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LAW & HUMAN DIGNITY

# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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# **'IT BEGINS WITH VICTORIA' — THE YOORROOK JUSTICE COMMISSION & INNOVATING TRANSITIONAL JUSTICE FOR FIRST NATIONS AUSTRALIA**

DR JEREMIE M BRACKA\*

*Transitional justice is long overdue to address colonialism and ongoing harms to First Nations people in Australia. The full truth of Australian history is ripe for recognition; yet, until recently, national efforts to address the colonial past have been partial, disconnected and State-centric. Moreover, the Federal government has often used the term 'reconciliation' politically as a rhetorical device, rather than a term of transitional justice. Nevertheless, in 2021, the State of Victoria established Australia's first ever comprehensive truth-telling process with the Yoorrook Justice Commission. Seeking to address the harms since colonisation, the state process is unprecedented, based on its scope, First Nations ownership, powers of a Royal Commission and ability to hold the state accountable. This article examines the Commission's contribution to structural truth-telling, First Nations empowerment, and institutional reform. It also identifies the Victorian initiative as a ground-breaking transitional justice model for settler-colonialism. Despite the challenges, incorporating truth and reconciliation through a First Nations lens might allow actual healing and practical change to occur.*

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## I INTRODUCTION

Australia's colonial era is formally over. Yet legacies of structural inequality, dispossession, exploitation, and racism against First Nations, Australians remain alive and well. From inter-generational trauma to historical massacres, Australia is yet to fully grapple with its dark past. Today, Australia finds itself at a critical juncture. The absence of constitutional protection of First Nations rights and national truth-telling, as well as the lack of treaty agreements, places First Nations' people in a uniquely vulnerable position. The Australian experience of transitional justice has been largely piecemeal and relatively ineffective in achieving the goals of truth-telling, reconciliation, and national healing. Moreover, Australia has engaged in 'reconciliation' as a political discourse rather than one of transitional justice.

Nevertheless, in 2021, Victoria established Australia's first ever truth-telling process with the Yoorrook Justice Commission. Seeking to address the harm perpetrated against First Nations people since colonisation, the state process is unprecedented in Australia and abroad. This article considers its relevance to national truth-telling, accountability, and structural reform. It also contends that the recent Victorian development marks an innovative transitional justice model for settler-colonialism departing from previous practices and scholarship. Indeed, the Yoorrook Justice Commission sets a valuable precedent for the establishment of a national Makarrata Commission. Ultimately, its work and design reflect the importance of First Nations ownership over transitional justice processes, and the need to name 'race' in conversations about harm and healing.

## II COLONIAL LEGACIES OF HARM, RACE AND DENIAL

A *Harm and Race*

Since British settlement in 1788, large-scale political violence has been perpetrated against First Nations people. This has included the use of armed force, wars, over-incarceration, deaths in custody, the removal of children, and territorial dispossession.<sup>1</sup>

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<sup>1</sup> Henry Reynolds, *An Indelible Stain?: The Question of Genocide in Australia's History* (Viking Press, 2001); Jens Korff, 'Timeline results for 1770 to 1899', *Creative Spirits* (Web Page) <<https://www.creativespirits.info/aboriginalculture/timeline/searchResults?q=&category=any&yearFrom=1770&yearTo=1899>>.

Unlike other settler-colonial states, like Canada and New Zealand, no formal treaty was signed with the over 200 separate First Nations communities who possessed the land for over 60,000 years.<sup>2</sup> Many communities resisted colonial invasion, but settler diseases, frontier wars, and mass atrocity deprived First Nations peoples of much of their community, culture, and country. First Nations peoples ‘were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement... [t]heir dispossession underwrote the development of the nation’.<sup>3</sup>

Specifically, race has been a conduit and catalyst for the legacies of abuse.<sup>4</sup> Colonisation was predicated on the indefensible notion that First Nations people were ‘less civilised, less human, and less deserving than white people’.<sup>5</sup> This ideology coupled with land confiscation led to a suite of laws, policies, and practices that both enabled and supported the colonial project. For example, it was through ‘the intersection between race and property’ that the legal fiction of terra nullius was invoked by the British Crown to justify White land settlement.<sup>6</sup> Indeed, in *Mabo v Queensland [No 2]* (*Mabo No. 2*) Brennan J noted that ‘[t]he theory that the indigenous inhabitants of a “settled” colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization, and customs’.<sup>7</sup>

Accordingly, race has been embedded into the legal structures of the Australian state in a way that has allowed the harm to continue. At Federation, First Nations people were largely regarded as a ‘dying race’<sup>8</sup> and ‘marginal’ by the drafters of the *Constitution*.<sup>9</sup> In this light, there were only two references to First Nations people in the *Constitution*, both

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<sup>2</sup> Peter 2, ‘The past 50,000 years: an archaeological view’ in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) 17, 19.

<sup>3</sup> (1992) 175 CLR 1, 69 (Brennan J) (*Mabo No. 2*).

<sup>4</sup> Mark McMillan and Sophie Rigney, ‘Race, reconciliation, and justice in Australia: from denial to acknowledgment’ (2018) 41(4) *Ethnic and Radical Studies* 759, 759.

<sup>5</sup> Victorian Government, Submission to the Yoorrook Justice Commission (28 April 2023) [10] citing *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) vol 1, [1.4.8]–[1.4.9] (*RCIADIC*).

<sup>6</sup> Aileen Moreton-Robinson, ‘Writing off Indigenous sovereignty: The discourse of security and patriarchal white sovereignty’ in A Moreton-Robinson (ed) *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007).

<sup>7</sup> *Mabo No. 2* (n 3) 39 (Brennan J).

<sup>8</sup> Geoffrey Sawer, ‘The Australian Constitution and the Australian Aborigine’ (1966) 2(1) *Federal Law Review* 17, 18.

<sup>9</sup> John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) 71.

of which were exclusionary.<sup>10</sup> It was not until 1967 that the nation's founding document was amended to allow First Nations people to be counted in the Australian population.<sup>11</sup>

Racial laws have also been used to justify ongoing violence. Since European occupation, protection laws sought to dispossess First Nations people through assimilation and segregation on racial grounds.<sup>12</sup> For example, a complex set of laws underpinned by racial belief systems led to the removal of First Nations children from their families.<sup>13</sup> Other laws denied basic civil and political rights, such as voting, political participation, citizenship and freedom of movement and association. More recent examples include laws regarding the administration of criminal justice that appear unbiased yet are applied in a manner that reflects entrenched racism.<sup>14</sup>

### B Denial

Not only has harm been inflicted on racial grounds, but it has been repeatedly denied.<sup>15</sup> In 1969, William Edward Stanner called upon historians to break 'the great Australian silence'.<sup>16</sup> White Australian institutions have created a narrative that has denied and/or minimised responsibility for harm.<sup>17</sup> Indeed, the Australian state and its laws have mirrored and perpetuated the denial of First Nations identity, presence, customs, and rights. Thus, legal proceedings frequently failed to redress many instances of harm perpetrated against First Nations people in the name of protection and welfare.<sup>18</sup> While

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<sup>10</sup> Section 51(xxvi) of the *Australian Constitution* provided that the Commonwealth had power to make laws with respect to 'the people of any race, *other than the aboriginal race in any State*' (emphasis added). Section 127 stated '[I]n reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.

<sup>11</sup> Section 51(xxvi) altered by *Constitution Alteration (Aboriginals) 1967* (No 55 of 1967) s 2 and s 127 repealed by *Constitution Alteration (Aboriginals) 1967* (No 55 of 1967) s 3.

<sup>12</sup> As well as protectionist legislation, this included the *Neglected and Criminal Children Act 1864* (Vic) and the *Adoption Act 1928* (Vic); Australian Human Rights Commission, *Bringing them Home* (Final Report, April 1997) 50–8 ('*Bringing them Home*').

<sup>13</sup> *Bringing them Home* (n 11) 50–8.

<sup>14</sup> See Melissa Castan, 'Reconciliation, Law, and the Constitution' in Michelle Grattan (ed), *Reconciliation* (Bookman Press, 2000) 202, 206.

<sup>15</sup> McMillan and Rigney (n 4) 763.

