**Australian Government Submission to the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)**

**Treaties, agreements and other constructive arrangements, between Indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition**

**Introduction**

Aboriginal and Torres Strait Islander peoples are one of the world’s oldest continuous living cultures. Their strong connections to family, land, water, language, and culture, form the foundation for social, economic, and individual wellbeing and contributes to Australia’s prosperity.

The question of how to formally, and fully, recognise the long connection of Indigenous Australians to this land has been the subject of ongoing community attention and advocacy. Currently, this important work takes a number of forms including constitutional recognition, development of treaty frameworks, development of partnership arrangements, negotiation of land-related settlements, and other mechanisms such as formal inquiries, reparations, and apologies.

**SECTION I: CONSTITUTIONAL RECOGNITION**

The Australian Constitution established the federation of the Commonwealth of Australia in 1901. Aboriginal and Torres Strait Islander peoples did not participate in the negotiation of the Constitution, nor were they recognised in any of the constitutions of the former colonies.

In recent decades, all Australian States have recognised Aboriginal and Torres Strait Islander peoples in their constitutions. The Australian Government is committed to recognising Indigenous Australians in the Australian Constitution. Constitutional change requires a successful referendum. Under Section 128 of the Constitution, a referendum to change the Constitution requires a ‘double majority’: that is, a national majority of voters in the states and territories, and a majority of voters in a majority of the states (i.e. at least four out of six states).

The Australian Government recognises that the issue of constitutional recognition of Aboriginal and Torres Strait Islander people in Australia is important and is committed to going to a referendum at a time when it has the most chance of success.

Work towards a referendum to recognise Aboriginal and Torres Strait Islander peoples has been underway for over a decade. Importantly, the form of constitutional recognition that would be acceptable to Aboriginal and Torres Strait Islander peoples has changed in that time.

Work began in earnest in 2010 with the appointment of the Expert Panel on Constitutional Recognition of Indigenous Peoples. The Expert Panel report in January 2012 recommended a number of changes to the Constitution, including a statement of acknowledgement, a new power to make laws for Aboriginal and Torres Strait Islander peoples, removal of references to race, and a protection against racial discrimination.

There has also been an Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel (reported September 2014), and a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (reported June 2015). The findings of these processes overlapped significantly with those of the Expert Panel.

In December 2015, the then Prime Minister, the Hon Malcolm Turnbull MP, and the then Opposition Leader, the Hon Bill Shorten MP, established a Referendum Council which conducted a series of dialogues around the country. The Referendum Council delivered its Final Report on 30 June 2017. Its recommendations shifted the conversation to provision in the Constitution for a body that gives Aboriginal and Torres Strait Islander peoples a voice to the Australian Parliament, and an extra-constitutional Declaration of Recognition to be legislated by all Australian Parliaments.

In March 2018, the Australian Parliament established a Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples to recommend options for constitutional change which met the expectations of Aboriginal and Torres Strait Islander peoples and would also receive support from the Parliament and Australian people. Additionally, the Committee examined how existing methods for consultation with Indigenous Australians operated, as well as potential options for the enhancement of self-determination, greater local decision-making, economic advancement and improved social outcomes.

The Joint Select Committee delivered its final report to Parliament on 29 November 2018. The report recommended:

* a co-design process to articulate the detail of the Voice;
* following co-design the Government consider legislative, executive and constitutional options to establish the Voice; and
* Government support the process of truth telling and consider the establishment of a National Resting Place for remains.

The Australian Government has adopted those recommendations and has been progressing work on the development of an Indigenous Voice. [See further on page 4]

**SECTION II: TREATY INITIATIVES**

Across Australia, there is a growing conversation with Indigenous representatives about political recognition and self-determination. Currently, the sub-national governments of the Australian Capital Territory, Northern Territory, Queensland, Victoria and Tasmania have initiated treaty related processes. These processes must grapple with questions of representation, capacity and popular support, as well as address treaty frameworks and institutions. The priority of the Australian Government at the federal level is the progression of co-design of an Indigenous Voice, and the establishment of Local & Regional Voices. This work will not disrupt the treaty negotiations underway in jurisdictions.

*Victoria*

The Victorian Parliament passed Australia’s first treaty legislation, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Treaty Act), in June 2018. The preamble of the Treaty Act notes that ‘the State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*’.

In December 2019, the Victorian Government declared the First Peoples’ Assembly of Victoria (Assembly) to be the Aboriginal representative body under the Treaty Act. The Assembly is an independent, democratically elected representative body whose role will be to determine the framework for negotiating a treaty or treaties.

*Northern Territory (NT)*

The treaty development process in the Northern Territory was initiated by the Barunga Agreement in 2018. On 16 July 2020, the Treaty Commissioner, delivered a discussion paper outlining a detailed framework for treaty as a basis for further consultation. A final report outlining the recommendations for a framework to negotiate treaties is expected in March 2022.

