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Unfinished Business? The Victorian Yoo-rrook Justice Commission and Truth-Telling in Australia

An ANZSOG Teaching Case by Harry Hobbs

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Abstract

Aboriginal and Torres Strait Islander peoples have long explained that the relationship between Indigenous and non-Indigenous Australians can only be improved through a comprehensive process of truth telling. In 2021, the Victorian government responded to these calls by establishing the Yoo-rrook Justice Commission. Designed in partnership with the First Peoples' Assembly of Victoria, the Commission is Australia's first formal truth telling process. Truth commissions have been set up in many countries around the world as a means to investigate and redress past human rights abuses. However, because truth commissions have generally emerged in states transitioning from authoritarian rule or mass atrocity, they have usually ignored Indigenous peoples and their perspectives. How has the Yoo-rrook Justice Commission been designed differently? What are the chances that it will succeed? And how does it relate to the national debate on constitutional recognition of Aboriginal and Torres Strait Islander peoples?

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Truth commissions can be valuable mechanisms to develop a shared understanding of the historic and contemporary injustices perpetrated against Aboriginal and Torres Strait Islander peoples since the start of colonisation¹. Enhancing awareness and recognition among non-Indigenous Australians may also be key to generating legal and political reform that will lead to a more equitable future. However, for this to occur two lessons should be borne in mind. First, Aboriginal and Torres Strait Islander peoples must take a leading role in the development and design of any truth-telling process. Developing a truth commission in partnership with Aboriginal and Torres Strait Islander peoples will help to guarantee that the process responds to the specific needs and aspirations of Indigenous peoples. Second, truth telling processes cannot by themselves lead to reform. Governments should demonstrate their commitment to structural reform by embedding a truth commission in a larger process of structural reform. The Yoo-rook Justice Commission in Victoria has emerged organically out of the State's treaty process. This improves the likelihood that any recommendations will be acted upon.

Introduction

'In order to know where you're going you must know where you've come from. Even if it's in your face or hard to swallow, people need to know the true history in order to move forward'.²

In June 2020, the First Peoples Assembly of Victoria, a state-wide Indigenous representative body developed as part of the State's treaty process, called on the government to 'establish an independent Truth Commission or inquiry to formally recognise historic wrongs, and past and ongoing injustices as a result of colonisation' (Dunstan 2020). The following month, the Victorian government announced that, 'in partnership with the First Peoples' Assembly', they would establish a truth and justice process (Premier of Victoria 2020).

The Yoo-rook Justice Commission was formally established in May 2021, following several months of consultation. Named for the Wemba Wemba word for 'truth', the Yoo-rook Justice Commission has two primary functions. First, drawing directly on the stories of First Peoples in Victoria, the Commission will establish an official record of the impact of colonisation on First Peoples in the state. It will do so by examining historical and ongoing systemic injustices perpetrated against First Peoples. Second, the Commission will determine the causes and consequences of systemic injustices and make detailed recommendations about practical reforms needed in Victoria.

The Yoo-rook Justice Commission is the first comprehensive truth-telling commission in Australia's history. It may soon be joined by others. Governments in Queensland, the Northern Territory and Tasmania are considering whether they too should establish a formal process of truth-telling. The development and design of the Yoo-rook Justice Commission offers important lessons for states and territories in Australia contemplating truth commissions.

Why Truth Telling

For generations, Aboriginal and Torres Strait Islander peoples have called for a formal process of truth-telling to shine a light on Australia's colonial history and to explore how that history continues to affect the present. Most prominently, the 2017 Uluru Statement from the Heart urges the Commonwealth government to establish a Makarrata Commission to supervise a process of agreement-making and truth-telling (Uluru Statement 2017).

The Uluru Statement from the Heart is the document issued by the First Nations National Constitutional Convention held over four days at Uluru in May 2017. The Convention comprised Indigenous Australian delegates elected from 12 regional dialogues held across Australia in 2016 and 2017. Although the Uluru Statement is not unanimously supported by Indigenous Australians, it reflects formidable consensus reached through a process of deliberation unmatched in Australian history.

The desire for truth-telling reflects the widely held view that there can be 'no justice without truth' (Guterres 2019). As Alywarre elder Pat Anderson has argued, 'You cannot make a lasting and effective agreement unless you have a shared, truthful understanding of the nature of the dispute, of the history, of how we got to where we stand' (Anderson 2017). On this view, a truth-telling process is necessary to develop a better understanding of our shared history and,

¹ This case note refers to the distinct political communities that possessed the Australian continent prior to British colonisation as 'Aboriginal and Torres Strait Islander peoples', 'Indigenous Australians' and 'First Peoples'. I also use the term 'Indigenous' to refer to similarly situated polities across the globe. Acknowledging that not all Aboriginal and Torres Strait Islander communities prefer this terminology, I identify the relevant nation or political community where possible.

