Megan is a renowned human rights expert and has led much of the work of the Referendum Council, which culminated in the Uluru Statement from the Heart and laid the referendum council's report to the parliament.

Megan has written about the challenge of walking between two worlds. In this way she reflects the anxiety I believe of a younger generation of Aboriginal people that have mastered both worlds, but find there is still a missing link, that there is an unreality to the framework of our society that ignores the truth of history and the truth of the present.

As a lawyer Megan has spoken of the capacity of the law to oppress Aboriginal and Islander people, but she's also spoken just as strongly of the power of the law to redeem, and redemption comes from clear, direct and empowering action. In the simple language of the Uluru Statement, it comes from giving Aboriginal and Islanders a voice.

Megan believes in the rule of law and she's sought to find the balance between a horse and buggy constitution as former Prime Minister Keating described it, and the complex realities and legitimate grievances of Aboriginal and Islander people throughout Australia. And like Noel, she must come here tonight wondering who really stands with her people, are the lawyers of the nation listening? Do they care? Can they make a difference, will they? And if so, what will they do to put their shoulders to the cause?

Our second speaker will be Professor Rosalind Dixon and she'll address us on voice. Professor Dixon is currently a professor of law at the University of New South Wales, having previously served as an assistant professor at the University of Chicago Law School. And Professor Dixon has been referred to as the 'renegade constitutionalist from down under', which surprised me because she was a former associate to Chief Justice Murray Gleeson. She's been referred to as the leading comparative constitutional scholar of her generation.

Our third speaker will be Associate Professor Gabrielle Appleby from the University of New South Wales Faculty of Law. Gabrielle has had extensive experience working in the Crown Solicitors' Office in Queensland and Victoria and relevantly Gabrielle provided pro bono assistance to the Referendum Council in the First Nation's regional dialogues and the First Nation's Constitutional Convention Uluru.

Professor Megan Davis

Thomas Mare will then unveil the Uluru Statement from the Heart and Thomas was one of the Uluru delegates and co-chairman of the Uluru working group.

Finally, Noel Pearson will provide a commentary and will take questions, and I want to say a few words about Noel who, despite being a Cowboy's fan, I admire. He stirred me up at a Parramatta Eels match in the semi-final but I'll forgive him for that. Noel is the chairman of the Cape York Institute and a leader of the Kuku Nyungkal people. Noel's great grandfather, Arrimi was a landowner of country around Cooktown who became a freedom fighter and renegade from those who came and forcibly without his consent took his land and everything that went with it. Noel's grandfather, his grandmother, his father and his mother were raised in missions which were places foreign to them and their ways and which were, we have to be honest about this, designed to keep them from what was rightfully theirs. As he has written, he has come up from a mission and from that place he has confronted and challenged us whilst never losing faith or belief in his fellow Australians.

The Yolngu people of north east Arnhem Land have recognised his brilliance and his effectiveness, they have given him the name 'Kerpa' the name means 'the tongue of the sacred fire' and the rest of us have felt the power of those words and watched his progress as he's given his life over to the causes of his people – education, empowerment, perseveration of our ancient heritage and now the coming together of Australians by way of constitutional recognition as the first Australians.

Noel prompted John Howard in 2007 to first put constitutional recognition on the political agenda. He was a member of Julia Gillard's expert panel on constitutional reform and later a member of the Referendum Council which has now reported to the parliament.

The success of this work is now teetering on the edge as we wait for the prime minister to respond to the Referendum Council report. And we should also excuse Noel if he came here tonight wondering whether there was anybody who was really with him and his people, for it must seem to him and to Megan that many of us who profess to be fellow travellers, are really little more than idle observers, that many of us with power and prestige of office do not wish to truly risk our positions with outright effusive support for the simple things that are sought by the Aboriginal and Torres Strait Islander people – recognition, respect and unity. And I suspect that what Noel and Megan and many, many others must share, what Galarrwuy Yunupingu has described as the splinter in his mind, the fear of all of who you are and all of what you represent will fade away and be no more, slowly destroyed by an outside force that is not prepared to cede its absolute control – that we're really not listening.

So, I look forward to the commentary this evening by Noel Pearson and the presentations of Professor Megan Davis and that of the other presenters, Professor Rosalind Dixon and Associate Professor Gabrielle Appleby, as well as the unveiling of the Uluru Statement from the Heart by Thomas Mare, we are honoured to have each of you here this evening and welcome to our home here at the Bar Association. Thank you,

Professor Megan Davis

The important point that I want to make in relation to the Referendum Council's work is that I was a member, as was Noel, of the expert panel on the Recognition of Aboriginal and Torres Strait Islander people that Julia Gilliard put together in December 2010. It was the result of the negotiations she entered into in relation to the hung parliament, where the Greens and the Independ-

ent, Rob Oakeshott, said to her: 'all agree on constitutional recognition - you need to put together a formal process that will put that into action and get us to a referendum in relation to recognition'. And that was the work of the expert panel.

