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It is now over a year since the declaration of the Uluru Statement from the Heart *(the* 'Uluru Statement*'). Following an exhaustive series of dialogues with Aboriginal and Torres Strait Islander community throughout Australia, the* Uluru Statement *offers an Indigenous-led legal, political, and cultural solution for bringing together Indigenous and non-Indigenous Australians within our system of governance. Its three pillars are Voice, treaty, and truth-telling.*

In this comment we provide an overview of the Uluru Statement *and its importance in Australia's legal landscape. We do so as a background to our key contention that the* Uluru Statement *is a central pillar in a truly pluralistic Australian public law. Regardless of its political reception — at the time of writing the Australian government has rejected it out of hand — the* Uluru Statement *represents a milestone of Australian law offering a vital opportunity to integrate Indigenous law into an otherwise settler legal system.*

When Prince Charles travelled to Australia in April 2018, he visited the Yolŋu people in Arnhem Land in the Northern Territory. As part of his tour he met privately with tribal leaders.[1] Many mainstream media reports omitted an essential component of this story; more detailed reports described tribal leaders presenting Prince Charles with a message stick.[2] They charged him with the diplomatic task of delivering to Prime Minister Turnbull a message entreating the Australian government to hear tribal requests for recognition of sovereignty.

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** Associate Professor, Bond University. The idea that the Uluru Statement is an example of truly Australian public law came from Dr Melissa Castan of Monash University and we are grateful for the opportunity to develop it.

1 ABC reported the meeting: Lucy Marks and Georgia Hicks, 'Prince Charles Tours Nhulunbuy for Sixth Visit to the Northern Territory', *ABC News* (online), 9 April 2018 <http://www.abc.net.au/news/2018-04-09/charles-visit-nhulunbuy-royals-northern-territory/9632620>. The event was not acknowledged in other media. See, eg, Amos Aikman, 'Prince Charles Wanders into a Monarchist Hotbed in Arnhem Land', *The Australian* (online), 10 April 2018 <https://www.theaustralian.com.au/national-affairs/indigenous/prince-charles-wanders-into-a-monarchist-hotbed-in-arnhem-land/news-story/db2057b1ed5c73df6ee4fc65fb438ba7>; 'Prince Charles Winds up Australia Visit', *Sydney Morning Herald* (online), 10 April 2018 <https://www.smh.com.au/national/prince-charles-winds-up-australia-visit-20180410-p4z8tu.html>.

2 See, eg, Marks and Hicks, above n 1; Chris Graham, 'Yolŋu Leader Gives Prince Charles A Treaty Letter Stick… And A Diplomatic "Middle Finger"', *New Matilda* (online), 9 April 2018 <https://newmatilda.com/2018/04/09/yolnu-leader-gives-prince-charles-treaty-letter-stick-diplomatic-middle-finger/>.

To the casual observer, this might seem nothing more than a novel cultural encounter. Such a response perhaps typifies mainstream Australian responses to Indigenous ceremony and communication, masking that what really occurred represented something more significant to the Yolŋu. As leaders of a sovereign people who had never ceded territory,[3] tribal leaders had requested Prince Charles — a recognised powerful third party — to act as intermediary with another sovereign representative: The Prime Minister of Australia. Prince Charles was to act as an envoy of an Indigenous nation carrying a solemn diplomatic message.

Without interrogating questions of dispossession and the role of the English monarchy, we suggest that the ceremony Prince Charles attended can be interpreted as an expression of sovereignty on terms and according to the laws of the Yolŋu. We cite this story as, if not evidence, an allegory both of continuing sovereignty of Indigenous Australian nations,[4] to illustrate the importance for the wider polity of understanding that we live in a pluralistic legal system.