² Alice Pepper, a Yorta Yorta, Mutti Mutti, Arrernte, Gunnai, Gunditjmarra and Djab Wurrung woman and member of the First Peoples Assembly of Victoria. Cited in First Peoples Assembly of Victoria 2021, 4.

ultimately, to lead to a more equitable future. Aboriginal delegates at the Referendum Council Regional Council dialogue in Adelaide gave voice to this position, noting that, ‘healing can only begin when this true history is taught’ (Referendum Council 2017, 19).

Developing a shared history may also relieve Aboriginal and Torres Strait Islander peoples of the burden of carrying that history alone. It will allow their stories to be ‘counted and to be heard’ without ‘silence or shame’ (First Peoples Assembly of Victoria 2021, 12). In the words of Geraldine Atkinson, Co-Chair of the First Peoples Assembly of Victoria, truth-telling ‘gives Victoria the opportunity to make the invisible visible and the pain of so many both heard and reconciled’ (First Peoples Assembly of Victoria 2020).

Two key challenges

These are worthy goals but designing a truth commission to realise them is challenging. Two key challenges faced those responsible for developing the Yoo-rook Justice Commission. First, the Commission must be adapted to the specific circumstances facing First Peoples in Victoria. Second, the Commission must be able to secure the support of First Peoples in the state by demonstrating that it can lead to significant legal and political reform.

1. Adapting the Commission to focus on harms stemming from colonisation

There are many examples of truth commissions around the world. However, because truth commissions initially emerged in countries transitioning from military dictatorship or authoritarian rule, such as in Chile or South Africa, they have historically ignored Indigenous peoples and their perspectives. Indigenous peoples have not played a major role in the design or development of most truth commissions.

The First Peoples Assembly of Victoria recognised that several elements of the traditional truth commission model may not be appropriate for truth telling processes engaging with the specific harms of colonisation. First, because truth commissions are designed to reconcile a divided or conflicted society, they are often under pressure to affirm goals of national unity. There is nothing fundamentally wrong with this — all societies require common bonds of solidarity — but it should not be a reason for the commission to exclude points of view outside the political mainstream, including from First Peoples who question the legitimacy of the state and federal governments.

Second, truth commissions are often set up by new governments to investigate human rights abuses under a previous regime. They aim to draw a line under human rights violations committed in the past. This is not always possible. As the Royal Commission into Aboriginal Deaths in Custody found in 1991, ‘So much of the Aboriginal people’s current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past’ (Royal Commission into Aboriginal Deaths in Custody 1991, 1).

A truth-telling process in Australia must do more than provide a richer understanding of Australia’s past. As Marcus Stewart, Nira illim bulluk man of the Taungurung Nation and Co-Chair of the First Peoples’ Assembly of Victoria, notes, truth-telling can uncover the ‘long-held trauma of past events or policies’ and explain ‘how they continue to affect and resonate with the lived experiences of Aboriginal people today’ (First Peoples Assembly of Victoria 2021, 14). Similarly, a truth commission may also help to show how existing institutions remain embedded within colonial structures, and thus continue to colonise and exclude Indigenous Australians (Wolfe 2006, 388).

Third, the traditional focus of truth commissions is on violations of individual human rights. This may not be appropriate in Victoria, where most perpetrators of direct violence are likely to have died (though of course, state-sanctioned violence continues in the form of colonial institutions). More importantly, as the regional dialogues that led to the Uluru Statement demonstrate, many Aboriginal and Torres Strait Islander peoples see little distinction between massacres, other individual acts of violence, and the broader structural forces that shape law, policy and attitudes that gave rise to and encouraged that violence (Referendum Council 2017, 16-21). A truth-telling process should aim to help identify those connections for non-Indigenous Australians.

Not all truth commissions ignore Indigenous peoples. In recent years truth commissions in Canada, Sweden, Norway, and Finland, as well as the state of Maine in the United States, have been adapted to specifically examine injustices against Indigenous peoples. In particular, the work of the 2008 Truth and Reconciliation Commission of Canada demonstrates that appropriately designed truth telling processes can pave the way for political and legal reform to

benefit Indigenous peoples. Other examples exist. In New Zealand, the Waitangi Tribunal, a standing commission of inquiry that shares some similarities to truth commissions has operated since 1975. The First Peoples' Assembly of Victoria drew on these models in considering the design of the Yoo-rook Justice Commission.