The expert panel worked over the period of 2011 and handed its report to the prime minister in 2012. There are a number of important recommendations that the expert panel made. One was the deletion of the race power and the insertion to the head of powers a new provision; a sort of federal parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples that had in its preamble, a statement of recognition of Aboriginal and Torres Strait Islander people. One of the primary recommendations that came out of the expert panel, though, was section 116A, which was a, a non-discrimination clause.

Post 2012 we, as Aboriginal and Torres Strait Islander leaders, never received any formal response from the government in relation to that report and those recommendations. There was a change of government in which a joint parliamentary committee was set up. That committee, led by Ken Wyatt and Nova Peris, handed down three reports, with recommendations that were, by and large, variations on the work of the expert panel.

In addition to that, the Commonwealth funded the creation of a campaign arm which was known as Recognise and that campaign's job was to educate the public on the need for constitutional recognition and the recommendations of the expert panel.

It's really significant to understand what happened at Uluru. The policy of the incoming government of Prime Minister Tony Abbott was to reconfigure Aboriginal funding in a way that all of the buckets of money for Aboriginal and Torres Strait Islander communities were taken out of each of the departments and put under a new framework that was known as the Indigenous Advancement Strategy.

What this then meant is that Aboriginal communities and organisations had to apply through a very unwieldly process for the funding to run their organisations in their communities. Many weren't successful. I think up until last year something like 60-70% of the money from the IAS went to non-Indigenous organisations, including big corporations with reconciliation action plans. But significantly we found in the dialogues, communities have been gutted of the funding that had sustained community governors and community autonomy for a long time. So, the IAS was a very significant influence and a very prominent issue in all of the dialogues as we did our work.

So, leading up to the Referendum Council's creation we got no traction on Section 116A. We did try to transform the civil society movement in relation to Section 18C into a Section 116A type public campaign and that was not successful.

The recognised campaign is the second element that was problematic for us. Although it was a public education campaign, it focussed on those recommendations of the expert panel that didn't have really significant support from Aboriginal and Torres Strait Islander communities. And then the IAS. So as a consequence of that, in 2015 Noel Pearson, Patrick Dodson, Kirsty Parker and I went to the prime minister and said: we have a problem here. You cannot move to a referendum because you need to go back and consult Aboriginal and Torres Strait Islander communities and ask them what it is that they want.

They were convinced that our communities would vote in favour of a minimalist reform. We weren't and inevitably they did set up the Referendum Council of which Noel and I were members. The primary goal of the Referendum Council was simply to go out to Aboriginal and Torres Strait Islander communities, run a series of dialogues in those regions with a sample of Aboriginal and Torres Strait Islander people and really get to the heart of whether or not it was that they would support a minimalist model or was there something else that people wanted. So that was our key role, to ask: What is it that Aboriginal and Torres Strait Islander people want? What is meaningful recognition to them?

We did that through this dialogue process: a deliberative decision-making process that a number of us designed, including Professor Cheryl Saunders, myself, Noel, Patrick to take a dialogue out to 13 regions and walk a sample of our mob through that.

We designed a process. We got the permission of the prime minister and the opposition leader as to what options we took out. They said we could take out the expert panel recommendations, we went back and said we would like to take out the idea of a voice to the parliament, in addition to agreement raising or treaty – that we couldn't go back to communities without that being a discussion given that Victoria had a treaty process and that South Australia was moving to one.

So, we had a series of meetings because the dialogues were designed on a 60/20/20 basis. 60% of participants had to be from our land base. They had to be traditional owners. They had to come from the land councils or the PBCs. That was very important for us to have that cultural authority. 20% were from our Aboriginal organisations, that is to say how we organise, how we run our community, and 20% of the invitees were other interested individuals and significant leaders in the movement.

We ran the entire design by those three groups, so we had a series of pre-dialogue, not pre-dialogue but pre-meetings with traditional owners in Broome, with Aboriginal organisations in Thursday Island and with individuals in Melbourne to run the entire dialogue process by them, walk them through it and get their permission and sign off on the way that we wanted to run this. And they gave us the okay to go out and conduct that, mostly under the auspices of the Land Council. So, the bulk of the organisation who helped us run these dialogues in the regions were our Aboriginal Land Councils around the country.

