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**The Road to Uluru: Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples and the UN *Declaration on the Rights of Indigenous Peoples***

*Abstract*

Aboriginal and Torres Strait Islander peoples have campaigned for reform to the Australian state for generations. Over the last decade, debate over constitutional recognition has assumed mainstream prominence as a series of parliamentary and expert bodies designed to raise awareness of the need for change, propose options for that change, and build a community consensus around those proposals have been established. This article assesses the five public processes undertaken between 2010 and 2017. It explains that constitutional reform has been hampered by state ambivalence towards the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP). However, it argues that that same state ambivalence created space for Aboriginal and Torres Strait Islander peoples to eventually take control of the debate, reframe it along their own priorities, and re-energise the movement for constitutional recognition. Even if prospects for a referendum remain uncertain, the Uluru Statement from the Heart has succeeded in building community consensus for a clear proposal because the UNDRIP informed and influenced its development.

## Comments to the Author

This is an informative and well-written article that should likely be published following some further work. It reviews the past decade of processes aimed at moving Australia towards a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples, from the earlier Expert Panel mechanism through to the more recent Referendum Council and the resulting Uluru Statement from the Heart. It assesses these processes against their level of engagement with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and particularly the Declaration's normative emphasis on Indigenous self-determination. The overview provided by the article is not particularly novel, and its insights fairly limited, but it is nonetheless a piece of writing that will form part of the historical record on this issue.

In my view, however, the shortcomings in this article could be addressed through revisions that provided a more critical and rigorously theorised analysis. At present the article presents the challenges associated with the constitutional recognition of Indigenous peoples as though this process were primarily a technical legal process that can and should be resolved through good process. This seems to ignore the more complex and philosophical debates that continue to swirl around the issue. Leaving aside what non-Indigenous peoples might think (and noting that the article relies almost entirely on Indigenous sources), the fact that the article skims over aspects of Indigenous discomfort about the recognition project is problematic. Indigenous concerns about recognition are reduced to a brief analysis of the well-known concerns with the Recognise campaign, ignoring both the widely discussed concern with the whole project of constitutional recognition (in what many see as an illegitimate and colonialist document) and the sharp theoretical critiques from scholars such as Audra Simpson and Glen Coulthard who have separately analysed the failings of liberal recognition projects in advancing Indigenous projects of self-determination and self-governance.

This leads to a second area of concern with the paper, and that is its minimalist interpretation of self-determination doctrine as it might be interpreted from the UNDRIP. The paper gives a nod to the stronger interpretations of self-determination preferred by many Indigenous political actors, but maintains that the minimalist interpretation is sufficient. This narrow framework provides very little on which to hang the following analysis, leaving the article more journalistic than scholarly in tone and content. This narrowness also exacerbates the philosophical concern outlined above, as it allows the author to minimise concerns with the proposals in the Uluru Statement on the grounds that the Statement was produced through a process that was informed by the self-determination principles in UNDRIP. This somewhat circular argument is only true if these principles are interpreted in a narrow way. As critics point out, an advisory body to parliament, whether enshrined in the Constitution or not, will not necessarily increase First Nations' capacity for self-determination or self-governance.

The article would be considerably strengthened if the author were to engage more seriously with these critical perspectives. There will be plenty of advocacy around the Uluru proposals in years to come, but I am not persuaded that academic journal articles should join in the cheering.

## I. INTRODUCTION

Aboriginal and Torres Strait Islander peoples have campaigned for reform to the Australian state for generations. Over the last ten years, their political struggle has garnered mainstream prominence as a series of parliamentary and expert bodies designed to raise awareness of the need for change, propose options for that change, and build a community consensus around those proposals have been established. Notwithstanding this considered attention, however, constitutional reform has proved elusive. Between 2010 and 2015, four significant and sustained public processes and reports led nowhere.

This may be about to change. In 2017, around 250 Aboriginal and Torres Strait Islander people ‘from all points of the southern sky’ called for meaningful reform to the Australian Constitution.<sup>1</sup> The Referendum Council regional dialogues and the resultant Uluru Statement from the Heart mark a profound shift in the process and processes of constitutional recognition in Australia. Although the Turnbull and Morrison administrations initially rejected the Referendum Council’s recommendations,<sup>2</sup> sustained community pressure has led the government to apparently reconsider.<sup>3</sup> As part of the 2019 federal budget, the government allocated \$160 million to hold a referendum in the term of the 46<sup>th</sup> Parliament, while during the 2019 election campaign it promised \$7.3 million to develop a proposal to take to that referendum.<sup>4</sup> Whether or not a referendum is ultimately held, the Uluru Statement has succeeded in building public momentum around a clear idea for constitutional reform. In this article, I explore why this process was more effective than earlier iterations by assessing the process and processes of constitutional recognition against the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP).<sup>5</sup>

Overwhelmingly endorsed by the United Nations General Assembly in 2007 (and by Australia in 2009),<sup>6</sup> the UNDRIP is the ‘most comprehensive and progressive of international instruments dealing with Indigenous peoples’ rights’.<sup>7</sup> As a United Nations Declaration questions persist over its legal force, but in its political and moral dimensions the instrument carries considerable normative weight. Indeed, the Declaration has the potential to reaffirm and strengthen First Nations’ political advocacy, because it establishes a ‘framework that states can adopt to underpin their relationship with Indigenous peoples and ... guide them in

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<sup>1</sup> “Uluru Statement from the Heart”, reproduced in Referendum Council, *Final Report of the Referendum Council* (Canberra, 2017) (*Final Report of the Referendum Council*) p.i.

<sup>2</sup> Prime Minister, Attorney-General, Minister for Indigenous Affairs, “Response to the Referendum Council’s Report on Constitutional Recognition” (Media Release, 26 October 2017); Fergus Hunter, “Mining giants back Indigenous Voice but Scott Morrison remains lukewarm”, *Sydney Morning Herald*, 31 January 2019 <<https://www.smh.com.au/politics/federal/mining-giants-back-indigenous-voice-but-scott-morrison-remains-lukewarm-20190131-p50us8.html>>.

<sup>3</sup> Survey results demonstrate that the Australian public supports the proposals of the Uluru Statement from the Heart: see for example Australian Constitutional Values Survey 2017 (Results Release 2, October 2017).

<sup>4</sup> Deborah Snow, “Morrison pledges recognition but will take ‘as long as needed’”, *Sydney Morning Herald*, 26 May 2019 <<https://www.smh.com.au/politics/federal/morrison-pledges-recognition-but-will-take-as-long-as-needed-20190526-p51r80.html>>.

<sup>5</sup> This same lens is applied to the initial stages of treaty-making in Victoria in Harry Hobbs, “Treaty making and the UN *Declaration on the Rights of Indigenous Peoples*: lessons from emerging negotiations in Australia”, *International Journal of Human Rights*, Vol. 23, 1-2 (2019) p. 174.

<sup>6</sup> Jenny Macklin, “Statement on the United Nations Declaration on the Rights of Indigenous Peoples” (Official Statement, 3 April 2009).

<sup>7</sup> Claire Charters, “Indigenous Peoples and International Law and Policy”, in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law* (Abingdon, 2009) p.161, 175.

the development of domestic law and policy'.<sup>8</sup> For this reason, it is valuable to explore whether and how the UNDRIP has informed or influenced the various processes of constitutional recognition at the Commonwealth level.

In this article, I assess this question in three parts. In Part II, I identify how the Declaration's central theme of self-determination is relevant to both the process and substance of constitutional reform. The aim of this part is to articulate a working standard against which the processes of constitutional reform can be assessed. In Part III, I step through four of those initial processes. I examine the 2010 Expert Panel on Constitutional Recognition of Indigenous Australians (the 'Expert Panel'), the 2013 Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (the 'Joint Select Committee'), the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel (the 'Review Panel'), and the public relations focused Recognise campaign. Here I demonstrate how state ambivalence towards the UNDRIP and Indigenous rights more generally structured the design and reception of these processes. Despite committed work by the eminent Indigenous and non-Indigenous members, as well as the goodwill provided by the thousands of Australians that interacted with these processes, that ambivalence ultimately inhibited government action to implement the meaningful reform recommended.

In Part IV, I contrast these processes with the Referendum Council. I argue that the same state ambivalence that hindered earlier attempts at constitutional recognition allowed Indigenous peoples to creatively adapt and lead a new process of reform. Two points stand out. First, by focusing explicitly on Indigenous communities, the regional dialogues were able to reframe reform options along First Nations' own priorities. Second, by presenting the Uluru Statement to the Australian people rather than government, the regional dialogues captured public attention and revitalised the movement for constitutional reform. Although the recommendations from the Uluru Statement have not been enacted, the regional dialogues have enhanced the likelihood that reform will be realised. Key to this shift is the fact that the UNDRIP informed and influenced the process.

