

11 June 2018

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

Dear Secretary

Submission from the Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention

Thank you for the opportunity to make a submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples. We are writing as a group of the Technical Advisers who attended the 13 Regional Dialogues and the Uluru First Nations Constitutional Convention. We are solely responsible for the views and content in this submission.

Role of the Technical Advisers in the Regional Dialogues: The Indigenous sub-committee of the Referendum Council designed the Regional Dialogue process via three consultation meetings with Traditional Owners (Broome), National peaks (Thursday Island) and individuals (Melbourne) and a trial Dialogue in Melbourne (Melbourne Law School). The full process that was followed in each Regional Dialogue is described in more detail in the Referendum Council's Final Report.

The Technical Advisors were engaged by the Referendum Council Indigenous sub-committee. To ensure the consistency of the support provided to local Dialogue conveners and Working Group Leaders, the Technical Advisers attended a number of the pre-Dialogue meetings and the Trial Dialogue in Melbourne in November 2016. The same Technical Advisers were engaged as far as possible across the Dialogues and at the Uluru Convention. The Technical Advisers that attended the Dialogues were:

- Associate Professor Gabrielle Appleby (UNSW Law)
- Ms Josephine Bourne (Macquarie University)
- Associate Professor Sean Brennan (Director of the Gilbert + Tobin Centre, UNSW Law)
- Dr Dylan Lino (UWA)
- Ms Gemma McKinnon (UNSW Law)
- Mr Dean Parkin (Parkin Consulting)
- Dr Nicole Watson (University of Sydney)

Three key roles were performed by the Technical Advisers at the Regional Dialogues: assisting the working groups, drafting the Record of Meeting for consideration by the delegates at the Dialogue, and facilitating in the plenary sessions.

1. Technical Advisers assisting the working groups: In the afternoon session of the second day of each Dialogue, two break-out working group sessions were held. These sessions were led by a Working Group Leader, who was a member of the local community, supported by a Technical Adviser. The first working group session considered the different options for constitutional reform, with each group considering the benefits and disadvantages of one of the following five reforms, and reporting back to the plenary:

- (1) Statement of acknowledgement
- (2) Races power
- (3) Racial non-discrimination clause
- (4) Voice to Parliament
- (5) Treaty / agreement-making

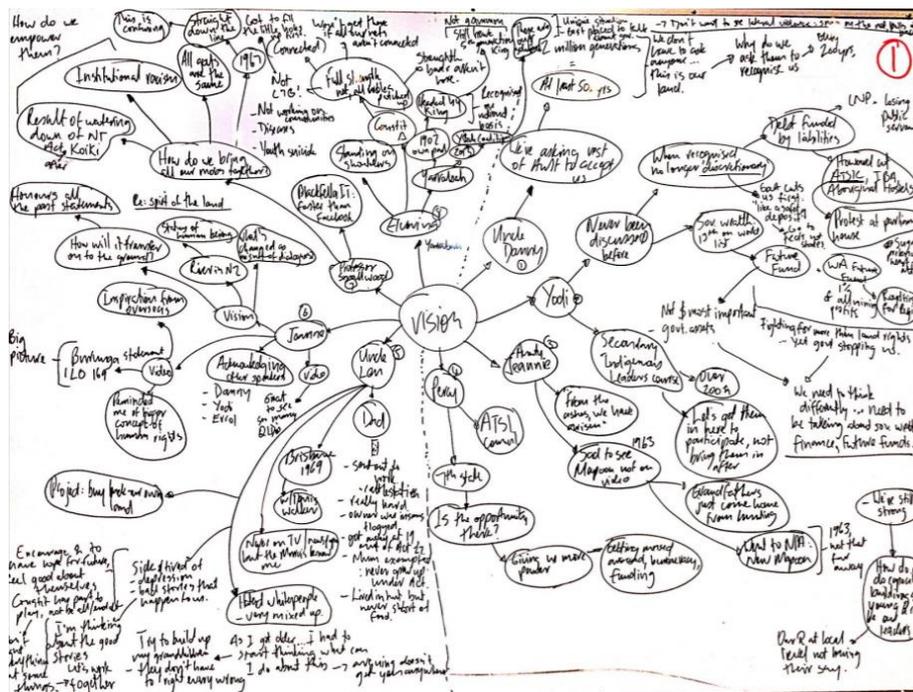
In the second working group session, having heard the report back from each of the first working groups on the options for reform, each group was asked to prioritise the options for reform, and again report back to the plenary.

