



Bills Digest | 20 December 2024

Truth and Justice Commission Bill 2024

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Key points

- The purpose of the [Truth and Justice Commission Bill 2024](#) is to establish a Commission to inquire into and make recommendations to Parliament on historical and ongoing injustices against First Peoples by the Commonwealth.
- Truth and Justice Commissions have been used in many countries, including stable democracies with Indigenous populations, to establish the facts of history and promote reconciliation and healing.
- Some previous high-profile Australian inquiries and commissions are comparable to the proposed Commission. These show the profound effects such inquiries can have on community understanding and wellbeing.
- The Bill responds to the *Uluru Statement from the Heart's* call for a Makarrata Commission, but may differ from what the Uluru Statement envisaged.
- The proposed Commission has a wide remit encompassing historical injustices perpetrated by the Commonwealth government and non-government bodies against First Peoples since pre-colonial times. Its Commonwealth-specific focus may mean that actions by states and pre-1901 colonial governments are out of its scope.
- The proposed Commission would have significant powers, modelled on the *Royal Commissions Act 1902*. It is unclear how these would work in practice, including protecting the rights of witnesses.
- There are potential risks regarding Indigenous data sovereignty, privacy and the Commission's records.
- The Bill has been referred to the [Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs for inquiry](#), with a reporting date of 11 February 2025.

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Date of introduction: 2 July 2024

House introduced in: Senate

Portfolio: Private Members Bill

Commencement: The day after Royal Assent

Links: Links to the Bill, its Explanatory Memorandum and second reading speech can be found on the [Bill’s home page](#), or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [Federal Register of Legislation website](#).

All hyperlinks in this Bills Digest are correct as of December 2024.

Purpose of the Bill

The purpose of the [Truth and Justice Commission Bill 2024](#) (the Bill) is to establish a Commission to inquire into and make recommendations to Parliament on historical and ongoing injustices against First Peoples in Australia by the Commonwealth, their impact, and appropriate means of acknowledgement and redress.

Structure of the Bill

The Bill is divided into 5 parts:

Part 1 contains commencement, definitions, and other preliminary matters.

Part 2 establishes the Commission, providing for appointment of members, terms of reference, and reporting requirements.

Part 3 provides the Commission with extensive powers of inquiry, including powers of search, summons, and seizure similar to or exceeding those of a Royal Commission.

Part 4 correspondingly creates offences for failing to appear or otherwise attempting to frustrate the Commission, such as by bribery or destruction of evidence.

Part 5 provides for the Commission's operation in various ways, including allowing the Minister to make further Rules by legislative instrument.

Background

Truth and Justice Commissions are used to enable a country to come to terms with a history of systematic oppression and human rights violations. According to the [International Center for Transitional Justice](#) (p. 9):

Truth commissions are official, nonjudicial bodies of a limited duration established to determine the facts, causes, and consequences of past human rights violations. By giving special attention to testimonies, they provide victims with recognition, often after prolonged periods of social stigmatization and skepticism. Truth commissions can contribute to prosecutions and reparations through their findings and recommendations, assist divided societies to overcome a culture of silence and distrust, and help to identify institutional reforms needed to prevent new violations.

Over 40 countries worldwide have used some form of Truth Commission. While this has frequently been after a regime change – for example, in [South Africa](#) post-Apartheid, [East Timor](#) post-Indonesian occupation, or [Chile](#) post-Pinochet dictatorship – Truth Commissions have also been used to examine the history of treatment of indigenous and ethnic minorities in countries with stable governments, such as Canada's [Truth and Reconciliation Commission](#), Norway's [Commission to Investigate the Norwegianisation Policy and Injustice Against the Sámi and Kven/Norwegian Finnish Peoples](#), and the US state of Maine's [Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission](#). In these three

Commissions, the forced removal and attempted assimilation of indigenous and minority children was a particular focus, but they also considered broader historical contexts and events.

