

# ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES, LAW REFORM AND THE RETURN OF THE STATES

DANI LARKIN,<sup>\*</sup> HARRY HOBBS,<sup>†</sup> DYLAN LINO<sup>‡</sup> AND AMY MAGUIRE<sup>+</sup>

*Aboriginal and Torres Strait Islander peoples have long called for structural reform to Australia's institutional framework to protect and promote their rights. In recent years, however, state and territory governments have proven more receptive to Aboriginal and Torres Strait Islander peoples' advocacy than the Commonwealth. In this article, we identify and map the return of the states and territories — and the retreat of the Commonwealth — in Indigenous law reform. While substantial progress has been made, significant risks are involved in the pursuit of subnational reform. It remains imperative that the Commonwealth government meaningfully engage with the aspirations of Aboriginal and Torres Strait Islander peoples as recorded in the Uluru Statement from the Heart.*

## I INTRODUCTION

In the wake of the historic 1967 referendum extending the Commonwealth Government's legislative power in Indigenous affairs, Prime Minister Harold Holt made a prediction to his Cabinet that the electorate would 'undoubtedly look increasingly to the Commonwealth Government as the centre of policy and responsibility' regarding Aboriginal and Torres Strait Islander affairs.<sup>1</sup> That prediction proved true. Prior to the referendum, the Commonwealth Government had occupied a relatively marginal place within Indigenous affairs, because of its ostensible lack of constitutional authority.<sup>2</sup> After federation in 1901, the states continued — virtually unimpeded by Commonwealth intervention — in their pre-federation roles of governing Aboriginal and Torres Strait Islander peoples through laws and policies that variously entailed forms of domination, racism, paternalism, exclusion and neglect.<sup>3</sup> With the states responsible for controlling so

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<sup>\*</sup> Lecturer and Deputy Director of the Indigenous Law Centre, University of New South Wales.

<sup>†</sup> Senior Lecturer, Faculty of Law, University of Technology Sydney.

<sup>‡</sup> Senior Lecturer, TC Beirne School of Law, University of Queensland.

<sup>+</sup> Associate Professor, and Co-Director, Centre for Law and Social Justice, Newcastle Law School.

<sup>1</sup> Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2<sup>nd</sup> ed, 2007) 61, quoting Harold Holt ('1967 Referendum').

<sup>2</sup> *Ibid* ch 2; John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) ch 4.

<sup>3</sup> See further Chesterman and Galligan (n 2) ch 1, 2 and 5.

many aspects of their lives, Aboriginal and Torres Strait Islander people directed most of their activism, advocacy and ire towards state governments.<sup>4</sup>

After many decades of oppressive and racially discriminatory governance by the colonies and their successor states, First Nations advocates and their non-Indigenous allies came to see the Commonwealth as the level of government most likely to be sympathetic to Indigenous demands. This view drove the campaign for constitutional change culminating in the 1967 referendum.<sup>5</sup> In the decades after the referendum, the Commonwealth would become the focal point for Indigenous affairs policy and Aboriginal and Torres Strait Islander advocacy.<sup>6</sup> As a result, the Commonwealth Government came to play a leading role in many key legal and policy reforms in Indigenous affairs, including expanded funding for social services,<sup>7</sup> protection against racial discrimination,<sup>8</sup> recognition of Indigenous rights to land,<sup>9</sup> protections for cultural heritage,<sup>10</sup> the establishment of Indigenous representative bodies<sup>11</sup> and the proliferation of Indigenous community organisations.<sup>12</sup> But in a remarkable and yet little-considered reversal of the historic constitutional and policy change inaugurated by the 1967 referendum, the centre of momentum (progressive and otherwise) in Indigenous law reform has now shifted back to the states and territories.

The return of the states and territories has been most pronounced in areas that, broadly speaking, are constitutional in nature, and can be traced to the election of the Coalition Government of John Howard in 1996. That election marked the beginning of two key changes in Indigenous affairs. First, in dismantling institutions of Aboriginal and Torres Strait Islander self-determination, advancing an agenda of ‘practical reconciliation’ and seeking to devolve responsibilities to the subnational level, the Howard Government commenced the Commonwealth’s retreat from the promise of the 1967 referendum.<sup>13</sup> Second, obstruction, resistance and delay in the Commonwealth sphere prompted a pragmatic decision by some Aboriginal and Torres Strait

<sup>4</sup> For examples, see Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Allen & Unwin, 1999) pts 1–2.

<sup>5</sup> Attwood and Markus, *1967 Referendum* (n 1) 9–12, 14, 30, 44.

<sup>6</sup> Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 144–7, 160–3, 167–71.

<sup>7</sup> John Gardiner–Garden and Joanne Simon–Davies, ‘Commonwealth Indigenous-Specific Expenditure 1968–2012’ (Background Note, Parliamentary Library, Parliament of Australia, 28 September 2012); Patrick Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Policy* (Aboriginal Studies Press, 2011) 4.

<sup>8</sup> See, eg, *Racial Discrimination Act 1975* (Cth). See also Lino (n 6) ch 6.

<sup>9</sup> See especially *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Native Title Act 1993* (Cth).

<sup>10</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1986* (Cth).

<sup>11</sup> See, eg, *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). See also Tim Rowse, *Indigenous and Other Australians Since 1901* (UNSW Press, 2017) 280–2; Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) 118–31.

<sup>12</sup> See, eg, *Aboriginal Councils and Associations Act 1976* (Cth); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). See also Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal and Islander Australia* (UNSW Press, 2002) 1–25.

<sup>13</sup> Lino (n 6) 33, 37–8, 171–2.

Islander peoples to seek change at the subnational level. Where that approach has borne fruit, it has done so in large part due to the receptiveness of sympathetic Labor governments, which have progressed reform intermittently, borrowing and adapting from each other.<sup>14</sup> The most recent manifestation of this combination of Commonwealth recalcitrance and subnational openness has concerned the reforms proposed in the 2017 Uluru Statement from the Heart: Indigenous constitutional recognition through a First Nations Voice to Parliament followed by treaty-making and truth-telling processes.

In this article, we seek to identify and map the return of the states and Territories in Indigenous law reform. We chart that return across four different domains: constitutional recognition (Part II), Indigenous representative bodies (Part III), treaty-making (Part IV) and truth-telling processes (Part V). Our goal is to explain this important development rather than to celebrate it. Indeed, as Megan Davis has pointed out, there are significant downsides and risks involved in the pursuit of protections of Indigenous rights at the subnational level.<sup>15</sup> Acutely aware of those problems, many First Nations advocates remain staunchly — and rightly so — committed to the pursuit of nationwide law reforms, even in the face of ongoing Commonwealth indifference or outright obstruction. That commitment is most evident in the powerful campaign for a national First Nations Voice enshrined in the Australian Constitution as the first step to meeting the demands laid out by Aboriginal and Torres Strait Islander peoples in the Uluru Statement.<sup>16</sup> While reform at the subnational level can offer significant benefit, there are also major downsides to turning back to the states and territories in Indigenous law reform. Our hope is that a fuller account of this subnational turn and its causes can help in the tasks of evaluating its consequences and thinking about pathways towards the return of the Commonwealth.

## II CONSTITUTIONAL RECOGNITION

Proposals to constitutionally ‘recognise’ Aboriginal and Torres Strait Islander peoples have historically focused on the Commonwealth rather than the states. After the 1967 referendum, calls for constitutional reform concerning Indigenous rights once more became pronounced from the late 1970s. Whereas the 1967 referendum campaign foregrounded protections for Indigenous people as Australian citizens, the new demands for constitutional change foregrounded

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<sup>14</sup> On the idea of laboratory federalism: *New State Ice Co v Liebmann* 285 US 262, 311 (Brandeis J) (1932); Gabrielle Appleby and Brendan Lim, ‘Democratic Experimentalism’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 221. In the context of treaty-making in Australia: Harry Hobbs and George Williams, ‘Treaty-Making in the Australian Federation’ (2019) 43(1) *Melbourne University Law Review* 178, 217–29.

<sup>15</sup> Megan Davis, ‘Voice, Treaty, Truth’, *The Monthly* (online, July 2018) <<https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth>>.

