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SUPPLEMENT ARTICLE

Receiving the final report of the referendum council: A challenge in public law

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Abstract

The *Final Report of the Referendum Council*, which includes the *Uluru Statement from the Heart*, is a formal claim on the Australian people and its governing institutions. The claim is for a new conception of the unity of the Australian people so that for the first time historically it includes the Aboriginal and Torres Strait Islander peoples as the first sovereign nations of Australia. This is the significance of the recommendation that a First Nations Voice to Parliament be established in the Australian Constitution. This is not just a claim on the Australian constitution; it is a claim in public law that offers a new political-constitutional horizon of intelligibility for the Australian constitution. In the current reception of the *Final Report*, this has not been properly understood.

KEYWORDS

Australian polity, First Nations law, First Nations Voice, public law, Uluru Statement from the Heart

1 | RECEIVING THE FINAL REPORT OF THE REFERENDUM COUNCIL

In the *Uluru Statement from the Heart*, and in the *Final Report of the Referendum Council*, which includes the *Uluru Statement* as its first page, Aboriginal Australia has made a fundamental claim on the Australian people as a polity. The claim is for recognition of the Aboriginal peoples of Australia as 'the first sovereign Nations of the Australian continent', who as the *Uluru Statement* continues to say, 'possessed it under our own laws and customs'. As I explain below, this is a claim in public law because it requires a new imaginary of the Australian polity and its formal institutional expression.

I say this claim has come from Aboriginal Australia because the *Uluru Statement* and the *Final Report* were authorised by a historically unprecedented and formal process of dialogue with leading

Aboriginal and Torres Strait Islander organisations and individuals that issued in consensus. Since the making of this claim in May-July 2017,[1] a complex political process regarding its reception has opened up. On the one hand there are those like Prime Minister Turnbull, and (most of) his Coalition Government, who are determinedly refusing the nature of this claim as one coming from the first sovereign nations of Australia, where recognition means building into the Australian constitution both a presence and voice for the Indigenous peoples of Australia *as* sovereign nations. Their mode of refusal takes the form of reducing the claim for constitutional recognition to issues of engagement and consultation of Aboriginal and Torres Strait Islander peoples, considered not as 'nations' but as aggregates of individuals, in the administration of policy and programs that affect them. On the other hand, many Australians of settler and/or multicultural heritage have both understood the claim and signalled their support for a First Nations Voice to the Australian Parliament.

In the July 2018 *Interim Report* of the Joint Select Committee on Constitutional Recognition (JSC) there is equivocation on the nature of the claim for constitutional recognition. Rather than being a claim in public law, it is understood as a call for 'greater self-determination' (Commonwealth of Australia 2018, 115), which should occur at local, regional, and national levels. The JSC's insistence on retaining the conventional language of 'Aboriginal and Torres Strait Islander peoples' as distinct from the Recognition Council's *Final Report*'s and *Uluru Statement*'s usage, 'First Nations/Peoples,' is symptomatic of its difficulty in coming to terms with the largeness and gravity of the claim for constitutional recognition as a claim on how the Australian polity is conceived and instituted.[2] At this point [of writing/publication] we cannot know how this process will turn out. However, one thing seems sure: as reflected at the 2018 Garma Festival and not only, the leaders of the First Nations of Australia are not retreating from the claim for constitutional recognition as it was made in the Recognition Council's *Final Report* and *Uluru Statement*.

For this reason, the first responsibility for those of us who are positioned as non-Aboriginal Australians (either of settler and/or multicultural heritage) is to understand that what is at stake is precisely how the Australian polity is conceived. We need to stop business as usual and comport ourselves so that we *receive* this claim. To receive it means that we listen to and hear it, specifically, that we become familiar with the *Final Report* of the Referendum Council and how it makes its argument.

To receive this claim means also that we think about why it is made *now*, its historical context in relation to like claims made by the First Peoples of Australia in the past, its re-storying of Australian history, and its new conception of Australian citizenship. But, as I have suggested, neglected so far in the reception of the claim in public discussion and commentary is an adequate appreciation of the formal nature of this claim: it is a claim in political jurisprudence or public law, one that demands a new beginning for the formal construction of the Australian people as a political entity and for this people's institutions of government.

