



Law Council  
OF AUSTRALIA

# Walking together: the role of the Uluru Statement and a First Nations Voice in addressing Incarceration Rates

**Speech delivered by Arthur Moses SC, Law Council President, at  
the National Indigenous Legal Conference, Darwin.**

**14 August 2019**

Ladies and gentlemen, esteemed guests. It is an honour to be here with you in Darwin for the National Indigenous Legal Conference.

I humbly acknowledge the traditional custodians of the lands on which we meet, the Larrakia people, and pay my respects to their Elders – past, present and emerging. I acknowledge the central role they play in the community as custodians of culture, ancient lore and Dreaming. I acknowledge and extend those respects to Aboriginal and Torres Strait Islander peoples with us today.

Advocating for the adoption of the Uluru Statement from the Heart and a Voice for First Australians is one of my key priorities as President of the Law Council this year. I am grateful for the opportunity to speak with you today on a subject that is critical to our nation's future. I want to examine how giving Indigenous people an effective voice can make a practical difference in addressing incarceration rates.

Australia's recent path to reconciliation has been, at times, incredibly slow.

Not because there is necessarily disagreement on where we need to head or why, but because we have often moved at different speeds, chartered different courses and tripped over best intentions.

Two years ago, the Uluru Statement from the Heart was conceived from one of the most comprehensive consultations of Indigenous Australians in our nation's history.

The Statement laid down a road map and issued an invitation – not to Canberra but to all Australians – “to walk with us in a movement of the Australian people for a better future”. That was an important invitation. It recognised that to achieve change requires all Australians – of all political persuasions – to walk together for a better future.

Unfortunately, the road map has not been properly understood. The legal profession and the Law Council have an important role in developing a better understanding of the Voice if we are to achieve the necessary bipartisan support. The Uluru Statement proposed a constitutionally enshrined Voice – not a controversial proposal but an indigenous advisory body to provide advice on how legislation will impact on indigenous Australians.

As the former Chief Justice of the High Court Murray Gleeson emphasised last month, a Voice to Parliament, not a Voice in Parliament.

The theme of this year's conference is “True Justice: Integrating Indigenous Perspectives” and in many ways that is precisely what the Voice seeks to achieve. True justice by listening to, integrating and respecting the Voice of Indigenous Australians.

Not just because it is the ‘right’ thing to be seen to do. But because a First Nations Voice could have a direct, tangible impact on policy development, the administration of justice and the improvement our laws.

The stark reality is that Aboriginal and Torres Strait Islander affairs in this country have consistently faltered in large part because Parliament has not listened to the voices of Aboriginal and Torres Strait Islander people.

As former Queensland Senator Neville Bonner AO once said change would only occur *“when people of non-Aboriginal extraction are prepared to listen and hear what Aboriginal people are saying, and then help and let us work together to achieve those ends”*.

In January this year, I inspected the Don Dale Youth Detention Centre on behalf of the Law Council. I was struck by a poster on the cell of a child detained there. The poster read in part: “Lessons not learnt are lessons repeated”.

These words have stayed with me long after the visit, a reminder for all those involved or entrusted with law reform, policy and advocacy that we cannot continue to repeat the mistakes of the past.

Alternating between ignoring and silencing the voices of First Nations Australians has led to policies and laws that are ineffective and ineffectual at best; insulting, discriminatory and outright harmful at worst.

The Voice is not about clever words or rhetoric. It is about opening our ears and minds and hearts. And recognising that a First Nations Voice in our Constitution is critical to inform and empower meaningful policy development and progress sound law reform.

One of the most powerful lines in the Uluru Statement are the words “This is the torment of our powerlessness”.

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.

For 249 years our First Nations peoples have not been heard. 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 for two and a half centuries.

This was made clear by WA State Coroner Ros Fogliani in her report this year on the deaths of thirteen children and young persons in the Kimberley Region of WA.

