Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

By email: JSCATSIA@aph.gov.au

20 September 2024

Dear Committee Secretary

Re: Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs on Truth and Justice Commission Bill 2024

We write as experts in constitutional law, human rights, international law and Indigenous peoples and the law. **Scientia Professor Megan Davis** is Pro-Vice Chancellor Society at UNSW Sydney, the Balnaves Chair in Constitutional Law and the Whitlam Fraser Harvard Chair in Australian Studies at Harvard University. She is the Director of the Indigenous Law Centre at UNSW Law & Justice. Professor Davis served on the Referendum Working Group, the Referendum Engagement Group and the Attorney-General's Constitutional Expert Group (2022-2023) and was a member of the Referendum Council (2015-2017) and the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution (2011-2012). Professor Davis has served on the United Nations Expert Mechanism on the Rights of Indigenous People (UNEMRIP) from 2017-2022. She was an expert member of the UN Permanent Forum on Indigenous Issues between 2011-2016. Professor Davis was the lead author on *Free, prior and informed consent: a human rights-based approach' (2018)*[1] and *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-determination (2021)*.[2] **Professor Gabrielle Appleby** is a professor of public law at the Faculty of Law & Justice, UNSW Sydney. She is the constitutional consultant to the Clerk of the House of Representatives, the Director of The Judiciary Project at the Gilbert + Tobin Centre of Public Law and the Editor of the *Rule of Law in Context* series (Hart Publishing). She served as an expert adviser to the First Nations Regional Dialogues and Constitutional Convention that delivered the Uluru Statement from the Heart (2016-2017). We have both been involved in the design and implementation of the *Towards Truth* database by the Justice and Equity Centre (formerly the Public Interest Advocacy Centre)

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1 UN Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and informed consent: a human rights-based approach,* 39th Session, Agenda Item 3 and 5, A/HRC/39/61 (10 August 2018).

2 UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-determination,* 48th Session, Agenda Item 2 and 5, A/HRC/48/75 (13 September 2021).

Cautious Support

We write with cautious support for the *Truth and Justice Commission Bill 2024*. Our position in this submission reflects the views expressed by the approximately 1200 First Nations participants at the Regional Dialogues and First Nations Constitutional Convention, overseen by the Indigenous Steering Committee of the Referendum Council.[3] Those delegates were asked to reflect on what constitutional recognition and structural reform could mean to them in their lives and communities. The Dialogues was the most extensive and informed deliberative conversation with First Nations that has ever been undertaken.

The Uluru Statement from the Heart called for structural change that commenced with a constitutional amendment to introduce a First Nations Voice, and proceeded to the establishment of a Makarrata Commission 'to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'. The Statement explained that Makarrata was the culmination of their agenda: 'It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination'. The call for truth-telling emerged from the delegates and was included in the Statement, despite not being a formal 'option' for reform that the government had sought views on.[4]

Sequencing: The Dangers of Truth without Voice and Treaty

As is clear from the Statement, truth-telling was never intended to be divorced from the aspirations of structural reform, and the pursuit of justice and self-determination for First Nations. It was never intended to be pursued as a stand-alone activity. As Professor Megan Davis has written:

> There will be a dissonance between problem and solution if truth-telling is not anchored by a proper settlement framework, as outlined by the Uluru Statement. Failure to understand this will render otiose the goals of truth-telling.[5]

One of the dangers that confronts Australia is the temptation, in the face of the Voice referendum loss of October 2023, to pursue truth-telling *in the place of* structural reforms that address the historical and institutional inequalities and injustices experienced by First Nations in the Australian State.

The intention of the careful sequencing of reforms in the Uluru Statement – Voice to Makarrata (Treaty and Truth) – was to ensure that political power inequalities were addressed before negotiations began between the governments and First Nations as to

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3 Referendum Council *Final Report* (May 2017), 10-32.

4 See explanation of this in Gabrielle Appleby and Megan Davis, (2018) 49(4) 'The Uluru Statement and the Promises of Truth' (2018) *Australian Historical Studies* 501, 502-503.

5 Megan Davis, 'Speaking Up: The Truth about Truth-Telling' (2022) 76 *Griffith Review*.

how to address the complex, sensitive and extremely important steps of treaty and truth. The initial establishment of Voice was important because it would then be in place to negotiate with the government the design of any truth-telling exercise.