The role of the Technical Advisers in each of these working group sessions was to brief the Working Group Leader on the necessary technical detail and how to structure the session, answer any technical questions about the details of the model during the session, and scribe for the group (if required). The Technical Advisers would also assist the Working Group Leader to prepare for the report back to the plenary session. The stability of the Technical Adviser team was a particularly important part of bringing consistency across the locally-led process.

2. Drafting the Record of Meeting for consideration by the Dialogue: At each Dialogue, the Technical Advisers were also responsible for taking detailed notes of the plenary discussions and the working group report backs, to draft a Record of Meeting that was then put in front of delegates for their consideration, finalisation and approval.

3. Facilitator in the Plenary Sessions: Dean Parkin was also engaged during the Dialogues and at Uluru as a facilitator to “live capture” the feedback from the plenary sessions and the inputs from the break-out working group sessions. The facilitator captured the feedback on whiteboards at the front of the room in a “spider diagramming” or “mind-mapping” format (see example below). At the end of each session, the facilitator repeated the ideas, questions and concerns that each of the speakers had raised to confirm their words and intent had been heard and captured. In collaboration with the notes from the legal scribes in the room, these “live captures” fed into the draft Record of Meeting. At the end of each Dialogue, the facilitator showed the draft Record of Meeting on a projector screen and worked through the draft in a plenary session, editing the draft live until the Dialogue participants agreed the final Record of Meeting.

There were two key benefits from this approach. Firstly, and most importantly, participants could see their ideas, questions and concerns being heard and captured as they were spoken. It gave confidence that their input was being directly fed into their Dialogue’s record and the overall Referendum Council process. The effectiveness of this approach meant that the final plenary drafting of the Record of Meeting was not as difficult as it might have been because people could see the connection between their words and the draft Record of Meeting. Secondly, the information captured on the whiteboards augmented the Technical Advisers’ notes, ensuring that feedback was being captured from both the front and rear of the venues.



Role of the Technical Advisers at the Uluru First Nations Constitutional Convention: A number of the Technical Advisers who had attended the Regional Dialogues also attended the Convention. The Technical Advisers who attended the Convention were:

- Associate Professor Gabrielle Appleby (UNSW Law)
- Associate Professor Sean Brennan (Director of the Gilbert + Tobin Centre, UNSW Law)
- Dr Dylan Lino (UWA)
- Ms Gemma McKinnon (UNSW Law)
- Mr Dean Parkin (Parkin Consulting)

Three key roles were performed by the Technical Advisers at the Convention: pre-convention technical assistance; technical assistance during the Convention; and, again, facilitating in the plenary sessions (see above).

1. Pre-Convention Technical Assistance: Prior to the Uluru First Nations Constitutional Convention, the Technical Advisers assisted the Referendum Council to distil the material in the Records of Meetings from the Regional Dialogues into a number of documents that were distributed to the delegates at the Convention. The first was a distillation of a number of

Guiding Principles, which were then read to the Convention for the delegates' consideration, finalisation and approval. The second document was a narrative distillation of the stories from the Records of Meetings – from the practice of law and sovereignty before colonisation through to the modern push for treaty – that were told during the Dialogues. This narrative was also read out to the Convention for the delegates' consideration, finalisation and approval, and the final version approved by the Convention is contained in the Referendum Council's Final Report (see "Our Story" at pages 16–21.) The final document was a distillation of the Records of Meetings for the reform options, so that the delegates could see the different responses to the options across the Dialogues.

In addition, the Technical Advisers worked to brief the Convention Facilitators and Working Group Leaders on the agenda and technical issues involved in their work.

2. *Technical Assistance During the Convention:* During the Convention, the Technical Advisers assisted the Working Group Leaders to lead discussions about the different reform options. The Technical Advisers answered technical questions during these sessions, supporting the Working Group Leaders as required. The Technical Advisers also assisted during the Convention by facilitating a meeting of the delegates chosen by the Convention to prepare a draft document from which the Uluru Statement from the Heart was written.

3. *Facilitator in the Plenary Sessions* (see above).

