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The making of the Uluru statement

Behind the landmark Uluru statement are years of conservative negotiation and compromise, led by Noel Pearson. By Karen Middleton.



Indigenous leader Noel Pearson at the Indigenous convention at Uluru.

In early 2014, just as a parliamentary committee was being established to produce a road map towards Indigenous constitutional recognition, Cape York leader Noel Pearson began his own series of quiet consultations with people he calls “constitutional conservatives”.

With a future recognition referendum in mind, he was looking to connect with some of those who had successfully derailed various referendums in the past and to start discussions aimed at ensuring they didn’t do it this time.

He did not want to see the hopes of Indigenous Australians raised and then dashed yet again.

In the vein of politics being the art of the possible, his was not a search for perfect reform but for compromise.

Having first approached constitutionalist Professor Greg Craven to talk about the kind of change conservatives might accept, Pearson sat down with conservative thinkers Damien Freeman and now-Liberal MP Julian Leeser, members of an organisation called Uphold & Recognise.

“Noel was tossing round a series of ideas around constitutional recognition,” Leeser told *The Saturday Paper* this week.

“...Nobody wants to put up a referendum that doesn’t succeed.”

Those discussions significantly influenced the direction of Australia’s constitutional debate. They also set the parameters for what was considered at the recent landmark Indigenous convention at Uluru and directly shaped the statement that emerged.

“Change Is Often A Slow-Moving, Lumbering Thing And We Become Frustrated That It’s Taking So Long. But I Have Hope ... That Change Is Going To Come. And When It Does, Nothing Will Ever Be The Same Again.”

The “statement from the heart” comes after a decade-long debate about constitutional recognition, sparked when, on the eve of calling the 2007 election, then prime minister John Howard promised a referendum within 18 months.

The Uluru statement stands apart from other recommendations since then, as the first to emerge from comprehensive nationwide consultations with Indigenous Australians.

Noel Pearson’s constitutional adviser, Shireen Morris, said this week that the basis for what Indigenous people agreed on at Uluru was drafted in consultation with the non-Indigenous “constitutional conservatives”.

Morris hailed the result as “a sensible consensus” and “a very pragmatic thing”.

“This proposal was designed with the kinds of people that have run ‘No’ cases in the past,” she said.

“It was designed with Professor Greg Craven and Julian Leeser, MP, in the Liberal Party. He used to oppose the republic referendum and the local government referendum and he is on board with this proposal. Now that says a lot. To me, that says this is actually a very modest and practical proposal.”

Those who believe the statement should have gone further also think there is a lot in what it didn’t say.

It did not propose a statement of recognition, either in the constitution’s preamble or in its body – the very thing the Recognise organisation had been given \$30 million over five years to educate the Australian people about.

There have long been differing ideas of what “recognition” meant and increasing tension between Recognise and some Indigenous leaders who thought a campaign without consultation or a referendum question was a waste of money.

The Uluru statement did not propose amending what is known as the “race power” either, the power under section 51 (xxvi) that allows the federal parliament to make laws specifically affecting people of particular races.

Before the 1967 referendum, this part of section 51 expressly banned the government from making laws directed at Indigenous Australians.

With almost 91 per cent support, the referendum removed the words that excluded Aboriginal and Torres Strait Islanders, paving the way for the Native Title Act that followed the High Court’s decision in the Mabo case.

But it also allowed other laws to be made targeting Indigenous people, in which the question of benefit was open to debate. They include those governing the extension of the Northern Territory’s emergency intervention to the states, starting with South Australia and Western Australia.

The Uluru statement did not endorse inserting any kind of constitutional clause banning racial discrimination, a clause that previous inquiries had recommended.

Referendum Council member and UNSW law professor Megan Davis said the proposals were abandoned because “conversations with government lawyers and politicians” indicated they could not insert any language into the constitution that would “fence the parliament in”.

Noel Pearson told *The Saturday Paper* they could not propose anything that could be seen to cede the parliament’s law-making power to the High Court.

Pearson is also member of the Referendum Council, appointed by the Abbott government, and funded with \$9 million over two years to run consultations with Indigenous Australians in the lead-up to a referendum. Its work built on two key sets of previous findings.

The parliamentary committee – the first to have two Indigenous chairs in the shape of Liberal MP Ken Wyatt and his deputy, Labor senator Nova Peris – had reported in 2015.

Before that, then prime minister Julia Gillard had appointed an expert panel, also including Pearson, to produce recommendations on a pathway to constitutional recognition.

Chairing that were now Labor senator Patrick Dodson and Australia/Israel & Jewish Affairs Council chairman and former co-chair of Reconciliation Australia Mark Leibler.

Both those sets of recommendations included amending the race power. The expert panel’s 2012 report proposed a statement of recognition in the body of the constitution, not in the preamble.

As a member of, or petitioner to, these various bodies, Pearson’s position has shifted considerably in recent years.

He has previously backed several versions of a statement of recognition.

As a member of the 2012 expert panel, he endorsed the recommendation to include the statement as part of the changes to section 51.

In 2015, he backed a declaration of recognition that would stand outside the constitution.