Australia has not previously created a Truth and Reconciliation commission, although there have been [previous calls](#) for one. Rather, many social issues have been the subject of [Royal Commissions](#) or other official inquiries, which have often had transformative effects on public understanding and policy towards Aboriginal and Torres Strait Islander people and issues. Particularly significant Royal Commissions and inquiries which have covered key issues affecting First Peoples (noting references to ‘Aboriginal people’ before the 1980s should be taken as including Torres Strait Islander people) include:

- The 1961 [Select Committee on Voting Rights of Aborigines](#), which led to all Aboriginal and Torres Strait Islander people being granted the right to vote in Commonwealth elections.
- The 1973–74 Royal Commission into Aboriginal Land Rights (final report [v. 1](#), [v. 2](#)), which led to the *Aboriginal Land Rights (Northern Territory) Act 1976*.
- The 1976–1979 House of Representatives Standing Committee on Aboriginal Affairs [inquiry into Aboriginal Health](#), which drew the Commonwealth’s attention to the wide and systematic differences in health and life expectancy (‘the gap’) between Aboriginal and non-Indigenous Australians.
- The 1984–85 Royal Commission into British nuclear tests in Australia, which covered the [effects of nuclear weapon testing at Maralinga](#) on the Anangu Pitjantjatjara people.
- The 1987–1991 [Royal Commission into Aboriginal Deaths in Custody](#), a wide-ranging inquiry which covered high rates of imprisonment and subsequent deaths in custody of Aboriginal people, relations between Aboriginal people and police forces, and the position of Aboriginal people in Australian society. As well as its historic role, this Commission is also notable for being the first time that an Aboriginal person, future Senator Pat Dodson, served as a Royal Commissioner.
- The 1991–2000 wide ranging work of the [Council for Aboriginal Reconciliation](#).
- The Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission)’s 1995–1997 [Bringing them Home](#) inquiry and report into the widespread forcible separation of Aboriginal and Torres Strait Islander children from their parents and families, which created the Stolen Generations.
- The 2013–2017 [Royal Commission into Institutional Responses to Child Sexual Abuse](#) examined the abuse experienced by many members of the Stolen Generations as well as by non-Indigenous children.
- The 2016–17 [Royal Commission into the Protection and Detention of Children in the Northern Territory](#) examined the interaction between child welfare policies and Aboriginal child criminalisation and detention in the NT.

Notwithstanding the importance and impact of these previous inquiries, the proposed Commission differs from them in several important ways. These include:

- The Commissioners will be largely or entirely First Peoples. Of the previous inquiries listed, only the Council for Aboriginal Reconciliation, the Royal Commission into the Protection and Detention of Children in the Northern Territory and the *Bringing them Home* inquiry were equal, or majority, First Peoples led.

- Most past inquiries have been focused upon specific problems, crimes, or wrongdoing, rather than taking a holistic approach to Indigenous history and experiences. The Council for Aboriginal Reconciliation and the Royal Commission into Aboriginal Deaths in Custody are exceptions in this respect.
- The proposed Commission is intended to contribute to ‘transitional justice’, which aims to come to terms with a past culture or pattern of wrongdoing, rather than the retributive justice of most Royal Commissions, which focused on specific wrongdoings and recommended law reform, compensation, charges, or punishments. Notwithstanding this intent, the Commission has coercive powers similar to those of a Royal Commission (see discussion below).

In the last decade, calls for a Truth and Justice process have grown in line with support for the [Uluru Statement from the Heart](#), which called for both a Voice to Parliament and ‘a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history’ – summarised as ‘Voice, Treaty, Truth’. At the 2022 election, Prime Minister Albanese [committed](#) to implementing the *Uluru Statement from the Heart* ‘in full’, but since the unsuccessful 2023 Voice referendum, the government’s position has [shifted](#) to a more general commitment to ‘coming together’ and ‘truth telling’ without specifically supporting a Makarrata Commission. This Bill has been presented by its sponsors as a way for the Government to [recommit](#) to the Uluru Statement.

