

KIMBERLEY LAND COUNCIL

ABN 96 724 252 047 ICN 21



20 September 2024

Committee Secretary

Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

Via email: JSCATSIA@aph.gov.au

Dear Secretary,

Kimberley Land Council submission to the inquiry into the Truth and Justice Commission Bill 2024

1. The Kimberley Land Council (KLC) is an Aboriginal organisation established in 1978 for the purpose of working for and with Kimberley Traditional Owners to get back Country, care for Country and get control of the future. As the native title representative body for the Kimberley, the KLC has achieved native title determinations across 97 per cent of the region, and there are currently 31 prescribed bodies corporate (PBCs) in the Kimberley holding and managing native title rights and interests.
2. The KLC works with PBCs to expand capacity and build economic development opportunities. The KLC also supports 18 Aboriginal ranger groups through the Kimberley Ranger Network, and conducts a range of land and sea management activities. In its representative capacity, the KLC plays a leading role amplifying the views and voices of Kimberley Aboriginal people locally, nationally and internationally.
3. The KLC welcomes the opportunity to provide a submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs regarding its inquiry into the Truth and Justice Commission Bill 2024 (Bill).
4. In summary, while the KLC strongly supports the need for truth-telling, the KLC does not support the Bill in its current form because the Bill does not combine truth-telling with an agreement-making process. The remainder of the submission provides further context for this position.

The importance of truth-telling

5. Just as the High Court of Australia's landmark decision in *Mabo v Queensland (No. 2)* overturned the doctrine of terra nullius, truth-telling can play a significant role in Aboriginal and Torres Strait Islander people's recognition and healing, as well as providing a pathway to an agreed, shared narrative of the nation's past and present day. Truth-telling about Australia's history and the impacts of colonisation has been a prominent topic in national discourse in recent years, particularly following the release of the Uluru Statement from the Heart (Uluru Statement) in 2017.
6. The avoidance of truth-telling has been described by former KLC CEO Nolan Hunter and academic Damien Freeman as "one of the biggest historical barriers to genuine reconciliation in Australia".¹ To date, there has not been a nationally coordinated process of truth-telling about Australia's history of colonisation. Despite

¹ Damien Freeman and Nolan Hunter, 'When Two Rivers Become One', in Shireen Morris (ed.), *A Rightful Place: A Road Map to Recognition* (2017), p 188.

this, it is important to acknowledge that truth-telling has occurred and continues to occur in communities and localities across Australia in a multitude of ways, including through local community initiatives, education, storytelling, memorials and formal inquiries (such as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which resulted in the *Bringing Them Home* report in 1997).

7. The importance of telling the truth about Australia’s history of colonisation and its ongoing impacts on Aboriginal and Torres Strait Islander people was raised many times in the regional dialogues held across Australia in the lead up to the First Nations National Constitutional Convention held in May 2017, and emerged as an important reform priority.² As was highlighted through the regional dialogues, the KLC believes it is crucial that truth-telling is Aboriginal and Torres Strait Islander led, and adapted at the local and/or regional level to suit the unique characteristics and histories of different communities across Australia.

The Bill

8. The Bill proposes to establish a formal truth commission that would “inquire into and make recommendations to Parliament on particular matters relating to historic and ongoing injustices against First Peoples in Australia and the impacts of these injustices on First Peoples”.³ In contrast to the Makarrata Commission called for in the Uluru Statement, the Truth and Justice Commission proposed by the Bill would not oversee or facilitate agreement-making. This is a crucial distinction.
9. While the KLC is a strong advocate for truth-telling, the KLC does not support the Bill in its current form, primarily because it does not structurally join truth-telling with an agreement-making mechanism. Shining light on the injustices experienced by Aboriginal and Torres Strait Islander people is crucial for healing and understanding, but must be combined with an agreement-making process to ensure substantive justice can be achieved. This is consistent with the concept of Makarrata as contained in the Uluru Statement and is discussed in more detail at paragraphs 17 to 25 below.
10. Beyond this, the KLC also has reservations about the Royal Commission-type body the Bill proposes to establish. The proposed Truth and Justice Commission is a formal western legal structure that may in many ways be inappropriate for a truth-telling process. The Bill’s proposed vehicle for inquiry into the impacts of colonisation in Australia very much reflects the colonising legal system that has historically disempowered, prejudiced and traumatised Aboriginal and Torres Strait Islander people (including, as the KLC has seen first-hand, through native title litigation). The Bill provides no direction on how the formality of the commission’s inquiry may be adapted to ensure it is run in a culturally safe and trauma-informed way.
11. Further, the KLC notes that the Bill is not the result of any comprehensive co-design process with Aboriginal and Torres Strait Islander people and organisations, and it is not clear whether a formal national commission of inquiry is Aboriginal and Torres Strait Islander Australians’ preferred mechanism for truth-telling. It is important to note that the Uluru Statement’s proposed Makarrata Commission is intended to *oversee* truth-telling, which may still occur primarily on a local or regional level, depending on communities’ preferences. The Uluru Statement does not contain detail on the scope and functions of a Makarrata Commission, which would still need to be determined.
12. The KLC also notes:
 - a. It is unclear in the Bill whether and how local and regional approaches to truth-telling can be incorporated into the inquiry process.

