



Insights for design of direct public participation: Australia's Uluru process as a case study

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The processes of the Indigenous Regional Dialogues and the Uluru Convention which led to the Statement from the Heart

Why is Indigenous constitutional recognition being discussed?

Indigenous peoples in Australia are a 3% minority and occupy a particularly vulnerable constitutional position. The Australian Constitution contains no full bill of rights, no guarantee of equality before the law, and Indigenous rights are not recognised or protected. Further, the Constitution contains no mechanisms for Indigenous people to be specifically heard or represented in political decision-making with respect to their rights. Historically, the Constitution has presided over extensive discrimination against Indigenous people, and on many social and economic indicators Indigenous peoples remain the most disadvantaged community in Australia.

Indigenous advocates have for decades called for constitutional reform to more fairly recognise and protect Indigenous rights. Since the 1990s, there has been bipartisan political support for the concept of Indigenous constitutional recognition, however there is still debate regarding the appropriate model for constitutional change. There have been multiple processes to investigate a constitutional recognition model.

The Referendum Council

The most recent process was run by the government-appointed Referendum Council. This process arose out of a meeting between 40 Indigenous leaders and the Prime Minister and the Leader of the Opposition at Kirribilli in June 2015, where it was agreed that a national community engagement process should be undertaken. The Referendum Council was appointed later in 2015 and comprised a mix of Indigenous and non-Indigenous experts and community leaders.

The Referendum Council was tasked with public consultation, including concurrent 'Indigenous designed and led' consultations. The Council was then required to advise the government on the outcomes of the consultations, options for a referendum proposal, steps for finalising a proposal, possible timing for a referendum and constitutional issues.

First Nations Regional Dialogues

To undertake the Indigenous designed and led consultations, the Indigenous members of the Council formed an Indigenous Steering Group. Together, in consultation with Indigenous community stakeholders and with advice from constitutional experts, they designed an Indigenous consultation process called the First Nations Regional Dialogues.

After an initial Trial Dialogue at Melbourne University to ensure the proposed format worked well, 13 Regional Dialogues were held across the country, culminating in an Indigenous Constitutional Convention at Uluru in May 2017. Each was hosted by a regional Indigenous organisation:

- Hobart, hosted by Tasmanian Aboriginal Corporation (9–11 December 2016)
- Broome, hosted by the Kimberley Land Council (10–12 February 2017)
- Dubbo, hosted by the New South Wales Aboriginal Land Council (17–19 February 2017)
- Darwin, hosted by the Northern Land Council (22–24 February 2017)
- Perth, hosted by the South West Aboriginal Land and Sea Council (3–5 March 2017)
- Sydney, hosted by the New South Wales Aboriginal Land Council (10–12 March 2017)
- Melbourne, hosted by the Federation of Victorian Traditional Owners Corporation (17–19 March 2017)
- Cairns, hosted by the North Queensland Land Council (24–27 March 2017)
- Ross River, hosted by the Central Land Council (31 March – 2 April 2017)
- Adelaide, hosted by the Aboriginal Legal Rights Movement Inc (7–9 April 2017)
- Brisbane, (21–23 April 2017)
- Thursday Island, hosted by Torres Shire Council and a number of Torres Strait regional organisations (5–7 May 2017).
- An information session hosted by the United Ngunnawal Elders Council was held in Canberra on 10 May 2017.

Indigenous Constitutional Convention at Uluru

A final national Indigenous Constitutional Convention was held at Uluru on 23–26 May 2017. This Convention gave rise to a national Indigenous consensus position on how Indigenous people want to be constitutionally recognised. This was an unprecedented breakthrough. Although seven out of 250 delegates dissented, it was still an extraordinary consensus and a historic moment in Indigenous peoples' struggle for constitutional recognition. Most of the Indigenous advocacy of the past tended to emanate from particular regions. Never before had a national Indigenous consensus position been achieved. The majority position was powerfully expressed in the poetic Uluru Statement from the Heart.

The Uluru Statement asked for two things: a constitutionally guaranteed First Nations voice (a constitutionally enshrined Indigenous body to enable Indigenous people a fairer say in decision-making with respect to their rights) and a Makarrata Commission to oversee agreement-making and truth-telling about history.

