Submission to the EMRIP Report on Self-Determination

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1. Introduction

The Castan Centre for Human Rights Law ('Castan Centre') is a leading academic research centre within the Faculty of Law at Monash University, Australia, the aim of which is to promote human rights through research, policy submissions, education, and public engagement.[1]

The Castan Centre is pleased to be able to provide a submission to the EMRIP Report on self-determination, and acknowledges the significant and important work done by the EMRIP over many years in advancing the rights of Indigenous peoples around the world.

Australia is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It has also expressed support for the Declaration on the Rights of Indigenous Peoples.[2] As these instruments all contain a right to self-determination, Australia should be facilitating self-determination for Aboriginal and Torres Strait Islander Peoples.

This submission focusses on the extent to which Australia is (or is not, as the case may be) facilitating self-determination for its Indigenous Peoples via constitutional recognition and treaties, and some of the challenges involved.

2. Constitutional Recognition

a. The national level

Australia does not currently recognise Aboriginal and Torres Strait Islander Peoples in its national Constitution, nor is self-determination for Aboriginal and Torres Strait Islander Peoples a stated policy goal of the national government.[3] Australia is, however, in the midst of a robust discussion about constitutional recognition, one which has been ongoing for many years.[4]

In 2017, after extensive consultations with Indigenous peoples around Australia, facilitated by the Referendum Council, the Australian people were presented with the 'Uluru Statement from the Heart'. Central to the Uluru Statement is a proposal for constitutional entrenchment of a Voice to the Parliament, an Aboriginal and Torres Strait Islander entity which would provide advice to the Australian Parliament on issues and proposed legislation impacting on Aboriginal and Torres Strait Islander Peoples. A constitutionally entrenched Voice was seen by Indigenous people involved in the consultations which resulted in the Uluru Statement as

[1] https://www.monash.edu/law/research/centres/castancentre/about

[2] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/418T6%22

[3] This has not always been the case. Self-determination as national policy was first adopted by the Whitlam Labor government in late 1972, but has eroded away in subsequent years: see eg, Will Sanders, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Centre for Aboriginal Economic Policy Research, No 230/2002). See also Megan Davis, 'Listening But Not Hearing: When Process Trumps Substance' (2016) 51 *Griffith Review* 73, 74–5, 83.

[4] See, eg, Megan Davis, 'The Long Road to Uluru – Walking Together: Truth Before Justice' (2018) 60 *Griffith Review* 13.

a means by which self-determination could be achieved.[5] A constitutionally entrenched Voice to the Parliament would provide a direct and meaningful influence on the legislative decision-makers.

Constitutional entrenchment is important because of the onerous procedures to amend the national Constitution, which require a referendum of a majority of electors in a majority of states to vote in support. Although this means that it would initially be difficult to entrench the Voice, it also means that once entrenched, it would be just as difficult to remove, thus preserving its ongoing existence. So one of the main challenges to constitutional entrenchment is also one of its main advantages, if successful.[6]

Constitutional entrenchment of the Voice is also important because it would be achieved with the support of the Australian people at a referendum, thus giving it greater legitimacy and moral authority in the eyes of the public than an entity that is merely a creature of statute.[7] Its advice to Parliament, although not binding, is therefore more likely to be given significant weight.

That proposal is currently the subject of much debate, with the current government favouring only a legislative Voice, ie one that is not constitutionally entrenched.[8] However, having only a legislative Voice to the Parliament, rather than one that is constitutionally entrenched, weakens its ability to facilitate self-determination. This is because it does not have the guarantee of an ongoing existence given that the legislation by which it would be established could be repealed by a later government.[9] This could affect its ability to give frank and fearless advice to a potentially hostile government.

In the Uluru Statement consultations, a constitutionally entrenched but symbolic statement of recognition was specifically rejected.[10] Such a statement would have only a limited effect on self-determination, as it does not effect any structural change to the relationship between the Australian Parliament and Indigenous Peoples. Indigenous Australians have emphasised that constitutional recognition must be substantive.[11]

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[5] *Final Report of the Referendum Council* (30 June 2017) 30.

[6] Opinion polls currently indicate that there is likely to be enough support for a constitutionally entrenched Voice to meet the requirements for a successful referendum: F Markham and W Sanders, *Support for a Constitutionally Enshrined First Nations Voice to Parliament: Evidence from Opinion Research Since 2017* (Centre for Aboriginal Economic Policy Research, ANU College of Arts and Social Sciences, CAEPR Working Paper 138/2020, November 2020).

[7] It is intended that the existence of the Voice be entrenched in the Constitution, but that its design be legislated.

[8] To that end, it has established a co-design process to develop the detail of what the Voice would look like and how it would operate. An interim report was released in January 2021; the final report is expected later this year.