The feedback that we got during the dialogues was the importance of involving this Constitutional recognition process or situating it in the history of the struggle. We heard that it would be difficult to go out to communities, particularly the places we were targeting, that had been gutted by the Indigenous Advancement Strategy to talk about recognition which by that point our mob assumed was merely constitutional symbolism, perhaps a preamble, perhaps a statement of recognition.

In consultation with those groups of people and produced by Rachel Perkins we put together a DVD of the movement for the mob, which would help them have the discussion in the dialogue about where this recognition project fits on the spectrum of the Aboriginal and Torres Strait Islander struggle for addressing unfinished business.

The important feedback I suppose, or feedback that we got during the dialogues was the importance of involving this Constitutional recognition process or situating it in the history of the struggle.

The dialogues in Uluru

The dialogues were a very structured process that involved three days, mostly a Friday, Saturday and Sunday. It involved the first day which would be quite a broad conversation with the community about what recognition or what meaningful recognition would mean to their community. Part of that first day, the first day was extremely important to settle people down because people were very angry. People were very exhausted from always participating in consultations and nothing coming of it. What they would say is that nobody listens to what we say, so why should we go through this process? People were very concerned in relation to recognition, about well two, two primary things, one was sovereignty and the second thing was this idea, well not this, people's very earnest belief that this process might be a process of forced assimilation, that people felt that our

old people were dying, our young people were increasingly becoming assimilated and they felt that they didn't want to be part of a project that was one that, that they felt was forced assimilation. That was their language.

The community were very tired and I think part of the conversation around truth is that it was inextricably linked to this notion of peace: communities feeling like they wanted some peace in their lives and peace for their children and their grandchildren and that there are a number of ways that that could be done. Part of the dialogue process was, for example, they saw the Makarrata Commission, an agreement making commission, as fast tracking native title, native title determinations, which most communities felt had led to a lot of tension and fighting in communities over what they called 'crumbs' although not all communities were like that. Obviously, up in Broome there was a very different opinion of native title.

One of the things we have to do in terms of the anger (and we have to let people vent before we could get into the process) was to ask them to walk through this law reform process with us, to see it as a law reform process, that part of law reform is imagining that the world can be different to what we live in now, that they needed to suspend their disbelief, that the system could change, that politicians would listen, that something might come of this. And as I've written before, we talked about the capacity of the law to oppress our people, but also the capacity of the law to redeem.

The workshops were very structured. They involved civics, lectures on the Australian legal and political system. We had a group of constitutional lawyers come out with us and lead those discussions alongside a community member who was a working group leader, they would discuss the options, we would come back and discuss it as a group and then we would cross pollinate the groups so that people from all of the options got to have a conversation. Then we would introduce issues of political viability. So, we had to be very careful of where we introduced political viability and policy viability, because if you introduced it up front people tended not to want to discuss the options. So, we introduced it towards the end and then they would shift their preferences according to what the political viability conversations were about and then essentially issued a final communique and came to an agreement on what was the priority in the region in relation to the reform. All the dialogues were run in exactly the same way and in exactly the same form.

Uluru

The dialogues elected 10 people at each dialogue to attend Uluru. People would nominate themselves, then they would get up and speak for about five minutes on why their community should elect them to attend Uluru. Uluru was not a decision making or deliberative process like the dialogues. The Referendum Council took all of the data from the dialogues which is basically the communiques and the preferences and we presented it to the group. The group agreed. They agreed on the narrative which is the Uluru Statement from the Heart, and so the outcome of the dialogues was endorsed there at Uluru.

I suppose then the Referendum Council wrote up its report that reflected the Uluru outcome with the primary recommendation being for a referendum to be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nation a voice to the Commonwealth Parliament. The important thing to keep in mind there is that it's a First Nation's voice. So, it's not like ATSIC where individuals will run, it is First Nation entity, it's a First Nation structure. And that was really important to the community in terms of what they thought was important, that is to say having cultural authority participating in decision making about Aboriginal and Torres Strait Island law and policy.

Associate Professor Rosalind Dixon

The other thing the dialogues thought would be a useful thing that this voice could do, would be to monitor the use of the heads of power in Section 51, 26 and Section 122l and Ros will talk a bit more about the voice. But that was seen as a front-end way of dealing with some of the issues that gave rise to the argument for a non-discrimination clause.

The other recommendation was with respect to an extra-constitutional declaration of recognition. The symbolic statement of recognition was rejected by all of the dialogue, overwhelmingly. So, there was no desire to have any form of symbolic recognition of people, of us, in the Constitution and that is where that declaration comes from. The Makarrata Commission and the localised truth telling that would sit under the Makarrata Commission would be done in legislation.