*To focus only upon the individual events that occurred shortly before their deaths would not adequately address the circumstances attending the deaths. The tragic individual events were shaped by the crushing effects of intergenerational trauma and poverty upon entire communities. That community-wide trauma, generated multiple and prolonged exposures to individual traumatic events for these children and young persons.*<sup>1</sup>

Within the community there is an acute recognition of wrongs done to our First Nations peoples. We know only too well the disturbing statistics. The criminal justice system has taken a disproportionate toll. Indigenous people represent less than 3 per cent of Australia’s population, but more than 28 per cent of Australia’s prison population.

Up to a third of Aboriginal and Torres Strait Islander people in prison are on remand awaiting a trial or sentence.<sup>2</sup> The speed of justice has been a prominent issue of discussion in Australia’s legal community this year. The issue has occupied the attention of Attorneys-General, heads of jurisdiction and the media alike. It has understandably attracted much public debate. But the voices of very people who have suffered the longest delays have been ignored in this conversation. Aboriginal and Torres Strait Islander Australians should not have to wait any longer to be heard.

It is the view of the national profession that accepting the Uluru Statement and the Voice will make us stronger as a nation – because it will allow us to move forward as a nation. This cannot occur while our First Nations people are denied a proper place in our society.

The recommendation of a First Nations Voice is not onerous or overly prescriptive.

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<sup>1</sup> WA Coroner, Inquest into the deaths of thirteen children and young persons in the Kimberley Region, Western Australia, 8.

<sup>2</sup> ALRC, *Pathways to Justice*, 14.

Former Chief Justice Gleeson explained it in these terms.

“Representation,” he said “cuts both ways”.

“When a lawyer represents a client in court, the client receives the benefit of the lawyer’s advocacy, but the court also is meant to receive a corresponding benefit. That benefit lies not only in the enhancement of the court’s capacity to make a just decision but also in the efficiency of the decision-making process. The client is bound by the conduct of the advocate, and it is only on this basis that the court can go about its business effectively. A body that has the capacity to speak to the Parliament on behalf of Indigenous people should be of advantage to Parliament and, through it, the nation. But it will also, in a practical way, bind Indigenous people.”

Ten years ago, then Prime Minister Kevin Rudd offered a formal apology to Australia’s Indigenous peoples for their systematic mistreatment. I recently reread the Prime Minister’s speech, and a particular line stood out to me.

“We apologise,” the Prime Minister said, “for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians”.

At the Law Council, we believe good laws and policies improves the lives of Australians. These protect our interests and freedoms; safeguard integrity and uphold confidence in our democracy, our courts, institutions and each other.

Equally ill-conceived and badly drafted laws and policies erode our rights; silence our voices; impact on business opportunity and certainty; frustrate our aspirations and deny access to fair outcomes before our courts.

Our laws and policies will not truly benefit our First Nations unless and they are led and informed by their experience, advice and expertise.

The Uluru Statement or the Voice will not solve all the legal and policy problems that impact upon Indigenous Australians – of course it cannot and will not. Anybody who says that it will, is lying or is seriously deluded.

We are the first to acknowledge that. Much work must be done to improve legal assistance, access to justice, better resourcing of our justice systems and develop meaningful legislative reform across a wide range of areas.

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

The Law Council has repeatedly said there is no legal impediment to providing for a Voice to Parliament in the Constitution.

A referendum on this issue is long-overdue and very welcome. But the opportunity to remedy the omission of our First Nations Peoples from the Constitution – and from a proper place in our society – must not be lost because of a lack of detail or planning.

Respect for the principle of self-determination is key to addressing existing disempowerment and the ongoing impact of colonisation.

Enshrining an Indigenous Voice within the Australian Constitution is a vital step in empowering Indigenous people. And it is vital to the development of meaningful policy and

law reform at federal, state and territory levels, informed by Indigenous experience and advice.

As the national representative body for the legal profession, Law Council is committed to supporting First Nations leaders, organisations and communities to lead Constitutional Recognition.

We have an obligation that is both professional and moral to press for timely recognition and advocate for social justice. There is more the legal profession must do to explain and advocate for this work to all parliamentarians and to the Australian public.

Misinformation and misunderstanding about what the statement stands for and what an Indigenous Voice to the Federal Parliament would mean has already seen a stalling of political will.