In parallel, Australian governments have supported several other truth-telling and reconciliation processes. These are detailed in the Parliamentary Library publication [Voice, Treaty, Truth? The role of truth-telling in Australian, state and territory governments’ reconciliation processes: a chronology from 2015](#). Under Priority Reform 3 of the [National Agreement on Closing the Gap](#), all Australian governments have committed to ‘identify[ing] their history with Aboriginal and Torres Strait Islander people and [facilitating] truth-telling to enable reconciliation and active, ongoing healing’ (clause 59(e)). For a discussion, see the Productivity Commission’s [submission](#) to the Committee inquiry into the Bill.

Comparisons with some international Truth and Justice Commissions

The proposed Commission has similarities and differences with the South African [Truth and Reconciliation Commission](#), the [Truth and Reconciliation Commission of Canada](#), and Norway’s [Truth and Reconciliation Commission](#).

The proposed Commission’s structure and composition of 10 members, including 2 Chief Commissioners, is broadly similar to [South Africa](#) (11–17 commissioners) and [Norway](#) (12 members). This might be contrasted with [Canada](#) (chairperson and 2 commissioners).

Like these international examples, the mandate of the proposed Commission is very broad. However, the emphasis on ‘justice’ and ‘injustice’ is somewhat distinct from reconciliation and historic fact-finding (see subsection 3(1) of the [relevant South African legislation](#)), as is the focus on ‘ongoing’ matters.

The Commission’s proposed powers are comparable to the South African Commission, which had powers to compel witnesses (section 31) and enter and search premises (section 32), and related offence provisions and penalties (section 39). In contrast, Canada and Norway did not confer coercive powers on these bodies. For example, Article 2(c) of the Canadian Commission’s [mandate](#) emphasised that participation in all Commission events

and activities is entirely voluntary. The Canadian High Commission's [submission](#) to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry describes the Canadian Truth and Reconciliation Commission (TRC) in more detail.

Comparison with a 'Makarrata Commission'

The 2017 [Uluru Statement from the Heart](#) ('Uluru Statement') called for 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.' Proponents of the Bill [argue](#) that the Truth and Justice Commission would fulfil the 'truth-telling' component of the Uluru Statement.

The *Uluru Statement from the Heart*, the associated 'Our Story' statement, and the [Final Report of the Referendum Council](#) in which they appeared, did not specify the Makarrata Commission's form or powers. 'Our Story' said (p. 32 of the *Final Report*):

The need for the truth to be told as part of the process of reform emerged from many of the Dialogues. The Dialogues emphasised that the true history of colonisation must be told: the genocides, the massacres, the wars and the ongoing injustices and discrimination. This truth also needed to include the stories of how First Nations Peoples have contributed to protecting and building this country. A truth commission could be established as part of any reform, for example, prior to a constitutional reform or as part of a Treaty negotiation.

The *Final Report* expanded slightly upon the Uluru Statement to say that the Commission would have 'the function of supervising agreement-making and facilitating a process of **local and regional** truth telling' (p. 2) [emphasis added].

The 2018 [Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples](#) heard a variety of views on the structure and function of a Truth or Makarrata Commission. Of particular note:

The National Congress of Australia's First Peoples (National Congress) recommended the creation of a Truth and Justice Commission to supervise, amongst other things, the process of truth-telling. It recommended that the Commission be tasked with:

- investigating the histories of various Aboriginal and Torres Strait Islander nations;
- holding tribunals;
- recording findings in official reports for each nation; and
- setting up 'keeping places' for each nation ([Interim Report, paragraph 6.41](#)).

The National Congress also suggested that the Commission could address intergenerational trauma and facilitate greater connection to culture for Aboriginal and Torres Strait Islander people ([Final Report, paragraph 5.16](#)).