Summary of the Regional Dialogues Records of Meetings: Below is a brief summary of each of the options considered by the Regional Dialogues, as captured in the Records of Meetings as well as the recollection of the Technical Advisers involved in the relevant working group.

Statement of acknowledgement: The Regional Dialogues generally did not see a statement of acknowledgement as a priority and unanimously rejected as tokenistic any statement that was not accompanied by stronger and more substantive constitutional change. Some said that a statement might inform the operation of the other reforms – for example, by providing the mandate for the Voice to Parliament or providing guiding principles for treaty-making. Many of the Dialogues also thought that a statement based on mere "acknowledgement" of First Nations was inadequate and too weak a basis for constitutional reform. Alternative suggestions included a "truth statement" recognising the history of frontier wars and massacres (Darwin) and a statement of the "inherent rights" of First Nations (Sydney and Melbourne). The Dialogues were also anxious to ensure that any statement did not negatively impact on First Nations sovereignty.

Across the Dialogues there was agreement that any statement that was adopted needed to have strength. It must recognise the sovereignty of Aboriginal and Torres Strait Islander peoples and their languages, cultures, knowledges and law. The Ross River Dialogue explained this by stating that any statement "would have to acknowledge the "*Tjukurrpa*" – "our own Constitution", which is what connects Aboriginal people to their creation and gives them authority." Several of the Dialogues also thought that an important component of any

constitutional statement would be truth-telling to dispel the lie of *terra nullius* and acknowledge the genocides and injustices of the past. As the Melbourne Dialogue concluded:

“This statement should not be simply of ‘acknowledgement’, but should contain a statement of ‘intent’ and a statement of the ‘inherent rights of the First Peoples’. The statement might refer to Australia’s international obligations, such as UNDRIP. The statement could also acknowledge the sovereign position of Australia’s First Peoples and the crimes committed against humanity.”

Several Dialogues said that instead of a statement of acknowledgement inside the *Constitution*, a national declaration sitting outside the *Constitution* could be passed. This could get around any drafting problems or political difficulties involved in trying to include a wide-ranging statement inside the *Constitution*. As the Cairns Dialogue said, an extra-constitutional declaration could be used:

- *“to unify the Aboriginal and Torres Strait Islander peoples;*
- *to provide a focus point for the wider community;*
- *to inform the work of a voice to parliament; and*
- *to provide guiding principles for treaty negotiation.”*

Constitutional prohibition on racial discrimination: Across most of the Dialogues, there was support for inserting a constitutional prohibition on racial discrimination to “*fence in*” the Commonwealth’s law-making power and protect against adversely discriminatory laws. This concern to prevent racially discriminatory laws was pronounced in the Northern Territory, in light of the Commonwealth Government’s Northern Territory Intervention.

But across the Dialogues, a constitutional prohibition on racial discrimination was generally not as high a reform priority as a Voice to Parliament or treaty-making. Delegates to the Dialogues often expressed the view that racially discriminatory laws could be prevented through a Voice to Parliament rather than a legally enforceable constitutional prohibition. A delegate at the Ross River Dialogue (NT) explained:

“Today, we still have the intervention. Being on that land, being told that our rights were taken away, that we were nothing, that we were, and we are still today. ... Let’s not forget the intervention, because we cannot move forward until we do something about the intervention. The only way we can empower ourselves is to go and get a voice.”

Several Dialogues also acknowledged that the effectiveness of a constitutional prohibition on racial discrimination would depend on how it was interpreted, and that there was no guarantee it would meet First Nations’ aspirations. The Brisbane working group considering this option concluded:

“there’s a risk that the High Court might not listen to Aboriginal and Torres Strait Islander people when deciding what amounts to racial discrimination, but instead just listen to the government.”

Amendment to races power (s 51(xxvi)): The working groups in the Regional Dialogues carefully considered the desirability of amending the races power (section 51(xxvi)). The option of section 51A was put to the working groups as a possible alternative but the discussion was not limited to this form of amendment.

The working groups discussed the significance of the amendment to the races power in 1967, when the Commonwealth was given the power to make laws for Aboriginal and Torres Strait Islander peoples. The delegates considered the implications of the High Court’s 1998 decision in *Kartinyeri v Commonwealth*. The working groups discussed how the power could be used to pass laws that discriminated in a positive way towards Aboriginal and Torres Strait Islander people, as well as negatively, in adverse ways against Aboriginal and Torres Strait Islander people. The delegates discussed the importance of the power in supporting many beneficial laws, including, for instance, laws that grant native title and cultural heritage protection. However, the groups also discussed the use of the power to pass adversely discriminatory laws such as those that excised Hindmarsh Island from the cultural heritage protection laws and the native title amendments following the *Wik* decision.

