Bond University

Legal Education Review

Volume 28 Issue 2

2018

A Mini-public of Academics: Experimenting with Deliberative Democracy and Indigenous Cultural Competency in Legal Education

Asmi Wood
Australian National University

Ron Levy
Australian National University

A MINI-PUBLIC OF ACADEMICS: EXPERIMENTING WITH DELIBERATIVE DEMOCRACY AND INDIGENOUS CULTURAL COMPETENCY IN LEGAL EDUCATION

ASMI WOOD* AND RON LEVY**

I INTRODUCTION

It has been over two decades since the *Mabo v Queensland (No 2)* decision[1] and the consequent debunking of the legal fiction of terra nullius in Anglo-Australian law. Yet Indigenous people, issues and perspectives are still uncommon in the Australian legal doctrinal landscape. At a minimum Australian law must translate the High Court of Australia's denial of terra nullius into a far more robust recognition of Indigenous people in the law. In part, this recognition must take place in the law schools from which lawyers emerge. Currently, most Australian law school curricula do not extensively and systematically bring Indigenous issues to the fore. Even after they gain admission to law school, many Indigenous law students say they feel alienated and excluded. Many prematurely abandon their law studies. Some do not see themselves represented in the law as it is taught. Non-retention (which translates into non-completion) in turn has slowed the growth of Indigenous participation in the profession, and greatly slows the achievement of population parity in the sector.

In this short article we report on a novel consultation event held in 2017, in which we served (with others) as leaders and facilitators. Fifty-two Indigenous and non-Indigenous legal academics convened in Melbourne to draft and promulgate standards to be followed by law schools across Australia for promoting Indigenous cultural competency (ICC). There is no universally accepted definition for ICC.[2] However, for the tertiary sector, Universities Australia (UA) defines ICC as:

> Student and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous

* Australian National University.
** Australian National University.

1 (1992) 175 CLR 1.

2 The ICCLAP project team (see below) retained the terminology of ICC, but did not seek to recommend or require 'full competency' in an Indigenous Australian culture. It has consciously left this issue for determination by individual law schools.

> protocols, combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples.[3]

The Melbourne ICC consultation took the general form of a mini-public. A mini-public is a decision-making body whose members are randomly selected from — but demographically representative of — a broader public. Mini-publics learn extensively from experts with diverse views before tackling a contentious policy- or law-making problem themselves. Ultimately, a mini-public issues a recommendation (advisory or binding) for a policy or law reform. The body's small membership (eg 20–200) allows for more sustained and extensive deliberation than would be possible for an entire public. At the same time, a mini-public improves on the decision-making conducted by other kinds of small deliberative bodies. For instance, mini-publics often enjoy perceived legitimacy greater than that of elected representative bodies. Mini-publics can be better trusted, especially because they are seen by the wider population as being constituted by people 'just like' themselves.[4] Mini-publics also potentially represent the broader citizenry's full diversity of views — often with greater fairness and impartiality, and without as much prejudgment or partisan polarisation as we see in other kinds of assemblies.[5]

Given these well-recognised benefits, public decision-making by mini-publics is now routine. Yet ours was a distinctive variation, in that the mini-public purported to represent not the whole public of a jurisdiction, but only a particular professional class within it – in this case legal academics in Australia. We convened this mini-public of legal academics in order, it was hoped, to give greater legitimacy to the promulgated guidelines for ICC in law school curricula. But a key question was whether a mini-public can adequately represent such a small and distinct sub-population.

The mini-public trial was part of a larger initiative called the Indigenous Cultural Competency for Legal Academics Program (ICCLAP). The objects of the ICCLAP are to examine questions of how law curricula can: (a) better include Indigenous perspectives and (b) improve Indigenous participation in law schools. Some of the relevant obstacles identified by law schools include: (a) low numbers of Indigenous law teachers, (b) generally low numbers of Indigenous law students and (c) a general lack of knowledge of Indigenous issues in both the broader community and legal community. This latter problem,

---

3 Universities Australia, *National Best Practice Framework for Indigenous Cultural Competency in Australian Universities* (October 2011) 171 <https://www.universitiesaustralia.edu.au/uni-participation-quality/Indigenous-Higher-Education/Indigenous-Cultural-Compet#.V_WbwMl0VnE>.

4 Fred Cutler et al, 'Deliberation, Information, and Trust: The British Columbia Citizens' Assembly as Agenda Setter' in Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008) 166.

5 Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34 *Melbourne University Law Review* 805.

in particular, increases the reticence of non-Indigenous law teachers to engage in increasing Indigenous content in their classes. The ICCLAP sought to address these issues using the mini-public, which aimed at both consulting and advising law teachers across Australia on how to increase Indigenous participation and content.