2 | THE CLAIM FOR RECOGNITION

The careful crafting of the *Final Report* of the Referendum Council invites respect and attention. In the *Introduction* of the *Report*, it first sets out three parts of 'the story of Australia' (Commonwealth of Australia 2017, 1), the first part centring on the ancient peoples of the continent and its adjacent islands, the second part on the colonial settlement of Australia and the ensuing settler history, the third part on the multicultural Australia that has been created by 'generations of migrants from Europe, Asia, the Middle East, the Pacific and the world over (*ibid.*).'

The Introduction then sets out the two recommendations that constitute the formal claim for recognition:

> *[*Recommendation*]* 1. *[A] referendum be held to provide in the Australian constitution [thus amending the Australian constitution] for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament (Commonwealth of Australia 2017, 2).*

This should be understood as a claim in political jurisprudence or public law that has two components: (a) recognition by the Australian people and its government of 'the status of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'. (b) The second component follows from the first: that as 'a unique' and irreducible constituent of the Australian people, the voice of the First Peoples of Australia is incorporated into the system of Australian government, and, since Parliament is the Australian people's voice, then the voice of Aboriginal Australia come alongside and inform the conduct of Parliament, both in terms of process and legislative/policy decisions.

> *[*Recommendation*]* 2. *[A]n extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians (*ibid.*)*

The full significance of this recommendation is missed if it seems to be 'merely' symbolic. *It is actually a claim for the re-constitution of the Australian people as a polity.* It suggests that the current understanding in public law of the Australian people is an exclusionary one because it articulates the British colonial-settler view of the Australian people and of its system of government. Recommendation 2 is a claim for a postcolonial reconstruction of the unity of the Australian people, one that includes the ancient First Nations of Australia, settlers of British heritage, and Australians of 'immigrant', multicultural heritage. This is also a claim in public law.

Public law comprises a set of fundamental formal relationships that together constitute the legal and political existence of a self-governing society. This set comprises: firstly, the relationships 'establishing the political unity of "the people"' (Loughlin, 2013, 23), – this is what we call the polity or the state; secondly, the relationship between 'the people' and its governing institutions where it is the people who authorise the power of government; and thirdly, the internal relationships of government that institutionalise government as a differentiated system of public office (the executive, legislative, and judicial branches).

Martin Loughlin, the most significant contemporary student of the idea and history of public law, makes the crucial point that public law is not the same thing as a written constitution. Public law is what he calls 'political jurisprudence'. It is the schema of intelligibility (Loughlin, 2016) that precedes and informs a written constitution. This schema concerns how rightful political authority is thought about at a particular time and place. Its role is to offer the guiding framework for positive law, including positive constitutional law: 'The basic relationships of public law—those establishing the political unity of "the people" (or "the state") and the governing relationship between state and government—are not constituted by modern constitutions; they evolve from more basic political circumstances concerning the ways in which governing authority is continually acknowledged' (Loughlin, 2013, 23). What we encounter in the *Uluru Statement* and the *Final Report* is the articulation of a new and timely schema of intelligibility for the Australian Constitution and for Parliament as Australia's sovereign power.

Public law concerns both the authority and the competence of government. These go together. It is difficult for a government to be competent if it lacks authority because it is unable to articulate an inclusive unity of the people for the reason that competence is tied so integrally to how a government represents and serves the people. What the *Final Report* and the *Uluru Statement* tell us is that the First Nations of Australia do not consider the current conduct of government to be legitimate or competent because the understanding of 'the people' that informs this conduct is exclusionary—it does not include them. As long as Australian governments act in matters that affect First Nations Australians, but do

not include them in how such action is designed and executed, fundamental failure of government competence in these areas will continue.

We need to hear the full implications of Recommendation 2. If it is symbolic, then it goes to the heart of our understanding of the Australian people as a political entity, and to how this understanding needs to be incorporated into the structures and conduct of government at all levels. In this context the *Final Report's* drawing attention to the *Uluru Statement's* call for 'the establishment of a Makarrata Commission with the function of supervising agreement-making [in a context where treaties are under consideration in several states and where many Aboriginal people are calling for a national treaty] and facilitating a [truth and reconciliation] process of local and regional truth telling' (Commonwealth of Australia 2017, 2) is important. If we are to have a 'more unified and reconciled nation' (Commonwealth of Australia 2017, 5), then establishing the Makarrata Commission may be just as important as the first two recommendations. The *Final Report* could not give this proposal such status because it fell outside its formal terms of reference.