² *Final Report of the Referendum Council*, p 32.

- b. The Bill does not contain a purpose or objects provision or a preamble. One or both of these provisions should be added to clarify the purpose of the Bill and, indeed, the purpose of the proposed inquiry and reporting process. This would assist with the interpretation of the Bill.
- c. The timeframe of four years to submit a final report seems insufficient. The proposed commission's terms of reference are incredibly broad, and a fulsome inquiry into them is likely to require more than four years.
- d. Although the inclusion of penalties is consistent with the powers of a formal commission of inquiry, this punitive approach seems out of step with a process that is intended to increase understanding and, ultimately, unity within the Australian community. Again, an objects provision and/or preamble would help to clarify the ultimate purpose of the inquiry and reporting process.

The Uluru Statement

13. The KLC's appraisal of the Bill has been critically informed by the Uluru Statement, which represents a historic call for constitutional and structural reform to empower Aboriginal and Torres Strait Islander people and transform relationships between Aboriginal and Torres Strait Islander people, non-Indigenous Australians and governments. The reforms proposed through the Uluru Statement are:
- a. a constitutionally enshrined First Nations Voice; and
 - b. a Makarrata Commission to oversee agreement-making between governments and First Nations and truth-telling about our history.
14. The KLC has supported the Uluru Statement, consistent with our members' views over the past several years. The KLC was co-convenor at the regional dialogue held in Broome in February 2017, which was one of 12 regional dialogues held across Australia in the lead up to the National Constitutional Convention.
15. The Uluru Statement, which was endorsed at the National Constitutional Convention, is the outcome of a robust, carefully informed and culturally robust process that represents a consensus position of Aboriginal and Torres Strait Islander people across Australia. With regard to the engagement process leading up to and including the Convention, the Referendum Council noted:
- "This process is unprecedented in our nation's history and is the first time a constitutional convention has been convened with and for First Peoples. ... This is the most proportionately significant consultation process that has ever been undertaken with First Peoples."⁴
16. The Uluru Statement, then, is the culmination of an unprecedented coming together of Aboriginal and Torres Strait Islander people and articulates carefully constructed reform proposals aimed at effecting structural change. It must remain our guide for what Aboriginal and Torres Strait Islander people want with respect to achieving substantive justice and self-determination.

Truth and treaty for justice

17. The following section provides further background and context to the KLC's assertion that truth-telling must be combined with agreement-making to enable real justice to be achieved for Aboriginal and Torres Strait Islander people.
18. The combining of treaty and truth in the Uluru Statement under a Makarrata Commission was intentional

⁴ *Final Report of the Referendum Council*, p 10.

and designed to enable justice and self-determination.

19. Truth-telling in and of itself provides no guarantee of practical justice and structural change. There have already been numerous inquiries and reports into historical and contemporary injustices affecting First Nations people in Australia⁵ and yet socio-economic outcomes for First Nations people remain significantly below those of non-First Nations Australians, with progress on four of the targets in the National Agreement on Closing the Gap going backwards and many more not on track to be met.⁶

20. As Professor Megan Davis has stated:

“The idea that truth automatically will lead to justice is fraught. It is illusory. It is an ahistorical belief that is simply not borne out by the evidence.”⁷

21. In this vein, the Bill – and the commission it proposes to establish – is insufficient to ensure just outcomes for Aboriginal and Torres Strait Islander people, with a report containing recommendations the only guaranteed outcome of the Bill’s proposed inquiry process. In contrast, the Uluru Statement’s proposal for a Makarrata Commission links truth-telling to just outcomes through agreement-making. As academics Shireen Morris and Harry Hobbs note:

“A Makarrata Commission calls for much more than just truth-telling and documenting of past atrocities: it calls for past atrocities to be dealt with through just settlements.”⁸

“[A] national Makarrata Commission imagines an embedded process of comprehensive agreement-making and truth-telling, leading to just resolutions of grievances and stronger ongoing partnerships between Indigenous peoples and the state.”⁹

22. It is the linking of agreement-making with truth-telling that provides the potential for substantive justice for First Nations. While truth-telling can shine light on the wrongs of the past and their contemporary effects, agreements – or treaties – provide a practical way to address, redress and compensate for those wrongs. Agreements can recognise Aboriginal and Torres Strait Islander people’s identities and political status, provide redress for past wrongs, and enshrine commitments from Aboriginal and Torres Strait Islander people and governments. They can be vehicles for economic and social empowerment and self-determination.