<sup>16</sup> William Edward Hanley Stanner, *After the dreaming: black and white Australians – an anthropologists' view* (Australian Broadcasting Commission, 1969) 25 cited in Damien Short, 'When sorry isn't good enough: Official remembrance and reconciliation in Australia' (2012) 5(3) *Memory Studies* 293, 297 ('When sorry isn't good enough').

<sup>17</sup> McMillan and Rigney (n 4) 774.

<sup>18</sup> See *Kruger v Commonwealth* (1997) 190 CLR 1; Megan Davis, *Competing notions of constitutional 'recognition': truth and justice or living 'off the crumbs that fall off the White Australian tables?'* (Parliamentary Paper No 62, October 2014).



the landmark *Mabo No. 2* decision in 1992 paved the way for legislative recognition of native title, its limitations have caused new trauma for those who could not meet the stringent eligibility tests. For example, native title also established that such claims may be swept away “by the tides of history”.<sup>19</sup> Legal decisions have thus denied the spiritual and ongoing First Nations connection to country.<sup>20</sup>

In 1996, the Federal Minister for Indigenous Affairs claimed that the Stolen Generations was not a ‘generation’ at all — because only ten per cent of children that potentially could have been removed from their families, were in fact removed.<sup>21</sup> More recently, former Prime Minister Scott Morrison denied that black slavery ever took place in Australia.<sup>22</sup> Although he later apologised, First Assembly Co-Chair and Taungurung man Marcus Stewart said that in 2020 such a statement from the nation’s leader suggests “there’s something fundamentally wrong about our nation’s narrative and our state’s narrative”.<sup>23</sup> In sum, recognition of White Australia, and its systems, in the discrimination against First Nations peoples, as well as protection from ongoing racial oppression remain to be reckoned with.

### III NATIONAL EFFORTS TO ADDRESS THE COLONIAL PAST

#### A *National Inquiries and Royal Commissions*

There is a history in Australia of Royal Commissions and inquiries on specific experiences of First Nations injustices. In 1987, the Royal Commission into Aboriginal Deaths in Custody was established to address concerns over Aboriginal and Torres Strait Islander

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<sup>19</sup> Bruce Buchan and Mary Heath, ‘Savagery and Civilization: From Terra Nullius to the “Tide of History”’ (2006) 6(1) *Ethnicities* 5, 21 quoting *Mabo No. 2* (n 3) (Brennan J).

<sup>20</sup> See, eg, *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422, [63]; Peter Seidel, ‘Native title: The struggle for justice for the Yorta Yorta Nation’ (2004) 29(2) *Alternative Law Journal* 70.

<sup>21</sup> Phillip Coorey, ‘A party torn by semantics and pedantry’, *The Sydney Morning Herald* (online, 4 February 2008); John Host and Jill Milroy, ‘The stolen generations: John Herron and the politics of denial’ (2001) (22) *Studies in Western Australian History* 141.

<sup>22</sup> Thalia Anthony and Stephen Gray, ‘Was there slavery in Australia? Yes. It shouldn’t even be up for debate’, *The Guardian* (Web Page, 11 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/11/was-there-slavery-in-australia-yes-it-shouldnt-even-be-up-for-debate>>.

<sup>23</sup> Caitlin Reiger, ‘Australia’s First Truth Commission: Transitional Justice to Face Colonial Legacies’, *Justice Info* (Web Page, 30 June 2020) <<https://www.justiceinfo.net/en/45000-australia-s-first-truth-commission-transitional-justice-to-face-colonial-legacies.html>>.

People frequently dying in custody.<sup>24</sup> The Royal Commission investigated 99 incidents of Aboriginal and Torres Strait Islander People deaths in gaols, police stations and juvenile detention centres between 1 January 1980 and 31 May 1989.<sup>25</sup> It concluded that the high number of deaths was mainly due to First Nations people being grossly over-represented in the criminal justice system.<sup>26</sup> Importantly, the report exposed patterns of systemic disadvantage and institutional racism.<sup>27</sup> Nevertheless, three decades on, many of the Commission's 339 recommendations have not been implemented.<sup>28</sup> Indeed, there have been 527 First Nations deaths in custody across Australia since the Royal Commission.<sup>29</sup> In 1995, the Human Rights and Equal Opportunity Commission was tasked with tackling the laws, policies, and practices that led to the state's removal of First Nations children. This became known as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997).<sup>30</sup> The inquiry interviewed over 500 affected individuals and spoke to organisations and First Nations groups across the country. The resulting *Bringing them Home* report contained harrowing evidence of First Nations children being removed from their families and communities.<sup>31</sup> By some estimates, up to 100,000 children were removed from the early years of settlement up until the late 1970s.<sup>32</sup> According to the report: 'not one Indigenous family has escaped the effects of forcible removal'.<sup>33</sup>

In many respects, this national inquiry was critical and powerful.<sup>34</sup> The report was 'widely read, with sixty thousand copies purchased in the first year of its release alone'.<sup>35</sup>

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<sup>24</sup> *RCIADIC* (n 5) vol 1, [1.1.2].

<sup>25</sup> *Ibid* [1.1.1].

<sup>26</sup> *Ibid* [1.3.1]–[1.3.2].

<sup>27</sup> Patrick Dodson, '25 Years On from Royal Commission into Aboriginal Deaths in Custody Recommendations' (2016) 8(23) *Indigenous Law Bulletin* 24, 24.

<sup>28</sup> Thalia Anthony et al, '30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented' (Working Paper No 140/2021, Centre for Aboriginal Economic Policy Research, Australian National University) 17.

<sup>29</sup> 'Deaths in Custody in Australia', *Australian Institute of Criminology* (Web Page) <<https://www.aic.gov.au/statistics/deaths-custody-australia>>.

<sup>30</sup> *Bringing them Home* (n 12).

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* 37.

<sup>33</sup> *Ibid* 37.

<sup>34</sup> Colin Tatz, 'The Reconciliation "Bargain"' (1998) 25 *Melbourne Journal of Politics* 1, 1–8.

<sup>35</sup> Anne Orford, 'Commissioning the Truth' (2006) 15(3) *Columbia Journal of Gender and Law* 851, 867 citing John Bond, 'Time to Say Sorry to "Stolen Generations"', *For a Change* (Web Page, 1 February 1998) <<https://www.foranewworld.org/material/articles/time-say-sorry-stolen-generations>>.

Indeed, public awareness of the Stolen Generation and the colonial impact on First Nations lives increased significantly.<sup>36</sup> Nevertheless, the report's recommendations of an official apology and for compensation were dismissed by the Howard government.<sup>37</sup> Whilst the Rudd government publicly apologised in 2008,<sup>38</sup> no federal reparations scheme has been created. The report also failed to categorically characterise the harm perpetrated against the Stolen Generation as genocide. Rather, the report concluded that the forcible removal of First Nations children could 'be labelled genocidal'.<sup>39</sup> This more equivocal language allows space for contestation.<sup>40</sup> In so doing, it supports further denial, apologetics, and qualifications about state accountability for the past.

No doubt, national inquiries and commissions have helped to expose White Australians to aspects of historical injustices experienced by First Nations people.<sup>41</sup> During the twentieth century, there were 118 government investigations into Indigenous Affairs.<sup>42</sup> There have also been a range of First Nations-focused inquiries in Victoria, primarily in the areas of youth justice and child protection.<sup>43</sup> Nevertheless, such processes have generally been unable to translate truth-telling into structural reform and material compensation.<sup>44</sup> In sum, while '[t]ruth-telling has not been absent in the relationship between First Nations and non-First Nations Australia',<sup>45</sup> past inquiries have been limited narrowly focused, 'ad hoc and piecemeal'.<sup>46</sup>

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<sup>36</sup> Shireen Morris and Harry Hobbs, 'Imagining a Makarrata Commission' (2022) 48(3) *Monash University Law Review* 19.

<sup>37</sup> Lindy Kerin, 'Long Journey to National Apology', *ABC News* (Web Page, 13 February 2008) <<https://www.abc.net.au/news/2008-02-13/long-journey-to-national-apology/1041564>>.