<sup>16</sup> *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

Aboriginal and Torres Strait Islander peoples' collective rights to land, culture and autonomy.<sup>17</sup> Often, First Nations activists used the language of 'recognition' as a way of advancing their constitutional demands.<sup>18</sup>

As they first emerged in the late 1970s and early 1980s, Indigenous claims for constitutional recognition envisioned substantial, even radical, transformations in the distribution of public power within the Australian state's institutional framework. The emphasis in these claims for constitutional recognition was on granting First Nations peoples' greater autonomy and territory. Such claims for recognition could be realised through changes to the 'small-c' constitutional order such as a treaty, formal amendments to the Australian Constitution, or a combination of both. Indigenous claims for constitutional recognition in this era were also often accompanied by demands for international recognition of Indigenous peoplehood.<sup>19</sup> From around the 1990s, debates over Indigenous constitutional recognition increasingly focused on formal amendments to the Constitution and making Aboriginal and Torres Strait Islander peoples visible within it. But for Indigenous advocates, such constitutional changes were overwhelmingly not purely about symbolism; they were also about redistributing political power to better protect Indigenous rights and autonomy.<sup>20</sup> For instance, in a 1995 report on the Keating Government's proposed 'Social Justice Package', an advisory committee operating within the Aboriginal and Torres Strait Islander Commission took a wide-ranging view on how constitutional recognition could operate to 'foster attitudinal change and a realignment of the power position of indigenous peoples'.<sup>21</sup> Among the possibilities for constitutional recognition proposed by the committee were protections in the Constitution for distinct Indigenous rights, the creation of Indigenous parliamentary seats and separate Indigenous parliaments, provisions facilitating and protecting treaties, and the establishment of Indigenous states and territories.<sup>22</sup>

By the end of the 1990s, the more far-reaching ideas for Indigenous constitutional recognition put forward by Aboriginal and Torres Strait Islander activists from the late 1970s had been largely eclipsed in prominence by a narrower, more conservative proposal developed by the Federal Coalition Government led by John Howard.<sup>23</sup> This proposal, which would have seen the incorporation of a new, legally unenforceable preamble in the *Australian Constitution* formally recognising Aboriginal and Torres Strait Islander people as 'the nation's first people', was put to a referendum in 1999 alongside a proposal

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<sup>17</sup> Lino (n 6) 16–17, 154–6, 167–71, 218–19.

<sup>18</sup> Ibid 16–24.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 24–33.

<sup>21</sup> Aboriginal and Torres Strait Islander Commission (ATSIC), *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (Report, 1995) [4.10] <<http://www.austlii.edu.au/au/other/IndigLRes/1995/1.html>>.

<sup>22</sup> Ibid.

<sup>23</sup> Lino (n 6) 33–8.

for Australia to become a republic: both were roundly defeated.<sup>24</sup> The Howard proposal for a new preamble was not exclusively focused on Aboriginal and Torres Strait Islander people; rather, the reference to their status as First Peoples was framed within a broader series of statements including mention of Australia's multiculturalism, the sacrifice of those who had defended the country at war, 'hope in God', and commitment to 'freedom, tolerance, individual dignity and the rule of law'.<sup>25</sup>

The Howard Government's constitutional recognition proposal needs to be understood against the backdrop of the Government's determination to push back against what Howard derisively labelled the 'rights agenda' and the legal and political gains it had made since the 1967 referendum.<sup>26</sup> The proposal also needs to be seen in the context of Howard's staunch rejection of what he called 'the black armband view of Australian history', which emphasised injustice and discrimination against Aboriginal and Torres Strait Islander peoples and which Howard saw as increasingly dominant.<sup>27</sup> The Government's 1999 proposal for Indigenous constitutional recognition should be seen as the Government '[a]cceeding to widespread community feeling for reconciliation while seeking to contain that sentiment's grander ambitions' for a more substantive transformation in the Indigenous–settler political relationship.<sup>28</sup>

The Commonwealth's intensely combative approach to Indigenous affairs and the failure of the 1999 referendum created an opening for action on constitutional recognition in the states, which all states would ultimately take up. In 2004, the Bracks Labor Government in Victoria passed legislation that made Victoria the first state to recognise Aboriginal and Torres Strait Islander people in its Constitution. It did so by inserting a new section 1A:

#### **Recognition of Aboriginal people**

- (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
- (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established –
  - (a) have a unique status as the descendants of Australia's first people; and
  - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

<sup>24</sup> Parliamentary Library, Department of Parliamentary Services, *Parliamentary Handbook of the Commonwealth of Australia 2020* (Commonwealth, 35<sup>th</sup> ed, 2020) 443–4.

<sup>25</sup> Mark McKenna, 'First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–99', (Research Paper 16 1999–2000, Australian Parliamentary Library, 4 April 2000) < [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp9900/2000RP16](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP16)>.

<sup>26</sup> Lino (n 6) 33–4.

<sup>27</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1996, 6158 (John Howard, Prime Minister).

<sup>28</sup> Lino (n 6) 34.

- (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.<sup>29</sup>

Even after the Rudd Labor Government came to federal power in 2007 with early commitments to pursue Indigenous constitutional recognition, the slow progress nationally saw more states follow Victoria's early lead by incorporating Indigenous recognition provisions into their own constitutions.<sup>30</sup> All of these provisions were designed to be purely symbolic, having no effect on how public power is distributed or regulated.<sup>31</sup> For that reason, many First Nations people criticised them as tokenistic, insincere and inadequate.<sup>32</sup> Nonetheless, their existence has demonstrated that reform may be easier at the subnational level and has also paved the way for the pursuit of more ambitious 'small-c' constitutional reforms subnationally.

### III INDIGENOUS REPRESENTATIVE BODIES

The capacity of Aboriginal and Torres Strait Islander peoples to have their voices heard in Parliament is limited. Although Aboriginal and Torres Strait Islander people were granted the right to vote in federal elections since 1962,<sup>33</sup> the structure and operation of the Australian electoral system inhibits the capacity of a territorially dispersed, demographic minority to secure seats in the federal Parliament.<sup>34</sup> While the 1967 referendum empowered the Commonwealth with the legislative authority to enact laws with respect to Indigenous peoples, it was not until the 1972 Whitlam Government formally recognised self-determination as Australian policy that the first attempt to remove these barriers were made.<sup>35</sup> These efforts were important but limited. In practice, a deliberately constrained

<sup>29</sup> *Constitution Act 1975* (Vic) s 1A, as inserted by *Constitution (Recognition of Aboriginal People) Act 2004* (Vic).

<sup>30</sup> See, eg, *Constitution of Queensland 2001* (Qld) Preamble, as amended by *Queensland (Preamble) Amendment Act 2010* (Qld); *Constitution Act 1902* (NSW) s 2, as amended by *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW). See also Lino (n 6) 42–7.

<sup>31</sup> Lino (n 6) 109–10.

<sup>32</sup> See, eg, Kerrin Binnie, 'Constitutional Preamble Opposed by Indigenous Leaders and Opposition', *ABC News* (online, 23 February 2010) <<http://www.abc.net.au/news/2010-02-23/constitutional-preamble-opposedby-indigenous/341300>>.

<sup>33</sup> *Commonwealth Electoral Act No 31 of 1962* (Cth) s 2. Aboriginal and Torres Strait Islander peoples entitled to vote in state elections were enfranchised at the federal level in 1949: *Commonwealth Electoral Act No 10 of 1949* (Cth) s 3. As Indigenous peoples in Queensland, Western Australia and the Northern Territory were precluded from voting in state elections, they remained unable to vote in Commonwealth elections until 1962. See also: Murray Goot, 'The Aboriginal Franchise and Its Consequences' (2006) 52(4) *Australian Journal of Politics and History* 517, 525.

<sup>34</sup> Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (n 11) ch 2.

<sup>35</sup> Will Sanders, 'Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy' (Discussion Paper No 230, Centre for Aboriginal Policy Research, 2002) 1; Gary Foley, 'Whiteness and Blackness in the Koori Struggle for Self-Determination: Strategic Considerations in the Struggle for Social Justice for Indigenous People' (2000) 19–20 *Just Policy: A Journal of Australian Social Policy* 74; Robert Tonkinson and Michael Howards (eds), *Going It Alone? Prospects for Aboriginal Autonomy: Essays in Honour of Ronald and Catherine Berndt* (Aboriginal Studies Press, 1990); Ian Anderson, 'The End of Aboriginal Self-Determination?' (2007) 39(2–3) *Futures* 137.

understanding of self-determination continues to impede Aboriginal and Torres Strait Islander peoples' ability to control their own affairs. Instead, the focus is on Indigenous-led service delivery organisations and political representation through Indigenous representative bodies.<sup>36</sup> As we demonstrate, although a national representative body remains a key aspiration, Aboriginal and Torres Strait Islander peoples have had more recent success at building state and territory organisations.

