DOCTORAL THESIS

The Law and Policy of Indigenous Cultural Identity and Political Participation: A Comparative Analysis between Australia, Canada and New Zealand

Larkin, Dani

Award date:
2020

The Law and Policy of Indigenous Cultural Identity and Political Participation:
A Comparative Analysis between Australia, Canada and New Zealand

Dani Larkin

Submitted in total fulfilment of the requirements of the degree of
Doctor of Philosophy
21 April 2020
Faculty of Law
Professor Jonathan Crowe and Associate Professor Kate Galloway

Abstract

This thesis examines the Commonwealth electoral laws, policies and processes of Australia, and in doing so, highlights where substantial inequality barriers exist that limit the political participation of Aboriginal Australians. The thesis acknowledges that Indigenous Australians comprise two distinct cultural identities (Aboriginal People and Torres Strait Islanders) who share different experiences with disenfranchisement in Australia, despite shared similar colonised pasts. This research primarily focuses on the disenfranchisement experiences of Aboriginal Australians. It is argued that the low political participation rates prevalent amongst Australia's Aboriginal population point to inadequate adherence by Australian governments to principles of representative democracy and proportionality. In particular, formalised voting rights and candidacy rights within the *Australian Constitution*, case law and Commonwealth electoral legislation do not adequately address current barriers to Aboriginal political participation. Contextual understandings of Aboriginal experiences are discussed that surround the disenfranchisement of prisoners and the disproportionately high rates of Aboriginal incarceration. Aboriginal prisoners are particularly vulnerable to falling into the 'unsound mind' electoral disqualification. The culmination of each of these legislative and policy barriers limits their ability not only to qualify as electors, but also to run for political office.

Potential solutions to overcoming those issues are sought from the comparator countries of Canada and New Zealand. Canada, for instance, is supportive and inclusive of prisoners exercising their democratic rights to vote as citizens, even whilst incarcerated for a lengthy term of imprisonment. The case law supportive of such an approach is considered, alongside electoral laws and policies of Canada that protect First Nations self-determination rights expressed and exercised through voting.

New Zealand is also more aligned with proportionate representative democratic practices as evidenced with its Mixed Member Proportionate system. This thesis particularly examines its establishment of the Maori Electoral Roll Option and Maori designated seats in Parliament as policy and institutional solutions that support Maori self-determination and political participation.

Lastly, the *Uluru Statement from the Heart* proposals that call for the establishment of a First Nation Voice to Parliament, Makarrata Commission and Truth-Telling Commission are other means this thesis deems integral for Aboriginal self-determination and political participation. Similar Indigenous representative bodies established in New Zealand and Canada that have evidenced meaningful impact and protection of their Indigenous Peoples' cultural identity are considered in terms of their design and structures.

Ultimately, this thesis suggests that Australia should reform its current electoral laws, policies and processes that limit Aboriginal political participation and self-determination, in ways that are more reflective of models and outcomes established in Canada and New Zealand which are beneficial to their respective Indigenous Peoples.

Keywords

Indigenous rights, Aboriginal, Torres Strait Islander, Maori, First Nations, Political participation, Self-Determination, Constitution, International law, Citizenship, Cultural identity, Sovereignty, Political representation, Political systems, Comparative law, Australian history, New Zealand, Canada, Voting rights, Candidacy, Self-Governance, Equality.

Declaration by Author

This thesis is submitted to Bond University in fulfilment of the requirements of the degree of Doctor of Philosophy.

This thesis represents my original work towards this research degree and contains no material that has previously been submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Dani Lee Larkin

Publications during Candidature

Peer-Reviewed Articles

Dani Larkin, 'Native Title Valued' (2016) 41(4) *Alternative Law Journal* 285 <https://www.altlj.org/news-and-views/downunderallover/duao-vol-41-4/1116-native-title-valued>

Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond Law Review* 334 <https://blr.scholasticahq.com/article/6796-uluru-statement-from-the-heart-australian-public-law-pluralism>

Online Articles

Dani Larkin, 'Growing up with Baryulgil's asbestos genocide' (2016) 26(18) *Eureka Street* <https://www.eurekastreet.com.au/article/growing-up-with-baryulgil-s-asbestos-genocide>

Dani Larkin, 'Funding policies silence Indigenous DV victims' (2016) 26(20) *Eureka Street* <https://www.eurekastreet.com.au/article.aspx?aeid=50014#.WAm3BjKa2Uk>

Dani Larkin, 'Indigenous citizenship rights 50 years after the referendum' (2017) 27(5) *Eureka Street* <https://www.eurekastreet.com.au/article.aspx?aeid=50877#.WOG2wW995hE>

Dani Larkin, 'Aboriginal participation before recognition' (2018) 28(13) *Eureka Street* <https://www.eurekastreet.com.au/article.aspx?aeid=56026>

Dani Larkin, 'Royal visit's model for Aboriginal sovereignty' (2018) 28(21) *Eureka Street* <https://www.eurekastreet.com.au/article/royal-visit-s-model-for-aboriginal-sovereignty>

Copyright Declaration

No Copyright Declaration. No published manuscripts were included for publication within this thesis.

Acknowledgements

No one who achieves success does so without the help of others.

The wise and confident acknowledge this help with gratitude.[1]

I draw upon my great grandfather's (Jack Patten) unfinished work with advocating for political and cultural equality of Aboriginal people of Australia through equal access to political participation rights as identified as integral for full citizenship rights. This was identified in the 10-point long-range policy plan of the first Aboriginal newspaper in Australia titled *The Abo Call* of which Jack Patten was the editor in 1938. I thank my great grandfather for his relentless and tireless advocacy for Aboriginal rights in Australia at a time when the laws of this country were at their worst and were significantly detrimental and exclusory of Aboriginal people. Thank you for showing me that what most thought could not be done, can be. I am continuously inspired by you and your work.

A huge thank you to my mother Michelle Larkin. The continuous supportive late night and early morning phone calls throughout this entire journey have kept me grounded and strong the entire way. I also want to say thanks to my sister Gabrielle Larkin who has been 'my rock' throughout this entire journey. Thank you Gabby, for your patience when having to listen to hours of my ramblings on Indigenous politics and thank you for your support. Thanks for my father Steven Larkin for your support and guidance.

I also want to say thanks to my late grandmother Pauline Gordon, grandfather Ken Gordon and my uncle Shane Gordon. Although each of you is no longer with me in this world and have passed on to the Dreamtime, each of you through my studies and life have been my favourite people in this world. As I have continued on with my studies in law, each of you has supported me and cheered me on from the sideline, always readily available to keep me grounded in my culture and identity. Thank you to each of you for inspiring me to be and do my best and to advocate for a better quality of life for our people.

Finally, I am appreciative for all of the support, kindness and mentorship I have been lucky to receive under the supervision of Jonathan Crowe and Kate Galloway as my PhD supervisors. Both of you showed me love and support at some of the hardest times I've had throughout this journey, and in doing so have made this entire process really positive and me a better writer and researcher.

[1] *Alfred North Whitehead Quotes* (allauthor.com, 2019) <https://allauthor.com/quote/31416/>.

I’ve met many people in my lifetime from all different walks of life and I can honestly say that people like Jon and Kate are very rare. They genuinely care wholeheartedly about others, particularly those who are less well-off and are placed in oppressive positions that struggle to have their voice heard and rights respected. I am thankful that out of all the people I could have possibly been matched with to undertake this enormous task, it was Jon and Kate because they are both not only people I look up to and admire, but they truly are selflessly loving, incredible legal academics, mentors and educators. Thank you for saying yes to embarking on this journey with me.

Preface

My name is Dani Larkin and I am a Bundjalung woman from Grafton, New South Wales. I grew up on Bundjalung land and was raised with a strong connection to my Aboriginal culture. My Aboriginal identity and experiences of culture, identity politics and overt racial discrimination have guided me to undertake a Doctor of Philosophy on Indigenous cultural identity and political participation rights. My aim in doing so is to make progressive contributions to necessary law and policy reform in Australia for a better future for my people and my culture.

Despite sovereignty never being ceded and my Aboriginal cultural identity having its own laws and political frameworks, I choose to write this thesis within already well-established and recognised Westernised Anglo-Australian legal frameworks. In doing so, my aim is to show how principles of equality and political participation can be rehabilitated and used as a progressive means of law and policy reform that enhance and protect Indigenous rights and cultural identity. This thought-process of adhering to moral and ethical considerations of equality within law and policy reform shows how existing Westernised frameworks can create pathways to meaningful change and reconciliation for all Australians – including those who are of Indigenous descent.

Table of contents

CHAPTER 1 INTRODUCTION

> We refuse to be pushed into the background. We have decided to make ourselves heard. White men pretend that the Australian Aboriginal is a low type, who cannot be bettered. Our reply to that is, 'Give us the chance!' We do not wish to be left behind in Australia's march to progress. We ask for full citizen rights including old-age pensions, maternity bonus, relief work when unemployed, and the right to a full Australian education for our children. We do not wish to be herded like cattle and treated as a special class.[1]

This thesis argues that in Australia there are significant barriers that contribute to the low political participation rates of Indigenous Australians (both Aboriginal and Torres Strait Islander people).[2] For example, studies from the Australian Electoral Commission show that only half of the less than 3 per cent of the Australian population that is Indigenous registers to vote.[3]

Further, out of those enrolled to vote, only half again of that Indigenous population turns up to vote at polling stations on the day of voting or fills in their ballot paper correctly.[4] Thus, despite having a formalised right to vote in federal elections since 1962,[5] there are substantial barriers for Indigenous Australians gaining access to that right and exercising it, including those arising from the incarceration exclusion if sentenced to three years or more imprisonment[6] and being classified as a person of 'unsound mind'.[7]

Disenfranchisement from voting at federal elections can also deem a person ineligible to run as a political candidate in federal parliament under the Australian Constitution[8] which expressly disqualifies a person from becoming a member of federal parliament if they are ineligible to enrol to vote as an elector.

Another means of political participation Indigenous Australians have sought to rely upon at a federal level has been through exercise (albeit limited) of their right to self-governance through

---

[1] *Jack Patten: Do White Australians Realise That There Is Actual Slavery in This Fair, Progressive Commonwealth? Opening Address to Day of Mourning Protest – 1938* (Speakola, 2009) <https://speakola.com/ideas/jack-patton-day-of-mourning-1938>.
[2] The use of the term 'Indigenous' is explained further in Part III of this chapter.
[3] *Additional Performance Information – AEC Annual Report 2015 16* <http://annualreport.aec.gov.au/2016/performance/additional.html>; *2016 Federal Election Key Facts and Figures* <https://www.aec.gov.au/Elections/Federal_Elections/2016/key-facts.htm>.
[4] Ibid.
[5] *Commonwealth Electoral Act 1962*, Act No. 31 of 1962 (Repealed by 1901 Amending Act).
[6] *Commonwealth Electoral Act 1918*, s 93 (8AA).
[7] *Commonwealth Electoral Act 1918*, s 93 (8) (a).
[8] *Constitution of the Commonwealth of Australia*, s 44.

their own Indigenous body representation. However, this has also been scarce and inadequate for Indigenous people in terms of being involved in federal decision-making processes on laws and policies about Indigenous cultural affairs. To date, Indigenous body representation has been limited to its establishment through Commonwealth legislation.[9] This has left those bodies susceptible to repeal under general federal parliament law-making powers according to the government policy of the day which can extinguish a legislated Indigenous representative body and detrimentally impact upon Indigenous political representation. A prime example of this occurring is the establishment and demise of the Aboriginal and Torres Strait Islander Commission (ATSIC).[10]

This thesis explores direct and indirect barriers Indigenous Australians face that limit their exercise of political participation and representation rights as components intrinsic to self-determination – itself a feature of expression of cultural identity. In doing so, this thesis also examines beneficial measures implemented in other similar jurisdictions (Canada and New Zealand) to support political participation of their Indigenous people.

This thesis adds to the existing body of knowledge through providing a contemporary analysis and recommendation of how legal pluralism can exist that politically empowers and protects the cultural identity of Indigenous colonised peoples. The analysis differs from other Australian scholars like Irene Watson who challenge the need for Aboriginal participation within the colonial paradigm.[11] Instead, this thesis suggests ways in which theoretical governing frameworks of Australia's

[9] For example, the Aboriginal and Torres Strait Islander Commission was established from the passing of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth); *Aboriginal and Torres Strait Islander Commission Amendment Act (No. 1*) 1999 (Cth); *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth); the National Congress of Australia's First Peoples was formed as an incorporated company independent from the Australian Government limited by guarantee in April 2010. Like all other Indigenous representative bodies that have been formed in Australia, the Congress is not legislatively or constitutionally entrenched and therefore formally protected, which has posed issues with the amount of government funding those bodies receive to reach their objectives and service deliverables to make meaningful impact to Indigenous lives across Australia that are in need. See Lorena Allam, 'Dodson, Burney Call For Government To Fund National Congress of Australia's First Peoples' (*The Guardian*, 12 June 2019) <https://www.theguardian.com/australia-news/2019/jun/12/national-congress-of-australias-first-peoples-fights-for-financial-survival>; *Building a Sustainable National Indigenous Representative Body – Issues for Consideration* (An Issues Paper prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner, in accordance with s 46C (1) (b) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), 2008).

[10] Gary Foley, *ATSIC: Flaws in the Machine* (The Koori History Website, 15 November 1999) <http://www.kooriweb.org/foley/essays/essay_4.html>; J. Robbins, 'Life After ATSIC: Indigenous Citizenship in an Era of Mutual Obligation' (Paper presented at the Australasian Political Studies Annual Conference, University of Otago, 28 September 2005); Larissa Behrendt, 'The Abolition of ATSIC – Implications for Democracy' (Democratic Audit of Australia, 2005); M. Phillips, 'Howard Abolishes ATSIC', *The Courier-Mail* (16 April 2004); S. Morris, S. Lewis and B. Hickman, 'Labor to Scrap ATSIC', *The Australian* (31 March 2004); Scott Bennett and Angela Pratt, 'The End of ATSIC and the Future Administration of Indigenous Affairs: Current Issues Brief No. 4, 2004–05' (Department of Parliamentary Services, 2004).

[11] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routlege, 2015); Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative* 508-520*;* Irene Watson, 'First Nations and the Colonial Project' (2016) 1(1) *Inter Gentes* 30.

democratic regime might be reformed through domestic electoral laws, processes and policies that best acknowledge Indigenous self-determination rights and protect Indigenous cultural identity through access to political participation.

Whilst this thesis draws upon the work of the relevant scholars who engage with recent issues that surround calls for Indigenous Constitutional recognition that provide a substantive means of political equality and cultural autonomy, it is but one component of the analysis this thesis engages with in terms of assessing Indigenous political participation.[12]

For instance, most of the current contributions that surround the need for Indigenous constitutional reform focus on the need to create institutions of differentiated Indigenous representation.[13] This particular recommendation forms only one component of what this thesis terms to be necessary for law reform in Australia that would seek to enhance Indigenous political participation.

This thesis examines other elements of political participation like voting and candidacy alongside constitutional reform proposals that call for an increased establishment of entrenched national Indigenous body representation. The voting and candidacy elements defined within what this thesis terms to be political participation provide, in addition to its constitutional law analysis, an additional examination into broader electoral laws and policies. This places the work that underpins the *Uluru Statement from the Heart* and the preceding *Final Report of the Referendum Council* in a different context that considers other democratic rights and law and policy barriers that limit access to those rights of Indigenous Australians. It shows that there are several law and policy reform steps that need to be taken to fully enhance the political participation of Indigenous Australians and adherence of the Australian Government to principles of representative democracy.

---

[12] *Final Report of the Referendum Council* (Commonwealth of Australia, 2018); G. Williams, and D. Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010); George Williams, *Human Rights under the Australian Constitution* (Melbourne: Oxford University Press, 1999); George Williams, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' (2015) 34 *University of Tasmania Law Review* 114; Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501 - 509; Gabrielle Appleby and Gemma McKinnon, 'Indigenous recognition: The Uluru statement' (2017) 37 *Law Society of NSW Journal* 36 – 39; Megan Davis, 'Constitutional reform and Aboriginal and Torres Strait Islander people: why do we want it now?' (2011) 7(25) *Indigenous Law Bulletin* 8; Megan Davis, 'The Long Road to Uluru Walking Together: Truth before Justice' (2018) 60 *Griffith Review* 13, 41 – 45; Megan Davis and Marcia Langton, *It's Our Country* (Melbourne University Press, 2016); Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018).

[13] Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond Law Review* <https://blr.scholasticahq.com/article/6796-uluru-statement-from-the-heart-australian-public-law-pluralism>; *Final Report of the Referendum Council* (Commonwealth of Australia, 2018); Referendum Council, 'Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (Law Council of Australia, 19 May 2017).

There are a number of ways in which this thesis highlights that Indigenous Australians are still limited from the Australian franchise. The primary focus of this thesis examines the pathway to disenfranchisement Indigenous Australians experience. In doing so, this thesis shows how their high and disproportionate representation in the out-of-home care system leads to a greater likelihood of their imprisonment which, if incarcerated for a lengthy term of three years or more in prison, contributes to their electoral disqualification to enrol and to vote.[14]

From there, a broader and more comprehensive understanding can be formulated, that shows how other co-existing and necessary areas of Australian electoral law and policy reform would complement proposals outlined in the *Uluru Statement from the Heart* and enhance Indigenous self-determination and political participation.

The Canadian comparator analysed in this thesis involves the framework of voting participation. Canada formally disqualifies citizens from voting if they are serving a term of incarceration of two years or more. Like Australia, Canada also has high levels of incarceration and persons deemed of 'unsound mind' who happen to be of First Nation descent. However, despite Canada's disqualifying provision, it has been ineffective since the handing down of the decision in *Sauvé*.[15] Canada also has a clearer process for determining whether a person is deemed of 'unsound mind' and supporting some of those persons to still engage in voting. Thus, it works as a useful example of how an overarching framework in the Australian context might support its Indigenous citizens currently limited from voting because of those disqualifications.

The New Zealand comparator deployed in this thesis involves candidacy representation. Unlike Australia, New Zealand safeguards designated seats in parliament for Maori candidates.[16] Further, to determine whether those designated seats are increased or remain the same (currently there are four seats) the New Zealand electoral system encourages Maori voters to enrol to vote on the Maori Electoral Roll Option.[17] This separate enrolment option provides direct Maori political data to the New Zealand Government that is used to determine together with Maori census data whether

[14] *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Royal Commission into Aboriginal Deaths in Custody* (National Report Volumes 1-4, 15 April 1991).
[15] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.
[16] *Maori Representation Act 1867* (NZ); Rozalind Dibley, *Maori Representation in Parliament: The Four Maori Seats* (MA Thesis, Victoria University of Wellington, 1993); Augie Fleras, 'From Social Control towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand' (1985) 18(3) *Canadian Journal of Political Science* 551; Andrew Geddis, 'A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's Electoral System' (2006) 5(4) *Election Law Journal* 347.
[17] *Electoral Act 1993* (NZ), s 76.

electoral boundaries need to be adjusted and whether an increase of designated seats in parliament needs to occur. In turn, it provides an incentive for Maori to vote and run as political candidates.

In addition to these two case studies, this thesis also identifies that both Canada and New Zealand have more national Indigenous representative bodies compared to Australian First Nations. The representative bodies established in Canada and New Zealand are unprotected by their Constitutions; however, they have a respected and meaningful presence in their countries' national decision-making on laws and policies that affect their Indigenous peoples.

The success of their representative measures is likely because of the treaties both countries have in place that recognise their Indigenous peoples' pre-existing rights over the land, and their citizenship.[18] In turn, those bodies are not reliant on being constitutionally protected *because* of the meaningful inclusion of and respect for First Nations peoples that they have established, and the mechanism for relationships with their respective governments.

Most recently in Australia, the constitutional entrenchment of a Voice to Parliament and a Makarrata (or treaty) Commission are being considered as constitutional reform proposals.[19] The Voice to Parliament, if successful at a referendum, would operate as a representative body that would provide guidance and oversight on federal laws and policies that directly and indirectly impact upon First Nation affairs. The Makarrata Commission would operate as a treaty supervisory body that would oversee treaty negotiations between First Nations and the governments (federal, state and territories).[20] These mechanisms are therefore part of the analysis in this thesis of the potential for institutional frameworks to support Indigenous Australian political participation.

I. RESEARCH AIMS AND METHOD

The contemporary discourse around the *Uluru Statement from the Heart* and the proposal for a Voice to Parliament[21] highlights Indigenous Australians' exclusion from political participation –

[18] For Maori in New Zealand there is the Treaty of Waitangi 1840 (NZ); For First Nations of Canada, since 'The Royal Proclamation' (7 October 1763), the Canadian Government recognizes 70 historic treaties in Canada signed between 1701 and 1923 that form the basis of the relationship between the Crown and 364 First Nations. Those treaties include: Treaties of Peace and Neutrality (1701–1760), Peace and Friendship Treaties (1725–1779), Upper Canada Land Surrenders and the Williams Treaties (1764 –1862/1923), Robinson Treaties and Douglas Treaties (1850 –1854) and The Numbered Treaties (1871–1921).
[19] Larkin and Galloway (n 13).
[20] *Final Report of the Referendum Council* (Commonwealth of Australia, 2017) 2.
[21] Amanda LeCouteur, Mark Rapley and Martha Augoustinos, 'This Very Difficult Debate about Wik: Stake, Voice and the Management of Category Memberships in Race Politics' (2001) 40 *British Journal of Social Psychology* 35, 35 –57; Rudi Maxwell, 'Fury as Government Rejects Voice to Parliament' (*Guardian*, Sydney, No. 1803, 15 Nov 2017) 3; Keith Windschuttle, 'Aborigines Want More than a Voice in Parliament' (2017) 61(9) *Quadrant* 50, 50 –55; Gregory Uhr and John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University

both voting and candidacy – in Australia and their ongoing desire to develop an institutional response. This thesis posits that the exclusion from political participation is both historical and ongoing – that it stems from the very processes establishing Australia's framework of governance and is maintained directly through the institutions and processes of political participation, and indirectly through various legislated limitations that fail to apprehend the experiences of Aboriginal and Torres Strait Islander Australians as colonised peoples. The absence of processes equipped to take account of these experiences reinforce the indirect limitations resulting in an entrenched disenfranchisement of Indigenous Australians.

This thesis, therefore, seeks first to identify how the structures of Australia's governance fail at the Commonwealth level, both directly and indirectly, to assure Indigenous political participation. In particular, it provides an account of the effect of the interrelationship between different components of the institutions of representative democracy on Indigenous participation in that system of governance. It concludes this account with a case study of select barriers to effective political participation: namely the effect of high rates of Indigenous incarceration and the absence of an institutional response to the political expression of Indigenous peoples' needs. It explains how these factors function, both directly and indirectly, to inhibit First Nations peoples' political participation and therefore their rights of self-determination.

Secondly, this thesis aims to identify feasible institutional reform in Australia that would structurally address Indigenous political participation within the confines of the colonial legal order. This analysis aims to marry Indigenous Australians' aspirations for communal rights of self-determination with the institutional norms of Western liberal democracy in the Westminster mould. It does so in two steps.

First, with reference to the select barriers to political participation identified initially, this thesis analyses the overarching legal framework within two comparable jurisdictions, Canada and New Zealand, to identify a range of institutional responses to the question of Indigenous political participation. It identifies institutional frameworks in both jurisdictions that marry various legal

---

Press, 1998); Sarah Maddison, 'White Parliament, Black Politics: The Dilemmas of Indigenous Parliamentary Representation' (2010) 45(4) *Australian Journal of Political Science* 663, 663 – 680; Andrea Felicetti, John Gastil, Janette Hartz-Karp and Lyn Carson, 'Collective Identity and Voice at the Australian Citizens' Parliament' (2012) 8(1) *Journal of Public Deliberation* Article 5; Lino (n 12); Megan Davis, 'The Long Road to Uluru Walking Together: Truth before Justice' (2018) 60 *Griffith Review* 41, 41 – 45; M. Davis, 'Indigenous rights and the constitution: making the case for constitutional reform' (2008) 7 *Indigenous Law Bulletin* 6 – 8; Megan Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (2015) 8(9) *Indigenous Law Bulletin* 10; G. Williams and D. Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010); George, Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38(4) *Osgoode Hall Law Journal* 643; Williams (n 12)114.

strategies – including treaty, constitutional provisions, charter or bill of rights, and electoral laws – that together enact principles of self-determination for Indigenous peoples through political participation. This analysis involves identifying the role of these institutional arrangements in mitigating the adverse effects of the case studies identified initially.

The second aspect of this institutional inquiry involves an analysis of Indigenous representative bodies in Canada and New Zealand, the comparator jurisdictions. These bodies are created under domestic legislation[22] rather than through constitutional entrenchment, providing a baseline of analysis encompassing a broader range of possibilities than constitutional entrenchment per se. To answer the question of feasible institutional responses in Australia, this thesis then compares these institutions to those that have existed previously in Australia, and those proposed by the *Uluru Statement from the Heart*.[23]

Ultimately, this thesis provides an account of barriers to Indigenous political participation in Australia and identifies possible institutional reform that might feasibly mitigate those barriers, in the framework of a commitment to self-determination as a marker of a robust and healthy democracy.[24]

This thesis adopts a doctrinal methodology in answering the research question. As a component of that methodology, it engages in a comparative legal methodology as described below.

A. Doctrinal Methodology

The primary methodology of this thesis is a doctrinal methodology. A doctrinal methodology has been described as the 'core legal research method'[25] that provides a thorough analysis and 'research into the law and legal concepts'.[26] For this research, which focuses on three Commonwealth

[22] For example, the Waitangi Tribunal is established under the *Treaty of Waitangi Act 1975* (NZ) and the New Zealand Maori Council is established under the *Maori Welfare Act 1962* (NZ). Similarly, the Assembly of First Nations replaced the National Indian Brotherhood in 1982 following the Declaration of First Nations (signed in December, 1980). The Assembly fulfils its role and functions in accordance with the *Indian Act 1876*, and the Congress of Aboriginal Peoples is a political organisation founded in 1971 to represent First Nations interests in Canada.
[23] *Uluru Statement from the Heart 2017;* P. L. Dodson, *Final Report: Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (Parliament of the Commonwealth of Australia, 2018); Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011).
[24] Anika Gauja, 'The State of Democracy and Representation in Australia' (2015) 51(1) *Representation* 1, 23–24; Arend Lijphart, 'Australian Democracy: Modifying Majoritarianism?' (1999) 34(3) *Australian Journal of Political Science* 313*;* Gregory Uhr and John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998).
[25] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 85.
[26] Ibid, 101; Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock, *Advanced Research Methods in the Built Environment* (John Wiley & Sons, 2009) 29.

jurisdictions (Australia, Canada and New Zealand), the doctrinal methodology employed will provide an analysis of their legal rules that surround political participation rights of citizens, evidenced through voting rights and candidacy. It will undertake a synthesis and understanding of each jurisdiction's electoral laws, policies and national political structures to determine whether they fully align with the jurisprudence that so governs them and on which they are based.[27]

Thus, a doctrinal systematic exposition of relevant electoral laws and political-legal concepts will aim to explain reasons that contribute to lacking Indigenous political participation figures, within the Australian political landscape, that further signify why they lack political representation in Australian federal politics. The synthesis of Australia's adherence to its international obligations will inform a greater understanding as to why current electoral laws might be considered to inhibit the full citizenship rights of Aboriginal people in Australia.

Electoral laws alone are not sufficient to answer this question. It is also imperative that constitutional concepts and values are examined. The legal concepts examined in this thesis that are fundamental to empowering and enhancing Indigenous political participation include self-determination, representative democracy and political equality. Those concepts, together, best promote a democratically representative and politically 'just society' within a Commonwealth democratic regime that has a colonialist past.[28] From there, an understanding of how electoral rules ought to be within a democratic colonialist background political system can be determined.

Within this context, the doctrinal analysis of those legal concepts requires consideration of international standards surrounding Indigenous political participation rights that define and scope what citizen political participation rights might include in terms of voting participation, candidacy representation, and national body representation.[29]

---

[27] Chynoweth, ibid.
[28] Jürgen Habermas, 'Reconciliation through the Public Use of Reason' (1995) 92(3) *Journal of Philosophy* 109.
[29] See, for example, the *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) art 25; the *Universal Declaration on Human Rights*, UN GA Dec (Paris: 10 December 1948) art 21; the *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A (XXI) (signed 16 December 1966) (entry into force 3 January 1976) art 8; *International Convention on the Elimination of All Forms of Racial Discrimination* (signed 21 December 1965) (entered into force 4 January 1969) art 5 (c); the *Convention on the Elimination of All Forms of Discrimination Against Women* (signed 18 December 1979) (entered into force 3 September 1981) arts 7 and 8; the *Convention on the Rights of Persons with Disabilities* (signed 30 March 2007) (3 May 2008) arts 4 (3), 29, 33 (3); the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA Res 47/135 (signed 18 December 1992) art 2 (2); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007) arts 5 and 18; the *Durban Declaration and Programme of Action* UN GA Res 61/149 (passed in 2006) art 22; the *Declaration on the Rights to Development* GA Res 41/128 of 4 December 1986, arts 1.1, 2 and 8.2; the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to*

From there, to assess Indigenous political participation rights within Australian domestic laws and evaluate whether they are effective or not, this thesis considers Australia's lack of constitutional recognition and arrangements in place between the Australian Government and Indigenous citizens. It then analyses those findings against two comparators: Canada and New Zealand. Each jurisdiction's electoral laws, policies and processes that affect their Indigenous peoples' political participation and representation will be analysed alongside other relevant, publicly available statistical data, reports and case law.[30] Each of those pieces of data will provide context as to the political status of each jurisdiction's Indigenous peoples with regard to their voting participation, candidacy representation and national body representation: the three components of political participation.

