PAPER

Peering under the rock: A closer look at the Uluru Statement

Close the Gap Research

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Introduction

The Uluru Statement from the Heart has become famous in Aboriginal circles—a symbol, if not a roadmap, of a way forward for reconciliation and Closing the Gap.

Yet the document fails to connect the problems faced by many Aborigines to any specific defect in the Constitution, much less explain why an advisory body needs the security of constitutional entrenchment.

Arguably, the Statement's legitimacy is drawn not from the persuasiveness of the text per se but from the consultation process that led to its endorsement at a special constitutional convention in 2017.

Its supporters argue that the Statement reflects 'many years of work and countless conversations in every part of the country' and bears the imprimatur of 'nearly 250 Aboriginal and Torres Strait Islander leaders and elders'.

Such claims deserve scrutiny.

Writing process

Consider the circumstances under which the one-page version of the Uluru Statement was written.

The National Indigenous Australians Agency reportedly considers Cape York leader Noel Pearson, Referendum Council co-chair Pat Anderson and academic Megan Davis the authors of the one-page statement. They are likely to have brought a draft with them to the convention in May 2017.

But on the final night, Pearson and others were forced to hole up in a resort hotel room for several hours making last-minute revisions.

By the time the huddle broke up around 4 am on Friday morning the authors were probably not doing their best work.

Although the draft would have benefited from more careful reflection and a good night's sleep, Pearson and his colleagues had painted themselves into a corner.

They had deliberately timed their convention to end on the eve of the 50th anniversary of the 1967 referendum, so there was only one day left to agree on a form of words.

To read the Referendum Council's Final Report it is not clear what convention delegates had been talking about for three days, or why Pearson and others needed to work into the small hours to complete the one-page document.

The convention was 'only an endorsement meeting', the sole purpose of which was to 'bring together the outcomes' from 12 regional dialogues.

Before the convention began, organisers had already concluded that 'A Voice to Parliament' was the only option for constitutional change endorsed by all dialogues.

Yet participants have written of their fear at the time that the meeting would break up without reaching an agreed position. How could that be?

The sticking point was certainly not detail. Records from each dialogue, released only this year under freedom of information, show that support for the Voice was lukewarm and conditional.

Some demanded it be more than merely advisory (Hobart, Broome, Dubbo, Melbourne); others wanted it to be directly elected by indigenous people (Broome, Darwin, Cairns, Adelaide).

The Statement skates over these questions.

It appears that the greatest threat to endorsement of the Voice was not any alternative constitutional alteration, but a sense among many delegates that the Constitution was not the top priority.

Davis, an early supporter of the Voice and the dominant figure at the dialogues, later conceded that participants' insistence on 'truth-telling' was 'unexpected'.

Demands for a treaty were less surprising, though like truth-telling this goal had no obvious constitutional dimension.

Davis later claimed that the various options had been 'ranked' by the regional dialogues, and that the Voice consistently ranked first. The Final Report includes no such rankings, and most of the records of meeting are vague about the relative levels of support for the Voice relative to other options.

A few clearly preferred alternatives to the Voice, be it symbolic recognition (Ross River), regional self-government (Torres Strait), or reserved seats in Parliament (Canberra).

The only consensus that seems to have emerged related to treaties, not the Constitution.

Faced with the possibility that their constitutional convention might decide to leave the Constitution untouched; Pearson and his late-night collaborators needed a form of words that would appear to make the Voice the servant of treaty and truth.

At the time they called it 'strategic sequencing', though this term is omitted from the Final Report.

Rather than present the final text of the Statement to delegates first thing the following morning, it is significant that organisers selected Thomas Mayor (now Mayo) to pitch the strategic sequence beforehand.

The persuasive young union official was presumably the veteran of many a contentious conference vote; his political nous would be crucial.

Only once Mayor had prepared the ground did Davis rise to read out the Statement itself. We are told that it was approved 'by acclamation' — that is, without a formal vote.

A claim of legitimacy

The text can be considered as four discrete sections: a claim of legitimacy; a claim of sovereignty; a case for change; and, finally, demands. It begins:

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

Mayor has described the Statement as having 'unprecedented cultural authority', and the pseudo-spiritual phrasing of the opening sentence is presumably intended to allude to this.

The wording is also meant to imply that the document reflects a nationwide consensus among Aborigines. **Such an implication is misleading.**

To begin with, the 'dialogues' which informed the convention were invitation-only. Organisers disdained voting as 'a traditional Western liberal model ... based upon individuals and not culture.'

