11 June 2018

Committee Secretary
Joint Standing Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Secretary,

Thank you for the opportunity to make a submission to this inquiry on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples.

I am a PhD Candidate at the University of New South Wales Faculty of Law. My thesis explores whether institutional reform to the structural architecture of the Australian state may empower Aboriginal and Torres Strait Islander peoples with the capacity to have their voices heard and their interests considered in the processes of government at the Commonwealth level. In light of the Uluru Statement from the Heart, which revealed widespread support among Aboriginal and Torres Strait Islander peoples for a voice to the federal Parliament, I approach this question primarily by assessing two Indigenous representative bodies with formal access to parliamentary decision-making. I examine the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Swedish Sámi Parliament, a representative body for the Indigenous Sámi people of Sweden. My submission will focus on the three arms of the Uluru Statement: voice, truth, and treaty.

Voice

The deliberative dialogues conducted by the Referendum Council revealed that Aboriginal and Torres Strait Islander peoples are alienated from the processes of government. Despite a formally equal opportunity to express themselves in political debate, Australia's governance system does not empower Aboriginal and Torres Strait Islander peoples with a real capacity to be heard. An absence of judicially enforceable rights protections and the primacy of representative and responsible government as mechanisms of accountability emphasise the importance of ensuring one's interests are heard in Parliament. However, electoral system design, demographics, and political considerations, combine to mean that Aboriginal and Torres Strait Islander people have a limited 'say in the parliamentary life of Australia'.[1]

In recent years, concerted effort by the major political parties to preselect Aboriginal and Torres Strait Islander candidates has led to successes. Although only eight politicians who identify as Indigenous have served across the life of the federal Parliament, six of those were elected in or following the 2010 election; and four are serving in the current 45th Parliament (including three on this Committee). This is a positive development that carries with it the possibility of greater engagement and consideration of issues that affect Indigenous peoples.

[1] Marcia Langton, 'Finding a Resolution to Constitutional Recognition of Indigenous Australians' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016), 27, 39; Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 23.

Nonetheless, it does not alter the fact that the design of Australia's electoral system fosters a model of representation that inhibits the ability of Indigenous Members of Parliament to represent Indigenous peoples, let alone encourage parliamentary debate on their distinctive concerns. Aboriginal and Torres Strait Islander people may speak for Indigenous interests, but they ultimately represent their constituents – Indigenous and non-Indigenous alike – as well as their political party's platform. These, potentially countervailing, interests must be considered by Aboriginal and Torres Strait Islander Members.

It is for this reason that Aboriginal and Torres Strait Islander peoples desire a Voice; 'a new review requirement for laws with respect to Aboriginal and Torres Strait Islander people;'[2] an 'institutional tension or brake' on government power,[3] to rectify feelings of being dictated to. The Uluru Statement from the Heart proposed a constitutionally conservative and politically modest reform option: a representative body with the authority to advise Parliament on proposed laws to be enacted under s 51(xxvi) (the races power) and s 122 (the Territories power). Survey results indicate that the Australian public supports this proposal.[4]

The experiences of ATSIC and the Swedish Sámi Parliament suggest that there will be challenges and complications under this model. First, Aboriginal and Torres Strait Islander peoples will not be successful in securing desired changes to all proposed bills and legislation. In fact, problematically, formalising rights to participate in decision-making will not necessarily entirely resolve concerns surrounding the extent (or genuineness) of any consultation. Nonetheless, procedural obligations requiring the government to consult at an early stage in the process, and publicly identify how those interests were considered and influenced the decision adopted would go some way to providing Aboriginal and Torres Strait Islander peoples with confidence that decision-makers have listened to their voices in good faith—even if their voices have not carried the day. Considered effort therefore needs to be expended on its design to ensure that the body is able to speak at a stage and in a forum where it has a real opportunity to influence the final text of any bill.

Second, the Swedish Sámi Parliament struggles to perform its functions as a result of limited funding. This fact reaffirms that a First Nations Voice must be resourced appropriately to fulfil its responsibilities. Sufficient funding should be provided to its *political* responsibilities, rather than simply to its administrative roles. Members should be provided appropriate salaries as a means to attract well-qualified individuals and to reflect the status of the body. In addition, members should be provided with staff, facilities, and resources to enable them to ascertain the views of their constituents and provide those views to the Parliament at an early stage in legislation and policy development.