The doctrinal methodology will identify in each jurisdiction key barriers that limit Indigenous political participation at a national level and, for the comparative jurisdictions, highlight beneficial measures from which Australia might learn. This includes consideration of issues surrounding Indigenous disenfranchisement through blanket-ban applied legislative elector and candidate qualifications and disqualifications, and consideration of Australia's lack of constitutional arrangements compared to Canada and New Zealand. Lastly, it will consider the types of Indigenous national body representation in each jurisdiction and determine whether, based on the data, those bodies are effective in terms of having a meaningful impact and power to self-govern.[31]

To achieve an analysis of doctrine per se requires consideration of historical facts. Historical and social contexts of each jurisdiction provide a greater understanding as to why and how electoral rules, policies and processes in each jurisdiction have come to be, within the dominant post-colonial paradigm.[32] To be precise, this analysis will be inclusive of examination into constitutions, statutes, case law, reports, journal articles and other relevant publicly available statistical data surrounding the electoral engagement of Indigenous people. That data will be used to determine what electoral

Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms GA Res 53/144 of 9 December 1998, art 8.

[30] Andrew Knight and Les Ruddock, *Advanced Research Methods in the Built Environment* (John Wiley & Sons, 2009) 29; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 84; Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and Socio-legal Methods of Research: Merits and Demerits' (2012) 2(7) *Educational Research Journal* 253.

[31] This represents a comparative method as described in Hutchinson and Duncan, Ibid.

[32] Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] *Law and Method* 1; Pauline C. Westerman, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law' [2009] in Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011) 87–110.

laws and policies should be reformed in order to ensure Indigenous citizens are given full and equal access to their exercise of political participation rights.

The historical context of doctrine will highlight the circumstances that have generated the key differences between the three jurisdictions' approach to engaging their First Nations peoples in the political process to provide useful pointers for achieving contemporary standards of human rights and meaningful protection of Indigenous Australians' cultural identity through full access and enhancement of their political participation rights.[33] These key differences will be teased out through a comparative methodology.

B. Comparative Legal Methodology

Within its doctrinal methodology, this thesis uses a comparative legal method to identify institutional benchmarks within a country's domestic legislation that achieve the goals of political equality of First Nations peoples with all other citizens.[34]

In identifying ways in which Australian electoral laws, policies and systems are currently inadequate in terms of supporting and enhancing Indigenous political participation in Australia, it contrasts the approach of equivalent Commonwealth jurisdictions, Canada and New Zealand. Both Canada and New Zealand support and enhance their Indigenous peoples' political participation through a combination of different legal mechanisms relevant to the Australian context.

For instance, whilst Canada was colonised by French and English settlers who based their actions of dispossession on a false assumption of terra nullius, First Nations have a longstanding and hard fought history of their ascertainment of legal recognition and political standing through treaties and constitutional recognition.[35] From there, the colonial policy objectives originally established in Canada, which were significantly influenced by French and English settlers, has shifted over time to a more inclusive cultural policy agenda that recognises the rights and sovereignty of First Nations.[36]

---

[33] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville, *Research Methods for Law* (Edinburgh University Press, 2017) 18; Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge, 2017) ch 2; Mathias M. Siems and Daithí Mac Síthigh, 'Mapping Legal Research' (2012) 71(3) *The Cambridge Law Journal* 655.
[34] Hoecke (n 32).
[35] Jonathan Paquette, Devin Beauregard and Christopher Gunter, 'Settler Colonialism and Cultural Policy: The Colonial Foundations and Refoundations of Canadian Cultural Policy' (2017) 23 (3) *International Journal of Cultural Policy* 271.
[36] Ibid, 274.

Another example is seen with the similar way in which New Zealand was colonised by English settlers. Like First Nations of Canada, Maori were dispossessed from their lands and have experienced a longstanding struggle with continuous debates over, the recognition of their sovereignty as a people working in partnership with the British Crown. Whilst much of those debates that surround recognition and protection of Maori sovereignty stem from interpretative issues and conflict of terms between the English and Maori versions of the *Treaty of Waitangi 1840,* the treaty has been a useful legal tool to assert such rights from Maori.[37] In doing so, the treaty itself opens a continuous dialogue for Maori and the New Zealand government to engage with on matters surrounding Maori cultural identity and political participation.[38]

Inherent in this comparison is the recognition in Canada and New Zealand of their Indigenous peoples' cultural identity in ways that are more meaningful and respectful than the approach to cultural identity in Australia. Consequently, there is a greater sense of political pluralism within Canada and New Zealand – of Western traditions intersected with Indigenous cultures and inclusion politically.[39]

The aim of this thesis coincides with the objectives that underpin comparative legal research[40] which is to learn information elsewhere as an instrument of evolutionary and taxonomic science to improve one's own legal system.[41] Further, choosing only two Commonwealth jurisdictions to compare with Australia allows this research to provide a deeper understanding of historical developments in each country, to better explain their current situations and relevancy to federal electoral reform options that should be considered within Australia.[42] Although there are other colonised nations with common law legal systems that might provide useful comparison, Canada and New Zealand offer a close alignment to the Australian experience in terms of political systems and broad Western cultural norms. These similarities are more likely to lead to meaningful comparison than some other jurisdictions with a more markedly different cultural and political landscape.

---

[37] Te Kani Kingi, 'The Treaty of Waitangi: A Framework for Maori Health Development' (2007) 54 (1) *New Zealand Journal of Occupational Therapy* 4-10.
[38] Mark Barrett and Kim Connolly-Stone, 'The Treaty of Waitangi and Social Policy' (1998) *Social Policy Journal of New Zealand* 1 – 2; Neil Lunt, Paul Spoonley and Peter Mataira, 'Past and Present: Reflections on Citizenship Within New Zealand' (2002) 36 (4) *Social Policy and Administration* 346 – 362.
[39] Elisa Morgera, 'Global Environmental Law and Comparative Legal Methods' (2015) 24(3) *Review of European, Comparative & International Environmental Law* 262.
[40] H. Patrick Glenn, 'The Aims of Comparative Law' in J. M. Smits, *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006) 57–65; Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] *Law and Method* 2.
[41] Hoecke (n 32) 2.
[42] Ibid, 5.

To undertake comparative research between these three countries requires an in-depth understanding of the overall differences and similarities between all three legal systems. To that end, this thesis addresses the relevant contexts explaining how and why those systems exist with an emphasis on political participation rights and electoral developments.[43]

1. Similarities

There are clear cultural and historical similarities between Australia, Canada and New Zealand. Drawing upon those commonalities and exploring them in greater depth is an important aspect of undertaking a comparative legal research methodology.[44]

In terms of the historical factors, all three Commonwealth jurisdictions have been colonised by the British[45] and are all common law legal systems.[46] Given the way in which all three jurisdictions were colonised by the British (through unnecessary extreme violence and force towards Indigenous peoples[47]), each jurisdiction shares similar issues surrounding Indigenous political oppression[48] maintained, in each case, in the face of otherwise ostensibly liberal democratic traditions.[49] Each country's political system and structures have been founded on racial discrimination and political inequality.[50] This, in turn, has significantly impacted upon Indigenous peoples' political representation in those systems including the extent of involvement in decision-making processes that involve laws and policies on Indigenous rights.

During the early post-colonial era at a time of the vital drafting phases of each country's Constitution, all three countries' Indigenous peoples' interests went politically unrepresented. Consequently, a governance system was created that established institutions, law-making processes

---

[43] Ibid, 7.
[44] Ibid, 3.
[45] Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32(2) *Brooklyn Journal of International Law*, 410; Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (Clarendon Press, 3rd ed, 1998) 44.
[46] Mark Van Hoecke, *Epistemology and Methodology of Comparative Law* (Bloomsbury Publishing, 2004) 209.
[47] Chris Cunneen, 'State Crime, the Colonial Question and Indigenous Peoples' [2011] *UNSWLRS* 2, 159–80; Asafa Jalata, 'The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians' (2013) 3(3) *SAGE Open* 3; A. Dirk Moses, 'An Antipodean Genocide? The Origins of the Genocidal Moment in the Colonization of Australia' (2000) 2(1) *Journal of Genocide Research* 90.
[48] Reza Banakar, 'Power, Culture and Method in Comparative Law' (2007) *International Journal of Law in Context* 6.
[49] Maurice Adams and Dirk Heirbaut, *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Bloomsbury Publishing, 2014) 133.
[50] Catherine Iorns, 'International Human Rights and Their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand' in P. Havemann, *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) 235–276; Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation* (UBC Press, 1995) 21–23; Marianne O. Nielsen and Linda Robyn, 'Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada, New Zealand and the United States of America' (2003) 4(1) *Indigenous Nations Studies Journal* 30.

and political processes within it to govern and regulate citizens within its territorial borders. The limited access of Indigenous colonised peoples to free exercise of their political participation rights shows how each country's government has ignored pre-existing rights to land as sovereign people[51] and, through that devaluation and lack of acknowledgement, has created systems and institutions that fail to uphold the civil and human rights of Indigenous peoples equally with other citizens. The resulting laws and policies have maintained the political oppression of each country's colonised Indigenous peoples and have either segregated them from or assimilated them into Westernised traditions. Those actions have not only compromised the collective human rights of those Indigenous colonised peoples but also left their cultural identity unprotected.

Each jurisdiction has therefore experienced longstanding issues with ensuring their Indigenous peoples' cultural identities and pre-existing rights to land, cultural traditions and governance structures do not continue to go unprotected. Accordingly, each country shares broadly similar historic post-colonial experiences and issues surrounding racial discrimination, political, social, financial and legal inequality of Indigenous people and, in turn, protection of Indigenous cultural identity from that.

2. Differences

Comparative legal research also requires consideration of each country's differences.[52] The different institutional contexts of each country and the way in which they recognise their Indigenous peoples inform a broader understanding of electoral law and policy reform generally. Discovery of law and policy reform is fundamental for answering the central research questions of this thesis.[53]

Quite often, there is a misconception of what comparative legal research does. A primary and quite narrowly defined misconception is that comparative legal research orients itself in presumptive cultural and historical similarities. That understanding inaccurately disregards the identification and analysis of differences that exist between jurisdictions and subject matters.[54] To avoid the resulting risks associated with ignoring differences, this thesis examines both commonalities and differences between jurisdictions and subject matters to justify why each jurisdiction is being comparatively

[51] Paul Callister, 'Skin Colour: Does it Matter in New Zealand?' (2008) 4(1) *Policy Quarterly* 19; P. Ongley and D. Pearson, 'Post-1945 International Migration: New Zealand, Australia and Canada Compared' (1995) 29(3) *International Migration Review* 756, 765–793; A. B. Watson, 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand' (2011) 34(2) *Seattle University Law Review* 510.
[52] Hoecke (n 32) 7; C. B. Picker, 'Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach' (2013) 1(1) *The Chinese Journal of Comparative Law* 9.
[53] Hoecke (n 32) 17.
[54] Ibid, 180.

analysed. Even its differences inevitably provide insight as to what Australia can learn and adopt from other systems that have better outcomes for Indigenous political participation.

A key difference between each country is the extent to which each has developed its political system and processes in ways that culturally reconcile with its Indigenous people and show they have learnt from past mistakes post-colonisation. Australia has made relatively little progress with reforming its laws and policies to ensure political inclusivity of Aboriginal citizens when compared to outcomes achieved in Canada and New Zealand. For instance, Australia's Constitution still has entrenched racially discriminatory provisions[55] contained within it that have been significantly criticised as being outdated[56] and in conflict with principles of equality.[57] Unlike Canada and New Zealand, Australia does not have a treaty established with its Indigenous people,[58] although there are currently treaty negotiations underway in Victoria,[59] and negotiations proposed in Queensland and the Northern Territory.[60] South Australia had proposed commencement of treaty negotiations but abandoned this policy following the last state election.[61]

---

[55] *Commonwealth of Australia Constitution*, ss 25, 51 (xxvi).
[56] Marcia Langton, 'Indigenous Exceptionalism and the Constitutional "Race Power"' (2013) *Space, Place & Culture* 19; M. Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7 *Indigenous Law Bulletin* 8.
[57] Langton, ibid, 10; Michael Saward, 'Fragments of Equality in Representative Politics' (2016) 19(3) *Critical Review of International Social and Political Philosophy* 245, 245–262; Geoffrey Stokes, 'The 'Australian Settlement' and Australian Political Thought' (2004) 39(1) *Australian Journal of Political Science* 5.
[58] Marcia Langton, *Settling with Indigenous People: Modern Treaty and Agreement-making* (Federation Press, 2006) 207; Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 30; *Aboriginal Treaty Working Group* (Victorian Government, 2018) <https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-bodies/aboriginal-treaty-workinggroup.html>; Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body – Phase 2* (June 2017); Aboriginal Victoria, Victorian Treaty Advancement Commission <https://www.vic.gov.au/aboriginalvictoria/treaty/victorian-treaty-advancement-commission.html>; 'Indigenous Treaty Remains on NT Government's Agenda' (*NT News*, 4 May 2017) <http://www.ntnews.com.au/news/northern-territory/indigenous-treaty-remains-on-ntgovernments-agenda/news-story/299369abf4b496a06aa92ee8e5d0300d>; Caroline Winter, 'Treaty: South Australian Government Enters Historic Discussions with Aboriginal Nations' (ABC News, 15 December 2016) <http://www.abc.net.au/news/2016-12-14/southaustralia-enters-historic-treaty-discussions/8120162>; Harry Hobbs and George Williams, 'Treaty Making in the Australian Federation' (2019) 43(1) *Mebourne University Law Review* 206.
[59] Hobbs and Williams, ibid; Aboriginal Victoria, Victorian Treaty Advancement Commission <https://www.vic.gov.au/aboriginalvictoria/treaty/victorian-treaty-advancement-commission.html>; *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).
[60] 'Indigenous Treaty Remains on NT Government's Agenda' (*NT News*, 4 May 2017) <http://www.ntnews.com.au/news/northern-territory/indigenous-treaty-remains-on-ntgovernments-agenda/news-story/299369abf4b496a06aa92ee8e5d0300d>; Queensland Labor, 'Queensland State Policy Platform 2016' (State Conference of the Queensland Branch of the Australian Labor Party, 29–30 October 2016) 93 [8.190]; Annastacia Palaszczuk, Jackie Trad and Leeanne Enoch, 'Historic Signing of "Tracks to Treaty" Commitment' (Media Release, 14 July 2019); Barunga Agreement, A Memorandum of Understanding to Provide for the Development of a Framework for Negotiating a Treaty with the First Nations of the Northern Territory of Australia between the Northern Land Council, the Central Land Council, the Anindilyakwa Land Council and the Tiwi Land Council and the Northern Territory Government (2018).
[61] Kyam Maher, 'Treaty Speech' (Speech, Parliament House, Adelaide, 14 December 2016); Roger Thomas, Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps* (Report, 21 July 2017).

Canada does have a number of treaty agreements with differing First Nation tribes across the country and an entrenched *Charter of Rights and Freedoms* forms the first part of the *Canadian Constitution Act 1982*. The *Charter* recognises First Nation treaty rights and protects their democratic rights to political inclusion in federal decision-making processes as culturally autonomous people.[62]

In addition, and although the system is not perfect,[63] the *Charter* affords First Nations of Canada political representation by providing a mechanism through which to advise the Canadian Government on laws and policies that impact upon their cultural affairs, including their access to full self-determination and political participation rights.[64] The system provides a comparative practical example of how First Nations can have a unique and special relationship with the Crown whilst maintaining their sovereignty and cultural integrity through treaties based on peaceful coexistence, mutual respect, recognition and the equitable sharing of lands and resources.[65]

New Zealand, on the other hand, has the *Treaty of Waitangi 1840* entered into between the British Crown and Maori. It is treated as one of several important constitutional documents in New Zealand. The significance of the *Treaty of Waitangi* in New Zealand is that it recognises and upholds Maori sovereignty and their partnership relationship with the Crown. In addition, New Zealand also has the *New Zealand Bill of Rights Act 1990* which, although not constitutionally entrenched like Canada's *Charter*, is still significantly valued in New Zealand and forms part of the New Zealand Government's obligation to respect and protect Maori political rights and cultural identity.[66]

Through the different legislative, constitutional, and treaty frameworks of Canada and New Zealand, even in only broad terms, First Nations of Canada and Maori of New Zealand have domestically sourced legislative tools to assert their rights and hold their governments accountable. Examining the different approaches and extents to which similar colonialist jurisdictions have

---

[62] *Charter of Rights and Freedoms 1982*, ss 3, 25; *Constitution Act 1982*, s 35; Brian Slattery, 'The Constitutional Guarantee of Aboriginal and Treaty Rights' (Fall 1982/Spring 1983) 8(1–2) *Queen's Law Journal* 232, 232–273.
[63] Ray Schmidt, 'Canadian Political Economy: A Critique' (1981) 6(1) *Studies in Political Economy* 65, 65–92; Iyko Day, 'Being or Nothingness: Indigeneity, Antiblackness, and Settler Colonial Critique' (Fall 2015) 1(2) *Critical Ethnic Studies* 102, 104 –105; Patricia A. Monture-Angus, 'Journeying forward: dreaming First Nations' independence' (Winter 2002) 29(1–2) *Resources for Feminist Research* 27.
[64] Jeff Corntassel, 'Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-determination' (2012) 1(1) *Decolonization: Indigeneity, Education & Society* 86, 92–93.
[65] *About AFN: Assembly of First Nations* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/>.
[66] D. Erdos, 'Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)' (2007) 5(2) *International Journal of Constitutional Law* 346; G. W. R. Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, 1987) 282–3.

managed to progress and reconcile Indigenous peoples provides practical examples of how Australian institutions might adapt.

3. Additional Considerations

The third component of this comparative methodology focuses on the historical and socio-economic contexts relevant to understanding the differing processes of evolution of legal institutions in each country.[67] Examining the legal historiography and taxonomy of all three jurisdictions has been described by comparative legal scholars as unavoidable in comparative legal research.[68] To properly understand current electoral laws and policies requires examination of how and why those laws have come to be what they are today.

Those historical and socio-economic contexts work as 'legal formants'[69] that show what has influenced electoral laws and policies over time as they evolve into their current form. For Indigenous peoples from colonial states such as Australia, Canada and New Zealand, this includes consideration of the way in which they were colonised and excluded from important law-making processes that created their governance systems. The exclusion of Indigenous peoples from those processes provides 'implied patterns' of the way in which law, policies and institutions are created and maintained at a federal level.[70]

From the outset, this will depend on how each country has recognised Indigenous self-determination rights and the extent to which they have sought to protect those rights through domestic laws and policies.[71] Those contextual matters for consideration are what Pierre Legrand refers to as a 'deconstructive hermeneutical' approach.[72] Legrand states that cultural considerations are integral to undertaking comparative legal research so that legal rules become signifiers of a more profound understanding of deep mental structures within a State's political system.[73]

---

[67] Hoecke (n 32) 7; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (European Academy of Legal Theory Monograph Series) (Hart Publishing, 11th ed, 2014); Elisa Morgera, 'Global Environmental Law and Comparative Legal Methods' (2015) 24(3) *Review of European, Comparative & International Environmental Law* 257.
[68] Hoecke (n 32) 18.
[69] Ibid, 17.
[70] Ibid, 6, 17.
[71] P. de Cruz, 'Comparative Law: Functions and Methods' in R. Wolfrum, *Max Planck Encyclopaedia of International Law* (Oxford University Press, 2010) 2–5; Elisa Morgera, 'Global Environmental Law and Comparative Legal Methods' (2015) 24(3) *Review of European, Comparative & International Environmental Law* 257.
[72] See generally Pierre Legrand, *What Do I Know? Comparative law* (Presses Universitaires de France, 2009); Hoecke (n 32) 198.
[73] P. Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52; Hoecke, ibid.

The interrogation of electoral laws, policies, federal-decision making processes and the way in which they limit the rights directly and indirectly of Indigenous peoples become signifiers within the cultural paradigm of each state to be considered and compared.[74] Accordingly, this component of the comparative methodology will highlight the socio-political marginalisation of Indigenous peoples of Australia, Canada and New Zealand and in doing so the legal history and taxonomy of each colonial country will show how 'law is central both to the historical narratives of loss and to the contemporary processes of rehabilitations and "reconciliation"'.[75]

Similarly, Paul McHugh identifies that 'the common lawyer's use of the past must be seen through the lenses of the present' and suggests that it is only when that occurs that questions and issues for resolution will become abundantly clear, which are derived from the past as the primary resource.[76] Therefore, this method involves not just considering past laws but also how they ought to be in the present in learning from past mistakes.[77]

II. SCOPE

This thesis explores the electoral legislative, policy, and political representative institutional measures that should be reformed or adopted in Australia, that seek to protect the cultural identity and political participation rights of Indigenous Australians. This part outlines concepts that are central to the analysis in this thesis and which together explain the boundaries of the inquiry.

A. Cultural Identities

This thesis recognises that the term 'Indigenous' in the Australian context refers to both Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples are two separate and distinct cultural identities despite sharing similar colonialist experiences of Australian colonisation and Indigenous oppression.[78] Although there is a variation in terminology adopted to describe Aboriginal and Torres Strait Islander Australians, this thesis, with respect, refers to and

[74] P. Legrand, *Extra Culturam Nihil Datur*: *Le Droit Compare* (Paris, Presses Universitaires de France, 2009) 84; *Hoecke* (n 32) 198; P. Legrand, 'La Comparaison des Droits Expliquée à Mes Étudiants' in P. Legrand, *Comparer les Droits, Eésolument* (Paris, Presses Universitaires de France, 2009) 216–17.
[75] Anthony Musson and Chantal Stebbings, *Making Legal History* (Cambridge University Press, 1st ed, 2012) 149.
[76] Paul McHugh, 'The Politics of Historiography and the Taxonomies of the Colonial Past' [2012] *Making Legal History*, 167; Anthony Musson and Chantal Stebbings, *Making Legal History* (Cambridge University Press, 1st ed, 2012) 151.
[77] Musson, ibid 151.
[78] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015); Pat Dudgeon, Michael Wright, Yin Paradies, Darren Garvey and Iain Walker, *The Social, Cultural and Historical Context of Aboriginal and Torres Strait Islander Australians* (Australian Institute of Health and Welfare, 2010) 25–26.

uses the terms 'Indigenous', 'Aboriginal' and Torres Strait Islander' people as appropriate, as well as the term 'First Nations'. Its principal analysis will, however, focus on Aboriginal experiences, recognising that while they share much, they also differ from Torres Strait Islander experiences in material respects. For instance, Torres Strait Islander people have suffered region neglect differently compared to Aboriginal experiences in terms of the islands' annexation to Australia in 1879.[79] Neglect of Torres Strait Islanders' sovereignty has generated culturally autonomous needs as a people and their exercise of self-determination including through political participation and, uniquely to Torres Strait Islanders, calls for regional autonomy.[80] To the extent that there is a difference between Aboriginal and Torres Strait Islander experiences, this thesis will focus on those of Aboriginal people. Those that do not identify as Indigenous Australians are referred to as non-Indigenous Australians.

In terms of considering the analysis of the Canadian experience, this thesis recognises that, like Australia, Canada's Indigenous people are not culturally homogenous. There are 634 First Nation communities (or reserves) in Canada with their own First Nation governments that are unique culturally and linguistically.[81] First Nations of Canada are one of three distinct groups recognised as 'Aboriginal' in the Canadian Constitution[82] with two other distinct groups: the Métis and the Inuit.[83] This thesis focuses its analysis of Canada's Indigenous people on First Nations as a broad category, without seeking to distinguish between particular nations. Although this thesis focuses on First Nation experiences in terms of assessing political participation rights overall, references will still be made to 'Aboriginal', 'Inuit' and 'Metis' people where relevant and appropriate. Those that do not identify as Indigenous or Aboriginal are referred to as non-Indigenous Canadian people.

Lastly, this thesis will focus on Maori of New Zealand as a relatively homogenous cultural identity in that despite its diverse community differences and values amongst Maori citizens, alongside dialectical differences, Maori do share the same language and cultural identity title as being identified as iwi Maori.[84] Accordingly, this thesis will refer to the Indigenous people of New

[79] Dudgeon, ibid 28.
[80] Richard Davis, *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004) 176–178; Dudgeon, ibid 28; Colin Scow and Monica Mulrennan, 'Land and Sea Tenure at Erub, Torres Strait: Property, Sovereignty and the Adjudication of Cultural Continuity' (1999) 70 *Oceania* 154; W. S. Arthur, 'Autonomy and Identity in Torres Strait, a Borderline Case?' (2001) 36(2) *Journal of Pacific History* 215; Peter Jull, 'The Political Future of Torres Strait' (1997) 4(7) *Indigenous Law Bulletin* 4.
[81] *About AFN: Assembly of First Nations* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/>.
[82] *Constitution Act of Canada 1982* (UK) c 11, sch B ('*Constitution Act of Canada 1982*').
[83] About AFN (n 81).
[84] Chadwick Allen, *Blood Narrative: Indigenous Identity in American Indian and Maori Literary and Activist Texts* (Duke University Press, 2002) 71; Anne Sullivan, 'Effecting Change through Electoral Politics: Cultural Identity and

Zealand as Maori and treat Maori views as being relatively homogenous in terms of them being for the most part, in consensus with national issues.

B. Political Participation

A key element of this thesis is the consideration of the political participation rights of Indigenous peoples in colonial Commonwealth countries. To do so, this thesis draws upon international legal instruments and standards to qualify its scoping of political participation, and to include three key elements.[85] Those elements have been narrowed down to comprise voting participation, candidacy representation and state body representation.

Each key element of political participation is also a key component of self-determination rights that seek the cultural empowerment and political autonomy of Indigenous colonised people.[86]

C. Level of Governance and Rights

This thesis only considers the national level of governance and political participation rights of each jurisdiction's Indigenous peoples. Accordingly, only Australian Commonwealth laws and policies relevant to considering the political participation rights of Aboriginal people will be explored. Given the entry of Australian states, such as Victoria, into treaty-making activities,[87] there is

---

the Maori Franchise' (2003) 112(3) *The Journal of the Polynesian Society* 232; Arohia Durie, 'Emancipatory Maori Education: Speaking from the Heart' (1998) 11(3) *Language Culture and Curriculum* 298.

[85] See, for example, the *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) art 25; the *Universal Declaration on Human Rights*, UN GA Dec (Paris: 10 December 1948) art 21; the *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A (XXI) (signed 16 December 1966) (entry into force 3 January 1976) art 8; *International Convention on the Elimination of All Forms of Racial Discrimination* (signed 21 December 1965) (entered into force 4 January 1969) art 5 (c); the *Convention on the Elimination of All Forms of Discrimination Against Women* (signed 18 December 1979) (entered into force 3 September 1981) arts 7 and 8; the *Convention on the Rights of Persons with Disabilities* (signed 30 March 2007) (3 May 2008) arts 4 (3), 29, 33 (3); the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA Res 47/135 (signed 18 December 1992) art 2 (2); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007) arts 5 and 18; the *Durban Declaration and Programme of Action* UN GA Res 61/149 (passed in 2006) art 22; the *Declaration on the Rights to Development* GA Res 41/128 of 4 December 1986, arts 1.1, 2 and 8.2; the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* GA Res 53/144 of 9 December 1998, art 8.

[86] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 2011) 27; Marc Weller and Stefan Wolff, *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005) 10 –12; J. Wright, 'Minority Groups, Autonomy, and Self-determination' (1999) 19(4) *Oxford Journal of Legal Studies* 605.

[87] *Aboriginal Treaty Working Group* (Victorian Government, 2018) <https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-bodies/aboriginal-treaty-workinggroup.html>; Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body – Phase 2* (June 2017); Aboriginal Victoria, Victorian Treaty Advancement Commission <https://www.vic.gov.au/aboriginalvictoria/treaty/victorian-treaty-advancement-commission.html>; Harry Hobbs and

currently a debate in Australia about the roles of the states and even local government[88] in regularising political participation of Indigenous Australians through institutional mechanisms.

Whilst there lies an interconnectedness of voting mechanisms between states and the Commonwealth[89] in that both levels of government have their own electoral legislation that applies to their elections only the federal level will be examined. Both levels of government in Australian have similar electoral rules but the issues that arise within those differing rules and political jurisdictions are dealt within differently and so this thesis will only focus on the national level of political participation which also affords a unified perspective that may then be applied more specifically to state circumstances.

The same applies to the comparative approach to Canada. The political participation analysis of Canada will also only include Canadian federal electoral law and policies that limit First Nation political participation. Canada, like Australia, has a federal level and provincial level of government. Whilst both levels have similar electoral legislation applicable to citizens that wish to politically participate in elections for provincial elections or general elections, they do still have minor differences in terms of what their electoral rules contain and how First Nation electoral issues are dealt with. Thus, for the purposes of scoping this thesis, it will only examine federal political participation rights of First Nations.

For New Zealand, given it is a unitary parliamentary democracy unlike Canadian and Australian systems, it will only consider its national-based issues that affect the political participation and representation of Maori citizens.

George Williams, 'Treaty Making in the Australian Federation' (2019) 43(1) *Mebourne University Law Review* 206; Aboriginal Victoria, Victorian Treaty Advancement Commission <https://www.vic.gov.au/aboriginalvictoria/treaty/victorian-treaty-advancement-commission.html>; *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

[88] Hobbs and Williams, ibid, 228.

[89] *Constitution of the Commonwealth of Australia,* ss 7, 24, 25.

III. STRUCTURE

This thesis is divided into six chapters.

Chapter 1: Introduction

This chapter introduces the thesis topic and outlines the structure of each chapter. It scopes the cultural identity analysis of Indigenous Australians to consider Aboriginal Australians with a slight expansion in terms of referencing 'First Nations' in Chapter 4. Further, this chapter scopes what rights underpin broader democratic political participation rights to include voting, candidacy and federal body representation.