Those ten guiding principles are that any reform does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty. That it involves substantive structural reform. That is advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous People. That any reform recognises the status and rights of First Nation, that any reform tells the truth of history. That any reform does not foreclose on future advancement, that it does not waste the opportunity of reform, that it provides a mechanism for First Nation's agreement making. That is has the support of First Nation and that it does not interfere with positive legal arrangements. And the Referendum Council Report has a much more lengthy explanation of what each of those guiding principles are and where they come from.

Associate Professor Rosalind Dixon

I begin by acknowledging the Gadigal people who are the traditional owners of the land on which we meet and paying respect to their elders past and present.

I want to congratulate Megan and Noel and Thomas for the amazing process that they helped lead that you've just heard about. It's a huge feat if you think organising a bar seminar is a challenge, imagine what those dialogues entailed with very little infrastructure and support and the level of real genuine engagement and dialogue and the serious thought and very viable proposals that have come out of it, I think it means that we should all congratulate them for their enormous effort, dedication and leadership.

I also want to congratulate the Bar Association and the Law Society and the Judicial Commission for this evening. I think the kind of proposals that come out of Uluru are ones that really critically depend on the support of the legal profession and the leadership of the legal profession and so having an evening like tonight where we can debate amongst ourselves the strengths and weaknesses in the way forward I think it critical.

Lawyers have played a critical part in the reform that that marvellous video showed in the past and I think they will play a critical role in this reform for the reasons that I'll talk about in just a moment. But which have to do with the fact that there are a lot of questions people may have about the details and mechanisms of this reform, which lawyers can easily answer and I think that that is our role in supporting the very important work that the dialogues and the Referendum Council have done.

So, I want to speak just briefly about three aspects of the voice proposal. I think Megan has eloquently spoken about its origins, its

origins are of course a mix of pragmatism on Noel's part and others about what is achievable in the current political climate, and a very serious bottom up process that has heard people's voices. I think as lawyers we often think, well why don't we want a 116A or a non-discrimination guarantee? We're the only people in the community that like litigation and believe the courts are a critical guarantee of our freedom, but that ship has sailed so whatever particular views we might have as individuals on that question, people have spoken at Uluru and through the dialogues and the action is now very much on the issue of voice. And the issue of voice is one that puts the locus of change in the parliament and in the legislative process and it's supported by this mix of principle and pragmatism and may say also by international law. I look at Sarah Walker who would know this better than anyone in the room, but the idea that there are very significant precedents in the UN Declaration, in the ILO Convention in Article 6 and in comparative precedent for this kind of consultation as a mode of self-determination and reform.

I want to say now three things: something about the precedents within Australia, secondly about the level of detail that the Referendum Council gives us and what needs to be decided before and after a referendum; and thirdly something about the notion of risk.

So, on precedent one of the other areas in which I work is on human rights and comparative human rights and I think many of us will be aware of, but not have spent significant time studying, the Human Rights Parliamentary Scrutiny Act and the committee it creates. Why? Because it doesn't generate litigation. That committee was created under the 2011 reforms to the Commonwealth Parliament. That introduced a specialised committee responsible for scrutinising legislation for its compatibility with seven international conventions. That committee has had some teething difficulties, but has got off the ground relatively successfully, and is fast becoming an important part of the Federal process.

That is obviously not going to be the exact model that you will see for a voice for First Nations but a recent and very successful experiment around innovation in the Commonwealth Parliamentary context of embedding a very serious commitment to write in a legislative oriented way. I think it is a model that gives us a status for optimism that that is eminently achievable and with some amount of, you know small amount of institutional reform and refinement can be very successful.

The second thing I want to talk about is detail and how much needs to be articulated prior to or after a referendum. The Referendum Council is very posthumous in the model it proposes. It says there are some non-negotiables, but Megan says this has to be a body that reflects First Nations and their membership, it has to be a body elected and drawn from community. It has to be a body with serious power to provide input and voice in the legislative process. It cannot be seen as purely optional and consultative, nor realistically can it be a hard veto. It has to have a function that is somewhere in between.

But the Referendum Council gives rise to at least five issues. The issue of the mode of election of such a body, its jurisdiction, its resources and institutionalisation, its interface in precise terms with the Commonwealth Parliament, and the issue of the timing of its creation.

That has caused some concern and my understanding is that it has led the government and the leader of the opposition to raise some questions about how much should be decided now verses in the future.

