Uluru Statement From the Heart – A Voice for those who need it most

By Zane Norris (Macquarie University Law and Security Studies Student)

Dear reader,

It is clear there are many injustices that Indigenous Peoples face as a result of illegal British occupation 233 years ago. What is less clear, however, is how to rectify the multitude of wrongdoings committed. Formal government apology by then Prime Minister Kevin Rudd was a step in the right direction, but clearly, there is still much to be done.

My passion for Indigenous Constitutional Recognition and the advancement of Indigenous rights was birthed in 2017, when I attended the NSW and National Schools Constitutional Convention as my High School's Captain. As someone with no Aboriginal or Torres Strait Islander connection, I was unclear on what my role could be. After mere minutes in the presence of Indigenous leaders, scholars, legislators and other students from all backgrounds, my role became clear. Listen. Listen to the struggles, hardships and atrocities that Indigenous Peoples have had to endure. Listen to what this has led to. Finally, and perhaps most importantly, listen to what can be done.

Combined with the presentation of the Uluru Statement From the Heart, this is when it became clear. Indigenous-led voices in decision-making, constitutional recognition, treaty discussion and truth-telling is the solution.

Apparently, this clarity hasn't been shared with many of our nations decision-makers, who continue with the business of the day often without second thought to these issues. I write here today, because frankly, enough is enough. It is time we all listen. And then act.

Below is a 2000 word essay I submitted for Constitutional Law at university. The question, assessing questions of Public Law Pluralism discussed by Dani Larkin (Bundjalung woman and legal scholar) and Kate Galloway (legal scholar) contemplates the positive legal ramifications from Implementing the Uluru Statement From the Heart. I choose mostly not to address ongoing economic and social issues, because these I believe are secondary to, and can be solved by, legal equality and self-determination.

I thank Dr Holly Doel-Mackaway and Ms Jemimah Roberts for their expert tutelage that led to the creation of this piece. Their demand for excellence has been nothing short of inspiring.

So reader, I hope you enjoy, and seriously contemplate this piece.

Thank you,

Zane Norris

Question: Dani Larkin (Bundjalung woman and legal scholar) and Kate Galloway assert the Uluru Statement from the Heart[1] 'offers an Indigenous-led legal, political, and cultural solution for bringing together Indigenous and non-Indigenous Australians' and 'represents a milestone of Australian law offering a vital opportunity to integrate Indigenous law into an otherwise settler legal system'.[2]

What are the constitutional and legal consequences that could flow from the reforms set out in the Uluru Statement from the Heart? **Do you agree with Larkin and Galloway's assessment about what the Uluru Statement from the Heart offers and represents?**

1 Referendum Council, *Uluru Statement from the Heart* (2017).

2 Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond Law Review* 335,335.

Despite successful inhabitancy for sixty thousand years, Indigenous peoples in Australia have struggled to achieve sovereignty and self-determination in a legal system created out of occupation under the falsehood of *terra nullius*. In 2017, Australia was presented the most viable option for legal equality through the Uluru Statement from the Heart ('Uluru Statement').[3] This paper will deduce that both of Dani Larkin (Bundjalung woman and legal scholar) and Kate Galloway's statements hold true for what the Uluru Statement represents in a legal fashion.[4] These statements, as found in their Bond Law Review publication, titles ' Uluru Statement from the Heart: Australian Public Law Pluralism', are as follows:

The Uluru Statement 'offers an Indigenous-led legal, political, and cultural solution for bringing together Indigenous and non-Indigenous Australians'; and

'represents a milestone of Australian law offering a vital opportunity to integrate Indigenous law into an otherwise settler legal system'.

Firstly, this will be done by an analysis of the constitutional and legal consequences of the implementation of the Uluru Statement, focussing on the voice component and the Makarrata Commission. The crux of this paper however, will be examining Larkin and Galloway's statements through the lens of mostly Indigenous scholarship. This will involve assessing the thematic relationship between voice, treaty and truth components of the Uluru Statement and Larkin and Galloway's statements. Finally, this paper will address why the Uluru Statement is a legal milestone, further highlighting the veracity of Larkin and Galloway's assessment.