*Queensland*

In July 2019, the Queensland Government committed to a reframed relationship with Aboriginal and Torres Strait Islander peoples, issuing a statement of commitment and appointing an Eminent Panel to report on the way forward to treaty. Following community consultations, in February 2020, the Eminent Panel provided their recommendations to the Queensland Government, and in May 2020, the Panel updated the advice to include COVID-19 considerations. In August 2020, the Queensland Government accepted, or accepted in principle, the recommendations, and released a statement of commitment and response which included establishing a Treaty Advancement Committee. The Treaty Advance Committee reported to the Queensland Government on 12 October 2021.

*Tasmania*

On 22 June 2021, Tasmania’s Premier appointed two experts to lead talks with the state's Aboriginal community in order to find a path to reconciliation and a treaty. On 25 November 2021, the Premier tabled the *Pathway to Truth-Telling and Treaty* report which makes 24 recommendations including legislation to cover concurrent truth-telling and treaty processes, and recommendations covering land, water, fishing, education, language and resourcing.

*The Australian Capital Territory (ACT)*

In February 2021, the ACT allocated $317,000 to develop the governance structure and administration of a 10 year $20 million Healing and Reconciliation fund. An amount of these funds will be allocated to facilitate a conversation with Traditional Owners about what treaty means in the ACT and what a treaty process will look like.

**SECTION III: PARTNERSHIP ARRANGEMENTS**

**Partnership approach to Closing the Gap**

Since 2007, Australia has used the Closing the Gap framework to guide and coordinate national efforts to improve the economic, health and education outcomes of Aboriginal and Torres Strait Islander peoples.

The original Closing the Gap framework outlined seven targets across early childhood, schooling, health, economic participation, healthy homes, safe communities, and governance and leadership. Annual progress reporting on Closing the Gap showed that while there had been progress against almost every measure, there was more work to do and so approaching the 10th anniversary of the agenda (in 2018), the Council of Australian Governments (COAG) committed to work together and with Indigenous leaders, organisations and communities to refresh the Closing the Gap agenda with renewed emphasis on collaborative effort, evaluation and building on what works in each jurisdiction.

In 2018, following extensive consultation, COAG committed to work in genuine formal partnership with Aboriginal and Torres Strait Islander people to refresh the Closing the Gap framework. A historic Partnership Agreement was signed in March 2019, between Australian governments, Aboriginal and Torres Strait Islander people as represented by the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (Coalition of Peaks), and the Australian Local Government Association (ALGA) to refresh the Closing the Gap framework. A new Joint Council on Closing the Gap was formed through this ten-year partnership, comprising 12 Indigenous members nominated by the Coalition of Peaks, as well as ministerial representatives from every Australian government.

On 2 July 2020, the Joint Council finalised the new National Agreement on Closing the Gap (National Agreement), which came into effect on 27 July 2020. It is a historic achievement as it is the first time an agreement designed to improve life outcomes for Aboriginal and Torres Strait Islander peoples has been developed in full and equal partnership with Indigenous Australians. The National Agreement has [17 targets](https://www.closingthegap.gov.au/node/19) across the following outcome areas: education, employment, health and wellbeing, justice, safety, housing, land and waters, and languages.

This partnership approach embeds shared decision-making into the design, implementation and monitoring of the framework, making this a truly hand in hand effort that recognises the value and importance of shared solutions to systemic problems. Moving forward, all Australian governments will work with Aboriginal and Torres Strait Islander peoples, communities, organisations and businesses to implement the new National Agreement at the national, state, territory, and local levels.

**Indigenous Voice**

In 2019, the Australian Government allocated $7.3 million for a co-design process to develop options for an Indigenous Voice and to enhance local and regional decision-making. The two-stage co-design process involved three co-design groups comprising 52 Australians from around the country, the majority of whom were Aboriginal and/or Torres Strait Islander people, and spanned from October 2019 to July 2021. The development of the Indigenous Voice involved a nationwide consultation process with more than 9,400 people and organisations giving feedback.

In December 2021, the Australian Government released the Indigenous Voice Co-design Final Report and announced its intention to progress the establishment of Local & Regional Voices.[[1]](#footnote-2) A principles-based framework will guide all aspects of Local & Regional Voice arrangements, accommodating the diversity of cultures, priorities and aspirations across Indigenous communities, and allowing Local & Regional Voices to build on any existing arrangements, such as Empowered Communities (see below). Local & Regional Voices will provide advice to and work in partnership with all levels of government (federal, state and local) as all Australian governments play a role in policy setting and delivery of programs and services relevant to Indigenous people. The Australian Government has committed to a continued co-design approach through the implementation stage. A Local & Regional Voice Establishment Group will be set up to help governments progress implementation, and communities will lead the design of their own arrangements, guided by the principles. Arrangements will be developed and formalised as communities indicate their readiness to stand up their Local & Regional Voice.

**Empowered Communities**

The Empowered Communities (EC) model is an existing Indigenous-designed and led, place-based partnership framework between Aboriginal and Torres Strait Islander people and the Australian Government. Under EC, government works with Indigenous communities to put in place processes, reforms and support so that communities are empowered to partner as equals with government to identify priorities and improve outcomes. Indigenous people also empower themselves to take responsibility for their lives and futures, with governments supporting them to do so.