In evidence to the Committee, Professor Megan Davis, Deputy Vice-Chancellor Indigenous at UNSW and a member of the former Referendum Council, and Mr Peter Yu, CEO of the Yawuru native title body, both supported a locally oriented truth telling process. Mr Yu suggested 'a national oral history project... [empowering] local communities involving local governments to tell their stories, their oral histories, so that they can research that and keep those stories in their local shire council offices or historical centres.' Professor Davis stated, 'people wanted that truth telling to be done on a local level—not to have some South African style truth commission but to allow First Nations to map out that truth with local Australian

historical societies and local councils.’ However, other First Nations people, such as Ms Ebony Hill, supported a national inquest or Royal Commission process ([Interim Report Ch 6](#)).

In its [Final Report](#), the Committee stated that ‘A large number of stakeholders agreed that truth-telling is best implemented at local and regional levels’ although ‘if a formal structure were to be implemented then a national body might be necessary.’ The Committee recommended:

that the Australian Government support the process of truth-telling. This could include the involvement of local organisations and communities, libraries, historical societies and Aboriginal and Torres Strait Islander associations. Some national coordination may be required, not to determine outcomes but to provide incentive and vision. These projects should include both Aboriginal and Torres Strait Islander peoples and descendants of local settlers. This could be done either prior to or after the establishment of the local voice bodies.

Truth-telling and agreement-making were closely intertwined. The Prime Minister’s Indigenous Advisory Council told the Committee that:

It is important that truth-telling leads to a constructive conclusion for Aboriginal and Torres Strait Islander peoples, and that they are able to seek amends through formal processes of agreement making.

The predominant view at the time seems to have been that the Makarrata Commission would function in a somewhat similar way to [Treaty Tribunals](#) such as the British Columbia Treaty Commission, in that it would be a facilitative body supporting and enabling Indigenous and non-Indigenous peoples to understand history at a local and regional level, and draw up agreements or treaties to resolve past injustices. For example, Shireen Morris and Harry Hobbs [write](#):

Drawing on the First Nations Regional Dialogues as recorded in the Referendum Council report, we see a Makarrata Commission as an independent tribunal empowered to facilitate agreement-making and truth-telling between Indigenous peoples and the Australian state, with truth and just outcomes being tethered together as much as possible (p. 26).

This is in some contrast to the Bill’s Royal Commission-like structure, focussing on truth-telling at a national level and with no explicit function to support treaty or agreement negotiation. However, many First Nations people have previously expressed support for a nationally directed truth-telling inquiry. Nor should it be assumed that, in the wake of the [unsuccessful Voice referendum](#), First Peoples’ views on truth-telling structures would be unaltered. For example, Professor Megan Davis, one of the architects of the Uluru Statement, has expressed ‘cautious support’ for the Bill, while raising several concerns about its structure and function (Megan Davis & Gabrielle Appleby, [Submission 153](#) to the [Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry](#), p. 2).

Policy position of non-government parties/independents

The Bill has been presented by the Australian Greens Senators Cox (Australian Greens Spokesperson for First Nations) and Shoebridge.

The Government has supported the Bill's referral to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, but has not expressed any final position.

Independent Senator Lidia Thorpe has [expressed support](#) for the Bill.

Liberal Senator Kerryne Liddle has [indirectly criticised](#) the Bill, saying:

The Greens want to talk about violence and dispossession in the context of a truth and justice commission, to facilitate healing and a way forward—at a cost of \$250 million? No. I want to talk about the here and now—the uncomfortable, the difficult, the too-hard. That's my priority.

Key issues and provisions

This section examines the legislative details of the Bill, not the wider issue of whether some form of Australian Truth and Justice Commission is needed or desirable.

Potential limits on the Commission's scope and powers

The Commission's terms of reference are specified in **subclause 8(1)**. They are largely based upon the [terms of reference](#) of the Victorian Yoorrook Justice Commission.