## II. THE UN DECLARATION

As the preeminent instrument on Indigenous rights, the UN Declaration recognises a swathe of procedural and substantive entitlements relevant to protecting and promoting the position of Indigenous peoples. However, one key theme intimately connected to debate on constitutional reform underpins the instrument: self-determination. As the 'the heart and soul' of the UNDRIP, constituting the 'river in which all other rights swim',<sup>9</sup> the norm of self-determination creates a basis for Indigenous dialogue and political advocacy with states.<sup>10</sup> In this part, I articulate one approach to understanding self-determination as established within the Declaration, with the aim of establishing a working standard against which Australia's constitutional reform processes can be assessed.

The right to self-determination is specifically provided for under Article 3. That article provides that Indigenous peoples may 'freely determine their political status and freely

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<sup>8</sup> Megan Davis, "Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*", *Melbourne Journal of International Law*, Vol. 9, 2 (2008) p.439, 465.

<sup>9</sup> Michael Dodson, cited in Craig Scott, "Indigenous Self-Determination and Decolonisation of the International Imagination: A Plea", *Human Rights Quarterly*, Vol. 18, 4 (1996) p. 814, 814.

<sup>10</sup> Megan Davis, "The United Nations Declaration on the Rights of Indigenous Peoples", *Indigenous Law Bulletin*, Vol. 6, 30 (2007) p.6, 6.

pursue their economic, social and cultural development'. Articles 5 and 18 reinforce this entitlement by guaranteeing Indigenous peoples the right to maintain their distinct political, legal, economic, social and cultural institutions, while also retaining the right to 'participate fully' in any state process that may affect their rights 'in accordance with their own procedures' and 'decision-making institutions'. Although broadly framed and suggestive of an expansive understanding of political sovereignty, this right is conditioned by Article 46(1), which protects the territorial integrity of existing states, and Article 4 which qualifies the right to self-determination as the 'right to autonomy or self-government' in relation to 'internal and local affairs'.<sup>11</sup> Self-determination as a principle may extend further,<sup>12</sup> but in the Declaration it is limited to internal manifestations.

Ascertaining the legal boundaries of self-determination is important, but even if the principle is understood as 'guid[ing] and encourage[ing] Indigenous peoples to forms of autonomy within the nation-state',<sup>13</sup> it still encompasses clear substantive rights resting on autonomy and respect.<sup>14</sup> As Noel Pearson has explained, self-determination underlies Indigenous peoples' desire to 'take charge of our own affairs and lead our own development agendas'.<sup>15</sup> This includes the ability to wield greater control over land and resources, as well as authority to ensure cultural preservation and integrity;<sup>16</sup> all rights guaranteed in the UNDRIP,<sup>17</sup> and recognisable in generations of Aboriginal and Torres Strait Islander advocacy.<sup>18</sup>

This narrow construction may be 'an inherently pragmatic decision',<sup>19</sup> but it nonetheless reflects a strong, majority current of Indigenous thinking. Throughout negotiations Indigenous peoples involved in the drafting frequently asserted that they 'have no interest in secession' but desire greater autonomy and decision-making authority in order to 'finally become part of' the state.<sup>20</sup> It is not surprising then that the UNDRIP's principles of 'participation, engagement and consultation',<sup>21</sup> are based on the 'assumption of interdependence between states and Indigenous peoples'.<sup>22</sup> That same notion of interdependence is present in the Uluru Statement, which explicitly declares that Indigenous sovereignty 'co-exists with the sovereignty of the Crown'.<sup>23</sup>

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<sup>11</sup> Michael Mansell, "Will the Declaration make any Difference to Australia's treatment of Aborigines", *Griffith Law Review*, Vol. 20, 3 (2011) p.659, 669. See also Steven Newcomb, "The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination" *Griffith Law Review*, Vol. 20, 3 (2011) p.578, 600.

<sup>12</sup> For discussion in relation to Indigenous peoples see Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (New York, 2016).

<sup>13</sup> Mansell, "Will the Declaration make any Difference" p.671.

<sup>14</sup> Harry Hobbs, "Aboriginal and Torres Strait Islander peoples and multinational federalism in Australia", *Griffith Law Review*, Vol. 27, 3 (2018) p.307.

<sup>15</sup> Noel Pearson, "In Pursuit of Regional, Reciprocal Responsibility Settlement for Cape York" (Speech delivered at the National Native Title Conference, Port Douglas, 18 June 2015).

<sup>16</sup> Jeff Corntassel and Tomas Hopkins Primeau, "Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing "Self-Determination"", *Human Rights Quarterly*, Vol. 17, 2 (1995) p.343, 344.

<sup>17</sup> UNDRIP arts 8, 10-15, 25-26

<sup>18</sup> Though of course, many Aboriginal and Torres Strait Islander people contest this elaboration and seek more expansive forms of sovereignty: See for example Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Abingdon, 2015).

<sup>19</sup> Megan Davis, "To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On", *Australian International Law Journal*, Vol. 19 (2012) p.17, 47.

<sup>20</sup> Ted Moses, Cree Leader, cited in Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley, 2003) p.156.

<sup>21</sup> Davis, "Indigenous Struggles in Standard-Setting" p.470.

<sup>22</sup> Roderic Pitty and Shannara Smith, "The Indigenous Challenge to Westphalian Sovereignty", *Australian Journal of Political Science*, Vol. 46, 1 (2011) p. 121, 128.

<sup>23</sup> "Uluru Statement from the Heart".

Interdependence and engagement requires some form of negotiation. As such, as a corollary of the more general right to self-determination embedded in the instrument, states are obliged to consult with Indigenous peoples before adopting and implementing measures that may affect them. However, the standard for this consultation is not made clear. Several provisions simply indicate that states should undertake ‘effective consultation’<sup>24</sup> or ‘consult[] and cooperat[e]’<sup>25</sup> with Indigenous peoples, leaving an appropriate norm to develop over time in practice.

Uncertainty as to the scope of the right has led to the development of several competing principles, characterised by James Anaya and Sergio Puig as instrumentalist, consent-veto, and minimalist approaches to consultation.<sup>26</sup> These approaches range from understanding consultation as a formal ‘notice-and-comment’ mechanism aimed at securing procedural requirements, maximalist positions animated by accounts of Indigenous sovereignty, and narrow box ticking exercises that see consultation as a bureaucratic hurdle.<sup>27</sup> For Anaya and Puig, none of these approaches accurately encompasses the meaning of the duty to consult at international law. Instead, drawing on the work of Patrick Macklem, they adopt a human rights-pluralist model that sees consultation as a mechanism to safeguard Indigenous rights and mitigate inequities.<sup>28</sup>

Anaya and Puig’s approach was developed deductively out of the authors’ experience observing consultation procedures surrounding exploitation of natural resources and infrastructure development on traditional Indigenous lands, but the lessons drawn are consistent with statements from UN bodies, and as such, help to elucidate an appropriate standard of consultation more broadly.<sup>29</sup> It finds that consultation should be undertaken at an early stage of any process, in good faith through culturally appropriate procedures, with representatives freely chosen by Indigenous peoples within their own representative structures. There should be ‘no coercion, intimidation or manipulation’, and there must be sufficient time and information.<sup>30</sup> Consultation as an element of self-determination is not a ‘mere right to be involved’ or simply to be heard, but a right ‘to influence the outcome’, including by proposing alternative and distinct models to those offered by government or other actors,<sup>31</sup> as well as the ‘freedom to guide and direct the process of consultation’.<sup>32</sup> There must be a fair, independent, impartial and transparent mechanism to facilitate consultation and alleviate power imbalances,<sup>33</sup> and Indigenous peoples can withhold their consent.<sup>34</sup>

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<sup>24</sup> UNDRIP art 30(2).

<sup>25</sup> UNDRIP arts 15(2), 17(2), 19, 32(2), 36(2), 38.

<sup>26</sup> James Anaya and Sergio Puig, “Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples”, *University of Toronto Law Journal*, Vol. 67, 4 (2017) p.435, 447.

<sup>27</sup> Anaya and Puig, “Mitigating State Sovereignty”, pp.447-452.

<sup>28</sup> Anaya and Puig, “Mitigating State Sovereignty”, pp.452-457. See Patrick Macklem, *The Sovereignty of Human Rights* (New York, 2015).

<sup>29</sup> Anaya and Puig, “Mitigating State Sovereignty”, pp.457-460.