This article explores the distinctive aspects of the ICCLAP Mini-Public (*IMP*). It examines the content of the consultation, centring on its suggestions for improved breadth, content and quality of legal teaching, as it touches the lives of Indigenous people. However, since this content is well addressed elsewhere in this special issue of the *Legal Education Review*,[6] our own focus in this paper is on not substance but method. Thus we assess the *IMP*'s unique use of a mini-public to represent an unusually small and highly formally educated public. Both the mini-public members and most of those they represented had multiple tertiary degrees, and were already well-versed in many aspects of the topics being deliberated. The *IMP* thus differed significantly from most mini-publics by starting off with these considerable deliberative advantages. Nevertheless, below we seek to assess the actual quality of deliberation in the *IMP*. For the most part, we will rely on our own qualitative observations about the novel *IMP* process and its methods.

In this short article, then, we first describe, in Part II, the ICCLAP's objectives and recent history. We then introduce the deliberative democratic approach the ICCLAP took, by giving a general outline of deliberative democracy and mini-publics in Part III. In Part IV we explain the rationales and the (sometimes unusual) design features of the *IMP*. Throughout, we also offer some key observations regarding the success and suitability of the innovative *IMP*. We sum up in Part V.

II THE OBJECTIVES OF ICCLAP

The difficulties of achieving increased Indigenous participation in the legal profession are widely recognised as inextricably and directly related to the 'pipeline of Indigenous students' in law schools. The schools' Indigenous retention and completion rates are therefore vital issues. Increasing indigenous content in legal curricula, particularly through championship by non-Indigenous colleagues — who make up the majority of academics — appears to be achievable in the near to medium term.[7]

---

6 Marcelle Burns, 'Are We There Yet? Indigenous Cultural Competency in Legal Education' (this issue).

7 To give an example, at the ANU (where the home law school of the authors is based) Indigenous people make up about 3 per cent of academic and general staff; however, population parity for students has not yet been achieved. For the purposes of this paper and at the ANU law school, 'parity' is calculated on graduation, and not on enrolments alone. The reason for this metric is that large enrolments with poor completion rates are not really helpful for the individual or the Indigenous community. The ANU has made a significant commitment to increasing its staff and student cohort, and its strategic plan sets Indigenous engagement at all levels in the university as a desired outcome: Australian National University, 'Strategic Plan: 2018 – 2021' (2018 Corporate Plan, Australian National University) 9.

Nicole Watson eloquently articulated the issues of Indigenous alienation in law schools and non-retention in the early part of this century.[8] When law schools employ Indigenous academics (coupled with other support services), retention rates tend to improve. Another relevant factor for increasing Indigenous student participation is the incorporation of Indigenous perspectives into the curriculum, helping Indigenous students to 'see themselves in the law' and to experience a higher degree of inclusion and acknowledgement of their cultural existence. Including such material is also beneficial to non-Indigenous students, as it helps them to gain a more sophisticated understanding of Indigenous issues, which have a long, ignoble and sometimes contested history under Anglo-Australian law. Such understanding is useful to all lawyers, as Indigenous related legal services represent a growing segment of the market.

After its conception, the ICCLAP received a grant that initially flowed from the National Indigenous and Knowledges Network (NIRAKN), an Australian Research Council-funded network. NIRAKN brought together Indigenous researchers to enable them collaboratively to build ICC capacity. One of the 'nodes' of the NIRAKN network was its 'law node', which comprised, at various times, between four and six law academics from law schools around Australia. Membership in the law node helped academics to compare experiences and identify common issues they faced in their daily work at their own law schools. Academics shared the approaches — or 'local' solutions — that they had each used. The ICCLAP Chief Investigators came together to abstract and extend these into broader expressions of specific solutions. The aim of the ICCLAP was therefore to seek general solutions to common problems, which could be applied across the sector and used by both Indigenous and non-Indigenous law teachers.

One such common issue highlighted was the dearth of Indigenous voices in the legal profession, academy and student body. Both Indigenous and non-Indigenous staff in the profession actively want greater and deeper engagement with Indigenous issues. Many non-Indigenous colleagues want guidance and support in order to facilitate the incorporation of Indigenous content into subject areas in which they specialise. The individual experiences of the ICCLAP project team were that having higher numbers of Indigenous staff employed helped non-Indigenous staff to discuss and consult on such issues. Indigenous colleagues provided a degree of comfort with the process and reduced reticence on the part of non-Indigenous staff. The question for the ICCLAP project team was how to achieve this support within law schools that have varying numbers of Indigenous academics. It was conceded that this is a complex problem which requires a host of parallel, long-term solutions.

---

[8] Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection' (2005) 6(8) *Indigenous Law Bulletin* 4.

In light of the interrelated problems and issues noted, the ICCLAP aims broadly to answer two key related questions: (a) should ICC be part of the formal legal curriculum at Australian law schools, and (b) if so, how can we achieve this while being cognisant of (and subject to) the constraints of a professionally accredited legal education program? In terms of the latter question, two main principles were identified by the ICCLAP team for increasing Indigenous participation: (a) increasing the numbers of Indigenous law teachers and (b) increasing Indigenous content in the curriculum.

