



Australian
Human Rights
Commission

Study on Recognition, Reparations and Reconciliation

Australian Human Rights Commission Submission to the Expert
Mechanism on the Rights of Indigenous Peoples

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) annual 2019 study (under Human Rights Council Resolution 33/25, paragraph 2b), which will focus on recognition, reparations and reconciliation.
2. The Commission is Australia's 'A status' national human rights institution. It was established and operates in full compliance with the Paris Principles.
3. The Commission considers recognition, reconciliation and reparations as part of a broader project of addressing the legacy of colonisation and intergenerational trauma, and resulting socio-economic inequalities, while achieving social justice for Aboriginal and Torres Strait Islander peoples across the Australian nation.
4. Achieving this substantial broader project is contingent on the emergence of a new and committed relationship between Aboriginal and Torres Strait Islander peoples, Australian governments, and all citizens of the nation.
5. This is a relationship that must be based in mutual respect, equality and accountability. Ultimately, it must realise the rights of Indigenous peoples as set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). A cornerstone of this relationship is the foundational right of self-determination. This requires that mechanisms and structural reforms are in place to guarantee that Aboriginal and Torres Strait Islander peoples can meaningfully participate in, and have control over, the policy and legislative decision-making that affects them. UNDRIP emphasises the importance of Indigenous participation and for representatives to be freely chosen by themselves in having a self-determining position in the political decisions about their rights (Article 18, see also articles 19, 3 and 4).
6. Despite the Australian government endorsing UNDRIP in 2009, the debate continues on the form of structural change required that will give Aboriginal and Torres Strait Islander peoples the agency required to determine how their rights will be realised in Australia.
7. The Commission is concerned that too often States in the global context consider Indigenous recognition, reconciliation and reparations through mainly symbolic gestures alone, rather than through a relationship building

that can lead to substantive structural change as a means to incorporate Indigenous peoples in the democratic life of a nation.

8. This study conducted by EMRIP is timely for the Australian context. There is a renewed discourse in Australia laying a pathway to achieve constitutional recognition of the unique and special place of Aboriginal and Torres Strait Islander peoples, alongside several other prospective complementary reforms. This includes consideration of agreement-making or treaty making processes that could lead to a reconciled Australian nation, alongside a greater conception of national settlement and the delivery of just reparations.
9. The Commission therefore welcomes the opportunity to comment on recent developments in Australia which look toward asserting the voice of Aboriginal and Torres Strait Islander peoples to have decision-making over issues that affect them.

2 Recommendations:

1. The Commission recommends that EMRIP provide practical examples to achieve substantive recognition, reconciliation and reparations for Indigenous peoples including, but not limited to, the following matters:
 - best practice examples of engagement, negotiation and co-design between Indigenous peoples and governments
 - approaches to establishing legitimate indigenous representative bodies as an equal partner to States in regard to decision-making on Indigenous issues
 - approaches to raise public awareness
 - process of truth telling leading to reconciled and unified outcomes for States
 - processes of agreement and treaty-making
2. The Commission recommends that EMRIP highlight the importance of supporting Indigenous representative bodies that can guide negotiations toward comprehensive agreement or treaty-making. Without such a representative body that is formally recognised by States it is difficult to achieve meaningful recognition, reconciliation and reparations that can benefit the lives of Indigenous peoples on an ongoing basis.

3 Summary

10. This submission focuses primarily on the work of the current and former Aboriginal and Torres Strait Islander Social Justice Commissioners. The role of Social Justice Commissioner was created by the Australian Federal Parliament in 1993 to provide ongoing scrutiny and guidance about the human rights issues faced by Aboriginal and Torres Strait Islander peoples in Australia.
11. In Australia, the process of reconciliation and achieving ongoing recognition are often discussed together, and alongside legitimate forms of Aboriginal and Torres Strait Islander representative bodies. Delivering reparations, although inherently linked to this dialogue, is often considered separately. This is in part due to the failure of Australian governments to design comprehensive national reparation strategies alongside processes of reconciliation.¹
12. To this end, the submission provides a detailed overview of constitutional reform processes since 2012. This includes consideration of key components and functions deemed necessary for Australia to achieve constitutional reform and commit to substantive recognition and reconciliation.
13. Although the Commission has commented extensively on reparation processes, including calling for a national reparation scheme in response to the forced removal of Aboriginal and Torres Strait Islander children from their families, known as the Stolen Generations,² this is not a focus of the submission.