2. Earlier truth telling processes in Australia have failed to lead to legal reform

The second challenge may be more difficult to resolve. As the First Peoples Assembly of Victoria and the State government recognised, truth-telling 'has not been absent in the relationship between Indigenous and non-Indigenous Australia' (Davis and Appleby 2018, 501). Several large scale, national truth telling processes have been undertaken in Australian history. They include the Royal Commission into Aboriginal Deaths in Custody, the ten-year process led by the Council for Aboriginal Reconciliation between 1991 and 2000, and the Human Rights and Equal Opportunity Commission's 1997 inquiry into the Stolen Generations.

These inquiries have led to a more detailed understanding of the systemic injustices experienced by Aboriginal and Torres Strait Islander peoples. However, they largely failed to generate the significant legal reform necessary for healing to truly begin. It is now over 30 years since the Royal Commission into Aboriginal Deaths in Custody handed down its report and recommendations. However, many of the Commission's 339 recommendations have not been implemented (Anthony et al 2021). Over 500 First Peoples have died in custody since 1991 (National Aboriginal and Torres Strait Islander Legal Services 2021).

The failure of previous truth-telling processes to lead to legal changes has had negative consequences. As the First Peoples Assembly of Victoria has noted, asking First Peoples to retell their experiences can lead to 're-traumatisation...when nothing changes' (First Peoples Assembly of Victoria 2021, 15). It has also led Aboriginal and Torres Strait Islander peoples to question the commitment of government and even the value of truth processes. For instance, Megan Davis has warned that:

'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. It defies the demands we have made as Aboriginal people for rigorous evidence-based thinking and public policy in Indigenous affairs' (Davis 2021, n.p).

Overcoming these challenges

It is too early to tell whether the Commission will overcome these challenges. However, the development of the Commission provides two promising lessons for other Australian states and territories contemplating truth commissions.

A First Peoples led truth commission

First Peoples in Victoria were intimately involved in the development and design of the Commission. The First Peoples Assembly of Victoria first called for the establishment of a truth telling process in June 2020. When the state government agreed, the Assembly and the government worked together collaboratively to identify an appropriate mandate and consider its design and legal basis. The Assembly set up a dedicated Committee to progress the matter. This Committee 'identified that the historic nature of this task required broad consultation, creativity and learning lessons from around Australia and elsewhere' (First Peoples Assembly of Victoria 2021, 8).

The Assembly conducted several rounds of consultation with First Peoples to understand their aspirations for the commission. In the first phase, which ran between September 2020 and January 2021, the Assembly sought high-level input from community on their expectations. Topics for discussion included how the Commission could be different from previous truth telling processes, the stories that should be told and recognised, the focus of the inquiry, and the people that should lead the process. Feedback from these discussions informed the draft Terms of Reference, which were put out for public comment in late 2020.

The second phase ran for two months between February and March 2021. During this phase, the Assembly asked more detailed questions aimed at exploring how the Commission could operate and engage with First Peoples across the State. Some of the questions included (First Peoples Assembly of Victoria 2021, 9):

- What sort of environment should be offered for individuals to tell their stories?

- What sort of events should be associated with the truth-telling process and where should these happen?
- How should the body approach gendered experiences of colonial violence and what practices should be put in place to address this?
- What form could a person's story take?

In the third phase, which ran in April 2021, the Assembly focused on gaining specific detail on the main themes that emerged in the earlier consultations. Topics included how the Commission could make the process culturally safe and minimise re-traumatisation, how the Commission should receive cultural knowledge, and how the Commission can ensure that it responds to and meets the needs of the community.

The COVID-19 pandemic and the short timeframe made community consultation difficult. Although in-person meetings were held where possible, engagement occurred primarily online and over the phone. As elected representatives for First Peoples across Victoria, members of the Assembly also reached out through their own contacts directly. The Assembly also engaged with First Peoples who were incarcerated and on-remand and are therefore often ignored. This is valuable but it is important to acknowledge that community consultation was not extensive. Only 457 people attended general community meetings, and while 30,778 interacted through social media platforms the extent of their engagement is difficult to clarify. Only 103 people returned detailed feedback responses, either via online surveys, email, or other submissions (First Peoples Assembly of Victoria 2021, 11).

The consultation process may have been limited, but the ultimate design of the Commission has delivered a truth commission adapted for the specific harms of colonisation. With the powers of a Royal Commission, the Yoo-rook Justice Commission will operate independent of government and be able to compel evidence under oath. Its terms of reference are broad, empowering it to look at both historic and ongoing systemic injustices, allowing the Commission to explain how historic injustices continue to affect and impact the present. Guided by community voices at all stages of its development, the Commission also has a better chance of operating in a culturally safe manner than other inquiries.

