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Submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018

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8 June 2018

Introduction

1. This submission addresses certain specific aspects of constitutional recognition of Indigenous Australians. It does so through the framework of international human rights and principles of self-determination, which comprise Australia’s international obligations. In particular this submission focuses on the role of a constitutionally established representative consultative Indigenous body, or a ‘Voice to Parliament’ expressed through the Uluru Statement,¹ in giving substance to those international legal rights.²
2. This submission acknowledges that the goal of the recognition process is to effect reconciliation, recognition, and to create a new and inclusive national narrative within that international human rights framework. This requires engagement with the legal implications of constitutional reform but demands that the process not get mired in uncertainties of possible future judicial interpretation. Attempts to forestall any possible objection into the future will necessarily inhibit the nation’s capacity to do justice through constitutional recognition.³
3. This submission endorses the substantive recommendations of the Uluru Statement from the Heart as the framework for constitutional recognition on the basis that they meet international human rights law standards regarding self-determination, political participation and the emerging standard for full civic engagement of indigenous peoples of free, prior, and informed consent. There are three key legal elements expressed in the Uluru Statement that achieve these goals, namely the Voice to Parliament, the Makarrata treaty process and truth telling commission.
4. Adoption of the Uluru Statement and particularly the ‘Voice to Parliament’ representative body meets the scope of this Joint Select Committee, namely:

i. contribute to a more unified and reconciled nation	Through providing institutional structures that meaningfully engage Aboriginal and Torres Strait Islander Australians within the Australian polity.
ii. be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples	Facilitating self-determination and the participation, choice, consent and non-domination of Indigenous Australians; and Reflecting the exhaustive dialogues with Indigenous communities undertaken throughout Australia in the lead up to the Uluru Statement from the Heart.

¹ Uluru Statement from the Heart (2017) <<https://www.1voiceuluru.org/the-statement/>> (‘Uluru Statement’).

² Melissa Castan, ‘Constitutional Recognition, Self-Determination and an Indigenous Representative Body’ (2015) 8(19) *Indigenous Law Bulletin* 14. Parts of this submission draw on the analysis presented in this article.

³ See, eg, Kate Galloway, ‘Cutting Through the Legal Arguments: Constitutional Recognition’ (2014) 8(15) *Indigenous Law Bulletin* 3.

iii. be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums	Focusing on the desired outcome of meaningful and substantive recognition that does not diminish from existing State institutions.
iv. be technically and legally sound	Deriving legitimacy from Australia’s human rights obligations, supported by extensive scholarly and institutional interpretation.
v. engage with key stakeholders, including Aboriginal and Torres Strait Islander Peoples and organisations.	Following exhaustive dialogues with Indigenous communities undertaken throughout Australia in the lead up to the Uluru Statement from the Heart and earlier consultative processes including those of the Expert Panel on Recognition. ⁴

5. We are each legal academics whose research interests include Constitutional Law and Indigenous Legal Rights.
6. We note at the outset the submissions of Mr Mark Leibler AC (submission No 8), Mr Fred Chaney (submission No 48) and Professor Anne Twomey (submission No 57) which provide specific details on the political and legal aspects of this proposal.⁵ We do not elaborate on those details. Instead, this submission endorses the proposal in light of Australia’s human rights obligations which at time of writing have not been considered by other submissions to this Joint Select Committee.

Human Rights Law Framework

7. The International Covenant on Civil and Political Rights (‘ICCPR’), signed by Australia in 1972 (ratified in 1980) is the leading human rights treaty at international law, representing the international legal standard for human rights.⁶ Article 1 of the ICCPR states that, ‘All peoples have a right to self-determination.’ The right to self-determination is also the first article of the International Covenant on Economic, Social and Cultural Rights; and self-determination is deeply embedded within the 2007 United Nations Declaration on the Rights of Indigenous Peoples (‘UNDRIP’), which Australia endorsed in 2009.⁷

⁴ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Commonwealth of Australia, 2012).

⁵ See also, Anne Twomey, ‘Putting Words to the Tune of Indigenous Constitutional Recognition’, *The Conversation* (online), 20 May 2015 <http://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>; Shireen Morris and Noel Pearson, ‘Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success’ (2017) 91(5) *Australian Law Journal* 350.

⁶ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (Oxford University Press, 3rd ed, 2013) ch 1.

⁷ Australia announced its support of the UNDRIP on 3 April 2009: see, eg, Jenny Macklin, ‘Statement on the United Nations Declaration of Indigenous Peoples’ (Media Release, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>.