And the longer it stalls, the longer 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.

So how might the Voice make a practical difference to the lives of First Nations Peoples?

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, and preserve Indigenous cultural heritage.

The lack of a voice continues to manifest through the dispossession of quality of life, and life itself. Through significant disparities in health, education and employment, the prolonged dispossession of freedom and basic rights.

And it continues to manifest in and exacerbate Indigenous incarceration rates which are a national shame.

Aboriginal and Torres Strait Islander Australians are the most incarcerated people on earth. In March last year, the Australian Law Reform Commissioner released its landmark *Pathways to Justice* Report, highlighting the stark over-representation of First Nations Peoples in Australian prisons.

More than a year later, the report has been met with silence. We are still waiting for the government to respond.

Over-representation and disproportionate incarceration has a staggering cost, both in monetary terms and in terms of social cost to community.

According to the ALRC, in 2016 the total criminal justice system costs of First Nations incarceration were \$3.9 billion. When related costs were taken into account, the estimated cost virtually doubled.<sup>3</sup>

The societal cost is immeasurable. We know the high rates of criminal justice interaction experienced by Indigenous peoples stem from, among other things, cycles of poverty, intergenerational trauma and grief. And we know these experiences of systemic injustice accumulate over a lifetime, with devastating consequences.

In this space, how could the Voice make any difference?

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<sup>3</sup> ALRC, *Pathways to Justice – summary Report*, 11.

There is a growing and compelling body of evidence that clearly illustrates Indigenous-led solutions to social issues lead to better outcomes.

First Nations peoples make up three per cent of Australia's population. Yet as of March, Aboriginal and Torres Strait Islander peoples accounted for 28 per cent of the national adult prison population.<sup>4</sup> For young people, this figure jumps to 49 per cent.<sup>5</sup>

Between 2006 and 2016, Aboriginal and Torres Strait Islander incarceration rates increased by a staggering 41 per cent.<sup>6</sup>

Prison should not be a rite of passage for any child.

About five per cent of young people aged 10-17 years in Australia are Indigenous.

However, more than half of all young people in detention on an average day in 2017-18 were Aboriginal or Torres Strait Islander people.

First Nations young people aged 10–17 were 23 times more likely to be in detention.

Across all Australian jurisdictions, the minimum age of criminal responsibility is 10 years of age. A child still at primary school can be imprisoned.

At the same time:

- a child under 13 years cannot sign up for a Facebook account;
- a child under 12 years cannot board a plane unsupervised; and
- and child under 18 years cannot get their ears pierced without parental permission.

Yet under the law as it currently stands, a ten year old child can be sent to a watch-house, sent to prison.

When it comes to Indigenous children, the low minimum age of criminal responsibility is sowing the seeds of future problems.

Indigenous children are 16 times more likely to be both in the child protection system and under youth justice supervision than non-Indigenous children the same age. They represent about 36 per cent of all children in out-of-home care.

Removing children from their families and communities is a well-documented pathway to juvenile and adult criminality.

The Law Council recently reassessed and changed our official policy on the minimum age of criminal responsibility, aligning our position with that of Indigenous peak bodies.

We believe no child under 14 should be placed in detention.

Due to their stage of brain development and limited capacity for reflection and comprehension before action, Law Council believes that children under 14 should not be held criminally responsible or formally charged.

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<sup>4</sup> Australian Bureau of Statistics, Aboriginal and Torres Strait Islander Prisoner Statistics, 30 June 2018.

<sup>5</sup> Australian Institute of Health and Welfare, Youth Detention Population in Australia, 2018.

<sup>6</sup> ALRC, *Pathways to Justice*, 7.

This is especially important for at-risk children whose experience of poverty, neglect and abuse often puts them in contact with the criminal justice system at an early age.

Children belong in their communities with their families and guardians. Not in detention. Imprisonment should be a last resort when it comes to children, not a first step.

There is a strong evidence base and health-justice research supporting increasing the minimum age of criminal responsibility.

Raising the minimum age is not being soft on crime.