<sup>38</sup> The speech was part of a formal motion that the Parliament then adopted. It was simultaneously broadcast on national television, as well as on large screens outside the Parliament building, reaching a significant audience: 'Apology to Australia's Indigenous Peoples', *Parliament of Australia* (Web Page) <[https://www.aph.gov.au/Visit\\_Parliament/Art/Icons/Apology\\_to\\_Australias\\_Indigenous\\_Peoples#](https://www.aph.gov.au/Visit_Parliament/Art/Icons/Apology_to_Australias_Indigenous_Peoples#)>.

<sup>39</sup> *Bringing them Home* (n 12) 239.

<sup>40</sup> McMillan and Rigney (n 4) 766–7.

<sup>41</sup> Christabel Chamarette, 'Terra Nullius Then and Now: Mabo, Native Title, and Reconciliation in 2000' (2000) 35(2) *Australian Psychologist* 167, 170.

<sup>42</sup> Tatz (n 34) 2.

<sup>43</sup> Commission for Children and Young People, *Always Was, Always Will Be Koori Children: Investigation into the Circumstances of Aboriginal Children and Young People in Out-of-Home Care in Victoria* (Report, 2016).

<sup>44</sup> Morris and Hobbs (n 36) 20.

<sup>45</sup> Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501, 501.

<sup>46</sup> *Ibid* 502.

B *Political Reconciliation*

To the extent that the Australian government has reckoned with First Nations harm and healing, it has done so using the language of ‘reconciliation’.<sup>47</sup> This discourse is individualised, with a focus on formal equality and socioeconomics,<sup>48</sup> rather than state accountability and past atonement.<sup>49</sup> It has denied claims to First Nations self-determination and sovereignty.<sup>50</sup> In 1991, the Council for Aboriginal Reconciliation was established ‘to promote... a deeper understanding by all Australians of the history, cultures, past dispossession’ and to provide a forum for discussion on reconciliation issues.<sup>51</sup> Composed of 25 First Nations and non-First Nations Australians,<sup>52</sup> the Council supported a range of large-scale national and local reconciliation initiatives during the 1990s. However, the federal government ultimately rejected the Council’s recommendations for constitutional reform and treaty.<sup>53</sup>

The reconciliation policy prevailed over the next two decades. It was echoed in Prime Minister Kevin Rudd’s formal apology to the Stolen Generation in 2008. On the one hand, his speech to Parliament marked an important national and discursive milestone.<sup>54</sup> On the other hand, it fell short of naming the state practices of removing First Nations children as genocide. According to Damien Short: ‘the apology failed to describe the harm inflicted accurately, and in the terms favoured by many of the victims’.<sup>55</sup> In this way, ‘the

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<sup>47</sup> Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Routledge, 2008) 39–41 (*‘Reconciliation and Colonial Power’*) cited in McMillan and Rigney (n 4) 768.

<sup>48</sup> The key focus of the ‘practical reconciliation’ approach was addressing Indigenous disadvantage in employment, health, education and housing, policies that would be developed and implemented by the government with very little input from Aboriginal and Torres Strait Islander People’: Samara Hand and Damien Short, ‘Indigenous Rights and Reconciliation: Lessons from Australia’ in Sheryl Lightfoot and Sarah Maddison (eds), *Handbook of Indigenous Public Policy* (Edward Elgar Publishing, 2024) 308, 308.

<sup>49</sup> See Short, *Reconciliation and Colonial Power* (n 47); Nicola Henry, ‘From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies’ (2015) 9(2) *International Journal of Transitional Justice* 199.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Council for Aboriginal Reconciliation Act 1991* (Cth) ss 6(1)(b), (d).

<sup>52</sup> *Ibid* ss 5, 14(1)(h).

<sup>53</sup> Sara Tomevska, ‘Australia Had a Chance to Recognise First Nations Peoples in the Constitution 20 Years Ago. Why Didn’t We?’, *SBS News* (Web Page, 1 January 2023)

<<https://www.sbs.com.au/news/article/australia-had-a-chance-to-recognise-first-nations-peoples-in-the-constitution-20-years-ago-why-didnt-we/l27d3r0ew>>; Harry Hobbs and George Williams, ‘Treaty-Making in the Australian Federation’ (2019) 43(1) *Melbourne University Law Review* 178, 221–2.

<sup>54</sup> Andrew Gunstone, ‘Reconciliation, Reparations and Rights: Indigenous Australians and the Stolen Generations’ in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples’ Rights* (Routledge, 2016) 301, 308.

<sup>55</sup> Short, ‘When sorry isn’t good enough’ (n 16) 299.

state supports reconciliation, rather than participating in it — this passive role allows the state to gain legitimacy, by making invisible the state's role as the cause of harm to Indigenous people'.<sup>56</sup> Arguably, successive governments have used reconciliation as a rhetorical device to silence First Nations calls for justice and truth-telling.<sup>57</sup> The temporal framing of reconciliation policy also situates harm in the past in a way that absolves White Australia from the ongoing harm of colonisation.<sup>58</sup> The discourse of political reconciliation has thus enabled White Australia to deny the scale and type of harm inflicted, as well as failing to engage in truth-telling in any depth or on Blak terms.<sup>59</sup>

### C Constitutional Reform

More recently, the national discourse in Australia was focused on a constitutional amendment to recognise First Nations people. In 2015, the government appointed the Referendum Council. Following a series of regional dialogues, it facilitated a National Convention. This led to the *Uluru Statement from the Heart* ('*Uluru Statement*')<sup>60</sup> which called for a First Nations Voice to Parliament enshrined in the *Australian Constitution* ('Voice to Parliament') and a Makarrata Commission for agreement-making and truth-telling between Aboriginal and Torres Strait Islander people and Governments.<sup>61</sup> The Voice to Parliament was intended to 'redistribute public power via the *Constitution*' and create an 'institutional relationship' between governments and First Nations people.<sup>62</sup> In May 2022, the newly elected Prime Minister Anthony Albanese committed to a referendum on the Voice to Parliament and to full implementation of the *Uluru Statement*. On 14 October 2023, Australians voted on recognition of First Nations people and creation of a permanent First Nations-led advisory body in the *Constitution*. The

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<sup>56</sup> McMillan and Rigney (n 4) 768.

<sup>57</sup> Hand and Short (n 48) 323, 327; Damien Short, 'Australian 'Aboriginal' Reconciliation: The Latest Phase in the Colonial Project' (2003) 7(3) *Citizenship Studies* 291, 297.

<sup>58</sup> Davis describes political reconciliation as 'a manifesto for maintaining the status quo': Megan Davis, 'The Truth About Truth-Telling' (December 2021) *The Monthly* ('The Truth About Truth-Telling').

<sup>59</sup> Blak is a term used by some First Nations people to reclaim historical, representational, symbolical, stereotypical and romanticised notions of Black or Blackness.

<sup>60</sup> *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017) ('*Uluru Statement*'); Referendum Council, *Final Report of the Referendum Council* (Report, 30 June 2017) 1, 16–21 ('*Final Report of the Referendum Council*').

<sup>61</sup> Castan Centre for Human Rights Law, Submission to the Expert Mechanism on the rights of Indigenous peoples, *Treaties, Agreements and Other Constructive Arrangements between Indigenous peoples and States* (January 2022) 4 ('Submission to the Expert Mechanism').

<sup>62</sup> Megan Davis and George Williams, *Everything You Need To Know about the Uluru Statement from The Heart* (NewSouth Publishing, 2021) 143, 151–2.

referendum was rejected nationally and by a majority in every state, thus failing to secure the double majority required. The referendum marked the 45<sup>th</sup> time Australia has attempted to change its founding document — but only eight proposals have ever cleared. Arguably, despite widespread public support for better outcomes for First Nations people, the Voice to Parliament failed due to a lack of political bipartisanship.<sup>63</sup> According to McAllister and Biddle, the questions put before voters ‘lacked the crucial political clarity required to elicit broad public support’.<sup>64</sup> Australians generally support reconciliation policy but remain divided over how to operationalize it.