4 The context

14. Over the last 25 years, during each of the terms of the Aboriginal and Torres Strait Islander Social Justice Commissioners, there have been numerous processes aimed toward achieving recognition, reconciliation and reparations for Aboriginal and Torres Strait Islander peoples in Australia.
15. In this regard discussions on substantial reforms including the need for treaties, reparations and reconciliation is not new. The discussion about the need for reconciliation, recognition and reparations has been shaped by substantial reports and processes exposing the devastating impact of colonisation and ongoing policies of dispossession and exclusion that has removed and/or eroded Indigenous rights in Australia.³

16. An overview of the findings of each Commissioner in regard to these processes is included as **Attachment 1** to this submission. The attachment also identifies related developments during this period that sit within the broad context of recognition, reconciliation and reparations. This includes both actions which have been designed to advance the delivery of social justice for Aboriginal and Torres Strait Islander peoples, and actions which have impeded the progression of achieving Indigenous people's rights.
17. Many of the actions identified continue to arise in consultations today. These actions are still necessary steps, mechanisms and vehicles to deliver social justice and achieve meaningful and substantial recognition, reconciliation and reparations.
18. In brief, since 1993, each Commissioner has made recommendations to this end in response to:
 - Major inquiries identifying the ongoing experience of Aboriginal and Torres Strait Islander peoples of racism and discrimination (such as the Royal Commission into Aboriginal Deaths in Custody,⁴ 1991, the National Inquiry into Racist Violence,⁵ 1991, and Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997).
 - The Proposals for a Social Justice Package (1995), as part of a comprehensive settlement response for the extinguishment of native title (the dispossession from, and permanent loss of, Indigenous peoples' traditional lands), and the inter-generational economic and social disadvantage because of this dispossession.
 - A 10 year legislated reconciliation process aimed at reconciling historical injustices and to address Aboriginal disadvantage and aspirations in relation to an extensive range of social, economic, justice, health and governance issues (1991–2000).⁶
 - The removal of legitimate Aboriginal and Torres Strait Islander representation within Government through the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) (2004). Without ATSIC the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner is the sole remaining national statutory body in an advocacy position to engage with Government.⁷

- The Australian Federal Government's national human rights consultation (2009) to consider how Australia might better protect human rights. The consultation process concluded that Australians know little about their human rights and that public education is needed to create a better culture of human rights.⁸
 - Consultations on constitutional recognition of Aboriginal and Torres Strait Islander peoples (2012 onwards).
19. Despite these many processes, the Federal Government of Australia has consistently struggled to meaningfully engage with, and, to ensure effective participation of Aboriginal and Torres Strait Islander peoples on matters that affect their lives. The unique place of Aboriginal and Torres Strait Islander peoples is still not recognised in Australia's constitution, nor are there national agreement-making frameworks or treaties.
20. This failure of governments to effectively involve Indigenous peoples about issues that affect them has seen social and economic crisis deepen over generations, leading to increasing inequalities and the compounding of trauma.⁹ The fact that we have record rates of Aboriginal and Torres Strait Islander suicides, growing incarceration, homelessness, domestic violence, and unemployment, amongst many other issues, is evidence of the pressing need for change.¹⁰
21. It is long overdue for the Federal Government to commit to negotiations with Aboriginal and Torres Strait Islander peoples about how to address the cycles of crisis and move toward a reconciled nation. This lack of commitment to engage in genuine ongoing dialogue between Australian governments and Aboriginal and Torres Strait Islander peoples, is commonly called, the 'unfinished business' of reconciliation.¹¹

5 Ongoing need for constitutional reform

22. Since 2012, discussions of recognition, reconciliation and reparations have been dominated by ongoing debates on constitutional recognition. There has been significant consideration and public consultation on the issue through four major processes, over an eight-year period.
23. These processes are: the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015, the Aboriginal and Torres Strait Islander Peoples Act of Recognition

Review Panel 2014, The Expert Panel on Constitutional Recognition of Indigenous Australians 2012, and the Referendum Council 2017.