The process for formal constitutional change in Australia

Section 128 of the Australian Constitution sets out special manner and form requirements for constitutional amendment. It requires, firstly, that any legislation proposing a change to the Constitution must pass by 'an absolute majority of each House of the Parliament'. An 'absolute majority' means a majority of the total number of members of each House must approve the bill.¹

¹ Section 128 provides: 'This Constitution shall not be altered except in the following manner: The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives'. As the Australian Electoral Commission explains: 'If passed by one House but rejected, or altered in the other (and the alterations are unacceptable to the first House) and this is repeated in the next session of the Parliament, the Governor-General may put the proposal to the electors as last proposed by the first House with or without any amendments agreed by both Houses'.

Secondly, section 128 requires a 'double majority' popular referendum to approve any constitutional change. That is, the proposed alteration may only be presented to the Governor-General for the Queen's assent 'if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law'. A successful referendum therefore must satisfy two requirements: firstly that a majority of electors nationally support the amendment, and secondly, that a majority of electors in a majority of States support it. Since the 'Referendum – Territories' was carried in 1977, voters in the Territories also have their votes counted towards the national tally, but not towards any State total.

Accordingly, although Indigenous consensus has been achieved through the Uluru Statement, a successful Indigenous recognition referendum must still overcome three further political hurdles for successful constitutional change. The first is getting the Commonwealth government of the day to initiate the constitutional amendment bill in the first place. The second is getting the absolute majority approval in both Houses of Parliament. The third is getting the approval of the Australian people via a double majority referendum. These requirements, combined with a political culture resistant to structural change, make constitutional reform in Australia extremely difficult. Only eight out of 44 attempted referendums have succeeded in Australia's history.²

How was the Indigenous participatory consultation process designed?

Indigenous Consultation: First Nations Regional Dialogues

The Council agreed early on that the consultation with Indigenous people must not be a 'tick the box' exercise but a true dialogue among the First Nations, on the basis that there would be no practical purpose to Indigenous constitutional recognition if Indigenous people did not agree with the model. Ascertaining Indigenous views was therefore crucial.

The Indigenous Steering Committee designed the First Nations Regional Dialogues process, in consultation with key Indigenous stakeholder organisations and with advice from constitutional experts. This was a careful process, requiring many strategic discussions. As well as meeting with constitutional experts, there were two preliminary meetings held with Indigenous stakeholder organisations to gain their input and assent to the proposed process. Once designed, approval for the proposed process was also sought from the whole Referendum Council, as well as from the Prime Minister and the Leader of the Opposition.

The First Nations dialogue process was unprecedented, as this was the first time a constitutional convention was convened with and for First Nations. The aim was to canvas a broad and fair snapshot of Indigenous views. At the same time, it was not possible to talk to every Indigenous individual in Australia. The First Nations dialogues were intended to be interactive and deliberative. This would require an Indigenous-led process whereby a cross-section of participants could be invited to participate fulsomely in discussion. It would also require Indigenous facilitators who could lead and support the discussion, as well as legal experts on hand to answer any constitutional questions.

Australian Electoral Commission, 'Referendums Overview'

<http://www.aec.gov.au/elections/referendums/Referendums_Overview.htm>.

² For the track record, see Australian Electoral Commission, Referendum Dates and Results, <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

In designing the dialogues, issues of fair representation and participation had to be considered. The Indigenous Steering Committee decided to gather a broad cross-section of Indigenous representatives, striving for a mix that reflected the importance of traditional leadership, as well as local Indigenous organisations and other influential individuals in the various regions. The mix adopted was 60% traditional owners, 20% Indigenous regional organisations, and 20% individuals. A core principle was to ensure that the First Nations formed the core representation to these dialogues. The attendee lists were finalised by the Indigenous regional host organisation in consultation with the Indigenous Steering Committee.

As the Referendum Council notes:

The Dialogues engaged 1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples. Indeed, it engaged a greater proportion of the relevant population than the constitutional convention debates of the 1800s, from which First Peoples were excluded.³

In order to prepare the facilitators, a Trial Dialogue was held at Melbourne University to test out the proposed process, and also to enable the facilitators to understand the concepts and issues to be discussed so they were ready to facilitate conversations themselves.