Within this broad ambit, the Melbourne *IMP* had some more particular goals. These were to: (a) ascertain best-practice principles for establishing greater ICC, (b) ascertain whether convincing non-Indigenous law colleagues that attaining population parity for both Indigenous students and staff is a useful target, (c) establish policies to provide or identify the resources necessary to help all law teachers (Indigenous and non-Indigenous alike) to increase the level and quality of Indigenous course content, (d) gain non-Indigenous legal academics' active support in implementing ICC in the near to medium term and (e) inform *IMP* participants about ICC issues in the course of the consultation. The last two goals here are notable as they are partly distinct from the previous three: in addition to using the consultation to gauge ideas about the best directions for ICC policies in law schools, the consultation also had educative roles. As we see next, this kind of process — in which participants are asked both to provide their opinions, and to engage with and learn more about the matter in question — is a familiar feature of consultations conducted via democratic deliberative mini-publics.

III Background: Deliberative Democracy and Mini-Publics

A *Deliberative Democracy*

A mini-public is, as noted, a deliberative democratic institutional innovation. This means that it aims to enable decision-making characterised both by democracy and deliberation. Here the terms 'deliberative' and 'deliberation' denote certain forms of robust and rational collective decision-making by citizens or their representatives. For instance, ideally 'no force except that of the better argument is exercised' in collective deliberative decision-making.[9] Persuasion for other reasons — majority opinion, reputation, caste, divine revelation — is devalued in comparison. Deliberativists flesh out such well-known general propositions with a range of further particulars:[10]

---

[9] Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism' (1995) 92 *Journal of Philosophy* 109, 124.

[10] For more on each of the following deliberative conditions, and further references, see Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 21–3.

(a) *Inclusive:* deliberation should be widely inclusive of citizens' interests, voices and views; it should air and listen to citizens' representations on equal terms.
(b) *Cooperative:* deliberation usually involves multiple deliberators working collectively rather than individually, drawing on multiple perspectives to respond in suitably complex ways to inherently complex policy problems.
(c) *Open-minded:* deliberation is relatively flexible and open to changes of position; it 'requires that participants sincerely weigh the issues on their merits'.[11]
(d) *Reflective:* deliberative procedures aim to give deliberators sufficient opportunity to reflect — that is, to consider relevant arguments exhaustively and carefully.
(e) *Informed:* deliberation takes account of broad sources of information (eg about ideas, scientific facts, and affected social interests).
(f) *Holistic:* deliberation is holistic, meaning that it accommodates or trades off diverse values, costs, and benefits, rather than viewing policy or legal options in isolation.
(g) *Other-regarding:* deliberative decision-makers are other-regarding — concerned both with their own interests and with those of others differently situated from themselves. This contrasts with more adversarial decision-making.
(h) *Civil:* civility in tone is also important and may manifest, for example, in verbal cues of mutual respect in the face of substantive disagreement.
(i) *Reason-giving:* decision-makers must justify their decisions by publicly and reciprocally providing reasons, which anyone else — assuming they share a goal of coexisting amicably in society with others — may reasonably be expected to endorse. Reasons should therefore be expressed in forms that are intelligible and accessible to all.
(j) *Uncoerced:* for a decision to be deliberative, no law or other force should unduly compel decision-makers to reach a particular decision.

There are several rationales for seeking to design democratic practices to be more deliberative. These rationales include:[12]

(a) *Epistemic:* elite leaders are often partisan and polarised and thus frequently fail to recognise pressing problems — environmental, geopolitical, economic etc — or to find solutions to them. By contrast, an effective deliberative process features greater sensitivity and responsiveness to such problems.

---

[11] James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2009) 35.
[12] Levy and Orr, above n 10, 25–6.

(b) *Managing difference:* deliberative democracy is also concerned with decision-making in the face of difference and disagreement. Deliberative decision-makers seek accommodation among their often markedly different values. For example, environmentalists and market-oriented economists may, despite some mutually incompatible general assumptions, share common ground if they agree on the economic wisdom of, say, carbon emissions-trading as a means of opening new markets in green technology.

(c) *Democratic:* deliberative democracy is arguably more democratic than other forms of democracy. For instance, with its stress on the force of the better argument, a deliberative democracy can place all participants on roughly the same footing regardless of social station. On this ideal, any person's argument is influential if it is cogent and relevant.

(d) *Informed consent:* the people's 'consent', often said to be the centre of democracy, is a fiction to the extent that citizens do not know what they are consenting to. By widening citizens' knowledge about public policy issues, deliberative democracy seeks to ensure informed consent in democracy.

