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‘FIRST PEOPLES’ TRUTH AND JUSTICE COMMISSIONS’

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‘The Victorian Yoo-rrook Justice Commission’

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The [Yoo-rrook Justice Commission](#) was established in 2021 as part of a historic legislative and political process that has been underway in Victoria for some time. The primary aim of this process is to reorder through treaty-making and other measures the relationship between First Peoples and the State and between Aboriginal and non-Aboriginal people to give effect to the fundamental human right of Indigenous peoples to self-determination. Yoo-rrook’s function in this process is foundational. It is to record, officially and publicly, First Peoples’ experience of systemic injustice since colonisation (and continuing) and identify structural reforms for addressing that injustice. Yoo-rrook’s findings and recommendations are intended fundamentally to influence the treaty or treaties and other measures that may be made or adopted.

The legislative part of the process has several components and the most important of these are:

- The [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), which recognises everyone’s civil and political rights and the distinct cultural rights of Aboriginal persons
- The [Traditional Owner Settlement Act 2010](#) (Vic), which recognises the right of traditional owners to land justice and establishes a facilitating mechanism
- The [Advancing the Treaty Process with Aboriginal Victorians Act 2018](#) (Vic), which establishes processes and institutions for state-based treaty-making between the First Peoples and the State

The political part of the process has been ongoing for at least two decades and today is represented in high-level negotiations between the [First Peoples Assembly of Victoria](#) and the State of Victoria. The First Peoples Assembly is an elected Aboriginal representative body established under the [Advancing the Treaty Process with Aboriginal Victorians Act 2018](#) for the primary purpose of giving effect to Indigenous self-determination in the treaty-making process, especially through framework building with the government.

Although truth and justice (as both rights and values) were structurally inherent in this legislative-political process before Yoo-rrook was established, they were not expressly recognised, and not recognised as indispensable and mutually indivisible elements.

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However, in June 2020, the First Peoples Assembly decided that the logic of treaty-making in the Victorian colonial context demanded that truth and justice be brought expressly into the frame of reference. As explained by Alice Pepper (a Yorta Yorta, Arrernte, Gunnai, Gunditjmara and Djab Wurrung woman and Assembly member):

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

On the initiative of the Assembly, the government agreed to establish a truth and justice commission in line with the transitional justice model which is based on international human rights law but reflecting the Victorian colonial context and its profound impact on First Peoples. This is the [Yoo-rook Justice Commission](#), which was established on 12 May 2021 by [Letters Patent](#) as a Royal Commission under s 5 of the [Inquiries Act 2014](#) (Vic).

The [Letters Patent](#) expressly recognise a number of historical and contemporary facts which constitute the foundation of Yoo-rook's work. In particular:

- The First Peoples include the traditional owners of the lands currently known as the State of Victoria, over which they maintain that their sovereignty was never ceded.
- First Peoples' experiences of Colonisation have included grave historic wrongs and past and ongoing injustices and intergenerational trauma.
- The State of Victoria acknowledges both the continuing impacts arising from historical injustices and the ongoing strength and resilience of First Peoples and survival of their living cultures, knowledge and traditions.
- ...
- The State of Victoria acknowledges the importance of non-discrimination, uncovering truth, providing justice and reparation, supporting wellbeing and preventing further harm to First Peoples.
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- Hearing First Peoples' stories and acknowledging the truth about their experiences is essential for healing and justice for First Peoples. It will also contribute significantly to a public dialogue, providing a foundation for new and positive relationships between First Peoples, non-Aboriginal Victorians and the State of Victoria.³
- ...

Making a direct connection between international human rights law and the objectives of Yoo-rook, the [Letters Patent](#)⁴ specify that 'relevant human rights' are recognised in

² First Peoples Assembly of Victoria, '[Tyerri Yoo-rook' \(Seed of Truth\): Report to the Yoo-rook Justice Commission from the First Peoples Assembly of Victoria](#) (June 2021, Melbourne) 4.

³ Clause 1 of [Letters Patent](#).