24. Each Social Justice Commissioner has contributed to all of these processes. Crucially, they have identified constitutional reform as but one integral component of addressing the human rights concerns faced by Aboriginal people across Australia. They have all drawn attention to other complementary reforms that are consistently raised as necessary and systemic changes to achieving a broader conception of recognition, reconciliation, and reparations for Aboriginal and Torres Strait Islander peoples across the whole nation.
25. These are:
 - A national representative body for Indigenous peoples to provide advice to the government about policy and legislation that affect their lives, in a manner consistent with self-determination and free, prior and informed consent
 - A national truth telling process to address historical and ongoing injustices faced by Aboriginal and Torres Strait Islander peoples
 - An agreement or treaty-making framework that could lead to a national settlement between Aboriginal and Torres Strait Islander peoples and the Australian Nation.
26. It is the Commission's view that each of these reforms requires a commitment by Australian governments over the long-term. A key failing of the approach to date is that these reforms have not been considered as inter-linked, and have often been approached separately, and in incremental and ad-hoc ways.
27. Developing a comprehensive approach to advance these reforms simultaneously is challenging. Debate continues about whether constitutional or legislative change, or a combination of both, is required to commit the Australian Government to achieving reforms over the long-term.¹²
28. Still, constitutional change is seen by many as an important step to guaranteeing that Indigenous peoples have a voice in their own affairs, and control over their destinies. It is this constitutional guarantee that may result

in meaningful application of UNDRIP and purposeful implementation of the other proposed reforms.¹³

5.1 Racial discrimination in the Australian Constitution

29. An integral component of Constitutional reform is how to deal with the racial discrimination contained within the Australian Constitution. This includes section 25,¹⁴ which allows states to disqualify any racial group from voting in Australian elections, and section 51(xxvi), known as the 'race power', which permits the Federal Government to pass laws based on race.¹⁵
30. There is strong agreement that section 25 is outdated and redundant and should be removed from the Constitution.¹⁶ The constitutional reform processes over recent years have mainly focused on how best to deal with the racial discrimination provision of section 51 (xxvi). While, the provision can enable '*special laws*' to be made which benefit Aboriginal and Torres Strait Islander peoples,¹⁷ the Australian Government has used section 51 (xxvi) to adversely discriminate against Aboriginal and Torres Strait Islander peoples.¹⁸
31. The Commission is unable to identify another country that provides the constitutional power to discriminate in this way.
32. Debate continues about whether the provision should be removed entirely, or a legislative power be created so the Commonwealth can make laws for Aboriginal and Torres Strait Islander peoples subject to a rule of racial non-discrimination.¹⁹
33. The Committee on the Elimination of Racial Discrimination (CERD) has raised concerns about the absence of entrenched protection against racial discrimination in Australia's Constitution. CERD has recommended Australia ensures that the Racial Discrimination Act (RDA) prevails over all legislation that may be discriminatory, and that Australia adopt comprehensive legislation to entrench protection against racial discrimination.²⁰
34. It is the Commission's position that there remains a pressing need to remove section 25 and section 51 (xxvi) in the Australian Constitution. The presence of racial discrimination in the foundational legal document of Australia is a severe roadblock to protecting, recognising and realising the rights of Aboriginal and Torres Strait Islander peoples as contained within UNDRIP.