### ***A Early Indigenous Voluntary Associations and Organisations Aspiring to National Status***

Aboriginal and Torres Strait Islander peoples have long been active in establishing their own organisations to progress their interests. The more prominent of these institutions have been predominantly focused on the national level. Consider the Australian Aborigines League ('AAL'), which was one of the first Indigenous associations when it formed in Victoria in 1934.<sup>37</sup> Under the leadership of Aboriginal rights activist William Cooper, the AAL made considerable headway. In 1937, it secured almost 2,000 signatures for a petition addressed to King George V calling for Aboriginal representation in the Australian Parliament.<sup>38</sup> That same year, William Ferguson, Pearl Gibbs and Jack Patten formed the Australian Aborigines Progressive Association ('AAPA'). The AAPA worked collaboratively with the AAL to bring together Aboriginal people for the first 'Day of Mourning' on 26 January 1938,<sup>39</sup> where protestors advocated for full and equal access to citizenship rights.

The work of the AAL and the AAPA was continued and extended by the Federal Council for the Advancement of Aborigines and Torres Strait Islanders ('FCAATSI'). Established in the late 1950s, FCAATSI campaigned for constitutional reform and played a crucial role in advocating for Indigenous rights during the lead up to the successful 1967 referendum.<sup>40</sup> Reflecting the larger political trends of the times, its emphasis was on equal citizenship rights. Over time, this position broadened and extended to include advocacy for recognition of

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<sup>36</sup> A central legislative outcome of the era of self-determination was the *Aboriginal Councils and Associations Act 1976* (Cth), which gave Indigenous peoples the statutory right to form associations. Over 3,000 Aboriginal councils, associations and corporations, including Aboriginal land trusts, town councils and business enterprises, have been incorporated under the Act. See Tim Rowse, 'Culturally Appropriate Indigenous Accountability' (2000) 43(9) *American Behavioral Scientist* 1514, 1517.

<sup>37</sup> Bain Attwood and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines' League* (Aboriginal Studies Press, 2004) 1.

<sup>38</sup> Andrew Markus, 'William Cooper and the 1937 Petition to the King' (1983) 7(1) *Aboriginal History* 46, 50–1.

<sup>39</sup> John Maynard, 'Fred Maynard and the Australian Aboriginal Progressive Association (AAPA): One God, One Aim, One Destiny' (1997) 21 *Aboriginal History* 1, 2.

<sup>40</sup> Josephine Bourne, 'Telling Our Story, Owning Our Story, Making Our Story' in Megan Davis and Marcia Langton (eds), *It's Our Country Too: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 60.

collective rights and identification as distinct peoples. By 1973, FCAATSI had become an Aboriginal and Torres Strait Islander managed and controlled organisation which provided a mechanism for Aboriginal and Torres Strait Islander people to take control over their own cultural affairs. However, following the 1967 referendum, successive federal governments began to establish their own forums for Indigenous affairs policy advice, leaving FCAATSI in an awkward position. Funding cuts significantly limited the capacity of FCAATSI to operate, and the organisation was extinguished by 1978.<sup>41</sup>

### ***B The Impact of the 1967 Referendum***

The 1967 referendum empowered the Commonwealth with legislative power in Indigenous affairs. Following the vote, the Holt Government entered that domain by establishing the Council for Aboriginal Affairs ('CAA'). The CAA marked the first government-sponsored Indigenous organisation. It was tasked with advising government on national policies for Aboriginal people and recommending policy coordination between the states and Commonwealth.<sup>42</sup> However, consisting of three non-Indigenous men, Dr Nugget Coombs, Bill Stanner and Barrie Dexter, the CAA struggled to represent Aboriginal interests. The CAA was served by the Office of Aboriginal Affairs ('OAA'). Incorporated into the Prime Minister's Department, the OAA was responsible for implementing policy and administering legislation. Yet, the small staff of the OAA meant that it also held little weight and value as a body advocating for Indigenous people's interests.

Government policy shifted with the election of the Whitlam Labor Government in 1972. The new government established a Department of Aboriginal Affairs, which took over the functions of the OAA, and Indigenous affairs within the Department of the Interior, advising government, as well as implementing and administering Indigenous policy. Significantly, the DAA recruited and appointed Indigenous staff, ensuring a more accurate representation of Aboriginal people within the executive.<sup>43</sup> The decision to increase recruitment of Indigenous staff within the public service reflected a marked shift in Indigenous policymaking from assimilation and integration to 'self-determination'. Although Whitlam lost office in 1975, this principle remained central to Indigenous policymaking until the election of the Howard Government in 1996. Practising this policy, successive governments experimented with nationally representative Indigenous bodies designed to

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<sup>41</sup> Lino (n 6) 17.

<sup>42</sup> Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (n 11) 123; Tim Rowse, *Obligated to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge University Press, 2000) 30; Melinda Hinkson and Jeremy Beckett, *Appreciation of Difference: WEH Stanner and Aboriginal Australia* (Aboriginal Studies Press, 2009) 43.

<sup>43</sup> Vanessa Castejon, 'Aboriginal Affairs: Monologue or Dialogue?' (2002) 26(75) *Journal of Australian Studies* 27.



develop and channel policy advice to government.<sup>44</sup> Bodies created included the National Aboriginal Consultative Committee (1973–1977), the National Aboriginal Conference (1977–1985), and ATSIC (1989–2005).

Each of these national Indigenous bodies had some successes, but none survived government interference and pressure, and all were abolished after clashing with government over the scope of their authority and independence.<sup>45</sup> This is a recurring problem. Rather than respecting the wants and wishes of Indigenous people and their guidance and control over their own affairs, Australian governments understand self-determination rights in a deliberately limited way. Governments may be interested in hearing ‘the Aboriginal voice’,<sup>46</sup> but only through structures of their own design and control.

It is no surprise then that ATSIC was replaced with the National Indigenous Council – an Indigenous advisory body whose members were appointed by government rather than chosen by their community. Although that Council too was eventually abolished, no representative body with a structural relationship to government has been established. Notwithstanding some movement towards a representative First Nations Voice, the federal government is still advised by Indigenous people it itself appoints. The only real self-determined national Indigenous representative bodies that have existed in Australia were ATSIC and the National Congress of Australia’s First Peoples (2010–2019), the latter of which was not integrated into government policy development.

### ***C The Emergence of Subnational Representative Bodies***

Following the abolition of ATSIC, First Nations looked to establishing representative bodies at the state and territory level. Torres Strait Islander people relied on the continuation of the Torres Strait Regional Authority (‘TSRA’) established in 1994 under the former *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (now known as the *Aboriginal and Torres Strait Islander Act 2005*). The TSRA was established as a separate Commonwealth entity from ATSIC that administers services and programs to the Torres Strait Islands.<sup>47</sup> While the TSRA is funded by the Department of Finance and Administration, its regional governance framework and the aspirations of Torres Strait Islander people for greater autonomy, is captured within the TSRA 2001 Bamaga Accord.<sup>48</sup> To achieve such autonomous representation, the TSRA consists of twenty elected

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<sup>44</sup> Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (n 11) 123–4.

<sup>45</sup> *Ibid.*

<sup>46</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 1978, 3449 (Ian Viner, Minister for Aboriginal Affairs).

<sup>47</sup> Aboriginal and Torres Strait Islander Commission, Office of Evaluation and Audit, *Evaluation of the Torres Strait Regional Authority* (Evaluation, June 2001) 8.

<sup>48</sup> Garth Nettheim, ‘Towards Regional Government in the Torres Strait’ (2002) 5(16) *Indigenous Law Bulletin* 4.

representatives who work to strengthen the economic, social, and cultural development of Aboriginal and Torres Strait Islander people living in the Torres Strait.<sup>49</sup>

No other subnational representative body enjoys the same powers and responsibilities of the TSRA, but a number of institutions have been developed in several states and territories. In 2008 the Aboriginal and Torres Strait Islander Elected Body ('ATSIEB') was established in the Australian Capital Territory ('ACT') and, in the same year, the South Australia Aboriginal Advisory Council ('SAAC') was established in South Australia ('SA'). Both bodies mark the beginning of government-supported Indigenous representative organisations at the subnational level.