The work of the Commission has so far been frustrated by COVID-19. Lockdowns have prevented the Commission from beginning community consultations or public hearings. Nonetheless, the Commission has appointed and hired key staff. Importantly, Indigenous Australians occupy central roles within the body. Four of the five Commissioners are Indigenous Australians, while the Commission's Letters Patent requires it prioritise the employment of First Peoples within the secretariat.

The ultimate test of the Commission is how it operates in practice. However, by empowering First Peoples in Victoria to lead the process of development, design and operation, the Yoo-rook Justice Commission appears well placed.

A complementary process

The genesis and development of the Yoo-rook Justice Commission points to a second major element that may increase the likelihood that any recommendations lead to legal and political reform. The Commission will not operate on its own. Rather, it forms part of the Victorian government's commitment to negotiating treaties with First Peoples across the state.

This commitment was first made in 2016. After several years of consultation with government and First Peoples across Victoria, the State Parliament passed Australia's first treaty Act in 2018 (Williams and Hobbs 2020, ch 8). The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* creates a legislative basis for negotiating a treaty with First Peoples in the State. Under the Act, the government is required to recognise an Aboriginal-designed representative body (the First Peoples' Assembly of Victoria). The Assembly is working with the government to establish a treaty negotiation framework 'so clans or mobs or nations here in Victoria can eventually negotiate their own treaties' (Allam 2019). Following elections for the First Peoples' Assembly in 2019, preliminary discussion on a treaty negotiation framework has commenced.

The need for a process of truth-telling emerged organically out of this treaty process. As noted above, the First Peoples' Assembly was active in leading discussion and consultation over the design and development of the Yoo-rook Justice Commission. This connection is evident in the Commission's Letters Patent. The Commission is required to support and promote the advancement of treaty or treaties (Letters Patent 2021, 2(f)). It can do that in several ways. The stories that will be told to the Yoo-rook Justice Commission are expected to 'shape Victoria's

conversation around Treaty-making, as well as the national conversation across Australia' (First Peoples Assembly of Victoria 2021, 33). Its recommendations are also anticipated to identify matters that may form part of treaty negotiations.

The Yoo-rrook Justice Commission must deliver its final report in June 2024. Unlike earlier truth telling processes such as the Royal Commission into Aboriginal Deaths in Custody, the conclusion of the Commission's mandate will not spell the end of this process. First Peoples and the government will draw on the Yoo-rrook Justice Commission's recommendations when engaging in treaty negotiations that are likely to continue throughout the decade. The fact that the Yoo-rrook Justice Commission is embedded in a larger conversation aimed at structural reform leaves it well placed to have significant legal and policy influence.

The National Debate

The Yoo-rrook Justice Commission has affected the national debate. For over a decade Australia has debated whether and how the Constitution should be amended to recognise Aboriginal and Torres Strait Islander peoples. In the 2017 Uluru Statement from the Heart, Aboriginal and Torres Strait Islander peoples explained what recognition means to them. The Statement called for an Indigenous representative body to be put in the Constitution and a Makarrata Commission to be established by legislation to supervise a process of agreement-making and truth-telling.

The Commonwealth government initially rejected the call for an Indigenous representative body. Prime Minister Malcolm Turnbull stated that the government did 'not believe such an addition to our national representative institutions is either desirable or capable of winning acceptance in a referendum' (Prime Minister, Attorney-General, Minister for Indigenous Affairs 2017). While the Scott Morrison government set up an inquiry to explore design options for an Indigenous representative body, it remains opposed to putting the body in the Constitution. The Morrison government has also dismissed calls for a Makarrata Commission.

Nonetheless, several other states and territories have responded to Aboriginal and Torres Strait Islander peoples calls. The Northern Territory and Queensland have formally committed to entering treaty processes with the Indigenous communities whose traditional lands fall within their borders. The ACT and Tasmania have also commenced preliminary discussions on treaty (Williams and Hobbs 2020). Early conversations with Aboriginal and Torres Strait Islander peoples in these jurisdictions have revealed a strong desire for an accompanying truth telling process. The work of the Yoo-rrook Justice Commission will be closely watched.

Conclusion and key lessons

Aboriginal and Torres Strait Islander peoples have long called for a formal process of truth-telling as a means to lead to structural reform. The Yoo-rrook Justice Commission is the first comprehensive truth commission in Australia's history. The Commission was developed in partnership with the First Peoples' Assembly of Victoria, and it forms part of the Victorian government's commitment to negotiating treaties with Aboriginal Nations across the state. If the First Peoples' Assembly helps to guide the state government's response to the Yoo-rrook Justice Commission's recommendations, truth-telling may lead to political and legal change.

Feedback on case use

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