<sup>30</sup> Permanent Forum on Indigenous Issues, “Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples”, UN Doc E/C.19/2005/3 (17-19 January 2005) p.12 [46]-[47].

<sup>31</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: A Human-Rights Based Approach*, UN Doc A/HRC/39/62 (10 August 2018) p.5 [15].

<sup>32</sup> Expert Mechanism on the Rights of Indigenous Peoples, p.6 [20](d).

<sup>33</sup> UNDRIP art 27.

<sup>34</sup> Expert Mechanism on the Rights of Indigenous Peoples, p.8 [26]-[27]; cf. Anaya and Puig, “Mitigating State Sovereignty”, p.442.

This working standard identifies several key points. First, a process that recognises Indigenous peoples' 'inherent and prior rights to their lands...and respects their legitimate authority',<sup>35</sup> should be designed and guided by Aboriginal and Torres Strait Islander peoples. Second, options proposed by Aboriginal and Torres Strait Islander peoples should be treated with respect and form the basis of broader community discussion. Third, proposals rejected by Aboriginal and Torres Strait Islander peoples should be dismissed. These three simple points drawn from the UNDRIP outline a working standard to assess the process and processes of constitutional recognition in Australia. Even if the Declaration is not properly characterised as constituting hard law,<sup>36</sup> this standard sets out a fair *political* process of consultation. In the next two parts, I employ this standard to assess the processes undertaken since 2007. I begin, however, with a brief background on the contemporary project of constitutional recognition.

### III. FOUR INITIAL PROCESSES

The Australian Constitution was drafted at a series of constitutional conventions in the 1890s. Aboriginal and Torres Strait Islander peoples were not invited to these conventions, their interests were not considered, and the document largely ignored them. In fact, as adopted, the Constitution expressly discriminated against Aboriginal and Torres Strait Islander peoples in several ways. Section 25 contemplated that a state can disqualify the people of an entire race from voting at an election; section 51(xxvi) empowered the Parliament to make laws with respect to 'the people of any race, other than the aboriginal race, for whom it is deemed necessary to make special laws', leaving responsibility for Indigenous affairs entirely in the hands of the states; and, s 127 excluded 'Aboriginal natives' from being counted in reckoning the number of people in the country.<sup>37</sup> The political, cultural and social values that gave birth to this Constitution were also reflected in considerable and draconian legislative interference into the lives of Indigenous Australians.<sup>38</sup>

Aboriginal and Torres Strait Islander peoples have long campaigned for structural reform to the Australian Constitution. In 1937, for instance, William Cooper, Secretary of the Aboriginal Advancement League, gathered 1,814 signatures for a petition to King George VI, calling for Indigenous representation in the federal Parliament. The petition was passed to Prime Minister Joseph Lyons, but Cabinet refused to forward it to the King, arguing that the Constitution did not allow such representation.<sup>39</sup> Cooper's petition echoed an earlier 1933 call by King Burruga of the Thirroul peoples in New South Wales, and was itself repeated in 1949, when Doug Nicholls wrote to Prime Minister Ben Chifley arguing for dedicated

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<sup>35</sup> UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, "Preliminary Working Paper on the Principle of Free, Prior and Informed Consent of Indigenous Peoples, Submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation", UN Doc E/CN.4/Sub.2/AC.4/2004/4 (8 July 2004) [13].

<sup>36</sup> Though see debate on this point: See for e.g. James Anaya, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development", UN Doc A/HRC/12/34 (15 July 2009) pp.12–15 [38]–[42].

<sup>37</sup> On s 127 see Greg Taylor, "A History of Section 127 of the *Commonwealth Constitution*", *Monash University Law Review*, Vol. 42, 1 (2016) p.206.

<sup>38</sup> Michael Dodson and Lisa Strelein, "Australia's Nation-Building", *University of New South Wales Law Journal*, Vol. 24, 3 (2001) p.826, 826; Dylan Lino, "Indigenous Recognition" in Rosalind Dixon (ed), *Australian Constitutional Values* (Oxford, 2018) p.243, 244-247.

<sup>39</sup> See Bain Attwood and Andrew Markus (eds), *The Struggle for Aboriginal Rights: A Documentary History* (St Leonards, 1999) p.63.



Indigenous members of Parliament.<sup>40</sup> These calls were not answered in 1967, but two of the Constitution's exclusionary provisions were amended. Section 127 was struck out, while s 51(xxvi) was altered by removing the clause 'other than the aboriginal race', so as to empower the federal Parliament to legislate specifically for Aboriginal and Torres Strait Islander peoples. This was a momentous change, but it fell far short of both providing substantive equality and meeting Indigenous aspirations.<sup>41</sup>

First Nations' calls to reform the Constitution predate the 1967 amendments, but these amendments serve as the starting point for the contemporary debate on constitutional recognition.<sup>42</sup> The referendum had the curious textual effect of entirely removing reference to Aboriginal and Torres Strait Islander peoples from the Constitution. Concern over this textual absence motivates a desire for symbolic reform aimed to 'complete our constitution rather than change it'.<sup>43</sup> However, the substantive limits of the 1967 reform were laid bare in a 1998 High Court decision. In *Kartinyeri v Commonwealth*, the Court held that, in contrast to the views of many who campaigned for the referendum,<sup>44</sup> the amended race power did not prevent the Parliament from enacting laws that discriminate adversely based on a person's race.<sup>45</sup> The fact that the race power has only ever been used to discriminate against Aboriginal and Torres Strait Islander peoples animates an entirely different project of constitutional reform. Rather than focused on symbolic textual amendment to incorporate a reference to Indigenous Australians in the country's founding document, those working within this project see structural reform as necessary to 'empower our people and take a rightful place in our own country',<sup>46</sup> and as a means to 'effect a more just basic distribution of public power'.<sup>47</sup> In 1999, a proposal responding to the first project, by inserting a preamble 'honouring Aborigines and Torres Strait Islanders' but otherwise not making any structural amendments, was soundly defeated.<sup>48</sup>

The 1967 amendments and the *Kartinyeri* decision animate two distinct projects of constitutional reform. On the one hand, textual or symbolic reform could 'recognise' Aboriginal and Torres Strait Islander peoples by incorporating a clear set of words to 'acknowledge and affirm the significance of Indigenous people in our national life'.<sup>49</sup> On the other, structural reform to the document could remedy the demographic disadvantages faced by a small minority in a democratic state. Although there is no reason why these aspirations

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<sup>40</sup> See Alexander Reilly, "Dedicated Seats for Indigenous Australians in the Federal Parliament", *Balayi*, Vol. 2, 1 (2001) p.73, 82.

<sup>41</sup> Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Canberra, 2007).

<sup>42</sup> For a comprehensive history on constitutional recognition see Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Sydney, 2018) Chapter 1. See also JL Birrell, "The Recognise campaign and constitutional relationships between Indigenous peoples and the state" *Public Law Review*, Vol. 27, 2 (2016) p.124.

<sup>43</sup> 'PM Tony Abbott wants conversation on Indigenous referendum', *ABC News*, 1 January 2014 <<http://www.abc.net.au/news/2014-01-01/abbott-wants-conversation-on-indigenous-referendum/5181004>>.

<sup>44</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [146], [157] (Kirby J). For the difficulties in using the 1967 referendum to inform interpretation of the race power see Robert French, "The Race Power: A Constitutional Chimera" in H.P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge, 2003) p. 180, 206-208.

<sup>45</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

<sup>46</sup> "Uluru Statement from the Heart".

<sup>47</sup> Lino, *Constitutional Recognition* p.88.

<sup>48</sup> *Constitution Alteration (Preamble) 1999* (Cth).

<sup>49</sup> Damien Freeman and Julian Leeser, *The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians* (Uphold & Recognise, 2014) p.3.

need conflict and the UNDRIP's emphasis on self-determination does not dismiss the relevance of textual amendment, the rights it recognises and encompasses does require some form of structural empowerment. Here then, the Declaration can guide Australia in the development of a proposal that satisfies Indigenous aspirations for a renegotiated relationship with the state. Did the four initial processes engage with the UNDRIP?

*A. The Expert Panel, the Review Panel, the Joint Select Committee, and Recognise*

Aboriginal and Torres Strait Islander peoples have long campaigned for structural reform to the Australian Constitution. While Indigenous aspirations have not always taken centre-stage in mainstream debate, in the weeks leading up to the 2007 federal election (and less than a month after the UN General Assembly endorsed the UNDRIP), Prime Minister John Howard announced that, if re-elected, he would hold a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution.<sup>50</sup> Details were limited, but Howard had in mind a preambular 'statement of recognition' that would merely textually recognise Indigenous Australians without amending the structural distribution of power provided for in the Constitution.