As a Commonwealth inquiry, there are some limits on the Commission's powers. For example, **paragraph 8(1)(a)** commits the Commission to inquire into 'historical injustices perpetrated by the Commonwealth government, Commonwealth government bodies and non-government bodies against First Peoples since pre-colonial times'. However, as the Commonwealth only came into existence as of 1901, the only pre-1901 historical injustices encompassed by the Commission's terms of reference would be those carried out by non-government bodies. Injustices perpetrated by the Imperial British government or pre-1901 colonial governments are not covered by the terms of reference, except indirectly under **paragraph 8(1)(c)** ('the causes and consequences of historical injustice') and **paragraph 8(1)(g)** ('matters reasonably incidental'). While this may not stop the Commission from conducting hearings about some pre-1901 matters, its legal powers of discovery and compulsion may not be in effect for such hearings. Any inquiry into pre-Federation colonial governments or government bodies would appear to be contingent on concurrent functions or powers being conferred on the Commission by the States under **clause 9**. Professors Davis and Appleby have criticised the Bill's self-limitation, arguing 'Constitutionally, the Commonwealth Parliament's legislative powers under the races power (s 51(xxvi)), the external affairs power (s 51(xxix)) and the implied nationhood power would provide sufficient power for a national body that looks holistically at the history of treatment of First Nations' ([Submission 153](#), p. 7).

Similarly, many of the terms of reference relate to policing, youth justice, incarceration, and child removal. While coming to terms with these histories is fundamental to understanding First Peoples' current status and meeting the [Closing the Gap targets](#), outside the territories the Commonwealth had almost no power to legislate on First Peoples' interactions with state law, justice, and child-related policies before 1967 (as the Australian Lawyers Alliance [submitted](#)). Even since 1967, police, justice, and child protection have largely remained in the legislative sphere of the states. It is well established that Commonwealth Royal Commissions do not have the power to compel state governments, their institutions or employees, and this principle would almost certainly apply to this Commission.

Thus, without referral of powers from the states, any inquiry the Commission made to state governments or institutions would only be answered on a voluntary basis, as was the case for the recent Senate Committee inquiry into [Missing and murdered First Nations women and children](#), which was unable to speak with the WA police force (see paragraphs 3.36–3.39 of that inquiry's report). The powers of the Commission would most likely only come into effect where and to the extent that the Commonwealth had involved itself in some way or with respect to non-government organisations. In order to avoid the risks of retraumatisation or raising false hopes, it would need to be clear to potential witnesses that the Commission's powers in the states would be largely limited to seeking voluntary cooperation from state authorities. As Professors Davis and Appleby state, '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' (*Submission 153*, p. 7).

The significant exception would be the territories, particularly the period from [1 January 1911](#) to [1 July 1978](#) during which the Commonwealth directly governed the Northern Territory. In this area the scope for the Commission to make use of its powers is quite large. The Commonwealth's plenary power in territories, and responsibility for the policies of that period, including [Aboriginal child removal](#) and [abuse](#), and [stolen wages](#), is well established. In contrast to these case settlements, there has not been any judicial proceeding or inquest into, or settlement of liability or reparations program for, the documented massacres committed by Commonwealth-employed police in the Northern Territory during this period (examples of such massacres are detailed on the [University of Newcastle's website Colonial Frontier Massacres in Australia, 1788–1930](#)), which the Commission could potentially facilitate. However, the Commission is clearly intended to be a national body, with only one Commissioner specifically from the Northern Territory (**paragraph 6(2)(a)**); which points to a potential mismatch between the Commission's terms of reference and its structure and powers.

Overlap with state/territory processes?

This mismatch could be overcome if states were to refer concurrent functions or powers to the Commission, under **clause 9**. However, state governments which are supportive of such an inquiry may have already created one, such as Victoria's [Yoorrook Justice Commission](#), while state governments which [do not support a truth-telling process](#) at the state level seem unlikely to empower a Commonwealth one. It is possible that a hostile state government

might seek to prevent the Commission holding hearings related to state history and issues, on the grounds that the Commission was exceeding its powers and terms of reference (see above).

As one way to address any duplication of effort, **clause 9** could be amended to also allow the Commission to refer its own functions and powers to state or territory bodies, thus ensuring that if, for example, the Yoorrook Justice Commission found that its inquiry was touching on Commonwealth policies or issues manifesting in Victoria, it could be empowered to inquire into those Commonwealth policies.