8. The right of self-determination is well defined at law, particularly regarding Indigenous peoples' self-determination.⁸ Self-determination embraces the fundamental proposition that people should collectively have control over, and be empowered to make, decisions over their own lives.
9. In Australia self-determination is almost exclusively synonymous with the claims of Aboriginal and Torres Strait Islander peoples, and it is generally expressed as calls for self-government, democratic participation, land rights, cultural protection, and political representation. Importantly in terms of the capacity for such rights to gain wide community acceptance, self-determination in the Australian context is rarely expressed in terms of secession, territorial break-away or renunciation of citizenship.
10. Self-determination need not 'fracture the skeletal principle' of the legal and political integrity of our nation. It is better understood as a 'relational' concept; Indigenous self-determination is a relationship with the Nation State that is characterised by participation, choice, consent, and non-domination.⁹ It is an inclusive, rather than a separatist, principle, consistent with practice in North America, New Zealand, Scandinavian nations and elsewhere. Such a characterisation works for the benefit of and accords with the wishes of Aboriginal and Torres Strait Islander peoples.
11. As a question of human rights law, Australia has an obligation to develop and support institutional frameworks that include Aboriginal and Torres Strait Islander peoples in the decisions, processes, law-making and administration that impact upon their lives.
12. James Anaya, a UN Special Rapporteur on Indigenous Rights (2008-2014) and leading indigenous rights scholar, clearly explained the indigenous expression of self-determination, drawing a distinction between the 'constitutive' and the continuing or 'ongoing' manifestations of self-determination.¹⁰ 'Constitutive' self-determination requires that the governing institutional order be 'guided by the will of the peoples who are governed.'¹¹ The political order must reflect 'the collective will of the peoples concerned', and to meet that standard, those who are governed must participate and consent to the institutions and processes of governance, particularly in times of institutional development and reform.

⁸ See, eg, Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2005); S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009); Megan Davis, 'Indigenous Struggles in Standard-setting: the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.

⁹ See Iris Marion Young, 'Two Concepts of Self Determination' in Austin Sarat and Thomas R Kearns (eds), *Human Rights, Concepts, Contests and Contingencies* (University of Michigan Press, 2001) 25. See also Benedict Kingsbury, 'Reconstructing Self Determination: A Relational Approach' in Pekka Aikio and Martin Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-determination* (Institute for Human Rights, 2000) 19.

¹⁰ S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004), 104–5.

¹¹ *Ibid.*

13. Applying Anaya's analysis to Australia's legal history and processes, it is obvious that indigenous peoples subjected to colonial invasion in the 19th century were excluded from the development of the legal and political order; then excluded from the constituent self-determination acts that created the federation and its governing constitution, 118 years ago. These acts and omissions underpin the current constitutional recognition debate. Resolving the exclusion of Indigenous Australians from Australia's institutions of governance through adoption of the Uluru Statement recommendations, will contribute to a more unified and reconciled nation and help to address some of the injustices of the past.
14. Self-determination (as Anaya explained) also has an on-going aspect, namely that 'the governing institutional order, independently of the processes leading to its creation or alteration, [must] be one under which people may live and develop freely on a continuous basis.'¹² Ongoing self-determination therefore necessitates the establishment and maintenance of institutions 'under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis'.¹³ Adopting the Uluru Statement recommendations benefits Indigenous Australians through facilitating such meaningful choices.
15. The UNDRIP framing of self-determination incorporates the rights of indigenous peoples to free, prior and informed consent on matters affecting them and their communities. A number of other international instruments similarly acknowledge that indigenous peoples have a right to participate in decision-making matters which affect their rights.¹⁴ There is a longstanding body of human rights law which asserts the fundamental right of indigenous communities to genuinely and deeply participate in the issues and decisions that impact upon them.¹⁵ Similar rights are expressed in the Convention on the Elimination of Racial Discrimination,¹⁶ to which Australia is a signatory, and has incorporated in Commonwealth legislation via the *Racial Discrimination Act 1975* (Cth). There is clear precedent internationally for the effective implementation of the terms of the UN Declaration on the Rights of Indigenous Peoples for the benefit of indigenous peoples, making such provisions technically and legally sound.

¹² Ibid 106.

¹³ Ibid.