5.2 Achieving referendum success

35. The Australian Constitution can only be amended through a referendum. For a referendum to succeed it must be passed by the majority of the Australian people and a majority of people in a majority of states. Historically, amending the Australian Constitution is very difficult, achieved only on eight occasions, from 44 attempts, since Australian Federation in 1901.²¹
36. This sets a high benchmark for recognising Aboriginal and Torres Strait Islander peoples within the Australian Constitution. Constitutional change in any form necessitates that there is strong public and bipartisan support across the political parties. Achieving this ultimately demands that the Australian public comes to a unified and reconciled position on constitutional change.
37. The Expert Panel in its final report laid out four criteria of referendum success: that constitutional recognition of Aboriginal and Torres Strait Islander peoples in Australia must:
- contribute to a more unified and reconciled nation;
 - be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples;
 - be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
 - be technically and legally sound.²²
38. These criteria have been used by all constitutional consultation processes to date: to succeed at a referendum and achieve an outcome that is legitimate to, and will result in meaningful change for, Aboriginal and Torres Strait Islander peoples.
39. The Commission is of the view that Indigenous-led processes are needed to meet the criteria set out by the Expert Panel (2012). Such processes should include, as recommended by the various constitutional committees to date: public awareness raising and education programs; referendum campaigns; and ongoing negotiations and dialogue between Aboriginal and Torres Strait Islander peoples, and Aboriginal and Torres Strait Islander peoples and the Australian Government.

40. Many of these components have been enacted by constitutional processes in recent years. Despite this, building public momentum for constitutional recognition and capitalising on the success of these processes has been hampered by a lack of political will and leadership. This has led to a degree of political inertia, public malaise over the debate, and growing apathy from Aboriginal and Torres Strait Islander peoples that constitutional recognition will result in meaningful change to their lives.

6 Meaningful engagement with Aboriginal and Torres Strait Islander Peoples

41. This trend was seen to shift in 2015 with the appointment of the Referendum Council and increased financial resources for the consultation process with members of the Aboriginal and Torres Strait Islander communities.²³
42. The Referendum Council marked the beginning of serious and committed engagement with Aboriginal and Torres Strait Islander peoples about the approach that constitutional recognition should take.
43. The Council was charged with similar responsibilities to previous committees such as advising on next steps towards a successful referendum. Importantly, the Council was also tasked with leading national consultations and community engagement, about constitutional recognition, including a series of Indigenous designed and led consultations.

6.1 Successful components of the First Nation Regional Dialogues

44. In addition to online consultations and a written submissions process, the Referendum Council conducted a series of Indigenous designed and led consultations through 12 First Nations Regional Dialogues held across Australia (Dialogues). This process was the first time in Australia that a Constitutional Convention was convened with and for Aboriginal and Torres Strait Islander peoples.²⁴
45. The Referendum Council noted the following five key features, which should be highlighted as contributing to the effectiveness of the Dialogues:
- *The process was structured and principled:* the Dialogues were conducted based on: impartiality; accessibility of relevant information;

open and constructive dialogue; and mutually agreed and owned outcomes.

- *The process engaged leading Aboriginal and Torres Strait Islander organisations and individuals:* delegates to each Dialogue comprised 60% from First Nations/traditional owner groups, 20% from community organisations and 20% involving key individuals. A core principle was to ensure that the First Nations formed the core representation to these Dialogues.
- *The Dialogues canvassed legal and policy issues and political viability:* Delegates received a comprehensive legal explanation of each of the proposals set out in the Referendum Council's Discussion Paper. They then focused on each of the proposals, which included a discussion of relevant legal and policy issues and questions of political viability for each reform option.
- *The process culminated at Uluru in May 2017:* The integrity of the Dialogues is demonstrated by the fact that a consensus position was reached at Uluru.²⁵

46. The consultations led by the Referendum Council demonstrate the importance of a robust process that prioritises Indigenous led design and control, as well as the full and meaningful participation of Indigenous peoples within the dialogues. A process such as this acts as a vehicle of reconciliation with an aim toward substantive recognition.

6.2 The Uluru Statement from the Heart, and the 'Voice' to Parliament

47. The Dialogues culminated in the National Constitutional Convention in May 2017, where the 'Uluru Statement from the Heart' was adopted by consensus.²⁶ The *Statement from the Heart* is a clear articulation of the powerlessness Aboriginal and Torres Strait Islander peoples feel due to a lack of effective recognition and structural exclusion from effective participation in the decision-making arenas of Australian governments.