Launching a paper containing the proposal by constitutional conservatives Damien Freeman and Julian Leeser, he said a “handsome, elegant Australian declaration” was the way forward.

Pearson now says the Uluru statement’s recommended advisory body – what it calls a constitutionally entrenched “voice” to parliament – would form a declaration of recognition just by its existence.

The statement contains three key demands, wrapped in elegant prose. Drafted with an eye to history, its poetic tone almost obscures the substantive demands within.

The Uluru statement seeks the establishment of two new bodies: one to be enshrined in the constitution to serve as a First Nations’ advisory body or “voice”, and the other to be legislated but lying outside the constitution.

The detailed nature of the advisory body is yet to be explained but it is not envisaged as involving a parallel parliamentary chamber or dedicated Indigenous seats.

Rather, it would sit outside and alongside parliament, to scrutinise laws and policies affecting Indigenous people and provide advice. Its constitutional status would protect it from the fate of similar bodies in the past – abolition on the whim of a new government with new ideas.

On the value of an advisory body versus amendment of the race power, Pearson describes it as a sword versus a shield. “It is the shield of the High Court versus the sword of representative advocacy,” he says.

The second body would have two roles. It would supervise the making of agreements with Australia’s governments – that means treaties, although the statement doesn’t use that word – and would also oversee a process of public “truth-telling” so real Indigenous history is heard.

The Uluru statement proposes that the latter body be a commission known as the “Makarrata”, an Indigenous word meaning “the coming together after a struggle”.

Certainly, reaching this point has been far from easy.

While some privately harbour concerns about the process, the product of the Uluru convention is being celebrated with great pride and goodwill in the Indigenous community and parts beyond.

Long dubbed the “father” of reconciliation, Labor frontbench senator Patrick Dodson urged Australians to listen to what emerged.

“The parliament has been challenged to look at the recommendations that have come from Uluru ... to seriously look at how we can, as a nation, give expression to achieving the better outcome as opposed to the most minimalist outcome,” Dodson says.

“It should be put beyond party politics and I would hope that our principal leader, the prime minister, would step into this but he would be well supported ... We need to go forward.”

The convention was the culmination of six months of consultations under time pressure from the federal government. The Referendum Council held 13 regional dialogues, each of which elected 10 representatives to attend the Uluru convention. Other specially invited Indigenous leaders from across Australia joined them, to a total of about 250 people.

Chairing the convention was Aunty Alison Hunt, an Anangu woman on whose country the meeting was held.

Her direction and reminder to participants that they were expected to both uphold standards of respectful behaviour and produce an outcome worthy of bearing her country’s name is being credited with keeping the meeting grounded and on track.

One participant told *The Saturday Paper*: “Some of the conversations were hard and some of them got heated. Given that, to get to where we got to is bloody amazing.”

The meeting was presented with five options for change, compiled in a discussion paper produced by the Referendum Council.

The first was to draft a statement acknowledging Aboriginal and Torres Strait Islanders as the first Australians, either inside the constitution as the preamble to a new head of power or as a separate declaration of recognition.

Second, it proposed amending or deleting the race power and replacing it with a new head of power.

The Referendum Council’s discussion paper included a reworded race power to enable the continuation of “necessary laws” with respect to Indigenous issues, meaning laws for the benefit of Indigenous people but not to their detriment.

It suggested the deletion of section 25 of the constitution, which contemplates the possibility of a state government excluding some Australians from voting on the basis of their race and threatens punishment in the form of reducing its number of senators in federal Parliament. While at least one state – Queensland – prevented Indigenous people from voting in the 1960s, the punishment has never been enforced.

The discussion paper raised the prospect of inserting an explicit anti-discrimination clause into the constitution and it provided for an “Indigenous voice” with the right to be consulted on legislation and policy.

The “voice” proposal – the centrepiece coming from Uluru – is the only one of the constitutional reform ideas to have survived.

The idea was not among the recommendations from the expert panel, nor was it contained in the parliamentary committee's report. It was completely Noel Pearson's idea.

In its submission to the expert panel, Pearson's Cape York Institute for Policy and Leadership had proposed inserting a whole new section on racial discrimination.

The panel ended up recommending inserting a new clause – section 116 (a) – prohibiting discrimination on the grounds of race, colour or ethnic or national origin but allowing laws or measures “for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group”.

It also recommended removing section 51 (xxvi) and replacing it with a statement of recognition and acknowledgment of and respect for Indigenous Australians, including the need to make laws for their advancement and for “the peace, order and good government of the Commonwealth” with respect to them.

But the proposals to insert an anti-discrimination clause attracted huge controversy. Seen as a de facto bill of rights, it was not something the government would countenance.

In 2014, Pearson's discussions with Leeser and other “constitutional conservatives” centred on what would be able to win enough parliamentary support to survive to a referendum.

They told Noel Pearson they would not accept a statement of recognition inside the constitution – not even in the preamble – and nor would they accept a change to the race power.

Changing the race power would jeopardise the parliament's law-making capability – on the existing measure to manage Indigenous peoples' welfare or any future measure – and leave it subject to High Court overthrow.