B *Mini-Publics*

Against this background, we can better understand the aims of deliberative democratic mini-publics. Mini-publics are now widespread and have been employed at national, state and local levels around the world, likely thousands of times since their origins in the last decade. An early example of a mini-public was the ground-breaking British Columbia Citizens' Assembly on Electoral Reform, which met on weekends over a period of eleven months in 2004. In the initial 'Learning Phase', assorted political scientists instructed members about electoral models. Learning strategies included interactive participation, a dedicated website, assigned readings and structured group work overseen by graduate students. The body's 162 members settled on a set of 'shared values' for mutually cooperative engagement. 'Public Hearing', 'Deliberation' and 'Referendum' phases took place later. At the Deliberation Phase, members sifted information gained from both expert and lay sources and spent over two months discussing and deciding on an electoral reform recommendation, which was ultimately put to voters in the referendum.

A mini-public such as this is meant to substitute for the elite experts who usually undertake decision-making about the reform of complex matters (eg electoral reform). Typically, elected or appointed leaders and bureaucrats carry out such tasks on behalf of the broader population, on the assumption that that broader population lacks the time or expertise to address such complex and technical matters. The mini-public innovation is significant because it instead allows members of the general public themselves to fulfil the expert role. Numerous empirical studies show that ordinary citizens can effectively vindicate

this role, provided that they are given adequate institutional support to develop their knowledge and to deliberate collectively and effectively.[13] Indeed, ordinary members of the public can often function even more effectively than elite leaders, as the latter are often insulated (by elaborate internal norms and systems of top-down decision-making) from the real-world needs and interests of the people they notionally serve.[14] Leaders may also be riven by ideological pre-commitments, or other polarising factors that impede open-minded and deliberative cooperation.

In sum, the rationales for decision-making by mini-publics are:[15]

(a) *Deliberative Quality:* While it is unrealistic for the entire public of a jurisdiction to become fully apprised of the detailed considerations bearing on a matter of reform, a small assembly can do so more readily. Institutional supports for mini-public deliberation can include extensive opportunities for learning by members, mutual and sustained exposure of members to each other's perspectives, and well-structured and facilitated discussions.

(b) *Non-partisanship and flexibility:* Mini-publics use neophyte members rather than partisans or other kinds of elites accustomed to power. Mini-public participants tend to be unaffiliated with any strong ideology or faction. These features help to ensure that participants do not come to their decision-making roles with rigidly pre-formed and polarised opinions about the matters at issue. A key reason for the popularity of mini-publics around the world is their demonstrated ability to transcend the dysfunctions of political partisanship and polarisation — problems that prevent many elite decision-makers from reaching agreement on contentious matters.

(c) *Democratic legitimacy (trust and impartiality):* Mini-publics rely on sortition, that is, choosing members at random from the broader population, but 'stratifying' selections to reflect the polity's demographics (eg regional, gender, age and ethnic background). As noted, mini-publics are also often viewed as more adept at fair and impartial deliberation than are legislatures.[16] As also noted, a member of the broader public tends to view mini-public members as 'just like me'.[17] Mini-

---

13 See, eg, contributions to Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008) 6. See also reviews of empirical evidence in, eg, Dennis F Thompson, 'Deliberative Democratic Theory and Empirical Political Science' (2008) 11 *Annual Review of Political Science* 497; Simone Chambers, 'Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?' (2009) 37 *Political Theory* 323, 325.

14 Ron Levy, 'The "Elite Problem" in Deliberative Constitutionalism' in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 351.

15 Levy, 'Breaking the Constitutional Deadlock', above n 5, 810–13.

16 Ibid 829–38.

17 Cutler et al, above n 4.

> public members thus may become experts well-versed in law-making particulars while still attracting substantial public trust — potentially more than career experts and political elites.

Arguably, on the other hand, mini-publics are democratically inadequate because they only 'descriptively' represent the public — they are not elected, but rather reflect the public's demographic diversity. This claim is part of an important and ongoing debate. For now, it is enough to note just three key rejoinders. First, empirical studies have shown that mini-publics enjoy considerable popular trust and perceptions of legitimacy.[18] The strong bond of trust between a mini-public and the broader public suggests that the latter are largely content to have their interests represented by the former during law-making. Second, some scholars assert that demographic diversity in democratic deliberations ensures that a wider range of the public's views surface.[19] And finally, as we have already noted (see Section II), an effective popular deliberative body also has important benefits for informed — and thus more robust — democratic participation.

IV A MINI-PUBLIC OF ACADEMICS

The ICCLAP leadership team sought a method for writing and promulgating guidelines with the specific goals mentioned in Section II in mind. Essentially, there needed to be innovative, well-informed and flexible thinking about how in practice to promote ICC and its methods and benefits. The ICC guidelines for law schools, in turn, needed to reflect the best current thinking among scholars of Indigenous legal practice and pedagogy. But this thinking could not ignore non-Indigenous perspectives on law and pedagogy, and it could not take non-Indigenous (and indeed Indigenous) legal scholars and students' support for ICC as given.[20] In addition, the process could not be wholly top-down (eg controlled by a subcommittee of law deans), nor too uninformed by the day-to-day realities of contemporary law teaching. The process thus needed to be — and, as importantly, appear to be — legitimate in the sense of being duly consultative and democratic, inclusive of many perspectives (especially, but not only, Indigenous) and premised on robust pedagogical theory and experience. These conditions might, if fulfilled, help to create a set of guidelines that were both *sound* and *persuasive*.