The participants in the working groups acknowledged the outdated language of the provision, and particularly its reference to the concept of “race”. However, ceasing use of the word “race”, and replacing it with the words “Aboriginal and Torres Strait Islander peoples” was not established as a priority at any of the Dialogues. The participants understood that this would not impact on the interpretation of the power, and specifically whether it could be used to support adverse laws.

The delegates understood that it ultimately falls to the High Court to interpret the power – however it is worded. There is no guarantee that by amending the power, the Parliament would be prevented from passing adversely discriminatory laws. The working groups discussed how a statement of recognition, such as inserted in the proposed section 51A, may or may not be used by the High Court to interpret the head of power. The delegates understood that there would be no guarantee this statement would be used by the High Court to interpret the head of power favourably for Aboriginal and Torres Strait Islander peoples. The delegates were concerned that even if explicitly positive language were used to constrain the races power – such as restricting it to laws “for the benefit of Aboriginal and Torres Strait Islander peoples” – this could be ineffective if the High Court deferred to parliamentary interpretation of what was for the benefit of Aboriginal and Torres Strait Islander peoples.

Delegates in the working groups expressed a desire to shift the responsibility for determining when the races power should be used from the Parliament or the High Court to a body comprised of Aboriginal and Torres Strait Islander people. It was suggested that this should be a central role of the Voice to Parliament.

Voice to Parliament: At every Regional Dialogue, the working groups and the plenary sessions agreed that the “Voice” was a reform priority. It was seen as a continuation of the long struggle for political representation going back over a century and an expression of the right to self-determination. The Regional Dialogues distinguished the concept of the Voice to Parliament from the election of Aboriginal and Torres Strait Islander MPs under the existing system. One delegate said, for example:

“There are Aboriginal people who have been elected to Parliament, but they do not represent us. They represent the Liberal or the Labor Party, not Aboriginal People.”

In each of the Dialogues, the working groups discussed in detail how a Voice would work. They understood that its primary purpose was to ensure that Aboriginal and Torres Strait Islander voices were heard whenever the Commonwealth Parliament exercised its powers to make laws under two heads of power:

- (a) The races power: section 51(xxvi) of the Constitution. This power has been relied on, for instance, to pass laws that protect Aboriginal and Torres Strait Islander cultural heritage, and to pass the *Native Title Act*.
- (b) The territories power: section 122. This power has been relied on, for instance, to pass the laws for the Northern Territory Intervention.

The Regional Dialogues’ working groups realised that constitutionalising a political voice was no guarantee that adverse laws would not be passed in the future. Rather, it would create a political limit, or political tension: whenever Parliament exercised its power to pass laws affecting Aboriginal and Torres Strait Islander peoples, their voices would necessarily be heard. One delegate at the Ross River Dialogue in the NT said, for instance:

“Since the demise of ATSIC, we’ve had no say. ... If there was a voice to Parliament when they designed the intervention, we would have had a say.”

In the Torres Strait Dialogue, delegates referred to the Voice as creating an “engine room” for change that would facilitate self-determination, safeguard against discriminatory laws and support future agreement-making.

There was consensus across the Regional Dialogues that the Voice needed to be in the Constitution, with many of the working groups recalling the abolition of bodies in the past, notably ATSIC, without any consultation. For instance, one delegate said:

“We don’t want to go back to ATSIC where it can be abolished.”

The Dialogues acknowledged that the full detail of the design of the Voice would have to be implemented via legislation, but that it must be designed through a process that is led by Aboriginal and Torres Strait Islander peoples.

The Dialogues considered that the body must have authority from, be representative of, and have legitimacy in Aboriginal and Torres Strait Islander communities across Australia. It must be structured in a way that respects culture. There were different ideas as to how the body might best represent Aboriginal and Torres Strait Islander peoples across the country in a way that had cultural legitimacy and inclusivity. The Dialogues consistently discussed the need for the body to have representation for women, elders, youth, traditional owners and the Stolen Generations, representation across urban, regional and remote areas, and representation for Torres Strait Islander people in both the Torres Strait and the mainland. One delegate, for instance, said:

“The body needs to capture and strengthen our identity and diversity.”