ATSIEB provides a political voice and platform for Aboriginal and Torres Strait Islander peoples living in the ACT on government programs, services, and policies to ensure they are considerate and inclusive of Aboriginal and Torres Strait Islander people. This also ensures programs, services and policies are effective and accessible to Aboriginal and Torres Strait Islander people living in the Territory.<sup>50</sup> Similarly, SAAC provides the SA government with advice on existing and new programs and policies that affect Aboriginal people, emerging issues likely to affect SA Aboriginal people, the development and implementation of future policies and services concerning Aboriginal people, and how the government should consult with Aboriginal communities.<sup>51</sup> Although both bodies are composed only of Indigenous peoples, they are limited to providing advice to their respective governments – they have no formal relationship with the federal government. This limitation is shared by all state or territory-based Indigenous representative bodies.

Other limitations are present in the Victorian First Peoples Assembly, established in 2019. Like developments in other states and territories, the First Peoples Assembly emerged as a result of frustration with Commonwealth intransigence on constitutional reform. Unlike the ACT and SA bodies, however, the Victorian First Peoples Assembly was designed to progress the State's commitment to treaty (discussed in more detail below). The primary role of the Assembly is to work collaboratively with the Victorian Government to develop a treaty negotiation framework under which treaties can be progressed. The Assembly operates as an independent not-for-profit company, rather than set up under State legislation. However, its mandate is more limited than that of a standing representative body. Unlike the proposed First Nations Voice outlined in the Uluru Statement from the Heart, or the ATSIEB or SAAC, the Victorian First

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<sup>49</sup> Ibid; 'Qld Councils Urged to Cooperate', *The Age* (online, 27 July 2007) <<https://www.theage.com.au/national/qld-councils-urged-to-cooperate-20070727-gdqqnf.html>>.

<sup>50</sup> *Aboriginal and Torres Strait Islander Elected Body Act 2008* (ACT) s 8.

<sup>51</sup> South Australian Aboriginal Advisory Council, *Government of South Australia: Department of the Premier and Cabinet* (Web Page, 2021) <<https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/south-australian-aboriginal-advisory-council>>.

Peoples Assembly is not intended to provide advice on laws and policies that affect First Nations peoples. Although it may speak out on these and other matters, its structural link to government is restricted to developing a treaty negotiation framework. Nonetheless, the structure of the Assembly may inform other states and territories as they embark on similar processes.

The establishment of the Assembly has also caused some tension within Aboriginal communities. Only 7 per cent of those eligible to vote participated in the first election in 2019, leading some candidates to secure election with only a handful of votes.<sup>52</sup> While recognising challenges involved in encouraging participation in an entirely novel process and in circumstances where trust in government is lacking,<sup>53</sup> the structure of the Assembly may also have contributed to a sense of anxiety and unease among some Aboriginal Victorians.<sup>54</sup> Indeed, the Yorta Yorta Council of Elders boycotted the election, describing the process as a 'pathway to assimilation'.<sup>55</sup> Nonetheless, as the Assembly continues to work with government to develop a treaty negotiation framework, scepticism within the community may dissipate. At the time of writing, the Assembly has commenced preliminary discussions with the Victorian government to broaden its mandate and establish a permanent Indigenous Voice to give Aboriginal Victorians influence over government decision-making. That proposal has not yet been formalised but is expected to come to a head in 2023 when the final stages of the Assembly's treaty framework negotiations begin.<sup>56</sup>

No Indigenous representative body exists in Western Australia, but recent moves suggest one may be established soon. In June 2018, the Western Australian Government released a discussion paper exploring whether an office for advocacy and accountability in Aboriginal affairs is desirable. The Discussion Paper makes clear that any new body would be an independent and permanent statutory office for advocacy and accountability in Aboriginal affairs in the State.<sup>57</sup> The Office would be responsible for determining how service delivery, accountability, and efficiency of State government programs for Aboriginal people and communities

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<sup>52</sup> Noel Towell, 'Historic Vote, But Only 7 Per Cent Turned Out for Aboriginal Poll', *The Age* (online, 10 November 2019) <<https://www.theage.com.au/politics/victoria/historic-vote-but-only-7-per-cent-turned-out-for-aboriginal-poll-20191110-p53950.html>>.

<sup>53</sup> Jill Gallagher, 'The Work of the Victorian Treaty Advancement Commission to Bring us Closer to Treaties' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Sovereign, Relational, Ready: Treaty Making Two Hundred and Fifty Years Later* (Federation Press, 2021) 220.

<sup>54</sup> Sarah Maddison, Julia Hurst and Dale Wandin, 'The Mess of Colonialism, the Complexity of Treaty' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Sovereign, Relational, Ready: Treaty Making Two Hundred and Fifty Years Later* (Federation Press, 2021) 179.

<sup>55</sup> Chris Walker, 'Trick or Treaty?' (Press Release, Yorta Yorta Elders Council, 25 June 2019) <<https://yynac.com.au/press-release-trick-or-treaty/>>.

<sup>56</sup> Paul Sakkal and Jack Latimore, 'A "Black Parliament"? Victorian Government Discusses Indigenous Voice', *The Age* (online, 23 October 2021) <<https://www.theage.com.au/national/victoria/a-black-parliament-victorian-government-discusses-indigenous-voice-20211022-p592dj.html>>.

<sup>57</sup> Government of Western Australia, *An Office for Advocacy and Accountability in Aboriginal Affairs in Western Australia* (Discussion Paper, June 2018).

can be improved. If successfully established, it would also advocate for Aboriginal people and communities across the State.<sup>58</sup>

The proposal has received tentative support. Respondents generally agreed that an independent Office could be effective in changing the way the Western Australian government engages with Aboriginal people and may provide them with the ability to voice their concerns directly to government.<sup>59</sup> However, it is unclear whether the Office would have a formal advisory role to the State legislature. Reflecting this uncertainty, some respondents have suggested the Office should be empowered with a stronger role in law and policy development and a more formalised relationship with the State parliament. Those respondents also suggested this role might also advance a treaty process in Western Australia.<sup>60</sup> At the time of writing, the Western Australian government is still in the process of considering community feedback.

### ***D The Continued Absence of a National Representative Body***

The emergence of subnational Indigenous representative bodies in several states and Territories is positive, but the continuing absence of a national Indigenous representative body challenges Aboriginal and Torres Strait Islander peoples' ability to have their voices heard and interests considered in the processes of government. As recorded in the Uluru Statement from the Heart, the inability to speak and be heard represents the 'torment of our powerlessness'.<sup>61</sup> The call for a First Nations Voice to Parliament is drawn from the understanding that structural reform to empower Indigenous peoples with an institutional position from which to negotiate and develop a relational partnership with the Australian state is necessary. A constitutionally entrenched body that has the ability to specifically speak to both houses of Parliament on First Nations law and policy reform can enhance the development of a partnership built on a foundation of mutual respect and inclusivity in national decision-making processes.

The Commonwealth government initially dismissed calls for a First Nations Voice.<sup>62</sup> While the Scott Morrison-led Liberal National government has since softened its tone and sought greater details on the design of the body, the government has reiterated its position that it will not consider the Voice's legal

<sup>58</sup> Ibid 2. See further Rangi Hirini, 'WA Announces Initiative for Indigenous Voice to State Parliament', *National Indigenous Television News* (online, 7 June 2018) <<https://www.sbs.com.au/nitv/nitv-news/article/2018/06/07/wa-announces-initiative-indigenous-voice-state-parliament>>.

<sup>59</sup> Government of Western Australia, *Strengthening Accountability and Advocacy in Aboriginal Affairs* (Community Feedback Report, July 2019) 3.

<sup>60</sup> Ibid 4.

<sup>61</sup> *Uluru Statement from the Heart* (n 16).

<sup>62</sup> Malcolm Turnbull, George Brandis and Nigel Scullion, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, Parliament of Australia, 26 October 2017); Elliot Johnston, 'Malcolm Turnbull's Big Let-Down' (2018) 87 *Australian Options* 4, 4–6.

form until the co-design process has been finalised.<sup>63</sup> First Nations involved in the authorship of the Uluru Statement remain steadfast that constitutional entrenchment of the Voice is critical to ensure its success, longevity and effectiveness as a national Indigenous representative body that holds cultural legitimacy and links to local and regional level Indigenous Voices. This is particularly important given that several states and territories are at various stages of talking treaty with First Nations.

