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Transitional justice measures and the legacy of human rights violations in colonial contexts

*Submission to the United Nations Special Rapporteur on the
promotion of truth, justice, reparation and guarantees of non-
recurrence*

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May 2021

Mr. Fabian Salvioli

Special Rapporteur on the promotion of truth,
justice, reparation and guarantees of non-recurrence,
OHCHR-UNOG,
8-14 Avenue de la Paix,
1211 Geneve 10, Switzerland

By email: srtruthcalls@ohchr.org

21 May 2021

Dear Mr. Salvioli,

The Castan Centre for Human Rights Law, based in the Faculty of Law at Monash University is pleased to submit our answers to the questionnaire on transitional justice measures and the legacy of human rights violations in colonial contexts.

The submission seeks to highlight how transitional justice measures to achieve accountability, truth, provide reparations, and ensure memorialisation and non-recurrence have occurred in Australia at the Commonwealth level, and in the state of Victoria (where the Castan Centre is located). It should be noted that in general, a gender perspective has been largely neglected in Australia, including in Victoria. We have sought to provide answers to all questions in the questionnaire, noting that the word limit of 750 words per question has necessitated that the response be more of an overview than a comprehensive analysis.

Please note that the Castan Centre's Director, Professor the Honourable Kevin Bell AM QC, as a member of the Yoo-rook Justice Commission referred to in this submission, was not involved in its preparation.

We thank the Special Rapporteur for the opportunity to contribute our insights on this important subject, and look forward to reading the thematic report to the United Nations General Assembly on these issues.

Sincerely,



Dr Ronli Sifris
Deputy Director, Castan Centre for Human Rights Law

I. ACCOUNTABILITY

Please indicate which mechanisms have been established in the concerned country to **hold accountable** persons accused of committing or bearing responsibility for gross violations of human rights and serious violations of international humanitarian law in colonial contexts. If such mechanisms were not adopted, please explain why. Please indicate the challenges and 2 opportunities encountered in investigating, prosecuting and sanctioning such crimes.

a) Commonwealth

In Australia, there have been few mechanisms established at the Commonwealth level to hold accountable persons accused of committing or bearing responsibility for gross violations of human rights. While there have been a number of formal investigations into issues such as Aboriginal and Torres Strait Islander deaths in police and prison custody, the recommendations from these inquiries have not been effectively implemented in any Australian jurisdiction.

Deaths in Custody

More than 455 Aboriginal and Torres Strait Islander people have died in police and prison custody since the 1991 *Royal Commission into Aboriginal Deaths in Custody* ('RCADIC').¹ Given delays and inconsistencies with government reporting on the issue,² this number is expected to be much higher, estimated to be at least 474 deaths since 1991.³

The RCADIC made 35 recommendations specifically for the reform of custody investigations and coronial inquiries in the event of an Aboriginal and Torres Strait Islander person dying in custody to ensure police accountability.⁴ Notwithstanding these recommendations, no uniform approach has been taken to deaths in police custody across jurisdictions.⁵ There have also been ongoing concerns regarding the conflict of interest where police investigate other police following a death in custody,⁶ and there is a perceived lack of impartiality of the police complaints process.⁷ Nevertheless, no completely independent system has been established in any Australian jurisdiction.⁸

The Australian Law Reform Commission has likewise recommended a review of police complaints handling mechanisms in each state jurisdiction to ensure greater accountability and transparency of investigations.⁹ It has also considered models for complaints mechanisms with both external and internal processes for the Australian Federal Police.¹⁰

¹ Eddie Cubillo, 'Real Action Needed on Aboriginal Deaths in Custody', *University of Melbourne: Pursuit* (13 April 2021) at <https://pursuit.unimelb.edu.au/articles/real-action-needed-on-aboriginal-deaths-in-custody>.

² Rachel Knowles, 'Federal Government not Keeping Track of Indigenous Deaths in Custody', *National Indigenous Times* (29 March 2021) at <https://nit.com.au/federal-government-not-keeping-track-of-indigenous-deaths-in-custody/>.

³ 'Deaths Inside: Every Indigenous Death in Custody since 2008 tracked', *The Guardian* (5 April 2021) at <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>.

⁴ Commonwealth, *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) Vol 2.

⁵ Office of Police Integrity, *Review of the Investigative Process Following a Death Associated with Police Contact* (2011) 13.

⁶ *Ibid.*

⁷ Australian Law Reform Commission ('ALRC'), *Pathways to Justice* (Report, 2017) [14.59].

⁸ *Ibid* [14.67], [14.70].

⁹ ALRC, *Pathways to Justice*, (n 7) [14-2].

¹⁰ ALRC, *Integrity: But Not by Trust Alone: AFP & NCA Complaints and Disciplinary Systems* (ALRC Report No 82, 1996) [2.2].