Howard was defeated, but the concept of constitutional recognition persisted. It was raised by several groups at Prime Minister Kevin Rudd's 2008, '2020 Summit', with some explicitly linking substantive constitutional change to the Declaration.<sup>51</sup> Although the Rudd government endorsed the UNDRIP on 3 April 2009, it emphasised that the instrument was 'aspirational' and did not alter the laws of Australia.<sup>52</sup> Around the same time, the government committed only to 'considering further' the idea of constitutional change.<sup>53</sup> Indeed, it was not until 2010, as part of Prime Minister Julia Gillard's negotiations to form a minority government that the first major public process focusing exclusively on this issue commenced.<sup>54</sup> In December that year, Gillard appointed an Expert Panel on Constitutional Recognition of Indigenous Australians.

The Expert Panel was tasked with consulting the Australian community about options for constitutional amendment. It comprised 13 Indigenous and 9 non-Indigenous leaders, and was jointly chaired by Yawuru man Patrick Dodson, and non-Indigenous lawyer Mark Leibler. The Expert Panel led a wide-ranging national public consultation and engagement program throughout 2011. It attracted considerable community input, holding more than 250 consultations and public meetings in at least 84 locations across the country, with more than 4600 attendees.<sup>55</sup> As Paul Kildea notes, this number 'compares favourably with similar processes', substantially exceeding the number of public meetings held by the 2009 National Human Rights Consultation (66), 1999 Republic Advisory Committee (22), and 2011 Expert

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<sup>50</sup> Gillian Bradford, "Howard plans constitutional recognition of Aborigines", *PM*, 11 October 2007 <<http://www.abc.net.au/pm/content/2007/s2057317.htm>>. See further Lino, *Constitutional Recognition*, p.42. Megan Davis and George Williams, *Everything You Need to Know About the Referendum to Recognise Indigenous Australians* (Sydney, 2015) pp.79-80.

<sup>51</sup> Commonwealth of Australia, *Australia 2020 Summit: Final Report* (Canberra, 2008) pp.226, 238, 244-245.

<sup>52</sup> Jenny Macklin, "Statement on the United Nations Declaration on the Rights of Indigenous Peoples".

<sup>53</sup> Commonwealth of Australia, *Responding to the Australia 2020 Summit* (Canberra, 2009) p.187.

<sup>54</sup> Agreement between the Australian Greens and the ALP, 1 September 2010, para. 3(f); and Agreement between the Hon Julia Gillard and Mr Wilkie (2 September 2010) [3.2(f)].

<sup>55</sup> Commonwealth of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) pp.5-7 ('*Report of the Expert Panel*').

Panel on Local Government (6).<sup>56</sup> The Panel released its recommendations in January 2012. Encompassing a suite of reforms, it recommended:

- s 25 be repealed;
- s 51(xxvi) be repealed;
- a new s 51A be inserted, recognising Indigenous people as first occupiers, acknowledging their continuing relationship to traditional lands and waters, respecting their continuing culture, language and heritage, acknowledging the need to secure their advancement, and empowering the Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples;
- a new section 116A be inserted, prohibiting racial discrimination; and
- a new section 127A be inserted, recognising Aboriginal and Torres Strait Islander languages as ‘the original Australian languages’, while noting that the ‘national language’ is English.

The Expert Panel also made a number of recommendations on the process for constitutional change, including that it should be preceded by a ‘properly resourced public education and awareness program’.

This recommendation followed from Australia’s poor record of constitutional amendment. The process for amending the *Constitution* is set out in s 128. A proposed amendment must first be passed by an absolute majority of both Houses of Parliament (or passed by the same House of Parliament twice, after a period of three months, if the second House refuses to pass it). It is then presented to the people, who must approve the amendment in a referendum. The amendment will only be successful if it obtains a double majority—that is, if it achieves a majority of votes across Australia, including the territories, and a majority of votes in a majority of states. Since 1901, only eight of the 44 proposed amendments have passed this gauntlet.

There are many reasons for the low success rate, but analysis suggests that the worst results have occurred when there has been no attempt to raise awareness of the need for change.<sup>57</sup> As such, the Gillard government established ‘Recognise’ in 2012 to promote public awareness about constitutional recognition. Set up under Reconciliation Australia, a non-government, not-for-profit foundation aimed at promoting reconciliation between Indigenous and non-Indigenous Australians, Recognise was initially led by Torres Strait Islander woman Tanya Hosch and non-Indigenous former Australian Labor Party secretary Tim Gartrell. Recognise achieved some success. Between 2012 and 2017 it held 365 events attended by 27,240 people in 273 communities and some 300,000 Australians pledged their support for constitutional recognition.<sup>58</sup> However, as discussed below, state ambivalence towards Indigenous rights and the project of structural reform caused considerable angst within Aboriginal and Torres Strait Islander communities. In August 2017 the campaign was quietly abandoned.<sup>59</sup>

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<sup>56</sup> Paul Kildea, “Expert Panels as a Mechanism of Constitutional Reform” (Australasian Study of Parliament Group Annual Conference, Darwin, 3-5 October, 2012) 1, 7. Though as Paul Kildea notes, the public meetings varied in their popularity, for example, a meeting in Canberra attracted 114 attendees, while the Broome consultation attracted just 5 attendees.

<sup>57</sup> George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (Sydney, 2010).

<sup>58</sup> Recognise, “About” <<http://www.recognise.org.au/about>>.

<sup>59</sup> Stephen Fitzpatrick, “Indigenous Recognise Campaign Ditched”, *The Australian*, 10 August 2017 <<http://www.theaustralian.com.au/national-affairs/indigenous/indigenous-recognise-campaign-ditched/news-story/b444305a94a3acccc26f1cb96a122300>>.

Although the Gillard Government established Recognise, it never officially responded to the substantive recommendations of the Expert Panel's Final Report. Concerned that the process was flagging, on 2 December 2013, the Parliament established a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. A few months later, in March 2014, the Minister for Indigenous Affairs appointed a Review Panel, as mandated under the *Aboriginal and Torres Strait Islander Recognition Act 2013* (Cth).

The Review Panel was tasked with assessing the level of public awareness and support for amending the Constitution to recognise Indigenous peoples, and exploring community support for different proposals for constitutional change. It did not consult with the Australian public but met with key Indigenous and non-Indigenous stakeholders and considered earlier consultations and reports.<sup>60</sup> The Panel's final report called for the establishment of a Referendum Council 'to settle the final form of words and draw debate on the model to a conclusion'.<sup>61</sup> Its Terms of Reference did not extend to offering any substantive reform proposals.<sup>62</sup> For this reason, it will not be considered in detail in this article.

The Joint Select Committee was instructed to 'inquire into and report on steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition'.<sup>63</sup> It held 16 public hearings in 2014 and 2015, across all states and territories, except for the Australian Capital Territory,<sup>64</sup> and received 139 submissions. Ultimately, the Joint Select Committee's final report recommended a similar suite of reforms to the Expert Panel; it agreed to all major proposals, except for the insertion of a provision on Aboriginal and Torres Strait Islander languages. However, despite being 'tabled with hugs and congratulations', the report 'was dead within three weeks'.<sup>65</sup> Western Australia Liberal MP Ken Wyatt, the Chair of the Committee, announced that a non-discrimination clause was not supported within his own party.<sup>66</sup> The process was back to square one.

### B. Did the Declaration inform these processes?

The UNDRIP informed discussions at community consultations and in submissions to the Expert Panel and Joint Select Committee. The Expert Panel Final Report notes that the Declaration was 'raised at most consultations and in a number of submissions to the Panel'.<sup>67</sup> For many who made submissions, constitutional reform was seen as demonstrating Australia's 'commitment to the principles in the UNDRIP', while for others, incorporating UNDRIP into the Australian Constitution or interpreting its provisions through 'the lens of the principles of UNDRIP' was seen as realising Indigenous aspirations for meaningful

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<sup>60</sup> John Anderson, Tanya Hosch and Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel* (Canberra, 2014) p.10, Appendix A ('*Final Report of the Review Panel*').

<sup>61</sup> *Final Report of the Review Panel*, p.7, Recommendation 1.

<sup>62</sup> *Final Report of the Review Panel*, p.10.

<sup>63</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (Canberra, 2015) p.1 [1.2] ('*Final Report of the Joint Select Committee*').

<sup>64</sup> *Final Report of the Joint Select Committee*, 'Appendix 5', pp.103-102.