This chapter also shows the way in which this thesis engages in a comparative analysis of Indigenous federal disenfranchisement between Australia, Canada and New Zealand. It shows how this thesis applies doctrinal, comparative and legal taxonomy methodologies to answer the research questions. It also provides a comprehensive literature review to afford historical contexts justifying the selection of Canada and New Zealand as comparators.

Chapter 2: Indigenous Political Participation and Representation in Australia

Chapter 2 examines the extent to which the Australian political system fails to adhere to the principles of representative democracy and proportionality. To do so, this chapter considers formalised voting rights within the *Australian Constitution*,[90] Australian case law and Commonwealth electoral legislation, highlighting current legislative and policy measures that limit federal Indigenous suffrage.

Secondly, this chapter examines citizen candidacy representation and its formalisation of rights through the *Australian Constitution,* Australian case law and Commonwealth electoral legislation. In doing so, this thesis further highlights current legislative and policy measures that limit Indigenous political representation at a federal level. In turn, this chapter explores measures implemented in Australian electoral legislation that limit the political rights of persons incarcerated who, as a result, are unable to qualify as electors and also limited to run as candidates.

Chapter 3: Indigenous Political Participation within Canada and New Zealand

This chapter addresses two forms of political participation: voting qualification and political candidacy. It uses case studies of each, from Canada and New Zealand respectively.

[90] *Constitution of the Commonwealth of Australia.*

First, it analyses the differences between Australia and Canada's prisoner electoral disqualifying legislation and how both jurisdictions' electoral legislation has impacted upon its Indigenous peoples. This is important given both jurisdictions' Indigenous peoples experience a greater likelihood of falling victim to a discriminatory streamlined pathway into incarceration compared to non-Indigenous people.

Secondly, this chapter considers beneficial measures established in New Zealand that give incentive to Maori to vote and also to run as a political candidate in parliament. New Zealand has a Mixed Member Proportionate electoral system which recognises all citizens' rights to vote and run as a candidate in politics, including Maori, as recognised within the *Treaty of Waitangi 1840*, the *New Zealand Bill of Rights Act 1990* and the *Maori Electoral Option.*

The *Treaty of Waitangi 1840* and the *New Zealand Bill of Rights Act 1990* identify the importance of Maori political representation during decision-making processes that impact upon Maori affairs through its designated seats in parliament.

The focus of this chapter lies on identifying policy and institutional solutions to the challenge of supporting voting by and the candidacy of Indigenous people.

Chapter 4: Federal Indigenous Representative Bodies within Australia

This chapter analyses the role of a national Indigenous representative body within Australia in terms of enhancing Indigenous political participation through its potential to represent Aboriginal cultural identity and heritage rights. It analyses the effect of the lack of a permanent or effectively integrated representative body in the Australian political system on Aboriginal Australian cultural identity and heritage rights and the consequences for self-determination.

This chapter highlights the importance of self-determination as a foundation right of Aboriginal Australians. It articulates the capacity of enacting such a right to go some way to remedy the failure of ostensibly representative democratic regimes with colonial backgrounds to realise the cultural rights and heritage of Indigenous people.

Ultimately this chapter explores the deficiencies of the Australian approach to self-determination – namely a limited interpretation that is constrained further through the fragility of federal Aboriginal representative bodies established so far. It canvasses previously formed Aboriginal representative

bodies in Australia[91] and examines how those bodies have been subjected to repeal under successive governments that disregard their purpose in terms of self-determination, with consequences for Indigenous political participation. The few bodies that remain lack meaningful inclusion and funding by the Australian Government to adequately represent the interests of Aboriginal affairs across the country.[92]

This chapter acknowledges contemporary proposed solutions for overcoming the lack of Aboriginal representation through federal representative bodies. The *Uluru Statement from the Heart* called for the Australian Government to recognise Indigenous self-determination rights and 'recognition' of Indigenous Australians to include a meaningful change that provides a sense of substantive political equality.[93]

Of the several constitutional reform proposals the *Statement from the Heart* calls for, this chapter focuses on the proposed Voice to Parliament, Makarrata Commission and Truth-Telling Commission.[94] In doing so it highlights the basis on which these bodies might provide a vehicle for Aboriginal self-determination rights to be exercised and the consequences of this for Indigenous political participation.

Chapter 5: Indigenous Representative Bodies within Canada and New Zealand

Despite Australia's limited interpretation and recognition of self-determination, its counterparts throughout the Commonwealth have taken a different approach to recognise those rights of their Indigenous peoples.

---

[91] A central legislative outcome of the era of self-determination was the *Aboriginal Councils and Associations Act 1976* (Cth). This gave Indigenous peoples the statutory right to form associations. Over 3000 Aboriginal councils, associations and corporations, including Aboriginal land trusts, town councils and business enterprises, have been incorporated under the Act. See Tim Rowse, 'Culturally Appropriate Indigenous Accountability' (2000) 43(9) *The American Behavioral Scientist* 1514, 1517; Zoe Pollock, *Aborigines Progressive Association* (2008) Dictionaryofsydney.org <http://www.dictionaryofsydney.org/entry/aborigines_progressive_association>; John Maynard, 'Fred Maynard and the Australian Aboriginal Progressive Association (AAPA): One God, One Aim, One Destiny' (1997) 21 *Aboriginal History Journal* 2; Delephene Fraser, *History of Government and Aboriginal Affairs Prior to 1967 and after* (2013) Thestringer.com.au <http://thestringer.com.au/history-of-government-and-aboriginal-affairs-prior-to-1967-and-after-2-4871#.WHgTc1N95hE>; H. C. Coombs and C. J. Robinson, 'Remembering the Roots: Lessons for ATSIC' in Patrick Sullivan, *Shooting the Banker: Essays on ATSIC and Self-Determination* (North Australia Research Unit: Australian National University, 1996) 1; Thalia Anthony, 'A New National Indigenous Representative Body... Again' (2010) 7(18) *Indigenous Law Bulletin* 5.

[92] Anthony, ibid 5; Chris Gibson, 'Cartographies of the Colonial/Capitalist State: A Geopolitics of Indigenous self-determination in Australia' (1999) 31(1) *Antipode* 52; Mark Moran, Doug Porter and Jodie Curth-Bibb, *Funding Indigenous organisations: improving governance performance through innovations in public finance management in remote Australia* (Issues paper no. 11 produced for the Closing the Gap Clearinghouse, September 2014) 45.

[93] Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403; Matthew Corrigan, 'Aboriginal justice: Major report makes key access to justice recommendations to reduce indigenous incarceration' (April 2018) 40(3) *The Bulletin* 34, 34–36.

[94] *Final Report of the Referendum Council* (Commonwealth of Australia, 2018).

This chapter identifies the distinct ways in which other Commonwealth jurisdictions whose Indigenous peoples have had oppressive experiences similar to those of First Nations peoples in Australia, have interpreted and applied Indigenous rights to self-determination. New Zealand and Canada have both established treaties between their Indigenous peoples and the Crown and in turn, have also been able to produce better outcomes that culturally empower their Indigenous people within their respective governance structures.

This chapter firstly recognises that in the case of New Zealand, at first grounding, Maori–Crown relations (or Indigenous–State relations) recognised Maori as Aotearoa (or sovereign).[95] That recognition paved the way for Maori to exercise self-determination rights to self-govern their own territories.[96]

Treaty has been fundamental to Maori establishing a more practical means of self-determination through representative bodies that act as primary consultative mechanisms for Maori with the New Zealand Government. What has followed since the recognition of such rights and establishment of such institutions has seen a continued Maori political presence on laws and policies that impact upon Maori affairs. This chapter, therefore, examines the types of national Maori representative institutions that have been established in New Zealand. Most specifically, this chapter considers the weight the Waitangi Tribunal and New Zealand Maori Council have had in advising the New Zealand federal parliament on laws that impact upon Maori affairs.

Second, this chapter considers the experiences of First Nations in Canada and the ways in which First Nations have been able to assert and exercise their rights to self-determination including through self-governance. Like New Zealand, First Nations of Canada have treaties with the Crown that recognise those rights.

---

[95] Barbara Hocking, *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005) 118; Maivan Clech Lam, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Transnational Publishers, 2000); Siegfried Wiessner, 'Rights and Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12(57) *Harvard Human Rights Journal* 57; Paul Havemann, *Indigenous Peoples Rights in Australia, Canada and New Zealand* (Oxford University Press, 1999); S. James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996); Russel Lawrence Barsh, 'Indigenous Peoples in the 1990's: From Object to Subject of International Law?' (1994) 7(33) *Harvard Human Rights Journal* 33; Robert A. Williams Jr, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660; Glenn T. Morris, 'In Support of the Right of Self-Determination for Indigenous Peoples under International Law' (1986) 29 *German Yearbook of International Law* 277.

[96] Jose R. Martinez Cobo, *Study on the Problem of Discrimination Against Indigenous Populations*, E/CN.4/Sub.2/1986/7/Add.1-8, [104]–[110]; Sovereign status for the Aboriginal and Torres Strait Islander people was disputed at the politico-legal level until the decision of the High Court in *Mabo v State of Queensland* (No. 2) (1992) 175 CLR 1.

Accordingly, this chapter examines the role, structure and outcomes achieved by the Assembly of First Nations and the Congress of Aboriginal Peoples. Both provide examples of the means by which representative bodies can embody effective political participation for Indigenous peoples.

This chapter uses the comparative studies of New Zealand and Canada as a benchmark for assessing constitutional reform proposals surrounding a First Nations Voice to Parliament and a Makarrata Commission.

Chapter 6: Conclusions

This chapter synthesises conclusions from Chapters 2–5 to highlight areas for reform of Australian electoral law and policy as well as institutional structures. In doing so, this chapter draws upon the comparative analysis of Canada and New Zealand to determine how each element of 'political participation' might be reformed through incorporating core features from those countries to promote Indigenous political participation within Australia.

Finally, this chapter designs reform options for each element of 'political participation'. It concludes that significant areas of the political disadvantage of Aboriginal Australians together contribute to substantial limitations to their rights as citizens, and, as Indigenous colonised people, their rights to self-determination. If protection of cultural identity as Aboriginal people lies at the heart of self-determination, then to achieve this through political participation requires substantive reform of Australian law. The conclusions of this thesis articulate the means by which this may be achieved.

IV. SELF-DETERMINATION

The essential theoretical commitment of this thesis that underpins its purpose, method, and scope, is that of self-determination. Political participation, as it is considered in this thesis, is itself an offshoot of self-determination. This part introduces the concept of self-determination as a foundation for the analysis that follows in subsequent chapters. It canvasses the broad meaning of self-determination before turning to its relationship with international law, and within the Australian experience. In the final section, it explains its relationship with citizenship and the experience of Indigenous Australians.

A. Self-determination within International Law

Self-determination is the corollary of Indigenous peoplehood and terminology used within the international community of law that identifies the collective human rights of Indigenous colonised peoples. Internationally, self-determination is identified in several international legal instruments and is widely recognised as a collective human right that specifically targets the wants, needs and aspirations of colonised Indigenous peoples'.[97]

Both self-determination and Indigenous peoplehood have become prominent collective Indigenous human rights that have been relied upon since the beginning of the decolonisation movement, particularly prevalent from the 1970s onwards.[98] Self-determination and Indigenous peoplehood have been relied upon globally from Indigenous rights advocates, to frame Indigenous political struggles within settler-State political systems.[99]

The United Nations *Declaration on the Granting of Independence to Colonial Countries and Peoples 1960* ('DGICCP') was the first international legal instrument to specifically and formally acknowledge self-determination rights.[100] Accordingly, it has been central to the decolonisation of Indigenous people in Trust and Non-Self-Governing Territories through upholding fundamental human rights and freedoms recognised within the *Charter of the United Nations*.[101] The *Charter of the United Nations* provides universal recognition of self-determination rights as being fundamental to Indigenous colonised people and the maintenance of friendly relations and peace among States.[102]

The DGICCP sought to end colonialism in all of its manifestations including practices of segregation and discrimination. However, of the 89 States that voted for this resolution, there were nine abstentions – one of which was Australia, which is important to identify given the limitations it has continued to place on Indigenous Australians having access to those rights.

---

[97] Lino (n 12) 219.
[98] Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003) ch 5; Andrea Muehlebach, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism' (2003) 10 *Identities* 241.
[99] Anaya (n 95) 54; James Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Purich Publishing, 2008).
[100] *Declaration on the Granting of Independence to Colonial Countries and Peoples,* GA Res 1514 XV (14 December 1960) art 2.
[101] *Declaration on the Granting of Independence to Colonial Countries and Peoples,* GA Res 1514 XV (14 December 1960) Preamble; *Charter of the United Nations,* signed 26 June 1945 (entry into force 24 October 1945).
[102] *Charter of the United Nations,* signed 26 June 1945 (entry into force 24 October 1945) art 1 (2), art 55; Michael Mansell, *Treaty and Statehood* (Federation Press, 1st ed, 2016) 167.

The *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD') forms another important international legal instrument that forms part of the collection of instruments that recognise Indigenous rights. ICERD calls for an end to colonisation globally and obliges signatory States to uphold principles of dignity and equality for *all* individuals despite their cultural differences.[103]

Explicit reference and thus acknowledgement of self-determination is found within the *International Covenant on Civil and Political Rights* ('ICCPR').[104] The ICCPR is considered a prominent legal instrument within the international community that obliges Australia and other signatory colonialist States to uphold self-determination rights within their domestic laws, policies, processes and institutions. In turn, this obligation requires those States to act without limitation and ensure its Indigenous people have access to freely determine their groups' political, economic, social and cultural development.[105] The ICCPR also reaffirms self-determination provisions of the *Charter of the United Nations.*

Lastly, the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') again acknowledges self-determination rights and how those rights must not be limited by a State.[106] Accordingly, Indigenous rights to cultural autonomy over internal and local affairs are integral to protecting their cultural identity and rights.[107]

Those initiatives and their objectives must be financially supported by the government to ensure that they are appropriately carried out.[108] The importance of ongoing funding was noted in Australia, for example, in the 1991 report *Royal Commission into Aboriginal Deaths in Custody* as a critical issue and key feature for the proper exercise of self-determination rights for Aboriginal Australians.[109]

---

[103] *International Covenant on the Elimination of Racial Discrimination* (signed 21 December 1965) (entry into force 4 January 1969) Preamble.
[104] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976).
[105] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) Article 1 (1).
[106] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007).
[107] Julie Evans, Ann Genovese, Alexander Reilly and Patrick Wolfe, *Sovereignty: Frontiers of Possiblility* (University of Hawaii Press, 2013) 163–177; S. J. Ferrell, 'The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples' (2001) 14(2) *St. Thomas Law Review* 259, 259–270; S. Errico, 'The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview' (2007) 7(4) *Human Rights Law Review* 749;*United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007) art 4.
[108] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007) art 4.
[109] *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 2, 15 April 1991) [20.6.1].

The General Assembly's adoption of the UNDRIP expounded not only on the right to self-determination and participation in decision-making processes affecting them but also the right to 'control the outcome of such processes'.[110] The Declaration contains more than 20 general provisions pertaining to Indigenous peoples and decision-making. This is because '[t]he right to full and effective participation in external decision-making is of fundamental importance to Indigenous peoples' enjoyment of other human rights'.[111]

Research conducted by the Expert Mechanism on the Rights of Indigenous Peoples (a mechanism of the United Nations Human Rights Council) shows that 'Indigenous peoples are among the most excluded, marginalized and disadvantaged sectors of society'. Accordingly, the Expert Mechanism highlighted how imperative it is for Indigenous peoples to be politically engaged and included when it comes to their decision-making in political regimes on matters that will enable them to protect their cultural identity 'including their languages and their lands, territories and resources'.[112]

A good indication a State has actively included its Indigenous people politically and adhered to internationally accepted standards is the extent to which a State has involved its Indigenous peoples in the design process of its government institutions and their agreement to it. Accordingly, States that haven't met those standards are ones that implement State-centred top-down interventions that have little regard to Indigenous rights which, in turn, can result in land dispossession, conflict, human rights violations, displacement and the loss of sustainable livelihoods.[113]

The duty to consult with Indigenous peoples must occur each time a State engages in matters that will directly or indirectly impact upon Indigenous affairs.[114] Having a lack of Indigenous representation in decision-making processes that impact upon Indigenous affairs also decreases the political interest and advocacy Indigenous people need that would fight for the maintenance of vital service delivery bodies and outputs relied on by Indigenous Australia. This is particularly important in sectors like health and education which provide Indigenous people with basic fundamental support they should be always receiving as citizens and first peoples of Australia.[115]

This circumstances of Australia are a far cry from other countries across the globe that have implemented domestic policies to include concrete measures intended to advance the right to self-

[110] Expert Mechanism on the Rights of Indigenous People, *Indigenous Peoples and the Right to Participate in Decision Making*, Advice No. 2, A/HRC/18/42 (2011) [2].
[111] Ibid, [13].
[112] Ibid, [1].
[113] Ibid, [15].
[114] Ibid, [16]; Davis (n 12) 12.
[115] *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 2, 15 April 1991) [20.6.2].

determination.[116] Australia remains one of the very few signatories to UNDRIP that is yet to achieve such measures of cultural progression and reconciliation.[117] This is reflective, perhaps, of the general experience of self-determination in Australia.[118]

B. Self-determination and Domestic Law

To protect and provide full access to political participation rights of Indigenous peoples, those rights must be considered in accordance with self-determination rights. Self-determination is a collective human right that seeks to empower Indigenous colonised peoples through acknowledgment and protection of their cultural identity through the implementation of domestic laws, policies and processes.[119] However, self-determination must, by definition, be self-determined, interpreted and applied by Indigenous colonised peoples themselves. To give full expression to self-determination, a State should not limit the exercise of Indigenous self-determination rights or treat all Indigenous peoples as automatically sharing the same set of values and beliefs.[120]

Indigenous Australian cultural identities comprise Aboriginal and Torres Strait Islander peoples. Both are differing cultural identities and within them there are internal differing cultural identities which for Aboriginal people in Australia are referred to as 'nations', 'clans' or 'mobs'.[121] This thesis will refer to internal Aboriginal groups as 'nations'. Differing Aboriginal nations have differing laws, societal values, names, languages, political views, governance structures, Dreamtime stories and land boundaries.[122] Each nation is complex and multi-faceted in its own respective way and should, in

---

[116] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007) arts 3–4.
[117] Dylan Lino, 'The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples' (2010) 34 (3) *Melbourne University Law Review* 847; See UN GAOR, 61s sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007) 19.
[118] Lino ibid, 844.
[119] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 2011) 27; Marc Weller and Stefan Wolff, *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005) 10–12; J. Wright, 'Minority Groups, Autonomy, and Self-determination' (1999) 19(4) *Oxford Journal of Legal Studies* 605.
[120] Yoram Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *International and Comparative Law Quarterly* 112; Jeff Corntassel and Cindy Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru' (2008) 9(4) *Human Rights Review* 2.
[121] Toni Bauman, 'Nations and Tribes "Within": Emerging Aboriginal "Nationalisms" in Katherine' (2006) 17(3) *The Australian Journal of Anthropology* 323; Peter McConchie, *Elders: Wisdom from Australia's Indigenous Leaders* (Cambridge University Press, 2003) 27; Peter Dunbar-Hall and Chris Gibson, 'Singing about nations within nations: Geopolitics and identity in Australian indigenous rock music' (2000) 24(2) *Popular Music & Society* 59.
[122] Bruce Pascoe, *Dark Emu: Black Seeds: Agriculture or Accident?* (Magabala Books, 2014); Robert Tonkinson, 'Landscape, Transformations, and Immutability in an Aboriginal Australian Culture' in Peter Meusburger, Michael J Heffernan and Edgar Wunder, *Cultural Memories* (Springer, 2011) 331.

turn, be referred to, recognised and treated as its own sovereign nation. This is precisely what self-determination identifies, protects and requires in terms of protecting Indigenous colonised identities.[123]

Issues arise when States wrongfully assume the right of self-determination necessitates an exercise of Indigenous sovereignty that requires complete secession from a State – a move which is generally seen to threaten a State's territorial integrity.[124] Whilst this exercise of self-determination and its interpretation has been advocated for and against in some jurisdictions,[125] it is not the only means of achieving self-determination.[126] Self-determination is a broad right of Indigenous self-empowerment that can take shape in many different forms according to differing Indigenous group's laws, customs and shared values. This is because not all Indigenous groups share the same wants and needs when interpreting and exercising such rights. Such rights are self-determined and expressed by differing Indigenous groups in ways in which they see fit.

Therefore, States should become better informed as to the plural objectives of self-determination rights prior to limiting access to those rights through domestic laws, policies and political processes.[127] A better understanding of self-determination rights is one that requires States that are party to international legislative instruments to recognise the right and to uphold their treaty obligations through the implementation of domestic laws, policies and processes.[128] In doing so their actions evidence the State's commitment to recognising and protecting such rights of its Indigenous

[123] F. D. McCarthy, 'Aboriginal Australian Material Culture' (1936) 2(1) *Mankind* 241; Emma Kowal, 'The Politics of the Gap: Indigenous Australians, Liberal Multiculturalism, and the End of the Self-Determination Era' (2008) 110(3) *American Anthropologist* 339; Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 *Alternatives* 111.

[124] Michael A. Murphy, 'Representing Indigenous Self-Determination' (2008) 58 *University of Toronto Law Journal*, 186; Larissa Behrendt, *Lessons from the Mediation Obsession: Ensuring that Sentencing 'Alternatives' Focus on Indigenous Self-Determination* (Cambridge University Press, 2002) 178–190; Larissa Behrendt, 'Self-representation, Self-determination and Sovereignty' (2013) *Hot Topics: Legal Issues in Plain Language* 21.

[125] Watson (n 11) 79.

[126] Larissa Behrendt, 'Self-determination and Indigenous Policy: The Rights Framework and Pratical Outcomes' (2002) (1) *Journal of Indigenous Policy* 43, 43–44; Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans, Ann Genovese, Alexander Reilly and Patrick Wolfe, *Soveriegnty: Frontiers of Possibility* (University of Hawai'i Press, 2012) 164; Megan Davis, 'Constitutional Recognition does not Foreclose on Aboriginal Sovereignty' (2012) 8(1) *Indigenous Law Bulletin* 13.

[127] Murphy (n 124)186.

[128] Behrendt (2002) (n 124) 21; Peter Dawson, 'On Self-determination and Constitutional Recognition' (Jan/Feb 2015) 8(16) *Indigenous Law Bulletin* 3; Larissa Behrendt, 'Unfinished Journey: Indigenous Self-determination' (April–May 2002) *Arena Magazine* 24; James Anaya, 'The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples' in Gudmunder Alfredsson and Maria Stravropoulou (eds), *Justice Pending: Indigenous Peoples and Other Good Causes: Essays in Honour of Erica-Irene Daes* (Kluwer Academic Press, 2002) 12; *Aboriginal and Torres Strait Islander Social Justice, Self-determination and Effective Participation 'within the life of the nation': An Australian Perspective on Self-determination* (Australian Human Rights Commission, 2003) <https://www.humanrights.gov.au/selfdetermination-and-effective-participation-within-life-nation-australianperspective-self>.

citizens. An understanding of self-determination rights should focus on protecting the cultural integrity of Indigenous colonised peoples through prior sought-after consent, consultation and inclusivity in national decision-making processes on Indigenous cultural affairs.[129]

In this context, self-determination rights can guide the reform of Westernised political systems and processes to better include plural cultures through political and legal intersection within a State's overall governance structure.[130] This point precisely has been examined by international treaty monitoring bodies in terms of what a State's governance structure and the political system might look like in practice where they correctly and fully acknowledge Indigenous self-determination rights.[131] That examination has since highlighted several key objectives of what a State's system and political processes must achieve.[132]

At first instance, a State may have a system where its Indigenous group/s have interpreted self-determination so as to form its own new State through secession from the colonial State. In addition, and in an alternative interpretation, Indigenous groups may also seek to agree to autonomy or association in a federal State, or integration or assimilation within a single unitary State.[133] The main requirement that underpins such changes to a State's governance structure and the political process is that there must be prior consent and consultation sought by a State from its Indigenous people when drafting laws and policies to implement those changes.[134]

Furthermore, that type of cultural partnership and collaboration must be guided by principles of mutual respect and continuity to ensure the element of collaboration within that relationship is maintained but also occurs at all levels of governance. The prior consent and consultation sought-after of Indigenous people must not merely be limited to lower levels of governance in regional organisations.[135]

---

[129] Larissa Behrendt and Alison Vivian, *Indigenous Self-Determination and the Charter of Human Rights and Responsibilities* (Victorian Equal Opportunity and Human Rights Commission, 1st ed, 2010) 8.
[130] Murphy (n 124) 186.
[131] Larissa Behrendt, 'Indigenous self-determination in the age of globalization' (2001) 3 *Balayi: Culture, Law and Colonialism* 2 (Paper in 'Indigenous Peoples in the International Sphere' delivered as part of the Human Rights and Global Challenges Conference in Melbourne); Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 132.
[132] Mansell, (n 102) 165; Behrendt (n 124) 21.
[133] Mansell, ibid 165.
[134] Behrendt and Vivian (n 129) 8.
[135] Leon Terrill and Sasha Boutilier, 'Indigenous Land Tenure Reform, Self-determination, and Economic Development: Comparing Canada and Australia' (June, 2019) 45(1) *University of Western Australia Law Review* 38; Heidi Norman, *What Do We Want? A Political History of Aboriginal Land Rights in New South Wales* (Aboriginal Studies Press, 2015) 11; Behrendt and Vivian (n 129).

There must be consultation and consent sought by a State government of Indigenous people at all levels on matters that concern their cultural affairs which most importantly includes top-tier federal decision-making processes. The consultation that occurs between Indigenous people and a State must also be meaningful, substantively effective and respectful.[136] As international treaty monitoring bodies have identified, self-determination in practice within democratic decision-making processes requires not only ethical consent but meaningful collaboration within shared political forums that counter majority dominance.[137]

Accordingly, a State should promote programs that protect cultural identity, and cultural autonomy through recognising rights to traditional lands, natural resources and economic activities.[138] Such programs implemented by a State comply with not only its international obligations but also refocus a State's actions on achieving cultural reconciliation – a move away from assimilation towards more culturally empowering measures for Indigenous people.[139]

Alongside those efforts, a State should also create multiple access points to political empowerment and decision-making for Indigenous people.[140] This may occur through Indigenous representation within their own autonomous self-governing institutions as well as their enhanced and protected political representation within local, regional and national institutions.[141]

A State should also support its Indigenous people in the development of their native language through domestic laws and policies. Further, those laws and policies that recognise such rights should allow for the practise and development of Indigenous language and culture into the future. In addition, a State should also encourage Indigenous people to communicate with government authorities in their native tongue – a measure to which this thesis will consider in its comparative New Zealand analysis with Maori political representatives speaking in their native tongue in the New Zealand Parliament.[142]

Overall, a State must ensure in its law and policymaking processes that Indigenous voices are included and protected. It is imperative that Indigenous views are incorporated into non-Indigenous forms of governance frameworks, if reconciliation is to truly be progressed with in Australia. This effort must also be continuous and there must be a partnership type relationship struck, between

[136] Behrendt and Vivian, ibid.
[137] Murphy (n 124) 200.
[138] Behrendt and Vivian (n 129).
[139] Ibid.
[140] Murphy (n 124).
[141] Ibid.
[142] Behrendt and Vivian (n 129).

Indigenous and non-Indigenous participants in those forums that share the decision-making space based on mutual respect for one another. It is only when these domestic contexts of self-determination are created, that a fuller expression of the right by Indigenous people of Australia (as understood at an international level) can be achieved. [143]

C. Self-determination and the Australian Experience

To make suggestions on law and policy reform in Australia that seek to right past wrongs arising from incorrect acknowledgement and interpretation of self-determination rights, it is important to first understand where and when those issues have arisen throughout Australian history. This is important for determining what can be learned from past mistakes in order to reform and create better pathways towards reconciliation into the future.

The Australian experience with understanding self-determination rights has been a historically contentious topic.[144] This is evidenced by the Australian Government's limited provision of self-determination rights for Aboriginal citizens.[145] This experience, however, is contrary to other colonial States with similar backgrounds and cultural struggles to Australia. As Megan Davis argues, 'The right to self-determination is taken seriously in most states of the world that have Indigenous communities because self-determination in its true form is intended to enhance democracy and enhance political participation and therefore improve health and well-being'.[146]

It is thus imperative that the right of self-determination be only applied and determined by Aboriginal Australians themselves as distinct autonomous people and *not* by the Australian Government.[147] The resurgence and movement of Indigenous people through self-determination rights centres around 'distinct groups, communities, tribes or nations engaging in the practical tasks of governing'.[148]

---

[143] Murphy (n 124) 202.
[144] Terrill and Boutilier (n 135) 34.
[145] Mansell (102) 166; Corntassel and Holder (n 120) 11; Will Sanders, 'Journey Without End: Reconciliation Between Australia's Indigenous and Settler Peoples' (Centre for Aboriginal Economic Policy Research, No. 237/2002) 2.
[146] Megan Davis, 'A Right that is Fundamental to our Aspirations', *Koori Mail* (28 November 2012) 24; Will Sanders, 'Journey Without End: Reconciliation Between Australia's Indigenous and Settler Peoples' (Centre for Aboriginal Economic Policy Research, No. 237/2002) 5; Geoffrey Stokes, 'Australian Democracy and Indigenous Self-Determination, 1901–2001' in Geoffrey Brennan and Francis G. Castles, *Australia Reshaped: 200 Years of Institutional Transformation* (Cambridge University Press, 2002) 193.
[147] Sharon H. Venne, 'The Road to the United Nations and Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 558; Geoffrey Stokes, 'Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Political Thought' in Geoffrey Stokes (ed), *The Politics of Identity in Australia* (Cambridge University Press, 1997) 193.
[148] Sarah Maddison, *The Colonial Fantasy Why White Australia Can't Resolve Black Problems* (Allen & Unwin, 2019) 32.