In any event, First Nations leaders have stressed that constitutional recognition requires more than symbolic ‘acknowledgement’ but substantive structural reform.<sup>65</sup> Indeed, since the failure of the Voice to Parliament referendum, little has been said about national truth-telling and treaty-making. It therefore remains to be seen whether political will still exists for the necessary unfinished transitional justice business. Moreover, attempts to ‘close the gap’ between First Nations and non-First Nations people have largely failed. Most recently the government’s 2024 *Close the Gap* report, revealed that only five out of 19 targets are currently on track, emphasising the need for urgent changes in the state’s approach to First Nations people.<sup>66</sup> Specifically, the targets for criminal justice, unemployment, youth justice, child protection and suicide prevention have all remained either unchanged or worsened. In these ways, structural and political harms are ongoing.<sup>67</sup> In sum, Australia still needs to meaningfully reckon with its historical past and its persistent legacies of abuse.

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<sup>63</sup> Ian McAllister and Nicholas Biddle, ‘Safety or change? The 2023 Australian voice referendum’ (2024) 59(2) *Australian Journal of Political Science* 1, 2.

<sup>64</sup> *Ibid* 2.

<sup>65</sup> See, for example, Megan Davis, ‘Constitutional Recognition for Indigenous Australians Must Involve Structural Change, Not Mere Symbolism’, *The Conversation* (Web Page, 18 February 2020) <<https://theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751>>.

<sup>66</sup> Lowitja Institute, *Close the Gap: Voyage to Voice, Truth, Treaty and Beyond* (Final report, March 2024) (*‘Close the Gap’*).

<sup>67</sup> McMillan and Rigney (n 4) 770–1.

## IV TRANSITIONAL JUSTICE FOR VICTORIA

A *Transitional Justice for Settler-Colonialism*

Transitional justice has become the dominant international framework for redressing mass harm and historical injustices. Broadly speaking, the field may be defined as a ‘process’ that aims to do justice at times of transition from authoritarianism or armed conflict. It addresses the wrongs of the previous regime<sup>68</sup> through judicial and non-judicial measures.<sup>69</sup> Traditionally, established democracies, like Australia, have not been regarded as requiring transitional justice.<sup>70</sup> Numerous authors have noted the difficulties of applying such mechanisms within settler-colonial societies.<sup>71</sup> For example, official truth-telling frequently risks emboldening rather than challenging the state.<sup>72</sup> Transitional justice as a field can lean towards state-centric, Western concepts which reinforce the settler-colonial relationship.<sup>73</sup>

At the same time, a recent trend exists towards applying transitional justice measures to democratic nations.<sup>74</sup> As the cases of Canada and the United States (‘US’) aptly demonstrate, truth-seeking endeavours have become increasingly relevant to facing colonial legacies. For example, Canada’s Truth and Reconciliation Commission (2008–15) examined residential schools for Indigenous children and the Maine-Wabanaki Truth Commission (2013–15) dealt with the US state of Maine’s child welfare system.<sup>75</sup> Whilst

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<sup>68</sup> Ruti Teitel, *Globalizing Transition Justice: Contemporary Essays* (Oxford University Press, 2014) xii.

<sup>69</sup> Fabián Salvioli, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, GA Res 45/45, UN Doc A/HRC/45/45 (9 July 2020) 4.

<sup>70</sup> See, eg, Colm Campbell, Fionnuala D Ní Aoláin and Colin Harvey, ‘The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland’ (2003) 66(3) *Modern Law Review* 317; Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’ (2009) 3(1) *International Journal of Transitional Justice* 5.

<sup>71</sup> See, eg, Jennifer Balint, Julie Evans, and Nesam McMillan, ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’ (2014) 8(2) *International Journal of Transitional Justice* 194; Jennifer Henderson and Pauline Wakeham, ‘Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada’ (2009) 35(1) *English Studies in Canada* 1.

<sup>72</sup> Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan, 2014); Balint, Evans and McMillan (n 71) 201–2.

<sup>73</sup> Victoria Roman, ‘From Apology to Action: A Comment on Transitional Justice in the United States and Canada’ (2022) 37(1) *Maryland Journal of International Law* 122.

<sup>74</sup> See generally Balint, Evans and McMillan (n 71).

<sup>75</sup> In Canada, refer to the various reports issued by the Truth and Reconciliation Commission: ‘Reports’, *National Centre for Truth and Reconciliation* (Web Page) <<https://nctr.ca/records/reports/#trc-reports>>. See also *Beyond the Mandate: Continuing the Conversation* (Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission Report, 14 June 2015) 6.

some academics adhere to a narrow legalistic concept of transitional justice,<sup>76</sup> others persuasively argue for a thicker view, in which ‘dealing with the past’ extends beyond fixed transitional periods or democratisation.<sup>77</sup> As Ní Aoláin and Campbell observe, authoritarian entities are not the only ones to commit systematic rights violations.<sup>78</sup> To this end, transitional justice is also an extremely useful framework to examine historical injustices in established democracies.<sup>79</sup>

In the Australian context, human rights violations warrant a transitional justice response as the wrongdoing against its first inhabitants remains embedded in state policy.<sup>80</sup> This is particularly urgent given that national processes in Australia have not adequately engaged the past, the limitations of political reconciliation and the recent failure of the Voice referendum. A meaningful process about the ongoing violence of colonisation seems critical to transforming the First Nations–settler relationship.<sup>81</sup> Victoria is happily applying a transitional justice approach to reconciling with First Nations Australians. It has the most advanced truth-telling and treaty model of all Australian jurisdictions. On 11 July 2020, the Australian state government of Victoria announced it will work with First Nations communities to establish Australia’s first truth and justice process to formally recognise historic wrongs and address ongoing injustices against its First Nations peoples.

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<sup>76</sup> See, eg, Campbell, Ní Aoláin and Harvey (n 70); Bell (n 68); Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, ‘Transitional justice: (re)conceptualising the field’ (2007) 3(2) *International Journal of Law in Context* 81. For example, Bell, Campbell and Ní Aoláin claim, ‘[a]t the very least, there needs to be an awareness that legalism, a focus on law’s normativity, and the imperative to frame questions in legal terms may privilege elite understandings and render invisible key issues affecting disenfranchised groups’: at 83.

<sup>77</sup> See, eg, Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2004) 34(4) *Journal of Law and Society* 411; Ron Dudai, ‘A Model for Dealing with the Past in the Israeli-Palestinian Context’ (2007) 1(2) *International Journal of Transitional Justice* 249.

<sup>78</sup> Fionnuala Ní Aoláin and Colm Campbell, ‘The Paradox of Transition in Conflicted Democracies’ (2005) 27(1) *Human Rights Quarterly* 172, 174.

<sup>79</sup> Nicola (n 49) 205.

<sup>80</sup> Stephen Winter, ‘Towards a Unified Theory of Transitional Justice’ (2013) 7(2) *International Journal of Transitional Justice* 224, 244.

<sup>81</sup> Hand and Short (n 48) 323, 327. Damien Short, ‘Australian ‘Aboriginal’ Reconciliation: The Latest Phase in the Colonial Project’ (2003) 7(3) *Citizenship Studies* 291.



B *Treaty-Making*

The development of a treaty between the Victorian Government and First Nations peoples in the state is currently underway.<sup>82</sup> In 2018, the Government formally committed to the treaty process by passing the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic). This led to the establishment of the First Peoples' Assembly of Victoria, a democratically elected representative body for First Nations Victorians.<sup>83</sup> In 2022, an independent Treaty Authority was recognised and legally empowered by the *Treaty Authority and Other Treaty Elements Act 2022* (Vic).<sup>84</sup>

This Treaty Authority is the first of its kind in Australia, and places First peoples' culture at the heart of its practices.<sup>85</sup> The Treaty Authority seeks to mediate the significant power imbalance by creating an institution independent of the Parliament and the Government.<sup>86</sup> The Treaty Authority is an important example of the realisation of First Nations' right to self-determination as recognised in international human rights law.<sup>87</sup> The Self-Determination Fund (through which the independent funding of First Peoples' negotiation with the State is generated) was established in November 2022.<sup>88</sup> The Victorian treaty provides an opportunity to enhance the legal protections and reinforce rights of First Nations people in Victorian and facilitate the transfer of authority and resources to allow traditional owners and First Nations people to exercise control over matters that impact upon them.<sup>89</sup>

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<sup>82</sup> 'Treaty for Victoria', *First Peoples – State Relations* (Web Page, 30 March 2021) <<https://www.aboriginalvictoria.vic.gov.au/treaty>>.