<sup>65</sup> Noel Pearson, "Process of Recognition", *The Monthly* (August, 2015)

<<https://www.themonthly.com.au/issue/2015/august/1438351200/noel-pearson/process-recognition>>.

<sup>66</sup> Natasha Robinson and Sarah Martin, "Indigenous Constitutional Recognition: PM listening to Aboriginal representatives", *The Australian*, 6 July 2015 <<http://www.theaustralian.com.au/national-affairs/indigenous/indigenous-constitutional-recognition-pm-listening-to-aboriginal-representatives/news-story/2470f15cd9d9beae58dcc8d0483bc418>>.

<sup>67</sup> *Report of the Expert Panel*, p.59; see also pp.49, 60-61, 84, 89, 104, 130, 147, 164, 180.

recognition and reform.<sup>68</sup> Similar points were raised before the Joint Select Committee. Amnesty International, for example, considered that a prohibition on racial discrimination would ‘further strengthen’ Australia’s commitment to the UNDRIP.<sup>69</sup>

That the Declaration was often raised before these two consultative bodies is positive as it demonstrates its political salience within the community. This is valuable because articulating aspirations in the language of the Declaration could ‘contribute to state internalisation of its norms’,<sup>70</sup> and potentially catalyse substantive change. Certainly, the recommendations of the Expert Panel and Joint Select Committee are consistent with the UNDRIP’s norms and principles. For instance, the prohibition on racial discrimination, removal of racially discriminatory sections in the Constitution, and insertion of a provision empowering the Parliament to make laws only for the benefit of Aboriginal and Torres Strait Islander peoples accords with several articles, as well as the Declaration’s generally reparative aims.<sup>71</sup> In addition, the Expert Panel’s recommendation to recognise Indigenous languages reflects Article 13’s requirement that State’s take effective measures to ensure that Indigenous peoples are able to exercise their right to revitalise, use, develop and transmit their languages.

The recommendations of the Expert Panel and Joint Select Committee were consistent with the Declaration, but it is not clear how significant the Declaration was in influencing their development. This is because those review processes did not refer to, nor cite the Declaration, when outlining their recommendations. In fact, the UNDRIP was only expressly referred to in one, minor, recommendation by the Joint Select Committee. Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Parliamentary Joint Committee on Human Rights (PJCHR) examines all bills and legislative instruments that come before the Parliament to assess their potential impact on human rights, as defined by reference to seven core international human rights treaties acceded to by Australia. The Joint Select Committee recommended that this Act be amended to permit the PJCHR to assess bills and legislative instrument against the UNDRIP.<sup>72</sup> That recommendation has not been adopted.

That even this minor reform proposal has not been adopted suggests larger problems. Indeed, the absence of the Declaration in the substance of the recommendations mirrors its omission from the consultative processes. While a majority of Expert Panel members, and the Chair and Deputy Chair of the Joint Select Committee, were Indigenous, Aboriginal and Torres Strait Islander people did not drive the process as required under the principle of self-determination provided for in the UNDRIP. Rather, despite the extensive consultations across the community, the process and options for reform were largely framed by the state.<sup>73</sup> In fact, as Megan Davis, an Indigenous member of the Expert Panel has noted, the Panel ‘decided what the options should be’, rather than allow them to emerge organically from consultations.<sup>74</sup> Four other key issues stand out.

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<sup>68</sup> *Report of the Expert Panel*, p.59.

<sup>69</sup> *Final Report of the Joint Select Committee*, p.60 [5.62].

<sup>70</sup> Claire Charters, “Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Māori Legal and Political Claims” in Andrew Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Wellington, 2017) p.137, 151.

<sup>71</sup> UNDRIP arts 2, 9, 14-17, 21-22, 24 and 29. See further James Anaya, *Indigenous Peoples in International Law* (Oxford, 1996) p.75.

<sup>72</sup> *Final Report of the Joint Select Committee*, p.68 [6.18] Recommendation 6.

<sup>73</sup> *Report of the Expert Panel*, p.9.

<sup>74</sup> Megan Davis, “Self-Determination and the Right to be Heard” in Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Carlton, 2017) p.119, 136.

First, the Expert Panel and Joint Select Committee's terms of reference unnecessarily constrained their ability to respond to issues of concern to Aboriginal and Torres Strait Islander people. For instance, among other things, the Expert Panel was tasked with 'lead[ing] a broad national consultation and community engagement program to seek the views of a wide spectrum of the community'. This suggests that the Panel had wide latitude to fashion an appropriate set of recommendations that would do justice to Indigenous aspirations. However, 'in performing this role', the Panel was instructed to 'have regard to' the form of constitutional change 'likely to obtain widespread support'.<sup>75</sup> The Panel itself understood this as requiring reform options to be 'capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'.<sup>76</sup> Likewise, the Joint Select Committee's mandate required it to 'work to build a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition'.<sup>77</sup>

As I have noted, Australia has a poor record of successful constitutional amendments. It is thus understandable that governments may be reluctant to pursue reform without clear evidence that a successful referendum is likely. However, the requirement that any reform option must be capable of receiving an 'overwhelming majority' support, or achieve a 'secure strong multi-partisan parliamentary consensus', served to place a straightjacket on potential recommendations. While community support is ultimately necessary for amendment, a more effective process, and one consistent with the principle of self-determination, would begin by asking Aboriginal and Torres Strait Islander people how they want to be recognised,<sup>78</sup> and consider what is politically feasible (or how effective political leadership could change what is considered feasible) second.

The Expert Panel and Joint Select Committee recognised problems with their mandate. In its Final Report, the Expert Panel noted that 'at almost every consultation Aboriginal and Torres Strait Islander participants raised issues of sovereignty',<sup>79</sup> and that 'agreement-making' was also frequently raised at community consultations.<sup>80</sup> Both bodies also discussed these two issues in discrete chapters. However, neither recommended pursuing reform options that would accommodate these widespread Indigenous aspirations. The Joint Select Committee implicitly cited its mandate, noting simply that 'the wider Australian community is not engaged with this potentially contentious issue',<sup>81</sup> while the Expert Panel was more explicit, arguing that to propose reform along these lines would 'jeopardise broad public support for the Panel's other recommendations'.<sup>82</sup> As Davis later revealed, 'resentment' over this decision percolated throughout the Indigenous community,<sup>83</sup> with important consequences for the debate going forward.

Second, concerns were also raised about the standard of the Expert Panel and Joint Select Committee's consultations. Article 19 of the UNDRIP provides that states should consult in

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<sup>75</sup> *Report of the Expert Panel*, p.3.

<sup>76</sup> *Report of the Expert Panel*, p.4. See further Lino, *Constitutional Recognition*, pp.49-50.

<sup>77</sup> *Final Report of the Joint Select Committee*, p.1 [1.2].

<sup>78</sup> UNDRIP arts 15, 17-19.

<sup>79</sup> *Report of the Expert Panel*, p.97

<sup>80</sup> *Report of the Expert Panel*, p.191.

<sup>81</sup> *Final Report of the Joint Select Committee*, p.73 [7.22].

<sup>82</sup> *Report of the Expert Panel*, p.201. Of course, the idea of recognising Aboriginal sovereignty in the Australian Constitution may be problematic for some First Nations peoples. See further Megan Davis, "Constitutional Reform Does Not Foreclose on Aboriginal Sovereignty", *Indigenous Law Bulletin*, Vol. 8, 1 (2012) p. 12, 13.

<sup>83</sup> Davis, "Self-Determination and the Right to be Heard", p.136.

good faith with Indigenous peoples before adopting measures that may affect them. While there is considerable debate over what satisfies this standard, we have established earlier that consultation should take place with Indigenous peoples separately.<sup>84</sup> However, both bodies' mandates required them to consult across the Australian community; Aboriginal and Torres Strait Islander people's voices would be heard, but only as part of a broader consultation.

The Expert Panel and Joint Select Committee both regarded this as problematic and sought to maximise their consultations with Indigenous communities. For instance, in most places, the Expert Panel held an initial meeting with local elders before holding a public community consultation, ensuring the views of as many Aboriginal and Torres Strait Islander people and communities as possible were heard.<sup>85</sup> The Panel also held focus groups with Aboriginal and Torres Strait Islander leaders, conducted web surveys from people who identified themselves as an Aboriginal or Torres Strait Islander person, and relied on surveys of members conducted by the National Congress of Australia's First Peoples.<sup>86</sup> Similarly, the Joint Select Committee rejected the suggestion that it create a separate Indigenous advisory body to assist its work, considering instead that 'wider consultation with Aboriginal and Torres Strait Islander leaders, communities and organisations would provide broader input'.<sup>87</sup> These efforts demonstrate commitment to a form of consultation that mitigates inequities, but the fact remains that Aboriginal and Torres Strait Islander people's views only informed the recommendations, rather than grounded them.