3 | THE AUTHORIZATION OF THE CLAIM FOR RECOGNITION

The work of the Council for Recognition was formally authorised in the name of the then Prime Minister of Australia (Malcolm Turnbull) and the Leader of the Opposition (Bill Shorten). The terms of reference for the Council required that it anchor its work in a 'process of national consultations and community engagement about constitutional recognition, including a concurrent series of Indigenous designed and led consultations' (Commonwealth of Australia 2017, 3). It was also required to inform its work by the 2015 Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, and to consider the recommendations of the 2012 Expert Panel on Constitutional Recognition of Indigenous Australians.

This was the process of formal authorization of the work of the Council. However formal authorization is not the same thing as authority or legitimacy. The authority or legitimacy of the *Final Report* (including the *Uluru Statement*) resides in how it is anchored in a historically unprecedented dialogue process with the Aboriginal and Torres Strait Islander peoples that culminated in a National Constitutional Convention. We should note here that this dialogue process confirmed the Kirribilli statement by the Aboriginal and Torres Strait Islander attendees at the 2015 meeting between them and the Prime Minister (Turnbull) and Leader of the Opposition (Shorten). For this reason the writers of the *Final Report* also claim authority for their recommendations and findings through how they build on this statement and its insistence that 'a minimalist approach, that provides preambular recognition, removes section 25 and moderates the race power [section 51 (xxvi)] does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples' (Commonwealth of Australia 2017, 5).

4 | THE AUTHORITY OF THE CLAIM FOR RECOGNITION

The Dialogues with First Nation peoples 'involved a sample of Aboriginal and Torres Strait Islander peoples from a sample of regions in Australia' (Commonwealth of Australia 2017, Appendix I, p. 111). These began in December 2016 and were concluded in May 2017. The dialogues were 'delivered in partnership with a local host organisation with an understanding of the region' (*ibid.*). 'Up to 100 delegates were invited' to each dialogue and 'the Council, together with the Australian Institute of Aboriginal and Torres Strait Islander Studies, worked with the host organisation at each location

to ensure the local community was appropriately represented, including a reasonable spread across age and gender' (Commonwealth of Australia 2017, 111–112). The two and a half-day agenda was structured, involving an 'intensive civics education on the Australian legal and political system and a history of Aboriginal and Torres Strait Islander advocacy for structural legal and political reform' (Commonwealth of Australia 2017, 112). The process included 'discussion of the process to select delegates for the National Constitutional Convention at Uluru' (Commonwealth of Australia 2017, 113), with selection done mostly by secret ballot on the final day (*ibid*.).

This process by which the Council initiated and developed a process of sustained dialogue with the First Nations of Australia was carefully structured in every respect. Significantly, such care extended to a *political education* in the challenge that the delegates faced. The thoroughness, inclusiveness, and procedural formality of the process invited the delegates to own the proceedings and their outcomes. It created the groundwork for a consensus that became fully evident at the National Constitutional Convention held at Uluru between 23 and 26 May 2017 out of which the *Uluru Statement from the Heart* came. In all these ways the *Final Report* embarked upon a political process that ensured that its recommendations and argument were authoritative because they articulate the voice of contemporary Indigenous Australia.

The deliberate creation of a National Constitutional Convention that was fed by the Dialogues is of enormous significance. Australia has not had a national constitutional convention since those that gathered, constituted and articulated the public law that became the basis of the Australian Federation. To call the final summative and synthesising gathering a national constitutional convention confirms that this was an exercise in political jurisprudence or public law.[3] If we additionally consider that the Dialogues can be understood as articulating the First Nations' sense of their own law into this jurisprudence, then this jurisprudential exercise is of immense importance.

The First Nations Regional Dialogues was not the only consultation process. There was also a broader community consultation process, both digital, and by submission, the outcomes of which lent further support to the recommendation for the Voice to Parliament option (see Commonwealth of Australia 2017, 33–35).

5 | WHAT DOES THE CLAIM TO VOICE MEAN?

Perhaps the most substantively important part of the *Final Report* is 'the synthesis of the Records of Meetings of the First Nations Regional Dialogues' produced by the Referendum Council (see Commonwealth of Australia 2017, 16 – 28). This synthesis first offers 'Our Story', a narrative of sovereignty, invasion and dispossession, mourning, resistance, and activism. It then sets out the guiding principles that 'provided a framework for the assessment and deliberation for reform proposals' (Commonwealth of Australia 2017, 22). This enabled the National Constitutional Convention to take these as its point of departure, and 'to bring together the outcomes from the Dialogues in order to arrive at a consensus' (*ibid*.).