Constitutional and Legal Consequences

Many of the constitutional and legal consequences flowing from the Uluru Statement stem from the creation of the Makarrata Commission. Deriving from the Yolngu language and meaning the coming together after a struggle,[5] Makarrata and its eponymous Commission embody a unique opportunity towards legal pluralism in Australia. In the words of Larkin and Galloway, the Uluru Statement and therefore the Makarrata Commission 'walks in two

[3] See Above 1.
[4] See Above 2.
[5] See Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Commonwealth Parliament, Interim Report (2018), 21.

worlds.'[6] This is because uniquely, the Uluru Statement embraces the sovereignty of Indigenous peoples otherwise denied under traditional Australian law. Further speaking to its uniqueness, a joint statement from Indigenous leaders to the general populace regarding a change in Australian constitutional and public law is unprecedented.[7]

It is appropriate to categorise this section with the three elements of the Uluru Statement: voice, treaty and truth. The Makarrata Commission embodies all of these elements, and along with the non-binding voice component, is the main legal remedy in the Uluru Statement. The voice unequivocally does not refer to a third chamber of parliament,[8] as any movement to alter bicameralism would be unlikely to receive support. Instead, the government would hear the voice of Indigenous Australians on matters of concern to them in a non-binding manner. The Referendum Council's report highlights that the parliament has explicit power in determining the scope, operation and authority of the voice, conforming to notions of parliamentary authority.[9] The type of power being contemplated for the voice is not one in which it has a veto on laws. Simply, it allows concerns to be raised on laws affecting Indigenous Australians pursuant to the Constitutions Races and Territories Power,[10] thereby providing for more direct oversight and accountability on lawmakers - the hallmark of a strong democracy. This is not wholly different from the way in which other concerned members of the community lobby parliamentarians in the creation of certain laws – it is just more formalised.

Secondly, the Makarrata Commission would oversee the treaty-making process between Indigenous Peoples and the Commonwealth Government. Jesse John Fleay argues that Australia should look towards the Treaty of Waitangi as a model to strengthen our democracy, by functioning to legitimise Indigenous claims to sovereignty and incorporating their languages, cultures and systems of land tenure within the politico-legal framework of

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[6] See Above 2, 339.
[7] Megan Davis, 'The Long Road to Uluru: Walking Together — Truth Before Justice' (2018) *60 Griffith Review*, 13.
[8] Kristen Rundle, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Melbourne, 26 September 2018, 34.
[9] See Above 2, 340.
[10] *Australian Constitution* s 51(xxvi), s 122.

Australia.[11] This will be difficult to navigate, but the point of the Commission is to help the government bridge the gap between Indigenous self-determination and parliamentary authority. Finally, relating to truth, the voice of Indigenous Australians would be constitutionally protected and will shed light on Indigenous Australian history. The Makarrata Commission would be created out of legislation, and enshrined within the constitution, which unlike previous bodies, provides higher immunity from being extinguished.[12] Of course, to create such a constitutional protection, it requires the majority support of parliament and the Australian people through referendum.[13]

Those opposing the Uluru Statement are correct in arguing that institutions built upon democratic principles are obliged to represent the rights and interests of all who are governed equally.[14] However, we know through history that equal representation is certainly not the case.[15] The constitutional and legal consequences of the Uluru Statement are simply that it provides a mechanism by which Indigenous peoples are afforded a politically and legally viable form of self-determination that doesn't defy our existing public law principles. Sui Generis Indigenous rights have been previously granted in relation to Native Title in the *Gove Land Rights Case* and in a more complete manner in *Mabo (No.2),*[16] so such a right for self-determination is not a step in an unknown direction. Rather, the voice and the Makarrata Commission is a direct pathway to legal pluralism and true equality for Indigenous peoples.