#### IV TREATY-MAKING

When European colonial powers met Indigenous political communities, they often negotiated arrangements to secure trading rights or safe passage. Over time, these agreements were formalised into treaties through which colonial powers sought to attain the legal right to obtain land and develop settlements. These agreements were not always fair and equitable and colonial powers did not always respect the promises that they had made. However, in establishing formal legal relationships with First Nations, European powers ‘were clearly aware that they were negotiating and entering into contractual relations with sovereign nations’.<sup>64</sup> In Australia, no treaties were signed at first contact, in the early years of settlement, or at federation.<sup>65</sup> Despite evidence that Aboriginal and Torres Strait Islander peoples possessed ‘a subtle and highly elaborate’ system of laws,<sup>66</sup> colonisation proceeded on the basis that the country was ‘vacant’.<sup>67</sup> Aboriginal and Torres Strait Islander peoples’ sovereignty was not recognised in law, setting in place a legal framework that continues to dismiss the fact that sovereignty was never ceded.<sup>68</sup>

Aboriginal and Torres Strait Islander peoples have long resisted this contention. It was not until after the 1967 referendum, however, that the claim for a legal, binding, and formal agreement or treaty became more pronounced. Perhaps reflecting the concerted push to compel the Commonwealth to engage in Indigenous affairs following the referendum, these calls were directed to the

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<sup>63</sup> Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, (Final Report, 29 November 2018) xvii, Recommendation 1; Mark Leibler, ‘Co-design Brings Voice an Octave Closer to Success’, *The Australian* (online, 22 January 2021) <<https://www.theaustralian.com.au/commentary/codesign-brings-voice-an-octave-closer-to-success/news-story/1f7bbab4b5025413b8dbccbe149f979e>>; Rob Harris, ‘Ken Wyatt Launches Voice to Parliament Consultation’, *Sydney Morning Herald* (online, 30 October 2019) <<https://www.smh.com.au/politics/federal/ken-wyatt-launches-voice-to-parliament-consultation-20191029-p535g6.html>>.

<sup>64</sup> Miguel Alfonso Martinez, Special Rapporteur, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 18 [110].

<sup>65</sup> See generally George Williams and Harry Hobbs, *Treaty* (Federation Press, 2<sup>nd</sup> ed, 2020).

<sup>66</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267 (Supreme Court of the Northern Territory).

<sup>67</sup> Sir Richard Bourke, *Proclamation*, 26 August 1835.

<sup>68</sup> *Love v Commonwealth* (2020) 270 CLR 152, 221–2 [178] (Keane J).

federal government, not the states. The first prominent call came in 1969. That year, Jack Davis, the President of the Western Australian Aboriginal Association, wrote to the Federal Council for the Advancement of Aborigines and Torres Strait Islanders to propose the negotiation of a treaty which would recognise Aboriginal peoples as the original owners of the continent. Davis argued that agreements should be struck between the Commonwealth Government and leaders of each Indigenous kinship group.<sup>69</sup> While Davis' letter went nowhere, calls for a national treaty or treaties continued into the 1970s. In March 1972, the Aboriginal Tent Embassy called for a treaty that would acknowledge dispossession and recognise their rights,<sup>70</sup> while in October that year, 1,000 Larrakia people signed a petition calling on Queen Elizabeth II to help negotiate a treaty.<sup>71</sup>

First Nations aspirations for treaty continued to focus on the Commonwealth. In 1979, the National Aboriginal Conference ('NAC'), an elected Indigenous body advising the federal government, passed a resolution demanding 'a treaty of commitment be executed between the Aboriginal Nation and the Australian Government'.<sup>72</sup> Expecting the government might object to the word 'treaty' and its connotations with international statehood, the NAC later proposed a compromise term, calling instead for a 'Makarrata' between 'the Aboriginal Nation' and 'the Australian Government'.<sup>73</sup> In response to community pressure, the Senate asked its Standing Committee on Constitutional and Legal Affairs to examine the feasibility of securing a compact or Makarrata between the Commonwealth Government and Aboriginal people. In 1983, the Standing Committee delivered its report, recommending constitutional change in order to implement a 'compact'.<sup>74</sup>

Treaty advocacy petered out following the dismantling of the NAC in 1985, but it returned to political prominence in the period surrounding the bicentennial of British colonisation in 1988. The Aboriginal Sovereign Treaty '88 campaign called for the recognition of the sovereignty of Aboriginal people and their ownership of Australia and for the Commonwealth Government to enter into a treaty with the Aboriginal nations of Australia.<sup>75</sup> The Barunga Statement, developed at the Barunga Festival in the Northern Territory, also called on 'the Commonwealth Parliament to negotiate with us a Treaty recognising our prior

<sup>69</sup> Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–1981' (2011) 42(3) *Australian Historical Studies* 372, 377; Karen O'Brien, *Petitioning for Land: The Petitions of First Peoples of Modern British Colonies* (Bloomsbury, 2018) 74.

<sup>70</sup> Williams and Hobbs (n 65) 35.

<sup>71</sup> Robert Secretary et al, *Larrakia Petition to the Queen*, 17 October 1972.

<sup>72</sup> Fenley (n 69) 378.

<sup>73</sup> National Aboriginal Conference, 'The Makarrata: Some Ways Forward' (Position Paper, World Council of Indigenous Peoples, Canberra, April 1981).

<sup>74</sup> Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later...: Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107, 13 September 1983) xii, Recommendation 1.

<sup>75</sup> Treaty 88 Campaign, 'Aboriginal Sovereignty: Never Ceded' (1988) 23(91) *Australian Historical Studies* 1–2.

ownership, continued occupation and sovereignty and affirming our human rights and freedom'.<sup>76</sup> The Barunga Statement was presented to Prime Minister Bob Hawke, who accepted its terms and announced that 'there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia'.<sup>77</sup> No treaty eventuated, however, and the idea was quietly shelved in 1991. Calls for a national treaty by ATSIC in the new millennium also fell on deaf ears.<sup>78</sup>

In the light of this history, it is significant to note that it is only recently that the treaty debate has included state and territory governments. The Uluru Statement from the Heart called for the establishment of a national Makarrata Commission to 'supervise a process of agreement-making between governments and First Nations',<sup>79</sup> implying treaties at both the state and national level. While the federal government has so far ignored the push for a Makarrata Commission, over the last few years, Victoria,<sup>80</sup> the Northern Territory,<sup>81</sup> Queensland,<sup>82</sup> and South Australia,<sup>83</sup> have officially committed to enter treaty negotiations with Aboriginal peoples. The shift towards subnational treaty-making is not simply a reflection of Aboriginal and Torres Strait Islander peoples' frustration at the failure of the Commonwealth to implement the Uluru Statement, but a broader and deeper anger at the failure of successive federal governments to meaningfully progress the decade-long national debate on constitutional recognition.<sup>84</sup> The initial burst of activity at the subnational level reveals the role of supportive Labor governments and laboratory federalism in Indigenous affairs in the Australian federation.

South Australia subsequently abandoned its treaty process following a change of government,<sup>85</sup> but several other states and territories have indicated that they support treaty. In 2018, the ACT government declared they were open to

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<sup>76</sup> 'The Barunga Statement', Australian Institute of Aboriginal and Torres Strait Islander Studies (Web Page, 2022) <<https://aiatsis.gov.au/explore/barunga-statement>>.

<sup>77</sup> Prime Minister Robert Hawke (Speech, Barunga Sports and Cultural Festival, Northern Territory, 12 June 1988) <<https://pmtranscripts.pmc.gov.au/sites/default/files/original/00007334.pdf>>.

<sup>78</sup> Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (Final Report, December 2000) 106, Recommendation 6; Hannah McGlade (ed), *Treaty: Let's Get it Right!* (Aboriginal Studies Press, 2003).

<sup>79</sup> *Uluru Statement from the Heart* (n 16).

<sup>80</sup> *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

<sup>81</sup> *Treaty Commissioner Act 2020* (NT), app.

<sup>82</sup> Department of Aboriginal and Torres Strait Islander Partnerships, Queensland Government, *Treaty Statement of Commitment and Response to Recommendations of the Eminent Panel* (Statement, August 2020).

<sup>83</sup> Kyam Maher MLC, 'Treaty' (Speech, Parliament House, Adelaide, 14 December 2016); Roger Thomas, Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps* (Report, 21 July 2017).