After some debate within the ICCLAP project, there was consensus among project team members that a deliberative democratic mini-public, when appropriately adapted to account for the project's parameters, was likely to be the best tool available in the circumstances.

---

18 Levy, 'Breaking the Constitutional Deadlock', above n 5.

19 Jane Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18 *Journal of Political Philosophy* 64, 72–4.

20 Mark Schafer and Scott Crichlow, *Groupthink Versus High-Quality Decision Making in International Relations* (Columbia University Press, 2010) 6; Cass R Sunstein, 'The Law of Group Polarization' in James S Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Blackwell, 2003) 80.

To organise the *IMP*, the ICCLAP project team sought the support, help and advice of Associate Professor Levy (a co-author of this paper) as well as Professor Janette Hartz-Karp, on how best to proceed with the application of a mini-public methodology. But the *IMP* was partly distinct from other mini-publics. It purported to represent a public that was relatively small and also unusually highly-educated in a formal sense, relative to most other mini-publics. These features meant that the rationales and methods of the *IMP* were different from many standard mini-publics, in ways alternately subtle and significant.

This is not to say, however, that the *IMP* necessarily fell short as a mini-public. To assess the theoretical and practical fit of the *IMP* to the mini-public ideal, we consider here how the *IMP* measures up to the basic deliberative hallmarks introduced above. As noted, we rely mainly on our own observations — subjective though these inevitably are — and pitch our comments at a broad level to consider the methodological choices made. (These commentaries can be read in conjunction with another contribution to this special issue of the *Legal Education Review*: the paper by Marcelle Burns presenting more granular empirical data.[21])

A *Formal Education and IMP Learning Phases*

The challenge for most mini-publics is to introduce a randomly selected set of individuals to a specific policy-making problem, and to rely on this group of people to render a coherent and well-informed decision that accounts for the many considerations bearing on that problem. In the case of a mini-public populated with legal academics, there are some notable differences in the levels and kinds of learning required before the group may be said to be competent enough to render policy decisions. This group possessed the considerable advantage of high levels of general learning, as well as more specific learning in their own areas of research. Again, many *IMP* members had PhDs or other advanced degrees in legal and related subjects. At least on the surface, then, the *IMP* appears to have begun its deliberations from a far more advantageous position than most mini-publics, specifically in terms of deliberative hallmarks such as *reflective*, *informed*, *holistic* and *reason-giving* deliberation.

More specifically, the *IMP*'s legal academics presumably benefitted from certain skills characteristic of academics, for example: critical reasoning skills, which allow participants to assess the normative underpinnings of assorted policy options; the ability to receive and accommodate large amounts of information and to weigh such information appropriately; and extensive personal experience that may be relevant to the policy-making task at hand (in this case, pedagogical strategy). These skills relate strongly to the deliberative prerequisites listed above; legal academics and lawyers generally are trained in *reflective*, *informed*, *holistic* and *reason-giving* deliberation. These skills were indeed strongly in evidence in the deliberations of the *IMP*.

---

[21] Burns, above n 6.

This helped *IMP* participants to achieve some mastery of the subjects debated, despite the event's relatively short, two-day duration. (Other mini-publics have run, for example, over four or five days. The *IMP*'s shortened format was predicted to have some influence on the outcomes, as discussed below.)

Despite the obvious benefits to deliberation of having highly-educated participants populating the *IMP*, several possible faults could be predicted. The 'general population' represented by the *IMP*, as mentioned, was that of all legal academics in Australia (and arguably many other lawyers, too). Despite the high levels of knowledge among academics in general, it was possible to have relatively low levels of knowledge on the topic at hand — namely concrete ways of designing legal courses to accommodate Indigenous people and cultures. This being so, Indigenous experts helped to educate the group about ICC issues, particularly as they apply to law schools. In practice, this meant educating representatives of the majority population (non-Indigenous people) on issues relevant or important to a minority community, in ways that would not normally organically occur in a reasonable period because of the disparities in the groups' numbers. *Inclusivity* on the *IMP* was essential for this objective.

B *Inclusivity*

One way of supporting *IMP* members' learning was to ensure that the deliberation was *inclusive* — another deliberative hallmark. In an inclusive process, members learn not only from experts in formal teaching settings but also — often more importantly — from each other's stories and views. One of the key deliberative effects of mini-publics tends to be that members are able to see policy matters from another community's perspective by hearing directly from members of that community. Sustained conversations between communities concretises the policy matters, encourages more sophistication and complexity in members' understanding of the issues at stake, and more readily allows members of each community to see matters through each other's eyes.[22] Hence, *inclusivity* is key to learning and education.