48. The *Statement* asserts that substantive constitutional reform is a means of empowerment for Aboriginal and Torres Strait Islander peoples to take a *rightful place* in their own country.

49. To this end, the Referendum Council's final report put forward one constitutional recommendation: that there is a constitutionally-enshrined representative body that gives Aboriginal and Torres Strait Islander First Nations a 'Voice' (the Voice) to the Commonwealth Parliament of Australia. The Referendum Council noted that the Voice was not a veto power, nor would it limit the legislative powers of Parliament.²⁷
50. To this end, the Council stated that the Voice was the favoured option as it was considered a way to achieve self-determination. Constitutional enshrinement was understood as a guarantee of inclusion in decision-making, rather than establishing a representative body through legislation and leaving it vulnerable to abolition. Lastly, the Voice was seen as recognition of a new relationship with the Australian Government. It would mark a departure from many of the superficial consultation processes which lacked the structural requirements to commit governments to deliver on consultation outcomes.²⁸
51. The Referendum Council also put forward extra-constitutional recommendations, including enacting through legislation a Declaration of Recognition; and the establishment of a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and to facilitate a process of local and regional truth-telling about the history and place of First Nations people in Australia.²⁹
52. The *Statement from the Heart* and the Dialogues have shown that recognition for Aboriginal and Torres Strait Islander peoples must have symbolic meaning as well as deliver substantive change.
53. It has put back on the table the need for complementary positions to be advanced alongside constitutional reform to progress the 'unfinished business' of reconciliation.

6.3 Response to the Uluru Statement

54. It was widely considered that the Dialogue series culminating in the Uluru Statement brought consensus to an issue that had not had agreement amongst Indigenous peoples themselves. It was also considered a success in respect to garnering public support and generating discussion about constitutional recognition. This is evidenced by national survey results indicating widespread public support for Indigenous constitutional recognition, including the Voice to Parliament proposal.³⁰

55. Despite this, the Uluru Statement was initially rejected by the Australian Government in October 2017.
56. The Prime Minister at the time, the Hon Malcolm Turnbull MP, stated that the Government saw the Voice as a radical change to the Constitution's representative institutions that would undermine the principles of equality, and one-person, one-vote. The Prime Minister also stated that it was unclear how the Voice would work, and that it would likely become a Third Chamber within the Parliament.³¹
57. Many Indigenous leaders and advocates of the Voice were shocked at the rejection.³² The Voice was widely regarded as a modest constitutional change that would not threaten the supremacy of the Parliament to make legislation.³³ It would merely provide a guaranteed mechanism to enable Aboriginal and Torres Strait Islander to have a say in the political decisions about their affairs, rights and interests.
58. The rejection of the Statement by the Government has made it evident that robust negotiations are still needed between Aboriginal and Torres Strait Islander peoples and the Australian Government to come to a mutually accepted position for referendum.
59. It is the Commission's view that one of the reasons that Indigenous Constitutional recognition has not succeeded is that conversations have happened along parallel pathways, about what is acceptable to Aboriginal and Torres Strait Islander peoples and what is acceptable for the Australian Parliament. These conversations must be brought together for a form of recognition to be achieved that is considered to be legitimate to Aboriginal and Torres Strait Islander peoples, while also acceptable to the Australian Parliament.
60. Despite the rejection, there continues to be bipartisan discussions on constitutional recognition. In March 2018, a new Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander peoples 2018 was established. The Committee was tasked with considering the recommendations of the Referendum Council alongside all other major constitutional process since 2018, and to find 'common ground' and work towards a successful referendum on Indigenous recognition in the Constitution.³⁴

7 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018

61. The Final report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples 2018, stated that the *Statement from the Heart*, and the introduction of the Voice as a new element, was a major turning point in the debate on constitutional recognition.³⁵ The Committee wrote:

Throughout the inquiry the Committee observed broad support for the concept of a First Nations Voice, both as a form of recognition and as mechanism to empower Aboriginal and Torres Strait Islander peoples to have a greater say in the policy and legislation that governs their affairs.³⁶

62. For this reason, the Committee focused attention on the detail and design of the Voice. It also considered the significant evidence presented on the need for a national truth telling process. The Committee noted that this reflects the strong desire from all Australians to have a fuller understanding of the historical and ongoing relationship between Aboriginal and Torres Strait Islander peoples and other Australians to develop a more reconciled nation.³⁷

63. To this end, the Committee put forward four recommendations:

- Recommendation 1 – The Australian Government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples, to ensure that the Voice suits the needs and aspirations of Aboriginal and Torres Strait Islander peoples
- Recommendation 2 – following the process of co-design the Australian Government considers, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice
- Recommendation 3 – The Australian Government support the process of truth-telling that should include a range of local, regional and community groups across Australia
- Recommendation 4 – the Australian Government consider a national resting place for Aboriginal and Torres Strait Islander remains as a place of commemoration, healing and reflection.³⁸

7.1 Co-design as a pathway forward

64. The current and former Social Justice Commissioners came together to present evidence as a collective to the Committee, through a submission and at public hearing on 18 October 2018.

65. At the Committee hearing the Commissioners stated:

It is time to move beyond the discussions and the political stalling of the last 25 years, and to begin robust negotiations between Indigenous Australians and the Australian Parliament so all Australians can commit to action and resolve the ‘unfinished business’ of this nation.³⁹

66. Given the pressing need to move forward, the Commission supports the Committee’s recommendation that the first step in achieving the Voice, and other complementary reforms is a co-design process that is Indigenous-led, while inclusive of the Australian Parliament and the Australian public. Co-design is necessary to bring separate conversations together and come to a shared and reconciled position for the nation as a whole.

67. The Committee was unable to determine the principles to inform a co-design process. However, the Committee presented a range of evidence suggesting that co-design should: be well resourced for effective and informed negotiations to take place, consistent with the principle of free, prior and informed consent; allow for sufficient time for deep conversations to take place between all parties involved; and follow a clear and transparent process.⁴⁰

68. The Committee is also of the view that a properly conducted process of co-design will ensure that the Voice can be:

- Legitimate and credible to Aboriginal and Torres Strait Islander peoples in local and regional communities across Australia
- Effective in advancing self-determination and achieving positive outcomes
- Capable of achieving the support of an overwhelming majority of Australians.⁴¹

8 The need for a negotiation framework

69. To date, the lack of accountability of governments for ensuring Aboriginal and Torres Strait Islander peoples' representation and full participation in matters that affect them is integrally connected to a lack of engagement with Aboriginal and Torres Strait Islander peoples.
70. It is the view of the Commission that a way forward in committing to meaningful engagement and progressing co-design is to legislate a negotiation framework. A framework for negotiation will lay the platform for dealing with the other major issues of injustice that face Aboriginal and Torres Strait Islander peoples that lie at the core of the relationship with the nation-state of Australia.
71. Efforts to deal with these issues have stalled in Australia, due to the apparent fear by consecutive governments that the outcomes of any negotiation process are uncertain. Such a stance misunderstands that the aim of negotiations is for views from both sides to be represented equally, and not for one to impose their will on the other. Instead, negotiation necessitates the mutual accommodation of the views of each side considered through dialogue.
72. Experiences from overseas, in countries such as New Zealand, Canada, Norway and the United States of America, show that it is not possible to entirely predict the final destination from a negotiation process. There will be key points on which consensus will emerge that cannot be foreseen in the present. This is true reconciliation, a process in which a relationship is built on mechanisms that can only be determined through genuine negotiation between Aboriginal and Torres Strait Islander peoples and the Australian Government.
73. That is why it is the Commission's position that the Australian Government must commit to developing a negotiation framework. This is a commitment to a new relationship with Aboriginal and Torres Strait Islander peoples, one built in partnership.
74. A negotiation framework should be underpinned by, and aim to achieve, the following:
- Nothing decided about the policy, legislation and service design and delivery that affects Aboriginal and Torres Strait Islander peoples

should occur without the involvement of Aboriginal and Torres Strait Islander peoples. In other words, Aboriginal and Torres Strait Islander people must be co-design partners in all matters to do with their affairs.