Voice, Treaty and Truth – Relating to Larkin and Galloway's Statements

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[11] Jesse James Fleay and Barry Judd, 'The Uluru statement: A First Nations perspective of the implications for social reconstructive race relations in Australia' (2019) 12(1) *International Journal of Critical Indigenous Studies* 1, 6.

[12] See Above 2, 340; see also Angela Pratt and Scott Bennett, 'The End of ATSIC and the Future Administration of Indigenous Affairs' (Current Issues Brief No 4, Parliamentary Library, 9 August 2004).

[13] See Generally *Australian Constitution* s 128.

[14] See Above 2, 342.

[15] See generally, Jon Altman, Nicholas Biddle and Boyd Hunter, 'Prospects for "Closing the Gap" In Socioeconomic Outcomes for Indigenous Australians?' (2009) 49(3) *Australian Economic History Review* 225; See Also Megan Davis, 'Chained to the Past: The Psychological Terra Nullius of Australia's Public Institutions' in Jeffrey Goldsworthy (ed) Protecting Rights Without a Bill of Rights (Routledge, 2006) 175.

[16] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ('Gove Land Rights'); See Also *Mabo v Queensland (No.2)* (1992) 175 CLR 125 ('Mabo No. 2'); See Generally *Native Title Act 1993* (Cth).

Indigenous participation in decision-making (IPDM) is enshrined in section 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[17] Despite piecemeal sovereignty and self-determination in Native Title jurisprudence, Australia has no formal recognition of IPDM.[18] Effectively, we are in contravention of UNDRIP and severely behind analogous democracies such as Canada when it comes to the promotion of Indigenous informed law.[19] Edward Synot echoes Larkin and Galloway's statement in relation to the voice being a vital opportunity to integrate Indigenous law into the existing settler legal system because, although clearly not a political priority, it fulfils our obligations under section 18 of UNDRIP.[20] More importantly, he argues UNDRIP has been crucial in shaping exactly what self-determination looks like under the Uluru Statement,[21] being the accepted proposal of 'sitting aside parliament' devised by Noel Pearson.[22]

The ambiguity behind the voice has been a primary argument of those opposing its implementation. However, these views are ill-informed, since we know that the voice will not impinge on parliamentary sovereignty, as it is non-binding, and parliament does not need to accept its conclusions.[23] As highlighted by Marcia Langton and Megan Davis, the powers and functions of the voice will be agreed upon between Indigenous peoples and government.[24] Its strength for both parties comes from the legitimacy of being a collective, representative voice with mandate coming from the Australian populace when put to referendum.[25] Wiradjuri woman and MP Linda Burney sees unknown elements of the voice as an opportunity for further consultation in order to tailor the voice to the need of Indigenous

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[17] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).
[18] See for example, *Coe v Commonwealth (No. 2)* (1993) 118 ALR 193, 199.
[19] Patrick McCabe 'An Australian Indigenous common law right to participate in decision-making' (2020) *Oxford University Commonwealth Law Journal*, *20*(1), 52, 68.
[20] Edward Synot 'The Universal Declaration of Human Rights at 70: Indigenous rights and the Uluru Statement from the Heart' *Australian Journal of International Affairs* (2019) *73*(4), 320.
[21] Ibid, 323.
[22] Daniel McKay, Uluru Statement: A Quick Guide (Department of Parliamentary Services, Research Paper Series 2016–17) 3.
[23] See Above 2, 340.
[24] Megan Davis and Marcia Langton 'Constitutional Reform In Australia: Recognizing Indigenous Australians In The Absence Of A Reconciliation Process' In *From Recognition to Reconciliation* (2018) 449-473, University of Toronto Press; See Also Gabrielle Appleby and Gemma McKinnon 'The Uluru statement' (2017) *LSJ: Law Society of NSW Journal*, 36
[25] Gabrielle Appleby and Gemma McKinnon 'The Uluru statement' (2017) *LSJ: Law Society of NSW Journal*, (37) 36, 38.

peoples – with parliament still having the final say.[26] The above encapsulates the idea that legal change must be enacted through the avenues of our existing legal system, with regard to notions of public law. However, this nexus between absolute Indigenous self-determination and parliamentary supremacy doesn't conflict with Larkin and Galloway's assessments or wider Indigenous scholarship, since there is an understanding of the importance of public support in order for constitutional reform. This is why the Uluru statement appeals to the hearts and minds of the populace through truth-telling as well as offering structural reforms.