⁴ *Ibid*, which relevantly specifies:

- Relevant human rights are also recognised in international human rights instruments, including the:
 - *United Nations Declaration on the Rights of Indigenous Peoples;*
 - *International Convention on the Elimination of All Forms of Racial Discrimination;*
 - *International Covenant on Civil and Political Rights;*
 - *International Covenant on Economic, Social and Cultural Rights;*
 - *Convention on the Prevention and Punishment of the Crime of Genocide;*
 - *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*

ten instruments (to which Australia is a party), the first of which is the *United Nations Declaration on the Rights of Indigenous Peoples*.⁵

Against this background, the [Letters Patent](#) states that the objectives of Yoo-rrook are to:

- a) establish an official public record based on First Peoples' experiences of Systemic Injustice since the start of Colonisation;
- b) develop a shared understanding among all Victorians of the individual and collective impact of Systemic Injustice and the intergenerational trauma that has flowed from them since the start of Colonisation;
- c) determine the causes and consequences of Systemic Injustice including the role of State policies and laws and which State Entities or Non-State Entities bear responsibility for the harm suffered by First Peoples since the start of Colonisation;
- d) develop a shared understanding among all Victorians of the diversity, strength and resilience of First Peoples' cultures, knowledge, and traditional practices;
- e) help build the foundations for a new relationship between First Peoples and the State of Victoria and all Victorians, based on truth and justice to prevent the recurrence of injustice;
- f) support the treaty-making process between the State of Victoria and First Peoples, including through the identification of subject matters for potential inclusion in a treaty or treaties; and
- g) identify Systemic Injustice which currently impedes First Peoples achieving self-determination and equality and make recommendations to address them, improve State accountability and prevent continuation or recurrence of Systemic Injustice.⁶

'Systemic injustice' (both historic and ongoing) is defined in terms of harm or impacts on human dignity, including as understood in modern human rights law, that are part of a 'systemic or structural pattern'.⁷

Under the [Letters Patent](#) and the [Inquiries Act 2014](#), Yoo-rrook has terms of reference, inquiry powers (including compulsive powers) and recommendation-making functions

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- o *Convention on the Rights of the Child;*
 - o *Convention on the Elimination of All Forms of Discrimination against Women;*
 - o *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; and*
 - o *Updated Set of principles for the protection and promotion of human rights through action to combat impunity.*

⁵ UN Doc A/RES/61/295 (2 October 2007).

⁶ Clause 2.

⁷ The definition in clause 6 of the [Letters Patent](#) reads:

Systemic Injustice means harm and/or impacts on human dignity (including, but not limited to, those as understood by reference to the application of current human rights instruments, including to events prior to the making of such instruments) experienced by First Peoples, that are part of a systemic or structural pattern, and which involve any policies, practices, conduct or laws which existed since the start of Colonisation. Unless otherwise stated, Systemic Injustice includes both ongoing and historical systemic injustices. This definition is not intended to limit the Royal Commission's ability to inquire into and report on individual experiences.

that are well sufficient to carry out these objectives. The arrangements are the product of detailed and respectful negotiations between the First Peoples Assembly and the government which are themselves self-determining in nature.

Transitional justice may be described as a paradigm for understanding, explaining and influencing the changes that occur in the political order of a state when it moves from an authoritarian or conflictual situation involving gross violations of human rights to one based on democracy and human rights.⁸ The general objectives of transitional justice are: to shed light on past violations of human rights; to address the challenges of the present; and to prepare the foundation for future relations based on democracy and human rights. It is generally understood that transitional justice is built on four pillars: prosecutions (reflecting the principle of retributive justice); truth-telling mechanisms (reflecting the principle of restorative justice); reparations (reflecting the principle of remedial justice); and institutional reform (reflecting the principles of democracy, human rights and the rule of law).⁹ An oft-given illustrative example is the South African Truth and Reconciliation Commission (1995-2002).¹⁰ There is a [United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#).¹¹

Two trends in the evolution of transitional justice have come together in the formation of Yoo-rook, reflecting a new conceptual approach.¹² The first trend is growing recognition that transitional justice principles are relevant in the colonial context, including in the context of settler states like Australia. Contemporary interest in the application of transitional justice in the colonial context is illustrated by a recent report by the Special Rapporteur,¹³ which gives Yoo-rook as an example.¹⁴ The second is growing recognition that these principles are relevant in relation to the impact of colonisation on Indigenous peoples. Contemporary interest in the application of transitional justice in the Indigenous context is illustrated by a recent report by the United Nations Expert Mechanism on the Rights of Indigenous Peoples.¹⁵ While

⁸ See generally Ruti G Teitel, *Transitional Justice* (Oxford University Press, 2000) 88-92; Pricilla Hayner, *Unspeakable Truths* (Routledge, 2nd ed, 2011) 1-26.