- Full accountability for government decision making that affects Aboriginal and Torres Strait Islander peoples.
- Acknowledgment of past harms caused to Aboriginal and Torres Strait Islander peoples and the ongoing impact this has on the relationship between Aboriginal and Torres Strait Islander peoples and Australian governments as well as the intergenerational trauma and inequality experienced by Indigenous peoples today.
- A seat at the decision-making table for Aboriginal and Torres Strait Islander people to have their say about a vision for a future, reconciled Australia.

8.1 Closing the Gap Strategy

75. A precedent exists in Australia for a negotiating framework with Aboriginal and Torres Strait Islander peoples and Australian Governments. The Closing the Gap Strategy agreed to through the Council of Australian Governments (COAG), provides a framework for an inter-jurisdictional approach to Indigenous advancement within the nation's federal system of governance.⁴²

76. In March 2008, all parliamentary parties signed the Close the Gap Statement of Intent to close the gap in Indigenous health inequality. The Statement is a formal commitment by Australian governments, across all jurisdictions to achieve Aboriginal and Torres Strait Islander health equality by the year 2030.⁴³ The Statement clearly articulates that the success of the Strategy is dependent on the full participation of Aboriginal and Torres Strait Islander peoples in the development and ongoing implementation of the strategy. The Statement has provided the impetus for the Government's Closing the Gap Strategy.

77. To this end the Statement committed governments to:

- develop a comprehensive, long-term plan of action that is targeted to need, evidence-based and capable of addressing the existing inequities in health services, in order to achieve equality of health

status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by 2030

- ensure the full participation of Aboriginal and Torres Strait Islander peoples and their representative bodies in all aspects of addressing their health needs
- respect and promote the rights of Aboriginal and Torres Strait Islander peoples, including by ensuring that health services are available, appropriate, accessible, affordable, and of good quality
- support and develop Aboriginal and Torres Strait Islander community-controlled health services to achieve lasting improvements in Aboriginal and Torres Strait Islander health and wellbeing
- measure, monitor, and report on our joint efforts, in accordance with benchmarks and targets, to ensure that we are progressively realising our shared ambitions.⁴⁴

78. Despite the intention of the Statement, the Federal Government acknowledged, in December 2016, that the Government's Closing the Gap strategy had failed to meet most of its targets.⁴⁵ There was broad consensus that the strategy failed because Government did not effectively engage with Indigenous people, and because of this the Strategy did not meet the commitments set out by the Statement. This led to COAG announcing a 'Refresh' of Closing the Gap *targets* in 2017.⁴⁶

79. A 10 year review of the Strategy from the Close the Gap Campaign stated that the Strategy had only partially and incoherently implemented the commitments of the Statement. The review called for a renewed commitment for implementing the Statement.⁴⁷ Prominent Aboriginal and Torres Strait Islander leaders also called for the next phase of Closing the Gap to be guided by principles of empowerment and self-determination, and deliver a community-led, strengths-based strategy.⁴⁸

80. Although there have been clear failings in the design and implementation of the strategy, having an inter-jurisdictional framework has meant that governments have been held both accountable to the failures and committed to having to address them. Further, the framework has enabled ongoing discussion across governments about these failures, leading to the Re-refresh. More recently the discussion has evolved again. The Government

has been criticised for its lack of meaningful inclusion of Aboriginal and Torres Strait Islander peoples throughout the Re-fresh process.⁴⁹