Regardless of their stance on the Uluru Statement, Indigenous scholars are nearly unanimous in stating that Australia needs a treaty or multiple treaties between Indigenous peoples and Commonwealth Government.[27] The Makarrata Commission needs to oversee the agreement-making process because of the power imbalance between federal government, whose constitutional power is ever-expanding, and Indigenous peoples.[28] This is for two reasons. Firstly, given that until 2013, there was no formal legislative recognition of the existence of Indigenous peoples, it is clear to see why there is general mistrust in the government creating equitable legal outcomes.[29] This lack of faith is built on the back of years of legislation and constitutional provisions that have defaced the rights of Indigenous peoples.[30] Secondly, Asmi Wood aptly states that existing parliamentary recognition is not entrenched, and removal of legislation here is a possibility.[31] He also argues that reconciliation, equality and improved social and economic indicators for Indigenous peoples are impossible without first addressing constitutional and legal change.[32] Treaty-making between two feuding parties

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[26] Linda Burney 'Taking 'a rightful place in our own country': Indigenous self-determination and the Australian people' *Australian Journal of Public Administration* (2018) *77*(S1) S59, S60.
[27] Warren Mundine, 'We Don't Need an Indigenous Treaty. We Need Lots of Them', Australian Financial Review (online), 31 May < https://www.afr.com/opinion/we-dont-need-an-indigenous-treaty-we-need-lots-of-them-20170530-gwg27i>.
[28] See Above 7,15.
[29] *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).
[30] There are far too many to list exhaustively, but see for example, *Aborigines Protection Amending Act (No. 2) 1915* (NSW) s 13A, as repealed by the *Aborigines Act 1969* (NSW); See also the *Northern Territory National Emergency Response Act 2007* (Cth) ('Intervention Laws'), as amended by the *Stronger Futures in the Northern Territory Act 2012* (Cth); See Also *Australian Constitution* s 127 (repealed).
[31] Asmi Wood 'Confluence of the Rivers: Constitutional Recognition of Australia's First Peoples' In *Peacebuilding and the Rights of Indigenous Peoples* (2017) 9 *The Anthropocene: Politik, Economics, Society Science* 89,91.
[32] See Ibid.

perfectly encapsulates Makarrata and Larkin and Galloway's statement regarding the integration of Indigenous law into the settler legal system. It is a solution that addresses the power imbalance between government and Indigenous peoples, and can lead to legal pluralism promoting self-determination and equality.[33]

In the dialogue of the Uluru Statement, it was made clear that a nation cannot legally recognise people they do not know or understand.[34] Therefore, as Patrick Dodson and Julian Leeser articulated in a joint statement, higher understanding of Indigenous culture will lead to a more reconciled nation.[35] This holistic approach that includes truth-telling as a part of Indigenous cultural awareness on top of political and legal change echoes Larkin and Galloway's statement of bringing together Indigenous and non-Indigenous Australians. By creating increased awareness, truth-telling from the Makarrata Commission will allow non-Indigenous Australians to appreciate the need for Indigenous recognition, and this will be helpful in gaining support for constitutional change. Public support is critical for such change, given the lack of success from previous referenda.[36] In saying this, the 1967 referendum, which repealed section 127 of the constitution and deleted part of s 51(xxvi), was the most successful in our history.[37] This indicates there is hope of altering the constitution to include voice, treaty and truth once people understand the need for Indigenous equality and self-determination.