The term and characterisation of 'people' have been also widely recognised as referring to a group of colonised Indigenous people that share common colonialist experiences with political and civil oppression.[149] Those 'people' are the authors of their future and must, in accordance with correct interpretation and application of self-determination rights, be given a rightful opportunity in acknowledgment of that.

However, Australia has not seen this type of cooperative and respectful governance over Indigenous affairs to date. Rather, self-determination has been interpreted and applied in a significantly limited way in Australia since 1788 which has left many Aboriginal people, after nearly 230 years, still unable to feel at home in their own country.[150]

In turn, self-determination rights originate in the continuous calls for recognition of sovereignty from Aboriginal and Torres Strait Islander people across the country. Those calls seek acknowledgement of their pre-existing, self-governing political entities that have been established prior to colonisation.[151]

Australian governance over Indigenous affairs through its domestic laws and policies has been relentlessly paternalistic and justified as a response to the so-called 'Aboriginal problem'.[152] The Australian Government continuously presumes that resolution of the 'Aboriginal problem' can only occur through the exercise of settler-colonial authority.[153] That mindset has warranted the implementation of liberal norms and institutions onto Indigenous polities that have been disempowering and deeply problematic to their lives and their cultural identity.[154] Accordingly, Indigenous policy has barely improved the quality of most Aboriginal Australians' lives.

Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar has identified that typically Australian Government policies are consistent with churn and reinvention and resist taking proactive measures that provide Aboriginal people with an ability to control and manage their own

[149] Dinstein (n 120)118.
[150] Maddison (n 148) xxii.
[151] Ibid 39.
[152] Katherine Ellinghaus, 'Absorbing the "Aboriginal Problem": Controlling Interracial Marriage in Australia in the Late 19th and Early 20th Centuries' (2003) 27 *Aboriginal History* 183.
[153] Maddison (n 148) xxiii.
[154] Diane Smith, 'Cultures of Governance and the Governance of Culture: Transforming and Containing Institutions in West Arnhem Land' in J. Hunt, D. Smith, S. Garling and W. Sanders, *Contested governance: Culture, Power and Institutions in Indigenous Australia* (ANU E-Press, 2008) 78; Diane Smith and Janet Hunt, 'Understanding Indigenous Australian Governance: Research, Theory and Representations' in J. Hunt, D. Smith, S. Garling and W. Sanders, *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU E-Press, 2008).

lives.[155] Australia's political systems and institutions have shown to be inadequate at providing Aboriginal Australians with appropriate representation in the matters that affect them.[156]

The Australian Government has also generally favoured a 'top-down' approach instead of dealing with Aboriginal people on a nation-to-nation basis like self-determination rights require in terms of requiring a State to seek free, prior and informed consent from Indigenous people on matters that affect their cultural affairs.[157]

Calls for self-determination by Aboriginal Australians really took off as early as the 1920s.[158] Such advocacy and calls for cultural respect and autonomy came largely as a reaction to specific legislation passed in Australia (known as the 'Aborigines Acts')[159] from the 1860s onwards that regulated Aboriginal people's lives during the decades of violence and massacres that occurred from 1830 to 1910.[160]

By the 1930s the attention shifted from apparent segregation inequalities that existed between Aboriginal Australians and non-Indigenous Australians to the importance of racial equality following the first Commonwealth–State Native Welfare Conference held in 1937.[161] However, the conference viewed the road to racial equality in Australia as an issue the Commonwealth would 'take care of' through total absorption policies that targeted Aboriginal people of mixed descent.[162]

The presumption was one that viewed Westernised culture as being superior to Aboriginal culture and, in turn, Aboriginal people must learn and adopt white European societal standards. The result of the wrongful understanding and application of measures necessary to achieve racial equality by the Commonwealth Government, has left Aboriginal people subject to laws, that expose them to continued, overt racial discrimination and denial of their basic and fundamental rights.[163] The

---

[155] Maddison (n 148) xxii.
[156] Ibid.
[157] Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (The Federation Press, 2005) 32; Christine Fletcher, *Aboriginal Self-determination in Australia* (Aboriginal Studies Press, 1994) 111; James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 *Arizona Journal of International and Comparative Law* 11.
[158] Sarah Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Allen & Unwin, 2009) 32; Margaret Ah Kee and Clare Tilbury, 'The Aboriginal and Torres Strait Islander Child Placement Principle Is about Self Determination' (1999) 24(3) *Children Australia* 4; Stokes (n 146) 202.
[159] *Aborigines Act 1905* (WA); *Aborigines Act 1890* (Vic)*; Aborigines Act 1911* (SA)*; Aborigines Act 1934* (SA); *Aboriginal Protections Act 1909* (NSW); *Aborigines Protection Act 1886* (WA); *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginals Ordinance 1911* (Cth); *Aboriginals Ordinance 1918* (Cth).
[160] Heather McRae, *Indigenous Legal Issues* (Thomson Reuters Australia, 4th ed, 2009) 651; Jill Webb, 'Indigenous Peoples and the Right to Self-Determination' [2012] 13 *Journal of Indigenous Policy* 75, 91.
[161] Webb, ibid, 92.
[162] *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 2, 15 April 1991) 510.
[163] *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 2, 15 April 1991) 39.

assimilationist policy era predominantly targeted 'half-caste' Aboriginal children by forcefully removing them from their parents' care and placing them into State care under various federal and state and territory laws. This is known as Australia's 'Stolen Generations' era.[164]

The assimilationist era reignited advocacy yet again for Aboriginal Australians and again called for respect of their cultural identity and acknowledgement of their legitimacy as peoples in Australia.[165] Aboriginal identity politics shifted by the 1960s into calls for equality through citizenship rights and, after over a decade of advocacy from Aboriginal activist groups comprising Indigenous and non-Indigenous advocates, a referendum was held to formalise those calls for racial equality.[166]

The 1967 constitutional referendum was successful and removed racially discriminatory provisions from the *Australian Constitution* that explicitly targeted and referred to Aboriginal people.[167] From there, the 'Black Power' movement began which shifted Indigenous identity politics from seeking recognition as citizens to recognition as people with pre-existing rights to land and cultural autonomy.[168]

The elected Whitlam Labor Government from 1972 until 1975 was significant for Indigenous identity politics as it formally acknowledged self-determination within its national policy

---

[164] *Bringing Them Home Report* (1997) <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>; J. Koolmatrie and Ross Williams, 'Unresolved Grief and the Removal of Indigenous Australian Children' (2007) 35(2) *Australian Psychologist* 158, 158–166; Kay Schaffer, 'Manne's Generation: White Nation Responses to the Stolen Generation Report' (2001) *Australian Humanities Review* 1, 1-11.

[165] Larissa Behrendt, Chris Cunneen and Terry Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) 298–9.

[166] Webb (n 160) 92.

[167] *Commonwealth of Australia Constitution*, s 51 (xxvi) was reformed to enable federal parliament to make special laws necessary for Aboriginal people – previously they were exempted. Section 127 was repealed which enabled Aboriginal people to be counted in the Australian census – previously it disqualified them. See generally Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007).

[168] Gary Foley, *Black Power in Redfern 1968–1972* (The Koori History Website, 5 October 2001) <http://www.kooriweb.org/foley/resources/pdfs/228.pdfs/228.pdf>; Gary Foley, Edwina Howells and Andrew Schaap, *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013); Ravi de Costa, *A Higher Authority: Indigenous Transnationalism ad Australia* (UNSW Press, 2006) ch 4; Jennifer Clark, *Aborigines & Activism: Race, Aborigines and the Coming of the Sixties to Australia* (University of Western Australia Press, 2008) ch 9; Russell McGregor, 'Another Nation: Aboriginal Activism in the Late 1960s and Early 1970s' (2009) 40 *Australian Historical Studies* 343; Bain Attwood, *Rights for Aborigines* (Allen & Unwin, 2003) ch 13; Sue Taffe, *Black and White Together: FCAATSI: The Federal Council for the Advancement of Aborigines and Torres Strait Islanders 1958–1973* (University of Queensland Press, 2005) chs 7–8; Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler State* (Oxford University Press, 2016); Geoffrey Stokes, 'Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Political Thought' in Geoffrey Stokes, *The Politics of Identity in Australia* (Cambridge University Press, 1997) 158.

framework. This came as a result of Australia's signature to the *International Convention on the Elimination of All Forms of Racial Discrimination*[169] in 1965.

The Whitlam government based its formalisation of self-determination in an Aboriginal land rights scheme in the Northern Territory,[170] which led to the establishment of an Indigenous sector responsible for representing Aboriginal people and delivering services to them.[171] Thus, self-determination was restrictive in that it purely focused on government-created institutions to deliver services for Aboriginal people and regulations implemented surrounding their land rights.[172]

Initially, the introduction of a formal policy of self-determination was perceived by Indigenous and non-Indigenous Australians alike as a necessary means and progressive step towards reconciliation. In theory, the objectives behind Australia's self-determination policy fell alongside the underlining principles and advocacy that underpinned the 'Black Power' movement which called for Indigenous Australians to 'make choices' about 'the terms and the pace of their adaption to the settler-colonial society that encapsulated them'.[173] This line of advocacy for self-determination was also later affirmed in the 1991 report of the *Royal Commission into Aboriginal Deaths in Custody* within the 19 recommendations tabled that specifically relate and refer to self-determination rights and Indigenous lives being returned to Indigenous hands.[174]

In practice, however, the Commonwealth's version of self-determination was not as transformative and progressive as what Indigenous Australians had hoped for.[175] The issue was that the policy was very State-centred as opposed to focusing on an Indigenous-led interpretation and application of self-determination to empower Indigenous Australians to manage their own internal cultural

---

[169] *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1(a), 2, 4(a), 14.
[170] *Aboriginal Land Rights Act 1976* (NT).
[171] Sean Brennan, 'Whitlam and the Value of Law in Indigenous Affairs: Lessons for the Contemporary Debate on Reconciliation and a Treaty?' in Jenny Hocking and Colleen Lewis, *It's Time Again: Whitlam and Modern Labor* (Circa, 2003) 138; Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal Australia* (UNSW Press, 2002) 1–25.
[172] Megan Davis, 'Aboriginal Women: The Right to Self-Determination' (2012) 16 *Australian Indigenous Law Review* 82; David Mercer, 'Aboriginal Self-Determination and Indigenous Land Title in Post-Mabo Australia' (1997) 16(3) *Political Geography* 189; Gibson (n 92) 45.
[173] Tim Rowse, '"Out of Hand": The Battles of Neville Bonner' (1997) 54–55 *Journal of Australian Studies*, 96–107; Maddison (n 148) 34.
[174] *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 1, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 2, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 3, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 4, 15 April 1991); Noel Pearson, *Our Right to Take Responsibility* (Noel Pearson and Associates, 2000).
[175] Maddison (n 148) 34.

affairs.[176] For the most part, Indigenous advocacy for cultural empowerment during this era sought Indigenous peoplehood through land rights.[177]

The Commonwealth Government implemented legislation to give effect to its national self-determination policy including the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*'), the *Aboriginal Councils and Associations Act 1976* (Cth) and the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).[178] From the establishment of those laws, the period of 1979 to 1983 saw a shift with Indigenous politics towards calls for self-determination rights through treaty formation.[179] Bodies like the National Aboriginal Conference and Aboriginal Treaty Committee were created to work on issues surrounding a potential treaty/s to be established between Indigenous Australians and the Commonwealth and state governments.[180]

Of all Indigenous representative bodies to be formed during this period, the Aboriginal and Torres Strait Islander Commission (ATSIC) was by far the most prominent, established in 1989 by Commonwealth legislation.[181] ATSIC, however, was designed by the Australian Government to include both administrative and elected arms in functions to provide a representation of, and services to, Indigenous people across Australia.[182]

In practice, ATSIC significantly lacked meaningful control and input over Indigenous policy and government funds to achieve its outcomes.[183] This was because, as critiqued by Irene Watson, ATSIC's design by the Australian Government was under-resourced to the extent that it left Aboriginal and Torres Strait Islander people with very little means to care for and represent Aboriginal Australia. Accordingly, to many Aboriginal and Torres Strait Islander people across Australia, ATSIC felt like it was doomed to fail from the very beginning.[184]

---

[176] Davis (n 146) 80.
[177] *Coe v Commonwealth* (1979) 24 ALR 118; Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–1981' (2011) 42 *Australian Historical Studies* 372, 376–7.
[178] Davis (n 146) 80.
[179] Tim Rowse, 'From Enforceability to Feel-Good: Notes on the Pre-History of the Recent Treaty Debate' in Peter Read, Gary Meyers and Bob Reece, *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986–2006* (ANU E-Press, 2006) 71, 75–7.
[180] Fenley (n 177); Rowse (n 179) 75–7.
[181] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
[182] Maddison (n 148) 36.
[183] Michelle Patterson, *Commonwealth machinery of government in Aboriginal and Torres Strait Islander affairs: 50 years of Commonwealth public administration in Aboriginal and Torres Strait Islander Affairs* (IAG Working Paper Series, No. 1, Aboriginal and Torres Strait Islander Affairs Group, Department of the Prime Minister and Cabinet, May 2017) 14.
[184] Irene Watson, 'Settled and Unsettled Spaces: Are We Free to Roam?' in A. Moreton-Robinson, *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 24.

The failure of ATSIC to meet its goals and achieve its objectives, caused by a lack of financial support, was held up by the Howard government as a failure of self-determination policy in Australia. Consequently, the then Prime Minister, John Howard, used that 'failure' as a racially discriminatory justification to replace Australian self-determination policy with a new policy regime that focused more on assimilation and control by the Australian Government over Aboriginal affairs.[185] By 2005, the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) was repealed, abolishing ATSIC and leaving Aboriginal and Torres Strait Islander people without a representative voice.[186]

Other failures of the Australian Government's limited purported policy and understanding of self-determination have included its lack of acknowledgment of the diversity of Indigenous nations in terms of understanding their cultural identity. This is fundamental to understanding the varying exposure and impacts Indigenous nations have had with colonisation. Those experiences influence the way in which communities interpret and apply self-determination according to their community's wants and needs. The national policy also limited traditional structures of governance and control established with elders in Indigenous communities with newly inserted settler structures (such as community elected councils).[187] The newly imposed regimes, when withdrawn from Indigenous communities and missions, also left social voids and destabilised some communities across Australia.[188]

By 2006, the *Aboriginal and Torres Strait Islander Social Justice Report* criticised the Australian Government's treatment of Indigenous Australians and labelled the rollout of its national self-determination policy as 'a passive system of policy development and service delivery'. Furthermore, the report also highlighted the absurdity of the Australian Government's criticism of Indigenous Australians 'for being passive recipients of government services'.[189]

In turn, it was clear that the Australian Government's limited version of self-determination left many Indigenous Australians disempowered by not having the financial means and support to

---

[185] Jon Altman, 'The Deliberating Aftermath of 10 Years of NT Intervention' (*New Matilda*, 28 July 2017) <https://newmatilda.com/2017/07/28/the-debilitating-aftermath-of-10-years-of-nt-intervention/>; Natalie Cromb, *Comment: We Need Aboriginal Control of Aboriginal Affairs* (NITV, 23 March 2017) <http://www.sbs.com.au/nitv/article/2017/03/23/comment-we-need-aboriginal-control-aboriginal-affairs>.
[186] Gibson (n 92) 47; Ian Anderson, 'The End of Aboriginal Self-Determination?' (2007) 39(2–3) *Futures* 137, 137–154; Will Sanders, *Reconciling Public Accountability and Aboriginal Self-Determination/Self-Management* (Australian National University, Centre for Aboriginal Economic Policy Research, 1993) 3.
[187] Maddison (n 148) 37.
[188] Peter Sutton, 'The Politics of Suffering: Indigenous Policy in Australia Since the 1970s' (2001) 11(2) *Anthropological Forum* 128.
[189] *Aboriginal and Torres Strait Islander Social Justice Commissioner: Human Rights and Equal Opportunity Commission 2007b* (Social Justice Report, 2006) 18.

provide culturally appropriate services to their communities.[190] The withdrawal of Australia's self-determination policy left Indigenous Australians culturally suppressed within the dominant cultural and political framework, and, to that extent, disempowered yet again.

By 2014, the then Prime Minister Tony Abbott introduced the Indigenous Advancement Strategy (IAS). The IAS significantly cut funding to Aboriginal community organisations and programs and in doing so left Indigenous communities across Australia with minimal control over their own community programs and services.[191] Those actions have since been criticised at all levels of governance for lacking effective policy logic and not seeking free, prior and informed consent and consultation with Indigenous communities prior to the implementation of the IAS.[192]

Ultimately, it is clear that self-determination is fundamental to the rights and aspirations of Aboriginal communities and, as such, should be viewed as the only acceptable framework for negotiating their governance within the Westernised political regime.[193] Although Australia has had and continues to undergo critique as to its 'impoverished', 'one-dimensional' and 'state-centric' form of self-determination,[194] there is still hope and an opportunity for Australia to totally recode its understanding of self-determination from an issue of 'policy self-management' to Indigenous 'political autonomy'.[195]

Outdated draconian-type controls must be eliminated from Australia's political system and the mentality of its government elites to make room for Indigenous political autonomy and empowerment.[196] Australia must align itself with an understanding and implementation of self-determination in its truest form intended to enhance democracy and Indigenous political

---

[190] Alexis Wright, 'Embracing the Indigenous Vision' (2016) 65(1) *Meanjin* 2.
[191] Megan Davis, 'Bad Faith Over Indigenous Voice', *The Saturday Paper* (4 November 2017) <https://www.thesaturdaypaper.com.au/opinion/topic/2017/11/04/bad-faith-over-indigenous-voice/15097140005450>; Maddison (n 148) 43.
[192] Maddison, ibid; Australian National Audit Office, 'Indigenous Advancement Strategy' (Commonwealth Department of the Prime Minister and Cabinet, 2017) 8; 'UN Rapporteur Slams the Government's Record on Indigenous Issues, But Hopeful for Change' (NITV News, 3 April 2017) <http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2017/04/03/un-rapporteur-slams-governments-record-indigenous-issues-hopeful-change>.
[193] Davis (n 12) 24; Maddison (n 148) 31.
[194] Davis, ibid.
[195] Elizabeth Strakosch, *Neoliberal Indigenous policy: Settler colonialism and the Post-Welfare State* (Palgrave Macmillan, 2015) 70.
[196] See *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginal Protections Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (SA); *Aboriginals Ordinance 1911* (Cth); *Aboriginals Ordinance 1918* (Cth); *Welfare Ordinance 1953* (Cth); *Aboriginal and Torres Strait Islanders Affairs Act 1965* (QId); *Aborigines Act 1911* (SA); *Aborigines Act 1934* (SA); *Aboriginal Affairs Act 1962* (SA); *Aborigines Protection Act 1886* (WA); *Aborigines Act 1905* (WA); *Native Welfare Act 1963* (WA); *Natives Administration Act 1905–1936; Aborigines Act 1890* (Vic); *Cape Barren Island Reserve Act 1912* (Tas).

participation.[197] Once this occurs only then can Australia pride itself on adhering to what's understood as a 'gold standard' of democracy for virtually all countries with Indigenous populations with liberal democratic governance frameworks.[198] In this version, a long-awaited united journey towards reconciliation can begin that deals with 'the unfinished business of post-colonial struggle' through an adjustment to the balance of power and relationships between Indigenous Australians and the Australian State – including political participation and citizenship.[199]

D. Indigenous Political Participation and Citizenship

Self-determination rights are quite broad and seek to protect all aspects of Indigenous cultural identity, mostly through political autonomy and inclusion in political decision-making processes on Indigenous affairs. Thus, political participation is integral for protecting the full citizenship rights of Indigenous people through their exercising of self-determination rights that recognise their marginalisation and dispossession post-colonisation.[200]

Although the term 'political participation' does not have a specific legislative definition, the international community has described it as 'citizen's activities affecting politics'.[201] As such, it is widely recognised internationally as a right that is vital to a person's citizenship within a liberal democratic political regime.[202] The most prominent legal instrument that recognises the right of political participation is the *International Covenant on Civil and Political Rights* (ICCPR).[203] Article 25 of the ICCPR obliges States signatory to the covenant to uphold the integrity of political equality and inclusion of *all* peoples it so governs.[204]

In theory, citizenship should enhance and empower the status of individuals as members of their respective States, and as a universal entitlement citizens should have full and equal access to all

[197] Davis (n 12) 80; Maddison (n 148); Lindsey Te Ata O Tu MacDonald and Paul Muldoon, 'Globalisation, Neo-Liberalism and the Struggle for Indigenous Citizenship' (2006) 41(2) *Australian Journal of Political Science* 209, 210.
[198] Davis (n 12) 10.
[199] Smith and Hunt (n 154) 13.
[200] Maddison (n 148) 34; Lindsey Te Ata O Tu MacDonald and Paul Muldoon, 'Globalisation, Neo-Liberalism and the Struggle for Indigenous Citizenship' (2006) 41(2) *Australian Journal of Political Science* 209, 210.
[201] Jan W van Deth, 'A Conceptual Map of Political Participation' (2014) 49 *Acta Politica* 349, 351.
[202] The Right to Vote Is Not Enjoyed Equally by All Australians (Humanrights.gov.au, 2010) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/right-vote-not-enjoyed-equally-all-australians>; *International Covenant on Civil and Political Rights,* GA Res 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.
[203] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976).
[204] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976), art 25.

civil rights that underpin their citizenship to their State.[205] However, in practice, full access to citizenship rights and entitlements in colonial States with Indigenous people often fail to provide them with access to such rights *equally* compared to other citizens. There exist in those states substantial inequality barriers when it comes to minority groups like Indigenous people accessing rights that underpin their citizenship.[206]

Indigenous people have, unlike their non-Indigenous counterparts, experience with political exclusion and marginalisation treatment in their State. Furthermore, they have distinct, differing internal cultural identities that governments often fail to understand, respect and recognise, and instead require within their democratic framework individuals to transcend their differences to assume an impartial, general point of view as part of their citizenship obligations.[207]

However, this can be problematic when assessing reform to political processes of a State to provide equal access to fundamental citizenship rights through the recognition of Indigenous people's rights to self-determination. Self-determination and identity politics recognise the distinct identities of Indigenous people and reject frameworks that deny Indigenous people their right to cultural identity recognition and protection. Instead, self-determination applied through political rights and autonomy relies on the principle of democratic equality to do the exact opposite in that the task is to nurture and sustain these group differences through specialised rights, policies and/or State-funded institutions.[208]

Those sorts of special measures are necessary for a State to adequately show its acknowledgement and understanding of the injustices its Indigenous people have faced as a product of colonisation that fall outside of surface value formalised rights afforded to everyone. They provide equitable outcomes to marginalised people faced with structural barriers that limit their full participation in society and political processes.[209]

---

[205] Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 *Ethics* 352, 354; Nicolas Peterson, Will Sanders, Geoffrey Brennan, *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Cambridge University Press, 1998) 188.
[206] Aileen Moreton-Robinson, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (1970) 15(2) *Cultural Studies Review* 61, 62; Tim Schouls, 'Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation versus Voter Equality' (1996) 29(4) *Canadian Journal of Political Science* 729, 732.
[207] Schouls, ibid.
[208] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990) 156–91; Alan C. Cairns, 'The Fragmentation of Canadian Citizenship' in Douglas E. Williams, *Reconfigurations: Canadian Citizenship and Constitutional Change* (McClelland & Stewart, 1995) 157–85; Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 *Ethics* 352, 369–77.
[209] Schouls (n 206) 733; Young, ibid; Cairns, ibid; Kymlicka, ibid.

Citizenship and structural assurances sit synonymously with one another and the task for a State is to ensure necessary legislative and policy respect to differentiated members of society whilst also treating those members as equals. This is imperative in circumstances when a State's members are marginalised and dissent from the majority normative cultural standards imposed upon them by the State.[210]

Thus, it is important for contemporary liberal democracies (like Australia) to temper majoritarianism within their electoral systems by reforming their formal procedural political rights, like, for instance, voting at elections.[211] Such reforms should seek to encourage more of its minority Indigenous groups to politically participate through reform of exclusionary decision-making processes and electoral laws and policies.[212] Protection of such rights should also be upheld through the entrenchment of a bill of rights or charters, recognition within a State's Constitution, establishing treaties and safeguarding reserved seats for Indigenous people within a State's parliament.[213]

Those types of substantive changes that would positively impact the citizenship status of Aboriginal people in Australia are still yet to occur.[214] This is because Australia has repeatedly since colonisation resisted such structural reforms to its institutions to properly accommodate its Indigenous peoples.[215]

In turn, Australia's current electoral system including its laws and policies that surround political participation of its citizens fail to acknowledge and protect important self-determination rights.[216]

V. CONCLUSION

The primary issue of law this thesis considers is: how can Australia reform its electoral laws, policies and political processes by learning from similar Commonwealth jurisdictions that have a colonial background but have politically empowered their Indigenous peoples better than what

[210] Schouls, ibid; Young, ibid; Cairns, ibid; Kymlicka, ibid.
[211] Wayne Hudson and John Kane, *Rethinking Australian Citizenship* (Cambridge University Press, 2000) 99; Tim Rowse, 'Indigenous Citizenship and Self-Determination: The Problem of Shared Responsibilities' in Nicolas Peterson, Will Sanders, Geoffrey Brennan, *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Cambridge University Press, 1998) 79.
[212] Michael C. Howard, 'Australian Aboriginal Politics and the Perpetuation of Inequality' (1982) 53(1) *Oceania* 82–101; Davis (n 12) 11.
[213] Davis, ibid.
[214] Maddison (n 148) 4.
[215] Davis (n 12).
[216] Davis (n 12) 10.

Australia has achieved. Ultimately, this is an issue surrounding Australia's understanding and implementation of full citizenship rights for all people through its domestic acknowledgement of international standards and obligations it must adhere to relating to self-determination and political participation rights.

There is clear statistical data that shows how Indigenous Australians and, in particular, Aboriginal Australians are restricted in their right to vote.[217] However, there is also clear comparison data from other jurisdictions, such as Canada, that is informative when considering how to overcome indirect electoral legislative exclusions specifically. For instance, Canada does not in practice disqualify prisoners from voting at federal elections. Given the similar statistical data both countries share with disproportionate figures of Indigenous incarceration, Canada's approach to overcoming this in and of itself as a key disenfranchising electoral obstacle, is important and useful for this thesis research to consider.

This is just one of several issues upon which this thesis makes law and policy recommendations, in terms of addressing the limitations on Aboriginal voting rights in Australia. Additional issues will be examined that highlight how racially discriminatory provisions within the *Australian Constitution* can limit Aboriginal voters from voting, alongside the lack of measures the Australian Electoral Commission has in place to better support Aboriginal voters.

In addition to the Canadian treatment of incarcerated voters, this thesis considers measures implemented in New Zealand that underpin Maori self-determination and sovereignty and thus their political representation. Australia has been slow to progress and enhance its political candidacy representation of Aboriginal members of parliament federally.[218] Importantly, however, there are also a variety of reasons stemming from the unreconciled relationship Aboriginal Australians have with the Australian Government and voter restrictions that influence their lack of incentive to run as a political candidate at Australian federal elections.[219]

There are additional beneficial practical examples established in New Zealand that will be considered. For example, this thesis examines the *Maori Electoral Option* and the viability of a

---

[217] *Additional Performance Information – AEC Annual Report 2015–16* (Annualreport.aec.gov.au, 2017) <http://annualreport.aec.gov.au/2016/performance/additional.html>.
[218] Howard (n 212) 82–101; Andrew Leigh and Tirta Susilo, 'Is Voting Skin-Deep? Estimating the Effect of Candidate Ballot Photographs on Election Outcomes' (2009) 30 *Journal of Economic Psychology* 61, 61–70; Murphy (n 112) 187–188.
[219] Andrew Markus, *Australian Race Relations, 1788–1993* (Allen & Unwin, 1994) 118; John Chesterman and Brian Galligan, *Citizens without Rights* (Cambridge University Press, 1998) 13; G. Stokes, 'Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Political Thought,' in Geoffrey Stokes, *The Politics of Identity in Australia* (Cambridge: Cambridge University Press, 1997) 158.

similar option for Aboriginal Australians as a means of providing a sense of political and cultural autonomy for Aboriginal people enrolling to vote at federal elections. Such measures can be used to determine where and when electoral boundaries need to be adjusted to ensure proportionality of Aboriginal voting and, secondly, it can determine whether designated seats might be feasible for Aboriginal candidates. These types of measures form the foundation for analysis in this thesis with a goal of assessing the extent to which they might provide a sense of political inclusivity and empowerment for Aboriginal Australians and, in turn, support increased numbers of their representation in federal parliament and politics.

Lastly, this thesis examines, in light of the contemporary political debates in Australia calling for the constitutional entrenchment of a Makarrata Treaty Commission and Voice to Parliament bodies, whether the design of such bodies could benefit from consideration of similar bodies already established in Canada and New Zealand.

Ultimately, this thesis provides additional contextual and electoral contributions to Aboriginal calls for and debates surrounding pathways towards Aboriginal constitutional recognition and political empowerment through self-determination and political equality.[220]

[220] *Final Report of the Referendum Council* (Commonwealth of Australia, 2018).