⁹ Ronli Sifris, 'The Four pillars of transitional justice: a gender-sensitive analysis' in Sarah Joseph and Adam McBeth, *Research Handbook on International Human Rights Law* (Edward Elger, 2010) 272-98

¹⁰ See Hayner (n 8) 27-32.

¹¹ [UN Doc A/HRC/RES/18/7 \(13 October 2011\)](#).

¹² See Jennifer Balint, Julie Evans and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) *The International Journal of Transitional Justice* 194-216.

¹³ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, *Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts* ([UNDoc A/76/180 \(19 July 2021\)](#)).

¹⁴ *Ibid* [51].

¹⁵ Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation* ([UN Doc A/HRC/EMRIP/2019/3/Rev. 1](#)).

previous truth and justice commissions have included some examination of the impact of colonisation and have included an Indigenous context in some cases, Yoo-rook is unique because, reflecting the new conceptual approach, a combined inquiry is the primary focus of its work.

The right to self-determination of peoples is stipulated in common article 1 of the *International Covenant on Civil and Political Rights*¹⁶ and the *International Covenant on Economic, Social and Cultural Rights*¹⁷ (to which Australia is a party) and elaborated in relation to Indigenous peoples in UNDRIP¹⁸ (which Australia supports). Consistently with the right to self-determination of Indigenous peoples, Yoo-rook is led by a majority of First Peoples Commissioners. Were it otherwise, Yoo-rook would have reproduced in its own structures relations of unequal power deriving from colonisation.

The [members of the Commission](#) are:

- Professor Eleanor Bourke, a Wergaia/Wamba Wamba Senior Elder, Traditional Owner and Chair
- Dr Wayne Atkinson, a Yorta Yorta/Dja Dja Wurrung Senior Elder and Traditional Owner
- Ms Sue-Anne Hunter, a Wurundjeri and Ngurai illum Wurrung woman and Traditional Owner
- Distinguished Professor Maggie Walter, an Aboriginal Tasmanian (Palawa) woman and descendant of the Pairrebenne People of the North-East Nation
- Professor the Hon Kevin Bell AM QC (non-Aboriginal)

Reflecting this principle of leadership by First Peoples, Yoo-rook has adopted values and decision-making protocols which are strongly informed by First Peoples' history, culture, languages and ways of knowing, being and doing¹⁹. Yoo-rook's vision is 'A transformed Victoria, based on truth and justice, and grounded in First Peoples' enduring spirit, cultures and self-determination'.²⁰ Yoo-rook's goals are 'Truth, Understanding and Transformation'.²¹ It has released its strategic priorities,²² which are:

- 1 Laying strong foundations for trust and cultural legitimacy
- 2 Honour First Peoples' Elders and preserve knowledge
- 3 Lay the foundations for a comprehensive picture of systemic injustices against First Peoples
- 4 Promote a coherent and holistic reform agenda

¹⁶ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁷ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁸ Articles 3-5 and throughout.

¹⁹ Yoo-rook Justice Commission, [Guiding the Path to Yoo-rook](#) (2021).

²⁰ Yoo-rook Justice Commission, [Strategic Priorities](#) (2021) 3.

²¹ *Ibid* 4.

²² *Ibid* 7-11.