We are lawyers, not diplomats or political scientists — a Bundjalung woman and a non-Indigenous Australian respectively. We interpret the story of Prince Charles and the message stick accordingly. As lawyers, we understand comparative systems of law, understand the implications of choice of law,[5] and understand the notion of sovereignty and its implications. For that reason, and to avoid an inevitable future of ongoing misunderstanding of meaningful entreaties of Indigenous Australians, lawyers must engage deeply with Australia's plural legal influences including in teaching our students. It is, after all, our students who as lawyers will take over the mantle for implementing, at last, the just terms that will reconcile the Australian polity.

Fortunately, the opportunity to embrace legal pluralism sits before us in the form of the *Uluru Statement from the Heart* (the '*Uluru Statement*'). This comment propounds the basis for comprehending the *Uluru Statement* as an expression of a truly Australian public law. It begins with an examination of the context and rationale for the *Uluru Statement*, followed by a sketch of the means by which it marks a pluralistic and inclusive Australian public law, regardless of its political future. As a comment, this piece aims to provoke discussion about the place of the *Uluru Statement* in Australian public law. As a sketch of the key themes, this comment does not therefore offer a fully-articulated academic foundation of the concepts with which we engage.

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3 See generally, Irene Watson, 'The Future Is Our Past: We Once Were Sovereign And We Still Are' (2012) 8(3) *Indigenous Law Bulletin* 12.

4 We acknowledge the distinct cultural identity of Aboriginal and Torres Strait Islander peoples and the diversity of culture throughout Australia. We use the term 'Indigenous Australians' in respectful recognition of this diversity.

5 Kent McNeil, 'Sovereignty and Indigenous Peoples in North America' (2016) 22(2) *UC Davis Journal of International Law and Policy* 81.

I Sovereignty Never Ceded

The legal fiction on which the Australian state is founded is well-known. Eurocentric international law provided the rationale for the English claim of sovereignty through the doctrine of terra nullius.[6] Deemed to be uninhabited, Australia was, as a question of international law, settled and belonged to the English.

For the English, the concomitant question of the relevant law of the land was within the domain of the common law. It aligned with international law, embracing the extended concept of terra nullius and constructing Australia as 'desert and uncultivated'.[7] Conveniently, this fiction established the common law in Australia, immediately dispossessing the estate of Australia's Indigenous peoples, uncompensated, through the operation of the doctrine of tenure.[8]

Aboriginal and Torres Strait Islander Australians — denied the benefits of citizenship despite having subject status,[9] and positioned by law and legal process as beyond 'mainstream' Australia both socially[10] and geographically[11] — have nonetheless remained steadfast politically, in culture, and in law.[12] In terms familiar to lawyers, the fact that sovereignty has never been ceded is clear through a long line of sovereign entreaties to the Australian state,[13] culminating most recently in the *Uluru Statement*.[14] Behrendt identifies underlying themes of both the *Barunga Statement* and the *Eva Valley Statement* as self-determination and sovereignty.[15] It is fair to say that these themes underpin each of the Indigenous declarations of sovereignty, which individually and collectively give legal expression to the political aspirations of Indigenous Australians vis-à-vis the State. Captain Cook's instructions, which 'represent the colonial enterprise, are

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6 See, eg, Henry Reynolds, *Aboriginal Sovereignty: Three Nations, One Australia?* (Allen and Unwin, 1996) 55.

7 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 34.

8 See, eg, ibid 39, 94.

9 Ibid 38. See, eg, *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld).

10 See generally, Paul Havemann, 'Denial, Modernity and Exclusion: Indigenous Placelessness in Australia' (2005) 5 *Macquarie Law Journal* 57; Stan Grant, 'The Australian Dream: Blood, History, and Becoming' (2016) 64 *The Quarterly Essay* 1.

11 As recounted, for example, in *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997), and also evidenced by the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld).