Risk of relitigating open or settled disputes?

The [Yoorrook Justice Commission's letters patent](#) paragraphs 4(m) and 4(n) prevent that Commission from inquiring into settled outcomes of native title and traditional owner recognition cases, and from inquiring into other individual legal cases except 'to the extent relevant to a pattern indicating Systemic Injustice'.

The Truth and Justice Commission's terms of reference do *not* have such a limitation, although **subclause 8(3)** allows the Commissioners to not inquire into a matter that is, has been or will be subject to another inquiry or criminal or civil proceeding if it is 'satisfied' that it is being 'sufficiently and appropriately' dealt with by that proceeding. That the only limit is the Commission's own satisfaction raises a risk that people in current civil or criminal proceedings who consider that their cases raise issues of injustice to First Peoples might attempt to simultaneously bring their matter before the Commission, with uncertain effects on the administration of justice by the courts.

The Commission would also have the power to examine settled cases, or cases which are in theory open but where there is no current proceeding ('cold cases'). It cannot be doubted that the outcomes of many historical cases are seen by many First Nations people as unjust, whether these are civil issues such as the High Court's 2002 [Yorta Yorta native title judgment](#) (see [this article](#)), or criminal investigations such as the [Bowraville murders](#). At a less high-profile level, many heritage, native title and land rights proceedings have caused intra-community conflict and dispute, or disputes between First Peoples and non-Indigenous land users. The Commission may need to carefully weigh the potential benefits of using its powers to re-examine past cases against the risks of 'reopening old wounds', of raising unrealistic expectations if its recommendations are not acted upon by governments, or of impeding an accused's right to a fair trial in cold cases where there are still prospects of new charges being laid in court.

Are the Commission's powers proportionate?

Part 3 of the Bill would confer certain powers on the Commission. In summary:

- **Clause 11** provides detail of hearings – the default would be for these to be public, but private hearings could be convened (**subclause 11(3)**).
- **Clause 12** would allow the Commission to appoint counsel assisting.
- **Clause 13** would give the Commission power to summon witnesses and take evidence.

- If a person summoned as a witness fails to attend in accordance with the summons, a member could, on proof of the service of the summons, issue a warrant to arrest the person (**clause 14**).
- The Commission could issue a search warrant if it has reasonable grounds for suspecting there may be relevant material that might be concealed or destroyed (**clause 15**).

While the Commission's terms of reference are modelled on those of the Yoorrook Justice Commission, its powers are largely modelled on those of a Royal Commission under the [Royal Commissions Act 1902](#) (Cth). However, some differences between the powers set out in the Bill and those under the *Royal Commissions Act* are likely to raise concerns about the rights and civil liberties of persons appearing before the Commission.

The most significant difference is that the Bill lacks an equivalent of [Royal Commissions Act 1902](#) section 6DD, which prevents evidence from a Royal Commission being used in court proceedings. It is usually seen as a check and balance against a Royal Commission's otherwise extensive power to compel persons to make statements or produce evidence that might tend to incriminate them (section 6A of the [Royal Commissions Act 1902](#)), and to encourage witnesses to testify freely without (immediate) fear of prosecution. In the absence of such a provision, the Commission may be able to compel a person to incriminate themselves in ways which would be admissible in court. Conversely, as the Bill does not explicitly state that self-incrimination is not a 'reasonable excuse', a court might hold that the statutory presumption that Parliament does not abrogate the privilege against self-incrimination applies and is a 'reasonable excuse' (**clause 19** of the Bill) for refusing to be sworn or to give evidence to the Commission. For a detailed discussion of this privilege's place in Australian law see the Australian Law Reform Commission (ALRC)'s *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Interim Report 127 at [Chapter 12](#).

