



Truth and Justice Commission Bill 2024

**Submission to the Joint Standing Committee on
Aboriginal and Torres Strait Islander Affairs**

SEPTEMBER 2024



20 September 2024

Committee Secretary
Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs
PO Box 6021 Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Submission from the Federation of Victorian Traditional Owner Corporations regarding the Inquiry into the Truth and Justice Commission Bill 2024

The Federation of Victorian Traditional Owner Corporations (Federation) welcomes the opportunity to provide a submission to the Committee Secretary of the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs.

The Federation is the Victorian state-wide body that convenes and advocates for the rights and interests of Traditional Owners while progressing wider social, economic, environmental, and cultural objectives. We support the progress of agreement-making and participation in decision-making to enhance the authority of Traditional Owner Corporations on behalf of their communities. Our submission has a particular focus on the experience of Traditional Owners in Victoria drawing on the current and previous work of the Federation.

Please contact Jill Webb [REDACTED] if you would like to discuss our submission further.

We thank you for considering our submission and we would be happy to provide further assistance as required.

Yours sincerely

[REDACTED]

Paul Paton
Chief Executive Officer

Overview

About the Federation

The Federation of Victorian Traditional Owner Corporations (**Federation**) is the Victorian state-wide body that convenes and advocates for the rights and interests of Traditional Owner groups while progressing wider social, economic, environmental, and cultural objectives. We support agreement-making and participation in decision-making that enhances the authority of Traditional Owner Corporations on behalf of their communities. The Federation does not speak *for* Traditional Owners, but our work is directed *by* Traditional Owner groups, and responds to their identified issues, objectives and ambitions.

TRADITIONAL OWNER CORPORATIONS

Victoria has legally recognised Traditional Owner groups across 75 per cent of the state. Traditional Owner Corporations hold these recognised collective rights – they are inclusive and representative membership structures with cultural authority to speak collectively for their community and Country. The term ‘Traditional Owner Corporation’ in this submission refers to the [12 groups](#) that have been formally recognised as Traditional Owners of Country in Victoria.

About this submission

The Federation strongly supports the process of truth-telling and sees great potential for an effective, rights-based Truth and Justice Commission (**Commission**) to help strengthen rights for First Nations peoples in Australia, accelerate progress towards treaty-making, and contribute to systemic change that sees the lessons of the past rebalance power relations for the future.

The Federation contributed two written submissions and twice gave testimony to Victoria’s Yoorrook Justice Commission over 2023-24. This submission to the Truth and Justice Commission Bill 2024 (**Bill**) draws from that experience, as well as from our preceding decade of work contributing to greater self-determination for Traditional Owner communities. Broadly, our submission addresses:

- Cultural safety and authority
- Truth-telling to activate inherent rights
- Creating and communicating a shared public record

The Federation is happy to provide further assistance to your inquiry as required.

1. Truth-telling on our terms

A national Truth and Justice Commission must be conceived as a powerful process of First Peoples' self-determination, not a state-sponsored consultation: one which recognises the inherent right to hear truths,¹ and respects the decades of community demand for truth-telling that has led to this landmark Bill.

The particular type of truth-telling called for by community in the Uluru Dialogues is “sophisticated, nuanced and meaningful... truth-telling that would inform a renegotiation of the political relationship between Aboriginal and Torres Strait Islanders and the rest of the nation”.² That process would capture the aspirations of delegates to the Uluru Dialogues for a “fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination”,³ as outlined in the Uluru Statement from the Heart, which the Federal Government has pledged to implement in full. Yet a Commission that achieves truth-telling as articulated by the Uluru Statement from the Heart must not be a government-led affair: the state cannot dictate how Aboriginal and Torres Strait Islander people heal from harm it caused. Fundamentally, Aboriginal and Torres Strait Islander communities must initiate and set the terms of the Commission, as an act of self-determination to help shape their own futures.

A culturally safe and authoritative Commission

Ensure the Commission has cultural authority

The Commission must have cultural authority to conduct its business. At this developmental stage of the Commission's life, seeking this authority should involve deep community consultation; actively pursuing permission and guidance for what comes next. In a Victorian context, this would involve engagement with Traditional Owner Corporations, who have authority to speak on behalf of their Country and their communities.⁴ Alongside this, deep engagement with existing representative bodies, including the Coalition of Peaks, and local-level Aboriginal and Torres Strait Islander communities, could ensure the Commission's design and scope has cultural authority to unearth and share truth in a way that is meaningful to the communities who will contribute and ultimately benefit from its recommendations.