12 See generally, Irene Watson, 'Kaldowinyeri — Munaintya In the Beginning' (2000) 4(1) *Flinders Journal of Law Reform* 3; Irene Watson, 'There is No Possibility of Rights Without Law: So Until Then, Don't Thumb Print or Sign Anything!' (2000) 5(1) *Indigenous Law Bulletin* 4; George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1 *Northern Territory Law Journal* 283; James Gurrwanngu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2 *Northern Territory Law Journal* 236; Grant, above n 10.

13 Including, in the last half-century or so: *Yirkkala Bark Petitions* (1963); *Barunga Statement* (1988); *Eva Valley Statement* (1993); *Kalkiringi Statement* (1998); *Kirribilli Statement* (2015).

14 *Uluru Statement from the Heart* (26 May 2017) <https://www.referendumcouncil.org.au/resource>.

15 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 87–9.

the first expression of Anglo-Australian public law',[16] and continue to be represented by the instruments and text of the coloniser legal system.[17] By contrast, the Indigenous Australian entreaties to the Australian government are, collectively, integral to Australian public law pluralism.

Despite the persistent Aboriginal and Torres Strait Islander voice in Australia's public law, it is Anglo-Australian legal text and process that dominates the legal landscape. Most recently, apart from the s 44 headlines of the last 12 months,[18] constitutional recognition of Indigenous Australians — far beyond the (in hindsight) modest changes arising from the 1967 Referendum[19] — has persistently occupied Australia's public law agenda. The government, with bipartisan agreement, has imposed a seemingly never-ending colonial process upon invited Indigenous engagement with the question of the recognition of Indigenous Australians within the foundations of Australia's public law — its Constitution.[20]

In the most recent tranche of constitutional reform proposals concerning Aboriginal and Torres Strait Islander Australians, the government appointed an Expert Panel on Recognition,[21] which consulted extensively throughout Australia.[22] Despite investment in public education about recognition as an idea, there is little political will to advance the Expert Panel recommendations, and governments have instead continued to commission reports: the Aboriginal and Torres Strait Islander Act of Recognition Review Panel in 2014; the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People in 2015;[23] the Indigenous dialogues resulting in the *Uluru Statement* in 2017;[24] and the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples in 2018.[25] While the latter inquiry is still in train, the government has so far rejected every proposal including the core of a truly Australian public law that sits amongst them: namely the *Uluru Statement*.

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16 Lisa Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 49, citing *Secret Instructions to Lieutenant Cook* (30 July 1768).

17 See, eg, *Australian Constitution*, *Australia Act 1986* (Cth).

18 Joint Standing Committee on Electoral Matters, 'The Impact of Section 44 on Australian Democracy' (Government Inquiry, Commonwealth of Australia, May 2018).

19 See generally, Larissa Behrendt, 'The 1967 Referendum: 40 Years On' (2007) 11(Special Edition) *Australian Indigenous Law Review* 12.

20 See, eg, Megan Davis, 'The Long Road to Uluru: Walking Together — Truth Before Justice' (2018) 60 *Griffith Review* (online) <https://griffithreview.com/articles/long-road-uluru-walking-together-truth-before-justice-megan-davis/>.

21 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).

22 For an overview of the recommendations, see, eg, Kate Galloway, 'Cutting Through the Legal Arguments: Constitutional Recognition' (2014) 8(15) *Indigenous Law Bulletin* 3.

23 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People, Commonwealth Parliament, *Final Report* (2015).

24 Referendum Council, *Final Report of the Referendum Council* (Commonwealth of Australia, 2017), chs 2–3.

25 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Commonwealth Parliament, *Interim Report* (2018).