¹⁴ See, eg, Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(j); International Labour Organisation Indigenous and Tribal Peoples Convention 1989 (No 169), opened for signature 27 June 1989 (entered into force 5 September 1991); United Nations Conference on Environment and Development, Rio Declaration, UN Doc A/CONF.151/26 (Vol 1) (28 September 1992); United Nations Conference on Environment and Development, Agenda 21 (1992); Human Rights Committee, General Comment No 23: Article 27 (Rights of Minorities), 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

¹⁵ Melissa Castan, 'DRIP Feed: The Slow Reconstruction of Self-determination for Indigenous Peoples' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010) 492–511. See also Davis, above n 8.

¹⁶ Committee on the Elimination of Racial Discrimination, General Recommendation No 23: Rights of Indigenous Peoples, 51st sess, UN Doc A/52/18 (18 August 1997) Annex V, [4].

16. The meaning of 'free, prior and informed consent' has been explored in detail by the United Nations' Expert Mechanism on the Rights of Indigenous Peoples:

The element of 'free' implies no coercion, intimidation or manipulation; 'prior' implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; 'informed' implies that indigenous peoples have been provided all information relating to the activity and that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; 'consent' implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.¹⁷

17. They describe requirement of indigenous peoples' participation and consultation as follows:

The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights.¹⁸

18. Appropriate consultation and participation in ongoing political processes and law-making will be a significant element of meeting the free, prior and informed consent standard for Indigenous Australians.

19. Other ICCPR human rights are also applicable to this obligation to guarantee participation and consent, such as:

- Article 25: guaranteeing rights of political participation
- Article 27: protection of minority rights
- Articles 2, 3 and 26 which guarantee non-discrimination.¹⁹

20. Applying these principles to Australian constitutional reform, a representative body can be analysed in terms of the recalibration of what Lino describes as the 'terms and dynamics of non-domination' and embedding a relationship between Indigenous

¹⁷ Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 18th sess, Agenda Item 5, UN Doc A/HRC/18/42 (17 August 2011) 27.

¹⁸ Ibid 26.

¹⁹ Joseph and Castan, above n 6.

communities, and peoples, and the nation state.²⁰ The point of that recalibration is to prevent Indigenous Australians from being controlled and coerced unilaterally by the state.²¹

21. Importantly, also beyond being simply a defence against control and coercion, it offers a framework for positive engagement by Indigenous peoples with questions of governance and policy, for the benefit of Indigenous Australians and as a unifying force for the nation.

Voice to Parliament Proposal

22. The Uluru Statement provides for a Voice to Parliament which meets the elements of the self-determination framework.

23. The Voice to Parliament proposal calls for the creation of an Aboriginal and Torres Strait Islander representative body vested with advisory functions. The body is a creature of the federal Parliament, created by normal legislation, and its existence is guaranteed by a new constitutional provision.²² The Voice to Parliament does not diminish the sovereignty of the Australian Parliament but operates in an advisory capacity only. In this respect, the proposal is capable of support by an overwhelming majority of Australians across the political spectrum.

24. Professor Twomey provides model language to consider, and we endorse that proposal.²³

25. The establishment of such a representative body, approved by the Australian electorate at referendum, satisfies human rights standards of self-determination, including political participation, and consultation leading to free, prior and informed consent in the process of establishment of the institution itself. It amounts to a structural development of the 'constitutive' kind described by Anaya and would bring Australia into compliance with the international human rights standards articulated in the ICCPR, and the UN Declaration on the Rights of Indigenous Peoples.

26. Having the approval of Indigenous communities obtained through extensive dialogues,²⁴ and electoral approval, a representative consultative Indigenous body could ensure greater 'ongoing' self-determination by integrating Indigenous Australians' participation into the law-making process while leaving parliamentary sovereignty undiminished. It recalibrates the Indigenous and state relationship, by providing Indigenous Australians with the mechanism to make meaningful choices and have informed impact in the

²⁰ See Dylan Lino, 'The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples' (2010) 34 *Melbourne University Law Review* 839, 854.

²¹ Ibid.

²² Cape York Institute, Submission No 38.2 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2015. See also Morris and Pearson, above n 5.

²³ Twomey, above n 5; Anne Twomey, Submission No 131 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 21 May 2015.

²⁴ Referendum Council, Uluru Statement Dialogues <<https://www.referendumcouncil.org.au/dialogues>>.

development of reforms that affect their communities. Ideally it would function on a 'dialogue model', which engages functions of advice, debate, and even political negotiation over decision-making.²⁵ In this sense, it builds in a continuing process, so constitutional reform becomes more than just a moment, with clear steps as to what follows the high point of the referendum event.

27. This shifts the relationship between Indigenous peoples and the Australian Parliament from a monologue to a dialogue, from unilateral to multilateral, and from a majoritarian agenda to a consultative, participatory one. This shift lies at the heart of reconciling the nation and the purpose of this inquiry.