23. Truth-telling is often an important component of or precursor to agreement-making, as has been seen in Victoria with the establishment of the Yoorrook Justice Commission, a formal truth-telling commission established after the commencement of Victoria’s treaty process whose findings will inform the negotiation of treaties in Victoria. Nolan Hunter and Damien Freeman have noted that we should aspire to agreement-making between governments and First Nations that is “more deeply anchored in history and truth” and provides “mechanisms for wholehearted conversations about the past”.¹⁰

24. The importance of truth-telling and agreement-making is further upheld in the 2023 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs report on its inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRI**P) in Australia. The Committee

⁵ For example, the Royal Commission into Aboriginal Deaths in Custody, which published its final report in 1991, and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which resulted in the *Bringing Them Home* report in 1997.

⁶ Productivity Commission 2024, *Closing the Gap Annual Data Compilation Report July 2024*, Canberra.

⁷ Megan Davis, ‘The Truth about Truth-Telling’, *The Monthly* (online, 1 December 2021).

⁸ Shireen Morris and Harry Hobbs, ‘Imagining a Makarrata Commission’, *Monash University Law Review* (Vol 48, No 3), p 26.

⁹ Morris and Hobbs, p 29.

¹⁰ Freeman and Hunter, p 192.

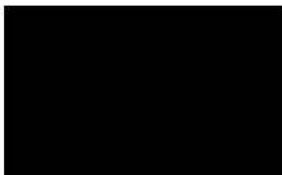
noted international experiences such as in British Colombia, Canada, where there has been an acknowledgement of the complementary relationship between truth-telling, treaty-making and constitutional recognition. The Committee recommended that the Commonwealth Government establish an independent process of truth-telling and agreement-making, as requested by Aboriginal and Torres Strait Islander peoples [via the Uluru Statement], as a mechanism to support healing and assist implementation of the UNDRIP.¹¹

25. While the KLC appreciates the intention of the Bill to move forward with a national truth-telling process, the KLC believes we must pursue a process that embeds both agreement-making and truth-telling, rather than a truth-only commission as proposed in the Bill. Unless there is consensus from Aboriginal and Torres Strait Islander people for an alternative approach, the KLC will continue to advocate for the key tenets of the Uluru Statement, including a structurally combined treaty and truth process.

Moving forward

26. The Uluru Statement was intentionally crafted to call for a constitutionally enshrined Voice as the first reform, to then be followed by a Makarrata Commission as the second reform. Following the unsuccessful referendum on the Voice in October 2023, consideration is now required about how to move forward with the concept of a Voice. Despite the challenges posed by the failed referendum, the KLC continues to support the key reform concepts in the Uluru Statement, and believes that a process to oversee both treaty and truth-telling remains crucial to achieving justice for Aboriginal and Torres Strait Islander people.
27. With the focus in recent years on constitutional reform to give effect to the Voice, there has not yet been a comprehensive engagement process with Aboriginal and Torres Strait Islander people on the design of a Makarrata Commission, or indeed any other truth-telling process or commission such as the one proposed in the Bill. Detailed consideration is still required as to the structure, functions, powers and scope of a body to oversee truth-telling and agreement-making. This would necessarily consider treaty and truth-telling processes already underway at the state level, including in Victoria and Queensland, and how these may interact with a national commission. A truth-telling and agreement-making body may not necessarily conduct a national truth-telling inquiry and reporting process; it may oversee numerous local or regional truth-telling initiatives, or do a combination of things. Precisely how it would function remains to be determined, and should reflect the outcomes of future engagement with Aboriginal and Torres Strait Islander people.
28. The KLC supports the establishment of a body to oversee agreement-making and truth-telling as a way to achieve justice for Aboriginal and Torres Strait Islander people. The KLC recommends that the Australian Government engage in good faith with Aboriginal and Torres Strait Islander people to determine next steps with respect to establishing such a body.

Yours sincerely



Tyronne Garstone
Chief Executive Officer

¹¹ Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs. *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia*. Parliament of Australia, Canberra, 2023, p 95.