Harsh law and order measures do not prevent or reduce crime. In many instances, they only serve to criminalise some of the most vulnerable people in our communities.

There is no doubt the current regime of minimum age of criminal responsibility continues to have devastating impacts on Indigenous communities.

First Nations peoples must be empowered and given autonomy over the future of their children. Enshrining a First Nations Voice in the Constitution is a significant step in the right direction.

On average, it costs roughly \$531,000 per year to keep a young person in juvenile detention. In 2017-2018 youth detention involved a staggering total government spend of more than \$509 million. Money the Law Council firmly believes would be better spent on prevention, rehabilitation, diversion and justice reinvestment.

This money would also be better spent on community-based programs aimed at strengthening families and keeping them together. It has long been recognised that the key drivers of incarceration for Indigenous people are external to the justice system, and justice reinvestment involves a commitment to invest in front-end strategies to prevent criminalisation.

We also know that community-driven approaches provide a blueprint as to what youth justice solutions should look like moving forward.

There are success stories we can look to and learn from, such as Bourke's Maranguka Justice Reinvestment project. It provides an emerging blueprint for an innovative and common-sense approach to community-based diversion that works, addressing the causes of offending before it begins.

The project began in 2013, when members of the Bourke Indigenous community approached Just Reinvest NSW with an interest in adopting a community-led justice reinvestment approach. They wanted a say in the policies and laws that affect them.

A community strategy, *Growing Our Kids Up – Safe, Smart, Strong*, was implemented in 2015. It is directed and guided by the Bourke Tribal Council. A 'backbone' team works with existing services to work collectively to develop and implement local solutions.

Statistics released last year showed a staggering decrease in crime rates in the community. While these are early results, since the project began there has been an:

- 18 per cent drop in the number of major offences;
- 34 per cent drop in non-domestic violence related assaults;
- 39 per cent fall in domestic violence related assaults;
- 39 per cent fall in the number of people proceeded against for drug offences; and

- 35 per cent reduction in the number of people proceeded against for driving offences.

These tangible results have been noticed. In March, an additional \$1.8 million in government funding was announced to keep the project going.

That additional contribution costs less than keeping four children in detention for a year.

Australia's juvenile justice system is currently based on a false economy.

A justice reinvestment model is now being rolled out across many other communities across Australia, which is promising.

Importantly, the model demonstrates the power of Indigenous communities determining their own futures.

The ALRC's *Pathways to Justice* Report noted a "recurring observation made during consultations and in submissions... that solutions should be developed and led by Aboriginal and Torres Strait Islander people".<sup>7</sup> The Commission's recommendations included that governments work with First Nations organisations to "develop and implement culturally appropriate bail support programs and diversion options; develop options to reduce the imposition of fines and infringement notices; and develop prison programs that address offending behaviours and prepare people for release".

The nexus between justice and health must also not be understated.

In the 2011 *Doing Time* report, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs found a range of physical and mental health issues directly relate and contribute to the overrepresentation of Indigenous youth in the criminal justice system, particularly cognitive impairment.

The Law Council's Justice Project found that these children are caught in cycles of disadvantage and imprisonment. This is due to a lack of early critical support services and a failure to invest in alternatives to criminalisation and imprisonment.

The Justice Project advocates preventative, rehabilitative, holistic solutions. This will mean greater partnerships across the health-justice sector, led by Indigenous people and organisations.

Importantly, the ALRC recognised that access to legal representation and advice is "one of the cornerstones of addressing" disproportionate incarceration rates of First Nations Australians.<sup>8</sup> Adequate resourcing of legal aid and legal assistance providers is therefore critical.

In this context, as you know, the independent Indigenous Legal Assistance Program (ILAP) has a central role to play in self-determination. However, it is currently under threat.

The Law Council recognises the strong leadership of Indigenous legal services and stands alongside them in supporting a standalone ILAP. The Law Council is opposed to the Federal Government's plan to incorporate Aboriginal and Torres Strait Islander Legal Services into a single funding mechanism. And we will support ATSILS however we can.