Finally, a First Nations Voice, like the Swedish Sámi Parliament, is intended to reflect the fact that Aboriginal and Torres Strait Islander peoples are distinct polities within the Australian community who never ceded sovereignty. This status should be reflected in several ways, including for example, the remuneration and resourcing of members of the body, the ability of the Chair of the body to speak in Parliament, and perhaps, a permanent building. Comparison with the Swedish Sámi Parliament is instructive. Only the President

---

[2] Commonwealth of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, 185.
[3] Megan Davis, 'A Rightful Place: Correspondence' (2014) 56 *Quarterly Essay* 73, 79.
[4] Stephanie Zillman, 'Indigenous advisory body would be supported by Australians, survey finds', *ABC News*, 30 October 2017 <http://www.abc.net.au/news/2017-10-30/australians-would-support-referendum-indigenous-voice-parliament/9101106>.

serves full-time, and no representatives have any staff to assist in their parliamentary duties. Some 24 years after its establishment, it still does not have a permanent building, operating out of committee rooms across northern Sweden. Its struggles with earmarking further constrain its ability to develop distinctive Sámi policies and present them to government. Consistent with this impoverished status, even the state acknowledges that consultation is not carried out in a 'consistent and comprehensive way' and is 'not sufficient to ensure Sámi influence'.[5] A First Nations Voice should bear these lessons in mind. It should reflect Aboriginal and Torres Strait Islander peoples' position as the First Nations and empower Indigenous peoples to be heard in decisions that affect them.

Truth

The Uluru Statement from the Heart also called for the establishment of a Makarrata Commission to supervise a process of truth telling about Australia's colonial history and agreement making across the country. The call for a process of local and regional truth telling is key for any lasting and meaningful form of reconciliation between Indigenous and non-Indigenous peoples in this country.

Transitional justice scholars have long recognised that truth telling is key to reconciliation.[6] This is the case even for countries like Australia, where the initial injustices occurred generations ago. Indeed, although many of the stories identified in the Referendum Council Regional Dialogues as needing to be told—invasion, massacres, resistance, protection—took place in the past, their effects have not passed.[7] For Aboriginal and Torres Strait Islander peoples then, a Makarrata Commission is not intended to simply flesh out counter-narratives and a provide a richer understanding of Australia's past—though that is one outcome. Rather, the process of truth telling is 'a bridge', intended to 'draw history into the present'.[8]

Local and regional truth-telling is intended to identify and articulate connections between denial of Indigenous sovereignty, peoplehood, and agency at first contact, during the frontier massacres, and in the racist and protectionist policies of the colonial period, *with* contemporary legislation, policies and attitudes that operate to perpetuate their disempowerment. This was expressed most clearly in Dubbo, where delegates spoke of the 'need to acknowledge the illegality of everything done since colonisation.'[9] It is this silence about Australia's past and ignorance of Australia's Indigenous history, that is a central cause of what the Uluru Statement described as the 'torment of our powerlessness'. Truth telling will therefore not only serve to 'narrow the range of permissible lies' as Michael Ignatieff suggests, but may serve to ground the public support necessary for constitutional amendment to empower Aboriginal and Torres Strait Islander peoples.

---

[5] Sweden, Ministry of Culture, Ds 2017: 43 'Consultation on Issues Related to the Sami People' (2017) 35.
[6] Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, UN Doc A/HRC/21/46 (9 August 2012).
[7] Royal Commission into Aboriginal Deaths in Custody (1991) vol 2, 1: 'So much of the Aboriginal people's current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past'
[8] Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Non-Transitional Society' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2010) 217, 230-231.
[9] Cited in Referendum Council, *Final Report* (2017) 17

Treaty

Treaty is another long-held aspiration of Aboriginal and Torres Strait Islander peoples. There are many examples of contracts or agreements between Indigenous peoples and governments, both in Australia and around the world. In Australia, for instance, there are agreements relating to land rights, joint-management of national parks, and resource benefit-sharing agreements, among many others. These agreements all secure important outcomes, empowering Aboriginal and Torres Strait Islander peoples to play a meaningful role in the development and implementation of solutions to problems faced by their communities. They are not treaties, however.