CHAPTER 2
INDIGENOUS POLITICAL PARTICIPATION WITHIN AUSTRALIA

> Since the 1967 referendum, Australia has been living a lie. It has patted itself on the back as a fair country, one that treats its citizens equally and, especially, protects the vulnerable.
>
> Don't get me wrong. I am proud to have helped to secure the 'Yes' vote that recognised us as citizens and more than mere flora and fauna. It was important. But it also pains me to know that the constitution still contains a potentially discriminatory power, which can be used by the commonwealth against our people or, indeed, any other race…[1]

I. INTRODUCTION

Research conducted from the Australian Electoral Commission in 2016 suggests that approximately 58 per cent of Indigenous Australians (both Aboriginal and Torres Strait Islander people) were enrolled to vote. However, this was viewed as a generous estimate of Indigenous voter engagement with a more realistic enrolment figure perceived to be at 50 per cent. Further, a private assessment conducted by Indigenous leaders, non-government and government agencies found that approximately 25 – 30 per cent of Indigenous Australians who are enrolled, actually cast a formal vote.[2] These figures are indicative of the broader systemic challenges facing Indigenous political participation in Australia.

In addition to a lack of Indigenous voter enrolment and voter participation in elections, there has also been only eight Indigenous Australians that have been successfully elected into the national parliament since its establishment. This chapter recognises that a citizen's political participation exercised through voting and political candidacy are fundamental to self-determination. Australia, therefore, has a responsibility to formally recognise and respect those rights.[3]

---

[1] Lowitja O'Donoghue, Speech at opening of the National Congress of Australia's First People (8 June 2011).
[2] Paul Daley, 'Only 58% of Indigenous Australians are registered to vote. We should be asking why, *the Guardian* (30 June 2016) <https://www.theguardian.com/commentisfree/2016/jun/30/only-58-of-indigenous-australians-are-registered-to-vote-we-should-be-asking-why>.
[3] Will Sanders, *Towards an Indigenous Order of Australian Government* (Centre for Aboriginal Policy Research, 2002) 1; Joshua Castellino and Jeremie Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 *Macquarie Law Journal* 155–178; Sarah Maddison, 'Indigenous Autonomy Matters: What's Wrong With the Australian Government's 'Intervention' in Aboriginal Communities' (2008) 14(1) *Australian Journal of Human Rights* 48.

This chapter identifies that despite Australia's representative democratic system of governance, it often lacks consideration in its electoral laws, policies and processes of Indigenous citizens' experience of limitations on their civil rights as a result of colonisation.[4] The absence of consideration of these experiences inhibits the full expression of self-determination through political participation.

The next part of this chapter defines the right and concept of universal suffrage according to voting rights acknowledged within international standards and how they are fundamental to representative democracy in general terms. Australia's representative democracy initially limited universal suffrage understood at an international level, to only providing access to voting rights for political elections to wealthy males. Thus, suffrage was used as a means of limiting the representative element of Australia's democratic regime to only wealthy males to maintain their political power, control and wealth within society. This chapter shows how representative democracy was extended to include poorer males, Indigenous Australians and women in the right of suffrage and its exercise through voting at political elections.[5]

Part III highlights key historical contexts of Australian political participation through consideration of the Westminster system introduced in Australia. Further, this part considers Australia's independence at federation from Britain, and how that has impacted the Australian franchise.

This chapter then considers the role of Australia's representative government within the constitutional framework that regulates its political system. This analysis is designed to test the adherence of the Australian system to principles of proportionality and responsible government that are central to its institutions of governance.

From there this chapter examines the historical development of the Commonwealth franchise and qualification standards of voting participation and candidacy representation under the *Commonwealth Electoral Act 1918*. It draws on the experience of Aboriginal Australians to demonstrate a limited version of accessibility to the franchise compared to non-Indigenous citizens.

This chapter shows how Aboriginal Australians are more vulnerable than non-Indigenous Australians to be subject to the Commonwealth disqualification of prisoners, the 'unsound mind'

---

[4] *Universal Declaration on Human Rights*, UN GA Dec (Paris: 10 December 1948) art 21.
[5] Adam Przeworski, 'Conquered or Granted? A History of Suffrage Extensions' (2009) 39(2) *British Journal of Political Science* 291; Patricia Grimshaw, 'Settler Anxieties, Indigenous Peoples, and Women's Suffrage in the Colonies of Australia, New Zealand, and Hawai'i, 1888 to 1902' (2000) 69(4) *Pacific Historical Review* 556; Marilyn Lake, 'The Meanings of the Self in Claims for Self-Government: Re-Claiming Citizenship for Women and Indigenous People in Australia' (1996) 14(1) *Law in Context: A Socio-Legal Journal* 13.

disqualification, and further limitations on candidacy eligibility. Ultimately, this chapter contextualises how all electoral legislative barriers are, when applied to Aboriginal citizens, inconsiderate of their continued oppression since colonisation that contributes to their overrepresentation of financial poverty, mental health issues and incarceration. The resulting inequality forms substantive barriers to Indigenous Australians' political participation in the Australian electoral system.

Although this chapter recognises the array of measures that have been established over time by the Australian Electoral Commission which seek to enhance Indigenous political engagement, it also acknowledges the inadequate impact and outcomes those programs have.

II. UNIVERSAL SUFFRAGE AND THE AUSTRALIAN FRANCHISE

The term 'adult suffrage' appears within s 128 of the *Australian Constitution* whereby electors qualified to vote for the election of members of the House of Representatives are also qualified to decide upon constitutional alteration.[6] However, this reference was only intended to acknowledge that both men and women had the vote.[7] As a result, the extent of suffrage was still able to be adjusted and limited by electoral legislation to exclude certain citizens and not others from the right to vote in political elections.[8] This calls into question the meaning of 'universal suffrage' in the Australian context.

Prior to the establishment of the *Australian Constitution*, Australian colonies were guided by the electoral legislative pattern of the *Australian Constitutions Act 1842* (Imp). The Act restricted the franchise to persons who satisfied the elector property qualification and who were not attained or convicted of 'any treason, felony, or infamous offence within any part of Her Majesty's dominions'.[9] The only exception was for those who had received a free pardon, or one conditional upon not leaving the colony, or who had undergone the sentence or punishment, and were excluded

[6] *Commonwealth of Australia Constitution,* s 128; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [131] (Hayne J).
[7] Lake (n 5); Patricia Grimshaw and Katherine Ellinghaus, 'White women, Aboriginal women and the vote in Western Australia' (1999) 19 *Studies in Western Australian History* 1.
[8] Reuven Ziegler, 'Legal Outlier, Again – U.S. Felon Suffrage: Comparative and International Human Rights Perspectives' (Summer 2011) 29(2) *Boston University International Law Journal* 211.
[9] *New South Wales Constitution Act 1842* (UK); John Waugh, *The Rules: An Introduction to the Australian Constitutions* (Melbourne University Press, 1996); *Events in Australian Electoral History* (Australian Electoral Commission, 2016) <https://aec.gov.au/Elections/Australian_Electoral_History/reform.htm>.

from those electoral disqualifications.[10] The franchise standards then were based on standards of the United Kingdom which favoured white adult males.[11]

At Federation, the elector property qualification to vote was altered or abandoned by states[12] but adult suffrage remained limited and it differed from state to state. Adult suffrage in South Australia and Western Australia, for example, remained relatively unfettered.[13] However, in other states, it was limited to only males.[14] New South Wales and Victoria both substantially maintained the elector disqualification for 'treason, felony or infamous offence' that had been contained within the *Australian Constitutions Act 1842*.[15] More recently, at a federal level, *some* prisoners are disenfranchised where they are serving lengthy terms of imprisonment without distinction as to their history or the nature and characteristics of their crime, as seen in *Roach v Electoral Commissioner*.[16]

Suffrage is an informative indicator of the proportion of the adult population who have the right to vote in their countries' political elections.[17] In that context, suffrage is important for not only providing a minimal standard of representative democracy within political regimes that hold political elections, but can also be used as a means of predicting voter turnout statistics for political

[10] *The Electoral Code* 1896 (SA); *Elections Act 1885* (Qld); *Constitution Act 1889* (WA); *The Constitution Act 1855* (Tas); *Roach v Electoral Commissioner* (2007) 233 CLR 162, [134] (Hayne J).
[11] With the exception to Queensland upper house elections which was limited to landholders. See *Rowe and Another v Electoral Commissioner and Another* (2010) 243 CLR 1 [301]; *Elections Act 1885* (Qld), s 6.
[12] *Elections Act 1885* (Qld), s 6; *Constitution Amendment Act (No. 2) 1896* (Tas), ss 3–5; *Constitution Acts Amendment Act 1899* (WA), s 15.
[13] Jennifer Norberry and George Williams, 'Voters and the Franchise: The Federal Story' (Research Paper no.17 2001–02, 28 May 2002); *Electoral Act 1907* (WA), s 17; R. Bennett, 'Candidates, Members and the Constitution' (Research Paper, Department of the Parliamentary Library, 2002); *Australasian Federal Convention Debates*, Adelaide, 1897, 715; *Constitutional Amendment (Adult Suffrage) Act 1894* (SA).
[14] For example, it was not until NSW passed the *Women's Franchise Act 1902* (NSW) that women in NSW could enroll and vote at NSW elections; the Tasmanian Government changed the word 'man' to 'person' with the *Constitution Amendment Act 1903* (3 Edw VII, No. 17) (Tas); The Victorian Government passed the *Adult Suffrage Act 1908* (Vic) which allowed only non-Indigenous women to vote at Victorian elections; The Queensland Government passed the *Elections Act Amendment Act 1905* (Qld) that allowed women to vote but not stand for election at Queensland elections.
[15] *New South Wales Constitution Act 1842* (UK); *Victoria Constitution Act 1855* (UK).
[16] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [131] (Hayne J).
[17] *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 [36]; Pamela Paxton et al, 'A Half-Century of Suffrage: New Data and a Comparative Analysis' (2003) 38(1) *Studies in Comparative International Development* 94; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [8].

elections.[18] That data is particularly useful for informing electoral law reform, particularly when there are portions of certain citizens who remain excluded from the franchise.[19]

In general terms, universal suffrage should only be limited if there are substantial reasons to justify the limitation of the franchise of adult citizens. Thus, all adult citizens should have access to exercising their right to vote at political elections if there are no substantial reasons present to justify a restriction of their access to that right.

At an international level, the heart of the problem of access to the franchise lies with the applicability of each country's domestic electoral disqualifications. Often this is found within a country's disqualification of the right to vote at political elections of citizens sentenced to a term of imprisonment.[20] Such disqualifications will generally also limit their eligibility to run as a political candidate.[21]

The United Nation standards to which Australia is a party oblige Australia to broadly seek to encourage its citizens to politically engage with domestic democratic processes. For instance, article 25 of the ICCPR[22] provides that every citizen shall have the right and opportunity to politically participate, without any of the distinctions mentioned in article 2 (such as race, colour, sex, language, religion etc.).[23] Further, the political rights of citizens should not be limited by unreasonable restrictions and should allow all citizens to take part in the conduct of public affairs, directly or through freely chosen representatives.[24] Article 25 also provides that citizens have the right without distinction to vote and to be elected at genuine periodic elections which shall be by

[18] Robert W. Jackman, 'Political Institutions and Voter Turnout in the Industrial Democracies' (1987) 81 *American Political Science Review* 405, 405–423; Paxton, ibid, 94. See generally, Cutright Phillips and James A. Wiley, 'Modernization and Political Representation: 1927–1966' (1969) 5(2) *Studies in Comparative International Development* 24, 24–40; Zehra F. Arat, *Democracy and Human Rights in Developing Countries* (Lynne Reiner Publishers, 1991); Kenneth A. Bollen, *Cross-National Indicators of Liberal Democracy 1950 to 1990* (Codebook, University of North Carolina, 1998).
[19] Paxton, ibid; H. Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30(1) *Sydney Law Review* 137; Chris Aulich, 'From Citizen Participation to Participatory Governance in Australian Local Government' (2009) (2) *Commonwealth Journal of Local Governance* 48; Graeme Orr, *Access to Electoral Rights Australia* (Country Report 2017/01, March 2017) 4–9.
[20] In the Australian context, for example, see the *Commonwealth Electoral Act 1918*, ss 93 (8AA); *Roach v Electoral Commissioner* (2007) 233 CLR 162; Orr, ibid, 6.
[21] *Constitution of the Commonwealth of Australia*.
[22] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) (ratified in Australia on 13 Aug 1980).
[23] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) art 2.
[24] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) art 25 (a).

universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.[25]

It is widely recognised that the foundation of representative democracy includes the right to political participation and that this right will only be limited under reasonable and objective circumstances.[26] Some democratic states (for example, the United Kingdom, the United States, Finland and New Zealand to name just a few) tend to disenfranchise citizens from the right to vote where sentences are lengthy and crimes committed are serious in nature.[27]

The argument or justification for disenfranchising prisoners from voting at elections is that in order to enhance civil responsibility and respect for the rule of law, citizens who have breached basic rules of society forfeit their right to have a say in the way those rules are made whilst they are serving their term of imprisonment.[28]

However, countries as diverse as Canada, Czech Republic, Denmark, France, Israel, Japan, Kenya, Netherlands, Norway, Peru, Poland, Romania, Sweden and Zimbabw however, do not disenfranchise prisoners from voting at elections.[29]

Whilst some democratic states include such limitations within electoral laws and policies, they can be contradictory to the objectives of article 10 of the ICCPR. Under art 10 (3), 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.[30] Punitive measures placed upon a prisoner in addition to their sentence,

---

[25] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) art 25 (b); John Rawls, *A Theory of Justice* (Harvard University Press, 2005) 221–22; Pamela S. Karlan, 'Convictions and Doubts: Retribution, Representation and the Debate over Felon Disenfranchisement' (2004) 56 *Stanford Law Review* 1147, 1169; G. Robins, 'The Rights of Prisoners to Vote: A Review of Prison Disenfranchisement in New Zealand' (2006) 4 *New Zealand Journal of Public and International Law* 165, 190.

[26] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; David Cingranelli and Mikhail Filippov, 'Electoral Rules and Incentives to Protect Human Rights' (2010) 72 (1) *The Journal of Politics* 244; John Stuart Mill, *Considerations on Representative Government* (Cambridge University Press, 1861) 42; *Roach v Electoral Commissioner* (2007) 233 CLR 162; Adrian Brooks, 'A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise' (1993) 12 *University of Tasmania Law Review* 208; Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125, 144–5; *King v Jones* (1972) 128 CLR 221, 230 (Barwick CJ).

[27] See, for example, *Department of Corrections Census of Prison Inmates and Home Detainees 2003* (Department of Corrections, Wellington, 2004) 23; *Electoral Act 1993* (NZ) s 80 (d); *Commonwealth Electoral Act 1918*, s 93 (8AA); Jeff Manza and Christopher Uggen, 'Punishment and Democracy: Disenfranchisement of Non-incarcerated Felons in the United States' (2004) 2(3) *Perspectives on Politics* 491; *Constitution of the United States 1787,* 14th Amendment (2).

[28] *Hirst v Attorney General* [2001] EWHC Admin 239 [40].

[29] Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Human Rights Watch and The Sentencing Project, 1998) 17.

[30] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) art 10 (3).

such as their political disenfranchisement whilst incarcerated, limit their pathway to social rehabilitation through engaging with the electoral system.[31] Prisoners are already physically excluded from society whilst they are incarcerated.

III. AUSTRALIAN HISTORY OF POLITICAL PARTICIPATION

Despite ostensible claims to universal suffrage, political participation rights are not afforded to Australian citizens equally. A primary issue stems from the way in which electoral processes were drafted into the *Australian Constitution* at federation. Despite its underlying objectives to adhere to principles of representative democracy, proportionality and equality,[32] the *Australian Constitution* was created in a way that contradicted those principles, excluding a portion of the nation's stakeholders. It is well known that only some interests were represented during the Federal Convention debates and not others. For instance, women and Aboriginal Australians were excluded from providing input during the drafting of the Constitution. In fact, the only people who were included during that process were non-Indigenous male delegates from each colony except Queensland.[33] It might be said that the drafting of the Constitution was itself a process of exclusion from political participation.

At the 1897 Convention in Adelaide, the draft proposal of s 30[34] and its wording 'until the Parliament otherwise provides'[35] attracted no serious debate as to whether that legislative power of enfranchisement should rest with the Commonwealth Parliament rather than state parliaments.[36] Instead, the debate at the Adelaide Convention focused on women's suffrage. Ultimately, this was left for the new federal parliament to decide.[37] The issue of women's suffrage was subsequently resolved by s 3 of the *Commonwealth Franchise Act 1902*:[38] '[s]ubject to the disqualifications hereafter set out, *all persons* not under twenty-one years of age *whether male or female married or*

[31] *Minister of Home Affairs v National Institution for Crime Prevention and the Re-Integration of Offenders (NICRO) and others* [2004] 5 BCLR 445 (CC); *Hirst (No. 2) (application no. 74025/01)* (2005) ECHR 74025/01 (Grand Chamber).
[32] B. F. Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12(2) *University of Tasmania Law Review* 266; *Australian Capital Television Ltd (No. 2) v Commonwealth* (1992) 177 CLR 106; *Nationwide News P/L v Wills* (1992) 177 CLR 1.
[33] Helen Irving, *Five Things to Know About the Australian Constitution* (Cambridge University Press, 2004) 1; Sarah Maddison, 'White Parliament, Black Politics: The Dilemmas of Indigenous Parliamentary Representation' (2010) 45 *Australian Journal of Political Science* 663.
[34] *Official Record of the Debates of the Australasian Federal Convention* (Adelaide, 15 April 1897) [715].
[35] *Official Record of the Debates*, ibid; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [123] (Hayne J).
[36] *Official Record of the Debates*, ibid [715]–[732]; Australian Senate, *Parliamentary Debates (Hansard)* (9 April 1902) [11450]–[11502]; Australian House of Representatives, *Parliamentary Debates (Hansard)* (23 April 1902) [11929]–[11953].
[37] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [124] (Hayne J).
[38] *Commonwealth Franchise Act 1902* (Cth), s 3.

unmarried' who met criteria of residence, being a subject of the King, and being enrolled, were entitled to vote.[39]

The franchise still at that point was not universal given s 4 of the *Commonwealth Franchise Act 1902* which disqualified some citizens and not others in terms of voting as electors at political elections. Section 4 disqualified persons of unsound mind, attainted of treason, or who had been convicted of an offence punishable by a sentence of imprisonment for one year or longer. In addition, it also disqualified Aboriginal natives of Australia, Asia, Africa or the Islands of the Pacific except for New Zealand. The only exception to that disqualification is if the 'native person' in question was entitled to have their name on an Electoral Roll and to vote prior to the *Commonwealth Franchise Act 1902* and in accordance with s 41 of the Constitution.[40]

The justification used for excluding Aboriginal people from the franchise was based on a racially discriminatory premise that wrongfully assumed Aboriginal people lacked the capacity to understand any political question, or to vote with intelligence. The Australian government's administrative construct of Aboriginal identity through Commonwealth electoral legislation was based on Aboriginal blood strains that singled Aboriginal people out for discriminatory legislative treatment to their detriment – that is, to politically disenfranchise them from the right to vote.[41]

In addition, the majority Anglo-Celtic population at the time was significantly guided and influenced by internationally recognised racist philosophies which maintained white privilege and devalued those that differed from 'white' Caucasian appearance.[42] The exclusion of Aboriginal Australians both from the drafting process and from the text of the Constitution itself was a deliberate act by constitutional drafters and political elites to maintain their privilege and standing economically, politically and culturally. Aboriginal Australians were excluded from being consulted during the drafting phases of Australia's Constitution because they were considered a 'dying race'[43]

[39] *Commonwealth Franchise Act 1902* (Cth), s 3 (emphasis added).
[40] *Commonwealth Electoral Act 1902,* s 4.
[41] John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 (1) *Australian History* 7; Jennifer Norberry and George Williams, *Voters and the Franchise: The Federal Story* (Research Paper no.17 2001-02, 2002) [30].
[42] John Immerwahr, 'Hume's Revised Racism' (1992) 53(3) *Journal of the History of Ideas* 481; George M. Fredrickson, *Racism: A Short History* (Princeton University Press, 2002) 105.
[43] John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 10; Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75 *Oceania* 127; Keith Windschuttle, 'The Fabrication of Aboriginal History' (2003) 15(1) *The Sydney Papers* 21.

and therefore it was pointless to involve them. They were depicted as uncivilised barbaric beings unworthy of being counted as people or having rights worth protecting formally.[44]

The absence of Indigenous Australians from constitutional processes affected Aboriginal peoples' political standing, their inclusion within the Australian polity, and the respect given to them culturally by the Australian Government. Aboriginal rights were only mentioned in the *Australian Constitution* to their detriment – not to their benefit or protection.[45]

Following the Convention debates, in the 1899 referendum,[46] both non-Indigenous women and Aboriginal Australians were prevented under colony electoral laws from voting.[47]

Thus, it is clear that even in the lead up to Australia becoming a federation, Aboriginal Australians experienced significant limitations to their civil rights.[48] The exclusion of Aboriginal Australians from the colonies' own establishment of a national government set the foundation for the Australian electoral system.[49] Consequently, post-federation Aboriginal Australians experienced political underrepresentation and exclusion at the federal level[50] culminating, in 1902, with the introduction of the *Commonwealth Franchise Act 1902* that excluded 'native people' of Australia and other countries from voting in Australian federal elections.[51]

The Barton government in power at the time justified the passage of such racially discriminatory, disenfranchising legislation as part of its rollout of the 'White Australia' policy.[52] The 'White Australia' policy movement informed laws and policies that racially discriminated against people of colour, including Aboriginal people in Australia and, in doing so, it consolidated a national racial

---

[44] Michael Coper and George Williams, *Power, Parliament and the People* (Federation Press, 1997) 1; Andrew Markus, *Australian Race Relations 1788–1993* (Allen & Unwin, 1994) 111; John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) 12, 18.
[45] Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 1; G. Stokes, 'Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Political Thought,' in Geoffrey Stokes, *The Politics of Identity in Australia* (Cambridge University Press, 1997) 158.
[46] Western Australia participated the following year: *Irving* (n 33) 1.
[47] *Women and the Right to Vote in Australia* (Australian Electoral Commission, 2015) <https://aec.gov.au/Elections/Australian_Electoral_History/wright.htm>; *Electoral Milestones for Indigenous Australians* (Australian Electoral Commission, 2017) <https://aec.gov.au/indigenous/milestones.htm>.
[48] Colin Wayne Leach, Aarti Iyer and Anne Pedersen, 'Anger and Guilt About Ingroup Advantage Explain the Willingness for Political Action' (2006) 32(9) *Personality and Social Psychology Bulletin* 1232.
[49] Michael Dodson, 'Citizenship in Australia: An Indigenous Perspective' (1997) 22 *Alternative Law Journal* 57.
[50] Leach (n 48).
[51] *Commonwealth Franchise Act 1902*, s 4.
[52] Irving (n 33) 33; H. I. London, 'Liberalising the White Australia Policy: Integration, Assimilation or Cultural Pluralism?' (1967) 21(3) *Australian Outlook* 338-346; Gwenda Tavan, *The Long, Slow Death of White Australia* (Scribe Publications, 2005).

identity designed to exclude Aboriginal Australians through political, social, economic and cultural mechanisms.[53]

The movement was a means employed by the Australian Government to legitimise racial discrimination against people of colour and as a result placed the interests of Anglo-Celtic non-Indigenous Australians above the interests of Aboriginal Australians.[54] Despite Aboriginal Australians being classified as British subjects under the Crown post-colonisation, they held few civil rights and limited citizenship – including political participation rights – compared to Anglo-Celtic Australians.[55]

For many years during the 'White Australia' policy era, Australian states and territories were able to exclude Aboriginal children from the mainstream education system and place limits on their level of education received. Those actions have significantly contributed to the imbalance of Aboriginal educational levels compared to non-Indigenous Australians.[56]

Further, the unequal political standing of Aboriginal Australians, born out of colonisation and post-federation White Australia policy exclusions, have made it exceptionally difficult for Aboriginal Australians to overcome such obstacles by politically participating as a people.[57] Maintaining the circumstances of Aboriginal people's lives have stemmed at least in part from the entrenched electoral process and political institutions within Australia's constitutional framework. To change the system, one must have the ability within it to exercise the franchise and elect members to represent their interests in both the upper and lower houses of the Commonwealth Parliament.

---

[53] Geoffrey Stokes, 'The "Australian Settlement" and Australian Political Thought' (2004) 39(1) *Australian Journal of Political Science* 8–9; *Commonwealth Franchise Act 1902*, s 4; *Aborigines Act 1890* (Vic); *Aborigines Act 1905* (WA); *Aborigines Act 1911* (SA); *Aborigines Act 1934* (SA); *Aborigines Protection Act 1886* (WA); *Aboriginal Protections Act 1909* (NSW); *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginals Ordinance 1911* (Cth); *Aboriginals Ordinance 1918* (Cth).

[54] Anthony Moran, 'White Australia, Settler Nationalism and Aboriginal Assimilation' (2005) 51(2) *Australian Journal of Politics and History* 169; C. D. Rowley, *Outcasts in White Australia* (Australian National University Press, 1971) 34–5; Russell McGregor, 'Wards, Words and Citizens: A. P. Elkin and Paul Hasluck on Assimilation' (June 1999) 69(4) *Oceania* 243–59.

[55] Stokes (n 53) 10; Julia Martínez, 'Plural Australia: Aboriginal and Asian labour in tropical white Australia, Darwin, 1911–1940' (Doctor of Philosophy thesis, Department of History and Politics, University of Wollongong, 1999) 9 <https://ro.uow.edu.au/theses/1437>.

[56] Quentin Beresford, Gary Partington and Graeme Gower, *Reform and Resistance in Aboriginal Education* (UWA Publishing, 2012) 86; A. R. Welch, 'Aboriginal Education as Internal Colonialism: The Schooling of an Indigenous Minority in Australia' (1988) 24(2) *Comparative Education*; Jan Gray and Quentin Beresford, 'A "Formidable Challenge": Australia's Quest for Equity in Indigenous Education' (2008) 52(2) *Australian Journal of Education* 197–8.

[57] Steven Lukes, *Power* (Palgrave Macmillan Ltd., 2nd ed, 2004); C. D. Rowley, *Outcasts in White Australia* (ANU Press, 1971) 383; Gwenda Tavan, 'The Dismantling of the White Australia Policy: Elite Conspiracy or Will of the Australian People?' (2004) 39(1) *Australian Journal of Political Science* 109.

Despite being citizens of Australia, the result of Aboriginal Australians' limited membership of the federal body politic has limited their capacity as a people to change the system.[58]

Barriers inhibiting Aboriginal people's full access to political rights, such as voting and candidacy representation, were maintained in the *Commonwealth Franchise Act 1902*. By 1918 the Act was repealed by s 3 of the *Commonwealth Electoral Act 1918* which reformed elector qualifications and disqualifications[59] but without reforming disenfranchisement of Aboriginal Australians because of their race. Instead, s 39 of the *Commonwealth Electoral Act 1918* replaced its predecessor, s 4 of the *Commonwealth Franchise Act 1902*.[60]

The *Commonwealth Electoral Act 1918* was reformed in 1949 to the extent that it recognised Aboriginal voting rights at federal elections if they satisfied s 41 of the *Australian Constitution*.[61] However, that was only a tentative step towards reform and recognition of Aboriginal voting rights for Commonwealth elections. Full Aboriginal voting rights for Commonwealth elections did not occur until s 39 was wholly removed in 1962 with further reform to the *Commonwealth Electoral Act 1918*.[62]

Despite the voting exclusion being removed, Aboriginal and Torres Strait Islander people were still excluded from the compulsory voting obligation for Commonwealth elections until 1984.[63] Legislators at the time justified the exclusion of the compulsory obligation to vote for Aboriginal and Torres Strait Islander people to avoid exposing those who chose to register but not exercise their right to vote, to penalties for not doing so. However, at the same time, the Act until 1983 also made it an offence to encourage Aboriginal and Torres Strait Islander people to vote.[64]

[58] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [83] (Gummow, Kirby and Crennan JJ).
[59] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [73] (Gummow, Kirby and Crennan JJ).
[60] *Commonwealth Electoral Act 1918,* s 39; *Commonwealth Franchise Act 1902*, s 4.
[61] *Commonwealth Electoral Act 1949*, s 3.
[62] *Commonwealth Electoral Act 1962*, s 2. Some limited provision in favour of "aboriginal natives of Australia" had been made by s 3 of the *Commonwealth Electoral Act 1949* (Cth).
[63] Marcia Langton, 'The Nations of Australia' (2002) 4(1) *Balayi: Culture Law and Colonialism* 29; Nicholas Aroney 'Representative Democracy Eclipsed? The Langer, Muldowney and McGinty Decisions' (1996) 19 *University of Queensland Law Journal* 75, 98.
[64] Aroney ibid.

IV. REPRESENTATIVE GOVERNMENT IN AUSTRALIA

Australia's electoral regime is based on Great Britain's Westminster model of governance[65] given the *Australian Constitution* refers to the Queen as the head of State with a federal indissoluble Commonwealth Parliament, Executive and Judicature.[66]

Executive power is vested in the Queen and is exercisable by the Governor-General on the advice of the Federal Executive.[67] Ultimately, this structure aims to adhere to principles of responsible government through keeping, in theory, the Executive, Legislature and Judicature separate from one another under the separation of powers doctrine.[68] Thus, to achieve responsible government, the Executive is accountable and responsible to the Legislature and through the Legislature, to the electorate.[69]

The Westminster system's promotion of representative democracy sought to theoretically ensure all citizens are politically heard through exercising their rights to political participation. However, as discussed in the previous part, despite the Australian electoral system affording itself the title of representative democracy, it has not in practice included all citizens equally. While the previous part examined the extent of suffrage afforded by the interaction between the Constitution and electoral provisions, this part focuses on the relationship between suffrage and representative democracy through constitutional provisions themselves.