Similar concerns apply to the right of legal professional privilege. Unlike ss 6AA-6AB of the *Royal Commissions Act*, the Bill does not provide guidance on whether a claim of legal professional privilege over a document is a 'reasonable excuse' not to produce a document, or how the Commission should adjudge such claims. It seems likely that, in the absence of express language in the Bill abrogating this right, the courts would uphold the privilege, but this could not be determined with certainty without a court ruling – see the ALRC's *Interim Report 127* at [Chapter 13](#).

Without clear guidance from the text of the Bill, witnesses could attempt to claim the right not to self-incriminate, or claim legal privilege, in a wide range of circumstances. This could undermine the Commission's remit to provide a full analysis of historical and ongoing injustice (**paragraphs 8(1)(c)-(e)**) and may cause delay and expense if the Commission laid charges against a reluctant witness, or challenged claims to legal privilege. The admissibility of testimony also raises a possibility of adverse interaction between the Commission's proceedings and the native title claims process, discussed below.

Another way in which the Commission's powers exceed those of a Royal Commission is that a Royal Commission must apply to a Judge of the Federal Court or a State or Territory court to issue a search warrant, if it considers that one is necessary (*Royal Commissions Act*, section 4). In contrast, the Commission can issue a search warrant on its own authority (**clause 15**). The explanatory memorandum does not explain why the check and balance of requiring judicial approval for a search warrant is not included in the Bill. As a partial counterbalance, a

witness's failure to attend, produce documents, be sworn, or give evidence has a lower penalty than a Royal Commission, with a maximum penalty of 6 months imprisonment as opposed to a Royal Commission's maximum penalty of 2 years.

More generally, it is open to question whether the Commission requires a full range of coercive powers similar to those of a Royal Commission to accomplish its purposes. The Commission's inquiry has a wide scope, examining historical and structural injustices as a whole, rather than being an inquiry into some specific, contemporary, and potentially criminal wrongdoing. In the absence of specific alleged wrongdoings, civil liberties concerns may be raised about why the Commission requires powers of arrest, search, and seizure, or about such coercive powers being combined with appointment by the executive (**clause 7**) and very wide-ranging terms of reference. In particular, if the Commission is to produce an accurate historical analysis (**paragraph 8(1)(c)**), not explicitly granting witnesses protections against self-incrimination seems likely to work against the Commission's purposes, as it may make witnesses more reluctant to come forward, testify, or otherwise cooperate.

There may be cases where the Commission's powers are necessary. For example, there may be financial institutions which have historical records relating to '[stolen wages](#)', churches or other institutions with records relating to Stolen Generations members, or institutions or private individuals holding records, artefacts, or ancestral remains of First Peoples, who have not yet made these objects and records available to affected First Peoples and their descendants. However, as discussed above, the Commission's powers may not have effect over state-government-based institutions outside the Northern Territory and other territories.

Historically and comparatively, there have been similar inquiries both with and without coercive powers. The Royal Commission into Aboriginal Deaths in Custody had such powers, in part because of First Peoples' and general public suspicion that police or jailer misconduct was causing Aboriginal deaths in custody. The South African Truth and Justice Commission had coercive powers similar to those of an Australian Royal Commission, but was also empowered to offer amnesty from prosecution to those who cooperated with the inquiry. Conversely, the Council for Aboriginal Reconciliation, the *Bringing them Home* inquiry, and the Canadian and Norwegian truth commissions did not have coercive powers.

Risk of adverse interaction with the native title claim system

Since the 2002 [Yorta Yorta decision](#), native title claimants have been required to demonstrate substantially uninterrupted continuity of their traditional laws and customs since the pre-colonial era. The current 'test' applied by the courts has been summarised in the ALRC's [Connection to Country: Review of the Native Title Act 1993 Final Report](#) (2015) at p. 77:

[The claimants] are a society united in and by their acknowledgment and observance of a body of accepted laws and customs;

[T]hat the present day body of accepted laws and customs of the society, in essence, is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances;

[T]hat the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty and that the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs [; and]

The claimants must show that they still possess rights and interests under the traditional laws acknowledged and the traditional customs observed by them and that those laws and customs give them a connection to the land.