II Uluru Statement from the Heart

May 2017 saw a convention at Uluru involving 250 Indigenous Australian leaders, culminating in the *Uluru Statement*. That *Statement* arose from a process of dialogues with Indigenous Australians held around Australia,[26] and the resulting collective agreement has redefined the political, cultural, and legal way in which Indigenous Australians now wish to be recognised as peoples within the Australian polity. The *Uluru Statement* formed the centrepiece of the Report by the Referendum Council, which was constituted by bipartisan agreement.[27]

As such, the *Uluru Statement* walks in two worlds. In accordance with principles of coloniser public law, the path to constitutional recognition will lie in representative democracy. The principles of representative democracy are, in turn, embodied within the dialogue process and ultimately through the referendum process itself. The difference between the *Uluru Statement* and other outcomes of the colonial democratic process, however, is that it embraces the sovereignty of Indigenous Australians otherwise denied by Anglo-Australian law: it provides a statement from Aboriginal and Torres Strait Islander peoples to the people of Australia concerning the operation of Australian public law.[28]

Naturally, as with any representative process, there has been opposition to the *Uluru Statement* from some Aboriginal and Torres Strait Islander communities,[29] including a walk out by seven delegates at Uluru in the lead up to the *Uluru Statement*.[30] However, as Pat Dodson has observed:

> the scale of the consensus at Uluru — the largest ever reached on this issue among Aboriginal and Torres Strait Islander people, although many people were not represented — should not be ignored. 'People with strong views on different sides of the argument were able to come to a consensus view about the way forward,' Dodson said. 'I would not be dismissing that very lightly.'[31]

We note also that, for some, acceding to constitutional change represents a loss of sovereignty.[32] From our own standpoint — as lawyers in the Anglo-Australian tradition — we seek to understand the *Uluru Statement* as evidence of a coming together of two legal systems, and thus as evidence of sovereignty never ceded. That the Makarrata Commission, on which more below, would work towards treaties, speaks to this point.[33]

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26 Described in Referendum Council, above n 4.

27 Ibid 3.

28 See, eg, Davis, above n 20.

29 See, eg, Les Coe, Nioka Coe and Ruth Gilbert, 'Walkout Statement' (Media Release, Aboriginal Embassy, 6 July 2017).

30 Calla Wahlquist, 'Uluru Talks: Delegates Walk Out Due to Sovereignty and Treaty Fears', *The Guardian* (online), 25 May 2017 <https://www.theguardian.com/australia-news/2017/may/25/uluru-talks-delegates-walk-out-due-to-sovereignty-and-treaty-fears>.

31 Ibid.

32 Coe, Coe and Gilbert, above n 29.

33 Warren Mundine, for example, has written of the need for 'many treaties' as part of his own disagreement with the *Uluru Statement* proposals. This is addressed, the authors believe, through the Makarrata Commission proposals. See Warren Mundine, 'We Don't Need an Indigenous Treaty. We Need Lots of Them', *Australian Financial Review* (online), 31 May

The proposals in the *Uluru Statement* have been described as comprising three key elements: Voice, treaty, and truth.[34] These three elements are embodied in the recommendation of an Indigenous treaty commission, entrenched within the *Australian Constitution*, to be called the 'Makarrata Commission'.[35] The Report explicitly preserves for Parliament the power to frame the operation and authority of the Makarrata Commission.[36] In doing so, it upholds core public law principles of parliamentary authority, while engaging an Indigenous voice in the process of considering laws concerning Indigenous Australians pursuant to the Constitutional powers in ss 51(xxvi) and 122.

> The Australian polity does not want to surrender parliamentary sovereignty. Aboriginal peoples don't want to cede sovereignty. The dialogues negotiated a way through these two points. … [T]he dialogues threw up a novel idea that not a single constitutional lawyer had contemplated: that a 'voice' to the parliament could monitor the use of the race power and the territories power. And, more practically, the voice could have multiple functions, the most important being direct input into decisions that are made about law and policy that affect Aboriginal and Torres Strait Islander peoples.[37]

In addition to Voice, the Makarrata Commission would oversee a treaty-making process between Indigenous Australians and Australian governments. Thirdly, it would give Indigenous Australians a constitutionally-protected voice that would tell the truth about Indigenous Australian history — for 'a nation cannot recognise people they do not know or understand'.[38] Created by legislation but enshrined in the *Constitution*, the Makarrata Commission would become the first such body in Australia to be protected from ready extinguishment — a fate that has consistently befallen Indigenous representative organisations in the past.[39]

To enact the Makarrata Commission proposal, it would be necessary to hold a Constitutional referendum, which would in turn require the support of the Australian Parliament.