<sup>84</sup> Harry Hobbs, 'The Road to Uluru: Constitutional Recognition and the UN Declaration on the Rights of Indigenous Peoples' (2020) 66(4) *Australian Journal of Politics and History* 613.

<sup>85</sup> Michael Owen, 'Aboriginal People Failed by "Expensive Gesture" Treaties', *The Australian* (online, 11 June 2018) <<https://www.theaustralian.com.au/nation/aboriginal-people-failed-by-expensive-gesture-treaties/news-story/84b000a2f0b81c82801d93cc9a45cb3c>>.

discussing a treaty process with Traditional Owners in the Canberra region,<sup>86</sup> and in 2021 provided funding to facilitate that conversation.<sup>87</sup> In June 2021, the Tasmanian Liberal government committed to talk treaty with Aboriginal Tasmanians, appointing former Governor Kate Warner and law professor Tim McCormack to lead discussions.<sup>88</sup> The New South Wales Labor Opposition also promised to hold treaty talks with Aboriginal nations within the State if they won their 2019 election.<sup>89</sup> Western Australia has not committed to a treaty process, but developments in that state have helped ensure treaty remains at the forefront of political attention. The size and scope of an Indigenous Land Use Agreement negotiated between the state government and the Noongar people in 2016 has led to its being characterised by some public lawyers as Australia's first treaty. The largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history, the settlement covers around 200,000km<sup>2</sup> and 'includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage', amounting to a total value of about \$1.3 billion.<sup>90</sup> Not all Noongar people supported the agreement. Following several years of objections, the Settlement has finally commenced.<sup>91</sup>

The Victorian process has moved furthest along. In June 2018, the Victorian Parliament passed Australia's first treaty bill. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) creates a legislative basis for negotiating a treaty with Aboriginal people in the State. Under the Act, the government is required to recognise an Aboriginal-designed representative body (subsequently established as the First Peoples' Assembly of Victoria) that will administer a self-determination fund to support First Nations in their treaty negotiations.<sup>92</sup> The representative body will also work with the government to establish a treaty negotiation framework. That framework must accord with several guiding principles set out in the Act: self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and

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<sup>86</sup> Nakari Thorpe, "'Real Outcomes' Needed for Clan Groups to Support Any ACT Treaty Process', *National Indigenous Television News* (online, 28 September 2018) <<https://www.sbs.com.au/nitv/nitv-news/article/2018/06/25/real-outcomes-needed-clan-groups-support-any-act-treaty-process>>.

<sup>87</sup> Jasper Lindell, 'Funding for First Indigenous Treaty Process in ACT Budget', *Canberra Times* (online, 7 February 2021) <<https://www.canberratimes.com.au/story/7115029/funding-for-first-indigenous-treaty-process-in-act-budget/>>.

<sup>88</sup> Lucy Shannon, 'Tasmanian Government Commits to Time Frame for Truth-Telling, Treaty Talks with Indigenous Community', *ABC* (online, 23 June 2021) <<https://www.abc.net.au/news/2021-06-23/tasmanian-aboriginal-truth-telling-treaty-discussions/100235634>>.

<sup>89</sup> Calla Wahlquist, 'NSW Labor Plans to Sign Treaty Recognising Indigenous Ownership', *Guardian Australia* (online, 25 January 2018) <<https://www.theguardian.com/australia-news/2018/jan/25/nsw-labor-plans-to-sign-treaty-recognising-indigenous-ownership>>.

<sup>90</sup> Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 31.

<sup>91</sup> Ben Wyatt, 'High Court Clears the Way for Historic South West Native Title Settlement to Proceed' (Media Statement, 26 November 2020).

<sup>92</sup> *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ss 9–10.



transparency and accountability.<sup>93</sup> Jill Gallagher, the Victorian Treaty Advancement Commissioner, explained the role of the First Peoples' Assembly:

Their role is to negotiate the roadmap so clans or mobs or nations here in Victoria can eventually negotiate their own treaties. ... This assembly here in Victoria can be about empowerment. It can be about reshaping our relationship with Victorians, reshaping our relationship with government, and acknowledging the past so we can all move on. It's about reparations and it's about giving a voice to the voiceless. And we've been voiceless for 230 years, in our own country. That's what it's about.<sup>94</sup>

Following elections for the First Peoples' Assembly in 2019, discussion on a treaty negotiation framework has commenced. At the same time, Aboriginal Nations in Victoria are considering their own position. This will take time, and as a result, negotiations are not expected to begin for several years.

The focus on subnational treaty-making is understandable in this context, but it carries some significant challenges. First, there is some concern among Aboriginal and Torres Strait Islander peoples over the genuineness and sincerity of state and territory governments' commitment to renegotiating relationships and empowering First Nations peoples through treaty. For example, before the treaty process in South Australia was abandoned, Aboriginal nations had expressed concern that the process was rushed. In consultations with the State's Treaty Commissioner, many people argued that it 'should be slowed down so that Aboriginal people can properly digest what is being proposed and the principles behind the proposition'.<sup>95</sup> Similar complaints have been made in Victoria. In that State, Djab Wurrung Traditional Owners launched the 'No Trees, No Treaty' campaign to protest VicRoads' plan to cut down sacred trees and highlight the State government's refusal to listen to their position.<sup>96</sup> The Queensland treaty process has also been criticised as moving too quickly. The hurried process fuels concern that it is being driven by that State's alarm over the *Timber Creek* decision,<sup>97</sup> and the desire to foreclose substantial compensation claims.<sup>98</sup>

Second, there are also difficult legal questions surrounding state and territory treaty processes. The constitutional allocation of legislative power means that there are certain matters that cannot be part of a subnational treaty,

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<sup>93</sup> Ibid ss 21–6.

<sup>94</sup> Quoted in Lorena Allam, 'Victoria a Step Closer to Indigenous Treaty with Creation of First Peoples' Assembly', *Guardian Australia* (online, 11 April 2019) <<https://www.theguardian.com/australia-news/2019/apr/11/victoria-a-step-closer-to-indigenous-treaty-with-creation-of-first-peoples-assembly>>.

<sup>95</sup> Roger Thomas, Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps* (Report, 21 July 2017) 8.

<sup>96</sup> Madeline Hayman-Reber, 'No Trees, No Treaty: Protestors Continue to Amass at Djab Wurrung Site', *National Indigenous Television News* (online, 26 August 2019) <<https://www.sbs.com.au/nitv/article/2019/08/22/no-trees-no-treaty-protesters-continue-amass-djab-wurrung-site>>.

<sup>97</sup> *Northern Territory v Griffiths* (2019) 269 CLR 1 ('*Timber Creek*').

<sup>98</sup> See discussion in Williams and Hobbs (n 65) 226, 238; Michael Dillon, 'Policy Implications of the Timber Creek Decision' (Working Paper No 128, Centre for Aboriginal Economic Policy Research, 2019) 9.

potentially threatening the possibility of a comprehensive settlement. Additionally, Aboriginal nations whose traditional lands stretch across state and territory borders may find their negotiating partners have very different ideas over the content and process of treaty-making (assuming that both governments are even committed to negotiating treaty). The ‘uncoordinated pursuit of treaty across the federation’<sup>99</sup> poses real challenges for Aboriginal and Torres Strait Islander peoples.

Most problematically, state and territory based treaties are legally vulnerable to Commonwealth interference. The terms of any Victorian treaty, for example, could be overridden by Commonwealth legislation grounded on the race power in s 51(xxvi) of the Constitution. Similarly, a Northern Territory treaty could be invalidated by Commonwealth legislation under s 122 revoking self-government over certain matters. If it was so inclined, the Commonwealth could override any or all parts of a treaty entered into with a state or a territory. Nonetheless, in assessing the legal vulnerability of subnational treaty processes it is important to note that — even with a First Nations Voice — a Commonwealth treaty will not be legally impregnable either; ‘[i]n the absence of constitutional protection of treaty rights, a future federal Parliament could enact legislation to abrogate any national treaty settlement as well’.<sup>100</sup> For this reason, it is important that treaty processes are insulated from political interference. A First Nations Voice and a comprehensive process of local and regional truth-telling may assist in this endeavour.