One of the reasons that Megan's involved me in some of these discussions is that some of my work comparatively has been on what Tom Ginsberg my co-author at the University of Chicago and I call, the phenomenon of deferral. The idea is that many constitutions nowadays make key decisions but leave critical aspects of the detail of those decisions to the future. If you go and look at the Commonwealth Constitution it is of course a Constitution that creates the federal judiciary and yet leaves to later legislation to create both the High Court, very soon after federation, and the Federal Courts in the 1970s. There are numerous examples in our Constitutional system of these two-part design model. Essentially deciding the key details of an institution at the Constitutional level and filling in the particulars through legislation. That model has the advantage of flexibility. If there are errors they can be readily corrected. It also has the advantage of parsimony in a question that is put to the Australian people, that there is not an overload of detail presented at a Referendum question which will be likely to confuse electors.

The issue of voice is one that puts the locus of change in the parliament and in the legislative process and it's supported by this mix of principle and pragmatism and may say also by international law.

I do think that there are one or two aspects of that detail that could usefully be resolved prior to a referendum, but one should not confuse resolving some critical questions with resolving all of them.

The two that I have in mind are interface and timing, although I think a third is a plausible candidate for resolution. By interface I mean the question of the status of the voice as it is inputted into the Commonwealth legislative process. As I said before, it cannot be merely advisory but nor can it be a hard veto and it would be useful I think in explaining it to the Australian people to have formulated some language that explains that concept and that is capable of commanding the support of First Nation and giving confidence to the government as to what exactly will be involved.

The second issue is timing. There are a number of instances of deferral within Australia and comparatively, to put it plainly have taken too long. If one is going to create Constitutional reform the expectation and hope that would be that a First Nation's voice would follow very soon thereafter, but as that very powerful documentary reminds us, expectations are often dashed in this context and I think it could be useful to ask in a referendum do you support this within say two or five years, to put time actually in the question in a way that makes absolutely clear to the parliament, should there be a change in government or a change in political context that there is a time limit on the implementation of the Constitutional mandate. I don't think that's a deal breaker, I just think it could be something that would be useful to consider.

The third thing is the jurisdiction of such a voice. I think there are a number of potential ways of resolving this and I'm not going to try and draft those solutions this evening. Others will do a better job than me no doubt in formulating the relevant language. But I think it is clear that the expectation would be that where the race power and likely section 122 were engaged by the Commonwealth in the formulation of legislation, the role of such a body would be mandatory and that the legislation should make that clear, and that where other heads of power were engaged, it would be open to the body to provide its voice and input into the legislative process. So, if you like that there would be a two-part jurisdiction, a mandatory role and a permissive or optional role where the body itself might decide whether to engage a particular piece of legislation, but that wherever the Commonwealth are purported to rely on 11, 122 or the race power it would have an obligation to refer the legislation to the relevant First Nation body. Michael Cromlin has come up with some language that I think is promising in that regard. I do not think that would need to be included in a referendum question, but I do think that some thought around that issue would be useful in explaining the idea to the broader public.

So, the last question, and I should say that the other issues around election and resourcing and institutionalisation there is plenty of very thoughtful work that has been done including by the Cape York Institute in providing that information and detail which again I think should be available and part of the public debate around this issue but need not delay the process or overload the perplex-

ity of a proposal that goes to the electorate.

So last thing on risk. I've had some very interesting discussions with other academics on this issue and I think there is a concern that with any form of Constitutional change there is risk associated with it. But I think that one needs to be mindful of both the degree of risk and the base line for comparison. Any legislation centred model of constitutional reform runs the risk that it will prove either somewhat weaker or somewhat stronger than those who design it envisage. That is an unavoidable risk. But I think in this context the risk is largely that the body will be weaker, not stronger than its designers hope for and I think for non-indigenous Australians, that is obviously a risk that they do not bear and therefore cannot be a reason to object to the proposal.

The risk is rather for First Nation and the people who support the model and the faith that they put in it as a mechanism for transformation. I have a lot of confidence however, that with the right degree of political pragmatism and leadership that has been shown to date, the body will not run that risk.

So, to put it more plainly, if it were the case that in the early years of the body's operation it gave advice that was seen by both sides of politics to be impracticable, it might lose its relevance, but I think that that is a risk that could be readily overcome through good choices and leadership of the kind that we have seen to date. And to underscore it's a risk that is largely a risk on the side of First Nation people and therefore cannot be a reason to object to it on the non-Indigenous side of politics. The risk that it will prove too strong could readily be dealt with by some language making clear that the input of such a body is not a hard veto on the ability to pass Commonwealth legislation.