Davis has claimed the invite list provided 'a robust sample' of indigenous opinion, though since this list has never been published, her claim is impossible to verify. More credible is Gary Johns' characterisation: 'round[ing] up a like-minded group of people with some theatrics thrown in', a view shared by the Blak Sovereign Movement (BSM).

Even if we accept that the organisers managed to include a representative sample, the dialogues were designed to persuade, not listen.

Davis personally controlled the flow of information to invitees throughout the dialogues, playing them two instructional videos she had written and delivering 'a two- to three-hour lecture on the legal options'.

Though Davis later commissioned a poll showing 80 per cent approval for the Voice among Aborigines, other research conducted by a different pro-Voice group has shown very low levels of Aboriginal awareness of the proposal, let alone support for it.

Nor do the dialogues conspicuously resemble anything we know about traditional pre-contact modes of decision-making. These invariably excluded women and young people, yet quotas ensured that both sexes and a range of age groups attended the dialogues and convention.

In 1972, Nugget Coombs had observed that to have any real legitimacy at the local level, decisions made by delegates at national gatherings would need to be 'referred back to local communities for further discussion before being confirmed, amended or rejected by a subsequent conference'.

This idea resurfaced at the dialogues, but organisers ignored feedback relating to the process itself.

Uluru was, as the BSM later charged, 'neither consistent with [indigenous] cultural protocols [nor] the democratic principles of the colonial system.'

A claim of sovereignty

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.

The largest political unit in pre-contact Aboriginal society was the band or horde, a group of around 25 people who lived, travelled and hunted together.

Though bands formed part of larger linguistic blocs thought to average 450 members (sometimes called 'tribes'), these did not function as political communities.

It was the colonists, struggling to comprehend modes of social organisation so dissimilar to their own, who first grouped autonomous bands into imaginary 'nations'; many of these invented group names were later adopted by Aborigines themselves.

Sovereignty entered the lexicon of Aboriginal rights much later, probably in the aftermath of the Western Sahara case, heard by the International Court of Justice (ICJ) in 1974–5.

Activist Paul Coe made a ceremonial claim of Aboriginal sovereignty two years later, then pursued the matter in the High Court. He was told, in no uncertain terms: "The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain."

Both Coe and the Court used the term sovereignty in the narrow legal sense of ultimate political and legal authority within a defined territory.

Subsequent left-wing commentators have continued to speak of sovereignty, noting that it can 'mean different things to different people'.

This is disingenuous, since activists use the term to advance specific political demands, such as treaties and self-determination, that no informal definition of sovereignty could possibly sustain.

The Statement plays the same word game, proposing:

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.

The Referendum Council's Final Report attributes the italicised text to the ICJ's advisory opinion on Western Sahara, as quoted by the High Court in Mabo.

It actually comes from the 'additional opinion' of just one ICJ member, Fouad Ammoun. Ammoun's words were praise for the Mobutu Sese Seko regime in Zaire.

It is unknown whether this quote was intended by the authors as a nod to Mobutu's ideology of Authenticité, which precludes non-indigenous people from owning land.

More likely they reached for what seemed like the most poetic turn of phrase in the Mabo judgement and ran out of time to check the footnotes.

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?

Here the authors erect their first straw man: the idea that to reject Aboriginal sovereignty is to ignore or destroy the link between Aborigines and country. This ignores the fact that questions of sovereignty on one hand and questions of land ownership or access are distinct.

In the celebrated Mabo case, the Meriam plaintiffs did not claim sovereignty over the Murray Islands, nor was such a claim necessary to secure land rights.

A case for change

In framing their case for change, the authors' task is twofold: to establish that there is a policy problem in need of a solution, and to position constitutional change as a fundamental component of that solution.

In 1995, at the very start of what has become known as the 'recognition' debate, Social Justice Commissioner Mick Dodson argued that the 'failure' of indigenous policy 'begins with our most fundamental document, the Australian Constitution.'

Dodson's clarity contrasts with the opaque wording that emerged from the hotel room, in which a referendum is simply one demand among many.

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

Consciously or not, the authors may have been channelling Paul Keating here, and not just with the talk of 'structural reform'.

The phrase 'full expression of Australian nationhood' can be found in a speech the then Prime Minister gave in praise of Suharto's 'New Order' dictatorship
in 1992.

> **Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened [sic] 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.**

The authors are on stronger ground drawing attention to three metrics on which Aborigines are, as a group, worse off than their countrymen: adult incarceration rates, juvenile incarceration rates, and the proportion of children in out-of-home care.