The ICCLAP leadership group sought to represent both Indigenous and non-Indigenous perspectives robustly on the *IMP*. In a standard mini-public, there would tend to be representation of the key demographic groups (eg male and female, people from various geographic areas, and Indigenous and non-Indigenous people) in roughly the same proportion in which they appear in the general population. However, for a consultation about specifically Indigenous issues, it would be counterproductive to *limit* Indigenous participation to approximately two to three per cent of membership. Instead, some level above this baseline percentage, perhaps even nearer to 50–50 equality, is warranted, since the matters at issue concern Indigenous

[22] Joshua Cohen, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997) 67, 72.

experiences. A high level of Indigenous participation was thus required, and sought, both among regular members of the *IMP* and among the experts involved.

The numbers of participants and their backgrounds were as follows:

- There were a total of 52 participants at the *IMP* consultation (including Indigenous experts, but not including 17 support staff and volunteers).
- The total number of Indigenous attendees was 20, or approximately 38 per cent.
- The total number of non-Indigenous attendees was 32, or approximately 62 per cent.

It may seem counterintuitive to represent Indigenous voices to an extent considerably greater than their representation in the general community. But a major rationale of the *IMP* consultation was to counter the general voicelessness of Indigenous people in law schools and the legal system. This is best achieved in a deliberative democratic setting, where all voices are meant to have equal standing. These voices are meant to persuade, not based on raw numbers in the community (a form of democracy often called 'aggregative'), but in light of the justice and salience of their claims. Indigenous voices needed to be included in relatively greater numbers in order to be heard at all, and in order to air an assortment of perspectives from within the Indigenous community. Running the *IMP* on a robustly deliberative model allowed the body to correct the under-representation of the Indigenous community, but without imposing their views on the majority. In short, the model ensured that a suitable breadth of Indigenous views was aired.

Full Indigenous versus non-Indigenous equality in representation on the *IMP* was not feasible, however, due to the relatively small pool of Indigenous lawyers and law teachers in Australia — currently approximately one per cent. This again demonstrates the need to include non-Indigenous staff in law schools in order to effectively incorporate ICC. Hence, the ICCLAP team sought to enlist non-Indigenous colleagues to support ICC.

C *Selection and Ideological Diversity*

Apart from demographic diversity, another form of diversity that might aid deliberation relates to ideology. We acknowledge that detractors of the ICCLAP project were evidently non-existent among participants. The *IMP*'s lack of dissentient voices may have reflected the process of selection. A typical mini-public selection begins with a large number of invitations to possible participants and concludes with a random (but demographically stratified) selection from within that group. Distinctively, ICCLAP received cooperation from a large array of law deans across Australia. Even though deans were explicitly requested not to exclude people who were critics of ICCLAP-style initiatives, the support of the deans to fund certain academics to travel to and participate in the Melbourne workshops meant that this was not

a truly randomised sample of law academics. The main risk with non-random selection is that is allows for participant self-selection: members might join the body for strategic reasons, such as influencing its outcome based on the members' preformed views. (Recall that open-minded flexibility of outlook is a key component of deliberation.)

A related issue affecting the *IMP* was that most Indigenous law teachers in Australia were already associated with the ICCLAP programme, often in a significant way (eg through the ICCLAP team, NIRAKN Law Node or the ICCLAP advisory and reference groups). Hence, a traditional mini-public selection process, which would have involved randomly selected members who are generally novices on the subject in question, was not possible if Indigenous academics were to be included in the *IMP* process.

Nevertheless, it is not uncommon for mini-publics to have non-standard selection procedures. For instance, in mini-publics called to deliberate over relatively arcane subjects (eg the citizens' jury empanelled in the ACT on compulsory third-party car insurance), inspiring public interest may be difficult. This may narrow the pool of prospective mini-public members, and thus may also make some amount of self-selection and imperfect demographic representation inevitable (since organisers must compromise on the ideal of random selection).[23]

In any event, within Australian legal academia there is apparently strong support for efforts such as the ICCLAP. Law teachers across Australia already include Indigenous content or epistemologies in their teaching. For example, an internal review at the ANU law school showed broad general support for ICC within the curriculum. But this support was not universal (though reasons against were almost totally supported by pedagogical considerations, and not by race).[24]

Such general attitudinal uniformity is potentially problematic from a deliberative democratic perspective as it risks generating an ideological monoculture and/or 'groupthink'.[25] That is, robust deliberation entails a canvass of *all* relevant perspectives, which may not be possible given an ideologically uniform set of participants. On the other hand, it may be argued that the contrary perspectives excluded from the *IMP* process — such as that the ICCLAP is *not* worthwhile — were properly left out, as they would have reflected an untenable position in a modern, pluralistic and rights-respecting polity. Some deliberative democracy scholars indeed suggest that views that are essentially unreasonable from a moral standpoint — eg overtly racist views — should be excluded from a public discourse.[26] Yet we should not take this too far; there can of course be legitimate criticism of ICC

---

23 Ron Levy, 'Independent Report on the ACT Citizens' Jury Pilot' (Independent Report, Law Society of the Australian Capital Territory, 1 February 2018) <https://cloudstor.aarnet.edu.au/plus/s/7H96sPdT8Hg4Wbs#pdfviewer>.