These Guiding Principles, as 'distilled from the Dialogues' are represented in the Report (*ibid*.) as follows:

The principles governing the assessment by the Convention of reform proposals were that an option should only proceed if it:

1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.
2. Involves substantive, structural reform.

3. Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.
4. Recognises the status and rights of First Nations.
5. Tells the truth of history.
6. Does not foreclose on future advancement.
7. Does not waste the opportunity of reform.
8. Provides a mechanism for First Nations agreement-making.
9. Has the support of First Nations.
10. Does not interfere with positive legal arrangements.

These principles deserve careful consideration, discussion and debate. Their core premise is the claim that the Aboriginal and Torres Strait Islander peoples of Australia never ceded their sovereignty, they were colonised without their consent, they resisted the processes of colonisation, dispossession and forced assimilation, and such institutions and positive law as characterise the historically existent Australian State have developed without ever having been negotiated with the Aboriginal and Torres Strait Islander peoples.

Here we find a claim to legal agency of the kind that belongs to a sovereign people or set of peoples. This is why in this section of the *Final Report*, 'Our Story' begins with the proposition: 'All stories start with our law,' and the first section of 'Our Story' is 'The Law'. This section begins: 'We have coexisted as First Nations on this land for at least 60, 000 years. Our sovereignty pre-existed the Australian state and has survived it.' It continues: 'The unfinished business of Australia's nationhood includes recognising the ancient jurisdictions of First Nations law' (Commonwealth of Australia 2017, 16).[4]

The claim to recognition, then, must be understood as a claim for recognition of the sovereign legal agency of the Indigenous peoples of Australia as this formally authorises their right to self-determination. The nature of this claim explains why it is that the existing (British settler) institution of Australian citizenship is unable to extend its conception of equality to the Indigenous peoples of Australia. If there is to be equality on terms that they can accept, then Australian citizenship has to be reframed so that it is able to include and encompass the sovereign legal agency of the First Peoples of Australia.

6 | WHERE DOES THIS LEAVE US?

The *Final Report* of the Referendum Council should be accorded the importance of offering the Australia polity or state at this time a new beginning (to borrow the Hannah Arendt's view of the creative possibilities of politics). It is a claim for the formal re-constitution of Australian sovereignty so that for the first time it become inclusive of the sovereign legal agency of the First Peoples of this country.

We should embrace this challenge. If we are to do so then *all* Australians must have the same opportunity the delegates to Dialogues with First Nations peoples had: 'an intensive civics education on the Australian legal and political system and a history of Aboriginal and Torres Strait Islander advocacy for structural legal and political reform' (Commonwealth of Australia 2017, 112). Without such education it is unlikely that non-Indigenous Australians will understand how to positively and creatively respond to the challenge of the *Final Report*.

ENDNOTES

[1] The *Uluru Statement from the Heart* was released 26 May 2017, and *The Final Report of the Referendum Council*, dated 30 June 2017, was publicly released on 17 July 2017.

[2] The JSC's Interim Report is a compromise document where the focus is on finding common ground between the two major and minor parties. For this reason it essentially sidelines the claim as a claim on how the Australian polity is imagined, that is, a claim in public law.

[3] It is relevant here that *The Final Report* (p. 10) points out that the consultation process 'engaged a greater proportion of the relevant population than the constitutional convention debates of the 1880s, from which First Peoples were excluded,' suggesting that its authors are fully aware that they are making such a claim.

[4] We begin to understand why it is that the writers of the Report included as its fourth appendix the powerfully eloquent essay by Galarrwuy Yunupingu, a Yolngu leader, elder and lawman, for *The Monthly* in 2016 which includes this statement:

> There is always something wanted by someone who knows nothing of our land or its people. There is always someone who wants us to be like them, to give up our knowledge and our laws, or our land. There is always someone who wants to take something from us. I disapprove of that person, whoever he or she is. There is no other way for us. Our laws tell us how to live and lead in the proper way. Others will always seek to interrupt my thinking, but I will tell the difference between their ways and my laws, which are the only ones to live by. I am mindful of the continuing attempts to change all that is in us, and I know that it is not workable at all. It cannot work. We are covered by a law of another kind and that law is lasting and alive, the law of the land, *rom watangu*—my backbone (Galarrwuy Yunupingu, 2016, 63, as republished by the Final Report of the Referendum Council as Appendix D).

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