¹ The United Nations' Human Rights Committee made a Resolution (9/11) on the Right to the Truth in 2009, which recognises not only a victim's right to know the truth, but a peoples' right to know the truth of their history: it aims to restore victims' dignity, avoid denial of wrongdoing, and prevent future harm from occurring.

² Appleby, G and Davis, M (2018) The Uluru Statement and the Promises of Truth, Submission to Joint Select Committee on Constitutional Recognition (2018), p4.

³ First Nations National Constitutional Convention, Uluru Statement from the Heart (2017).

⁴ Aboriginal Cultural Heritage Act 2006 (Vic), s148.

RECOMMENDATION 1

Proactively and carefully engage with Aboriginal and Torres Strait Islander representative collective bodies and communities at this early design stage, to help ensure a future Commission has cultural authority, community confidence, and clear purpose.

The make-up of the Commission, once active, will be another opportunity for stronger Aboriginal and Torres Strait Islander community oversight of the truth-telling process. The Bill allows two government ministers to jointly appoint 10 commissioners, with only six (60 per cent) required to have First Nations identity.⁵ Four out of five commissioners on Victoria's Yoorrook Justice Commission have First Nations identity (80 per cent),⁶ and the Federation would urge the Bill to reconsider who can be appointed, by whom, and with what oversight guiding their work.

RECOMMENDATION 2

Improve Aboriginal and Torres Strait Islander oversight of the Commission by amending section 7 to require:

- Commissioners to be community-nominated
- A minimum of 80 per cent of commissioners to have First Nations identity
- Both appointing ministers to have First Nations identity
- An elected First Nations representative body (with veto power) to endorse Commissioner appointments
- An experienced judge with First Nations identity to serve as Chair, or an experienced judge and qualified First Nations person to serve as co-Chairs

Ensure people can share their own experiences on their own terms

The Federation welcomes the Bill's allowance for different forms of sharing experiences to be accepted by the Commission.⁷ We urge the Bill to go further: it should actively encourage evidence that isn't just written submissions or oral testimony and provide clear avenues to effectively receive this evidence.

Those avenues must be both geographic and modal: hearings should be held (with permission) on the Country of as many First Nations groups as possible, and in private or 'in camera' where cultural customs require; and should actively incorporate Aboriginal and Torres Strait Islander ways of sharing information, including yarning.⁸

The Bill must also consider the issues of re-traumatisation and privacy in sharing evidence. Adopting the principle of free, prior and informed consent can help guide the Commission's

⁵ Truth and Justice Commission Bill 2024 s6.

⁶ Yoorrook Justice Commission website [About page](#), accessed 20 September 2024, and Victorian Government Gazette No S 217 Friday 14 May 2021, 'Yoorrook Justice Commission Letters Patent'.

⁷ Truth and Justice Commission Bill 2024 s8.

⁸ Yarning as a research methodology is described as a 'metaphorical journey' through 'camps', or themes, "each fitting into the landscape with a precise function and purpose": Barlo S, Edgar W, Boyd A P and Wilson S (2020), 'Yarning as Protected Space: Principles and Protocols', *AlterNative* 1-9 at p4.

processes regarding receiving evidence. People who submit evidence must be able to withdraw publication permission at any time, and the Bill must provide more detail about how Commissioners will come to their decisions about what evidence will be published (especially if only a scant majority of Commissioners have First Nations identity). Finally, in order to ensure access to the process and in giving testimony, it will be important to have regard to resourcing processes to facilitate First Nation people's testimony. Additionally, consideration should be given to resourcing for an independent organisation to provide ongoing practical and wellbeing support to all non-government witnesses.