III The Government's Response

The government rejected outright the proposal of its own body, the Referendum Council, instead criticising the Makarrata Commission

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2017 <https://www.afr.com/opinion/columnists/we-dont-need-an-indigenous-treaty-we-need-lots-of-them-20170530-gwg27i>.

34 Megan Davis, *Voice, Treaty, Truth*, The Monthly (online), July 2018 <https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth>.

35 'Makarrata' is a Yolŋu word meaning 'coming together after a struggle'. See Referendum Council, above n 25, 21.

36 Referendum Council, above n 24, 2 [1].

37 Megan Davis, *To Walk in Two Worlds*, The Monthly (online), July 2018 <https://www.themonthly.com.au/issue/2017/july/1498831200/megan-davis/walk-two-worlds>.

38 Davis, above n 20.

39 See, eg, 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).

proposal as undermining principles of democracy and creating a 'third chamber of Parliament'.[40] As such, and given that it would be tailored exclusively for Indigenous Australians, the former Prime Minister argued that the establishment of the Makarrata Commission would undermine equality in civic rights.[41] Following this reasoning, and ostensibly invoking the democratic principles he sees as being offended, the former Prime Minister also asserted that all citizens of Australia should have an equal opportunity to vote for, stand for and serve in either of the two chambers of our national Parliament.[42]

The Minister for Indigenous Affairs, Nigel Scullion, accused the Referendum Council of being 'irresponsible' in proposing the Voice to Parliament. Confusingly, though, he has since suggested that his portfolio of Indigenous Affairs should be taken over by an Indigenous body, with power to allocate funds and to create policy. In Minister Scullion's own words: 'Now if you don't have that you're just fluffing around the edges. You don't want a voice to parliament, you don't want a third chamber … it is nothing next to the decision-making, the policymaking, that comes with my office.'[43] While Minister Scullion's proposal takes a Voice away from Parliament, it suggests instead the replacement of part of executive government — surely a greater challenge to established processes and institutions of governance.

In short, the government response purports to deny the *Uluru Statement's* close adherence to foundational public law principles. It is undoubtedly a political response, described by Noel Pearson as a 'betrayal'.[44] Yet as a question of legal principle the government's response cannot be let stand. The government's account of the Makarrata Commission proposal misrepresents its true nature. Its response thus fails to engage with the real issues facing Aboriginal and Torres Strait Islander Australians. In doing so, the government demonstrates that it does not apprehend what is at stake in terms of the legitimacy afforded to Australian structures of governance.

In the first place, the Voice would be no 'third chamber of parliament'. It would simply allow the government to hear the voice of Indigenous Australians in matters concerning them — an idea less radical than the Expert Panel recommendations and certainly less radical than Nigel Scullion's suggested takeover of his Ministerial office. It is true that the

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40 Malcom Turnbull, George Brandis and Nigel Scullion, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, 26 October 2017).

41 Dan Conifer et al, 'Indigenous Advisory Body Rejected by PM in "Kick in The Guts" for Advocates', *ABC News* (online), 26 October 2017 <http://www.abc.net.au/news/2017-10-26/indigenous-advisory-body-proposal-rejected-by-cabinet/9087856>.

42 Ibid.

43 Rachael Baxendale, 'Indigenous Deride Scullion for his Offer: "Take My Job"', *The Australian* (online), 11 June 2018 <https://www.theaustralian.com.au/national-affairs/indigenous/indigenous-deride-scullion-for-his-offer-take-my-job/news-story/a2ce92105a028dfa7df07df1d25f400e>.