In a recent article (attached), George Williams and I argue that a treaty is a special kind of agreement that must satisfy three conditions.[10] We draw these conditions from contemporary international human rights instruments concerning Indigenous peoples and modern treaties that are currently being negotiated in Canada today. We argue that, first, a treaty must recognise Indigenous people as a distinct political community as well as acknowledge the deep historic and contemporary injustices that invasion has caused. Acknowledgment of this status differentiates Indigenous peoples from other citizens and distinguishes the agreement from other legal forms, such as contracts.

Second, a treaty is a political agreement that must be reached by way of a fair process of negotiation between equals. Negotiation is the appropriate process for resolving differences between Indigenous peoples and the State as it reduces the risk that the rights and interests will be ignored, brings all relevant information and perspectives to the decision-making process, and recognises that winner-take-all processes are unlikely to endure or to produce good policy.[11] Finally, a treaty must also contain more than symbolic recognition, or simply service delivery provisions. Although the content of any negotiated settlement may differ, a treaty must recognise and provide for an inherent right to self-government. This is both a concomitant of the recognition of an Indigenous community as a distinct political community, as required under the first criteria, and a recognition that a treaty is designed to improve the lives of Indigenous communities and to secure the foundations for a just relationship going forward; for a reconciled and united nation. As the Canadian Supreme Court has explained, a treaty is 'an exchange of solemn promises … [and] an agreement whose nature is sacred'.[12]

Treaty processes are ongoing in several states and territories in Australia. Victoria and the Northern Territory have officially committed to enter treaty negotiations. Reflecting the political nature of these agreements, however, the situation is complex and subject to change. For example, despite officially commencing treaty negotiations with three Aboriginal Nations, the recently elected South Australian government has stopped the treaty process, despite widespread support for negotiations among Aboriginal peoples in that state.[13]

The processes at the state and territory level are hugely significant. However, they are inherently fragile. Although the states and territories are legally competent to negotiate and

[10] Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40 *Sydney Law Review* 1, 7-14.
[11] See also Sean Brennan et al, *Treaty* (Federation Press, 2005) 8.
[12] *R v Badger* [1996] 1 SCR 771, 793 [41] (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ).
[13] Dr Roger Thomas, *Treaty Talk: Summary of Engagements and Next Steps* (Office of the Treaty Commissioner, July 2017).

enact treaties, the division of powers in a federal system means that the Commonwealth government can overrule any treaty settlement. It is for this reason that Commonwealth support, via a Makarrata Commission, is critical. This does not mean that there should necessarily be one single national treaty; Aboriginal and Torres Strait Islander peoples and communities are differently situated and may prefer different arrangements. The choice is theirs to make. Certainly, the modern treaty process in Canada is state and territory-based, with federal government support.

As the Uluru Statement from the Heart recognised, treaty is particularly important because it has the capacity to contribute to a more unified and reconciled nation. Indeed, in a recent article (attached) I argue that treaty (or treaties) is a key mechanism that can contribute to a reconciled Australia because at its core treaties are about relationships with and between peoples.[14] In articulating these relationships, treaties tell a story about the interaction between different peoples and communities that share the land, and the values and responsibilities that secure the bonds of association between and among those communities. In this sense, treaties are a process of 'belated state building',[15] whereby the political and legal foundations of the Australian nation are legitimated and new understandings of identity and citizenship are constituted.

Treaties provide a language for citizens within Indigenous and non-Indigenous communities to listen, to talk, and to articulate common aspirations and values embedded in a shared history. As such, they are a medium through which, in the words of Edward Allen, CEO of the Nisga'a Lisims Government, 'we have negotiated our way into Canada, to be full and equal participants of Canadian society'.[16] In the Uluru Statement from the Heart, Aboriginal and Torres Strait Islander peoples drew on this understanding to invite non-Indigenous Australians 'to walk with us in a movement of the Australian people for a better future'. I believe non-Indigenous Australians are ready. The Committee should recommend the government adopt the proposals of the Uluru Statement from the Heart.

Yours sincerely

Harry Hobbs
Doctoral Candidate, UNSW Law
[redacted]

[14] Harry Hobbs, 'Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty' (2018) 53 *Australian Journal of Political Science* 176.
[15] Erica-Irene Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' (1993) 3 *Transnational Law & Contemporary Problems* 1, 9.
[16] Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11(3) *International Journal on Minority and Group Rights* 233, 234.