On the importance of sequencing, Professor Sana Nakata has written:

> Voice precedes Treaty not because of what it does, but because of what it makes possible: a new start.
>
> The purpose of Voice is to make sure that Treaties, negotiated not at first contact but centuries later, have every chance to be strong, enforceable and transformative. We cannot risk Treaties that will become further artifacts of an already-history. Symbolic. Unenforceable. *If our continued screams are silenced by bureaucracies, then for what will our truth matter except for the continued performance of our rage and grief for a third century and longer. To make our Truth count, we must have Treaty. And to have Treaty, we must have Voice.* And if our Voice is not to be silenced when it becomes too hard to listen to, it must be constitutionally enshrined.[6]

In the wake of the failed Voice referendum, it is understandable that those wishing to continue to see reform have turned to truth-telling as an alternative next step. It presents as a possibly easier – and more achievable – activity to undertake when there is a danger of losing all forward progress in Indigenous affairs.

However, designing a truth-telling exercise in these circumstances, where political inequalities and the voicelessness of First Nations has not yet been addressed, brings significant dangers. It must be done with care to respect the self-determination and aspirations of First Nations.

Makarrata and Truth

The First Nations participants at the Regional Dialogues that led to the Uluru Statement spoke at length about the need for truth-telling. They spoke not necessarily about a lack of knowledge of history, but the failure of that knowledge to have informed their contemporary relationship with the government and non-Indigenous Australia. The delegates were not seeking a top-down, state-designed and dominated activity, that was performed once. Indeed, references were made to the many Royal Commissions and other institutional inquiries that had failed. It was, as historians as far back as William Stanner have identified, not so much that Australians do not know our history,

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[6] Sana Nakata, 'On Voice, and Finding a Place to Start' (3 March 2021) *IndigConLaw Blog* https://www.indigconlaw.org/sana-nakata-on-voice-and-finding-a-place-to-start

but that they have forgotten it, that there is no institutional mechanism for ongoing remembering.[7]

The intention of the delegates at the Dialogues was that truth-telling in Australia would be part of Makarrata – the coming together after a struggle. This referred to a genuinely co-operative and on-going activity that respected the importance of First Nations self-determination and local involvement, and which informed continuing structural and social changes. As we have explained before, the intention of truth in Makarrata is a relational truth:

> The Regional Dialogues that preceded the Uluru Convention, at which the calls for truth were first made, emphasised that the truth was not for them as victims, or as survivors, or as resistance fighters, but for all Australians, now and, through ongoing educational programs, in the times to come. It was offered as part of a proposal to the Australian people for a different future, one in which all Australians could understand the truth, shame and complexity of their own stories and thus move towards a stronger, freer and richer future.[8]

Across the Dialogues,[9] people spoke of the need for truth-telling to be performed at a local level: to involve Indigenous and non-Indigenous people remembering the complex and contested truths of their shared history, and reflecting on how that must affect their contemporary and future relationships.

There was an appreciation that this local truth-telling needed to 'lock into'[10] a national framework, and hence the call for a Makarrata Commission. This national framework would support local truth-telling through resources and institutional support, while also, importantly, providing a national repository, or record, of the more diverse and contested history of Australia, and an organisational point for future use of that record, such as informing national and state policy and future educational curricula.

In this way, the vision of truth in the Regional Dialogues does not neatly fit into the international transitional justice conceptualisation of a 'truth and justice' commission. It is, but it is not only, an historical commission.[11] It does also pertain to political transition and today's political leadership or practices, and has an ongoing role.

We have previously set out a vision for the Makarrata Commission that might achieve the objectives of the Regional Dialogues previously:

> The delegates spoke of injustices at a local level, and the promise of truth-telling leading to local understandings within communities of a shared history. Truth-

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7 William Stanner, 'After the Dreaming', Boyer Lecture (1968), also Kate Fullagar, 'Why Does Truth Come Third' (8 June 2021, *Inside Story* https://insidestory.org.au/why-does-truth-come-third/.

8 Appleby & Davis, above n 4, 504.

9 For a full examination of the Dialogues on this point, see Appleby & Davis, above n 4, 505-508.

10 Davis, above n 5.

11 Appleby & Davis, above n 4, 504.

> telling must thus come from local communities, led by Aboriginal and Torres Strait Islander peoples working with non-Aboriginal people in that community. This work might be undertaken in conjunction with local councils, local history societies, or other local community groups. Indeed, as Penelope Edmonds has explained, locality is key because so many individuals and communities are wary of attempts at reconciliation led by the government, viewing previous attempts as 'state-based and top-down social program[s]' that can be 'repressive and reinforce colonial hegemonies'.[12] Many locally initiated and led processes are already occurring. A Makarrata Commission, if established, should not step into this space and take this away; a Commission, rather, should provide additional support and resources to continue to facilitate and encourage such processes.
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> Delegates also spoke of the promise of truth-telling to inform public conversations, and changes to the educational curriculum, to inform government training and policies and, of course, to ultimately inform the negotiation of treaties and agreements. Such promises require more than localised truth-telling. It requires these local truth-telling activities to be collated, properly archived, and, where appropriate and with the proper permissions, made public. This would create a record of history: a unified understanding of the contested nature and experience of Australia's history. The Makarrata Commission would be ideally suited to such national-level organisation, and providing a permanent home for these materials. The purpose of the Makarrata Commission in this sense would not be to judge the truths that emerge from the locally led activities, but, rather, to take responsibility for establishing a record of historical experience. By establishing a national record of historical experience, a Makarrata Commission would perform another important function. It would, as McKenna says, create a nation-wide footprint of the violence of our history.[13]

We have **attached** our full article, *The Uluru Statement and the Promises of Truth* (2018), to this submission.