44 Noel Pearson, *Betrayal: The Turnbull Government has Burned the Bridge of Bipartisanship*, The Monthly (online), December 2017 <https://www.themonthly.com.au/issue/2017/december/1512046800/noel-pearson/betrayal>.

Voice would be constitutionally protected, but its precise role would be determined by Parliament itself.

Secondly, the government's response ignores the dispossession, inequality and lack of civic rights that Indigenous Australians continue to experience.[45] The Prime Minister is correct to state that institutions of governance built upon democratic principle are obliged to represent the interests and rights of all who are governed, and to do so equally. As demonstrated more fully in Part IV, however, this does not occur in practice. This negative experience accounts for the long-standing, resolutely expressed desire among indigenous groups for self-determination. The *Uluru Statement* is itself an expression of self-determination, which embodies principles of equality, and derives its legitimacy from Indigenous Australian processes:

> For the first time, a state mechanism, the Referendum Council, adopted the Aboriginal tradition of storytelling to influence the hard-edged contours of the Australian state that has for too long resisted the footprint of the cultural authority of this country and has been the poorer for it.[46]

In doing so, the Makarrata Commission proposal represents the offer of legal reform that would embody the equality proclaimed by the Prime Minister as integral to our system of governance, but in a way determined by and accessible to Indigenous Australians.

Derived from a self-determining process and calling for systems that enable self-determination, the Makarrata Commission proposal connects government with the governed within boundaries recognising the power imbalance between State and citizen — a core feature of public law. Self-determination has significance for the internal constitutional and political order of states: '[the right to self-determination] is the right to determine … political and economic and social destiny.'[47] Self-determination thus demands the establishment and maintenance of institutions 'under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis'.[48]

As Lino points out, however, self-determination has little work to do for non-indigenous populations, whose rights are presupposed.[49] It is therefore a concept almost exclusively associated with indigenous peoples.

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[45] 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; 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.

[46] Megan Davis, *The Status Quo Ain't Working: The Uluru Statement from the Heart is the Blueprint for an Australian Republic* The Monthly (online), 7 June 2018 <https://www.themonthly.com.au/blog/megan-davis/2018/07/2018/1528335353/status-quo-ain-t-working>.

[47] Roslyn Higgins, 'Postmodern Tribalism and the Right to Secession' in Catherine Brölmann, René Lefeber and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff, 1993) 29, 32.

[48] Ibid.

[49] Dylan Lino, 'The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights, and Indigenous Peoples' (2010) 34(3) *Melbourne University Review* 839, 844.

Perhaps this is the blind spot of government that fails to apprehend the historical exclusion of Indigenous Australians and its contemporary iteration.

The *Uluru Statement* is a grassroots, representative expression of self-determination. Its purpose is not to implement 'inequality' in representation as the government maintains, but rather (and finally) to remedy the deficit in equality of representation of Indigenous Australians. The impaired capacity of Australia's present governance structures to provide equal representation to Indigenous Australians is illustrated through unequal political participation.

IV (Un)equal Representation — A Case Study

Democratic participation, as the Prime Minister has pointed out, affords legitimacy to our system of governance. Yet his assumption that the Makarrata Commission proposal somehow elevates Indigenous voices at the expense of others is a nonsense. Voting participation, for example, is an integral component of exercising full citizenship rights. It is also an important civic political right. For Indigenous Australians, as for all Australians, voting and participating in the Australian polity more broadly is fundamental to self-determination. However, Indigenous voter participation in Australia is disproportionately low. Data from the Australian Electoral Commission indicates that Indigenous Australians are half as likely to enrol to vote compared to non-Indigenous Australians. In addition, those Indigenous Australians that are enrolled to vote are less likely to vote or fill in their ballot papers correctly.[50]