This challenge highlights a further empirical and methodological problem. The difficulty of constructing dialogues and consultation with a diverse and territorially dispersed population meant that the views sought from First Nations communities may not reflect the views of all Aboriginal and Torres Strait Islander peoples. Indigenous communities are 'diverse in culture and circumstance' and consequently have very different needs and aspirations;<sup>88</sup> yet, financial and other considerations meant that no committee or panel could not conduct consultations on an individual nation-to-nation basis, as some community members desired.<sup>89</sup> Compounding this absence was the fact that, as the Expert Panel itself noted, no established survey instrument 'can provide an accurate and representative picture of the opinion of Aboriginal and Torres Strait Islander people,' and constructing a statistically representative panel 'is not feasible'.<sup>90</sup> As a consequence the consultations were 'neither comprehensive nor deliberative'.<sup>91</sup>

Third, notwithstanding their concerted effort, the consultations themselves also suffered from challenges. The Expert Panel's Final Report documents concerns of some Aboriginal and Torres Strait Islander participants that time pressure meant the meetings did not provide for sustained in-depth discussion of relevant issues, and no follow-ups were conducted. More problematically, some participants claimed that they were not provided with advance notice of the consultations.<sup>92</sup> As such, the process appeared rushed. As one participant explained:

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<sup>84</sup> UNDRIP arts 15, 17-19; Permanent Forum on Indigenous Issues, "Report of the International Workshop", p.12 [46]-[47]; UN Commission on Human Rights, "Preliminary Working Paper", [13].

<sup>85</sup> *Report of the Expert Panel*, pp.5-7, and page xi.

<sup>86</sup> *Report of the Expert Panel*, p.9.

<sup>87</sup> *Final Report of the Joint Select Committee*, p.1 [1.3].

<sup>88</sup> Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney, 2003) p.87.

<sup>89</sup> *Report of the Expert Panel*, p.100 (Kempsey, and Galiwin'ku).

<sup>90</sup> *Report of the Expert Panel*, p.9.

<sup>91</sup> Davis, "Self-Determination and the Right to be Heard", p.136.

<sup>92</sup> *Report of the Expert Panel*, p.100.

In my very short time, my experience is that rushing the consultation is a recipe for disaster. Consulting Aboriginal and Torres Strait Islander peoples so that they do feel consulted, and not just a tick box approach, takes more than months.<sup>93</sup>

These complaints were reflected in survey data, which found that 70 per cent of Indigenous respondents believed that consultation had been inadequate.<sup>94</sup> Similar issues beset the Joint Select Committee. Although committee members and the secretariat strove to engage Indigenous people in an inclusive manner and the flexibility of the committee system encouraged communication and relationship building, a ‘recurring theme in evidence heard from Aboriginal and Torres Strait Islander people at public hearings [was] a persistent distrust of government and bureaucracy’.<sup>95</sup> The inadequate time and structure of these consultations prevented these state-driven processes from obtaining a comprehensive and informed view of First Nations opinions, failing the standard enunciated in the UNDRIP.

Finally, reflective of the state’s reluctance to meaningfully engage with the norms underlying the UNDRIP, no government was ever prepared to publicly commit to reform that proposed structural readjustment rather than reform that merely remedied First Nations’ textual absence. This decision weakened the political force of both the Expert Panel and the Joint Select Committee but it placed Recognise in an especially precarious position.

Surveys suggest that Recognise succeeded in building support for the ambiguous concept of ‘recognising’ First Peoples in the Australian Constitution. However, without a model to rally support around, Recognise animated ‘a suspicion and anxiety’ in the Aboriginal and Torres Strait Islander community that reform would be textual and minimal.<sup>96</sup> Apprehension was amplified by the disjuncture between the upbeat and positive rhetoric surrounding the ambiguous notion of ‘recognising’ Aboriginal and Torres Strait Islander people, and government policy towards Indigenous affairs more generally.<sup>97</sup> In particular, in 2013, the conservative government cut \$534 million from Aboriginal and Torres Strait Islander programmes as part of its ‘Indigenous Advancement Strategy’.<sup>98</sup> The strategy centralised programs in the Department of Prime Minister and Cabinet, and required competitive tender bids for organisations providing services to Indigenous communities.

The results were not positive. The Minister for Indigenous Affairs informed a 2016 Senate Committee that around 54 per cent of the tenders were awarded to non-Indigenous organisations,<sup>99</sup> forcing many Indigenous organisations to close or reduce their services. As

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<sup>93</sup> *Report of the Expert Panel*, p.100.

<sup>94</sup> Cited in Kildea, “Expert Panels as a Mechanism of Constitutional Reform” p.8.

<sup>95</sup> Toni Matulick, Ann Palmer and Aleshia Westgate, “Engaging Indigenous people with the Australian Parliament through the Senate committee system” (Australia and New Zealand Association of Clerks at the Table Conference, Wellington, 19 January 2016) p.14.

<sup>96</sup> Megan Davis and Marcia Langton, “Introduction” in Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne, 2016) p.1, 5.

<sup>97</sup> Megan Davis, “Listening but not hearing”, *Griffith Review*, Vol. 51 (2016) p.73; Davis, “Self-Determination and the Right to be Heard”, p.137.

<sup>98</sup> Eddie Cubillo, “Funding Cuts to Aboriginal and Torres Strait Islander Legal Services: Where is the justice for our Nation’s First Australians?” 8(14) *Indigenous Law Bulletin*, Vol. 8, 14 (2014) p.15.

<sup>99</sup> Senate Standing Committee on Finance and Public Administration, *Commonwealth Indigenous Advancement Strategy Tendering Process* (2016) p.24 [2.50].



the Special Rapporteur noted this, had a ‘devastating impact on Indigenous organisations’, ‘dented their trust in government’, and

runs contrary to the principles of self-determination and participation and the publicly expressed commitment of the Government to doing things with rather than to Aboriginal and Torres Strait Islander people.<sup>100</sup>

Recognise did have the support of many Aboriginal and Torres Strait Islander peoples. However, as a state-funded organisation it was frequently criticised for not listening to communities. Recognise was not a ‘people’s movement’, but a ‘taxpayer-funded organisation with paid employees’,<sup>101</sup> undertaking a ‘top-down approach’ to reform.<sup>102</sup> Consequently, it could not overcome the fact that, at this stage, constitutional recognition was largely seen as a state-driven process, rather than an Indigenous-driven one. Many Aboriginal and Torres Strait Islander people considered Recognise ‘spoke primarily to white Australia’,<sup>103</sup> was ‘removed from grassroots Indigenous opinion’,<sup>104</sup> and accused the organisation of ‘actively suppressing much-needed debate...by silencing black dissent’.<sup>105</sup> The ‘simplistic slogans and mantras’<sup>106</sup> voiced by the campaign, left many Aboriginal and Torres Strait Islanders ‘disempowered’.<sup>107</sup> Ultimately, the campaign ‘unwittingly inspired a resistance to recognise’.<sup>108</sup>

The failure of successive governments to meaningfully engage with the norms underlying the Declaration meant that the initial state-driven processes of constitutional reform would not succeed for two reasons. First, state ambivalence on Indigenous rights informed the design of consultative processes that did not allow Aboriginal and Torres Strait Islander peoples to drive the agenda. Notwithstanding the presence, skill and creativity of respected Indigenous leaders, both the Expert Panel and Joint Select Committee were hamstrung by their mandates, which specifically required broad community consultation aimed at securing overwhelming majority support for change. Second, this same ambivalence meant that when the Expert Panel and Joint Select Committee nonetheless recommended substantive constitutional amendment, consistent with Aboriginal and Torres Strait Islander peoples’ desire for structural change to the Australian state, state actors unaware of or unconcerned by international standards on Indigenous rights were surprised and threatened. Rather than respond to those considered recommendations, the state simply ignored them.

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<sup>100</sup> Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) p.8 [39].

<sup>101</sup> Geoff Scott, “Minding Each Other’s Business” in Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne, 2016) p.72, 80.

<sup>102</sup> Josephine Bourne, “Telling our story, owning our story, making our story” in Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne, 2016) p.56, 61.

<sup>103</sup> Fitzpatrick, “Indigenous Recognise Campaign Ditched”.