If claimants cannot meet these requirements, courts may hold that their native title is no longer recognised by Australian common law, but is considered to have been ‘washed away by the tide of history’ (*Yorta Yorta v Victoria*, [2002] HCA 58 at 107). The Australian Law Reform Commission has noted that there is a strong tension between the native title test’s continuity requirements (which the ALRC considers have been ‘read into’ the *Native Title Act 1993* by the courts, p. 159), and claimants being able to acknowledge the devastating effects of dispossession: see [Connection to Country: Review of the Native Title Act 1993](#), pp. 151–159.

The Commission will investigate, and invite witnesses to testify about, topics including cultural violations, destruction of cultural knowledge, evictions and displacements, massacres, forced removals, and attempts to eradicate language, culture, or identity (**paragraphs 8(1)(a)(i)–(v)**). As evidence before the Commission is admissible in court proceedings, there could be concerns that testimony about cultural disruption and loss may have implications for subsequent native title claims or [compensation claims](#), as it may affect a claim of ‘substantial uninterrupted’. Such concerns could be a disincentive for First Peoples witnesses to come forward or testify.

Indigenous Data Sovereignty, privacy, and the Commission’s records

A key ongoing First Peoples concern [worldwide](#), expressed in the slogan ‘[nothing about us without us](#)’, is lack of [Indigenous Data Sovereignty](#), manifesting in the acquisition, retention, control, and use of information about First Peoples by non-Indigenous people and institutions, frequently with negative effects. Negative effects can occur even when the non-Indigenous information custodians have worked closely with, and believe that they are acting in the best interests of, First Peoples (see [this article](#) for an example). Increased First Peoples access to and control over information and records about them is now a [Priority Reform](#) of the new Closing the Gap Agreement. The proposed Commission may acquire particularly sensitive information, for example about restricted cultural knowledge, child protection, or previous abuse.

Given this concern, and the potentially extremely sensitive subject matter, it is notable that, apart from a general direction to ‘observe the principles of cultural safety’ (**subclause 8(4)**), the Bill does not explicitly provide for secure and culturally safe restrictions, retention and access to the Commission’s records (as recommended by the Yoorrook Justice Commission in its [submission](#)). In contrast, the *Royal Commissions Act 1902* provides guidance on the records of Royal Commissions in general (section 9 of that Act) and in particular imposes access controls and restrictions on records of the Child Sexual Abuse Royal Commission (section 6ON), the Disability Royal Commission (section 6OP) and the Defence and Veteran Suicide Royal Commission (section 6OQ).

While the Minister may be able to make rules for the records of the Commission under **clause 36** of the Bill, it would be better legislative practice for this key issue to be addressed in primary legislation, or for the Bill to provide directions to the Minister about the nature and purpose of the rules. It is also doubtful whether the rules, as subordinate legislative instruments, could override the *Archives Act 1983* or the *Freedom of Information Act 1982* if

access to records was sought under those Acts. In contrast, records relating to private sessions of Royal Commissions are exempt from Freedom of Information requests under subsection 7(2E) of the [Freedom of Information Act 1982](#), and are subject to a 99-year embargo on archives otherwise accessible under the [Archives Act 1983](#) by section 60M of the *Royal Commissions Act 1902*. As the Commission created by the Bill is not a Royal Commission, it would probably not be covered by these provisions.

Concluding comments

Many of the technical and civil liberties issues raised could be addressed if the Bill incorporated, with appropriate modifications, the existing legislative provisions for Royal Commissions regarding admissibility of evidence, privileges of witnesses, and record keeping.

The issue of whether the Commission's powers are appropriate to its purpose and scope depends in part on whether it attracts cooperation and potential referral from the states, and whether it is intended to have a Northern Territory specific or whole of Australia focus. Without state cooperation, giving the Commission powers which may not be able to be exercised outside the Territories may raise false hopes in First Peoples respondents living in states.

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