The *Australian Constitution* formally recognises the principle of responsible government and maintains that parliamentary representatives be 'directly chosen by the people'.[70] Further, it provides that those representatives must be accountable to their electors in exercising their powers as members and representing their constituents' rights and interests.[71] In light of the capacity of

---

[65] Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009) 1; The Preamble is part of the *Commonwealth of Australia Constitution Act 1900* (UK), which in s 9 sets out the Constitution of the Commonwealth of Australia, itself consisting of 128 sections.
[66] Megan A. Winder, 'Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law that Australia Should Address' (2010) 19 *Pacific Rim Law and Policy Journal* 394; John Kincaid and Alan Tarr, *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's Press, 2005) 30; Brian Galligan, 'Federalism and the Constitution' in Ian McAllister, Steve Dowrick and Riaz Hassan, *The Cambridge Handbook of Social Sciences in Australia* (Cambridge University Press, 2003) 235–236.
[67] *Constitution of the Commonwealth of Australia,* ss 61, 62.
[68] *Australian Capital Television Pty Ltd and Others v Commonwealth of Australia* (No. 2) (1992) 177 CLR 106, 631; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[69] *Australian Capital Television Pty Ltd and Others v Commonwealth of Australia* (No. 2) (1992) 177 CLR 106, 631; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[70] *Constitution of the Commonwealth of Australia,* ch 1; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [112] (Gummow, Kirby, Crennan JJ).
[71] J. A. G. Griffith, Michael Ryle and M. A. J. Wheeler-Booth, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 1989) 6; Nadia Urbinati, 'Representative Democracy and Its Critics' [2010] *The Future of Representative*

electoral law to disenfranchise sections of the community, the question is how the State can meet the obligations inherent in responsible and representative government.

Gummow and Hayne JJ observed in the case of *Mulholland v Australian Electoral Commission*[72] that the words 'until the Parliament otherwise provides' implies that representative government is not a static institution.[73] Instead, as Stephen J held in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* ('*McKinlay'*),[74] representative democracy is descriptive of a whole spectrum of political institutions. Those institutions differ from each other in countless respects yet still seek to adhere to representative democracy in ensuring numerical equality of electors is present within the electorates.[75] In addition, the High Court noted in *McKinlay* that representative democracy in its purest form requires adult suffrage free from discrimination on the grounds of race, sex, property or educational qualification.[76]

Representative democracy is in theory an electoral system that ought to connect all citizens equally to accessing political rights and, in turn, contributing to decision-making through voting. Voting is important because constituents must elect candidates from their electorate to become their member representatives in parliament. A representative democratic regime should also ensure member representative proportionality is present and reflective of the system's differing citizen interests.[77]

A. Voting and Candidature

Stephen J held in *McKinlay*[78] that the parliament ought to legislate so that electoral proportionality amongst members of the several Commonwealth states and territories is present.[79] An elected Senator must obtain a number of votes equal to or in excess of, the required quota necessary which is based on the latest Commonwealth population statistics. Excess quota votes for successful candidates are then distributed to their electors ranking preferences until all vacancies are filled by

Democracy 2; Paul Mitchell, 'Voters and Their Representatives: Electoral Institutions and Delegation in Parliamentary Democracies' (2000) 37 *European Journal of Political Research* 337.
[72] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.
[73] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 237 [155]–[156].
[74] 1975) 135 CLR 1.
[75] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, [56]–[57].
[76] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, [56]–[57].
[77] Richard S. Katz, *Democracy and Elections* (Oxford University Press, 1997) 28; *Aroney* (n 65) 98; Harry Brighouse and Marc Fleurbaey, 'Democracy and Proportionality' (2010) 18(2) *The Journal of Political Philosophy* 138.
[78] (1975) 135 CLR 1.
[79] *Constitution of the Commonwealth of Australia,* s 24.

candidates obtaining quotas of the total votes. The Commonwealth Parliament decides when and where those elections are to occur.[80]

This system has been held to be the appropriate calculation to achieve political proportionality within the Australian Senate to ensure Senators are elected by a proportionate system of voting reflective of the votes of the electors as opposed to the majority vote system used for the House of Representative.[81] By doing so, smaller parties and independants have a greater opportunity to be elected and form part of the composition of the Senate and, be part of the review and check of the government of the day.

To be eligible to run as a candidate for membership of the Commonwealth Parliament of Australia, persons must firstly meet Constitutional eligibility standards for the Commonwealth House of Representatives.[82]

For persons to qualify as members for the Commonwealth House of Representatives, according to the *Australian Constitution*, they must have attained the age of 21 years and must be already eligible to or already entitled to enrol to vote at federal elections.[83] In terms of citizenship, those persons must have also been residents of Australia for three years up to the time at which they are chosen.[84]

In the alternative, those persons must be a subject of the Queen including 'natural-born' persons or persons that have been naturalised under a law of the United Kingdom, of a colony that has become a state, or of the Commonwealth for at least five years.[85]

The objective behind the framers of the Constitution when creating the role and powers of the Senate was to ensure it served to protect the interests of the less populous states in the federal parliament.[86] The Constitution does so on a generalised scale by providing equal representation of those states.[87] This is turn requires there be six senators for each original state unless the parliament legislates and provides otherwise for each state.[88]

---

[80] *Constitution of the Commonwealth of Australia,* s 9.
[81] *Constitution of the Commonwealth of Australia,* s 24 (1); *Commonwealth Census and Statistics Act 1905*.
[82] *Constitution of the Commonwealth of Australia,* s 8.
[83] *Constitution of the Commonwealth of Australia,* s 34 (1).
[84] *Constitution of the Commonwealth of Australia,* s 34 (1).
[85] *Constitution of the Commonwealth of Australia,* s 34 (2).
[86] *Convention Debates*, Adelaide (1897), 303 (Clarke), 650; Aroney (n 65) 215.
[87] *Senate Brief No. 10 – The Role of the Senate* (Aph.gov.au, 2017) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief10>.
[88] *Constitution of the Commonwealth of Australia,* s 7.

The Senate's role and powers are contained within Part II of the Constitution, which provides that the Senate be comprised of senators for each state, directly chosen by the people unless parliament provides otherwise.[89] The Senate is also counted as one electorate.[90] The House of Representatives' role and powers within Part III of the *Australian Constitution* provides that (as practicably as possible) the number of members comprising the House of Representatives be twice the number of members comprising the Senate.[91] Members of the House of Representatives are also directly chosen by the people.[92]

Section 41 of the *Australian Constitution* deals with issues relating to both Houses of the Parliament. It seeks to ensure adults who have the right to vote in the Lower House of their state parliament are also enfranchised to exercise their right to vote at Commonwealth elections.[93] This means that a person who has the right to vote at state elections or was entitled to enrol to vote at state elections prior to 1901 are also entitled to enrol and to vote at Commonwealth elections.

However, if a person did not acquire the right to enrol and to vote at their state election prior to 1901, they were not then also entitled to enrol and to vote at Commonwealth elections. The passing of the *Commonwealth Franchise Act 1902* changed that disqualification of persons from enrolling and voting at Commonwealth elections if they had not acquired the right to vote at state elections.[94] This was, of course, subject to electoral qualifiers and disqualifiers within the *Australian Constitution* (where a person must be an adult and a citizen/permanent resident of Australia)[95] and *Commonwealth Franchise Act 1902* (where a person must be of capacity and not sentenced to a term of imprisonment of a year or more).[96]

Section 41 does not, however, provide an express right to vote, nor does it provide a guarantee of adult suffrage.[97] However, it was noted by Murphy J in *R v Pearson; Ex parte Sipka* (1983)[98] that the right to vote is so precious it should not be read out of the Constitution by implication.[99]

---

[89] *Constitution of the Commonwealth of Australia,* Pt II.
[90] *Constitution of the Commonwealth of Australia,* s 7.
[91] *Constitution of the Commonwealth of Australia,* s 24.
[92] *Constitution of the Commonwealth of Australia,* Part III.
[93] *Constitution of the Commonwealth of Australia,* s 41 (i); Zappala, Gianni and Stephen Castles, *Citizenship and Immigration in Australia* (University of Wollongong, 1998) 298; Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 (2) *Sydney Law Review* 207; T. H. Marshall, *Class, Citizenship, and Social Development* (Doubleday, 1964) 30.
[94] Crowe and Stephenson, ibid, 210; *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 [264] (Gibbs CJ, Mason and Wilson JJ); 279 (Brennan, Deane and Dawson JJ).
[95] *Constitution of the Commonwealth of Australia,* s 41 (i).
[96] *Commonwealth Electoral Act 1902,* s 4.
[97] *R v Pearson; ex parte Sipka* (1983) 152 CLR 254, 12–21.
[98] 152 CLR 268.
[99] *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 12; Crowe and Stephenson (n 93) 213.

Therefore, every reasonable presumption and interpretation should be adopted that favours the right of people to participate in the elections of those who represent them.[100] In practice, this position has only been applied without restrictions to non-Indigenous Australians (with the exception of non-Indigenous women until the passing of the *Commonwealth Franchise Act 1902*).[101]

For Aboriginal Australians, proportionality within its constitutional sense is limited because it does not extend provisional consideration or articulation of their cultural constituency if they are to run as a political candidate to become a member of the Senate or House of Representatives. The assumption of proportionality is that society is homogenous; indeed this was the basis for excluding certain people and not others from the discussions of the Constitutional Conventions and their debates. Thus, Australian society has been built on the image of the white landed men who made it, which as a result limits the inclusivity of those left outside of the discussions during that process like Aboriginal people (and other minorities). Consequently, the system on the face of it looks like proportionality, but not everyone within it experiences the system that way.

This is an important factor of consideration given Aboriginal policy interests and objectives are likely to differ from the status quo of their electorate or their political party if they are not running as an independent. Jurisdictional proportionality in a post-colonial, politically disproportionate Australia for Aboriginal Australians, is not enough to adequately represent those cultural interests. There needs to be cultural proportionality given Australia's continued post-colonial issues with disenfranchisement of an Aboriginal population comprising less than 3 per cent, compared to the non-Indigenous majority.

The practical and lived day-to-day experiences of Aboriginal Australians as a distinct cultural identity are contrastingly different from the so-called 'mainstream' identity of non-Indigenous Australian citizens. As such, there must be some sort of legislative consideration that delivers support for and understanding of that.

Furthermore, Australia's current political climate has strayed considerably away from democratic norms based on democratic equality and fairness.[102] That shift affects the likelihood of Aboriginal

[100] *R v Pearson; Ex parte Sipka* (1983) 152 CLR 268.
[101] *Commonwealth Franchise Act 1902* (Cth), s 3; Pat Stretton and Christine Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise' (1993) 25 *Australian Historical Studies* 529; Megan A. Winder, 'Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law That Australia Should Address' (2010) *Pacific Rim Law and Policy Journal* 389.
[102] Gerry Stoker, Mark Evans and Max Halupka, 'Democracy 2025 Report No. 1: Trust and Democracy in Australia' (December 2018) 9; John Stuart Mill, *Considerations on Representative Government* (Cambridge University Press, 1861) 42; Philippe van Parijs, 'La Justice Et la Démocratie Sont-elles Incompatibles?' (1993) 31 *Revue Européenne des*

candidates elected into federal parliament,[103] which in turn affects Australia's ability to achieve proportionate political representation of its citizens. Despite the currently elected five Aboriginal federal candidates sitting within Australian federal parliament, the overall political representation of Aboriginal Australians is still lacking. The current representation of Aboriginal Australians should be increased so that there is more diversity of representation that reflects all differing Aboriginal wants and interests politically.

Aboriginal candidates must still be 'chosen by the people' of their electorate like their non-Indigenous counterparts.[104] Citizen interests within electorates are led by its majority because the entire Australian electoral system is based on a majority vote creation of leadership. Minority candidates must, therefore, appeal to the majority interests to be selected and then elected.

B. 'Directly chosen by the people'

Evidently, voting in elections for the parliament lies at the heart of Australia's representative democratic regime under the *Australian Constitution*.[105] As foreshadowed earlier, a key aspect of representation is how the electoral system deals with placing limitations upon 'universal suffrage'.[106] While this is largely the province of electoral law, these laws must adhere to the constitutional requirement that candidates are 'directly chosen by the people'. The right to vote is an implied right contained within ss 7 and 24 of the *Australian Constitution*, based on the requirement for members of parliament to be 'directly chosen by the people'.[107]

Constitutionally speaking, section 7 provides that the senators for each state within the Commonwealth Parliament are to be 'directly chosen by the people' of the state, voting, until the

---

Sciences Sociales 133, 133–149; Keith Dowding, Robert Goodin and Carole Pateman, *Justice and Democracy* (Cambridge University Press, 2004).

[103] Brian F. Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12(2) *University of Tasmania Law Review* 300; Alexander Reilly, 'Dedicated Seats in the Federal Parliament for Indigenous Australians: The Theoretical Case and its Practical Possibility' (2001) 2(1) *Balayi: Culture, Law and Colonialism* 73–103; John Chesterman, 'Chosen by the people? How Federal Parliamentary seats might be reserved for Indigenous Australians without changing the Constitution' (2006) 34 *Federal Law Review* 262; Brian Costar, ""Odious and Outmoded"? Race and Section 25 of the Constitution' in John Chesterman and David Philips (eds), *Selective Democracy: Race, Gender and the Australian Vote* (Circa Books, 2003) 93–4.

[104] *Constitution of the Commonwealth of Australia,* s24.

[105] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [81] (Gummow, Kirby and Crennan JJ).

[106] Michael Oakeshott, 'The Masses in Representative Democracy' in A. Hunold and R. Stevens, *Freedom and Serfdom: An Anthology of Western Thought* (Springer, 2013) 151; Anthony Gray, 'The Guaranteed Right to Vote in Australia' (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 178; A. Brooks, 'A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise' [1993] *University of Tasmania Law Review* 208–30; A. Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 144–5.

[107] *Constitution of the Commonwealth of Australia,* ss 7, 24; *Rowe v Electoral Commissioner* [2010] 243 CLR 1; *Roach v Electoral Commissioner* (2007) 233 CLR 162.

parliament otherwise provides, as one electorate.[108] Section 24, on the other hand, considers electoral proportionality. Section 24 provides that when s 25 adjustments are made to a state's representation within Commonwealth Parliament (the provision that deals with races disqualified from voting), those adjustments are proportionate to the number of seats that state has in the Commonwealth House of Representatives.[109] The total number of House of Representative members must be twice the number of Senators.[110]

Section 24, however, does not guarantee universal adult suffrage because adults can be excluded from voting if the parliament legislates to exclude them for 'substantial reasons'[111] The internationally recognised standard for the allowance of limitations being placed on universal suffrage within democratic regimes.[112] Accordingly, the words 'directly chosen by the people' according to Australian case law, are words of generality and must not be confused with words of universality.[113]

The nature and extent of exceptions that limit adult suffrage are important. Within the Australian context, the Constitution leaves it to parliament to define.[114] However, parliament's legislative power to do so, Australian common law standards have confirmed that this must be balanced with principles of representative democracy.[115]

Representative democracy and enfranchisement of citizens lie at the heart of political participation rights recognised within Australia's political regime. Thus, for parliament to disenfranchise a group of adult citizens from voting and politically participating within Australia's democratic regime, the case of *McGinty* confirmed it must do so for substantial reasons.[116] Substantial reasons must be weighed in with consistency of 'choice by the people' according to the High Court's finding in

---

[108] *Constitution of the Commonwealth of Australia,* s 7.
[109] George Nicholson, 'A racist constitution for a nation: a nation of racists?' (2000) 25(5) *Alternative Law Journal* 211 [3]; George Williams, 'Removing racism from Australia's Constitutional DNA' (2012) 37(3*) Alternative Law Journal* 151–2.
[110] *Constitution of the Commonwealth of Australia,* s 24.
[111] *McKinlay* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ), 68–9 (Murphy J); *McGinty* (1996) 186 CLR 140, 170 (Brennan CJ), 201 (Toohey J), 221–2 (Gaudron J), 286–7 (Gummow J); *Langer v Commonwealth* (1996) 186 CLR 302, 343 (McHugh J).
[112] Pamela Paxton, Kenneth A. Bollen, Deborah M. Lee and HyoJoung Kim, 'A Half-Century of Suffrage: New Data and a Comparative Analysis' (Spring, 2003) 38(1) *Studies in Comparative International Development* 93, 107–108; Avery Davis-Roberts and David J. Carroll, 'Using international law to assess elections' (2010) 17(3) *Democratization* 420; Ludvig Beckman, 'Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy' (2008) 15(1) *Democratisation* 29, 30–31.
[113] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [127] (Hayne J).
[114] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [7] (Gleeson CJ); *McGinty v Western Australia* (1996) 186 CLR 140 [201].
[115] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [7] (Gleeson CJ).
[116] *McGinty v Western Australia* (1996) 186 CLR 140 [201].

Roach. In doing so, take into consideration all factors relevant to those citizens' circumstances before limiting their right to political participation.[117]

Australian case law has confirmed that Australian citizens can be excluded from voting if they are infants, minors, persons of unsound mind and felons serving lengthy prison sentences:[118] this is what Australia's current parliament considers qualifying as 'substantial reasons'.[119] The wording of s 24 should be interpreted so that reference to 'the people' includes, as the case of *McKinlay* held, those who hold the capacity to understand the voting process.[120] Any other arbitrary reason for disenfranchising persons from voting that are discriminatory in nature according to international law standards, (based on race, colour, sex, language, religion etc.) do not satisfy this standard.[121] However, while this may represent formal equality, without further consideration of a person's individual circumstances prior to their exclusion from voting, Australian case law has confirmed disqualification is likely to disproportionately affect some sections of the community resulting in substantive inequality.[122] This has the potential to affect Australia's ability to conform to the norms of representative government.

The phrase 'directly chosen by the people' contained within ss 7 and 24 provides electors with a constitutional implied right to vote.[123] The way in which members are chosen is by way of a popular vote where parties compete for votes and seats on the national as well as the sub-national level.[124]

The effect of the requirement to be 'directly chosen by the people' is that sovereign power will reside in the people and will be exercised on their behalf by their representatives through legislative and executive powers.[125] Those representatives are accountable to the people and are responsible for

---

[117] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [7] (Gleeson CJ).
[118] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, [642].
[119] Graeme Orr and George Williams, 'The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia' (2009) 8(2) *Election Law Journal: Rules, Politics, and Policy* 131; *McGinty v Western Australia* (1996) 186 CLR 140, 170; *Australasian Federal Convention Debates*, Melbourne, 3 March 1898, 1846–7; Twomey (n 106) 129.
[120] *Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1,140 [68]–[69].
[121] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) arts 2, 25; *Universal Declaration on Human Rights*, United Nations General Assembly (Paris: 10 December 1948), art 5; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/Res/61/295 (29 October 2018), arts 5, 13, 20, 36; *International Covenant on the Elimination of Racial Discrimination* (signed 21 December 1965) (entry into force 4 January 1969) Preamble, arts 5, 21.
[122] *Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 [140].
[123] *Commonwealth of Australia Constitution Act 1901*, ss 7, 24; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* [2010] 243 CLR 1.
[124] Andre Kaiser, 'Parliamentary Opposition in Westminster Democracies: Britain, Canada, Australia and New Zealand' (2008) 14(1–2) *The Journal of Legislative Studies* 21; Arend Lijphart, 'Australian Democracy: Modifying Majoritarianism?' (1999) 34(3) *Australian Journal of Political Science* 314.
[125] *Australian Capital Television Pty Ltd and Others v Commonwealth of Australia (No. 2)* (1992)177 CLR 106, 594.

representing and protecting their interests within politics and legislation drafting.[126] Further, at a federal level, those parliamentary representatives are responsible for regulating the way in which elections take place in Australia according to the *Australian Constitution*.[127]

C. The Race Disqualification

A prominent Constitutional provision that deals with race and voting rights is found in s 25 of the *Australian Constitution*. Section 25 provides "if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted."[128]

The intention behind s 25 was to create an entrenched penalty provision that would work to restrict a state's representation within the Commonwealth Parliament if it disqualifies citizens from voting at state elections because of their race. This section is an altered version of subs 2 of the 14th Amendment of the United States Constitution[129] which, for Australia's version, aimed to limit the extent to which racial inequality and political inequality were present during the time of federation.

Section 25 outdatedly refers to the term 'race' which has been deemed to offend principles of equality and representative democracy. This is because disqualification from voting because of a citizen's 'race' does not fit within the common law meaning of 'substantial reasons' which qualifies the government to legislate and disenfranchise people from voting.[130]

Further, contemporary political debates[131] that oppose references to race within Australia's constitutional framework deem it irrelevant and outdated if Australia is to truly align itself with principles of equality and representative democracy.[132] This is because all citizens should not be subject to disenfranchising laws that limit their right to vote at elections (be it at a state/territory

---

[126] *Australian Capital Television Pty Ltd and Others v Commonwealth of Australia (No. 2)* (1992) 177 CLR 106, 596.
[127] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 188 [6].
[128] *Constitution of the Commonwealth of Australia,* s 25.
[129] *The Constitution of the United States 1787*, amendment 14 (2); John R. Vile, *A Companion to the United States Constitution and Its Amendments* (ABC-CLIO, LLC, 6th ed, 2015) 187–188.
[130] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [7] (Gleeson CJ).
[131] *Final Report of the Referendum Council* (Commonwealth of Australia, 2018) <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> ; 'Calls For Australian Constitution Racist Clauses To Go' (BBC News, 2015) <https://www.bbc.com/news/world-australia-33404898>; George Williams, 'Old-Style Racism Still in Constitution' (*The Sydney Morning Herald*, 2019) <https://www.smh.com.au/politics/federal/oldstyle-racism-still-in-constitution-20100913-1598c.html>; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No. 31 (2010).
[132] Final Report of the Referendum Council (n 131).

level or Commonwealth) for unjustified discriminatory reasons. Accordingly, a nation with a democratic regime's primary political purpose in that context is to encourage and allow for *all* citizens to vote equally in public elections so that their interests are proportionately represented in federal parliament.[133]

Section 25 of Australia's Constitution evidences a clear formalised acknowledgement of politically unconstrained state and territory electoral law-making powers that can go against those principles of equality, democracy and universal suffrage based on race. The slow progression of Australian states and territories extending the franchise to Aboriginal people (including Aboriginal women) is indicative of Australia's limited adherence to those principles.[134]

D. Parliament's Power to Make Electoral Laws

At the core of the challenge to generate truly universal suffrage is the implied right to vote as expressed through ss 7 and 24 of the *Australian Constitution*. Those sections are vague and so the parliament is left with the power to define who is disenfranchised and who is not.[135] As a result, parliament has been able to preserve the scope to which 'directly chosen by the people' applies.[136]

The *Australian Constitution*, in providing a framework and structure under which the electoral system operates, vests legislative power in the federal parliament.[137] That legislative power qualifies electors' eligibility to enrol and to vote at federal elections.[138] This system of governance, as noted in *Lange*[139] and by Isaacs J in the *Federal Commissioner of Taxation v Munro*,[140] 'provides for the fundamental features of representative government'.[141]

However, parliamentary electoral legislative power does have its limitations. For instance, under both ss 8 and 30 of the *Australian Constitution* there can be no plural voting.[142] Plural voting in Australia occurred prior to the establishment of the *Australian Constitution* where colonies gave

---

[133] *Constitution of the Commonwealth of Australia,* s 25.
[134] *Australian Capital Television Pty Ltd and Others v Commonwealth of Australia (No. 2)* (1992) 177 CLR 106, 631; *Constitution of the Commonwealth of Australia*, ss 8, 30; *Electoral Milestones for Indigenous Australians* (Australian Electoral Commission, 2019) <https://aec.gov.au/indigenous/milestones.htm>.
[135] *Constitution of the Commonwealth of Australia,* s 7 and s 24.
[136] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [112] (Gummow, Kirby, Crennan JJ).
[137] *Constitution of the Commonwealth of Australia,* ss 1, 7, 8, 13, 24, 25, 28, 30.
[138] *Constitution of the Commonwealth of Australia,* ss 8, 30*; Roach v Electoral Commissioner* (2007) 233 CLR 162 [47] (Gummow, Kirby, Crennan JJ).
[139] (1997) 189 CLR 520 [557].
[140] (1926) 38 CLR 153 [178].
[141] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [44] (Gummow, Kirby, Crennan JJ).
[142] *Constitution of the Commonwealth of Australia,* ss 8, 30; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [47] (Gummow, Kirby, Crennan JJ).

property owners (for those who had freehold or leasehold interests) an additional vote in elections. This was eventually abolished at a state and territory level as it had been significantly critiqued as undemocratic and anachronistic.[143]

Further, those provisions must be read in consideration of the context and structure of the *Australian Constitution* in its entirety, which in turn requires those sections to be read with reference to, and in consideration of s 128. Section 128 requires electors qualified to vote at elections for the numerous House of Representatives to be eligible to also vote at elections for proposed laws for an alteration of the Constitution.[144]

Thus, ss 7, 8, 24 and 30 are to be read in consideration of and reference to each other and the entirety of the *Australian Constitution*.[145] Chapter 1 of the Constitution also makes clear that by providing the formula "[u]ntil the Parliament otherwise provides' the parliament has vested legislative power to regulate elections for and membership of both Houses of Parliament.[146] This is evidenced within the wording contained in s 7 (with its provisions about the division of Queensland into divisions, and its provision for the numbers of Senators to be elected in each state);[147] s 9 (in reference to the method of electing Senators);[148] s 10 (in the application of certain state laws to the election of Senators);[149] s 14 (for further provision for the rotation of vacancies in the Senate);[150] and s 22 (which refers to the quorum at a meeting of the Senate).[151]

The *Australian Constitution* also makes reference to Commonwealth Parliament's legislative power to regulate how representatives within it are to be elected.[152] In that context, it is clear that the Australian franchise is thus a matter for the Commonwealth Parliament to determine with only one generalised limitation and requirement that each House must be 'directly chosen by the people'.[153]

This can prompt larger political issues in terms of indirectly excluding members of minority groups like Aboriginal Australians who become ineligible for a variety of reasons under Commonwealth

[143] *McGinty v Western Australia* (1996) 186 CLR 140, 281 (Gummow J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 116 [365] (Crennan J); Twomey (n 106) 145.
[144] *Constitution of the Commonwealth of Australia,* s 128.
[145] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [129] (Hayne J).
[146] *Constitution of the Commonwealth of Australia,* Ch 1.
[147] *Constitution of the Commonwealth of Australia,* s 7.
[148] *Constitution of the Commonwealth of Australia,* s 9.
[149] *Constitution of the Commonwealth of Australia,* s 10.
[150] *Constitution of the Commonwealth of Australia,* s 14.
[151] *Constitution of the Commonwealth of Australia,* s 22.
[152] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [130] (Hayne J).
[153] *Constitution of the Commonwealth of Australia,* ss 7, 24; *Roach v Electoral Commissioner* (2007) 233 CLR 162 [130] (Hayne J).

electoral legislation. Laws controlling eligibility should observe the broader significant circumstances that contribute systemically to ineligibility to participate politically. In this regard, it is necessary to appreciate the distortion of Australia's electoral system through laws that indirectly disqualify Aboriginal Australians – in particular, the disqualification of prisoners.[154]

Substantive inequality within the Australian electoral system is maintained because legislative reform has failed to genuinely seek to increase the political participation of minority groups like Aboriginal Australians.[155] This is evident in Australia's prioritisation of issues that continue to favour the non-Indigenous majority whilst at best masking, and possibly suppressing, the expression of Indigenous issues and the representation of those issues within institutions of Australian governance.[156]

The *Australian Constitution* provides the framework for Australia's governance structure and electoral processes. Further, it established a constitutional framework for representative democracy in terms of federal electoral processes,[157] constituting the houses of parliament through citizens' vote. These processes are further regulated by federal parliament through Commonwealth electoral legislation.

V. THE COMMONWEALTH ELECTORAL SYSTEM

Australia's overall governance structure is, as defined and set out in the Constitution, one that is labelled as being reflective of a liberal representative and democratic regime. It is impliedly defined within the *Australian Constitution* in ss 7 and 24 as a system that provides its citizens with a right to vote candidates into parliament who are 'to be chosen directly by the people' to best represent their interests if they win a seat as an elected member.[158]

To do so, citizens who are eligible to enrol to vote at federal elections (which are held every three years) are subject to a compulsory voting obligation once enrolled.[159] Further, those persons must

[154] *Commonwealth Electoral Act 1918*, s 93 (8AA); *Roach v Electoral Commissioner* (2007) 233 CLR 162 [49] (Gummow, Kirby, Crennan JJ).
[155] Lukes (n 57); J. L. Walker, 'A Critique of the Elitist Theory of Democracy' (1966) 60 *American Political Science Review* 285–95.
[156] Lukes, ibid, 21; Elmer Emeric Schattschneider, *The Semi Sovereign People* (Holt, Rinehart and Winston, 1975) 146–7; Joseph Alois Schumpeter, *Capitalism, Socialism and Democracy* (George Allen & Unwin, 3rd ed, 1950) 244.
[157] *Constitution of the Commonwealth of Australia,* ss 7, 10, 24, 29, 31.
[158] *Constitution of the Commonwealth of Australia,* ss 7, 24.
[159] *Commonwealth Electoral Act 1918*, ss 101, 245 (1).

attend a polling booth on Election Day, have their name marked off the certified list of electoral division electors, mark their ballot paper in a polling booth and place it in the ballot box.[160]

Originally, the method of voting in Australia's democratic regime was exercised through what was referred to as a 'simple majority voting' system (or 'first-past-the-post' system). However, this voting system changed in 1919 when the Commonwealth Parliament passed legislation to introduce the preferential voting system (or the 'alternative vote' system).[161] The preferential voting system has been upheld by the High Court of Australia for elections for the House of Representatives.[162]

The preferential voting system is a unique system of voting for the House of Representatives of parliament that requires electors to number the candidates in order of preference and the 'winner' to have 51 per cent support.[163] Electors cast one vote to elect a candidate from their electoral division to represent their interests as members of parliament in the House of Representatives.[164]

In this system, once electors attend a polling booth on Election Day, they must fill in the ballot paper to choose their preferred candidate. Electors must write the number one in the box beside the candidate's name they choose to elect as their most preferred choice and the numbers two and three for other candidates that fall in the hierarchical order of the voter's preference.[165]

For Senate elections, a proportional representation voting system is used for electors to choose candidates in multi-member electorates. This system requires winners to meet a set quota of votes.[166] Ballot papers for Senate elections can be numbered in order of preference 'above the line' when choosing parties or groups of their choice (there must be at least six boxes marked). In the alternative, electors can vote 'below the line' and number their ballot paper boxes alongside their preferred individual candidates from candidates they prefer to least prefer (there must be at least 12).[167]

---

[160] *Commonwealth Electoral Act 1918*, s 245 (1).
[161] M. Mackerras and I. McAllister, 'Compulsory Voting, Party Stability and Electoral Advantage in Australia' (1999) 18 *Electoral Studies* 225; Graeme Orr, 'Ballot Order: Donkey Voting in Australia' (2002) 1(4) *Election Law Journal* 573.
[162] Ibid.
[163] Marian Sawer, *Elections: Full, Free & Fair* (Federation Press, 2001) 80; Shaun Bowler, David M. Farrell and Ian McAllister, 'Constituency Campaigning in Parliamentary Systems with Preferential Voting: Is There a Paradox?' (1996) 15 (4) *Electoral Studies* 462.
[164] *How to Vote* (Australian Electoral Commission, 2016) <https://aec.gov.au/Voting/How_to_Vote/>.
[165] *Voting in the House of Representatives* (Australian Electoral Commission, 2016) <https://aec.gov.au/Voting/How_to_Vote/Voting_HOR.htm>.
[166] *Key Features & History of the Australian Electoral System* (Australianpolitics.com, 2017) <http://australianpolitics.com/voting/features>.
[167] *Voting in the Senate* (Australian Electoral Commission, 2018) <https://aec.gov.au/Voting/How_to_Vote/Voting_Senate.htm>.