RECOMMENDATION 3

Strengthen provisions for evidence-giving by:

- Embedding the principle of free, prior and informed consent into all evidence-giving processes
- Creating clear, formal processes for receiving evidence that is not only written evidence, including creating yarning circles
- Holding many hearings on different Nations' Country and in private settings where custom requires
- Funding and resourcing to ensure First Nations people's access to the process to facilitate the giving of testimony, and funding a wellbeing support organisation to aid in evidence-giving
- Creating clearer processes to protect the right to privacy of witnesses, including by producing decision-making frameworks for what evidence is published and guaranteeing the right to withdraw evidence

Take the best parts of Yoorrook Justice Commission

Victoria's advanced truth-telling process is now just months away from delivering its final report. Formal, structured and ongoing engagement with Yoorrook Justice Commission can help the Commission understand decisions made and challenges experienced – particularly around ensuring the cultural safety of witnesses and providing adequate levels of cultural, wellbeing and psychological support, and with creating a robust and well-resourced Commission that can get on effectively with its work.

RECOMMENDATION 4

Learn from Yoorrook Justice Commission by:

- Creating a working group to understand the decisions made and challenges faced around cultural safety and wellbeing support, and committing to incorporating best practice in the Commission over its lifetime
- Creating a reference group from people involved in giving evidence to Yoorrook Justice Commission to inform best-practice decision-making over cultural safety and wellbeing support over the lifetime of the Commission
- Funding the Commission from consolidated revenue, as Yoorrook Justice Commission is, to guarantee sustainable funding

- Establishing the Commission with the full powers of a Royal Commission, as with the Yoorrook Justice Commission

Get the timing right

With last year's failed Voice to Parliament referendum and a paucity of national-level transitional justice mechanisms,⁹ the Commission faces the challenge of moving fast, but not too fast, to effect change. It must avoid delay to ensure harm is addressed and not further compounded, but do the careful work required to ensure communities have confidence in its mandate. The Federation believes the four-year timeframe selected by the Bill is ambitious, particularly with the Bill's national scope. Victoria's Yoorrook Justice Commission – established by a letters patent, not an act of parliament – will take five years to deliver a state-specific final report. New Zealand's Waitangi Tribunal is a permanent body with inquisitorial powers to seek truth and make recommendations to government, which allows it the time to unravel complex issues that wouldn't otherwise be managed with the considerations of the day when they are first raised. The Bill should consider the similarly complex Australian context and create a permanent Commission to meet the ongoing need for truth-telling this country.

RECOMMENDATION 5

Amend section 10 to make the Commission a permanent body.

Ensure Indigenous data sovereignty

The American novelist and First Nations advocate Thomas King reminds us: "Once a story is told it cannot be called back... it is loose in the world";¹⁰ it is the Commission's responsibility to ensure stories can be called back if their givers wish. To provide cultural safety and strengthen trust in the truth-telling process, the Commission must be clear and exacting about how it will protect the privacy and intellectual property of First Nations witnesses, ensuring they maintain control of their testimony and the integrity of witnesses' evidence isn't lost in collection, collation, interpretation or analysis. Truth-telling initiatives as 'political processes' "reflect the realities of power and vested interest – in how the issues get defined, whose voices are heard, which facts are acknowledged".¹¹ If evidence is not handled transparently and carefully, with ownership and control vesting back to Aboriginal and Torres Strait Islander witnesses, the

⁹ Transitional justice mechanisms include national commissions of inquiry – such as the Royal Commission into Aboriginal Deaths in Custody (1991) and the national family separation inquiry that produced the Bringing Them Home Report (1997); official statements apologies – covering Paul Keating's Redfern Speech in 1992 ("we practiced discrimination and exclusion"), John Howard's Motion of Reconciliation in 1999 (a milquetoast rejection of Bringing Them Home's recommendation for an apology to the Stolen Generations that instead "acknowledge[d] openly the wrongs and injustices of Australia's past", then decided "we can now move forward as a nation"), Kevin Rudd's eventual apology in 2007; and truth-telling commissions – like the ones underway in Victoria and Queensland. Just six national examples in 33 years make this Truth and Justice Commission notable, as pointed out in McMillan M and Rigney S (2018), 'Race, reconciliation and justice in Australia: from denial to acknowledgment', *Ethnic and Racial Studies*, 41(4), 759-777.

¹⁰ In Barlo S, Edgar W, Boyd A P and Wilson S (2020), 'Yarning as Protected Space: Principles and Protocols', *AlterNative* 1-9 at p6.

¹¹ Payne A M and Norman H (2024), 'Coming to Terms with the Past: Findings from the Literature Review', Indigenous Land & Justice Research Group, School of Humanities & Languages UNSW, p4.