24 This report, which was not released publicly, is on file with the authors.

25 Above n 20.

26 Amy Gutmann and Dennis Thompson, 'Moral Conflict and Political Consensus' (1990) 101 *Ethics* 64, 64–9.

initiatives, and such criticism did emerge in various guises throughout the *IMP*'s sessions. Without necessarily directly referencing critiques, such as those of Ambelin Kwaymullina,[27] of research work conducted on Indigenous people and the law (especially — but not only — when conducted by non-Indigenous people), these critiques were seldom far from the discussions. Kwaymullina suggests, for example, that much research in the legal field is implicitly Eurocentric, and thus reproduces European conventions and attitudes regarding the social place of Indigenous people, vis-à-vis others who benefit from the 'assumed superiority of Western ways of knowing, being and doing'.[28] During the *IMP* proceedings, many participants took time to explore a number of arguments and variations in a similar vein.

Hence, in important ways, *IMP* members were diverse in their views. Even assuming general progressive attitudes towards Indigenous people, a diversity of views naturally exist about how (or even whether) efforts to accommodate Indigenous people should be approached via law. Many such views were aired in the *IMP* process. This broadened the space for genuine deliberative discussion. Moreover, some participants had experience in attempting to implement ICCLAP-style policies in their own law teaching while others did not. Many academics who might have been supporters of teaching Indigenous cultural perspectives in theory might fail to see how the approach can be applied in actual teaching practice. Indeed, this is a common feature of curriculum design discussions in Australian law schools, where imperatives such as the perceived need to teach doctrine comprehensively and to fulfil the national *Priestley 11* guidelines (for law school accreditation) are assumed to limit what can be done in practical terms to address Indigenous issues and perspectives. *IMP* members' discussions frequently reported these attitudes among their law school colleagues across Australia.

As a result, how to address such attitudes — especially through concrete demonstrations of how mainstream law teaching can relatively seamlessly incorporate examples involving Indigenous people — was a common point of discussion. Whether some members of the *IMP* themselves shared this reluctant attitude in relation to implementing the ICCLAP is difficult to gauge but initially there was some reticence. During the *IMP's* learning phases, members were given an example of how one of the authors of this paper (Levy), who convened and taught a *Priestley 11* course (Torts), incorporated Indigenous content both in the substantive legal content in class and in his assessment regime. This was intended as an example of how ICC might be achieved through

---

[27] Ambelin Kwaymullina, 'Research, Ethics and Indigenous Peoples: An Australian Indigenous Perspective on Three Threshold Considerations for Respectful Engagement' (2016) 12 *AlterNative: An International Journal of Indigenous Peoples* 437.

[28] Ibid 439. Kwaymullina later continues: 'I suggest that the initial — and perhaps the most important — question to be asked of any research relating to Indigenous peoples is whether the research should be undertaken at all': at 440. Since teaching and research in a university setting are closely linked — with the one being often premised on the other, and vice-versa — these critiques seem just as relevant, potentially, to practices of teaching.

careful course design, with benefits to learning but with no diminution of the substantive course content. As the Burns paper in this collection shows, post-*IMP* survey indicated that practical examples used in the workshop positively altered attitudes to some extent, making members more supportive of ICC. Members seemed to have widely varying levels of experience with concrete ICC practice. Ironically, this variation in levels of experience (and thus knowledge) perhaps ensured a wider-ranging discussion that was inclusive of various perspectives on the ICCLAP, including those that were relatively unaware or even dismissive of ICC methods.

D *Facilitation and Program Design*

Recall that some of the further desiderata of a deliberative consultation include *cooperative, other-regarding, open-minded* and *civil* deliberation. Before commencing, some *IMP* facilitators (including one of the present authors: Levy) voiced the opinion that we might see hardened and polarised positions emerge in the course of deliberations. Cooperative, other-regarding and open-minded reasoning can be difficult to achieve among even — or especially — the most highly educated individuals in any society. This point is supported by empirical evidence from the work of psychologist Dan Kahan and others. Kahan shows that individuals with higher levels of education (a class that presumably reaches its apotheosis among university academics) are often among the most ideologically polarised.[29] This is partly because such individuals can be 'motivated reasoners', uniquely able to bend and cherry-pick facts to suit their own pre-formed opinions.[30] These same studies have found that other imperatives impel these people to reaffirm foregone conclusions. One of these imperatives is the deep psychological benefit of membership in identity groups[31] (eg right wing, libertarian, left wing, intelligentsia). Hence, in theory at least, academics may be less open-minded and willing to cooperate or to view things from the perspectives of their putative ideological opponents. They might, for example, cite '*Priestley 11* issues', crowded curricula or not being 'subject experts' in ICC as reasons why they should not adopt ICC as a goal. However, as noted, there was general (though not complete) ideological uniformity among *IMP* members, which left little space for polarisation.