To date, there have been no successful prosecutions for any of these deaths.¹¹ Nor have there been losses to the 'rank or salary' of police officers involved in such deaths.¹² There are numerous contributing factors to this, including conflict of interest, reports of collusion and corruption, and insufficient evidence.¹³

There have been small steps forward to increasing accountability at a national level. For example, the Custody Notification Service ('CNS') is a state and territory-wide 24-hour, 7-day a week telephone legal advice service available to Aboriginal and Torres Strait Islander people who have been detained in custody. All states and territories have arrangements in place to enable lawyers to provide legal advice in a culturally sensitive manner.¹⁴ However, this obligation to notify is not provided for in legislation regarding Commonwealth offences, nor is it uniform across states and territories.¹⁵

b) Victoria

In the state of Victoria, there has also been only limited progress in holding accountable persons accused of committing or bearing responsibility for gross violations of rights. There have been an estimated 28 Aboriginal deaths in custody in Victoria since the 1991 RCADIC.¹⁶ Notwithstanding, the issue remains largely without redress.

In April 2020, an opportunity arose for accountability for the death of Aboriginal woman Tanya Day, who died in police custody in 2017. Following a coronial inquest, the Coroner's Office referred the case to the Director of Public Prosecutions on the basis that 'an indictable offence may have been committed' in connection with the death of Ms Day.¹⁷ There has however since been confirmation from Victoria Police that no formal charges will be laid against the police officers involved with Ms. Day's death, following the advice from the Office of Public Prosecutions.¹⁸ The coronial inquest, along with the RCADIC did, however, result in a change to the law which had put Ms Day in police custody.¹⁹

¹¹ Craig Longman, 'Scales of justice still tipped towards police who harm people in their custody', *The Conversation* (15 April 2016) at <https://theconversation.com/scales-of-justice-still-tipped-towards-police-who-harm-people-in-their-custody-57125> ('Scales of Justice Tipped Towards Police'). See also Craig Longman, 'Where Is the Accountability for Aboriginal Deaths in Custody' (2016) 5 *Human Rights Defender* 5, 5-6 ('Where is the Accountability').

¹² Longman, *Scales of Justice Tipped Towards Police* (n 11).

¹³ Longman, *Where is the Accountability* (n 11) 5-6.

¹⁴ ALRC, *Pathways to Justice* (n 7) [14.78]-[14.79].

¹⁵ *Ibid* [14.80].

¹⁶ Alexandra Gannoni and Samantha Bricknell, Australian Institute of Criminology, 'Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody' (Report 2019) at https://www.aic.gov.au/sites/default/files/2021-05/sb17_indigenous_deaths_in_custody_-_25_years_since_the_rciadic_v2_0.pdf; Alexandra Gannoni and Samantha Bricknell, Australian Institute of Criminology, 'National Deaths in Custody Program: Deaths in custody in Australia 2016-17' (Report 2017) at https://www.aic.gov.au/sites/default/files/2020-05/sr13_national_deaths_in_custody_program.pdf; Laura Doherty and Samantha Bricknell, Australian Institute of Criminology, 'Deaths in custody in Australia 2017-18' (Report 2018) at https://www.aic.gov.au/sites/default/files/2020-05/sr21_deaths_in_custody_in_australia_2017-18.pdf; Laura Doherty and Samantha Bricknell, Australian Institute of Criminology 'Deaths in custody in Australia 2018-19' at https://www.aic.gov.au/sites/default/files/2021-05/sr31_deaths_in_custody_in_australia_2018-19_v2.pdf. See also 'Deaths Inside', *The Guardian* (5 April 2021) at <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>.

¹⁷ Caitlin English, *Finding into Death with Inquest: Tanya Louise Day* (Report, 9 April 2020) 103.

¹⁸ Steven Schubert, 'Tanya Day's family 'devastated and angry' no police officers will be charged over the Indigenous woman's death', *ABC News* (27 August 2020) at <https://www.abc.net.au/news/2020-08-27/victoria-police-officers-not-charged-over-tanya-day-death/12600798>.

¹⁹ Bridget Rollason, 'Victorian Parliament decriminalises public drunkenness in a victory for the family of Tanya Day', *ABC News* (19 February 2021) at <https://www.abc.net.au/news/2021-02-19/victorian-parliament-decriminalises-public-drunkenness-tanya-day/13172136>; *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Act 2021* (Vic)

II. TRUTH

Please indicate which measures have been established in the concerned country to inquire on and **establish the truth** about gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such mechanisms were established, please indicate how was the outcome of the inquiries made public and conveyed to victims and civil society in the affected country as well as to civil society in the former colonizing power. If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

a) Commonwealth

There have been no comprehensive truth commissions at a Commonwealth level. However, there has been a *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, which was established between 1995 and 1997 amid concerns among Aboriginal and Torres Strait Islander peoples that the ‘general public’s ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and their families and the provision of services’.²⁰ The Inquiry interviewed over 500 people affected, and spoke to organisations and institutions across the country. This process of truth-telling noted calls for truth and acknowledgement of responsibility, and relatedly, demands for apologies.²¹ The resulting *Bringing Them Home* report went on to recommend that there be acknowledgement and apology (see Question 4), as well as reparations (see Question 3).²²