Commission risks becoming another tool of the state interference into First Nations peoples' lives that it seeks to unearth.

RECOMMENDATION 6

Amend section 13 of the Bill to recognise witnesses' rights to withdraw evidence and clarify how that evidence is owned and controlled, and by whom, once given.

2. Make it known and meaningful

Truth-telling is an “intergenerational project of change”¹² – an “ongoing process of dialogue and engagement”¹³ – that will not conclude at the end of the Commission's term. Truth-telling is broader than the Commission. Yoorrook Justice Commission's terms of reference¹⁴ understand this scope, with objectives including: develop a shared understanding among all Australians of the diversity, strength and resilience of First Peoples' cultures, knowledge and traditional practices; help build the foundations for a new relationship between First Peoples and the Commonwealth and all Australians, based on truth and justice to prevent the recurrence of injustice; and identify systemic injustice which currently impedes First Peoples achieving self-determination and equality and make recommendations to address them, improve state accountability and prevent continuation of recurrence of systemic injustice.

A Commission with teeth

A truth-telling process isn't a new idea, and the Commission can learn from the challenges faced by previous international enquiries relating to to independence, credibility, funding, political interfere, ensuring the participation of marginalised groups, and weak outcomes.¹⁵

RECOMMENDATION 7

Amend section 8 to expand the Commission's purpose to include:

- Building a shared public record of historic and ongoing injustice
- Developing a shared understanding of the diversity, strength and resilience of First Peoples' cultures
- Using truth to help build a new relationship of power that helps prevent future systemic injustice from occurring.

¹² Ibid.

¹³ Ibid.

¹⁴ Victorian Government Gazette No S 217 Friday 14 May 2021, 'Yoorrook Justice Commission Letters Patent', s3.

¹⁵ Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples (2013), 'Access to justice in the promotion and protection of the rights of indigenous peoples', United Nations General Assembly 13-13473.

Embed Indigenous human rights

Truth-telling in and of itself is unlikely to be sufficient reparation for serious wrongs;¹⁶ in the Australian context, truth-telling must therefore be accompanied by other measures that address the ongoing impacts of dispossession and colonisation on Aboriginal and Torres Strait Islander peoples.¹⁷ One meaningful measure¹⁸ the Bill could introduce is embedding into domestic law the rights enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).

As the Federation wrote in our submission to the Senate Legal and Constitutional Affairs Committee's inquiry into implementing UNDRIP in Australia, just recognising rights isn't the goal: we must see the exercise of those rights. Our submission suggested:

- Enacting legislation affirming the application of the UNDRIP in Australia and providing a compatibility framework, similar to Victoria's Charter of Human Rights
- Including UNDRIP rights as enforceable and justiciable rights within treaties

Our UNDRIP inquiry submission noted international examples of nation-states embracing the justiciability of all human rights as a means of addressing brutal and longstanding historical injustice, and suggested rights relating to self-determination, self-government, free, prior and informed consent, cultural practice and maintaining distinct political, social and economic institutions as examples of rights that could be included in treaties. Amending the Bill to include these areas as subjects for inquiry, at the same time as legislating UNDRIP affirmation legislation, could ensure the Bill helps embed UNDRIP and gives the Commission real weight.

Treaty and compensation

Truth-telling as outlined in the Uluru Statement from the Heart cannot be separated from the call for treaty. A meaningful national Commission would accept community's calls for treaty-making and, like Yoorrook Justice Commission, explicitly state its intention to provide context and subject matter to future treaty or treaties.¹⁹ Compensation as a subject must be within the scope of what's available to the Commission in making recommendations.

Finally, the Commission must respect the authority of previous native title and other land rights determinations and include in its terms of reference that it cannot make findings that challenge existing formal recognition outcomes.

¹⁶ Walker M U, (2010), 'Truth telling as reparations', *Metaphilosophy*, 41(4), 525-545.

¹⁷ Payne A M and Norman H (2024), 'Coming to Terms with the Past: Findings from the Literature Review', Indigenous Land & Justice Research Group, School of Humanities & Languages UNSW, p5.

¹⁸ Another option would be enacting a national Human Rights Act, which could also help embed UNDRIP into Australian law.