Indigenous data sovereignty²³ principles are fundamental, as is a research methodology that respects First Peoples knowledge systems.²⁴ These priorities will be reflected in an Interim Report, which is due by 30 June 2022. The final report is due by 30 June 2014.²⁵

The human right to Indigenous self-determination and other relevant human rights will inform how Yoo-rrook carries out its research, reporting and recommendatory functions. In pursuing all three of the interconnected goals of truth, understanding and transformation, it will adopt a ‘human rights-based approach’,²⁶ recognising that it has legal obligations under the [Inquiries Act 2014](#) and the common law, including to stay within its Terms of Reference²⁷ and to observe the rules of natural justice.²⁸ Moreover, it will analyse historic and systemic injustice experienced by First Peoples under colonisation within a framework that reflects the catalogue of human rights in UNDRIP.²⁹ This will allow Yoo-rrook to identify the impact of colonisation on First Peoples as peoples (as well as on individual Aboriginal people) in the past and the present in a way that is connected with recommendations for coherent and holistic reform³⁰ and for treaty-making to realise self-determination in the future.

The process of realising the human rights in UNDRIP, and especially the right to self-

²³ See generally Maggie Walter et al (eds), *Indigenous Data Sovereignty and Policy* (Routledge, 2020).

²⁴ [Strategic Priorities](#) 9.

²⁵ Clause 7(a) and (b) of the [Letters Patent](#).

²⁶ According to the [Australian Human Rights Commission](#), a human rights-based approach (‘PANEL’) is one based on:

- Participation
- Accountability
- Non-discrimination and equality
- Empowerment
- Legality

²⁷ These are in clause 3 of the [Letters Patent](#). Clause 4 contains directions as to how Yoo-rrook is to conduct the inquiry. For example, it states in part that Yoo-rrook is to: ‘a) Provide a safe, supportive and culturally appropriate forum for First Peoples to exercise their rights to truth and justice with dignity and demonstrate their cultural resilience and survival ...; [and] f) Adopt practices and approaches to minimise harm and re-traumatisation for First Peoples; ...’

²⁸ See eg *Annetts v McCann* (1990) 170 CLR 596, 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578.

²⁹ The [Strategic Priorities](#) state (10):

3.3 Reflecting UNDRIP, launch lines of inquiry into the following themes:

- Political organisation, resistance and self-determination
- Law and lore
- Culture and cultural heritage
- People, society and well-being
- Land, water and resources
- Ecology and caring for country
- Economy, productivity and sustainability

³⁰ [Strategic Priorities](#) 11.

determination, has been famously characterized as ‘belated State-building’.³¹ It is belated because it involves processes of inclusion and state reformation in respect of Indigenous peoples who now find themselves encapsulated within states created by colonial forces in circumstances where they were excluded or dominated when the state was formed. But it does not only involve them. It involves the non-Indigenous population, for the process is necessarily reflective, reconciliatory, reparatory and involves some reordering of political and legal relationships.³² Yoo-rrook is a transitional justice institution that has been created to contribute to this process in Victoria. Its primary focus is upon truth and justice, but it is expressly required to consider these matters in the general context of treaty-making to which its recommendations will be directed.

There are different ways of describing this process of belated state-building. Some describe it as Indigenous people realising ‘internal’³³ self-determination, that is, internal to the state concerned, and others describe it as ‘constitutive’ self-determination, which is less statist in orientation.³⁴ However described, the process involves creating a political order that allows Indigenous peoples to realise self-determination within the state without destruction of the state.³⁵ It is predicated on the continuation of the sovereignty of the state concerned. In Victoria, the process is predicated on recognition by the State of the maintenance by First Peoples of the position that they still hold their never-ceded sovereignty.³⁶ Victoria is a political unit in a constitutional federation, which obviously affects the nature of the ‘treaty’ which is in contemplation and the how the agreed terms are to be implemented and enforced. In the absence of an applicable international or national mechanism, the treaty will need to be supported by dispute resolution mechanisms under state law, presumably by legislation.

³¹ Erica-Irene A Daes, ‘Some Considerations on the Right of Indigenous Peoples to Self-Determination’ (1993) 3 *Transnational Law and Contemporary Problems* 1, 9.

³² See Report of the Expert Mechanism (n 15).

³³ Daes (n 31) 9.

³⁴ S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 97-128.

³⁵ I am putting aside the special case of remedial interpretation.

³⁶ Clause 1 of the [Letters Patent](#).