In the Northern Territory, there has been an *Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, which resulted in the ‘Little Children are Sacred’ (*‘Ampe Akelyernemane Meke Mekarle’*) report.²³ The report examined the nature of sexual abuse of Indigenous children in Northern Territory, and handed down 97 recommendations to address the issue.²⁴

In response, the Commonwealth government implemented the Northern Territory National Emergency Response (the ‘Intervention’) in 2007.²⁵ The Intervention received considerable criticism for suspending the operation of the *Racial Discrimination Act 1975 (Cth)* (‘RDA’), among other existing laws.²⁶ The Intervention began without benchmarks for evaluation, and in 2012 it was extended ‘without clear evidence as to its effectiveness’.²⁷ Moreover, the intervention was linked to the national ‘Closing the Gap’ campaign from 2008 onwards under the Council of Australian Governments’

²⁰ *Bringing Them Home* (n 4) 15.

²¹ *Ibid* 246.

²² *Ibid* Appendix 9.

²³ Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred* (Report, 2007) 21-33.

²⁴ *Ibid*.

²⁵ *Northern Territory National Emergency Response Act 2007 (Cth)*. See also, Castan Centre for Human Rights Law, *The Northern Territory Intervention: An Evaluation* (2020) 7.

²⁶ See eg, Naaman Zhou, ‘Northern Territory intervention violates international law, Gillian Triggs says’, *The Guardian* (2 September 2017) at <https://www.theguardian.com/australia-news/2017/sep/02/northern-territory-intervention-violates-international-law-gillian-triggs-says>.

²⁷ Castan Centre for Human Rights Law, *The Northern Territory Intervention: An Evaluation* (2020) 15.

(‘COAG’) *National Indigenous Reform Agreement* (‘NIRA’).²⁸ However, none of the targets were reached by 2018, resulting in a 2020 agreement to 16 new targets.²⁹

Truth-telling is also part of the 2017 Uluru Statement from the Heart (discussed in Question 5), which calls for the creation of a *Makarrata* Commission to oversee agreement-making and facilitate a truth-telling process.³⁰

b) Victoria

Victoria is the first state in Australia to establish a truth-telling process. The Yoo-rrook Justice Commission was established only recently in May 2021, following years of activism from Indigenous communities.³¹ The Commission is vested with the powers of a Royal Commission, and will ‘investigate both historical and ongoing injustices committed against Aboriginal Victorians since colonisation by the State and non-State entities, across all areas of social, political and economic life’.³²

The terms of reference for the Commission include both *historical* systemic injustices (i.e. cultural violations; destruction of cultural knowledge and property; massacres, wars and genocide; the forced removal of children etc.) and *ongoing* systemic injustices (i.e. issues with policing, incarceration and detention; youth in the criminal justice system; child protection; health and healthcare etc.).³³ The Commission will determine how historical injustices can be ‘effectively and fairly acknowledged and redressed in a culturally appropriate way’; how ongoing injustices can be addressed or redressed through law, policy and practices; and how to best ‘raise awareness and increase public understanding of the history and experiences of First Peoples before and since the start of Colonisation’.³⁴

The Commissioners were appointed through a transparent nomination process,³⁵ and include four Indigenous Victorians: Professor Eleanor Bourke (Wergaia/Wamba Wamba Elder), Dr Wayne Atkinson (Yorta Yorta/Dja Dja Wurrung Elder and Traditional Owner), Ms Sue-Anne Hunter (Wurundjeri and Ngurai Illum Wurrung woman and recognised leader in trauma and healing); Distinguished Professor Maggie Walter (Palawa woman and Distinguished Professor of Sociology) and one non-Indigenous Commissioner, Professor the Honourable Kevin Bell AM QC (Castan Centre Director and former justice of the Supreme Court of Victoria).³⁶

c) Gender Perspective

Measures discussed in this subsection do not appear to have been designed to consider the disproportionate impacts experienced by Indigenous women. However, with its broad Terms of Reference, the Yoo-rrook Commission presents an important opportunity to provide such an

²⁸ COAG (Council of Australian Governments), *Intergovernmental Agreement on Federal Financial Relations* (Report, 2008) at <https://www.pc.gov.au/research/supporting/national-agreements/indigenous-reform/indigenous-reform-agreement.pdf>.

²⁹ *National Agreement on Closing the Gap* (2020) at <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf?q=0720>.

³⁰ *Uluru Statement from the Heart* (2017) at https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF.