Specific submissions on the Truth and Justice Commission Bill 2024

Our submissions on the Truth and Justice Commission Bill are informed by the views of the delegates at the Regional Dialogues, as summarised above. The Truth and Justice Commission Bill 2024 reminds us of the importance of continuing to seek progress in Indigenous Affairs beyond the current status quo. However, it also demonstrates the

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12 Penelope Edmonds, *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Basingstoke: Palgrave Macmillan, 2016), 8 and 184.

13 Mark McKenna, 'Moment of Truth: History and Australia's Future' (2018) 69 *Quarterly Essay* 39.

dangers of doing so without careful consideration of the purposes of truth-telling in the Australian context, the desires of First Nations people, and the need to connect truth-telling into a broader agenda of structural reform.

With this in mind, we make the following specific points in relation to the Bill:

1. **Membership and appointments: lack of First Nations appointments**

   Under clause 6 of the Bill, the Commission is constituted by 10 members, one from each State, the ACT and the NT and two Chief Commissioners. As a preliminary point, we note that there is no separate representation for Torres Strait Islanders, something that was noted as important in the Regional Dialogues.

   Under clause 7, the members are appointed by the Joint Ministers (the Attorney-General and the Prime Minister). The Joint Ministers must be satisfied that the persons have requisite skills knowledge or experience (7(2)), and they must consult with relevant stakeholders (7(3)). This, presumably, includes First Nations people but it does not expressly state this. The Joint Ministers must ensure that a majority are First Peoples (7(4)). Two Chief Commissions are to be appointed by the Joint Ministers, they must be First Peoples and there must be only one man (7(5)-(7)).

   The appointment process provides for no First Nations-determined appointments. First Nations people may be consulted, in conjunction with other 'stakeholders', on appointments, but will have no determinative power. While the majority of members must be First Nations people, this does not remedy the problem. For a truth-telling commission to have legitimacy among First Nations people, there must be members of that body that represent them.

2. **Terms of reference: Commonwealth limitations**

   The terms of reference for the Commission are set out in Clause 8 and relate to the historic and ongoing injustices against First Peoples in Australia and the impacts of these injustices on First Peoples. As a preliminary point, the focus on 'injustices' is narrower than the 'truth' of history that was sought in the Dialogues, and may unnecessarily limits the purview of the Commission, or lead to unnecessary future debates as to relevance of evidence that might relate to collaboration and positive interactions between the government, First Nations, and non-Indigenous people.

   The terms of reference are historically focussed, and also refer to ongoing injustices (8(b)), the consequences of historic injustice and the impact on the

contemporary relationship between government and First Nations, and contemporary policies, practices, conduct and laws, and how these can be redressed, and contemporary awareness raised (8(c)-(f)). This may seem initially broad, but on a close reading attempts to only relate to matters perpetrated by the ***Commonwealth government, its bodies and non-government bodies***. While it might be thought that such a limitation is necessary and appropriate, given the constitutional jurisdiction of the Commonwealth, and initiatives that have already commenced at state and local levels, it is both unnecessary and problematic.

This limitation misunderstands the desire of First Nations for a *national* body, which was to look *holistically* at the truths of colonisation, as perpetrated by individuals, colonial and then state officers and governments, as well as Commonwealth governments. A holistic, national body would allow First Nations and non-Indigenous Australians to draw these experiences together and understand their history. To attempt to confine a truth-telling exercise to matters relating to the Commonwealth and NGOs will necessarily fragment this history. It will also likely bring with it complex technical questions as to who was responsible for various actions. This will both tie up the Commission in complex technical legal issues, and will likely lead to a sense of injustice among those appearing before the commission if their stories do not fall within the narrowly drawn terms of reference.

This limitation is also unnecessary. Constitutionally, the Commonwealth Parliament's legislative powers under the races power (s 51(xxvi)), the external affairs power (s 51(xxxi)) and the implied nationhood power would provide sufficient power for a national body that looks holistically at the history of treatment of First Nations. Further, if, as we have explained above, a national commission is designed in such a way as to respect and, indeed, support, local and state-level truth initiatives, for instance through the provision of resourcing, articulating standards and providing national repository, there is no practical concern regarding the overlap between the work undertaken at different levels.