81. In December 2018 COAG agreed on a communiqué recognising that to effect real change, governments must work collaboratively, through a co-design approach, and in genuine formal partnership with Aboriginal and Torres Strait Islander peoples. COAG plans to formalise this partnership by the end of February 2019, to finalise the Refresh of Closing the Gap and provide a forum for ongoing engagement.
82. The elements of this formal partnership, as included in the communiqué, are:
 - Mutual respect between parties
 - Direct engagement and negotiation as the preferred pathway to productive and effective agreements
 - Aboriginal and Torres Strait Islander peoples having an integral part in the making of the decisions that affect their lives
 - Shared ownership of and responsibility for a jointly agreed framework
 - Built on the strength and resilience of Aboriginal and Torres Strait Islander peoples and communities
 - Continue to build the capability of Indigenous organisations for genuine collaboration and partnership.⁵⁰
83. The Close the Gap Campaign Co-Chair and current Social Justice Commissioner, June Oscar AO, has publicly highlighted the significant development of this approach. Ms Oscar reaffirmed the position that when Aboriginal and Torres Strait Islander peoples are included in the design and delivery of services that affect their lives, the outcomes are far better.⁵¹
84. The Commission welcomes this renewed commitment from COAG. The development of the Closing the Gap Strategy along these lines will lay the ground-work for a cohesive national agenda to emerge. It is a national inter-jurisdictional framework such as this that can allow for ongoing negotiation and a blueprint for co-design between governments and Aboriginal and Torres Strait Islander peoples on a range of development issues including the broader project of progressing recognition, reconciliation and delivering substantial reparations.

9 Treaties and agreement-making

85. It is a challenge to determine how a negotiation process should be designed and how best to identify representation of Aboriginal and Torres Strait Islander peoples to lead those negotiations, and make decisions considered legitimate by the broader community. However, there are many existing mechanisms and processes that can be built on in Australia.
86. While establishing an Aboriginal representative body and progressing agreement-making at the national level continues to stall in Australia, treaty processes are developing at the Australian State and Territory levels.
87. For example, In July 2018, the Victorian State Parliament passed the first legislation in Australia to establish an Aboriginal Representative body, tasked with developing the framework for facilitating future treaty negotiations with the Victorian state.⁵² The passing of this historic legislation has set in motion a process of agreement-making underpinned by Indigenous principles. The legislation will mean the establishment of an Aboriginal representative body and a framework to guide agreement-making.⁵³
88. Jill Gallagher AO, the Commissioner of the Victorian Treaty Advancement Commission,⁵⁴ has identified key components that have given legitimacy to the treaty process among Aboriginal community members. This includes: the independence of the Advancement Commission from government; the open and inclusive process; ongoing engagement to effectively inform, and be informed by, the Aboriginal community about the process; the full and meaningful participation of Aboriginal peoples at every stage of the process; and that legislating the process provided the time needed to have robust conversations and come to acceptable positions about an issue that has many differing views amongst the Aboriginal community.⁵⁵
89. In addition, in proposing a model for the representative body, the Advancement Commission has drawn on key principles put forward throughout engagements with the Aboriginal community. For example, principles such as unity, inclusive representation, and culturally based, have determined that the representative body will have a gender quota and reserved seats for recognised traditional owner groups.⁵⁶
90. Other States and Territories in Australia have entered into similar processes and discussions about treaty-making, underpinned by similar principles. For example, the Northern Territory (NT) Government has said that a Treaty will

be a new way forward, and an important step toward empowering Aboriginal people. The NT Government has stated that a Treaty could include, alongside a number of different items: acknowledgement of First Nations peoples; truth telling process; reparations for past injustices and dispossession of Aboriginal peoples from their lands; and mechanisms of accountability to live up to the commitments of the treaty.⁵⁷

91. It is the Commission's view that these approaches offer examples of how best to develop co-design processes and negotiation frameworks, underpinned by Indigenous principles and rights, which lead to legitimate models of representation. The key to the success of these reforms is the full and meaningful participation of Indigenous peoples in leading negotiations and determining the outcomes.
92. Further, through the establishment of institutional mechanisms, such as legislating for a representative body, ongoing substantive recognition and reconciliation can be achieved.

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