Previously, in the old system, voters had the option of simply putting a '1' in one box above the line or filling out all the numbers below the line. Accordingly, if they voted above the line in this system, their preferences would be determined by the chosen party or group.[168] However, this allowed for so-called micro-parties to swap preferences with each other which meant high numbers of candidates being elected on very low first-preference votes. In 2013, the prevalence of micro-parties in the Senate prompted parliament to change the rules.[169] Nonetheless, it is essential for voters to understand how the new system works for their vote to be counted.[170]

The current qualifications for voting at Commonwealth elections are found in s 93 of the *Commonwealth Electoral Act 1918*. Section 93 provides that persons are eligible to vote when they have obtained the age of 18 years,[171] where they are Australian citizens.[172] Section 93 also provides an exception for persons to vote in federal elections who are not directly classified as an Australian citizens if their name would be on the electoral roll for an electoral division *if* the relevant citizenship laws had remained in force and they are British subjects.[173]

Another crucial part of voting in Australia is enrolling to vote. Australian electoral legislation requires persons to evidence their eligibility to enrol to vote as electors by identifying themselves as an Australian citizen or eligible British subject. They must also be able to prove through identifying themselves that they meet the age requirement – for enrolment, this is at age 16, although the right to vote will only apply once the person reaches 18 – and that they have lived at their address for at least one month.[174]

Identification to meet eligibility requirements is done by way of producing a driver's licence, an Australian passport number, or by having a person already enrolled to vote confirm their identity. An 18+ or a Proof of Age card are not accepted.[175] Documentary proof of meeting the age requirements all depend upon having a birth certificate. Birth registration and certification of

[168] Judith Ireland, 'One in Two Voters Don't Understand How to Vote for the Senate: Poll' (*The Sydney Morning Herald*, 2019) <https://www.smh.com.au/federal-election-2019/one-in-two-voters-don-t-understand-how-to-vote-for-the-senate-poll-20190419-p51flf.html>.
[169] Ireland, ibid; Norm Kelly, 'Party registration and political participation: Regulating small and "micro" parties' in Anika Gauja and Marian Sawer, *Party Rules? Dilemmas of political party regulation in Australia* (ANU Press, 2016) 73–4.
[170] Ireland, ibid; Christopher Rootes, 'A Referendum on the Carbon Tax? The 2013 Australian Election, The Greens, and the Environment' (2014) 23(1) *Environmental Politics* 166, 167–8.
[171] *Commonwealth Electoral Act 1918*, s 93 (1) (a).
[172] *Commonwealth Electoral Act 1918*, s 93 (1) (b) (i).
[173] *Commonwealth Electoral Act 1918*, s 93 (1) (b) (ii).
[174] *Commonwealth Electoral Act 1918*, ss 98AA, 99.
[175] *Commonwealth Electoral Act 1918*, s 98AA; *Enrol to Vote* (Australian Electoral Commission, 2018) <https://aec.gov.au/enrol/>.

individuals in Australia rests with state and territory governments.[176] This is done through a Registry of Births, Deaths and Marriages with oversight by a Registrar whose responsibility is to seek to maximise birth registration and certification.[177]

The registration and certification of births affect the electoral system in two ways. First, birth registration provides data to the Australian Bureau of Statistics which informs each state and territory's population statistics that are used to determine how many seats are apportioned to electorates in the Commonwealth House of Representatives.[178] Secondly, registration and certification of births are necessary for the issue of identifying documentation including primary photographic identifying documents required to identify individuals seeking to enrol and vote at elections.

Evidently, the franchise is still limited for certain citizens in Australia, which disqualifies persons from voting who are under the legal age, are non-citizens, are of 'unsound mind', persons serving a lengthy term of imprisonment or are unable to identify themselves to register to vote at polling booths on election day.[179] Disqualifications based on 'unsound mind', imprisonment, and voter registration have a disproportionate impact on Indigenous Australians.

A. The Prisoner Disqualification

The provisions that limit a person's ability to enrol and to vote at Commonwealth elections are found in s 93 of the *Commonwealth Electoral Act 1918*.[180] The two primary disqualifications that affect Aboriginal voting participation for Commonwealth elections include persons deemed of 'unsound mind' who are incapable of understanding the nature and significance of enrolment and voting,[181] and those serving a term of imprisonment of three years or more.[182]

For persons incarcerated for a lengthy term of imprisonment, the first formal limitation in Australia was s 6 of the *Australian Constitutions Act 1842* (Imp) for the New South Wales legislature:[183]

> no person shall be entitled to vote at any such Election who shall have been attainted or convicted of any Treason, Felony, or infamous Offence within any Part of Her Majesty's Dominions unless he

[176] Melissa Castan and Paula Gerber, *Proof of Birth* (Future Leaders, 2015) 48.
[177] Ibid.
[178] Ibid.
[179] *Commonwealth Electoral Act 1918*, s 93.
[180] *Commonwealth Electoral Act 1918*, s 93.
[181] *Commonwealth Electoral Act 1918*, s 93 (8) (a).
[182] *Commonwealth Electoral Act 1918*, s 98 AA.
[183] 5 & 6 Vict c 76.

> shall have received a free Pardon, or one conditional on not leaving the Colony, for such Offence, or shall have undergone the sentence or Punishment to which he shall have been adjudged for such Offence.[184]

This was the beginning of disenfranchisement of prisoners from politically participating in Australasian colonies.[185] The section refers to an 'infamous offence'. An 'infamous offence' in that period included circumstances where 'a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity [and] the law considers his oath to be of no weight and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to affect the property or liberty of others'.[186] It focused on the infamy of the punishment as opposed to the nature of the crime itself. Therefore, the legislation rendered the offender as politically unworthy of exercising their civil responsibility to politically participate.

Those who were disenfranchised who fell into those circumstances were only exempted if they had received a free pardon or had already served their sentence imposed upon them for the crime they had committed.[187] Disqualification from being an elected member in the lower house of the legislature arose from attainment of treason, by a conviction of a felony or any infamous offence or crime.[188]

This disqualification of elected members was later put forth as a Bill at the Sydney Convention in 1891 leading up to the establishment of the *Constitution of the Commonwealth of Australia.* It provided in Chapter I clause 46 (3) that persons ineligible to be chosen and sit in either legislative chamber included those who were 'attainted of treason or convicted of a felony or of any infamous crime'. Furthermore, it also provided that the civil political disability imposed upon such persons might be removed upon 'the expiration or remission of the sentence, or a pardon, or release, or

---

[184] *Australian Constitutions Act 1842* (Imp), s 6.
[185] The *New Zealand Constitution Act 1852* (Imp) 15 & 16 Vict c 72, ss 8, 42, 50. Subsequent legislation in New Zealand is traced in Robins (n 25) [167]–[171]; The Tasmanian statute No. 17 of 1854 was made in exercise of the power conferred by s 32 of the *Australian Constitutions Act 1850* (Imp) 13 & 14 Vic c 59. Sections 13, 24 and 25 of the 1854 statute dealt with disqualification; The *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vic c 54, Sched 1, ss 11, 16, 26. It was under power conferred by the 1855 Imperial Act that the 1859 Order in Council established a Legislative Council and Legislative Assembly for Queensland. Section 8 of that Order in Council applied in Queensland, and until further provided, the New South Wales provision for the disqualification of electors and members of the Legislative Assembly; The *Victoria Constitution Act 1855* (Imp) 18 & 19 Vic c 55, Sched 1, ss 11, 12, 24; The South Australian statute No 2 of 1855–56 also relied upon the 1850 Imperial statute. Sections 14, 16 and 26 of the South Australian statute dealt with disqualification.
[186] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [59] (Gummow, Kirby, Crennan JJ).
[187] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [101] (Gummow, Kirby, Crennan JJ); *Evidence Act 1843* (Imp) s 6 & 7 Vic, c 85.
[187] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [101] (Gummow, Kirby, Crennan JJ); *Evidence Act 1843* (Imp) s 6 & 7 Vic, c 85.
[188] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [61] (Gummow, Kirby, Crennan JJ).

otherwise'.[189] The disqualification was later considered at the Adelaide Convention in 1897 where it was presented in the form of a paper to both Houses of the Parliament of Queensland by Sir Samuel Griffith.[190]

Disqualification of elected members fell within the then s 45 of the draft constitution which recommended that the word 'felony' be amended. This was because its use made the disqualification dependent upon state law.[191]

The disqualification was then considered at the Sydney Convention in September 1897 within s 45 (iii). S 45 disqualified a person 'who is attainted of treason or has been convicted of felony or of any infamous crime or any offence punishable under the law of the Commonwealth or of a State, by imprisonment for three years or longer'.[192]

The three-year disqualification was later reduced to one year by 1889. This was a result of a recommendation provided by the Drafting Committee in the final stages of the Melbourne Convention.[193] However, those constitutional provisions for disenfranchising persons with a conviction, or those that are imprisoned, only disqualify political candidates under s 44 (ii). The disqualification of electors sentenced to imprisonment was not included. Instead, the disqualification of electors was left to states and territories to legislate on within their respective electoral laws (until parliament provides otherwise).[194]

By 1983, the disqualification of electors from voting at Commonwealth elections had changed yet again within the *Commonwealth Electoral Act 1918.* In particular, s 93 of the *Commonwealth Electoral Act 1918* changed the targeted disqualification time period for those sentenced to a terms of imprisonment from one year or longer to a time period that disqualified those sentenced to a term of imprisonment of five years or longer.[195]

The reform process of this particular disqualifying section continued on through the *Electoral and Referendum Amendment Act 1995* (Cth). The prisoner disqualification section changed again to

[189] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [63] (Gummow, Kirby, Crennan JJ).
[190] John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) [616]–[635].
[191] Williams, ibid, [633]; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [65] (Gummow, Kirby, Crennan JJ).
[192] Williams, ibid, 774; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [65] (Gummow, Kirby, Crennan JJ).
[193] *Official Record of the Debates of the Australasian Federal Convention* (Melbourne, 16 March 1898, vols VI–V) [2439] – [2448].
[194] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [68] (Gummow, Kirby, Crennan JJ).
[195] *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth), s 23(e); *Commonwealth Electoral Act 1918,* s 93.

disqualify persons 'serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory'.[196]

By 2004, the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth) changed the elector imprisonment disqualification sentence time from five years or more to three years or more from enrolling to vote at Commonwealth elections.[197] The current disqualifying section is now found in s 93 (8AA) of the *Electoral Act 1918* (Cth).[198] Whilst this has changed yet again in 2006 (from a term of three years or more to imprisonment in general (no matter what the term is))[199] the Australian Parliament changed the prisoner disqualifier section back to three years or more which is our current disqualifying provision within the *Commonwealth Electoral Act 1918.*

Therefore, persons will not meet the voter eligibility criteria[200] if they are serving a term of imprisonment of three years or more.[201] Those persons will also not appear on the certified list of voters for elections prepared by the Australian Electoral Commission.[202] In contrast, persons serving a term of imprisonment of less than three years are still entitled to enrol to vote in Commonwealth elections as per s 96A of the *Commonwealth Electoral Act 1918.*[203]

While the disqualifying provision applies to all persons equally who are serving a term of imprisonment of three years or more, by prohibiting them from voting at federal elections, it comes with a variety of indirect racially discriminatory issues for Indigenous people.[204] Some of those issues were discussed a landmark Australian case called *Roach v Electoral Commissioner* ('*Roach*').[205]

Gleeson CJ in *Roach* considered the rationale behind excluding certain citizens from the franchise for 'substantial reasons':

> The franchise is critical to representative government and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of

[196] *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth), Sched 1, Item 5.
[197] *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth), Sched 1, Item 1.
[198] *Commonwealth Electoral Act 1918*, s 93 (8AA).
[199] *Commonwealth Electoral Act 1918*, s 93 (8AA).
[200] *Commonwealth Electoral Act 1918*, s 93 (3), (4), (5), (7).
[201] *Commonwealth Electoral Act 1918*, s 93 (8AA).
[202] *Commonwealth Electoral Act 1918*, ss 208 (2) (c), 221 (3) (b).
[203] *Commonwealth Electoral Act 1918*, s 96A.
[204] Orr and Williams (n 115) 131; *McGinty v Western Australia* (1996) 186 CLR 140, 170; Twomey (n 106) 129; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [150] (Gonthier J).
[205] (2007) 233 CLR 162.

> adult citizens on a basis that does not constitute a substantial reason from such participation would not be consistent with choice by the people.[206]

As such, certain citizens should only be excluded from voting for 'substantial reasons' which are neither disproportionate nor inconsistent with choice by the people.[207]

The majority in *Roach*, however, relied on the reasoning of 'substantial reasons' in the case of *McKinlay*.[208] *McKinlay* held that the wording contained within s 24 of the *Australian Constitution* did not guarantee universal suffrage and that disqualifying citizens from voting who are infants, minors, persons of unsound mind and felons serving lengthy prison sentences were substantial reasons.[209]

The majority held in *Roach* that the disqualification of the prisoner in question (an Aboriginal female) was justified. Yet the reasoning behind holding the disqualification justification, only considered the length and serious nature of the offence committed by the prisoner. Other important considerations of the prisoners Aboriginal cultural identity and historical contexts that she as an Aboriginal woman has been subjected to in terms of her pre-imprisonment disenfranchisement, incarceration and intergenerational trauma from being a survivor of the Stolen Generations, were not taken into account.

On those limited terms the court held that political exclusion was justified as the prisoner evidenced disconnection from society and an exercise of antisocial behavior which warranted limitation of full civic rights.[210]

The disqualification and exclusion of political participation rights form an important part of a person's connection to society and exercise of civil rights. International standards,[211] argue that such limitations placed upon a person's exercise of fundamental political rights are invalid as they add an additional and unnecessary layer of punishment on someone already punished and serving their sentence. Therefore, it is not appropriate for Commonwealth electoral legislation to further add

---

[206] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [7] (Gleeson CJ).
[207] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [8] (Gleeson CJ).
[208] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *Roach v Electoral Commissioner and Another* (2007) 239 ALR 1 [24]; *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), ss 93 (8AA) and 208 (2) (c).
[209] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 642.
[210] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [8] (Gleeson CJ).
[211] Daniel Guttman, 'Vicki Roach v Commonwealth: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?' [2007] *Sydney Law Review* 11; (2007) 29(2) *Sydney Law Review* 297.

to a state's administration of criminal justice, on a person who has committed a state-based offence, by disqualifying those persons from politically participating at federal elections.[212]

If anything, it is important for persons to maintain their political membership of their country's political community.[213] This is important to ensure persons incarcerated, particularly those serving lengthy terms of imprisonment, form a better sense of civic responsibility and political inclusion that underpins citizenship rights and societal obligations.[214]

The preamble to the *Australian Citizenship Act 2007* (Cth) declares that parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations.[215]

The reference to the reciprocity of rights and obligations is important in the context of membership of the community and their exercise of political participation rights. However, the current parliamentary rationale for temporarily limiting such rights to the franchise is warranted for persons that engage in antisocial behaviour and serious criminal conduct.[216] To be eligible to access political participation rights, persons must not sever their connection to their community. This requires them to be civically responsible and not commit a serious offence with a lengthy term of imprisonment.

Australian electoral legislation does not also formally recognise those who qualify for non-custodial sentencing options. Further, it also does not acknowledge, the circumstances of those who suffer from poverty, homelessness, mental health problems or reside in a geographically remote location.

These factors are key contributors that place Aboriginal Australians in a higher risk category compared to non-Indigenous Australians, of being incarcerated. According to the Australian Bureau of Statistics, Aboriginal and Torres Strait Islander prisoners accounted for over a quarter, or 28 per cent, of the total Australian prisoner population.[217] Bearing those factors in mind, it is also worth noting that the amount of serious offences that Indigenous people are incarcerated for are less when compared to non-Indigenous Australians. In 2019, Indigenous Australians comprised 34 per cent of

---

[212] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [10] (Gleeson CJ).
[213] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [11] (Gleeson CJ).
[214] *Singh v Commonwealth* (2004) 222 CLR 322; *Hwang v Commonwealth* (2005) 80 ALJR 125; 222 ALR 83; Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co, 2002) [329].
[215] *Australian Citizenship Act 2007* (Cth).
[216] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [23] (Gleeson CJ).
[217] *4517.0 - Prisoners in Australia* (2019) <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2019~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13>.

acts intended to cause injury and 14 per cent of unlawful entry with intent. Whilst these offences are serious in nature, other serious offences like homicide, sexual assault and illicit drug offences had a majority non-Indigenous population of offenders sentenced to imprisonment. Statistics of Indigenous imprisonment rates also found that 78 per cent of Indigenous prisoners had been imprisoned previously.

Overall, based on that data alone, it is clear that the rates of imprisonment are higher for Aboriginal people which increased their likelihood to reoffend and re-enter incarceration for a potentially longer imposed subsequent sentence. Some states in Australia actually include imprisonment as a mandatory sentence for certain offences. This can also be an issue for Indigenous offenders who are reliant on the principle of 'imprisonment as a last resort' given their cultural and historical vulnerabilities as Aboriginal people who are frequently subjected to all kinds of systematic racism within Australia.[218]

Thus, the arbitrary nature of determining which offences are serious enough to warrant disenfranchisement is unjust because of the culmination of factors that need careful consideration when further punishment is imposed one someone's sentence that disenfranchises them. Those factors *must* consider the nature of the offence, the cultural background of the person and the environment and circumstances that person has grown up in and continues to live within.[219]

The legislative requirement in most Australian states and territories is to treat imprisonment of an offender as a last resort.[220] In doing so, other sentencing options such as fines, community service, home detention, or periodic detention are considered as initial penalty options.[221]

Where these penalty options are preferred, offenders have the chance to remain connected to their community which includes their political enfranchisement. However, data reveals that Indigenous offenders are more likely than non-Indigenous offenders to attract a custodial sentence than an alternative penalty option.[222]

---

[218] New South Wales Law Reform Commission, *Sentencing: Aboriginal offenders Report 96* (2000) 31, 244.
[219] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [23] (Gleeson CJ).
[220] *Crimes Act 1914* (Cth), s 17A; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5 (1); *Sentencing Act 1991* (Vic), s 5(4); *Criminal Law (Sentencing) Act 1988* (SA), s 11 (1) (a) (IV); *Sentencing Act 1995* (WA), s 6 (4) (a); *Penalties and Sentences Act 1992* (Qld), s 9 (2) (a).
[221] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [12], [22] (Gleeson CJ).
[222] *Appropriateness of alternative sentencing options* (Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, ALRC Report 133, 11 January 2018) [7.152]; *4517.0 – Prisoners in Australia* (Abs.gov.au, 2017) table 25. See also ch 3 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>.

The Australian Law Reform Commission has identified that this is a persistent and increasing problem for Australia's criminal justice system to deal with by recognising the economic, housing, employment and educational issues Aboriginal Australians experience post-colonial oppression with.[223] Those factors, as noted by the *Royal Commission into Aboriginal Deaths in Custody* in 1991, go frequently overlooked when it comes to sentencing Aboriginal people which contributes to their greater streamlined pathway into incarceration compared to non-Indigenous Australians. Those high, unfair and disproportionate Indigenous incarceration rates also have a flow-on effect to Indigenous disenfranchisement for Australian political elections.

B. The 'Unsound Mind' Disqualification

The unsound mind disqualification disenfranchises persons deemed to be of unsound mind based on the rationale that such persons lack capacity in exercising a free and informed choice in terms of voting at elections.[224]

There has been much critique from the Australian Human Rights Commission of the wording of this provision. The Australian Human Rights Commission has commented that the wording is vague and lacks clarity as to how persons are categorised as being of 'unsound mind' and who decides on their status.[225] This critique also acknowledges international standards of protecting the franchise of persons with disabilities found within the *United Nations Convention on the Rights of Persons with Disabilities.*[226]

Nonetheless, this exclusion was established during the 19th century in Australia during a time when exclusionary social policies were dominant and guided legislation drafting and political norms.[227] This exclusion remains in the current *Commonwealth Electoral Act 1918.*[228] It is important because being deemed as being of 'unsound mind' can also statistically contribute to a person's greater

---

[223] Ibid.
[224] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [9] (Gleeson CJ).
[225] *The Right to Vote Is Not Enjoyed Equally By All Australians* (Humanrights.gov.au, 2010) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/right-vote-not-enjoyed-equally-all-australians>.
[226] Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
[227] Trevor Ryan, Andrew Henderson and Wendy Bonython, 'Voting with an Unsound Mind: A Comparative Study of the Voting Rights of Persons with Mental Disabilities' (2016) 39(3) *UNSW Law Journal* 1038; Ien Ang and Jon Stratton, 'Multiculturalism in Crisis: The New Politics of Race and National Identity in Australia' (1998) 2 *TOPIA: Canadian Journal of Cultural Studies* 28; Bruce Kapferer and Barry Morris, 'The Australia Society of the State: Egalitarian Ideologies and New Directions in Exclusionary Practice' (Fall, 2003) 47(3) *Social Analysis* 85; Kay Anderson and Affrica Taylor, 'Exclusionary Politics and the Question of National Belonging' (2005) 5(4) *Ethnicities* 464.
[228] *Commonwealth Electoral Act 1918,* s 93 (8) (a).

likelihood of entering into the incarceration qualification through antisocial and criminalising behavioural traits. Both are factors that Aboriginal people are significantly vulnerable to experiencing and which both have a huge impact on the political participation of Aboriginal electors.

Historically, Aboriginal people were automatically deemed to be of 'unsound mind' with the introduction of s 4 of the *Commonwealth Franchise Act 1902.* That section showed that the original legislative electoral law presumption on Aboriginal mental capacity to exercise their rights to the franchisee as citizens, was exclusionary and one that considered Aboriginal people as lacking capacity and intelligence to understand political choice through voting at an election.[229] Whilst that section has since been repealed, there remains indirect possibilities left open where Aboriginal people may experience racial discrimination with being deemed to be of 'unsound mind' for the purpose of disqualifying those persons from voting at federal elections.[230] This is largely due to ever present racial bias existent in many of Australia's institutions, law and policies, but in particular in this regard, within Australia's health care system.[231]

As such, the deeming of an elector (particularly those of Aboriginal descent) to be of 'unsound mind' which would disqualify them from voting at a federal election, provides doctors with power to certify those persons politically unfit to vote, from a health care systematic perspective where racial bias is present towards Aboriginal people.[232] This aspect is yet to be fully resolved and given further cultural and historical consideration towards Aboriginal experiences with disenfranchisement through being deemed directly or indirectly, mentally incapacitated to vote at an election. The section needs to better understand and have a greater presence of cultural sensitivity to, the ways in which Aboriginal people experience political racial bias through discriminatory assumptions made about their mental capacity to make informed and intelligent political decisions that will affect their lives.

Most Aboriginal electors suffer inter-generational trauma as a result of their dispossession following the Stolen Generations and that has often led to their incarceration through antisocial behaviour exhibited towards authorities.[233] Those experiences of inter-generational trauma and

---

[229] *Commonwealth Franchise Act 1902*, s4 (repealed).
[230] *Commonwealth Electoral Act 1918*, s 93 (8) (a).
[231] Angela Durey, 'Reducing Racism in Aboriginal Health Care in Australia: Where Does Cultural Education Fit?' (2010) 34 (1) *Australian and New Zealand Journal of Public Health* 87 – 88.
[232] Joint Select Committee on Electoral Reform, Parliament of Australia, *The Operation During The 1984 General Election of the 1983/84 Amendments to Commonwealth Electoral Legislation* (1986) 31 [3.39];
[233] Bringing them Home Report (1997) 154 <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>;

dispossession however, do not automatically incapacitate their ability to understand the importance of their right to vote and to undertake their exercise of that right. Inter-generational trauma, depression and an aggression towards authorities, do not limit the political capacity and intelligence of a person to capably vote at an election.[234] If anything, one would think those types of actions for a person from such a culturally disenfranchised background, would empower them and have a positive impact to some degree, on their self-worth as an individual and as an Aboriginal person, which would lead to a better state to some extent, of their mental health and wellbeing.

Whilst a support person or carer can assist in helping persons deemed of 'unsound mind' with exercising their right to vote (where appropriate), the point to be made is that there is a need for further development of this particular section that takes into account Aboriginal experiences with mental health and disenfranchisement.

There is also the realisation that without doing so, Aboriginal people that trigger this section, may understandably lack incentive to progress with trying to exercise their right to vote with additional administrative obstacles placed upon them together with already present feelings of political exclusion based on past legislative electoral assumptions about their capacity as a people.

This section must afford itself further legislative or even policy development that realises those contextual experiences of Aboriginal disenfranchisement and mental capacity.

C. Indigenous Citizens' Voting Experiences

When Indigenous Australians do not see themselves or their experiences within the Australian Constitution and electoral legislation, they become alienated from the political process. Such forms of legislative exclusion can also make Indigenous Australians, alongside their pre-existing longstanding rights to sovereignty, question the Australian political systems legitimacy.[235] In those circumstances, some Indigenous Australians view engaging such a system is not worthwhile and may limit their recognition as sovereign people of this land.

However, for those who seek political recognition and political exercise of their sovereignty, who do wish to engage and be politically heard and represented, and do wish to take up their plight for

---

Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133 (2017) 66.

[234] Trevor Ryan, Andrew Henderson and Wendy Bonython, 'Voting with an Unsound Mind: A Comparative Study of the Voting Rights of Persons with Mental Disabilities' (2016) 39 (3) *University of New South Wales Law Journal* 1060.

[235] W. Kymlicka, *Multicultural Citizenship - A Liberal Theory of Minority Rights* (Clarendon Press, 1995) 150.

political justice, voting and political inclusivity is essential. This part focuses on the aspirations of those Indigenous Australians that seek to engage in voting and aspire for reform of the Australian system so that the majority rule accommodates their aspirations as an Indigenous minority.

A contemporary example of where reform to the system might exist can be seen with results from the rollout of the new voting system for Commonwealth elections. Surveyed research results revealed that almost 50 per cent of voters do not understand how the new Senate voting system works. The Australian Electoral Commission (which is an independent federal agency in charge of organising, conducting and supervising federal elections, by-elections and referendums) has been criticised by the Australia Institute for providing voters with unclear instructions including aspects of the instructions that are incorrect.[236] The result has meant that some of those voters have been unintentionally preferentially voting for parties on their ballot papers that they thought they were putting last.[237]

The rate of informal Senate ballots that have been incorrectly filled out and go uncounted increased to 3.9 per cent in the 2019 federal election from its previous 2.9 per cent in 2013.[238] This rate of informal votes becomes important when there are tight counts in an election. Furthermore, this is of particular importance in consideration of the statistics on Indigenous Australians' voting participation. Prior to the rolling out of the new Senate voting system, the AEC had identified that only half of the less than 3 per cent Indigenous population had registered to vote and, out of those enrolled to vote, only half of that population actually turns up to vote at polling stations on the day of voting or fills in their ballot paper correctly.[239]

Voting correctly is crucial to the performance of political participation and, consequently, for voters' political voice to be heard and represented. AEC initiatives to provide electors with correct instructions to fill out their ballot paper validly, and also to assist electors to do so, are of fundamental democratic importance.

---

[236] Judith Ireland, 'One in Two Voters Don't Understand How to Vote for the Senate: Poll' (*The Sydney Morning Herald*, 2019) <https://www.smh.com.au/federal-election-2019/one-in-two-voters-don-t-understand-how-to-vote-for-the-senate-poll-20190419-p51flf.html>; Sally Whyte, 'Independent candidate Anthony Pesec says voters were given wrong instructions on how to vote' (*Canberra Times*, 24 May 2019) <https://www.canberratimes.com.au/story/6180279/pesec-aec-gave-wrong-instructions/>; Gareth Hutchins, 'Reports of confusing advice about new Australian Senate voting rules' (*The Guardian*, 2 July 2016) <https://www.theguardian.com/australia-news/2016/jul/02/reports-of-confusing-advice-about-new-australian-senate-voting-rules>.