The second point I want to suggest is that we need to be clear about what the baseline for comparison is when we talk about risk. There are two risks in the status quo or in the proposals previously considered in the process of reform. The risk in the status quo is a whole generation of Aboriginal and Torres Strait Islander peoples will entirely lose faith in the process of legal and constitutional reform. I say that as someone who has the great privilege of teaching some people who are the leaders of that generation and I can say to you from what they have said to me, there is a real sense that this is the last chance in this documentary, right the last clip that we get for a generation to fix this and so that the small risk that one runs of changing things with you know downstream uncertainty, has to be weighed against the absolutely certain risk of disillusioning and disappointing a whole generation of leaders and fellow members of our community.

The other risk I would say is that when we debated prior versions of constitutional change that involved a stronger role for litigation in the courts, a sort of 1, 16A or non-discrimination model, that too was not without risk of two kinds. The obvious risk kindly pointed out by many political leaders was that it would give too much power to the judiciary. But the risk that I point out in my own work from a comparative perspective is that a stand-alone race guarantee without any of the modern accoutrements of other rights and other guarantees of non-discrimination that one would normally see in a modern constitutional democracy, might not be a guarantee that the High Court felt particularly empowered to enforce robustly.

Associate Professor Gabrielle Appleby

So, no reform that we can come up with is without some degree of risk or uncertainty and that this model in my view has far less risk associated with any other plausible alternative, whether it be the status quo or a judiciable model of change.

And the last thing I want to emphasise before turning over to Gabrielle is that the two-part structure that the Referendum Council endorses and envisages which is core decisions put in the constitution and detail left to legislation, clearly lends itself to correction and flexibility. If it were the case that an initial body was created and not seen to be performing its function either on the side of the community or the Commonwealth Parliament, there would clearly be scope for revising the legislation to better refine and create a model that fulfilled the aspirations of the Uluru statement and the dialogue and I think that that is the huge advantage of a two part model, putting in the Constitution a mandate to create a voice and leaving to legislation the detail, it creates considerable flexibility downstream to correct any difficulties that might arise. I think that means that debates about risk really are misplaced. Of course, there's always as we understand there's always change and uncertainty that goes with that, but that it's very minimal compared to all other relevant alternatives and given the flexibility that's envisaged. Obviously we'll be happy to take questions and debate some of those questions in detail and questions.

Associate Professor Gabrielle Appleby

I'd also join in acknowledging and paying my respects to the Gadigal people of the Eora nation and their elders past and present, the traditional custodians of the land on which we are meeting tonight.

I've been asked by Megan to quickly explain and reflect a little on the truth telling dimension of the Uluru Statement from the Heart. Just a quick reminder, the Statement calls for Makarrata to achieve a fair and truthful relationship with the people of Australia. The statement seeks a Makarrata Commission to be established, not only to supervise a process of agreement making, but also for 'truth telling about our history'. So first I wanted to say something about how this call emerged from the dialogues and into the Uluru Statement.

The need for a truth telling was not a formal option that was incorporated into the dialogue's agenda as Megan has just explained, around for example which a break out group was established or a working group was established for the second day. And this was because it was not a reform option that had emerged from those previous reports on which those break out options have been created.

However, the importance of history became very obvious in every dialogue that we went to. Its emergence highlighted the importance of the process being a dialogue and not simply being a rigid consultation on predetermined options. So at every dialogue the delegates used the first session of the first day, when they were asked to imagine what meaningful reform would mean in their community, they used that session to talk about their history, to talk about the importance of their law, to talk about the impact of invasion on their community, to talk about the resistance that was mounted and the resulting massacres, the disease and the death, to talk about the period following invasion, a period of government control and discrimination. So, it became very clear to those attending the dialogues that before the communities could or were willing to speak of reform, the past needed to be properly acknowledged.

The dialogues thus emphasise that a process was needed to create space for First Nation's people to tell the truth about history in their own voices and from their own point of view and equally, an importance was placed on the need for mainstream Australians to hear those voices and to reconsider what they know and understand about their own nation's history.

Here I just wanted to pause and reflect on a few quotes that were taken from the records of the dialogues that were endorsed at the end of each meeting. This is a quote from the Darwin dialogue. 'Australia must acknowledge its history, its true history. Not Captain Cook. What happened all across Australia. The massacres and the wars. If that were taught in schools, we might have one nation where we are all together'. And a quote from the Brisbane record of meeting, 'In order for meaningful change to happen, Australian society generally needs to work on itself and to know the truth of its own history'. And finally, from the Melbourne dialogue, 'Government needs to be told the truth of how people got to here. They need to admit to that and to sort it out'.

This call for the true telling of history that came out from the dialogue was reflected I those 10 guiding principles that Megan referred to, that were adopted at the Uluru Convention and that guided the Convention to its final settlement in the form of the statement. So these guiding principles included in principle number five, 'Any final resolution must tell the truth of history'.