Makarrata treaty process

28. Although not dependent on constitutional change, the establishment of a Makarrata Commission to progress the remaining two elements of the Uluru Statement, namely agreement/treaty making and truth telling, would be a further vital step in contributing to a more unified and reconciled nation. Reconciliation can only truly occur if the truth about past injustices are told and acknowledged, enabling relationships to be repaired. A treaty or series of treaties between Indigenous Australians and the rest of the nation about how those relationships should look into the future would be a unifying force, providing the basis for a partnership of mutual respect, and proper legal relations. Such a process is already underway in Victoria.²⁶

Truth-telling commission

29. Truth telling, through the establishment of a truth and reconciliation process or commission has long been recognised in international and comparative settings as an important part of transitional justice, to support the proper recognition and understanding of past injustices and conflict and their ongoing impacts. Formal processes, through a commission or tribunal are important structurally to promote awareness and understanding of matters that underpin contemporary impacts on the community.
30. Although the terms of this Inquiry address the constitutional or legislative dimensions of reform, we endorse the Uluru Statement call for truth telling, such that would promote honest and fulsome understanding of the impacts of colonialism and dispossession on Aboriginal and Torres Strait Islander peoples. This is consistent with the recommendations of the Referendum Council in 2017, and supported by a series of dialogues and consultative processes held with Indigenous delegates around Australia, and endorsed by

²⁵ This 'dialogue' model is often used in the context of human rights legislation, as seen in the discussion of the *Charter of Rights and Responsibilities 2006* (Vic): Julie Debeljak 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thompson Reuters, 2012).

²⁶ <<https://www.vic.gov.au/aboriginalvictoria/treaty.html>>. The Northern Territory Government is also proposing to commence treaty discussions: <<http://www.abc.net.au/news/2018-06-07/aboriginal-treaty-with-northern-territory-one-step-closer/9841374>>.

the Council for Aboriginal Reconciliation 2016 report, yet again indicating the support for proper recognition processes.

Consultation and consent

31. An appropriate process for achieving a consensus amongst Indigenous communities is critical, because in a human rights framework, it is not enough that the outcome meets a particular standard: the process for the adoption of the outcome must also be conducted properly.
32. We submit that there have already been a number of Indigenous dialogues that constitute a legitimate foundation for framing a referendum question. First, the Expert Panel conducted a process of consultation with Indigenous Australians in 2011. There have been consultations through the Council of Aboriginal Reconciliation, and the Referendum Council, as well as by other community and formal bodies. Further dialogues led up to the Uluru Statement from the Heart.
33. Embodied in the Uluru Statement from the Heart is a level of consensus from Indigenous Australia previously unseen as to a model for constitutional recognition.²⁷ This is remarkable given the complexity of the legal and political landscape on this issue. It is incumbent upon non-Indigenous Australia to grasp the opportunity embodied in the Uluru Statement. The recommendations contained in the Uluru Statement from the Heart therefore constitute the foundation for constitutional reform in a way that conforms with Australia's international human rights obligations.

Conclusion

34. In sum:

Self-determination cannot be met by pure poetry, or 'minimalist' models. Symbolic change may be socially enriching, and politically achievable, but it is not the kind of reform that amounts to self-determination, or political participation, or free, prior and informed consent. There is little value in expending political and community goodwill, or the money required for a referendum, on ineffective and merely symbolic change.

Indigenous peoples' calls for self-determination, often embodied in calls for a Treaty, for 'sovereignty' or self-determination, should not be dismissed as unfeasible. Our common-law cousins have found their own mechanisms for establishing proper lawful relations with their Indigenous communities, whether it is as domestic dependent nations, tribes, or citizens.²⁸

²⁷ See, the response to earlier models of recognition, eg, Celeste Liddle, '87% of Indigenous People do not Agree on Recognition. You'd Know if You Listened' *The Guardian* (online), 19 June 2015 <<http://www.theguardian.com/commentisfree/2015/jun/19/87-of-indigenous-people-donot-agree-on-recognition-youd-know-if-you-listened>>.

²⁸ Castan, above n 2, 17.

35. In our submission Australia is well overdue for a just settlement with Aboriginal and Torres Strait Islander peoples. Constitutional reform grounded in genuine free, prior and informed consent, and manifesting self-determination, is an essential aspect of that settlement.
36. That can be achieved through implementation of the recommendations of the Uluru Statement from the Heart.