³¹ ‘Yoo-rrook Justice Commission’, *First Peoples’ Assembly of Victoria* (2021) at <https://www.firstpeoplesvic.org/our-work/truth-telling/yoo-rrook-justice-commission/>.

³² ‘Truth and Justice in Victoria’, *Aboriginal Victoria* (14 May 2021) at <https://www.aboriginalvictoria.vic.gov.au/truth-and-justice>

³³ Letters Patent: Yoo-rrook Commission (2021) 3 at <https://www.aboriginalvictoria.vic.gov.au/truth-and-justice>.

³⁴ *Ibid* 3-4.

³⁵ *First Peoples’ Assembly of Victoria* (n 31).

³⁶ *Ibid*.

intersectional lens to historic and ongoing systemic injustice. It should also be noted that the Commission is led by an Indigenous woman as Chair, and also includes two other Indigenous women Commissioners.

III. REPARATIONS

Please indicate which measures have been established in the concerned country to provide **reparation to victims** of gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such processes were established, please indicate which type of reparation was provided to victims (for example: restitution, compensation, satisfaction, and/or rehabilitation). If such measures were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

a) Commonwealth

Reparations

The 1997 *Bringing Them Home* report recommended that the Commonwealth Government make reparations to victims in accordance with internationally accepted standards for responding to the victims of human rights violations as a result of forcible removals. 'Reparations' was defined to include an acknowledgement and apology, measures of rehabilitation and monetary compensation.³⁷ However, the Senate Legal and Constitutional References Committee did not support monetary compensation.³⁸ Monetary reparations schemes for 'Stolen Generations' has therefore been left to states (discussed below).

National Apology

The Commonwealth has since issued a formal National Apology, made by then Australian Prime Minister Kevin Rudd in 2008. The Apology was intended to reflect symbolic reparations to Aboriginal and Torres Strait Islander peoples.³⁹ Although this demonstrates some progress, frustration with the political process, and the absence of further reparations remains.⁴⁰

The *Bringing Them Home* report also recommended that parliament and police forces, churches and other institutions, as well as the state and territory parliaments and governments all issue statements recognising and publicly apologising to the 'Stolen Generations'.⁴¹ In that respect, the Victorian Parliament issued an apology in 1997.⁴²

³⁷ *Bringing Them Home* (n 4) recommendation 3.

³⁸ Commonwealth, *Healing: A Legacy of Generations* (Inquiry Report, Senate Standing Committees on Legal and Constitutional Affairs) [8.5], [8.7], [8.136].

³⁹ Commonwealth, *Apology to Australia's Indigenous Peoples*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, MP).

⁴⁰ 'Reflections on the Apology: Kevin Rudd in conversation with Stan Grant', *National Apology Foundation* (9 February 2018) at <https://www.nationalapology.org.au/2018/02/09/reflections-on-the-apology-kevin-rudd-in-conversation-with-stan-grant/>.

⁴¹ *Bringing Them Home* (n 4) recommendations 5a, 5b, 6.

⁴² Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2017, 107 – 120.

Land Rights and Native Title

Some progress has been made regarding land rights. The High Court ruled in the historic *Mabo* decision that Australia was not *terra nullius* ('land belonging to no one') at the time of European settlement.⁴³ As a result of *Mabo*, the Commonwealth enacted the *Native Title Act 1993* (Cth) ('NTA').⁴⁴

Under the NTA, it is now possible for Aboriginal and Torres Strait Islander groups to be recognised as having 'native title' to their traditional country. This may be exclusive or non-exclusive.⁴⁵

Native title holders are entitled to compensation for activities which diminish or extinguish their rights and interests for acts on or after 31 October 1975 when the RDA came into effect.⁴⁶ Compensation payable may be for economic and cultural loss. The landmark case of *Northern Territory v Griffiths* ('Timber Creek case') in 2017 saw the High Court of Australia for the first time award compensation under the NTA for the past extinguishment of native title rights.⁴⁷

The Commonwealth has also established the Indigenous Land and Sea Corporation ('ILSC'), which assists Aboriginal and Torres Strait Islander peoples to acquire and manage interests in land, saltwater and freshwater.⁴⁸ The ILSC's objectives include protecting and maintaining cultural and environmental values in connection with land, and improving outcomes in employment, education, income, standards of living and improved health and wellbeing for Indigenous Australians.⁴⁹

b) Victoria

Stolen Wages

The Victorian Government's control of the 'wages, savings and benefits of Indigenous people' throughout the 19th and 20th centuries has been referred to as 'stolen wages practices'.⁵⁰ In addition, they experienced severe employment controls, and often had their wages paid into trust accounts, which were typically mismanaged and inaccessible to Indigenous workers.⁵¹ The Victorian Government has however 'failed to develop a reparation scheme' for the above.⁵²

Stolen Generations Redress Scheme

⁴³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1

⁴⁴ *Native Title Act 1993* (Cth)

⁴⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*'). In *Wik*, it was found that pastoral leases did not confer exclusive possession and extinguish native title, thereby substantially increasing the land over which native title could be recognised.