Calls for truth as well as redress have been reflected in previous declaration and calls for reform by First Nation's people. For instance the Eva Valley statement of 1993 called for a lasting settlement between Aboriginal and Torres Strait Islander people in the Commonwealth and it said that that settlement process must recognise and address the historical truth.

So it's not unsurprising that the need for a form of truth telling to be part of a package for reform emerged. Indeed, it reflects the term of many international instruments and in these instruments, it's recognised that truth telling opens the way for justice, healing, the restoration of dignity and on those bases, reconciliation.

For instance, the United Nations Declaration on the Rights of Indigenous People enshrines the importance of truth telling in a number of its preambular statements and throughout its article. In 2013, the UN General Assembly passed the Resolution on the Right to the Truth, and Article 4 specifically encourages states to, 'consider establishing specific judicial mechanism and where appropriate, truth and reconciliation commissions to complement the justice system, to investigate and address gross violations of human rights and serious violations of international humanitarian law'.

Now other countries have led the way in establishing truth telling mechanisms to deal with the violence and injustice of a colonial past. Examples of truth telling commissions and tribunals from other foreign jurisdictions include the South African Truth and Reconciliation Commission which operated between 1995 and 2002. The South African commission was established to help that country come to terms with the legacy of Apartheid in a morally acceptable way. Its mandate included violations by the government and by non-government actors and it held special hearings into specific sectors, into specific institutions and in some cases, specific individuals. The commission's final report covered the structural and historical background to the violence, it set out individual cases, regional trends and the broader institutional and social environment of the apartheid system. The report made detailed recommendations for a series of financial, symbolic and community reparation.

Another example is the Truth and Reconciliation Commission of Canada which operated between 2009 and 2015. The Canadian commission was established with a very specific mandate, to investigate the abuse and assimilation that occurred in Indian residential schools across Canada over a period of more than 100 years. The commission was allocated 60 million dollars and spent

Truth telling opens the way for justice, healing, the restoration of dignity and on those bases, reconciliation.

six years travelling across Canada hearing testimony from more than 6,000 witnesses including survivors and families, former provincial government and church officials, and all of those affected by residential schools. The final report recommended action across a broad front, including improvement to Aboriginal education, reducing the number of Aboriginal children in care, closing gaps in outcomes and funding Aboriginal language initiatives. It also said that a national centre for truth and reconciliation should be established and should receive $10 million so that government and community archives would be able to provide records relevant to the history and legacy of the residential school system to the national centre. It recommended additional funding for communities to research and produce histories of their own residential school's experience, so a localised truth telling to continue.

And finally, in New Zealand there's the Waitangi Truth Tribunal. The Waitangi Tribunal is an ongoing mechanism, which was established as a permanent commission of inquiry that investigates claims that are brought by Maoris relating to Crown action which breaches the promises of the Treaty of Waitangi where Maoris have suffered prejudice as a result. Once a claim is registered in the tribunal, the tribunal conducts research and hearings with evidence given by the claimant and from the Crown. The tribunal panel writes a report that sets out its findings and importantly to make recommendations on the actions the Crown needs to take to remedy the damage suffered, including entering into future treaty negotiation.

So, these fine examples certainly provide some ideas as to what a truth telling process in Australia might look like, and as does the Human Rights and Equal Opportunities Commission investigation into the separation of Aboriginal and Torres Strait Islander children from their families which led to the 1997 report, Bringing Them Home. In the course of the commission's inquiry it heard the stories of survivors in their own voices, some for the first time. The final report of the commission documented these stories extensively and made 54 recommendations to redress the impact of removal and the ongoing trauma it was causing.

So what might then truth telling in Australia look like as called for in the Uluru Statement? Well it's not detailed in the Uluru Statement what form truth telling might take, other than it needs to be supervised by the Makarrata Commission that's called for. It's not my intention to make recommendations as to what it might look like, but rather I'm going to conclude by raising some important questions.

Truth telling in Australia might, under the Makarrata Commission be a nationally led but locally run operation so that regional groups and communities can design and run their own localised truth telling processes in a way that responds to their own needs. In fact, it may be that such local processes can start before the national process is established, perhaps providing the political momentum to get up to that national process.

It might be designed around significant issues or events or policies that have affected Aboriginal and Torres Strait Islander people, it might focus on specific sectors, institutions or actors, or it might be a general process for all stories to be shared. What we'll also have to be given to have a truth telling work of the Makarrata Commission will inform the negotiation of the treaty by the commission and also how it will inform the work of the structural reform that was called for in the Uluru Statement. That is, how it will inform the work of the voice.