Content and Agenda of First Nations Dialogues

As the Referendum Council explains:

The process was structured and principled, modelled partly on the Constitutional Centenary Foundation framework utilised through the 1990s to encourage debate on constitutional issues in local communities and schools. It was adapted to suit the needs of the First Nations Regional Dialogues but the characteristics remained the same: impartiality; accessibility of relevant information; open and constructive dialogue; and mutually agreed and owned outcomes. The dialogues were a deliberative decision-making process that followed an identical structured agenda across all the regions.⁴

To plan the agendas that would guide the content of the First Nations dialogues, the Indigenous Steering Committee had to consider what they hoped to achieve. The agreed objective was to ascertain Indigenous views on how they want to be constitutionally recognised. In order to do this, the dialogues needed to afford participants the opportunity to assess the range of constitutional reform options on the table, and also to be armed with the constitutional knowledge, as well as the political knowledge, required to make informed decisions. Accordingly, the agenda included a history session to remind participants of the history of Indigenous advocacy for constitutional reform. It also included civics education, to ensure participants were informed about the basics of Australia's constitutional structure and how this impacted Indigenous peoples. Participants then had the opportunity to discuss each of the options for Indigenous constitutional recognition, together and in breakout groups – everything from a more symbolic amendment to more substantive proposals like a racial non-discrimination clause, a constitutionally enshrined First Nations voice, and treaty-making processes. As the Referendum Council explains:

The structured nature of the Dialogues provided for a comprehensive legal explanation of each of the proposals set out in the Referendum Council's Discussion Paper. Delegates then engaged in break out groups that focussed on each of the proposals in turn. Relevant legal

³ Referendum Council, Final Report, 10.

⁴ Ibid.

and policy issues were canvassed during these sessions and reported back to the plenary session. The level of engagement and intensity of the evaluation of proposals was very high. Furthermore, delegates grappled with questions of political viability and were prepared to assess and prioritise options for reform.⁵

Each dialogue resulted in a Record of Meeting, a statement agreed by all the participants reflecting the outcomes of their discussion, including the preferred proposals for constitutional reform.

Uluru Final Constitutional Convention

The objective of the final Indigenous Constitutional Convention at Uluru was to enable Indigenous people to consolidate a national consensus, drawing together all the discussions around the country in the Regional Dialogues, on how they want to be constitutionally recognised. To support this, a set of Guiding Principles were distilled from the Regional Dialogues, which provided a framework for the assessment and deliberation on reform proposals at the final convention. As noted, the three day Constitutional Convention resulted in a strong Indigenous consensus that coalesced around two proposals: a First Nations constitutional voice and a Makarrata Commission.

Non-Indigenous consultation

The Referendum Council's terms of reference required consultation with the broader community, as well as the Indigenous community. This was fulfilled through submissions and engagement through the Referendum Council's digital platform. Over 1000 written submissions were received. Submissions from the general public also supported a First Nations voice as the most preferred option for constitutional reform.

At what stage(s) of the constitutional reform process did participation occur? What were the critical features of the ways in which the Dialogues and the Convention were conducted?

The First Nations regional dialogues, which culminated in an Indigenous consensus at the Uluru National Convention, were an expression of Indigenous self-determination: this was the latest call for constitutional recognition in a long history of Indigenous advocacy that stretches back many decades.

As noted, the process was interactive and deliberative. While the Indigenous Steering Committee played a lead role in setting the agenda in consultation with other Indigenous stakeholders and with expert advice, the structure allowed the delegates to discuss the various constitutional reform options, share their opinions and rank proposals in order of their preferences. This also allowed for their original input and ideas. For example, in expressing support for a First Nations constitutional voice, the delegates also raised the idea that the voice could play a role in advising on the exercise of particular constitutional heads of powers of specific relevance to Indigenous people (such as sections 51(xxvi) and 122 of the Constitution). This was a proposal the Referendum Council ultimately adopted in their recommendations and was an original idea that arose from Indigenous people through the dialogues.