All Dialogues agreed that the primary function of the Voice would be to provide a First Nations perspective whenever federal laws were passed that affected Aboriginal and Torres Strait Islander peoples, although the exact breadth of this mandate was not decided upon. The importance of having a Voice in Parliament with real political power, engaged in a genuine dialogue with the Parliament, was emphasised. For instance, delegates at the Regional Dialogues said:

“Instead of doing things to us, doing things with us.”

“We need to have say over our own lives.”

Suggestions of how to create political power included that the body should have the right to address both Houses of Parliament, or that the Houses must be compelled to respond to the body’s reports and recommendations before passing the laws.

Many groups also discussed whether the body could undertake other roles, including designing new policies; advising Ministers; reviewing, monitoring and overseeing funding coming into communities; and auditing and evaluating service delivery in Aboriginal and Torres Strait Islander affairs. There was some discussion about whether the body also needed to be involved in advising State, Territory and local governments. It was also suggested that the body could represent Aboriginal and Torres Strait Islander peoples internationally. Some groups also discussed the possible role that the body would play in pursuing the objective of treaty, particularly in the negotiation of a future treaty or treaties, and overseeing legislation giving effect to treaty or treaties.

The Dialogues discussed that to be effective, any body must also be supported by a sufficient and guaranteed budget, with access to its own independent secretariat and experts, including lawyers.

Treaty: There was strong support expressed for a treaty or an agreement-making process at all the Regional Dialogues. Many people said that they had long supported and campaigned for a treaty.

A range of reasons were given by people for why they supported a treaty process. It was seen as the means for establishing a fair and honest relationship between First Nations peoples and Australian governments. As one delegate put it at the Sydney Dialogue:

“Treaty is about being real in sitting down and speaking to us as equals, about our customs, our country, our future, our kids’ and our grandkids’ future.”

A treaty was also regarded as an appropriate way of expressing the reality that Aboriginal and Torres Strait Islander people have never ceded their sovereignty, and respecting that fact. A treaty process would enable Aboriginal and Torres Strait Islander people to negotiate as equals – as one Melbourne participant put it, *“Treaty is a level playing field”*.

Participants in the Dialogues also associated a treaty with empowerment. Through negotiating agreements with government, they saw a way of tackling the tough issues facing their communities by taking responsibility for dealing with them, rather than having governments control their affairs and generally do an unsatisfactory job of improving the situation.

Another benefit of having treaties at a regional and local level that people identified was the ability to design things that suited their local situation. As one participant at Broome said, “*We don’t want uniformity.*”

A treaty was also seen as a means of negotiating substantial reforms and fair solutions to issues that have never been properly resolved. People saw a treaty process as a path to greater economic independence and thus a way out of the poverty experienced over generations by so many First Nations people. They also often commented on a treaty as a way of achieving protection for their rights as First Peoples. There was strong interest in a treaty resolving outstanding issues of land justice. Agreements would also allow people to hold governments more accountable for what they did in Aboriginal and Torres Strait Islander affairs. In Broome participants noted that a treaty process may address topics that fall outside native title negotiations. Reparations and compensation for the past wrongs done to First Nations people was identified at several Dialogues as an important aspect of a treaty.

Finally, many people at the Dialogues associated a treaty with stability, certainty and security. They reflected on the tendency in Aboriginal and Torres Strait Islander affairs for things to change every time there is a new Prime Minister or a new party in power. They commented on how bodies like ATSIC had been abolished and good programs had been wiped out, at great cost to their community. Participants at Broome explained that they wanted gains made in agreements under the *Native Title Act* to be better protected into the future. A treaty was widely seen as a strong and enduring document that would secure the position of First Nations people and prevent things being overturned at the whim of government.

Alongside the enthusiasm for the idea of treaties and agreements, there was also discussion of the need for realism about the challenges and complexity of going down that path. In the Torres Strait Dialogue, for example, it was recognised there was a lot of detail to be worked out before pursuing a treaty, including who has authority to enter into a treaty and the content of a treaty. In the Brisbane Dialogue, the agreements working group discussed issues such as representation and internal governance that would need to be sorted out on the First Nations side of the table before entering into negotiations. There was concern expressed during the Dialogues that agreements must go beyond questions of service delivery and address fundamental issues regarding the position of First Nations. Some participants cautioned that the treaty process would be ultimately measured against the difference it made for people on the ground. Participants at some Dialogues also pointed out that overseas governments had breached their treaty obligations towards Indigenous peoples.