⁴⁶ NTA (n 44) ss 51(1), 61(1). For acts before 31 October 1975, it may be possible to claim compensation under the Australian Constitution if the acquisition or taking of land was not on 'just terms'. See *Commonwealth Constitution* s 51(xxxi). A Federal Court case is currently testing this issue (see *Galarwuy Yunupingu (On Behalf of the Gumatj Clan or Estate Group) v Commonwealth of Australia & Anor ('Gove Compensation Claim')* at <https://www.comcourts.gov.au/file/Federal/P/NTD43/2019/actions>).

⁴⁷ *Northern Territory v Griffiths* (2019) 93 ALJR 327.

⁴⁸ 'About: Indigenous Land and Sea Corporation', *Australian Government Indigenous Land and Sea Corporation* at <https://www.ilsc.gov.au/indigenous-land-and-sea-corporation-ilsc/about/>.

⁴⁹ *Ibid.*

⁵⁰ Andrew Gunstone, 'Indigenous Stolen Wages and Campaigns for Reparations in Victoria' (2014) 8(12) *Indigenous Law Bulletin* 3, 4 ('*Indigenous Stolen Wages and Campaigns for Reparations*').

⁵¹ *Ibid.*

⁵² *Ibid.*

The forcible removal of Aboriginal children from their families affected many Indigenous communities in Victoria.⁵³ In 2020, the Victorian Government announced the ‘Stolen Generations Redress Scheme’ which has dedicated \$10 million for the redress of Stolen Generations survivors.⁵⁴ In 2021, the Victorian Government established a AUD\$300,000 interim funeral fund to ‘ensure the families of members of Stolen Generations can access financial support to cover funeral expenses to honour their loved ones’.⁵⁵ The Stolen Generations Reparations Steering Committee, in connection with Stolen Generations communities from around Victoria designed the fund as a measure to support members of the Stolen Generations who pass away prior to the full operation of the Redress Scheme.⁵⁶

Native Title

There have been several successful native title determinations in Victoria under the NTA: the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples, the Gunditjmara people, the Gunaikurnai people, and the Gunditjmara and Eastern Maar peoples.⁵⁷ However, the Yorta Yorta people were unsuccessful in their native title claim.⁵⁸

Traditional Owner Settlement Act 2010

The *Traditional Owner Settlement Act 2010* (Vic), in Victoria provides a mechanism for settlement of native title claims out of court.⁵⁹ The Act enables recognition of traditional owner rights on state-owned land akin to native title rights. Settlements include Recognition and Settlement Agreements; Land Agreements; Land Use Activity Agreements; Funding Agreements and Natural Resource Agreements. Settlements under the Act have been entered into with the Gunaikurnai people, the Dja Dja Wurrung people and the Taungurung people.⁶⁰

IV. MEMORIALISATION

Please indicate which measures have been established in the concerned country to **memorialize** the gross violations of human rights and serious violations of international humanitarian law committed in colonial

⁵³ Alister McKeich, ‘Among Us: A Story of the Stolen Generations of Victoria’ (2010) 45(4) *Agora* 35-37. See also ‘Stolen Generations Redress Scheme: Assembly Response’, *First Peoples’ Assembly of Victoria* (2020) at <https://www.firstpeoplesvic.org/news/stolen-generations-redress-scheme/>.

⁵⁴ ‘Righting Past Wrongs with Stolen Generations Redress’, *Premier of Victoria, Daniel Andrews* (18 March 2020) <https://www.premier.vic.gov.au/righting-past-wrongs-stolen-generations-redress>.

⁵⁵ ‘Funeral Fund to Support the Stolen Generations’, *Premier of Victoria, the Hon Daniel Andrews* (23 April 2021) at <https://www.premier.vic.gov.au/funeral-fund-support-stolen-generations>.

⁵⁶ *Ibid.*

⁵⁷ ‘History of Native Title Claims in Victoria’, *Victorian Government Department of Justice and Community Safety* (2 June 2020) at <https://www.justice.vic.gov.au/your-rights/native-title/history-of-native-title-claims-in-victoria>. See *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795; *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474; *Mullett on behalf of the Gunaikurnai People v Victoria* [2010] FCA 1144; *Lovett on behalf of the Gunditjmara People v Victoria* (No 5) [2011] FCA 932.

⁵⁸ *Yorta Yorta v Victoria* (2002) 214 CLR 422.

⁵⁹ ‘Traditional Owner Settlement Act’, *Victorian Government Department of Justice and Community Safety* (4 March 2021) at <https://www.justice.vic.gov.au/your-rights/native-title/traditional-owner-settlement-act-2010>. See *Traditional Owner Settlement Act 2010* (Vic) pt 2 div 1.