Davis wrote in a separate report to the NSW Government that the Statement 'identifies two public policy areas—primarily the responsibility of the states—as underpinning the logic of Commonwealth structural reforms' but does not explain the link between the two.

As it happens, fewer than one per cent of Aboriginal prisoners are serving time for federal offences, and the Commonwealth manages neither prisons nor out-of-home care.

While the 'most incarcerated' line may well be true, the straw men regarding criminality and love for children underscore the lack of seriousness with which the Statement addresses these issues.

No-one claims Aborigines are 'innately criminal' or that Aboriginal parents, in general, do not love their children.

But it is fatuous to imply that Commonwealth laws or policies keep Aboriginal offenders in prison longer than other Australians convicted of the

same offences in State and territory courts. Or that any act or omission of the Commonwealth compels State and territory child protection officials to discriminate against Aboriginal families.

The primary task of the Statement from the Heart is to connect genuine examples of disadvantage to some defect of the Constitution.

But all it offers is this curious phrase:

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

Here the authors invoke two phrases written by anthropologist Bill Stanner (1905–81), both of which appear in Pearson's 2014 essay "A Rightful Place".

In his 1968 lecture, "The Great Australian Silence", Stanner characterised the historical lack of political and scholarly interest in Aborigines as a 'structural matter' rather than mere 'absent-mindedness'.

He is not, as the Statement implies, talking about constitutional structures. Rather he is describing a past mindset, employing the metaphor of a house in which 'a window ... has been carefully placed to exclude a whole quadrant of the landscape.'

A case for change (continued)

The phrase 'torment of powerlessness' is also Stanner's. Again, his meaning has little to do with politics. Rather, the anthropologist is describing the story of Durmugam, a Nangiomeri man he met several times between 1932 and 1958.

Durmugam's generation had grown up under the authority of customary law but now, in their old age, could no longer rely on its traditions of respect for elders.

Younger men treated him with disrespect, even violence, from which Australian law offered him scant protection.

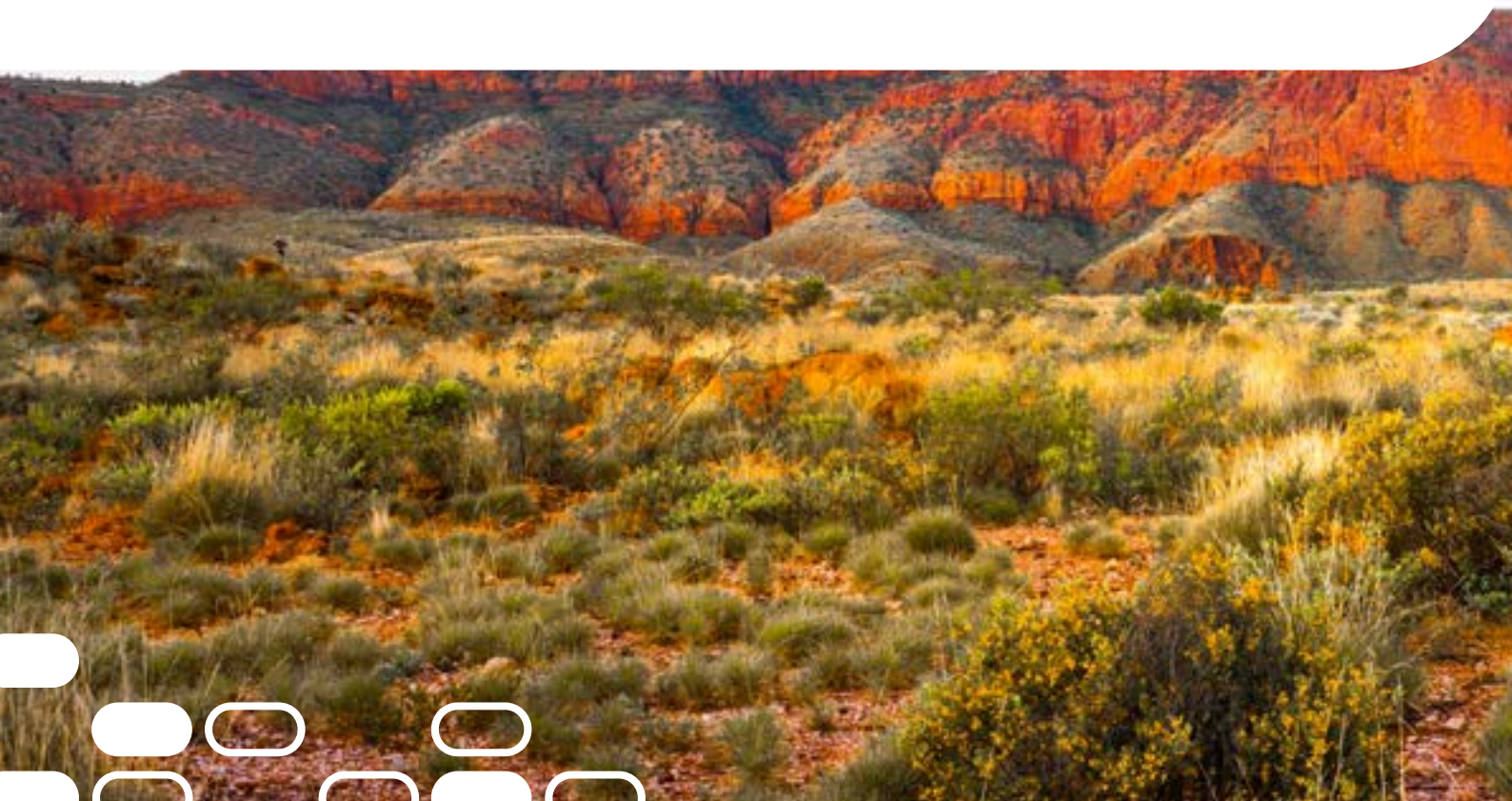
It was the fate of his generation to live through the wrenching transition from the ancient to the modern world in the space of a few short years: 'His times were so thoroughly out of joint that ideal and real could only drift further apart.'