[9] This was the fate that befell the Aboriginal and Torres Strait Islander Commission.

[10] This was in part due to 'concerns raised about the question of sovereignty' and that its content would likely be a 'bland statement incompatible with truth telling,' *Final Report of the Referendum Council* (30 June 2017) 11-12.

[11] See *Final Report of Referendum Council*, 23–24. See also, eg, Megan Davis, 'Listening But Not Hearing: When Process Trumps Substance' (2016) 51 *Griffith Review* 73, 81, 83.

b. The state level

State constitutions generally do not have the same onerous amendment procedures as those found in the national Constitution, other than certain 'manner and form' provisions.[12] Accordingly, all state constitutions in Australia now contain provisions recognising their Indigenous peoples.[13] However, this recognition is only symbolic, generally being a statement of respect for and acknowledgement of their ancient and continuing connection to their traditional lands and waters. Further, in a majority of state constitutions this recognition is specifically noted as being of no legal effect.[14] For example, in South Australia's *Constitution Act 1934*, after having provided for the recognition of Aboriginal peoples in s 2(1) and (2), in s 2(3) it states 'The Parliament does not intend this section to have any legal force or effect.' Therefore, as a means of facilitating self-determination, a statement of recognition of no legal effect has little to recommend it due to its lack of enforceability.

As the above outline of federal and state constitutional recognition illustrates, whether constitutional recognition has the capacity to facilitate self-determination will depend on the form that constitutional recognition takes. Constitutional recognition that is only symbolic will not promote self-determination in any meaningful way for Australia's Indigenous peoples.

3. Treaty

Despite a promise in 1988 by then Prime Minister Bob Hawke that there 'would be a treaty negotiated between Aboriginal people and the Government on behalf of Australia,'[15] Australia does not have any treaties with its Indigenous peoples, at either the national or state level.

Notably, at the national level, the second key element of the Uluru Statement from the Heart is Treaty, described in the Uluru Statement as 'a process of agreement making between governments and First Nations'.[16] The focus to date, however, has been on the Voice to the Parliament, explained above. This is deliberate; the key elements in the Uluru Statement were intended to be sequentially dealt with.[17] Given the current national government's attitude to the Voice, the likelihood of a treaty (or treaties) at the national level in the near future appears remote.

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[12] See, eg, *Constitution Act 1975* (Vic) s 18. Many of these manner and form provisions are not binding on Parliament.

[13] *Constitution Act 1975* (Vic) s 1A; *Constitution Act 1902* (NSW) s 2; *Constitution of Queensland 2001* (Qld) preamble, s 3A; *Constitution Act 1934* (Tas) preamble; *Constitution Act 1934* (SA) s 2; *Constitution Act 1889* (WA) preamble.

[14] Tasmania and Western Australia are exceptions.

[15] *Land Rights News,* no 2, July 1988, 9. Cited in Coral Dow and John Gardiner-Garden, *Overview of Indigenous Affairs: Part 1: 1901 to 1991* (Parliamentary Library, Social Policy Section, 11 May 2011): https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/1011/indigenousaffairs1#_Toc293318917

[16] The three key elements of the Uluru Statement from the Heart are described in summary as 'Voice, Treaty, Truth': https://ulurustatement.org/

[17] Megan Davis, 'Voice, Treaty, Truth', The Monthly online (July 2018).

However, a number of Australian states and territories have commenced (or are about to commence) treaty discussions with their Indigenous peoples. In that respect, the state of Victoria is the furthest advanced. Discussions first commenced in early 2016 and legislation subsequently passed in 2018 to "lay the foundation for negotiations by requiring the State and a future Aboriginal representative body, the purpose of which is to establish the 'elements necessary to support future treaty negotiations'".[18] That body, the First Peoples' Assembly of Victoria, was established in late 2019. The legislation does not set out the parameters of negotiations, however the first of the guiding principles for negotiations is a recognition of the right to self-determination.[19] This is consistent with the Victorian government's commitment to self-determination as the guiding principle in Aboriginal Affairs generally.[20] Importantly, the consultation processes used to date have been Indigenous led; the First Peoples' Assembly having been designed by Indigenous peoples and its members having been elected or appointed by their communities.[21]

Queensland has also commenced a treaty conversation, in which self-determination is one of the guiding principles.[22] So too has the Northern Territory, which, in June 2018, signed 'The Barunga Agreement'.[23] Although not referring specifically to self-determination, one of the guiding principles of that Agreement notes that a treaty (or treaties) 'must … honour the Articles of the United Nations Declaration on the Rights of Indigenous Peoples,' which, as noted earlier, includes the right to self-determination. In 2019, a Treaty Commissioner was appointed, and in 2020 legislation was passed to convert that appointment to a statutory appointment.[24]

The Australian Capital Territory has indicated a willingness to enter into treaty discussions,[25] and to that end has allocated funding in its most recent budget to commence the process.[26]

The Tasmanian government has stated publicly that it is 'open to having discussions on treaty with Aboriginal communities'[27] but there has been no confirmed commitment to date.