Starting with seven regions in 2016, there are now 10 EC regions operating across six states and the Northern Territory. They cover urban, rural and remote areas. Indigenous leaders from each of the regions have formed an EC National Leaders Group to oversee implementation and act as a united national advocate on key reform issues. At the regional level, Indigenous leaders work with communities, governments and other stakeholders to drive implementation on local priorities.

**SECTION IV: NEGOTIATION OF LAND RELATED AGREEMENTS**

The land now known as Australia was first colonised by the British in 1788. At that time, Aboriginal and Torres Strait Islander peoples were not recognised as political entities. In 1992, the prior occupation and ongoing rights and interests in land and water of Aboriginal and Torres Strait Islander peoples, since colonisation, was recognised in Australian law through the High Court of Australia’s decision in *Mabo v Queensland (No. 2)*.

This landmark case is the context in which many land related settlements are now negotiated. The *Native Title Act 1993* (NTA) establishes statutory processes through which native title claims can be determined; and future dealings affecting native title can proceed, including through voluntary agreements between Aboriginal and Torres Strait Islander peoples and third parties. Most land settlements commence as native title claims and resulting agreements use the Indigenous Land Use Agreement framework under the NTA to formalise agreements.

Native title now covers a significant proportion of Australia. As of December 2021, approximately 42 per cent of Australia’s land mass is now covered by a determination that native title exists, with a further 14.1 per cent subject to a native title claim. This is in addition to land held by Aboriginal and Torres Strait Islander peoples under Commonwealth, state and territory land rights legislation (14.9 per cent, with an overlap with native title land of about 3.3 per cent). The Commonwealth Government of Australia has direct responsibility for Indigenous land rights in the Northern Territory of Australia through the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). Australian State and Territory governments also have their own statutory Indigenous land rights schemes and legislation in place.

**SECTION V: OTHER MECHANISMS**

**Truth Telling**

The Australian Government recognises that truth-telling is an important step towards a stronger and more resilient nation for future generations; acknowledging our shared history and ensuring that the story of our nation embraces the experiences of all Australians. The Australian Government is committed to truth-telling at the national level by working in partnership with Aboriginal and Torres Strait Islander peoples and communities, and local, state and territory governments, to support reconciliation and to acknowledge and understand our nation’s history.

The Australian Government welcomes local truth-telling processes, and processes undertaken by states, territories and local governments. In January 2022, the Australian Government announced the establishment of the Ngurra Cultural Precinct, a new national institution focussed exclusively on the diverse history, cultures and heritage of Aboriginal and Torres Strait Islander peoples as an important part of our national story. The Ngurra Cultural Precinct will incorporate a National Resting Place, a facility that will perform the functions of housing and caring for Aboriginal and Torres Strait Islander ancestral remains repatriated to Australia from overseas collections with limited or unknown provenance.

**Redress and Reparations Schemes**

The forcible removal of Indigenous children was a part of assimilation policies adopted by all Australian governments throughout the twentieth century. It is estimated between 1 in 10, possibly as many as 1 in 3, Indigenous children were removed from their families and communities between 1910 and the 1970s. These children, now known as the Stolen Generations, were placed in institutions, fostered, or adopted out to non-Indigenous families.

On 13 February 2008, Prime Minister Kevin Rudd made a formal Apology to Australia’s Indigenous peoples, particularly to the Stolen Generations whose lives had been blighted by past government policies of forced child removal and Indigenous assimilation. Redress and reparations schemes represent a major practical step forward towards healing, truth-telling and reconciliation following on from the Apology and aim to assist in intergenerational healing and to improve the health and wellbeing of the Stolen Generations, their families and communities.

*The Territories Stolen Generations Redress Scheme*

On 5 August 2021, the Australian Government announced a $378.6 million financial and wellbeing redress package for Stolen Generations survivors who as children were removed from their families whilst in the Northern Territory or the Australian Capital Territory prior to their respective self-government, or the Jervis Bay Territory.

The Scheme will run from 1 March 2022 to 28 February 2026 and will offer eligible applicants a one-off payment of up to $75,000, a one-off healing assistance payment of $7,000, and the opportunity to confidentially tell their story about the impact of their removal to a senior official within government, have it acknowledged, and receive a face-to-face or written Direct Personal Response.

Consultation with key Stolen Generations organisations is underway and an external advisory board has been established to ensure the Scheme is delivered in a trauma-informed and culturally sensitive manner. Support services will be available to provide free practical and emotional support, legal advice, and financial counselling.

The Australian Government is also investing $51.7 million in programs that provide practical support for the Stolen Generations and their families in healing. At the state level, Tasmania, South Australia, New South Wales and Victoria have enacted reparations schemes. Queensland and Western Australia have not enacted a reparations scheme recognising removal, however some Stolen Generations survivors in these states have been eligible for redress payments under schemes acknowledging trauma caused by abuse and neglect while in state care.

1. This report can be viewed in full at <https://voice.niaa.gov.au/sites/default/files/2021-12/indigenous-voice-co-design-process-final-report_0.pdf>. [↑](#footnote-ref-2)