3. Reporting: Findings of 'fact'

Clause 10 provides for interim and final reporting of the Commission. Reports are to contain 'findings of fact' and any recommendations relevant to the inquiry that the Commission thinks fit. The tying of the Commission's role to 'findings of fact' misconceives of the role of truth-telling, particularly historical truth-telling. As we have written:

> Of course, as Daly observed, 'No period of a nation's history can be described by a single, elegant truth narrative'.[14] In a society in which truths have been denied for generations, construction of the truth is particularly unsurprising. What, then, is the purpose of establishing a 'record', as the Dubbo dialogue called for, if there is no single truth? Even if truth-telling cannot determine a single truth, it can go beyond divided versions of history, or 'divided memories' that compete for recognition in the history books.[15] It can, as the Office of the United Nations High Commissioner for Human Rights observed, help societies understand the contested versions of their history, and the denials of some of those versions, and what to do from that point. A truth-telling exercise of this nature is not directed at determining a single truth necessarily, but at developing public understanding and deliberation about the different experiences of the society's history.[16]

The limitation on the proposed Commission to findings of 'fact' brings with it unnecessary questions as to against what standard these 'facts' will be tested, and what will be excluded from them.

4. Four-year reporting obligation with no on-going role

Clause 10(4) requires the Commission to submit its final report within 4 years, unless an extension is granted by the Senate. While the Commission does have a role in making recommendations for redress, there is no-ongoing role for the Commission to follow up its recommendations. There is no on-going role to inquire into matters that might emerge later, whether because they are historical matters that had not been fully realised, or because they are contemporary matters within the Commission's remit. Makarrata is not a one-off experience that is captured in a single report. Indeed, such a reporting approach mirrors many of the truth-telling exercises that have been performed in Australia in the past (such as the *Royal Commission into Aboriginal Deaths in Custody*, the Human Rights and Equal Opportunity Commission's *Bringing them Home Report*), where reports have been issued, but without ongoing political will, the recommendations of these reports, particularly as they relate to structural reform, languish.

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14 Erin Daly, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition', (2008) 2(1) *The International Journal of Transitional Justice* 23–41, 25.

15 Paul Muldoon, 'The Moral Legitimacy of Anger' (2008) 11(3) *European Journal of Social Theory* 299–314.

16 Appleby & Davis, above n 4, 505.

5. Institutional structure

The proposed Commission appears to have been largely modelled on a Royal Commission. For example, under clause 11 it has powers to hold public and private hearings, grant legal representation and conduct the hearing as it thinks fit. The Commission may appoint counsel to assist it (clause 12). It has power to summon witnesses and take sworn evidence (clause 13), and to issue a search warrant to obtain relevant material (clause 15). There is some acknowledgement of the unique circumstances of the Truth and Justice Commission in clause 11(2), which states that in conducting the hearings, 'the Commission must give consideration to the customs, traditions, rules and legal systems of First Peoples who are appearing before the Commission, or who are likely to be affected by evidence given before the Commission.'

The adoption of a Royal Commission style institutional structure might be considered appropriate in that the powers to compel testimony and issue search warrants may act as important 'hard' threats to ensure cooperation with the Commission. However, this choice in institutional design also raises significant cultural challenges. For many First Nations, their experiences with institutional processes such as Royal Commissions or Courts are associated in deep and complex ways with trauma and historical injustice. In contrast, many local truth-telling initiatives are designed by local First Nations and non-Indigenous community members in ways that is non-threatening and culturally safe.

6. Institutional design: lack of local responsiveness

The emphasis in the Regional Dialogues was on the need for locally driven and responsive truth-telling, that were resourced and supported by a national commission. The current Bill, and particularly the institutional structure that we have set out above, has no capacity for local responsiveness, for variation depending on the desires of local First Nations communities, given the nature of their history or where they might be in relation to local truth-telling processes.

7. Custody of material

The Regional Dialogues emphasised the importance of creating a national repository from any truth-telling exercise, so that it can perform ongoing roles in the development of policy and educational curricula across the country. There is currently no provision in the Bill for the custody of the material that is uncovered by the Commission (it would presumably become the property of the Commonwealth government, and subject to regular archival and access requirements). Any national commission framework needs to provide for the

custody of the material and evidence it uncovers, in a national, ongoing, repository, that can be accessed into the future in culturally appropriate ways (eg, requiring relevant permissions from First Nations to access material relating to them).

Yours sincerely,

Professor Gabrielle Appleby

Professor Megan Davis