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First Nations consensus in constitutional reform, nation building and treaty making processes

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The Judicial Commission's Ngará Yura Committee, in partnership with the NSW Bar Association, Law Society of NSW and Museum of Applied Arts and Sciences, organised the third Exchanging Ideas symposium held on 15 June 2019 to discuss the processes that led to the 2017 Uluru Statement from the Heart.

Around 100 judicial officers, lawyers and Aboriginal community members came together to discuss the making of the Uluru Statement as well as the processes of nation building and treaty making currently being undertaken in a number of communities. The discussion also canvassed the design challenges of such processes that can be inclusive and facilitate community consensus. The venue, the Museum of Applied Arts and Sciences (MAAS), provided the perfect setting with its impressive Aboriginal heritage collection.

The day began with Justice Lucy McCallum (Chair, Ngará Yura Committee) and Marcus Hughes, Head of Indigenous Engagement and Strategy, MAAS extending a warm welcome to the group. Joanne Selfe, the Commission's Ngará Yura Project Officer, set the tone with a moving Acknowledgement in language attributed to the Eora people.

Justice Rachel Pepper then introduced Professor Megan Davis, Pro Vice Chancellor and Professor of Law, UNSW, who provided a comprehensive and compelling introduction to the day. She addressed some of the extensive history on

* With thanks to The Hon James Allsop AO, Chief Justice, Federal Court, the Hon Justice Lucy McCallum (Chair), her Honour Judge Dina Yehia SC, his Honour Magistrate Brian van Zuylen and Ms Joanne Selfe for their invaluable contribution.

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The Commission's Ngara Yura Project Officer, Joanne Selfe (l) with Professor Megan Davis.



Barristers Andrew Smith (l) and Tony McAvoy SC with Justice Rachel Pepper.

constitutional recognition, noting that the Uluru Statement comes at the end of decades of advocacy, campaigning and thought by Aboriginal and Torres Strait Islander people. Since first contact, the community's aspirations have been consistent: a voice in government; agreement-making with non-Indigenous Australians; and truth about the colonial past. Megan spoke to the feelings of ethical loneliness that Indigenous communities face within such discussions. For those of us who have fortunately not been exposed to this, ethical loneliness is the experience of being abandoned by humanity, compounded by the cruelty of wrongs not being heard.¹

Professor Davis then moved to explain the concept of the Dialogues — theory, research and design. The Dialogues were a series of 13 meetings of Indigenous Australians held around the country between December 2016 and May 2017. The significance of this process lies in it being

a wholly Indigenous-designed and led process and the first time Aboriginal and Torres Strait Islander peoples were asked to deliberate collectively and report back on possible constitutional reforms. It is important to note that, while consultation with Aboriginal and Torres Strait Islanders was extensive, non-Indigenous Australians were also consulted.

As a precursor to the Dialogues, community education on civics and legal issues was provided to inform the community participants, thereby assisting them to assess the various legal options on reform being presented to them. This process was essential and enhanced the outcomes.

The Dialogues were community-led and included traditional owners. In each location, the Referendum Council partnered with a land council or another local host organisation which invited around 100 participants. Gender and demographic balance, and representation for the Stolen Generations was a focus. The idea behind this approach was that, for the most part, large community-based organisations have the opportunity to use their voice, so the focus was to listen to those not usually heard. The wording of the referendum was workshoped (as part of the Dialogues) so there was an understanding of what it would look like. The gathering was reminded that the Statement from the Heart was issued to the Australian people.

Judge Dina Yehia SC then introduced Teela Reid (lawyer and human rights advocate) and Thomas Mayor (National Indigenous Officer, CFMMEU and former co-chair Uluru Working Group) who focused on the process to develop community consensus from a participant's perspective. This process involved engaging with people in communities around the country. Teela spoke forcefully about the role of young people and the necessity for recognition. In Aboriginal and Torres Strait Islander communities, 53% of the population is under the age of 25. She emphasised the importance of respecting the consultative process and community members' views.

Thomas spoke of how the Uluru Statement from the Heart has provided a practical platform to work together to achieve the goal of constitutional reform and nation building. A people's movement is fundamental to this process along with building momentum through organisations and with individuals. Both speakers were passionate and instructive about the Dialogues and the importance of a constitutionally enshrined Voice.