Although Western Australia has not formally commenced any treaty discussions, academic commentary has suggested that a native title settlement reached with the Noongar people

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[18] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 9(1)
[19] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 22.
[20] Victorian Aboriginal Affairs Framework 2018-2023, available at:
<https://www.aboriginalvictoria.vic.gov.au/victorian-aboriginal-affairs-framework-2018-2023>.
[21] https://www.aboriginalvictoria.vic.gov.au/treaty-bodies
[22] Queensland Government, *Statement of Commitment* (nd) 2.
[23] The Barunga Agreement: A Memorandum of Understanding to Provide for the Development of a Framework for Negotiating a Treaty with the First Nations of the Northern Territory of Australia (8 June 2018) https://dcm.nt.gov.au/__data/assets/pdf_file/0003/514272/barunga-muo-treaty.pdf
[24] *Treaty Commissioner Act 2020* (NT)
[25] https://www.sbs.com.au/nitv/nitv-news/article/2018/06/25/real-outcomes-needed-clan-groups-support-any-act-treaty-process
[26] https://www.canberratimes.com.au/story/7115029/funding-for-first-indigenous-treaty-process-in-act-budget/
[27] https://www.abc.net.au/news/2020-11-15/tasmanian-aboriginal-treaty-push-renewed/12883932

of the South West region of WA amounts to a treaty in all but name.[28] It has also been suggested that the Noongar settlement is 'self-determination on a non-territorial basis'.[29]

The New South Wales Coalition government has not indicated any intention to enter treaty discussions, however, in the lead-up to the 2019 state election, the opposition Labor Party stated that it would enter into a treaty with the Aboriginal people of that state, should it win the election (which it didn't).[30]

South Australia commenced treaty discussions in late 2016 followed by the appointment of a treaty commissioner in February 2017. In July 2017 a report was produced which set out the next steps in the treaty-making process. However, treaty discussions have since been discontinued following a change in government.

As the experience in South Australia indicates, and as evidenced by the varying stages of treaty discussions in other states and territories, whether a treaty (or treaties) is likely to be reached will be dependent on the commitment of the government of the day.[31] It will therefore be a significant barrier to achieving self-determination via a treaty if the government is not supportive of the process. Treaty discussions, by their nature need to be enduring, requiring significant time and resources if they are to result in any meaningful progress towards self-determination.

Both substantive constitutional recognition and treaty could be instrumental in preventing overt destructive acts that ignore or manifest a complete disregard for Indigenous self-determination. Australia's cultural heritage laws[32] and the inadequate *Native Title Act 1993* (Cth), for example, allowed the destruction of an ancient Aboriginal site at Juukan Gorge in Western Australia, despite clear evidence of its significance.[33] They would also assist in accelerating reform of Australia's environmental and natural resource laws which treat Aboriginal and Torres Strait Islander Peoples as merely another stakeholder to be consulted.[34]

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[28] Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1*) Sydney Law Review* 1.

[29] Bertus de Villiers, 'Chasing the Dream: Self-Determination on a Non-territorial Basis for the Noongar Traditional Owners in the South West of Australia' (2020) 27 *International Journal on Minority and Group Rights* 171.

[30] Calla Wahlquist, 'NSW Labor Plans to Sign Treaty Recognising Indigenous Ownership' The Guardian online (25 January 2018) https://www.theguardian.com/australia-news/2018/jan/25/nsw-labor-plans-to-sign-treaty-recognising-indigenous-ownership

[31] One reason for the passage of the Victorian treaty legislation was to ensure that treaty discussions would not cease should there be a change in government.

[32] *Aboriginal Heritage Act 1972* (WA), *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

[33] Joint Standing Committee on Northern Australia, *Never Again: Inquiry into the Destruction of the 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia – Interim Report* (Canberra, December 2020).

[34] See, eg, Katie O'Bryan, *Indigenous Rights and Water Resource Management: Not Just Another Stakeholder* (Routledge 2019). See also, Graeme Samuel, *Independent Review of the EPBC Act Final Report* (Department of Agriculture, Water and the Environment, Canberra, October 2020) 6–8, 57–72; Productivity Commission, *National Water Reform 2020 Draft Report* (Canberra, February 2021) 111–120.

4. Conclusion

There has been limited progress in Australia in terms of constitutional recognition of a kind that would facilitate the exercise of self-determination by Aboriginal and Torres Strait Islander Peoples. However, the emerging treaty processes in various states suggest that this is an area where self-determination for Australia's Indigenous Peoples has a chance of becoming a reality.