Those voting statistics represent one of several factors contributing to low political participation rates among Indigenous Australians. Current electoral laws (both Commonwealth, and State and Territory) continue to indirectly disenfranchise Aboriginal and Torres Strait Islander Australians. For example, prisoners are disqualified from voting at federal elections under the *Commonwealth Electoral Act 1918* if they are serving a prison sentence of three years of more.[51] The Commonwealth disqualification applies to both Indigenous and non-Indigenous Australians. However, the incarceration rate of Indigenous Australians each year compared to non-Indigenous Australians is disproportionately high.[52] Disqualification from voting thus disenfranchises a significant proportion of Indigenous Australians, skewing a representational system ostensibly designed to enact equal civic rights. [53] Such disenfranchisement, coupled with generations of oppression and dispossession at the hands of government

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50 Australian Electoral Commission, *Additional Performance Information — AEC Annual Report 2015-16* (2017) <http://annualreport.aec.gov.au/2016/performance/additional.html>.

51 *Commonwealth Electoral Act 1918* (Cth) s 93(8AA).

52 Australian Bureau of Statistics, *Prisoners in Australia* (11 December 2014) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Imprisonment%20rates~10009>.

53 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (30 June 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

policy, is also likely to generate resistance among Indigenous voters to engage in the voting process itself. There is thus a likely confluence of factors leading to lower political participation by Indigenous Australians.

The proper alignment of our system of governance with the principles of democracy, including equal civic rights, requires full and equal citizen political participation, as the Prime Minister has pointed out. Yet, in failing to acknowledge the baked-in inequality that blights the existing system, he falsely concludes that any change, such as the Makarrata Commission proposal, will somehow unfairly skew the system in favour of Indigenous Australia.

'Recognition' on its own is an abstract concept with no clear meaning. The Makarrata Commission proposal, however, represents a concrete means of institutional implementation, finally, of a collective right to self-determination. By enacting the proposed Makarrata Commission, Australia would afford Indigenous Australians the means of attaining political equality, civic equality, and ultimately the protection of their cultural identity. The legally protected, constitutionally enshrined mechanism affords self-determination through consultation resulting in expression of a prior, informed voice in State governance processes.

V Conclusion

For all the hand-wringing that goes on about Indigenous Australians' health, education, families, communities, and economic outcomes, government continues to replicate its own mistakes in Indigenous affairs. And testament to its colonial mentality, when still faced by what it describes as intractable problems concerning Indigenous Australians, is the government's unwillingness to countenance recognising the power of Indigenous Australians within the Australian institutional framework. This power is Makarrata.

To advance as a nation requires changing the Indigenous Australian experience of governance, articulated through public law principles. Transformation of governance in turn depends upon a shift in mentality—including that of Australia's political representatives. As Minister Scullion has pointed out, his role holds power. He, with other members of government, is in a position of practical power over the future development and progression of Indigenous policy and expenditure on its programs. As Davis points out, political elites proclaim the limits of what Australians will tolerate.[54] They must be called to account in steering the national narrative. Truth-telling about the Makarrata Commission proposal is a good place to start.

As long as Australia maintains institutional structures designed to exclude the voices of Indigenous communities, we remain ill-equipped to support communities to solve the complex problems they face. Where Indigenous Australians themselves author proposals to move the nation forward, it behoves us to pay attention, and respect the legitimacy of

[54] Davis, above n 20.

appeals for self-determination. Australians have been gifted an elegant and legally viable solution to the challenge of inclusive governance within established public law principles. Government denial that the *Uluru Statement* embodies democratic governance does not alter this truth. While government is responsible for leading political and legislative change, as lawyers we can contribute to public understanding of the *Uluru Statement*,[55] and its importance in the evolution of a pluralistic Australian public law.

[55] See, eg, the leadership demonstrated by the Law Council of Australia: Law Council of Australia, 'Law Council Supports Calls for Voice to Parliament' (Media Release, 15 June 2018) <https://www.lawcouncil.asn.au/media/media-releases/law-council-supports-calls-for-voice-to-parliament>.