Another distinctive feature of the dialogues was allowing room in the agenda for stories to be shared and histories to be remembered. These histories differed from region to region, but carried similar themes across the country. The dialogues also allowed for strategic thinking and

⁵ Ibid, 11.

conversations: the format enabled discussion of ‘where have we come from?’ as well as ‘where do we want to get to?’

Accordingly, a useful feature of the dialogues was that the process became a vehicle for political advocacy for constitutional reform, if the delegates so wanted. Each dialogue culminated in a statement (Record of Meeting) that was collectively drafted and signed off by the participants. The assisting experts would also help the delegates convert their dialogues into opinion pieces that could be published in the media, to reflect their views and build advocacy for constitutional recognition. Most of the dialogues published such an opinion piece, usually by the co-convenors. In this way, the dialogues were a tool not only for building an Indigenous constitutional consensus, but they also empowered Indigenous advocacy along the way. This advocacy helped build momentum and awareness in the broader non-Indigenous community.

Was there a risk that participation would lead to polarisation within the Indigenous community or between Indigenous and non-Indigenous communities?

Polarisation and division within the Indigenous community was a risk – but this is a risk with any process of consultation and consensus building. As noted, at the final convention, seven out of 250 delegates dissented. This to be expected. There can be no majority agreement without first sorting through the disagreement. Such risks were accommodated by allowing dissenting views to be shared and processed through open discussion. In the end, majority positions prevail.

There was also a risk that an Indigenous-only dialogue process may cause non-Indigenous people to feel excluded because there was no equivalent process of consultation with the Australian public. However Indigenous constitutional recognition involves reform to the relationship between Indigenous peoples and the Australian state – as represented by politicians in Parliament and government. It was justifiable and necessary that Indigenous people needed a specific say in this process.

Post-Uluru, a process of negotiation is now needed between Indigenous representatives and Australian political representatives, to settle the terms of Indigenous constitutional recognition. Then a public education process should be conducted to raise awareness and understanding of the agreed reform, before Australians at large get the decisive say through a ‘double majority’ referendum to approve the proposal.

In terms of staging, it made logical sense to ascertain the views of the Indigenous minority before having the discussion with the broader community. If these conversations were held all together, Indigenous minority views may be drowned out. They are the subjects of the constitutional recognition, so it is logical that their position be ascertained first and separately. The emerging Indigenous consensus could then inform a broader community process.

What insights can be drawn for others from these experiences for (a) the design of participatory processes and (b) the use of the referendum for constitutional change?

Participatory processes that engage and empower participants to express informed views, supported by expert advice and armed with the appropriate constitutional knowledge, can be immensely productive, especially in generating community consensus and impetus for change. Such processes, properly designed and implemented, can even forge consensus in the face of a vast diversity of views and positions. The result of a 97% Indigenous consensus on the complex matter of constitutional reform is an extraordinary achievement. This is a community of immense cultural,

social, economic, linguistic and geographic diversity, replete with personal and historical rivalries and differences. That this community was able to come to a strong consensus is testament to the potential of this kind of process.

A 'double majority' referendum, as required in Australia for constitutional change, is a very difficult threshold. As noted, only eight out of 44 referendums have succeeded – the vast majority have failed. The last successful constitutional change was in 1977. If thinking about constitutional design, it may be that the referendum requirement under section 128 is more rigid than is desirable. Potentially, constitutional reform to recognise Indigenous rights might have been achieved earlier if the amendment hurdles were not so difficult. On the other hand, constitutional recognition in a less rigid constitution would be less securely protected. Australia's constitutional system is by and large stable and works well. A less onerous amendment process would potentially compromise this stability.

As with any constitutional reform, change will not be achieved without political will and political leadership. While an Indigenous consensus is crucial, it is not enough for referendum success. More discussion must now be had as to the appropriate strategy going forward to secure the constitutional change Indigenous people seek. Current polling suggests 66% of Australians would vote 'yes' to a First Nations constitutional voice. What is missing now is political leadership. Although the current opposition party supports the proposals, the current Australian government appears hesitant about the idea of a First Nations constitutional voice, though they are moving ahead with a co-design process to flesh out the details of the proposed First Nations voice. It is hoped this will be a productive process that enables the parties to find common ground and a way forward to implement the Uluru Statement's call for substantive constitutional recognition through a constitutionally guaranteed First Nations voice.

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