<sup>83</sup> 'We are the First Peoples' Assembly', *First Peoples' Assembly of Victoria* (Web Page) <<https://www.firstpeoplesvic.org/about/the-assembly/>>.

<sup>84</sup> *Treaty Authority and Other Treaty Elements Act 2022* (Vic) pt 2.

<sup>85</sup> Melissa Castan, Kate Galloway and Scott Walker, 'A New Treaty Authority between First Peoples and the Victorian Government is a Vital Step Towards a Treaty', *The Conversation* (Web Page, 16 June 2022) <<https://theconversation.com/a-new-treaty-authority-between-first-peoples-and-the-victorian-government-is-a-vital-step-towards-a-treaty-184739>>.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> 'Treaty Fund to Help Level the Playing Field for First Peoples in Victoria', *First Peoples' Assembly of Victoria* (Web Page, 24 November 2022) <<https://www.firstpeoplesvic.org/news/treaty-fund-to-help-level-the-playing-field-for-first-peoples-in-victoria/>>.

<sup>89</sup> 'Pathway to Treaty', *First Peoples – State Relations* (Web Page, 18 July 2024) <<https://www.aboriginalvictoria.vic.gov.au/treaty-process/>>.

### C *Truth-Telling: Yoorrook Justice Commission*

In the *Uluru Statement*, First Nations people called for ‘truth-telling about our history’ to build a ‘fair and truthful relationship with the people of Australia’.<sup>90</sup> First Nations leaders have long campaigned for recognition of history and accountability for the past.<sup>91</sup> Building on this activism, in June 2020, Victoria’s First People’s Assembly agreed that truth-telling must be a fundamental part of treaty-making and called on the government to establish a formal truth-telling process.

In 2021, the Victorian Government established the Yoorrook Justice Commission to undertake a formal and comprehensive inquiry into colonial violence.<sup>92</sup> It has charted a course expressly aligned with transitional justice.<sup>93</sup> Unlike previous truth-seeking inquiries and commissions, the Yoorrook Justice Commission is the first one explicitly labelled as such.<sup>94</sup> This state process is vested with the powers of a Royal Commission and is unprecedented.<sup>95</sup> Indeed, the Victorian initiative marks the first time any Australian government has embarked on treaty-making accompanied by a comprehensive process of truth-telling with First Nations peoples at the same time. The Commissioners were appointed through a transparent nomination process and include four First Nations Victorians and one non-First Nations Commissioner. Former Federal Court Judge, the Honourable Anthony North KC, has recently been appointed as a Commissioner of Victoria’s formal truth telling process within the Yoorrook Justice Commission.

The terms of reference and the form of the Commission were designed by the First People’s Assembly and the government and were based on consultations with local Aboriginal communities. In institutional form, the Yoorrook Justice Commission is a transitional justice commission grounded in international human rights law.<sup>96</sup>

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<sup>90</sup> *Final Report of the Referendum Council* (n 60) 1, 16–21.

<sup>91</sup> Morris and Hobbs (n 36) 22.

<sup>92</sup> Victoria, *Victoria Government Gazette*, No S 217, 14 May 2021 (‘Victorian Gazette No S 217’).

<sup>93</sup> Megan Davis, ‘Speaking up’ (2022) *Griffith Review 76: Acts of Reckoning* (online) <<https://www.griffithreview.com/editions/acts-of-reckoning/>>.

<sup>94</sup> Yoorrook’ is a Wamba Wamba word meaning ‘truth’.

<sup>95</sup> Under the *Inquiries Act 2014* (Vic) s 5 the Royal Commission has the power to summons witnesses to appear before it, produce a document or other material piece of evidence and require them to answer questions under oath or affirmation.

<sup>96</sup> See Human Rights Council, *Human rights and transitional justice*, GA Res 21/15, UN Doc A/HRC/RES/21/15 (11 October 2012).

Specifically, the Commission has a broad mandate to inquire into and report on historical systemic injustices perpetrated against First Nations people since colonisation (such as massacres, wars, and genocide), as well as ongoing systemic injustices (such as policing and child protection).<sup>97</sup> The Commission's role is to listen to First Nations' stories and to establish an official public record of First Nations' experiences of systemic injustices since the colonisation of Victoria. The Commission is expected to make detailed recommendations for changes to laws, policy and education and the types of matters to be included in future treaties.

Since 2021, the Commission has been investigating the impacts of colonisation in Victoria. The Yoorrook Justice Commission first convened on 24 March 2022 for a ceremonial first hearing and has subsequently sat formally several times since to hear evidence.<sup>98</sup> The Commission delivered an interim report in June 2022,<sup>99</sup> and a critical issues report two month later into systemic injustice within the child protection and criminal justice systems. Following a one-year inquiry, the report found evidence of gross human rights abuses and issued 46 recommendations.<sup>100</sup> In April 2024, Yoorrook Justice Commission completed another series of hearings about the colonial impact on land, sky and waters in Victoria. Most recently, the Commission's public hearings (May 2024) focuses on systemic injustice in relation to First Nations health, education, housing and economic life. The Yoorrook Justice Commission will deliver its final report and official public record to the Co-Chairs of the First Peoples' Assembly and Governor of Victoria by 30 June 2025.

## V YOORROOK JUSTICE COMMISSION: OPPORTUNITIES AND TRANSITIONAL JUSTICE INNOVATION

The application of transitional justice to Australia is a relatively new field of scholarship.<sup>101</sup> This section outlines the unique opportunities offered by the Yoorrook Justice Commission to reckoning with historic harms in Australia. It also explores the

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<sup>97</sup> 'Truth and Justice in Victoria', *First Peoples – State Relations* (Web Page, 4 April 2024) <<https://www.aboriginalvictoria.vic.gov.au/truth-and-justice>> ('Truth and Justice in Victoria').

<sup>98</sup> 'Past Hearing Videos', *Yoorrook Justice Commission* (Web Page) <<https://yoorrookjusticecommission.org.au/hearings/>>.

<sup>99</sup> Yoorrook Justice Commission, *Yoorrook With Purpose* (Interim Report, 30 June 2022) ('*Yoorrook With Purpose*').

<sup>100</sup> Yoorrook Justice Commission, *Yoorrook for Justice* (Report, 31 August 2023) ('*Yoorrook for Justice*').

<sup>101</sup> Balint, Evans, and McMillan (n 71) 194–216; Henry (n 49).

Yoorrook Justice Commission as an innovative transitional justice mechanism for settler-colonialism. By adopting a radically local approach to truth-telling, the Commission might serve as a corrective to critiques of the field. These have included narrow legalism,<sup>102</sup> top-down processes<sup>103</sup> and sidelining structural issues.<sup>104</sup> Traditionally, transitional justice is a liberal template that privileges civil and political rights,<sup>105</sup> which has excluded groups such as First Nations peoples.<sup>106</sup> In these respects, and others, the Yoorrook Justice Commission is unprecedented. The level of First Nations involvement and ownership, its authority as a Royal Commission and the range and breadth of its inquiry warrant international attention. Indeed, in a recent report on ‘Transitional Justice Measures in Colonial Contexts’, the United Nations Special Rapporteur mentioned the Yoorrook Justice Commission as a unique example of a transitional justice commission for First Nations peoples.<sup>107</sup>

At a national level, the Yoorrook Justice Commission marks a radical departure from past inquiries and the political rhetoric of reconciliation. By placing the Victorian state properly at the centre of any questions of redress, the Commission opens a space for institutional accountability. In addressing systemic harms, it also gives socio-economic harms a place in the construction of what healing might look like for First Nations Australia and official truth-telling mechanisms. In this way, Victoria is developing its potential as a truth-telling lab where First Nations peoples, together with transitional justice policy, transcend the conceptual comfort zone and dominant practices of the field.

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<sup>102</sup> McEvoy (n 77) 411–40.

<sup>103</sup> Rosalind Shaw, ‘Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone’ (2007) 1(2) *The International Journal of Transitional Justice* 183; Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing, 2008).

<sup>104</sup> Mahmood Mamdani, ‘A Diminished Truth’ in James Wilmot and Linda Van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Ohio University Press, 2001) 58; Zinaida Miller, ‘Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice’ (2008) 2(3) *International Journal of Transitional Justice* 266, 266–91; Claire Moon, *Narrating Political Reconciliation: South Africa’s Truth and Reconciliation Commission* (Lexington Books, 2008).

