

Submission to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples

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Introduction

The Joint Select Committee faces, on behalf of Australia, an epochal challenge that is charged with both challenge and opportunity. This submission contends that addressing this challenge requires peer-to-peer engagement between Indigenous and Non-Indigenous Australia that recognizes in-principle equivalence at the national level between Indigenous and Settler jurisdictional authority. Meanwhile, we suggest that a careful process of lived engagement between Indigenous and Non-Indigenous peoples, beginning at the local level and being alive to the historical and contemporary effects of gross asymmetry, offers the means to bring about political rapprochement and forge the foundations for a wider and more formal settlement at the state and national level. Beginning at the local level is necessary to develop legitimate and appropriately grounded forms of Indigenous authority, and to build the capacity and experience of Settler institutions to recognise and negotiate jurisdictional authority with local Indigenous peoples.

The mechanism for advancing this first stage in the rapprochement between Indigenous and Non-Indigenous peoples can be facilitated by a legislated independent body, with or without constitutional backing. Our proposal is bold and ambitious in line with the epochal nature of the challenge we face, and yet it does not ask too much too early of a state and polity that remains in many respects opposed to rapid or strong change on constitutional reform, especially as evidenced in the stance taken by constitutional conservatives. The combination of idealistic ambition and pragmatic lived engagement lays a foundation for a recalibration of relations between Indigenous and Non-Indigenous peoples in Australia to generate viable and meaningful constitutional reform.

Challenge and Opportunity

To develop and recommend options for constitutional change relating to Aboriginal and Torres Strait Islander Peoples is a truly invidious challenge. This is borne out by the diversity of views and tensions identified in the *Interim Report of the Joint Select Committee*. The challenge is also defining for the Australian polity. British colonisers treated Indigenous First Nations as an enemy, obstruction, annoyance and finally a client of the welfare state. Indigenous peoples have been excluded from, and then incorporated within, the settler-colonial political order. Indigenous jurisdiction and socio-political order has not been recognised, and the accompanying usurpation and expropriation of Indigenous rights and entitlements are now widely recognised as unjust and indefensible.

The momentous nature of the challenge that the Committee faces on behalf of Australia also presents the opportunity to develop a true partnership involving the construction of a proper, mature, formal, modern engagement and agreement between our two countries – between Indigenous *country*¹ and Non-Indigenous Australia. Because the task is so weighty, it needs to be grasped in its fullness to restore and ensure maximum dignity for both Indigenous and Non-Indigenous peoples. It also deserves to be approached methodically, carefully and incrementally through a compact for the ongoing growth and well-being of all peoples inhabiting this continent. Only this combination of serious partnership and the continual development of engagement between Indigenous and Non-Indigenous Australia holds the promise for our meaningful and substantive rapprochement.

Equivalence and Balance

The epochal nature of the challenge faced by Indigenous and Non-Indigenous Australian peoples requires a peer-to-peer engagement that recognizes in-principle Indigenous and Settler jurisdictional authority. Indigenous people were owners and runners of country across the entire Australian continent for tens of thousands of years. This is a civilizational history. In many instances Indigenous First Nations continue to be active owners and runners of country. In many other instances, Indigenous First Nations are reclaiming and reasserting their rights as owners and runners of country. Settlers, meanwhile, have asserted political jurisdiction through force and by dispossessing Indigenous people. The accompanying sovereignty is marred by the illegitimacy that comes with its means of acquisition. Settler sovereignty exists *de facto* (it is true in fact) but into the future and in the face of evolving standards of international human rights it cannot exist *de jure* (in accordance with law). The only way to fulsomely address this conflict – and the accompanying wound – is to bring equivalence and balance into our relationship by recognizing in-principle Indigenous and Settler jurisdictional authority.

¹ The Aboriginal term for land as a sentient force, already related to people.

To assert the principle of equivalence and balance in our relationship responds to the long history of habitation of the Australian continent. To do so is to step back from our recent colonial history to induce a purview sufficiently expansive to envision a possibility when we will no longer be ensnared and belittled by the entailments of colonialism. To pursue anything other than a relationship based in equivalence and balance is to explicitly or implicitly retain the racialized logic upon which this continent was colonized. Such logics have no place in any valued relationship. Such a step is surely bold, but it is only step that will enable the possibility of a true rapprochement. While invoking balance and equivalence is lofty, bringing this principle to ground also provides a path for addressing the many thorny challenges that come with it.

Living Engagement

In pursuing rapprochement through equivalence and balance, Indigenous and Non-Indigenous Australians must grapple with the conditions and dynamics of drastic asymmetry. The accompanying challenges are legion. Introduced systems of jurisdictional authority, many of them deeply ingrained, predominate and are exceptionally well-known and resourced in comparison to their Indigenous counterparts. Indigenous systems of jurisdictional authority have been fractured, damaged, and disavowed by colonialism. They are neither well-known nor well-resourced. Many settlers assume that they automatically hold authority and are not readily given to negotiation with Indigenous people. Indigenous people may not be confident in their authority. But these and similar challenges highlight the nature of epochal work. Careful and respectful learning and growth is necessary on both sides. Indigenous peoples and Settlers, and their systems of political jurisdiction, both need time to adjust, develop and change through the enacting of equivalence and balance through a living and evolving engagement.