## V TRUTH-TELLING

Truth-telling is an important part of the process towards achieving reconciliation between First Nations people of Australia and the Australian government and non-Indigenous Australians. Truth-telling forms the third-sequenced pillar of reforms proposed within the Uluru Statement from the Heart. Delegates who participated in the process of drafting the Uluru Statement understood that a constitutionally protected Indigenous Voice would provide the necessary resources and political legitimacy Indigenous people need prior to entering agreement-making processes. Delegates also considered that without an Indigenous Voice and treaty, truth-telling processes and initiatives will be vulnerable because they will be limited by non-Indigenous bureaucracies that have failed to make real changes and forced Indigenous peoples to continuously relive and retell their trauma and oppression.<sup>101</sup> The delegates’ desire for truth-

<sup>99</sup> Megan Davis, ‘Step by Step: The Road to a Settlement’ (2018) 146 *The Monthly* 12, 12; Harry Hobbs, ‘Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia’ (2019) 23(1–2) *International Journal of Human Rights* 174.

<sup>100</sup> Hobbs and Williams (n 14) 226.

<sup>101</sup> Sana Nakata, ‘On Voice, and Finding a Place to Start’, *Indigenous Constitutional Law* (Blog Post, 3 March 2021) <<https://www.indigconlaw.org/home/on-voice-and-finding-a-place-to-start>>.

telling was to ensure that it not only reveals historic and continuing injustices against Indigenous peoples but provides community with a sense of justice, peace and healing. More importantly, it is intended to allow learning from past mistakes and to prevent recurrence.

Despite the renewed focus on truth-telling inaugurated by the Uluru Statement, it is not a novel idea. Several major truth-telling initiatives have occurred since the 1967 referendum. The most extensive and consequential of these have been undertaken by Commonwealth governments. More remarkable is that the most prominent of these national truth-telling processes have occurred in relation to traditional areas of state and territory responsibility.

One such initiative was the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), established by the Hawke Labor Government in 1987 and concluding its work in 1991. The Royal Commission was precipitated by vocal Indigenous activism over the alarming number, and often the suspicious nature, of the deaths of Aboriginal and Torres Strait Islander people in police custody or prison. In a wide-ranging, multi-volume report that addressed both national and regional issues, the Royal Commission exposed the high and disproportionate figures of Indigenous deaths in custody, the contexts in which those deaths occurred and their causes. It revealed entrenched racial discrimination and corrupt, violent behaviour from police authorities towards Indigenous people placed into the custody of the police.<sup>102</sup> The RCIADIC acknowledged the Commonwealth's funding and leadership role in Indigenous affairs, and its capacity to pressure state and territory governments and agencies to implement recommendations targeted towards police, corrections, health services, the Attorneys-General and the courts.<sup>103</sup>

The RCIADIC was a watershed moment of truth-telling about the ongoing violence visited upon Aboriginal and Torres Strait Islander peoples by the settler colonial legal system. It continues to be a touchstone of public debate and Indigenous advocacy today, even as many of its recommendations remain unimplemented.<sup>104</sup> The beginning of Commonwealth disengagement from the Royal Commission can be traced to the Howard Government. As then Social Justice Commissioner Mick Dodson noted at a Commonwealth-convened national Ministerial Summit on Indigenous Deaths in Custody in 1997:

[T]he Commonwealth demonstrated its co-operative approach by hiring a room so the states and territories could announce what they intended to do, then made defensive

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<sup>102</sup> *Royal Commission into Aboriginal Deaths in Custody* (National Report, 15 April 1991) vol 1–4.

<sup>103</sup> See *ibid*, Recommendation 1.

<sup>104</sup> Thalia Anthony et al, '30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented' (Working Paper No 140, Centre for Aboriginal Economic Policy Research, 2021).

noises about criminal justice being a state responsibility and sent the Ministers home to get on with the job.<sup>105</sup>

Longer-scale national truth-telling initiatives have also been set up. In 1991, the Council for Aboriginal Reconciliation ('CAR') was established to undertake a formal, 10-year process of national reconciliation between Indigenous and non-Indigenous Australians. CAR consisted of 25 members who represented Aboriginal and Torres Strait Islander communities and the broader Australian community. One of its statutory functions was to progress the cause of reconciliation by promoting 'a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders' — and providing 'a forum for discussion by all Australians of issues relating to reconciliation'.<sup>106</sup> While CAR supported a range of important national and local initiatives in truth-telling, it had a difficult relationship with the Howard Government, which rejected its final recommendations for constitutional reform and treaty.<sup>107</sup>

In 1995, the Keating Labor Government initiated another major national truth-telling initiative, this time into the Stolen Generations — the thousands of Aboriginal and Torres Strait Islander children removed from their families by Australian governments since the late 19<sup>th</sup> century. As with the RCIADIC, the Bringing Them Home Inquiry (as it would come to be known) came about as a result of Indigenous advocacy, stemming from a concern that 'the general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and their families and the provision of services'.<sup>108</sup> The Bringing Them Home Report was 'widely read, with sixty thousand copies purchased in the first year of its release alone',<sup>109</sup> and community knowledge and understanding of the Stolen Generations has improved substantially since the 1990s.

Acceptance of Australian history at a Commonwealth level was resisted by former Prime Minister John Howard who referred to acknowledgement of events like the Stolen Generations and the frontier wars as a 'black armband' view of history. The black armband places a white blindfold on history and, in doing so, has contributed to societal and government failure to acknowledge the experiences of Indigenous people as a result of past wrongful government actions.

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<sup>105</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report* (Human Rights and Equal Opportunity Commission, 1997) 23.

<sup>106</sup> *Council for Aboriginal Reconciliation Act 1991* (Cth) ss 6(b), (d).

<sup>107</sup> Lino (n 6) 37–8.

<sup>108</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) 15.

<sup>109</sup> Anne Orford, 'Commissioning the Truth' (2006) 15(3) *Columbia Journal of Gender and Law* 851, 867.

This has maintained the gap that has been a barrier to achieving truth-telling and reconciliation in Australia at a national level with Indigenous people.<sup>110</sup>

Not all governments supported this position. Reflecting the trend that we have identified in this article, sympathetic state and territory governments rejected Howard's denial of history. Between 1997 and 2001, all state and territory governments acknowledged past practices and policies of forced removal of Aboriginal and Torres Strait Islander children and issued their own apologies for the trauma those policies caused.<sup>111</sup> It was not until a Labor government was elected at the federal level that a formal national apology to Indigenous people was made on behalf of the Commonwealth government for its contribution to the Stolen Generations.<sup>112</sup> The impact of the national apology is evidence of the importance of historical acceptance of past government actions to achieve healing and reconciliation.<sup>113</sup>

It is this sentiment that lay behind the Uluru Statement from the Heart's call for a Makarrata Commission to oversee a process of truth-telling about Australia's history. Such a process is integral for healing and reconciliation to occur in a manner that would bring benefit to all Australians, particularly Aboriginal and Torres Strait Islander people. The First Nations representatives who participated in the regional dialogues and Uluru Convention strongly supported the implementation of truth-telling initiatives. It was in their view that doing so would provide the Australian people with a fuller understanding and awareness of First Nations culture and history. In Adelaide, for instance, delegates explained:

[We] want the history of Aboriginal people taught in schools, including the truth about murders and the theft of land, Maralinga, and the Stolen Generations, as well the story of all the Aboriginal fighters for reform. Healing can only begin when this true history is taught.<sup>114</sup>

Across the country, dialogue participants emphasised that the true history of colonisation must be told. In their view, truth could serve as a bridge to connect

<sup>110</sup> Patrick Brantlinger, '“Black Armband” versus “White Blindfold” History in Australia' (2004) 46(4) *Victorian Studies* 655, 657.

<sup>111</sup> Coral Dow, 'Sorry: The Unfinished Business of the Bringing Them Home Report' (Background Notes, Parliamentary Library, Parliament of Australia, 4 February 2008).

<sup>112</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

<sup>113</sup> Paul Daley, 'Historian Shines a Light on the Dark Heart of Australia's Nationhood', *Guardian Australia* (online, 10 March 2014) <<https://www.theguardian.com/world/postcolonial/2014/mar/10/historian-shines-a-light-on-dark-heart-of-australias-nationhood>>; Brantlinger (n 110) 658; Lawrence McNamara, 'History, Memory and Judgment: Holocaust Denial, the History Wars and Law's Problems with the Past' (2004) 26(3) *Sydney Law Review* 353.