The design of the truth telling process should be led by Aboriginal and Torres Strait Islander people. And I say this both for its own legitimacy and to make sure it's designed to respond to their requirements for the process and their call that was heard in those dialogues.

Much thought's going to be need to be given to answer many questions, including how we ensure it's given adequate funding and resources to conduct the necessary hearings across communities in Australia, and to also ensure that people who attend and give evidence are properly supported in what's going to be, what will often be traumatic testimony. Resources I would say will also be needed to ensure the stories are properly documented and properly archived so that

they can provide a publicly accessible record for future generations.

So, a very brief word in conclusion. As a non-Indigenous Australian I am genuinely excited by the call for truth telling that came out of the Uluru Convention, as we read in the statement. And I say this first because it's a call that emerged strongly and organically from the delegate and the communities themselves and so it truly represents what they wanted and needed in terms of meaningful reform. And secondly, because it represents a process through which all Australians might be able to grow and ensure that the whole nation emerges richer and strong for that process. Thank you.

Noel Pearson

Thank you very much Arthur and to the Bar Association, Law Society and the Judicial Commission for your invitation to present this evening. I want to pay tribute to the First Nations of this city and this region. I want to pay in front of her fellow lawyers here, tribute to Megan's leadership of our dialogue process over that torrid six month period. It really was led by her and Pat Anderson, a team from the University of New South Wales, Gabrielle and the other lawyers that helped Megan through that process really did a, an astounding job. I really think that the result defied all of my expectations about what could be achieved if we go through a proper process of consideration and discussion about the law and discussion about the politics and I'm certainly very proud of the Uluru Statement from the Heart. I really think it represents our best chance to do something great for the country.

I think it is a modest but profound way forward. It will make a huge change in my view. All of my life is devoted to trying to build things from the ground, but even as we build things up from the ground, we have to attend to the structural conditions that make life so parlous for people on the ground.

The strongest argument is captured in the statement itself, which is the statement about our extraordinary incarceration in this country. No people on the planet earth are incarcerated at our rates, we all know that – you all know that. And it begs the question, our egregious incarceration rate begs the question as to whether we are a particularly criminal people inclined towards criminality in some kind of innate way. Well, I don't think we accept that. There's a structural dimension to our parlous situation and my submission is that the structure at our highest level is part of our disempowerment and if we want to turn those things around, we have to turn that thing around. And the advocacy of the last 100 years or more in relation to this question of can we have a say about our own destiny in our own country?

When I consider the time period that our people have been on this continent it is like considering the origins of the universe. It is so unimaginable. Who can imagine a people who have been here for sixty millennia? It is out of our imagination to think of the idea that a people could be in possession of a continent for more than sixty millennia and yet in little more than 200 we have to beg, we have to beg for a rightful place in our own country and what I urge upon those who have come here, the idea that there might be some recognition of that past and our continuing presence.

So, this is an opportunity to do that. I really believe that if the nation doesn't take advantage of the opportunity of the Uluru Statement, this is a question that will never go away. I fear for the state of the Australian heart in relation to Indigenous issues. It may well prove that there be greater love for our equivalent human rights strugglers in same-sex marriage; that there will be more sympathy for that cause then there will be for ours. I think it's a real question. We've been gazumped by that debate. We should have moved on from Uluru to a proper consideration by the government and the parliament of the proposition put forward there. But as the politics played out, we have been gazumped and put on the backburner. We hope that as soon as the same-sex marriage plebiscite is concluded, that there might be a way to put this agenda back on the front.

Now one of my concerns about all of this is that no great human rights achievement has been done without national political leadership. The equivalent achievement with civil rights in the United States required a

Noel Pearson signs the canvas where the Uluru Statement from the Heart will be painted on, during the closing ceremony in the Mutitjulu community of the First Nations National Convention held in Uluru, on Friday 26 May 2017. Photo: Alex Ellinghausen / Fairfax Photos

president who had made this a project in his mind decades before it was achieved. LBJ was thinking about civil rights, decades before he brought it to pass with Martin Luther King. He was thinking about the Gordian challenge involved long before he became president. He had the brains to think through the problems and untie the knot and see a pathway through, how it is that he would convince the South and particularly the Texas South to eventually allow civil rights to come about. The great plotter of social justice.

We have no equivalent calculators of political solutions in Australia, not in the leadership of the country, not in the parliament. So, the challenge we have is how do we plot our way forward from the outside if nobody on the inside is thinking it through? LBJ showed that every political knot can be untied, you've just got to work out how to do it.