A first stage, which is the core of our proposal and could readily be supported by a legislated independent body with or without explicit constitutional backing, would encourage and support the acceptance (by Settlers) and development (among Indigenous people) of locally and regionally based Indigenous terms of reference and governance. The fact that Indigenous forms of governance have been damaged and overrun by colonialism and its forms of governance necessitates the space and time for processes among Indigenous people, both locally and regionally, to carefully revisit, recalibrate, and develop principles and protocols for decision-making, negotiating, and entering into agreements with settlers and settler institutions. These principles, which should not be pre-figured prior to local deliberations, may include elements of First Nations Laws of Autonomy, Relationality, Reciprocity and Stewardship (i.e. Custodial Ethic of Looking after Country, Looking after Kin) drawn from the great foundational origin stories that tell of how respective lands brought Indigenous peoples and all living things into being and socio-political order.

Local Indigenous deliberations would involve the evolving documentation of principles, and the concomitant practice of these principles for First Nations to re-establish their political and

cultural authority in order to become provisional authorities – in dialogue, exchange and partnership with other local Indigenous groups and local governments – within local areas and regions. A constant reiteration of this process is necessary to support Indigenous peoples to embed the political importance and depth of this approach and process. There is a strong appetite for this type of process in Indigenous Australia. Only local First Nations can speak for First Nations; only First Nations can determine what their political status is and what defines their jurisdictional authority. Expression of these matters must be direct, clear, unambiguous and transparent. Indigenous voice has to be coherent, logical and unhindered.

Such a careful and evolving process is necessary to develop legitimate and appropriately grounded forms of Indigenous authority to underpin subsequent stages of official and genuine negotiations at the state and national level. To attempt otherwise is to risk shortcuts that bypass genuine Indigenous authority and reinstate colonial logics by having Indigenous people operate through colonial procedures and institutional processes that rush past Indigenous ways of convening and instituting socio-political order. Many existing proposals, whether for a ‘voice’ or constitutional reform (strong or weak), suffer the shortfall of not being grounded in Indigenous authority and of relying too heavily on the Settler-Colonial order. It is understandably tempting to rush to the national level to attempt to secure a framework solution that apparently locks in rights (for Indigenous peoples) or brings festering conflict to a close (for Settlers). However, doing so offers only false hope. Recognition is only sought and pursued in relation to the state and its institutions is no recognition at all. It is instead necessary to first work carefully and solidly at the local level recognising the authority of Indigenous jurisdiction.

Meanwhile, the same independent body – with strong capacities to lead, mediate and facilitate – would support settler institutions and personnel at the level of local governments to engage with Indigenous peoples through the principles of equivalence and balance while remaining cognisant of the evolving developmental work that Indigenous groups are engaging in. In the process, local governments would themselves develop their capacities to recognise and negotiate jurisdictional authority with local Indigenous groups. This process is necessarily incremental and experimental. Because it operates incrementally and at the local level it does not ask too much too early of a state that remains in many respects, especially through the stance taken by constitutional conservatives, opposed to rapid or strong change. Nonetheless, the principle of equivalence and balance in jurisdictional authority would guard against the unilateral imposition of government authority. The devolved authority of the commonwealth and state government to local governments, for instance, could not be assumed as a mechanism to summarily override Indigenous authority. Local Indigenous groups would be engaged as serious interlocutors.

Through this process two key achievements arise. First, it provides serious recognition to both Indigenous and Settler jurisdictional authority, through the principle of equivalence and balance, to lay foundations for recasting the relationship between Indigenous and Settler peoples. Second, it provides the necessary space and time for capacity development and experimentation in 3 dimensions: a) for Indigenous peoples to carefully do the necessary work

to rearticulate and redevelop Indigenous authority; b) for Settlers to begin to develop capacity for sharing governmental authority; and c) for Indigenous peoples and Settlers to practice and negotiate a form of constructive relationship and shared authority to inform subsequent official and genuine negotiations at the state and national level.

Conclusion

Adopting a staged process that is based in both idealistic principles and recognition of the limitations imposed by the asymmetry of Indigenous-Settler relations is necessary to adequately respond to the gravity of the epochal challenge that Indigenous and Non-Indigenous Australians face. Equivalence and balance in jurisdictional authority at the national level are necessary for the grounding of a meaningful and sustainable rapprochement. Equally, a patient and living engagement, beginning at the local level, is necessary to develop the capacities and experience to (re-) articulate and constructively negotiate jurisdictional authority. Only this type of living engagement can forge a reworked relationship that is worthy of the aspiration for long-term peace between Indigenous and Non-Indigenous peoples on the Australian continent.

The level of political difficulty for advancing this proposal is relatively low in comparison with other options currently being canvassed. It requires the development of a legislated independent body, with or without constitutional backing, to help to facilitate, mediate and negotiate lived engagement at the local level according to principles of equivalence and balance in jurisdictional authority. This body would naturally work with existing Indigenous and Non-Indigenous organisations to initiate a phase of 21st century nation-building for Australia, beginning at the local level. This combination of idealistic ambition and pragmatic lived engagement provides a pathway for serious rapprochement between Indigenous and Non-Indigenous peoples of Australia.