It is this torment, not that of a criminal sitting in a prison cell as a result of his own choices, that Stanner so movingly describes.

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.

To their as-yet unsubstantiated claim that the Constitution has some invisible shortcoming, the authors add another: that enhanced political status is a requirement in order for children to 'flourish' and 'walk in two worlds'.

But surely the story of 80 per cent of Aborigines, who are doing about as well as other Australians without the assistance of the Uluru agenda, demolishes any such argument.



Demands

The concluding paragraphs contain the Statement's demands. The authors knew delegates were overwhelmingly supportive of both treaty and truth-telling, neither of which would require a referendum.

Davis's lectures and the structure of the regional dialogues had dissipated support for symbolic recognition or new constitutional rights, but only slightly.

How to place the Voice ahead of delegates' true priorities? The formula is clever: treaty and truth-telling are positioned as 'the culmination of our agenda'.

Though they are acknowledged as more important than the Voice, the Voice still comes first. This is the 'strategic sequencing' referred to earlier. Thus:

> **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.

The Final Report wrongly attributes the italicised phrase to a 2016 essay by Galarrwuy Yunupingu.

More importantly, the translation is incorrect. Makarrata is a Yolngu word for a practice common in pre-contact Aboriginal Australia: the 'juridical' (or 'regulated') fight.

Rival clans caught in destructive cycles of retributive violence had no higher authority to whom they could appeal. Instead, they invoked such fights as a means by which grievances could be settled.

Far from being anything like a treaty negotiation or formal inquiry, makarrata was a bloody affair.

Though governed by strict rules, it was designed to end in death or serious injury. The term acquired its modern connotations only around 1980, when the National Aboriginal Conference sought an alternative to the polarising 'treaty'.

> **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.**

The convention was timed to coincide with the 50th anniversary of the successful 1967 referendum. The immense symbolism of that vote has tended to obscure its actual legal effect, even today.

In attempting to summarise the significance of 1967, the authors have used the turn of phrase 'we were counted', referring to the repeal of s. 127 of the Constitution. Yet this is false. Statisticians had provided counts, or at least estimates, of the Aboriginal population since the 19th century. Until 1967, numbers of 'full-blood' Aborigines were tabulated separately.

Far from directing that Aborigines not be counted, s. 127 was a practical response to the difficulty in sourcing accurate figures for the large numbers of Aborigines then living in the traditional way, largely out of contact with government officials.

Conclusion

A month after Mayor persuaded convention delegates to accept the Voice as a stepping-stone to treaty and truth, Pearson, Anderson and Davis delivered their coup de grâce.

Together with their Referendum Council colleagues, they presented a Final Report in which neither treaty nor truth were among the recommendations.

Alas, both were beyond their terms of reference. 'However,' they offered by way of consolation, 'we draw attention to this proposal'.

As a last-minute solution to a potentially embarrassing impasse, the cleverness of the Uluru Statement is not in dispute.

But the circumstances of its composition and its lack of authenticity cast grave doubt on its status as a genuine expression of Aboriginal opinion.

Close the Gap Research

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