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<sup>7</sup> ALRC, 11.

<sup>8</sup> ALRC, *Pathways to Justice – Summary Report*, 17.



This is a plan that undermines the key reason ILAP was established – to recognise Indigenous peoples not only need access to more legal services but also greater access to culturally appropriate legal services.

ATSILS play an important role in providing civil, family, criminal, child protection and human rights assistance.

They address the unique needs of Aboriginal and Torres Strait Islander people which may not be covered by Legal Aid Commissions.

They speak out on unfair laws, policies and practices that harm many Indigenous Australians. Their work is too important to fail.

Had there been a Voice to Parliament, it could have provided advice about the importance of stand-alone funding for Indigenous legal services and proposed amendments. Instead, the government pressed ahead despite the findings of the Review it commissioned into the Indigenous Legal Assistance Program

That review highlighted the importance of independent, Indigenous-led ATSILSs, stating:

*“There is an increasing body of evidence in Australia and internationally that best practice approaches to service delivery to address Aboriginal and Torres Strait Islander disadvantage are those that operate within the framework of community control ... local communities have control of their response to issues that directly affect their community.”*

This is just another practical example of the importance of giving people a voice in the policies that directly affect them.

In conclusion, the invitation posed by the Uluru Statement is not meant just for politicians in Canberra – it is an invitation to all Australians to come together for a better future and learn from the past.

I am sometimes asked “what do the problems of indigenous Australians have to do with the rest of Australia?”. When I am asked that question, I quote the words of Martin Luther King Junior in his letter from Birmingham Jail in 1963: *“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”*

In the 1967 referendum, more than 90 per cent of all Australians voted in favour of amending the Constitution to include Aboriginal people in the census and empower the commonwealth to create laws for them.

A referendum on Constitutional Recognition and a First Nations Voice is a natural progression from the 1967 referendum, and an essential step forward to progress meaningful reconciliation in a post-apology Australia.

The same “right wrongs, write yes” campaign posters used then could well be used some 50 years later in a new referendum to enshrine a First Nations Voice in the Constitution.

But for a referendum to succeed, and for the Voice to achieve its potential to allow all Australians to move forward as a nation, we must tread that path together. This means clearly and accurately explaining the Voice, and what it means, to an Australian community that is open to listening. It also means better explaining the link between the Voice and its capacity to inform and improve policies and laws that impact upon our First Nations Peoples.

A significant amount of confusion and misinformation currently exists about the Uluru Statement and the Voice. It is critical that the Voice and what it represents be properly understood and explained to our political leaders and the community before Australians are asked to vote on it.

But misinformation and misunderstanding about what the statement stands for and what an indigenous voice to the federal parliament would mean has already stalled progress, - despite goodwill. Such misinformation cannot be allowed to let us wander off course.

The recent appointment of the Honourable Ken Wyatt as Minister for Indigenous Australians is a truly defining moment in Australia's political history.

Mr Wyatt's approach to the Voice has remained pragmatic. Like the Law Council, Mr Wyatt has said he believes the wording of any referendum question must be carefully considered.

If we get this wrong, the reality is it could result in unintended consequences detrimental to First Nations peoples.

Not getting it right could set Indigenous constitutional recognition back decades.

That is why the hard work must start now.

Steps towards developing and implementing the Voice must be facilitated by the 46<sup>th</sup> Parliament of Australia.

Critically, this process must be led by Indigenous Australians, supported by government, the Australian people and allies of the Voice, including the legal profession and Law Council.

I recognise the particular leadership and expertise amongst this conference's membership in building this Voice.

Realistic time frames must also be established to ensure that the Voice is not only constitutionally enshrined, but effective, empowering and enduring.

Though acknowledging our history of dispossession, segregation and brutality may be painful, it is also the key to healing.

That is why the Uluru Statement offers the Makarrata Commission to supervise a process of agreement-making and truth-telling to make peace with our past, both the stories of struggle and hardship and those of survival, resilience and kinship.

The invitation posed by the Uluru Statement is an invitation to all Australians to come together 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.

Now is the time to start walking in the right direction – together.

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