The *IMP* was also, perhaps surprisingly, free of the kinds of incivility that characterise much modern debate among highly-educated and motivated reasoners. Before the start of deliberations, some organisers predicted that members of the *IMP* might fall short on the important criterion of civility, in part as legal academics are of course lawyers, trained in the often deeply antagonistic adversarialism of the

---

29 Dan M Kahan, 'Ideology, Motivated Reasoning, and Cognitive Reflection' (2013) 8 *Judgment and Decision Making* 407, 417–18.

30 Ibid 408.

31 Ibid; Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (Vintage, 2012) 219–55.

common law system. Civility is important as a means of signalling respect in collective decision-making processes, and in turn avoiding the kinds of partisan and reactive feelings that could keep deliberators from cooperating, seeing eye-to-eye or reaching common ground.

Despite the predictions, *IMP* deliberations were characterised by thoroughgoing civility. In practice, with only a small number of outlying cases, the levels of civility in *IMP* proceedings indeed attracted consistent praise from facilitators and participants. One possible explanation is that legal academia in Australia is a relatively insular professional environment, which breeds civility since academics face reputational risks after disrespectful conduct. Another possible explanation is that a lack of ideological diversity prevented deep discord. Still another is that legal academics, like other academics and lawyers, develop a posture of intellectual detachment over time and an embrace of complexity in argumentation. Given these characteristics, it is relatively unlikely that deliberators will adopt overly tenacious and rigid positions in debates with each other. Finally, some legal practitioners and academics — most of whom are familiar with curial litigation and its downsides — are likely to be aware of the emotional costs of polarised argumentation and of alternatives to litigation such as alternative dispute resolution (ADR). (The methods of ADR and of deliberative democracy share some intriguing family resemblances.[32])

Part of the explanation for the civility and apparent willingness of *IMP* members to hear each other out was, we surmise, effective facilitation by the large team led by Professor Hartz-Karp. Members were divided into tables, with each table itself somewhat demographically diverse. At each deliberation session, one *IMP* member was appointed as a scribe for each table. The scribes relayed table discussions to a central facilitation team. Points raised by each table were then moderated, distilled, recorded and made available to the whole *IMP* membership on large video screens at the centre of the room. This helped to convey information across the tables and to keep the various small groups in contact. It also, however, allowed small-group participation to remain at the centre of the process. This kind of deliberation is often a crucial element of proceedings involving reasonably large membership, such as the 52 participants of the *IMP*. Deliberation has been found to be most robust in micro settings.[33] Participants can feel more comfortable speaking honestly and at length under such circumstances.

Some non-Indigenous participants reported that they felt they were not adequately heard at their tables. This was despite the fact that each table had a facilitator with specific instructions to promote participation and actively invite the quieter members actively to engage. But there was, more generally, much solidarity reported among participants, and collaborative discussions developed organically during the workshop.

---

[32] Lawrence Susskind, 'Deliberative Democracy and Dispute Resolution' (2009) 24 *Ohio State Journal on Dispute Resolution* 395.

[33] Robert E Goodin, 'Democratic Deliberation Within' (2000) 29 *Philosophy and Public Affairs* 81.

Often this led to agreements for longer-term cooperation, such as on the present series of articles in the *Legal Education Review*.

V CONCLUSION

In this article we have outlined some of our own reflections on the *IMP* process, which we helped to conceive and run. We do not presume objectivity in these observations but offer them as a reflection on what was, we believe, a novel and worthwhile endeavour. Our focus has been on providing reflections across the whole process – from conception to conclusion of the *IMP* — and theorising the goals and methods of the *IMP* through the lens of deliberative democracy. We are wary of drawing universal conclusions about the suitability of mini-publics for future policy-making about university-level pedagogy. But, in the last main section above, we did raise some key questions about this novel process, for which we also offered some tentative answers. Our hope is that at least some of these answers might guide future collective exercises regarding academic decision-making in general, and ICC in particular. In sum, the *IMP*'s unusual features — for example, the high levels of formal education among its participants — appear to have given the body a significant advantage over other mini-publics with members less accustomed to critical and other forms of rigorous reasoning. On the other hand, there are the deliberative downsides that should prevent us from reaching the facile conclusion that a group of academics will readily reach a well-informed or normatively 'best' decision. Still, by most indications, the *IMP*'s deliberations were robust, and helped to further inform participants and to devise a number of concrete recommendations for eventual adoption of ICC ideas and policies across the country.