Uluru Statement as a Legal Milestone

Megan Davis describes the Uluru Statement as being tactically issued toward the Australian people, and not politicians, as they are the key that unlocks the potential for constitutional change.[38] This is the genius of the Uluru Statement, and an inherently different approach to previous constitutional reform proposals. Given the notoriety of the Uluru Statement beyond

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[33] See Above 2, 338.
[34] See Above 7; See Also Gabrielle Appleby and Megan Davis 'The Uluru statement and the promises of truth' (2018) *Australian Historical Studies*, *49*(4), 501.
[35] Patrick Dodson and Julian Leeser, 'Final Report of the Joint Select Committee on Constitutional Recognition'(Media Release, Parliament of Australia, 29 November 2018) 1.
[36] George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018), 1409.
[37] Larissa Behrendt, 'The 1967 Referendum: 40 Years On' (2007) 11(Special Edition) *Australian Indigenous Law Review* 12.
[38] See Above 7, 15.

Indigenous peoples, this echoes Larkin and Galloway's sentiment for the integration of Indigenous law to our existing public law system. The most notable previous attempts for constitutional recognition occurred in 2010 and 2012 when the government appointed an Expert Panel on Recognition.[39] Despite widespread consultation resulting in public education on the benefits of constitutional recognition, a lack of political will to advance the panel's recommendations meant that no reforms were seriously contemplated. For whatever reason of political expediency, our government seem to ignore the desire of Indigenous peoples to have real legal power in self-determination.[40] Instead, they commission more pointless reports and panels that deduce the same outcome and then fail to act effectively.[41] This shows the impotence of appealing directly to politicians and that engagement with the people creates political will at a grassroots level, forcing politicians to act.

Finally, as expressed by Larkin and Galloway, the potential for the Uluru Statement to be a unified voice and simultaneously work from the ground up makes it a legal milestone.[42] It has been affecting change at a localised level from the inspiration and work of individuals both Indigenous and non-Indigenous. Generally, change that stems from reconciliation will provide more equitable outcomes that are tailor-made for the communities they affect.[43] At a larger scale, the Makarrata Commission will be composed of Indigenous peoples from a diverse background of communities all over Australia, who will bring wide-ranging perspective to the truth-telling and treaty-making processes.[44] The result of this, echoing Larkin and Galloway's sentiments for Indigenous-led change, will be the empowerment of Indigenous leaders to take responsibility of their communities, one of the pillars for effective

[39] Julia Gillard and Robert McClelland, 'Expert Panel on Constitutional Recognition of Indigenous Australians Appointed' (Media Release, 23 December 2010); 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Expert Report, Commonwealth of Australia, 2012).
[40] See Above 7, 18.
[41] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People, Commonwealth Parliament, Final Report (2015); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Commonwealth Parliament, Interim Report (2018).
[42] See Above 2, 39.
[43] Julie Collins and Warlpa Kutjika Thompson 'Reconciliation in Australia? Dreaming beyond the cult of forgetfulness. In *Reconciliation in Conflict-Affected Communities* (2018) 185-206.
[44] See Above 2, 39.

change highlighted in the Referendum Councils Report.[45]

Conclusion

The Uluru Statement is the most comprehensive document offering an Indigenous-led legal, political, and cultural solution for bringing together Indigenous and non-Indigenous Australians.[46] This is because it calls for an Indigenous voice in parliament, a treaty that alleviates power imbalance and constitutionally enshrined truth-telling that provides context surrounding the need for Indigenous self-determination. Although this will occur within our current system, the fact that the Uluru Statement appeals to people not politicians and despite being a unified voice, can still address issues at a local level is what makes it a legal milestone. Larkin and Galloway's sentiment plainly points out that the structural problems that marginalise Indigenous peoples are a result of the 'torment of powerlessness,' which can be alleviated by the legal opportunities presented in the Uluru Statement.[47]

[45] Referendum Council, Final Report of the Referendum Council (Commonwealth of Australia, 2017) 139; See Also Uphold & Recognise, *Submission 172: Attachment 3*, 2018, 6.
[46] See Above 2.
[47] See Above 1.

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