Andrew Smith, a proud Wiradjuri man (and one of the five First Nations barristers currently practising at the NSW Bar), then introduced a panel of three speakers who provided commentary on the methodology.

Dr Gabrielle Appleby, Professor of Law, UNSW, had provided technical assistance to the Dialogues. She was able to speak to the maturity of the proposal for a First Nations Voice, a proposal with a long history internationally and in Australia.

Gabrielle referenced the United Nations Declaration on the Rights of Indigenous Peoples to which Australia became a

¹ As defined in J Stauffer, *Ethical loneliness — the injustice of not being heard*, Columbia University Press, 2015.

signatory in 2009. Under Articles 18 and 19² there is a duty on government to consult with Indigenous people.

Dave Allinson, CEO of Uphold & Recognise, spoke to the need for bipartisan support and the focus of his organisation on bringing those in doubt or opposition to the table. He spoke of the controversy and confusion that myths cause, such as the notion of the Voice as a third arm of Parliament, and the need for ongoing clarification and education.

Arthur Moses SC, President of the Law Council of Australia, suggested that sufficient detail about the proposed model for a Voice was essential to progress the notion. Without a level of detail, the proposal could be undermined by those opposing it and so risk failure.

Following lunch (and much lively talk), the group reconvened to hear the inspiring story of First Nations consensus in nation building.

Magistrate Brian van Zuylen introduced Matthew Walsh, (Executive Manager, Research, Jumbunna Institute for Indigenous Higher Education and Research), Professor Daryle Rigney (Jumbunna Institute for Indigenous Education & Research, UTS) and Damein Bell (CEO, Gunditj Mirring Aboriginal Corporation). These speakers provided practical examples of how communities and institutions worked together to achieve consensus.

Matthew calmly but passionately stressed the need and reasons for reform of the Constitution and First Nations rebuilding. Damein then provided impressive examples of how his Gunditj Mirring community works within this space and of their challenges and achievements (of which there are many). He described how the community has regained their land (in Victoria), restored cultural land management of Lake Condah, and their impressive plans for the future.* Damein also explained that his mob has enhanced its leadership over the years. The processes driving this work clearly demonstrated an empowered community model and it was refreshing to hear of these results.

Daryle then spoke of his involvement in the practicalities of nation rebuilding. He referred to the Hindmarsh Bridge controversy in South Australia in the 1990s, and the ensuing damage done to the community. He spoke about the ethical loneliness that Professor Megan Davis had referred to and how damaging this was to community. Daryle then shared a number of examples of how the community has worked tirelessly to address this situation and unite in a healing and liberating way.

Chief Justice James Allsop AO chaired the final session in which Professor Michael Dodson AM and Tony McAvoy SC addressed the challenges of achieving First Nations consensus in treaty making processes.

Professor Dodson began by outlining his work as Treaty Commissioner for the Northern Territory. He discussed the

difficulties in dealing with government representatives and government departments. In particular, there was often a failure to appreciate that the treaty process is not a different way of improved service delivery but rather, a discussion and process to share power. Professor Dodson counselled against viewing the outcome of this process as a short-term issue or one that will be achieved soon. He is of the view that this is a generational process that requires non-Indigenous Australians to understand the country's true history. An understanding of that history from the First Nations' perspective is the foundation of the mutual respect that a treaty reflects.

Tony McAvoy then explained that Victoria has also been working in the treaty space. He spoke of the need for Indigenous groups to be treaty ready themselves. Tony saw progress to be in a shorter time frame than Professor Dodson, but agreed that the fundamental task was truth telling by and to non-Indigenous Australians as the foundation of treaty making and a just society.

The day ended on that salutary note — to move forward, we must also look back.



Acting Magistrate Paul Mulroney with Magistrate Sue Duncombe, Presiding Magistrate of the Youth Koori Court.

* UNESCO's World Heritage Committee announced on 6 July 2019 that the Budj Bim Cultural Landscape, in Gunditj Mirring country, has been added to the UNESCO World Heritage List for its Aboriginal cultural importance.

2 Article 18: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" at www.humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples-1, accessed 3/7/2019.