<sup>114</sup> Referendum Council, *Final Report of the Referendum Council* (Report, 30 June 2017) 19 n 31.

acknowledgment of historic injustices with a contemporary project of structural reform.<sup>115</sup>

The Commonwealth governments in power since the Uluru Statement was issued have not responded to its call for truth-telling processes. At most, they have adopted tokenistic policies. On 1 January 2021, for instance, Prime Minister Scott Morrison announced his decision to change a single word in the Australian national anthem; the line that Australians are 'young and free' would be amended to 'one and free' in a bid to honour Indigenous people.<sup>116</sup>

In the face of the federal government's seeming indifference to a nationally-led truth-telling process as envisioned by the Uluru Statement, the Victorian Labor Government has taken the initiative. In June 2020, the First Peoples Assembly of Victoria called on the Victorian Government to establish an independent truth commission or inquiry to formally recognise historic wrongs, and past and ongoing injustices as a result of colonisation.<sup>117</sup> The Victorian government responded to those calls with support. Over the latter part of 2020, the First Peoples Assembly commenced work designing Australia's first officially designated Truth and Justice Commission. On 9 March 2021, the State government announced the establishment of the Yoo-rook Justice Commission in partnership with the First Peoples Assembly. The Yoo-rook Justice Commission will be Australia's first ever truth-telling Commission.<sup>118</sup>

The Commission commenced its work investigating past and present injustices against the Aboriginal people of Victoria in July 2021. This broad jurisdiction allows detailed focus on the interconnections between past and ongoing contemporary harm. Indeed, it is likely that the Commission will explore how abuses suffered during the frontier wars and colonial period continue to affect and influence the experiences of Aboriginal Victorians today, particularly in relation to harms such as deaths in custody and incarceration.<sup>119</sup> With the powers of a Royal Commission, the Yoo-rook Justice Commission will be able to fulfil its responsibilities independent of government. Nevertheless, some limitations do exist; it will not have the power to order reparations, punish

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<sup>115</sup> Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501; Megan Davis, 'The Long Road to Uluru Walking Together: Truth Before Justice' (2018) 60 *Griffith Review* 15, 41.

<sup>116</sup> Jessie Yeung, 'Australia Has Changed its National Anthem in a Bid to Reflect 60,000 Years of Indigenous History', *CNN* (online, 1 January 2021) <<https://edition.cnn.com/2021/01/01/australia/australia-anthem-indigenous-intl-hnk-scli/index.html>>.

<sup>117</sup> Joseph Dunstan, 'Victorian First Peoples' Assembly Calls for Truth Commission on Path to Treaties with Aboriginal Nations', *ABC News* (online, 18 June 2020) <<https://www.abc.net.au/news/2020-06-18/victorian-aboriginal-treaty-body-calls-for-truth-commission/12361496>>.

<sup>118</sup> Darby Ingram, 'Victoria Launches Country's First Truth-Telling Commission', *National Indigenous Times* (online, 10 March 2021) <<https://nit.com.au/victoria-launches-countrys-first-truth-telling-commission/>>.

<sup>119</sup> Leonie Thorne, 'Victoria to Establish Truth and Justice Process as Part of Aboriginal Treaty Process', *ABC News* (online, 11 July 2020) <<https://www.abc.net.au/news/2020-07-11/victoria-truth-telling-process-moment-aboriginal-history/12446102>>.

individuals, or implement reforms.<sup>120</sup> This is because its overall mandate is to build a stronger relationship between Aboriginal people of Victoria and the Victorian government, by addressing past and present injustices.<sup>121</sup> The creation of the Yoo-rook Justice Commission is significant. It serves not only as a mechanism to provide healing for Victoria's Aboriginal people and communities, but if effective, can serve also an example that other states and territories could adopt. Nonetheless, it does not absolve the Commonwealth of its responsibility to engage seriously with the Uluru Statement's call for a Makarrata Commission to supervise regional and local truth-telling around the country.

## CONCLUSION

In this article, we have outlined the shifting locus of Indigenous law reform in Australia. While Aboriginal and Torres Strait Islander peoples continue to call on the federal government to protect and promote their rights, in recent years the majority of promising law reform has occurred at the subnational level. It is not only that the states and territories have proved more receptive to the aspirations and advocacy of Aboriginal and Torres Strait Islander peoples, but that progress at the subnational level has come at the same time that the federal government has consciously receded from the field. Beginning with the election of the Howard government in 1996, the Commonwealth has determined to adopt a lower profile on legal reform in Aboriginal and Torres Strait Islander affairs. This extends to its muted response to the Uluru Statement from the Heart. As we have documented, the federal government continues to dismiss calls for a constitutionally enshrined First Nations Voice and disclaims any responsibility for treaty-making or truth-telling. In the words of Indigenous Affairs Minister Ken Wyatt, '[i]t is important that state and territory jurisdictions take the lead'.<sup>122</sup>

Three points can be identified in this shift. First, Australia's federal system has often complicated the ability of Aboriginal and Torres Strait Islander peoples to protect and promote their rights. The initial constitutional distribution of legislative powers left the responsibility for Aboriginal and Torres Strait Islander peoples in the hands of the states – a constitutional incapacity that allowed the federal Cabinet to dismiss William Cooper's 1937 petition to the King.<sup>123</sup> The 1967 referendum did not solve this challenge; opaque lines of responsibility continue

<sup>120</sup> Tony Wright, 'The Yoo-rook Justice Commission: Some Facts About Truth-Telling', *The Age* (online, 14 May 2021) <<https://www.theage.com.au/national/victoria/the-yoo-rook-justice-commission-some-facts-about-truth-telling-20210513-p57rql.html>>.

<sup>121</sup> Joseph Dunstan, 'What Australia's First Aboriginal Truth and Justice Commission Might Look Like', *ABC News* (online, 12 December 2020) <<https://www.abc.net.au/news/2020-12-12/australian-aboriginal-truth-and-justice-commission-what-is-it/12956326>>.

<sup>122</sup> Quoted in Dan Conifer, 'Indigenous Constitutional Recognition to be Put to Referendum in Next Three Years, Minister Promises', *ABC News* (online, 10 July 2019) <<https://www.abc.net.au/news/2019-07-10/indigenous-constitutional-recognition-to-go-to-referendum-wyatt/11294478>>.

<sup>123</sup> Attwood and Markus (n 38) 58.

to allow federal and state and territory governments to obscure failures within their policy spheres. Notwithstanding these complications, however, we have demonstrated that the federation can also carry considerable benefits. Chief among these is the fact that state and territory governments can engage in significant law reform without waiting for the Commonwealth government to act.

Developments in constitutional recognition, the establishment of Indigenous representative bodies, treaty-making and truth-telling are only occurring because of Australia's federal structure. As we saw in relation to the insertion of preambular statements of constitutional recognition, and may be seeing in relation to treaty-making, efforts by one government are placing pressure on other governments. Proven success in bringing about change at the state and territory level could eventually generate credibility and momentum for reform at the national level.

Second, reform at the state and territory level has not been shared across the federation. As we have seen, Victoria has repeatedly been at the forefront of subnational Indigenous law reform. In our view, this highlights not only the strength of First Nations activism in that State but also the fact that Victoria appears to be a relatively more progressive electorate. One reason for this might involve the way in which Victoria has been associated with extended periods of Labor rule in recent decades – though Queensland and South Australia have seen similar stretches of Labor government.

Third, this positive narrative must be tempered. Even if legal reform in Victoria may place political pressure on the New South Wales government, it does not directly assist Aboriginal people in that State. A treaty between the Wurundjeri people and Victoria will offer little immediate value to the Wiradjuri Nation in NSW. Similarly, the allocation of constitutional powers in the Australian federation means that any reform at the state and territory level remains legally vulnerable. As such, significant downsides and risks are involved in the exclusive pursuit of protections of Indigenous rights at the subnational level.<sup>124</sup> The optimal solution remains the simplest. Contra Ken Wyatt, it is important that the Commonwealth take the lead. The federal government should meaningfully engage with the aspirations of Aboriginal and Torres Strait Islander peoples and listen to their calls for structural reform. It is only by doing so that Aboriginal and Torres Strait Islander peoples' 'ancient sovereignty can shine through as a fuller expression of Australia's nationhood'.<sup>125</sup>

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<sup>124</sup> Davis, 'Voice, Treaty, Truth' (n 15).

<sup>125</sup> *Uluru Statement from the Heart* (n 16).