⁶⁰ See <https://www.justice.vic.gov.au/your-rights/native-title>. See also ‘Gunaikurnai Native Title Agreement’, *Victorian Government Department of Justice and Safety* (2 June 2020) at <https://www.justice.vic.gov.au/your-rights/native-title/gunaikurnai-native-title-agreement>; ‘Dja Dja Wurrung Settlement’, *Victorian Government Justice and Community Safety* (18 May 2020) at <https://www.justice.vic.gov.au/your-rights/native-title/dja-dja-wurrung-settlement>; ‘Dja Dja Wurrung Settlement Commences’, *Victorian Government Department of Justice and Community Safety* (2 June 2020) at <https://www.justice.vic.gov.au/your-rights/native-title/dja-dja-wurrung-settlement-commences>. See also <https://www.justice.vic.gov.au/your-rights/native-title/taungurung-recognition-and-settlement-agreement>

contexts. If yes, please indicate whether memorialization processes were established in the affected country and/or in the former colonizing power. If such measures were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

a) Commonwealth

There have been few measures established to memorialise the gross violations of human rights. The *Bringing Them Home* report recommended that a 'National Sorry Day' be celebrated each year to commemorate the history of forcible removals and its effects, and that proposals for further commemoration would be sought.⁶¹ This annual day of healing is held on 26 May to remember and acknowledge the mistreatment of the Stolen Generations.⁶²

The National Archives of Australia has an index of names that appear in their records in response to the recommendations of the *Bringing Them Home* report.⁶³ The Australian Museum has curated a special exhibition, 'Unsettled', to uncover 'untold histories' and demonstrate 'the power of truth-telling'.⁶⁴ *The Guardian* has also published a map of evidence of mass killings from 1788 until 1928, the time of the Frontier Wars.⁶⁵

b) Victoria

Some memorialisation of the gross violation of human rights experienced by Aboriginal people in Victoria has occurred, although this has been limited.

In 1988, the Koorie Heritage Trust released the 'massacre map' which highlighted the known locations of massacres against Aboriginals by Europeans in Victoria between 1836 and 1853.⁶⁶ The map contains annotations indicating the several thousands that died in the violence, and in some cases, those responsible.⁶⁷ Notably however, the map did not present an exhaustive list of the violence encountered by Aboriginals during the time.⁶⁸

More recently, the Melbourne Museum Bunjilaka Aboriginal Cultural Centre has created the 'Black Day, Sun Rises, Blood Runs' exhibit, an interactive map which covers sites where massacres against

⁶¹ *Bringing Them Home* (n 4) recommendations 7a and 7b.

⁶² Reconciliation Australia, *National Sorry Day 2020* (25 May 2020) at <https://www.reconciliation.org.au/national-sorry-day-2020/>.

⁶³ *Bringing Them Home Name Index* (Factsheet) at <https://www.naa.gov.au/sites/default/files/2020-05/fs-175-bringing-them-home-name-index.pdf>.

⁶⁴ Australia Museum, *Unsettled* (22 May 2021) <https://australian.museum/exhibition/unsettled/>.

⁶⁵ 'The Killing Times: A Massacre Map of Australia's Frontier Wars', *The Guardian* (18 November 2019) at <https://www.theguardian.com/australia-news/ng-interactive/2019/mar/04/massacre-map-australia-the-killing-times-frontier-wars>.

⁶⁶ Anita Pisch, 'Peta Clancy brings a hidden Victorian massacre to the surface with Undercurrent', *The Conversation* (26 March 2019) at <https://theconversation.com/peta-clancy-brings-a-hidden-victorian-massacre-to-the-surface-with-undercurrent-113350>. See Koorie Heritage Trust, 'Massacre Map', *Cultural Victoria* (2016) at <https://cv.vic.gov.au/stories/aboriginal-culture/indigenous-stories-about-war-and-invasion/massacre-map/>.

⁶⁷ Koorie Heritage Trust, 'Massacre Map', *Cultural Victoria* (2016) at <https://cv.vic.gov.au/stories/aboriginal-culture/indigenous-stories-about-war-and-invasion/massacre-map/>.

⁶⁸ Pisch (n 66).