¹⁹ Yoorrook Justice Commission is intended to support treaty-making between Aboriginal Victoria and the Victorian Government, and its terms of reference explicitly instruct it to consider subjects for future treaties.

RECOMMENDATION 8

Make the Commission explicitly consider land justice and help embed UNDRIP into domestic Australian law:

- Add an objective for the Commission to help advance treaty-making in section 8
- Add a clause stating the Commission's findings can form the subject matter of future treaties (over any jurisdiction) in section 8
- Alongside the Bill, enact legislation affirming the application of UNDRIP in Australia (ie a standalone UNDRIP Act), to provide a compatibility framework the Bill must meet
- Add a clause in section 8 stating the Commission can make findings and ask questions relating to compensation
- Add a clause clarifying that the Commission's findings will not challenge existing formal recognition outcomes.

Power cannot cause further harm to First Nations witnesses

Will the Commission be established with the powers of a Royal Commission, as Yoorrook Justice Commission was?²⁰ The Federation believes it should be, in part for a Royal Commission's ability to compel witnesses and documents. However: the Federation notes that a visible show of power exists in that the Bill is prepared to compel witnesses to testify, under threat of arrest. The Commission must not cause further harm to First Nations communities by forcing people to testify if they choose not to, and the Bill should balance the need for a powerful process that compels government to participate, without compounding the harm to First Nations communities it seeks to uncover.

RECOMMENDATION 9

Establish the Commission with the full powers of a Royal Commission but amend clauses compelling witnesses to testify: government officials should be able to be compelled to provide evidence and participate, but First Nations communities should not be punished for choosing not to testify.

An accountable Commission

Communicate well to help enable truth

Frequent and high-quality communications out of the Commission are much more than a public relations opportunity – they can ensure trust in the integrity of the truth-telling process, build in accountability to community, enliven the Commission's findings beyond the text of its final report, and play an important part in the truth process itself:

²⁰ Yoorrook Justice Commission [website FAQ page](#), accessed 20 September 2024, and Victorian Government Gazette No S 217 Friday 14 May 2021, 'Yoorrook Justice Commission Letters Patent'.

“Truth-telling can provide an opportunity for the victims of human rights abuses to have their experiences “acknowledged”, to establish “the facts” in the public domain, and to set the historical record “straight.”²¹

Canada’s Truth and Reconciliation Commission into its residential schools system provides an example of how engaging the public can aid the purposes of a truth-telling process. It heard from 6,500 witnesses over six years, received five million records, and published a six-volume final report in 2015.²² Alongside this data collection and synthesis, the Canadian Commission held seven public-facing events, to “educate people about the history and legacy of the residential schools system, and share and honour the experiences of former students and their families”,²³ and its documents live at the purpose-established National Centre for Truth and Justice at the University of Manitoba, which was created by the Truth and Reconciliation Commission’s mandate, for the purpose of “fostering reconciliation and healing”.²⁴

RECOMMENDATION 11

Amend section 10 to expand its purpose to ‘reporting’, with objectives to acknowledge experiences, establish the facts, set the historical record straight, and foster reconciliation and healing.

The two reports currently proposed by section 10 are another consideration. The Federation supports the contemplation an interim report as well as the final report but urges the Bill to go further: it should mandate the Commission to produce at least one interim report, mandate the government to respond to that report, and mandate deadlines for the government’s own responses to interim and final reports. This will help promote transparency and trust in the truth-telling process and help ensure governments can’t avoid or devalue the Commission.

RECOMMENDATION 12

Amend section 10 to require at least one interim report and add clauses requiring government to respond to the Commission’s interim and final reports, within a specified timeframe.

Conclusion

Aboriginal and Torres Strait Islander communities have been calling for truth and justice for far too long. The Bill presents an historic opportunity to listen. The Federation has provided points for consideration in relation to this Bill in working towards a national Truth and Justice Commission that has cultural safety and authority, enables First Nations communities to lead and control their own stories, and acts as a starting point for ongoing systemic change, rather than serving as a mere historical record.

²¹ Cohen S (2001), *States of Denial: Knowing about Atrocities and Suffering*, Polity, Cambridge.

²² Truth and Reconciliation Commission of Canada [website](#), accessed 20 September 2024.

²³ Ibid.

²⁴ National Centre for Truth and Reconciliation [website](#), accessed 20 September 2024.