<sup>105</sup> Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ (2014) 8(3) *International Journal of Transitional Justice* 339, 341.

<sup>106</sup> Maja Davidovic, ‘Transform or Perish? The Crisis of Transitional Justice’ (2019) 20(1) *Conflict, Security & Development* 293, 294.

<sup>107</sup> Fabian Salvioli, Special Rapporteur, *Promotion of truth, justice, reparation and guarantees of non-recurrence*, GA Res 76/180, UN Doc A/76/180 (19 July 2021). The Special Rapporteur noted that ‘[t]he Yoorrook Justice Commission provides a positive example of a broad approach and the involvement of affected communities’: at [51].

A *Transitional Justice from 'Below': Locally Owned and Culturally Autonomous*

*"To move forward together, we must reckon with this past, and that includes understanding history from First Peoples' perspective."*<sup>108</sup>

The Yoorrook Justice Commission is marked by a conceptual and normative paradox. It is established as a Royal Commission, drawing its legal powers and authority from the very colonial framework it seeks to hold accountable. At the same time, the Commission's mandate and decision-making is independent of Government and entirely First Nations led. The Commission innovated operational practices to bolster perceptions of its independence.<sup>109</sup> Thus, unlike other Royal Commissions, which use a government server, the Yoorrook Justice Commission engaged an First Nations-owned digital agency to develop its own website and domain name. The Letters Patent also recognises that the Commission upholds the sovereignty of First Nations over their knowledge and stories by consulting with First Nations people and ensuring adequate information and data protection without interference.<sup>110</sup>

As scholars have argued, communities must have input into their own transitional justice mechanisms: this is transitional justice 'from below'.<sup>111</sup> In the post-colonial context, the need for participation, representation and ownership is fundamental to Indigenous people.<sup>112</sup> It is therefore commendable that the Yoorrook Justice Commission has integrated cultural values and First Nations voices into its practices. This includes the use of First Peoples' language. The Commission's title 'Yoorrook' (meaning 'truth') is itself derived from the Wemba Wemba language. The Commission has also incorporated First Nations art into its work, logo, and branding.

According to Cohen, '[i]n many indigenous cultures, wisdom about how to restore harmony in the aftermath of violence is embedded in ritual practices.'<sup>113</sup> Thus, a defining

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<sup>108</sup> Yoorrook Justice Commission, 'Newsletter Issue 11' (20 October 2023) *Newsletter*.

<sup>109</sup> *Yoorrook With Purpose* (n 99) 14.

<sup>110</sup> *Letters Patent*, Yoorrook Justice Commission (at 8 September 2021) para 4(f)(iv) <<https://yoorrookjusticecommission.org.au/wp-content/uploads/2023/03/Yoo-rrook-Justice-Commission-Letters-Patent-14-05-21-1.pdf>> ('*Letters Patent*').

<sup>111</sup> McAvoy and McGregor (n 102).

<sup>112</sup> Carsten Stahn, 'Confronting Colonial Amnesia Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects' (2020) 18(4) *Journal of International Criminal Justice* 814.

<sup>113</sup> Cynthia Cohen, 'Reimagining Transitional Justice' (2020) 14(1) *The International Journal of Transitional Justice* 1, 3.

feature of Yoorrook is acknowledging the cultural authority of Elders through guidance and communal processes. In early 2022, Commissioners travelled across Victoria to meet with Elders on numerous Traditional Owners' countries.<sup>114</sup> The Commissioners met with around 200 Elders at 29 traditional 'yarning circles.' More recently, the Yoorrook Justice Commission has held roundtables with over 850 Traditional Owners in Victoria on land and water injustices. This local ownership extends transitional justice theory by refusing 'the state's framing of the issues'.<sup>115</sup> In this way, the Commission has laid strong foundations for trust and cultural legitimacy with First Nations people. Culturally informed advice has become ever more pressing in the wake of the failed Voice to Parliament advisory body.<sup>116</sup>

### B *Comprehensive Truth-Telling, Connecting the Dots, and Blak Voices*

*"The systemic injustices that First Peoples have experienced are not confined to history."*

Gabrielle Williams, Victorian Minister for Aboriginal Affairs<sup>117</sup>

Whilst past inquiries and the Rudd apology marked moments of national reckoning, they only ever addressed one aspect of the violence and were not part of a comprehensive truth-telling process. Significantly, the Yoorrook Justice Commission is mandated to address the multiplicities of harm inflicted on First Nations peoples, in a more holistic manner. Firstly, the period of inquiry extends from colonisation to the present.<sup>118</sup> Secondly, it considers the historical and ongoing structural injustices inflicted by the settler-colonial state. This includes massacres, protectionist laws, Christianising and assimilation policy, land justice, and the First Nations welfare system.<sup>119</sup> From May 2024, the Yoorrook Justice Commission conducted social justice hearings and gathered an enormous body of evidence on health, housing, education and economic injustices. This

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<sup>114</sup> *Yoorrook With Purpose* (n 98) 16.

<sup>115</sup> Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (University of Minnesota Press, 2017) 15.

<sup>116</sup> Narelle Bedford, 'The Aftermath: What if The Voice Referendum Does Not Succeed?' (2023) 34(2) *Public Law Review* 156, 161.

<sup>117</sup> Hand and Short (n 48) 326.

<sup>118</sup> Colonisation is defined as 'from 1788': *Letters Patent* (n 110) para 6.

<sup>119</sup> *Yoorrook With Purpose* (n 99) viii.

is innovative as official transitional justice measures tend not to focus on the welfare of the population and its contextualised needs.<sup>120</sup>

Under this broad mandate, the Yoorrook Justice Commission must identify how institutional injustices continue to affect First Nations Victorians today.<sup>121</sup> Indeed, the challenge in post-colonial contexts is to find ways in which truth-recovery could tackle not just the forensic details of violations, but also the systemic and ongoing nature of abuses. Given the recent debates around the Voice referendum, many Australians remain unable to link the colonial past with Aboriginal people being a persistently vulnerable minority.<sup>122</sup> Thus, facing the racial past is more than just than documenting abuses, it's about exposing 'implicit truths' surrounding white privilege, power, and bias. This is no small task. As discussed, the colonial past has been too frequently denied, silenced, and even implicitly reproduced in contemporary legal frameworks.<sup>123</sup> For example, the recognition of native title shows how laws passed to rectify historic injustices also risk inadvertently reinforcing them.<sup>124</sup>

To this end, the Yoorrook Justice Commission has embarked on a process of truth-telling, that connects the dots between the past and present, seeking to 'un-do history'.<sup>125</sup> There is an urgency to this undertaking. Evidence shows that the child protection and criminal justice systems are only deteriorating for First Peoples.<sup>126</sup> At the end of 2022, the Yoorrook Justice Commission completed two weeks of public hearings, during which 84 witnesses, including First Nations leaders and experts, universities and First Nations community gave evidence about systemic injustices in the child protection and criminal justice sectors.<sup>127</sup> Just as race has operated as a factor in the infliction of harm, race can also be central to truth-telling practices. To this end, the Yoorrook Justice Commission is

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<sup>120</sup> Gready and Robins (n 105) 341.

<sup>121</sup> Victorian Gazette No S 217 (n 92) 3.

<sup>122</sup> Catriona Elder, 'Unfinished Business in (Post)Reconciliation Australia' (2017) 61 *Australian Humanities Review* 74, 79.

<sup>123</sup> Antony Anghie, 'Towards a Postcolonial International Law' in Prabhakar Singh and Benoît Mayer (eds), *Critical International Law: Postrealism, Postcolonialism and Transnationalism* (Oxford University Press, 2014) 123.

<sup>124</sup> Buchan and Heath (n 19).

<sup>125</sup> Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2010) 217, 231; Morris and Hobbs (n 35) 20.

<sup>126</sup> *Close the Gap* (n 66).