Indigenous Victorians occurred, with voiceovers from Indigenous peoples recounting their knowledge of the events.⁶⁹

In 2016, the City of Melbourne opened a memorial in honour of two Aboriginal men, Tunnerminnerwait and Maulboyheenner, who were the first people to be publicly hanged in Melbourne, and were executed following a six-week guerrilla war resisting white settlers.⁷⁰ The monument has been described as the 'first major city landmark in Australia which acknowledges the Frontier Wars' fought between Aboriginal and Torres Strait Islander peoples and European settlers.⁷¹

There also exists a public art project at the boundary of Coranderrk Aboriginal Station,⁷² an Indigenous reserve established in 1863.⁷³ At that time, residents of Coranderrk were subject to considerable efforts to 'control' and direct their lives, but the community resisted such measures.⁷⁴ Coranderrk was officially closed in 1924, however was returned to Aboriginal peoples in 1991.⁷⁵ It remains a site of importance for Aboriginal peoples in Victoria, and now features an art project named 'untitled (seven monuments)' which includes seven monuments that mark the boundaries of Coranderrk in 1866, which the reserve was at its largest.⁷⁶ The announcement of the Victorian Yoo-rook Justice Commission was also made at Coranderrk in 2021.⁷⁷

V. NON-RECURRENCE

Please indicate which measures have been established in the concerned country to guarantee non-recurrence of the gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

a) Commonwealth

Some progress has been made to guarantee non-recurrence of gross violations of rights through legal reform. In 1962, Aboriginal and Torres Strait Islander people were given the right to vote,⁷⁸ although it was not made compulsory for Indigenous Australians until 1984.⁷⁹ In 1967, the Commonwealth *Constitution* was amended so that Indigenous Australians would be counted as part of the population, and to enable the Commonwealth to make laws for them.⁸⁰

⁶⁹ Claire Slattery, 'White-washed' history of Indigenous massacres subject of new Melbourne exhibition', *ABC News* (9 November 2017) at <https://www.abc.net.au/news/2017-11-09/white-washed-stories-of-frontier-massacres-told-in-exhibition/9134816>; Robert Burton-Bradley, 'Multimedia experience seeks to keep the dark history of the frontier wars alive', *SBS NITV* (9 November 2017) at <https://www.sbs.com.au/nitv/nitv-news/article/2017/11/08/multimedia-experience-seeks-keep-dark-history-frontier-wars-alive>.

⁷⁰ Jemma Costa, 'The Frontier War memorial you might have missed in the heart of Melbourne', *ABC News* (28 May 2019) at <https://www.abc.net.au/news/2019-05-28/frontier-war-memorial-in-melbourne-cbd-lies-forgotten/11108480>.

⁷¹ *Ibid.*

⁷² 'Untitled (seven monuments)', *Yarra Ranges Council* at <https://www.yarraranges.vic.gov.au/Experience/The-Arts/Our-creative-community/Public-Art/untitled-seven-monuments>.

⁷³ 'Coranderrk', *National Museum Australia* at <https://www.nma.gov.au/defining-moments/resources/coranderrk>.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Yarra Ranges Council (n 72).

⁷⁷ Joseph Dunstan, 'Victoria announces landmark truth and justice royal commission as part of Aboriginal treaty talks', *ABC News* (9 March 2021) at <https://www.abc.net.au/news/2021-03-09/victoria-truth-and-justice-royal-commission-aboriginal-treaty/13226116>.

⁷⁸ *Commonwealth Electoral Act 1962* (Cth).

⁷⁹ *Commonwealth Electoral Amendment Act Cth* (1983) s 99.

⁸⁰ The referendum was a vote on the Constitution Alteration (Aboriginals) Bill Cth (1967) that would amend section 51(xxvi) and repeal section 127 of the Commonwealth Constitution. See *Constitution Alteration (Aboriginals) Cth* (1967).

More recently, there has been support for further constitutional reform. In 2012, the report of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution explored various forms of recognition.⁸¹ This resulted in the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) and recognition was reviewed in 2014.⁸² In 2015 the Commonwealth government appointed the Referendum Council. Following a series of regional dialogues, it facilitated a National Convention. This led to the Uluru Statement from the Heart⁸³ which called for a First Nations Voice to Parliament enshrined in the Australian Constitution and a Makarrata Commission for agreement-making and truth-telling between Aboriginal and Torres Strait Islander people and governments.

The Indigenous Voice is currently in a co-design process following the recommendation of the 2018 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples. The Interim Report of the Co-design Process contains proposals for the Indigenous Voice, at local, regional, and national levels and how they interconnect.⁸⁴ Public consultation and submissions closed on 30 April 2021. However, the Commonwealth government has ruled out enshrining the Voice in the *Constitution*.⁸⁵

b) Victoria

Charter of Rights

The *Victorian Charter of Human Rights and Responsibilities* ('Charter') includes in its preamble a statement that 'human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters'.⁸⁶ The Charter provides for recognition and equality before the law, including the right to enjoy human rights without discrimination.⁸⁷ It also includes protection for 'cultural rights', with specific reference to Aboriginal persons' rights to enjoy identity and culture, as well as maintain and use their languages, 'kinship ties' and 'distinctive spiritual material' and relationship with land, water and resources.⁸⁸

The Charter has numerous functions, including enabling the scrutiny of new legislation by requiring members of parliament to produce 'Statements of Compatibility' with human rights when proposing bills, statutory rules and policy submissions;⁸⁹ requiring 'public authorities' to act compatibly with human rights;⁹⁰ and requiring as far as possible, the interpretation of laws in a way that is compatible with Charter rights.⁹¹ Notably however, a declaration of inconsistency with Charter rights does not impact the 'validity, operation or enforcement' of a law or statutory provision.⁹²

⁸¹ Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report, January 2012) 109-136.