<sup>104</sup> Celeste Liddle, “I don’t want your Recognise campaign—it’s nothing but a sham”, *Guardian Australia*, 18 August 2014 <<https://www.theguardian.com/commentisfree/2014/aug/18/i-dont-want-your-recognise-campaign-its-nothing-but-a-sham>>.

<sup>105</sup> Amy McQuire, “Recognising the truth about treaty through a storm of constitutional spin”, *New Matilda*, 4 May 2016 <<https://newmatilda.com/2016/05/04/recognising-the-truth-through-a-storm-of-constitutional-spin/>>.

<sup>106</sup> Scott, “Minding Each Other’s Business”, p.74.

<sup>107</sup> Luke Pearson, “Treaty vs Recognition—the importance of self-determination”, *IndigenousX*, 29 April 2016 <<http://indigenoux.com.au/treaty-vs-recognition-the-importance-of-self-determination/#.WY0ng2flzRw>>.

<sup>108</sup> Davis and Langton, “Introduction”, p.5.

State reluctance to absorb and comply with the minimal human rights standards recognised in the Declaration suggests that meaningful reform was not possible at this stage. Nonetheless, the consultative bodies could have responded differently. Indeed, although the recommendations of the Expert Panel and Joint Select Committee were consistent with the principles and values underlying the Declaration, the failure of each consultative body to explicitly articulate their recommendations in the language of the UNDRIP was problematic. This decision may have reflected a pragmatic position that the Australian state would not be receptive to the language of international Indigenous rights, but it enabled the state to construct the recommendations as political aspirations rather than obligations Australia has accepted and agreed to meet. This framing meant politicians could argue that the substance of the report was something akin to ‘a log of claims’, providing cover to disregard it.<sup>109</sup>

And yet, as I argue below, the same ambivalence which characterised the state’s relationship to the Declaration and the recognition process more broadly, allowed Indigenous leaders to creatively respond and adapt, successfully modifying the process of consultation on constitutional reform in its next iteration. This shift allowed Aboriginal and Torres Strait Islander people to drive the process of constitutional reform, bringing consultation closer into line with the standards of the UNDRIP and reform proposals in line with their priorities.

#### IV. THE REFERENDUM COUNCIL REGIONAL DIALOGUES

Indigenous resistance to the state-driven processes reached a nadir following the failure of the Joint Select Committee. On 6 July 2015, Prime Minister Tony Abbott and Opposition Leader Bill Shorten met with 40 Indigenous leaders at the Prime Minister’s residence in Kirribilli to consider a way forward. According to Noel Pearson, the outcomes were ‘preordained’. While a number of Indigenous speakers argued for an Indigenous-specific consultation process to seek consensus on reform options, Abbott and Shorten announced that a Referendum Council would be established to conduct another round of nationwide community consultations.<sup>110</sup> Once again, Aboriginal and Torres Strait Islander peoples would be part of the process—but their views would only be one element to consider.

Abbott grounded his rejection of an Indigenous-specific process in the same nebulous imagery that had infected the debate thus far, explaining that it ‘jars with the notion’ of reconciliation.<sup>111</sup> Indigenous peoples firmly reject this approach. In the Kirribilli Statement, all 40 Indigenous leaders who attended the meeting reiterated their desire for substantive reform that would ‘lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future’ and called for deliberative Aboriginal constitutional conventions as a means of revitalising debate.<sup>112</sup> After considerable pressure, Abbott reversed

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<sup>109</sup> Prime Minister Tony Abbott used this language to initially rebuff a call for Indigenous-only constitutional conventions: Natasha Robinson, “Recognise campaign: Tony Abbott sparks fury among Aboriginal leaders”, *The Australian*, 3 August 2015 <<http://www.theaustralian.com.au/national-affairs/indigenous/recognise-campaign-tony-abbott-sparks-fury-among-aboriginal-leaders/news-story/edcde4345a0061494c96dcd392c40919>>.

<sup>110</sup> Pearson, “Process of Recognition”.

<sup>111</sup> Michael Gordon, “Tony Abbott scuttles Indigenous plan on constitutional recognition”, *Sydney Morning Herald*, 3 August 2015 <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-scuttles-indigenous-plan-on-constitutional-recognition-20150803-giq6bs.html>>.

<sup>112</sup> “Statement prepared by Aboriginal and Torres Strait Islander attendees at a meeting held today with the Prime Minister and Opposition Leader on Constitutional Recognition” (6 July 2015).

his decision:<sup>113</sup> a Referendum Council would be established, but it would consult only with Indigenous people and communities. It was set-up by Prime Minister Malcolm Turnbull in December 2015.

The Referendum Council conducted 12 deliberative dialogues across every state and territory in the country. Attendance at each of the dialogues was by invitation and meetings were capped at 100 participants to promote discussion. These were inclusive forums: 60 per cent of places were reserved for traditional owner groups; 20 per cent for community organisations; and 20 per cent for key individuals. A balance was sought between gender and across age groups, while Stolen Generations were also represented. The Referendum Council worked in partnership with a host organisation at each location to ensure the local community too was appropriately represented in the process. The dialogues themselves were conducted as a deliberative forum. Each took place over three days, and included opportunities for large and small group discussions. The Council assisted delegates by providing information on the Constitution and the history of constitutional reform. This allowed delegates to discuss and assess different reform options in an informed manner, and to explain what recognition would mean for their communities. At the end of the three days, delegates confirmed a statement of their discussion, and selected ten representatives for a final convention at Uluru.<sup>114</sup>

The regional dialogues were an example of the norms recognised by the Declaration in action.<sup>115</sup> They were ‘an innovation in deliberative decision-making and direct democracy’,<sup>116</sup> and, as entirely Indigenous-designed and led, were infused by notions of self-determination. Significantly, these regional dialogues centred discussion and debate about democratic design on Indigenous aspirations for the first time in this loving running debate. Through this process, a nuanced, representative view on what reform might mean to Indigenous communities and individuals was heard.

At Uluru, delegates issued the powerful ‘Statement from the Heart’. Grounded in their inherent right to sovereignty, the statement called for constitutional reform to empower Indigenous people to take ‘a rightful place in our own country’.<sup>117</sup> The delegates considered that this can be achieved through three elements, described as ‘power, treaty and truth’.<sup>118</sup> Power would enshrine a ‘First Nations Voice’ in the Constitution—a national representative body empowered to advise parliament on laws that affect Indigenous people; treaty would result from a process supervised by a Makarrata Commission; and truth about Australia’s colonial history would emerge from a public truth and reconciliation process overseen by the Makarrata Commission. Makarrata is a Yolŋu word meaning ‘a coming together after a struggle’. As the delegates explained, makarrata ‘captures our aspirations for a fair and

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<sup>113</sup> “Abbott denies ‘about face’ on Indigenous forums”, *SBS News*, 20 August 2015

<<http://www.sbs.com.au/news/article/2015/08/20/abbott-denies-about-face-indigenous-forums>>.

<sup>114</sup> Gabrielle Appleby and Sean Brennan, “The Long Road to Recognition”, *Inside Story*, 19 May 2017

<<http://insidestory.org.au/the-long-road-to-recognition/>>.

<sup>115</sup> On the need for Indigenous peoples to work with and implement the Declaration without passively waiting for the state see: Megan Davis, “Putting Meat on the Bones of the United Nations Declaration on the Rights of Indigenous Peoples” in Hossein Esmaili, Gus Worby and Simone Tur (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston* (Sydney, 2016) p.265, 271.

<sup>116</sup> Davis, “Self-Determination and the Right to be Heard”, p.127.

<sup>117</sup> “Uluru Statement from the Heart”.

<sup>118</sup> Megan Davis cited in Gabrielle Appleby, “Power, Treaty and Truth”, *Inside Story*, 29 May 2017

<<https://insidestory.org.au/power-treaty-and-truth/>>.

truthful relationship with the people of Australia and a better future for our children based on justice and self-determination'.<sup>119</sup>

The Uluru Statement reflected a distinct shift in debate on constitutional recognition. Gone was the prohibition on racial discrimination. In its place was a mechanism designed to provide 'active participation in the democratic life of the state'.<sup>120</sup> Similarly, calls for treaty and truth-telling reflected Indigenous demands that their co-existing sovereignty, understood as 'a spiritual notion',<sup>121</sup> deriving 'from within a people or culture',<sup>122</sup> be recognised by the state. These were considered calls for structural reform to the state, not textual amendment.