<sup>127</sup> Yoorrook Justice Commission, 'Newsletter, Issue No. 4' (24 February 2023) *Newsletter*.

giving a platform to Victoria's Blak voices to articulate their harm and healing, and as such is supporting First Nations conceptions of justice.<sup>128</sup>

Over the course of one year, Yoorrook Justice Commission heard from First Peoples with first-hand experience of harm in the child protection and criminal justice systems.<sup>129</sup> At public hearings, Commissioners were told deeply personal stories of the impact of police racism and brutality, of the harm of child removal, and of failures within Victoria's prison system.<sup>130</sup> The Commission documented gross human and cultural rights violations, past and ongoing, committed at the hands of the state.<sup>131</sup> Creating a historical record that links dispossession and colonial policy *with* current laws and attitudes that perpetuate the harm is the Victorian key to reckoning with the past, and to heralding institutional reform.

The Yoorrook Justice Commission's wider framing of truth-telling is vital to dealing with settler-colonialism. Comparable transitional justice experiences have been criticised for failing to recognise colonial continuities.<sup>132</sup> For example, the South African Truth and Reconciliation Commission focused on human rights abuses between 1960–94, 'missing the bigger picture of apartheid and its historical foundations in colonisation'.<sup>133</sup> Similarly, the Canadian Truth and Reconciliation Commission examined 'the tragedy of residential schools' rather than the ongoing harms of settler colonialism.<sup>134</sup> By squarely addressing how past actions are rooted in systemic harm, the Yoorrook Justice Commission sets a new precedent for liberal democracies.<sup>135</sup>

### C State Accountability

*"For over 100 years...Victoria Police contributed to the Stolen Generations by enforcing policies and laws..."*

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<sup>128</sup> McMillan and Rigney (n 4) 772.

<sup>129</sup> More than 15 witnesses appeared before the Commission in a combination of public, closed and pre-recorded hearing sessions: Yoorrook Justice Commission, 'Newsletter, Issue No. 5' (11 April 2023) *Newsletter*.

<sup>130</sup> Yoorrook Justice Commission, 'Newsletter, Issue No. 10' (4 September 2023) *Newsletter*.

<sup>131</sup> *Ibid.*

<sup>132</sup> Augustine SJ Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14(2) *International Journal of Transitional Justice* 260, 272; Henderson and Wakeham (n 69).

<sup>133</sup> Mamdani (n 104) 58.

<sup>134</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014).

<sup>135</sup> Roman (n 73).



Chief Commissioner of Victorian Police, May 2024<sup>136</sup>

The Yoorrook Justice Commission seeks accountability for past atrocities ‘perpetrated by state and non-state entities against First Peoples since the start of colonisation’.<sup>137</sup> In this way, the Commission enters a new relationship with the Victorian state, as the entity responsible for much of the harm, and now required to acknowledge the injustices against First Nations Victorians. This is unprecedented. As discussed, Australia has a long history of state institutions refusing to acknowledge the type and scale of harms perpetrated against First Nations Australia; and the reconciliation movement has favoured political rhetoric over material redress.<sup>138</sup> In Victoria, there has been little progress in accountability for gross violations of First Nations rights. There have been an estimated 34 Aboriginal deaths in custody since the 1991 Royal Commission in the state, and yet the issue remains largely unresolved.<sup>139</sup>

Nevertheless, the Yoorrook Justice Commission seems to be making inroads on this front. In April 2023, the Commission held public hearings in which Commissioners questioned ministers and senior bureaucrats about First Nations injustices in the criminal justice and child protection systems. These historic hearings marked the first time an Aboriginal-led Royal Commission has publicly held to account the authorities that have exercised power over the lives of First Peoples for generations.<sup>140</sup> Significantly, seven government representatives made formal apologies for past and current harms against First Peoples.<sup>141</sup> The Secretary of the Department of Justice and Community Safety acknowledged that one of the primary drivers of over-representation of First Peoples in the criminal justice system is systemic racism. Similarly, the Victorian Attorney-General, acknowledged that structural racism inherited from the colonial past persists in the criminal justice system.<sup>142</sup> The Minister for Police accepted that many police racially

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<sup>136</sup> ‘Apology to the Stolen Generation’, *Victoria Police* (Web Page, 24 May 2024) <<https://www.police.vic.gov.au/apology>>.

<sup>137</sup> ‘Truth and Justice in Victoria’ (n 97).

<sup>138</sup> McMillan and Rigney (n 4) 759.

<sup>139</sup> Submission to the Expert Mechanism (n 61) 4.

<sup>140</sup> Yoorrook Justice Commission, ‘Newsletter, Issue No. 6’ (31 May 2023) *Newsletter* (‘Newsletter, Issue No. 6’)1.

<sup>141</sup> *Ibid.* These included the Victorian Attorney-General, Chief Commissioner of Victoria Police and the Minister for Children Protection and Family Services. Many other witnesses who didn’t make formal apologies, acknowledged the suffering of First Peoples caused by government actions.

<sup>142</sup> *Ibid.*

profile First Peoples, and acknowledged the lack of accountability for Aboriginal deaths in custody since the 1991 Royal Commission.<sup>143</sup> After decades of denial, these on the record admissions are considerable achievements.

In October 2023, Yoorrook Justice Commission made a series of 46 recommendations to address injustices in the criminal justice system, many of which related to policing.<sup>144</sup> On 3 April 2024, the Victorian Government formally accepted 28 of the recommendations in full or in principle, and another 15 remain under consideration.<sup>145</sup> Arguably, this official response reflects the effectiveness of First Nations led truth-telling. At the same time, the state rejected three recommendations on raising the age of criminal responsibility, bail reform and pursuing human rights abuses through the Victorian Civil and Administrative Tribunal. This has been widely criticised.<sup>146</sup> Yet, it does not detract from the Commission making space for First Nations experience to confront institutions of power.<sup>147</sup>

## VI YOORROOK JUSTICE COMMISSION: PRACTICAL CHALLENGES

### A *Responsibility for a Distant Past?*

*"We want our fellow Victorians to stand with us and walk with us on this journey... We all need to shoulder this responsibility..."*

First People's Assembly Co-Chair Marcus Stewart<sup>148</sup>

It is worth recalling that post-colonial harm involves multi-generational trauma far removed from the present. Invoking collective responsibility for violations committed hundreds of years ago is therefore no small task. Perhaps for this reason, truth commissions have frequently examined the more recent past and narrower subject-matter. The U.S. Greensboro Truth and Community Reconciliation Commission focused

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<sup>143</sup> Ibid.

<sup>144</sup> Yoorrook for Justice (n 100).

<sup>145</sup> Yoorrook Justice Commission, 'Newsletter, Issue No. 16' (22 May 2024) *Newsletter*.

<sup>146</sup> Kieran Rooney and Rachel Eddie, 'Yoorrook Hits Back After Government Rejects "Crucial" Indigenous Reforms', *The Age* (Web Page, 3 April 2024) <<https://www.theage.com.au/politics/victoria/government-delays-call-on-separate-indigenous-child-protection-system-20240403-p5fh16.html>>.

<sup>147</sup> Rosemary Nagy, 'Settler Witnessing at the Truth and Reconciliation Commission of Canada' (2020) 21(3) *Human Rights Review* 219, 237; Roman (n 134).

<sup>148</sup> Nicole Asher, 'Commissioners chosen for Australia's first Aboriginal truth-telling inquiry', *ABC News* (Web Page, 14 May 2021) <<https://www.abc.net.au/news/2021-05-14/aboriginal-truth-telling-inquiry-commissioners-selected/100139586>>.

on two weeks in November 1979. As noted, Canada's Truth and Reconciliation Commission (2008–15) was established to examine the Canadian First Nations residential school system. However, the Yoorrook Justice Commission is challenging the entire colonial enterprise and its current footprint. On one hand, this is exceedingly ambitious. On the other, it is a crucial project if Victoria is to meaningfully account for historical and ongoing injustices.

Mainstream accountability for the past continues to face resistance.<sup>149</sup> In 2002, Keith Windschuttle published 'The Fabrication of Aboriginal History', inciting a national academic/media war over responsibility for the colonial past. The extent to which the present generation might atone for historical violence remains uncertain.<sup>150</sup> The recently failed Voice proposal also marks a setback for recognition of First Nations rights. At the same time, it underscores the urgency for truth-telling processes in mainstream society.<sup>151</sup> Accordingly, Yoorrook Justice Commission must be adequately equipped to invoke a sense of responsibility in the wider community to 'narrow the range of permissible lies'<sup>152</sup> about the past and present.