⁸² *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (Report, 2014) ('Anderson Review').

⁸³ *Final Report of the Referendum Council* (Report, 2017) 1, 16-21.

⁸⁴ Indigenous Voice Co-Design Process, *Interim Report to the Australian Government* (Report, October 2020) 14-17.

⁸⁵ Ken Wyatt, Minister for Indigenous Affairs, Senior Advisory Group - Opening Remarks (Media Release, November 2019) at <https://ministers.pmc.gov.au/wyatt/2019/senior-advisory-group-opening-remarks>.

⁸⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) preamble ('Victorian Charter').

⁸⁷ *Victorian Charter* (n 86) s 8.

⁸⁸ *Victorian Charter* (n 86) s 19. This is based on Art 27 of the *International Covenant on Civil and Political Rights*.

⁸⁹ *Victorian Charter* (n 86) pt 3 div 1, ss 28-30.

⁹⁰ *Victorian Charter* (n 86) pt 3 div 4, ss 38-39.

⁹¹ *Victorian Charter* (n 86) pt 3 div 3; See also 'How does the Charter Work?' *Victorian Government Solicitor's Office* (2017) at <https://humanrights.vgso.vic.gov.au/about-charter/how-does-charter-work>.

⁹² *Victorian Charter* (n 86) s 29.

Although the Charter has been successfully invoked in court in relation to the right to culture,⁹³ it has been criticised for not adequately restraining government power, and providing only limited powers to the courts.⁹⁴ Further, the Charter does not include the right to self-determination.⁹⁵ This failure has been criticised on the basis that its exclusion from the Charter is unjustified, and serves to ‘undermine the recognition of other rights included in the Charter’.⁹⁶ For Aboriginal peoples, the inclusion of a right to self-determination is also central to the promotion of ‘democratic inclusion and accountability’.⁹⁷ The Charter has also been criticised for failing to incorporate economic, social and cultural rights such as those relating to health, housing, water and education, which have particular significance for Aboriginal peoples.⁹⁸

Treaty

The development of a treaty between the Victorian Government and Indigenous peoples in the state is currently underway.⁹⁹ Phase one saw the Government formally commit to the treaty process through the enactment of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).¹⁰⁰ This led to the establishment of the First Peoples’ Assembly of Victoria,¹⁰¹ a democratically elected representative body for Aboriginal Victorians.¹⁰² The treaty process is currently in Phase Two, wherein the Government and the Assembly will establish an independent Treaty Authority to provide oversight and facilitate formal negotiations, a framework for negotiation and a ‘self-determination fund’ to enable Aboriginal Victorians to have adequate independent financial resources to engage in negotiations with the State.¹⁰³ The final phase of the treaty process will involve formal negotiations between parties.¹⁰⁴

The Victorian Treaty provides an opportunity to enhance the legal protections and reinforce rights of Aboriginal Victorians, and facilitate the transfer of authority and resources to allow traditional owners and Indigenous Victorians to exercise control over matters that impact upon them.¹⁰⁵

⁹³ *Secretary to the Department of Human Services v Sanding* [2011] VSC 42; *Cemino v Cannan* [2018] VSC 535.

⁹⁴ Jackie Hartley, ‘Indigenous Rights under the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic)’ (2007) *Australian Indigenous Law Review* 6, 8.

⁹⁵ Melissa Castan and David Yarrow, ‘A Charter of (Some) Rights - For Some’ (2006) 31 *Alternative Law Journal* 132. See also Hartley (n 94) 17.

⁹⁶ Castan and Yarrow (n 95) 136.

⁹⁷ *Ibid.*

⁹⁸ Hartley (n 94) 7.

⁹⁹ ‘Treaty in Victoria’, *Aboriginal Victoria* (30 March 2021) at <https://www.aboriginalvictoria.vic.gov.au/treaty>.

¹⁰⁰ ‘The Treaty Journey So Far’, *First Peoples Assembly of Victoria* (2020) at <https://www.firstpeoplesvic.org/about/the-treaty-journey-so-far/>.

¹⁰¹ *Aboriginal Victoria, Treaty in Victoria* (n 99).

¹⁰² ‘Treaty Process’, *Aboriginal Victoria* (16 November 2020) at <https://www.aboriginalvictoria.vic.gov.au/treaty-process>. See also, ‘The Assembly’, *First Peoples’ Assembly of Victoria* (2020) at <https://www.firstpeoplesvic.org/about/the-assembly/>.

¹⁰³ *Aboriginal Victoria, Treaty Process* (n 102).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*