So Pearson switched his attention to an alternative – a constitutionally entrenched advisory body, now being described as “the voice”.

On Monday night, Noel Pearson told ABC TV's Q&A audience that he had now decided amending the race power was “cosmetic”.

He said it had become clear that there was very little support for amending the race power, that people saw that as too minimalist and favoured “a more substantial option”.

He told *The Saturday Paper* he had come to the view that an anti-discrimination clause was “never going to fly” and that removing the reference to “race” was not going to make a big difference.

“Race is still going to be a big part of the discourse,” Pearson says. “I wish it wasn't. Yeah, maybe it's a nice idea to get Australia out in front in terms of putting the word behind us but I've adjusted my thinking about the priority of that. We have a limited amount of constitutional capital to spend. Would I spend it on that?”

He concluded an advisory body would have more practical impact.

Pearson was so confident of his idea that he persuaded the Referendum Council to give the Cape York Institute \$250,000 this year to develop and design the proposal – before the consultations had even formally endorsed it. Constitutional expert Professor Anne Twomey drafted it.

The institute's work on the advisory body is supposed to feed into the Referendum Council's final report, due to be produced by June 30.

But Pearson confirmed to *The Saturday Paper* that the institute's work is still in draft form.

The Uluru convention has appointed an ongoing 24-person working group to liaise with government and parliament after the Referendum Council is disbanded.

It is due to meet on Monday next week to finalise its summation of the Uluru proceedings and then present them formally to the Referendum Council for inclusion in its deliberations. Pearson is pushing for a tight timetable – a referendum by Australia Day next year.

He argues the compromise is also a victory because those who began not accepting any constitutional change are now willing to accept the “voice” proposal.

“The decisive move that needed to be made was to step right,” he said.

“We needed to fully take account of the conservatives. We needed to take full account of their reasonable objections.”

He says they now have no grounds to object.

The existing National Congress of Australia's First Peoples, which the Coalition government has de-funded, has this week put itself forward as the most sensible framework for such a body.

Some continue to hope that the council will make recommendations beyond those produced at Uluru.

Patrick Dodson told *The Saturday Paper* that the issue of the race power still needed to be addressed.

“I do think the heads of power of the constitution do still need to be given serious attention,” he says.

Fellow Indigenous Labor parliamentarian Linda Burney is also reminding Australians that the Uluru statement is only one of the sets of recommendations the parliament has to draw on in determining the way forward.

She said the parliament has to “consider a number of pieces of work, the expert panel, the parliamentary committee, and what comes out of the Referendum Council, and then make a decision that meets the aspirations of Indigenous Australia – but it has to be successful in a referendum”.

Noel Pearson considers the challenge of getting a set of proposed changes through parliament – the necessary first step – to be a greater hurdle than winning endorsement from the Australian people.

Initial responses from government MPs indicate he could be right. Prime Minister Malcolm Turnbull trod cautiously.

“We will consider them with the greatest of respect and gravity as is appropriate to accord to them,” Turnbull said. “These are weighty matters, momentous matters and they deserve very serious consideration.”

Deputy Prime Minister Barnaby Joyce appeared to dismiss the Uluru statement out of hand.

“I support constitutional recognition,” Joyce said. But he added a caveat: “Ask for something that will not be supported by the Australian people such as another chamber in politics or something that sits above or beside the senate – that idea just won’t fly.”

Aboriginal Affairs Minister Nigel Scullion urged Coalition critics to hold their fire. “I’m a bit sad some of my colleagues are talking about it because they’re a bit frightened about what they don’t understand,” he said.

Those who led the consultations that culminated at Uluru, Megan Davis and Referendum Council co-chairwoman Pat Anderson, are deliberately drawing a distinction between politicians – including those who are Indigenous – and the wider Indigenous population.

Some of those who had assumed recognition meant a benign statement acknowledging Indigenous people in the constitution are now shocked at what they see as a radical alternative.

Others, who have been close to the process for decades, believe the Uluru statement is actually a conservative document, much less potent than proposals produced through the two most recent processes investigating recognition options.

Among those who wanted more, some will see the behind-the-scenes negotiations with constitutional conservatives as sinister.

Others will argue that it is sensible pragmatism, that it is better to design a model that will win support than one that won’t and that some of something is better than more of nothing.

What is clear is that among Indigenous Australians, the Uluru statement has ignited a sense of hope.

At Parliament House on Monday night, at the launch of a new ABC-hosted website *Right Wrongs*, detailing the history of the recognition movement on the 50th anniversary of the 1967 referendum and the 25th anniversary of the Mabo decision, Nggunawal woman Jude Barlow offered the welcome to country and gave voice to that hope.

Barlow spoke of the two men who had raised her, her uncle and her father, and their hopes for change in her lifetime.

“Because, you know, change is here,” Barlow told the crowd. “And change is often a slow-moving, lumbering thing and we become frustrated that it’s taking so long. But I have hope, like the two men that shaped my life, that change is going to come. And when it does, nothing will ever be the same again.”

On that, the many sides of the argument might most readily agree. The challenge is to persuade the fearful, uninterested, sceptical and suspicious that this version of change will actually be for the good of Australia and more about gain than loss.