Until recently, the Yoorrook Justice Commission has prioritised engagement with the First Nations community.<sup>153</sup> The Canadian experience provides a cautionary tale. Whilst its Truth and Reconciliation Commission operated for over five years across Canada, the average non-Indigenous Canadian remains unaware of it.<sup>154</sup> The Commission must continue to reach out to those members of society who most need to hear the truth-telling. If a sense of collective awareness about the past is not fostered, the Yoorrook Justice Commission risks playing a diminished role or else largely preaching to the choir. A meaningful truth-telling process is therefore dependent on mobilising 'White' Victoria. In the words of Mayor: 'If First Nations people and the rest of the nation who benefits from our dispossession and oppression cannot agree about what we have suffered, then

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<sup>149</sup> Elder (n 122) 79.

<sup>150</sup> Ibid.

<sup>151</sup> Bedford (n 116) 161.

<sup>152</sup> Michael Ignatieff, 'Articles of Faith' (1996) 25(5) *Index on Censorship* 110, 113.

<sup>153</sup> 'Strategic Priorities', *Yoorrook Justice Commission* (Report, 2021).

<sup>154</sup> Virginie Ladisch and Anna Myriam Roccato, 'The Color of Justice: Transitional Justice and the Legacy of Slavery and Racism in the United States' (ICTJ Briefing, April 2021) 8.

a settlement can never be achieved'.<sup>155</sup> The Commission must therefore continue to engage those members of society who most need to hear the truth-telling.

### B *Structural Reform: Smoke and Mirrors?*

*"Aboriginal people are all too familiar with promises written in the sand"*

Reuben Berg, Co-chair of the First Peoples' Assembly<sup>156</sup>

After decades of failed policy and rhetoric, it is unsurprising that First Nations people have prioritised structural reform over truth-telling as represented in the *Uluru Statement*. Even in Victoria, the goal of truth has followed the establishment of the First Peoples' Assembly and preparatory work for Treaty. Accordingly, there are valid concerns over whether an First Nations truth-telling body could deliver substantive justice.<sup>157</sup> Indeed, the Yoorrook Justice Commission does not itself have the power to order reparations or implement reforms.<sup>158</sup> From this standpoint, '...implementation is in many ways beholden to a settler-colonial state that too often engages in the rhetoric of reconciliation rather than meaningful change.'<sup>159</sup> As Davis quips: 'The idea that truth automatically will lead to justice is fraught. It is illusory...'<sup>160</sup>

In this light, the Yoorrook Justice Commission must meet the challenges of connecting truth to reform and restitution. The Commission will only succeed if it helps to tell a broader story that could inform the treaty process and effect institutional and political change.<sup>161</sup> This remains to be seen. However, the necessity for concrete action and reform is not lost on the Commission. During its 2023 hearings with state authorities on the

<sup>155</sup> Thomas Mayor, 'Reconciliation is more than a word: it needs a voice', *The Jewish Independent* (online, 25 May 2021) <<https://thejewishindependent.com.au/reconciliation-is-more-than-a-word-it-needs-a-voice>>.

<sup>156</sup> Rooney and Eddie (n 146).

<sup>157</sup> Davis, 'The Truth About Truth-Telling' (n 58).

<sup>158</sup> Harry Hobbs, 'Unfinished Business? The Victorian Yoo-rrook Justice Commission and Truth-Telling in Australia', *Australia and New Zealand School of Government* (Web Page, 3 March 2022) <<https://anzsog.edu.au/research-insights-and-resources/research/unfinished-business-the-victorian-yoo-rrook-justice-commission-and-truth-telling-in-australia/>>; Dani Larkin, Harry Hobbs, Dylan Lino and Amy Maguire, 'Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States' (2022) 41(1) *University of Queensland Law Journal* 35, 56.

<sup>159</sup> Rosemary Nagy, 'Transformative Justice in Settler Colonial Transition Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada' (2022) 26(2) *International Journal of Human Rights* 191, 208.

<sup>160</sup> Davis, 'The Truth About Truth-Telling' (n 57).

<sup>161</sup> Morris and Hobbs (n 36) 20.

criminal justice system, Commissioners stressed that apologies without actions are hollow; that change must follow, and that change must involve self-determination.<sup>162</sup> Indeed, throughout the hearings, ministers and bureaucrats committed to addressing injustices. Notably, the Yoorrook Justice Commission has strong powers to compel government and others, if necessary, to produce documents and official records.

In May 2024, Victoria Police responded to the Commission's Report by committing to complete 79 reforms by the end of 2025.<sup>163</sup> As part of these reforms, the police will apologise for its involvement with the Stolen Generations, improve oversight and monitoring of complaints made by First Peoples, reduce the over-representation of Aboriginal people in the criminal justice system, and expand cultural awareness and human rights training across the organisation. Victoria Police said that six of the 79 reforms had already been completed.<sup>164</sup> Clearly, the Yoorrook Justice Commission is not merely paying lip service to First Nations rights. It is contributing dynamically to the process by which those rights will be protected, especially in terms of making recommendations for implementing self-determination and structural reform as well as promoting treaty-making.<sup>165</sup>

## VII CONCLUSION

While the Yoorrook Justice Commission itself is not a panacea for resolving colonial injustice, it provides an important means of relational and structural truth-telling toward more just relations and righting racial wrongs. This article demonstrates how an First Nations driven transitional justice mechanism that decentres the settler-state, and prioritises socio-economic harms as well as structural ones, sets a valuable precedent. In mobilising grass-roots efforts, the Victorian initiative departs from the political rhetoric at the federal level and comparable truth-seeking experiences.

No less important, the Yoorrook Justice Commission holds significance for other Australian States and Territories looking for a model for their own truth, justice, and

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<sup>162</sup> 'Newsletter, Issue No. 6' (n 140).

<sup>163</sup> Shane Patton, 'The Chief Commissioner's Statement of Commitment' *Victoria Police* (Web Page, 11 March 2024) <<https://www.police.vic.gov.au/statement-commitment>>.

<sup>164</sup> Yoorrook Justice Commission, 'Newsletter Issue No. 15' (5 March 2024) *Newsletter*.

<sup>165</sup> Kevin Bell, 'Aspects of the changing face of the rights of Indigenous people in Australia' (Speech, Victoria Criminal Law Conference Institute, 21 July 2022) 6.

treaty-making processes.<sup>166</sup> First Nations control of truth-telling is now regarded as essential for creating better outcomes for First Nations Australians.<sup>167</sup> The Northern Territory process (2022) noted the ‘importance of truth telling and the view that there is unfinished business without truth telling’.<sup>168</sup> The Yoorrook Justice Commission is also a blueprint for a national Makarrata Commission. Ultimately, the Commission must continue to prioritise First Nations understandings of harm and healing, to ensure that the Victorian state takes the necessary political and legal action for structural reform. So, while there is past disappointment, there is also much hope that innovated transitional justice processes will provide a genuine pathway towards recognition of First Nations rights and history. It begins with Victoria.

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<sup>166</sup> For Queensland, see the Path to Treaty process: Community Support and Services Committee, Parliament of Queensland, *Path to Treaty Bill 2023* (Parliamentary Paper No 30, April 2023); For the Northern Territory, see the Northern Territory Treaty Commission, *Final Report* (Final Report, 29 June 2022); For Tasmania, see the Premier’s Announcement in March 2022 about the government’s intention to take the next steps in the truth-telling and treaty-making process following publication of the report *Pathway to Truth-Telling and Treaty* (2021): Kate Warner, Tim McCormack and Fauve Kurnadi, *Pathway to Truth-Telling and Treaty: Report to Premier Peter Gutwein* (Report, November 2021).

<sup>167</sup> Richard Martin and Fred Pascoe, ‘Tommy Burns and the Challenge of Truth-telling on the Pastoral Frontier in the Gulf Country of Northern Australia’ in Cameo Dalley and Ashley Barnwell (eds), *Memory in Place: Locating Colonial Histories and Commemoration* (ANU Press, 2023) 88, 89.

<sup>168</sup> The Northern Territory Treaty Commission, *Final Report* (Report, 29 June 2022) 23.

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