Around 300 Aboriginal and Torres Strait Islander delegates gathered at Uluru, but the Uluru Statement was not unanimous. Seven delegates walked out in protest the day before it was agreed to, concerned that any reform would lead to a loss of sovereignty, and not all returned.<sup>123</sup> This is disappointing but does not detract from the Statement's normative authority. As the Special Rapporteur on the Rights of Indigenous Peoples has explained, 'the principle of free, informed and prior consent does not require the consent of all'.<sup>124</sup> The statement reflects a formidable consensus position of Indigenous Australians. As such, it was officially adopted by the Referendum Council in its final report.

Like the earlier processes, the Referendum Council recommendations accord with the UNDRIP. However, unlike those processes, in this case the Declaration informed debate across the country and influenced the development of those proposals. Prior to the National Constitutional Convention, the Referendum Council distilled a set of ten Guiding Principles drawn from the consistent themes that emerged from each regional dialogue.<sup>125</sup> These principles served as a framework for the assessment and deliberation on reform proposals at Uluru.

The development of these principles reflects generally the Declaration's emphasis on self-determination. However, six of those principles are expressly conceived of in terms of the UNDRIP. For instance, delegates at each dialogue agreed that potential constitutional amendment must: involve substantive, structural reform (consistent with arts 3, 37 and 38); recognise the status and rights of First Nations (consistent with art 3); tell the truth about our history, including the Frontier Wars and massacres (consistent with preambular paragraphs 3, 4, 8, 15 and 21, and arts 5, 15, 37 and 40); provide a mechanism for agreement-making (consistent with art 37); and have the support of First Nations (consistent with arts 3 and 19).<sup>126</sup> Most significant, however, is Guiding Principle 3, which is explicitly framed by the Declaration, and requires any constitutional amendment to '[advance] self-determination and the standards established under the UNDRIP'. As the Final Report of the Referendum

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<sup>119</sup> "Uluru Statement from the Heart".

<sup>120</sup> Davis, "Self-Determination and the Right to be Heard", p.131 (emphasis in original).

<sup>121</sup> "Uluru Statement from the Heart".

<sup>122</sup> Kirke Kickingbird et al, *Indian Sovereignty* (Indian Legal Curriculum and Training Program of the Institute for the Development of Indian Law, 1977) p.1.

<sup>123</sup> Calla Wahlquist, "Uluru Talks: Indigenous Australians Reject "Symbolic" Recognition in Favour of Treaty", *Guardian Australia*, 26 May 2017 <<https://www.theguardian.com/australia-news/2017/may/26/uluru-talks-opt-for-sovereign-treaty-not-symbolic-constitutional-recognition>>.

<sup>124</sup> Tauli-Corpuz, *Report of the Special Rapporteur*, p.17 [101].

<sup>125</sup> Pat Anderson, "Aboriginal and Torres Strait Islanders Peoples from across Australia make Historic Statement" *Indigenous Law Bulletin*, Vol. 8, 29 (2017) p.9, 9.

<sup>126</sup> *Final Report of the Referendum Council*, pp.24-28.

Council notes, self-determination and the UNDRIP were discussed at 11 of the 12 dialogues.<sup>127</sup>

Self-determination means that Aboriginal and Torres Strait Islander people should determine for themselves how the society in which they live is shaped. This means that they should deliberate within and across their communities to reach a consensus position on constitutional reform before any broader state-wide consultation is undertaken. The regional dialogues marked the first time in Australia's long-running debate on constitutional recognition that this standard was actively sought. Of course, the designers of these dialogues opted for practicality at certain points, not least in inviting participants to the dialogues rather than enabling each community to select their delegates. Nonetheless, the dialogues themselves were structured around free and informed discussion on reform options, and resulted in considerably distinct proposals. This shift was possible because state ambivalence towards Indigenous rights and the norms of the UNDRIP allowed Aboriginal and Torres Strait Islander peoples to reassert control over debate on constitutional recognition.

However, as a proposal for constitutional amendment must be supported by government, a tension soon emerged. In the immediate aftermath of the Uluru Statement's delivery, Deputy Prime Minister Barnaby Joyce falsely characterised the advisory body as a 'third chamber of Parliament'.<sup>128</sup> This language was repeated by Prime Ministers Malcolm Turnbull and Scott Morrison when declaring that they would not support a First Nations Voice.<sup>129</sup> In summarily dismissing the Uluru Statement, the Coalition government broke trust with Indigenous people. Indigenous Australians were stunned. Noel Pearson stated simply that the decision demonstrated there would be 'no reconciliation' under the Coalition government, while Pat Anderson explained that it was 'a kick in the guts for us all'.<sup>130</sup>

The Coalition government's initial outright rejection of the First Nations Voice put it at odds with a historic, Indigenous community based process of deliberative dialogue. Indeed, the regional dialogues that occurred across the country constituted the largest and most comprehensive process of deliberative constitutional debate in Australia's history. Despite this rejection, however, public support for the Uluru Statement appears strong.<sup>131</sup> Replicating its origins in community deliberation, proponents of the Uluru Statement travelled widely across the country to educate the Australian public and build support for its recommendations. The explicit use of the Declaration is important as it reflects a shift in the constitutional reform debate.

As part of this shift, the Morrison government has quietly stepped away from the extremes of its initial response. In its pre-election budget, the government allocated \$160 million to hold a referendum, while during the 2019 election the Liberal party promised \$7.3 million to

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<sup>127</sup> *Final Report of the Referendum Council*, p.24. Those dialogues were Hobart, Broome, Darwin, Perth, Sydney, Cairns, Ross River, Adelaide, Brisbane, Torres Strait and Canberra.

<sup>128</sup> Louise Yaxley and Dan Conifer, "Barnaby Joyce says Indigenous chamber in Parliament "just won't fly" with Australians", *ABC News*, 29 May 2017 <<https://www.abc.net.au/news/2017-10-27/decision-to-reject-uluru-statement-is-indefensible/9093408>>.

<sup>129</sup> Prime Minister, Attorney-General, Minister for Indigenous Affairs, "Response to the Referendum Council's Report on Constitutional Recognition"; Hunter, "Mining giants back Indigenous Voice".

<sup>130</sup> Bridget Brennan, "Indigenous leaders enraged as advisory board referendum is rejected by Malcolm Turnbull", *ABC News*, 27 October 2017 <<https://www.abc.net.au/news/2017-10-27/indigenous-leaders-enraged-by-pms-referendum-rejection/9090762>>.

<sup>131</sup> Australian Constitutional Values Survey 2017; The Australia Institute, "Polling – Uluru Statement" (December 2017).

develop a proposal to take to that referendum.<sup>132</sup> It is not yet clear whether a referendum will be held. Following the government's surprise re-election, it has repeated the Howard-era focus on 'practical' steps towards reconciliation,<sup>133</sup> and has called for 'more detail' to be provided on how the Voice could operate.<sup>134</sup> There may yet be another parliamentary committee or panel to identify a precise proposal. Nonetheless, reflective of Aboriginal and Torres Strait Islander peoples' aspirations and addressed to the Australian people, the Uluru Statement will continue to build pressure on government.

## V. CONCLUSION

Scholars and policy-makers have identified several reasons for the lack of progress in constitutional recognition over the last ten years. These include the difficulty of securing formal constitutional alteration under s 128 of the Constitution, philosophical dispute over the relative advantages and disadvantages of statutory or constitutional rights protection, politicians wary of expending political capital, as well as an exclusive conception of Australian citizenship that denies Indigenous peoplehood.<sup>135</sup> There is, of course, no single reason that accounts for constitutional recognition's continued deferral; each helps explain a part of the story.

In this article, I extended our understanding of the lost decade of constitutional change by identifying another element. I demonstrated that state ambivalence towards the rights of Aboriginal and Torres Strait Islander peoples, as reflected in the failure of successive governments to meaningfully engage with the norms underlying the UNDRIP when designing public processes and reviews on constitutional recognition, hampered the push for reform. However, as I argued, that same state ambivalence was critical in carving space for Indigenous Australians to eventually take control of the debate, reframe it along their own priorities, and re-energise the movement for constitutional recognition and reform. State ambivalence remains, but even if a referendum is not held during this term of Parliament, the Uluru Statement from the Heart succeeded in building community consensus for a clear proposal. It did so, because it was informed and infused by the UNDRIP.

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<sup>132</sup> Snow, "Morrison pledges recognition".

<sup>133</sup> Mungo MacCallum, "Where to for Indigenous Recognition from Here?", *The Monthly*, 3 June 2019 <<https://www.themonthly.com.au/blog/mungo-maccallum/2019/03/2019/1559531495/where-indigenous-recognition-here>>.

<sup>134</sup> Snow, "Morrison pledges recognition".

<sup>135</sup> Harry Hobbs, "Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty", *Australian Journal of Political Science*, Vol. 53, 2 (2018) p.176.