Discussion at the Dialogues, particularly in the agreement-making working groups, also went to possible solutions to these challenges. People raised questions about the laws or even constitutional provisions that might be needed to protect agreements once they were negotiated. As one Adelaide participant put it: “*When it comes to signing a treaty, we need a treaty that can’t be broken.*” Some Dialogues raised the idea that an agreement-making commission could support a treaty process and address some of the challenges that would arise. At the Torres Strait Dialogue a participant expressed support for negotiating a treaty that would have practical milestones for achieving meaningful change:

“The conversation around treaty should be really real, a treaty with real milestones ... We need really clear objectives, articulated by us and designed by us.”

The Dialogues took place as discussions about State-based treaty processes were getting underway or in progress, in South Australia and Victoria. This formed part of the discussion of treaties in Dialogues in those States and elsewhere. That discussion included taking advantage of what was learned from these processes and concerns that national and State processes should not undercut each other. The broader question of who should be parties to treaties on the government side of the table was a common discussion point at the Dialogues. There was a lot of enthusiasm for both a national agreement and/or possibly a national framework for agreements, and for local or regional treaties. At several Dialogues, people emphasised the importance of State governments and that their policies also affected Aboriginal and Torres Strait Islander peoples’ lives in significant ways. As a result, the treaty discussion across the Dialogues contemplated agreements potentially being made with Commonwealth, State and Territory and possibly also local governments. It was also noted at one Dialogue that Aboriginal groups’ country often crosses State borders.

Various opinions were expressed throughout the Dialogues about the relationship between constitutional change and the pursuit of a treaty. While some prioritised a treaty, others saw value in the possibility of achieving constitutional reform through the momentum created by the Referendum Council process. Participants in several Dialogues expressed this view in a way that linked the two together, for example, arguing that having a constitutionally recognised and representative voice in the political process would be helpful in supporting and promoting a treaty process. In grappling with the relationship between pursuing a referendum for constitutional change and pursuing a treaty process, many participants in the Dialogues said they saw potential benefits in each for achieving justice and a more honest relationship with the rest of Australia:

“We want Australia to take a giant leap in humanity. This is about truth-telling. Whether it is constitutional change or Treaty. It is not about colour. It is about truth-telling and justice.” (Adelaide)

“I feel that we should think seriously about having both in order to get that balance. And we can, we are able to have both.” (Melbourne)

Truth-telling: The Uluru Statement from the Heart’s call for the Makarrata Commission to supervise a process of truth-telling is testament to the genuinely deliberative nature of the Regional Dialogue process. The option of pursuing a process of truth-telling was not an option that was specifically considered by a working group during the break-out sessions. Nonetheless, the importance of truth-telling became evident in every Dialogue. In some of the Dialogues, there was an express call for a truth-telling exercise, or the idea of “truth and justice”. In other Dialogues, the need for a truth-telling exercise became apparent in two of the sessions.

First, during the session on the first day in which delegates at the Dialogues were asked what meaningful reform would achieve in their communities, in every Dialogue the delegates first

took the opportunity to tell their stories. The emphasis placed by the delegates on this story-telling in the initial session reinforced the communities' desire for a truth-telling process. Second, the importance of a truth-telling process again became apparent during the deliberations of the working group on whether a statement of acknowledgement should be pursued. While the Dialogues overwhelmingly rejected such a statement as a reform priority, the groups discussed in detail their stories, including histories of frontier wars and massacres, and their experience of missions, working on stations and government policies of removing children from their families. This underpinned the recommendation from many of the Dialogues to pursue a statement of acknowledgement outside of the Constitution, so that a fuller, richer picture of Australia's history could be told. So, for instance, in the Torres Strait Dialogue, the working group said:

“The statement also has to tell the truth about history. Talk about the tactics and strategies that have been used against Aboriginal and Torres Strait Islander peoples. This is not about portraying the negative, but it's about telling the truth. Australia was occupied, and it is still being occupied, that hasn't changed.”

Yours sincerely,

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