[237] Ireland, ibid.

[238] Ibid.

[239] *Additional Performance Information – AEC Annual Report 2015–16* (2017) <http://annualreport.aec.gov.au/2016/performance/additional.html>.

At first instance, and in consideration of one of the first steps required in the voting process which requires electors to identify themselves when enrolling to vote on Election Day, it is important to note various barriers Aboriginal electors face with this requirement.

Despite the difficulty in calculating unregistered births across Australia, a study conducted in Western Australia in 2016 found that there are lower rates of birth registrations amongst Aboriginal Australians compared to non-Aboriginal Australians.[240] According to the study, many Aboriginal Australians do not have registered birth certificates when they are infants. This was common amongst Aboriginal children from disadvantaged families who were also shown to be nine times less likely than non-Aboriginal people to have their births registered.[241] The study also found that there are significant barriers in the birth registration process that can contribute to Aboriginal families not registering births. Generally, those barriers included situations where the mother was a teenager when they had their first child, who lived in a remote area without private healthcare insurance, and whose own birth was not registered.[242]

The most likely circumstances for non-registration occurred where the parent was disadvantaged through having lower levels of literacy which made it difficult for them to complete the application form whilst trying to look after a newborn baby. Despite assistance being available through the birth registry, access to such staff is difficult for those residing in very remote areas.[243] The financial disadvantage was another common factor given most Aboriginal parents living within remote communities had higher unemployment rates are were unable to afford the fee for a birth certificate.[244]

Despite electoral legislation allowing persons without photo identification to enrol with the support of a statutory declaration signed by a person who is identified to vouch for their identity, there remains a barrier for Aboriginal electors. Those who reside in remote communities may lack the

---

[240] Alison J. Gibberd, Judy M. Simpson and Sandra J. Eades, 'No Official Identity: A Data Linkage Study of Birth Registration of Aboriginal Children in Western Australia' (2016) 40(4) *Australian and New Zealand Journal of Public Health* 388; E. J. Glasson et al, 'An Assessment of Intellectual Disability among Aboriginal Australians' (2005) 49(8) *Journal of Intellectual Disability Research* 629.

[241] Kim Johnstone, 'Indigenous Birth Rates – How reliable are they?' (2009) 17(4) *People and Place* 29; David Lawrence et al, 'Adjusting for Under-Identification of Aboriginal and/or Torres Strait Islander Births in Time Series Produced from Birth Records: Using Record Linkage of Survey Data and Administrative Data Sources' (2012) 12(1) *BMC Medical Research Methodology* 4.

[242] Gibberd (n 240) 391.

[243] Elizabeth Comino et al, 'The Gudaga Study: Establishing an Aboriginal Birth Cohort in an Urban Community' (2010) 34 *Australian and New Zealand Journal of Public Health* 10; Gibberd (n 240) 391.

[244] Paula Gerber, 'Making Indigenous Australians "Disappear": Problems Arising from our Birth Registration Systems' (2009) 34(3) *Alternative Law Journal* 157; Jewel Topsfield, 'Aborigines Lack Proof of Identity' (*The Age*, 23 January 2009); ABC Radio, 'Indigenous Australians Face Greater Difficulties Obtaining ID' (*PM*, 12 December 2008); Gibberd (n 240) 391.

incentive to enrol to vote in the first place because of that initial barrier, compounded by the task of finding someone to vouch for their identity through a statutory declaration. Inevitably, some Aboriginal citizens will remain off the voter rolls.

There is another way in which low rates of birth registration intersects with high rates of incarceration, to compound Indigenous people's disenfranchisement. Australia's national incarceration statistics evidence a disproportionately high representation of Aboriginal Australians imprisoned despite comprising less than 3 per cent of Australia's population.[245] Aboriginal Australians occupy 27 per cent of Australia's national prison population.[246] This statistic was acknowledged by the Australian Law Reform Commission report *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* ('*Incarceration Report*').[247]

In addition, the *Incarceration Report* found that the rate of Aboriginal incarceration climbs each year. For instance, from 2006 to 2016 Aboriginal incarceration increased by 41 per cent and further contributed to their higher likelihood of being incarcerated compared to non-Indigenous Australians.[248]

Unlicensed driving offences greatly contribute to Indigenous Australians being overrepresented in incarceration. Those without a birth certificate are unable to get a driver's licence. Those in remote areas, in particular, depend on driving to cover the vast distances between families and services. Without a licence, many drive regardless, which leaves those persons open to being found guilty of driving a vehicle without a licence. The offence is typically one that occurs in emergency and high need situations where an Indigenous person needs to or is the only one able to (illegally, however) drive a vehicle to attend a hospital for an emergency and/or lives in a remote community and needs to travel to get groceries etc.[249]

---

[245] *3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Abs.gov.au, 2018) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.
[246] *4517.0 – Prisoners in Australia* (2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>.
[247] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133 (2017) 90.
[248] Ibid.
[249] ARRB Transport Ltd and CARRS-Q, *Draft Report for the Australian Transport Safety Bureau, RC 2321* (Australian Indigenous Road Safety, 2002); *Australian Crime: Facts and Figures 1998* (Australian Institute of Criminology, 1999); A. Boe, *The Failure of the 'Whitefella' Criminal Justice System towards Aborigines & Torres Strait Islanders* (Brisbane: North West Queensland Aboriginal Legal Service, 1999).

The *Incarceration Report* also revealed that Aboriginal Australians who are incarcerated, are also likely to be affected by mental illnesses and illiteracy issues.[250] Mental illnesses and illiteracy issues experienced by Aboriginal Australians can potentially put them at risk for being disenfranchised under the 'unsound mind' disqualification. Being deemed of 'unsound mind' can limit a person's voting rights and eligibility to become a federal member of parliament.[251]

Aboriginal Australians are particularly vulnerable to falling within this exclusion given the post-colonial dispossession and intergenerational trauma they still experience even to date. The Pathways to Justice – Inquiry into the *Incarceration Report* specifically identified that post-colonial dispossession, dislocation, deprivation and discrimination[252] still suffered by Aboriginal Australians can negatively impact their mental and physical health and cause developmental and psychological problems.[253]

Continued psychological and cultural disempowerment can over time lead to frustrated and destructive behaviour which can be displayed by an individual in a variety of different ways. Sometimes the behaviour can be seen through drug and alcohol abuse, other times it can appear in reckless or abusive behaviour towards authorities, agencies and other people from the community.[254] That type of behaviour is a result of Aboriginal Australians being absorbed into a system that has placed limitations upon Aboriginal cultural and political empowerment.

Electoral legislation and its disqualification provisions fail to account for the high risk for Aboriginal Australians of entering the streamlined process and early age entry into institutionalisation, relative to non-Indigenous Australians. The cause of this is widely understood to lie in the unhealed and unreconciled intergenerational traumatic experiences that remain unrecognised within Australia's formalised Western system of governance.[255] Its blanket ban applying to all prisoners that excludes them from politically participating is a prime example.[256]

---

[250] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133 (2017) 63.
[251] *Commonwealth Electoral Act 1918*, s 93 (8) (a).
[252] Annette Jackson, *Taking Time: A Literature Review – Background for a Trauma-Informed Framework for Supporting People with Intellectual Disability* (NSW Department of Family and Community Services, 2015) [62] – [63].
[253] Australian Law Reform Commission (n 250) 51.
[254] Ibid, 186.
[255] *Electoral Act 1918* (Cth) ss 93–7; Jennifer Fitzgerald and George Zdenkowski, 'Voting Rights of Convicted Persons' (1987) 11 *Criminal Law Journal* 11.
[256] *Australian Citizenship Amendment Act 1993* (Cth) s 3; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, [149] – [152].

Research suggests that adult Indigenous Australians are more likely to be charged with criminal offences, sentenced to a term of imprisonment and denied bail by courts and be held in prison on remand compared to non-Indigenous adults.[257] In addition, research showed in 2001 that most persons sentenced to a lengthy term of imprisonment have a mental illness or an intellectual disability.[258] Thus, this provokes the beginning of further disenfranchisement issues of political exclusion for Aboriginal Australians in being incarcerated and highly likely to, whilst incarcerated, be deemed of 'unsound mind' given associated mental health issues and intellectual disabilities associated with being incarcerated.

Some of the Aboriginal population who are incarcerated form part of the un-sentenced national prison population if they are on remand and are awaiting trial. That part of the incarcerated population is still eligible to vote and more than one-fifth of that population vote either by postal voting or by the visit to prisons of mobile voting booths.[259] However, for those that are serving a term of imprisonment and that term is for three years or longer, the electoral disqualifications apply.[260]

The starting point for many Aboriginal children is dispossession from their culture, family and friends through out-of-home care.[261] The *Incarceration Report* found there is currently a significant overrepresentation of Aboriginal children in child removal rates which continues to increase.[262] Usually, this occurs in situations where children are living with only one sole carer and that carer becomes incarcerated (be it mother or father). The Australian Human Rights Commission found in a 2008 Report ('2008 AHRC Report')[263] that 30 per cent of Indigenous households were one-parent families (as opposed to 10 per cent of non-Indigenous families).[264] The 2008 AHRC Report also found that typically out-of-home care begins for most Aboriginal children through the removal of their mother into adult incarceration. This is because 80 per cent of Indigenous imprisoned women

[257] Jackson (n 252) 91.
[258] Schizophrenia Fellowship of NSW Inc., *Report on the Criminal Justice System in Australia* (2001).
[259] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [10] (Gleeson CJ).
[260] *Commonwealth Electoral Act 1918,* ss 93 (8) (a), 93 (8AA).
[261] *Child Protection and Aboriginal and Torres Strait Islander Children* (Child Family Community Australia, 2017) <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>; Rosemary Woodward, 'Families of prisoners: Literature review on issues and difficulties' (Occasional Paper No. 10, September 2003) 10; Leah Bromfield, Daryl Higgins, Alexandra Osborn, Stacey Panozzo and Nicholas Richardson, 'Out-of-Home Care in Australia: Messages from Research' (A report to the Community Services Ministers Advisory Council commissioned by the Australian Government Department of Families, Community Services and Indigenous Affairs, June 2005) 37–40; Bruce Valentine and Mel Gray, 'Keeping Them Home: Aboriginal Out-of-Home Care in Australia' (2006) 87(4) *Families in Society: The Journal of Contemporary Social Services* 538.
[262] Australian Law Reform Commission (n 238) 376.
[263] Ibid; Australian Human Rights Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia: Social Justice* (2008) 27.
[264] Australian Human Rights Commission, ibid.

are mothers[265] who are also the current fastest-growing prison population and severely overrepresented.[266] Further, the 2008 AHRC Report found that not only were those women incarcerated sole carers to their own children but were also carers for other Aboriginal children from their community whose parents or grandparents were incapable of looking after them.[267]

As a result, research has found that by 2016, Indigenous children were 9.8 times more likely than non-Indigenous children to be placed in out-of-home care. This equates to approximately 36 per cent of Indigenous children living in out-of-home care. The *Incarceration Report* found that this is usually the first encounter most Aboriginal children have with authority which is negative because not only were they removed from their parents, but also their friends, their family and their environment.[268]

For instance, when children are placed into out-of-home care there is no guarantee that those children will remain in the same school and geographical area where they previously resided. This can mean that children are moved from schools and locations several times if they are placed in multiple out-of-home care options throughout their lifetime. The *Incarceration Report* found that their continuous displacement can lead to disruption to their educational learning and frustration with authority and the system.[269] That type of disruption and lack of routine in a settled environment contributes to the high rate Aboriginal children have of lower levels in literacy and numeracy compared to non-Indigenous Australians.[270]

Aboriginal children placed into out-of-home care range usually from ages 10–17 years old. Those children are 26 times more likely to be placed into a detention centre compared to non-Indigenous young people.[271] Further, those children are also more likely to enter into institutionalisation through early entry into a detention centre through accumulated frustrations and loss of trust with the system and authorities which can also increase their likelihood to proceed into adult incarceration.[272]

---

[265] Schizophrenia Fellowship of NSW (n 258) 24.
[266] Margaret Cameron, *Women Prisoners and Correctional Programs* (Australian Institute of Criminology, 2001) 1.
[267] Schizophrenia Fellowship of NSW (n 258) 24.
[268] *Child Protection and Aboriginal and Torres Strait Islander Children* (Child Family Community Australia, 2017) <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>.
[269] Australian Law Reform Commission (n 250) 186.
[270] Aileen Moreton-Robinson, *Whitening Race* (Aboriginal Studies Press, 2004) 87; The Right to Vote Is Not Enjoyed Equally (n 225).
[271] Australian Law Reform Commission (n 250) 43.
[272] Jackson (n252) 91.

The *Joint Standing Committee on Electoral Matters Report* ('JSCEM Report') showed because of unjust and unequal treatment of Aboriginal Australians post-colonisation, their literacy and numeracy levels and school retention rates were lower than non-Indigenous Australians.[273] It also identified that poorer health and social conditions and remoteness of living experienced by Aboriginal Australians might affect their political participation.[274] This is because they evidence substantial inequality conditions compared to non-Indigenous persons.[275] Those conditions can lead to mental and emotional health issues that can place those persons at risk of falling into the 'unsound mind' categorisation with its vague wording yet broad application.[276]

Most prisoners also have an intellectual disability, and people with intellectual disability have shown statistically to be detained at a rate four times greater than that of the general population.[277] For Aboriginal Australians, the 'unsound mind' electoral disqualifying provision must not be taken lightly or applied in a way that automatically blanket-bans them from participating and voting. This is because, since colonisation, Aboriginal Australians have experienced a lack of consultation, consent and political inclusion which has been detrimental to the social, economic, cultural and educational support they've received (or rather lacked) from the Australian Government. This was highlighted in the *JSCEM Report*.[278]

VI. ELECTORAL LAWS: CANDIDACY

Suffrage depends on both active suffrage – the right to vote – addressed in the previous sections, as well as passive suffrage – the right to stand as a candidate. The *Commonwealth Electoral Act 1918* provides that to be eligible to nominate for the Senate or to stand for election to the House of Representatives, a person must be an Australian citizen and have attained the age of 18 years.[279]

---

[273] *4704.0 – The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (Abs.gov.au, October 2010) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter350Oct+2010>.
[274] *4102.0 – Australian Social Trends* (Abs.gov.au, 1996) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/2992cea7a4df5866ca2570ec0073eda9!OpenDocument>.
[275] Quentin Beresford, Gary Partington and Graeme Gower, *Reform and Resistance in Aboriginal Education* (UWA Publishing, 2012) 91.
[276] Committee on the Rights of Persons with Disabilities, *Views: Communication No 4/2011*, 10th sess, UN Doc CRPD/C/10/D/4/2011 (2–13 September 2013) [9.4], [44].
[277] *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (Commonwealth of Australia, 2009); *4433.0.55.005 – Aboriginal and Torres Strait Islander People with a Disability* (Abs.gov.au, 2012) <http://abs.gov.au/ausstats/abs@.nsf/mf/4433.0.55.005>.
[278] Report on the Conduct of the 2007 Federal Election, ibid.
[279] *Commonwealth Electoral Act 1918*, s 163 (1) (a) and (b).

The *Commonwealth Electoral Act 1918* also requires a candidate to be enrolled to vote or be eligible to become such an elector, for Commonwealth elections.[280]

The wording contained within s 163 of the *Commonwealth Electoral Act 1918* almost mirrors s 34 (1) of the *Australian Constitution* except for differing age requirements.[281] The *Commonwealth Electoral Act 1918* requires a member to have attained the age of 18 years whereas the *Australian Constitution* provides that a member must be 21 years old.[282] In practice, the parliament applies the *Commonwealth Electoral Act 1918* age requirement instead of what is prescribed in Part III of the *Constitution* because section 34 itself, gives the Parliament the power to set new qualifications.[283]

A. Inability to Enrol as Elector

Disenfranchisement of prisoners from enrolling to vote at Commonwealth elections can also limit a person's eligibility for political candidacy as a member of the Commonwealth Parliament. The wording contained within s 44 of the *Australian Constitution* makes clear that the term of imprisonment applicable is one year or longer.[284] The disqualification also ends once that person's sentence is served.[285]

Section 44 provides that persons are ineligible to be elected as senators or members of the House of Representatives in federal elections if they have an allegiance to a foreign power or are entitled to citizenship of a foreign power.[286] Potential federal candidates are also disqualified if they are attainted of treason or have been convicted of a state or Commonwealth offence subject to a term of imprisonment for one year or longer.[287] In addition, persons are also disqualified if they are bankrupt or insolvent;[288] hold any office of profit under the Crown or pension payable from revenues of the Commonwealth;[289] or have a pecuniary interest in any agreement with the Public Service of the Commonwealth.[290]

---

[280] *Commonwealth Electoral Act 1918*, s 163 (1) (c) (i) and (ii).
[281] *Constitution of the Commonwealth of Australia,* s 34 (1).
[282] *Constitution of the Commonwealth of Australia,* s 34 (1).
[283] J. A. Pettifer, A. R. Browning and J. K. Porter, *House of Representatives Practice* (Australian Govt Pub. Service, 1981) 167.
[284] *Constitution of the Commonwealth of Australia,* s 44 (ii).
[285] Kim Rubenstein, Citizenship in Australia: Unscrambling it's Meaning (1995) 20 *Melbourne University Law Review* 503; See generally, Robert French, Geoffrey Lindell and Cheryl Saunders, *Reflections on the Australian Constitution* (Federation Press, 2003).
[286] *Constitution of the Commonwealth of Australia,* s 44 (i).
[287] *Constitution of the Commonwealth of Australia,* s 44 (ii).
[288] *Constitution of the Commonwealth of Australia,* s 44 (iii).
[289] *Constitution of the Commonwealth of Australia,* s 44 (iv).
[290] *Constitution of the Commonwealth of Australia,* s 44 (v).

In addition to that limitation to candidacy, a person can also be disqualified from running as a political candidate to become a member of the Commonwealth Parliament if they are not eligible as an elector.[291] As such, if a person is not eligible to be an elector by virtue of s 93 (8AA) (disqualification of prisoners exclusion) and s 93 (8) (a) (disqualification of persons of 'unsound mind'), then they are ineligible for political membership of federal parliament.[292] Persons must be entitled to enrol and to vote at Commonwealth elections to qualify for candidacy for Commonwealth Parliament.[293] This candidacy disqualification in the *Commonwealth Electoral Act 1918* is also not an entrenched membership disqualifying provision within the *Australian Constitution* because of how s 34 parliamentary legislative powers can override it.[294]

As such, persons that fall within the disqualification criterion within s 44 of the Constitution may be determined ineligible to run as a candidate by the High Court of Australia after an election.[295] The AEC is also able to reject nominations of candidates based on grounds in s 172 of the *Commonwealth Electoral Act 1918* which fall outside of the disqualification within s 44 of the Constitution.[296]

In theory, the disenfranchising prisoner disqualifications that exclude persons from voting and qualifying for political membership in the Commonwealth Parliament apply to all Australian citizens equally.[297] However, this is precisely the problem. The electoral disqualifications are applied as a blanket ban that does not consider other factors relevant to limiting a person's right to politically participate. Both provisions operate without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender.[298]

For instance, the voter eligibility criteria set out in the Australian electoral legislation[299] imposes tighter and more defined standards compared to what is imposed on persons within the Constitution to become a member of parliament.[300] Again, this prompts further discussion and consideration of how laws surrounding the broad disqualification of persons of 'unsound mind' should consider

[291] *Commonwealth Electoral Act 1918,* s 93.
[292] *Commonwealth Electoral Act 1918,* ss 93 (8AA), (8) (a).
[293] *Commonwealth Electoral Act 1918,* s 163 (1) (c) (i) and (ii).
[294] *Constitution of the Commonwealth of Australia,* s 34 (1).
[295] *Re Canavan* [2017] HCA 45; *Sykes v Cleary* (1992) 109 ALR 577; *Sue v Hill* (1999) 163 ALR 648.
[296] *Commonwealth Electoral Act 1918,* s 172.
[297] Constitutional Commission, *Final Report of the Constitutional Commission* (1988) 1 [4.177] - [4.198].
[298] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [90] (Gummow, Kirby and Crennan JJ).
[299] *Commonwealth Electoral Act 1918,* s 93.
[300] *Constitution of the Commonwealth of Australia,* ss 8, 30, 44 (ii); *Roach v Electoral Commissioner* (2007) 233 CLR 162 [20] (Gleeson CJ).

other extrinsic factors as those persons may just be slightly less capacitated than others, in terms of their literacy and numeracy levels.

Those factors are important if Australian electoral laws are to be considerate of the Australian political system's commitment to adhering to principles of representative democracy. In turn, the way forward in ensuring such adherence is committed to through further examination into the *types* of citizens who are affected by such disqualifying provisions.[301]

B. Indigenous Candidacy Limitations

What both candidacy disqualifying provisions lack is a consideration of the disproportionate incarceration statistics that show a significant overrepresentation of Aboriginal Australians who could very well also be deemed to be of 'unsound mind' given the vagueness of the wording within that disqualifying provision.[302] Those statistics are relevant for consideration when making determinations as to whether the Australian electoral system upholds the principles of representative democracy embedded within its constitutional framework.[303]

As a result, there are currently only five Aboriginal federal parliamentary representatives.[304] Those representatives consist of three Senators of the 79 in the Senate and two members within the House of Representatives out of 150 members.[305] The lack of having a more prominent Aboriginal presence within the Commonwealth Parliament is partially due to the broad application of Australian electoral legislation that disqualifies persons from becoming members of Commonwealth Parliament.[306]

Electoral boundaries and geographical locations that have both high and low Aboriginal population statistics also contribute to the low figures of Aboriginal political representation. For example, Aboriginal citizen interests can be marginalised within a broader society of people who live in city

---

[301] *Constitution of the Commonwealth of Australia,* ss 8, 30, 44 (ii); *Commonwealth Electoral Act 1918,* s 93 (8AA).
[302] *4517.0 – Prisoners in Australia* (Abs.gov.au, 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>
[303] *Roach v Electoral Commissioner* (2007) 233 CLR 162 [92] (Gummow, Kirby and Crennan JJ).
[304] Current Aboriginal federal parliamentary representatives include Patrick Dodson, Ken Wyatt, Malarndirri McCarthy, Jacqui Lambie and Linda Burney. Hannah Gobbett, *Indigenous Parliamentarians, Federal and State: A Quick Guide* (2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/IndigenousParliamentarians>.
[305] Gobbet, ibid.
[306] *Commonwealth of Australia Constitution Act 1901,* s 44; *Commonwealth Electoral Act 1918,* s 163.

electorate locations and where they are more exposed and vulnerable to dominating 'mainstream' political agendas.[307]

In the alternative, Aboriginal citizens that live in regional locations can also become politically marginalised by lacking a means to attend a polling booth on election day if that location does not have an AEC outreach service designated to it, or they comprise even a lesser population statistic within their region as a minority culture with an already lacking critical mass voice to make meaningful impact. In both circumstances, the focus on proportionality through a geographical location lens alone is not a sufficient adherence to the scope to which political proportionality can be interpreted. There are other factors that should be taken into consideration that promote cultural inclusivity with political representation, reflective of Aboriginal people and their cultural interests within Australia.[308]

The *Australian Constitution's* 'blanket ban' application of candidacy qualification provisions lacks consideration of a potential candidate's background, identity and other relevant circumstantial information.[309] For Aboriginal Australians, their post-colonial oppressive experiences and significant over representative figures of incarceration and mental health issues within Australia go ignored politically and legislatively.[310] Those factors not only legislatively limit their representation within federal parliament through candidacy disqualifications, but also, the situation overall creates a sense of unbelonging and exclusivity of Aboriginal potential candidates which does not provide them with much incentive to run as candidates and feel culturally safe within the current structure of Federal Parliament.

Ultimately, the underrepresentation of Aboriginal people within the Commonwealth Parliament limits their representation in Commonwealth decision-making processes on laws and policies that

[307] Celeste Liddle, Kelly Briggs, Philip Morrissey, Benjamin Gertz, 'The Panel: Who Should Indigenous Australians Vote For?' (*The Guardian*, 3 September 2013) <https://www.theguardian.com/commentisfree/2013/sep/03/indigenous-vote-australian-election>.
[308] Jennifer Curtin, 'The Voice and the Vote of the Bush: Representation of Rural and Regional Australia in the Federal Parliament' (Department of Parliamentary Services, Parliamentary Library, Information and Research Services) 8.
[309] For example, see the case of Billy Gordon who was elected as a Labor MP into the Queensland Parliament for the seat of Cook whose circumstances highlight the high bar Aboriginal people must meet to be elected and remain elected within parliament. Casey Briggs, 'Controversial Queensland MP Billy Gordon won't run in state election' (ABC News, 31 October 2017) <https://www.abc.net.au/news/2017-10-31/billy-gordon-will-not-recontest-cook-in-queensland-election/9094304>; Jessica Marszalek, Trenton Akers, Sarah Motherwell, 'Cook MP Billy Gordon quits politics' (*The Courier Mail*, 31 October 2017) <https://www.couriermail.com.au/news/queensland/cook-mp-billy-gordon-quits-politics/news-story/8003bfff2696ddab865095bac3c82743>.
[310] Katherine Lindsay, *Federal Constitutional Law* (Lawbook Co., 2003) 20; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (Mason J).

concern their cultural identity and affairs.[311] If anything, without much of a political presence and invested interest to represent their interests from other candidates who they would then depend on to advocate on their behalf for their rights and affairs, their interests go overlooked, un-prioritised and become inappropriately represented.[312]

This was evident in Australia's rolling out of the *Northern Territory Intervention Package* ('NT Intervention').[313] The NT Intervention saw the Australian Government using parliamentary law-making powers contained within the *Australian Constitution*[314] to partially suspend several existing laws that protected Indigenous rights.[315]

The intent was to establish 'emergency response' legislation that would add further regulation of the civil rights of citizens living within the packages identified 'prescribed areas'.[316] However, the 'prescribed areas' were several Northern Territory communities that were mostly populated by Aboriginal people who became in that context, the indirect subjects of the limiting civil rights legislation.

Prior to drafting the NT Intervention package legislation, the Australian Parliament did not make any effort to consult with citizens residing in the targeted prescribed areas.[317] The Australian Parliament did not evidence, when drafting the NT Intervention package legislation, a need to consult with citizens that would be potentially affected by the package.

---

[311] Katherine Murphy, 'Ken Wyatt says he has Indigenous voice to parliament plan for Scott Morrison' (*The Guardian*, 17 October 2019) <https://www.theguardian.com/australia-news/2019/oct/17/ken-wyatt-says-he-has-indigenous-voice-to-parliament-plan-for-scott-morrison>; Katherine Murphy and Paul Karp, 'Ken Wyatt accuses IPA of engaging in bigotry in voice to parliament video' (*The Guardian*, 1 November 2019) <https://www.theguardian.com/australia-news/2019/nov/01/ken-wyatt-accuses-ipa-of-engaging-in-bigotry-in-voice-to-parliament-video>; Eddie Synot, 'Ken Wyatt's proposed 'voice to government' marks another failure to hear Indigenous voices' (*The Conversation*, 30 October 2019) <https://theconversation.com/ken-wyatts-proposed-voice-to-government-marks-another-failure-to-hear-indigenous-voices-126103>.

[312] Ken Coghill and Paula Wright, *Hear Our Voice* (The Australian Collaboration, 2012) 2.

[313] Ibid; *Northern Territory National Emergency Response Act 2007; Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007; Families, Community Services and Indigenous Affairs and Other Legislation Amendment. (Northern Territory National Emergency Response and Other Measures) Act 2007*; *Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007–2008*; *Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007–2008.*

[314] *Constitution of the Commonwealth of Australia,* s 122.

[315] *Racial Discrimination Act 1975*; *Aboriginal Land Rights (Northern Territory) Act 1976*; *Native Title Act 1993(Cth)*; *Northern Territory Self-Government Act 1978*; *Social Security Act 1991*; *Income Tax Assessment Act 1993.*

[316] *The Suspension and Reinstatement of the RDA and Special Measures in the NTER* (Humanrights.gov.au, 2017) <https://www.humanrights.gov.au/publications/suspension-and-reinstatement-rda-and-special-measures-nter-1#_edn1>; *Northern Territory National Emergency Response Act 2007,* s 4; Human Rights Commission, *Social Justice Report* (2007) <https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf>

[317] Irene Watson, 'In the Northern Territory Intervention: What is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 5.

A primary contributor to the government's lack of consultation with citizens affected, many of whom were Aboriginal, was the absence of a political voice to represent their interests prior to drafting the legislation. The result of not having a political voice and presence in federal decision-making left those citizens, particularly Aboriginal people, with an additional layer of disappointment and distrust towards the Australian Government.[318]

This suggests that elected parliamentary representatives may only feel compelled to represent and be held accountable for protecting the interests of their electors and constituents with whom they share common interests. This helps to understand how the NT Intervention package was implemented: via a lack of representation of Aboriginal interests in the development and implementation of the package.

To date, formal inclusion has proven to not be enough. Engagement and encouragement of Aboriginal Australians to vote and participate at Commonwealth elections so they are eligible to run as a political candidate are also not enough if the structure and incentive to represent their cultural affairs as candidates in parliament is not respectful of their colonialist past, and meaningful representation and inclusion.

VII. AUSTRALIAN ELECTORAL COMMISSION INITIATIVES

The Australian Electoral Commission (AEC) was established in 1962 and is an independent statutory body separate from the Commonwealth Parliament. As part of its mandate, the AEC has established voter education programs to provide Aboriginal and Torres Strait Islander Australians with education on Australia's democratic political system and processes.[319]

The AEC also produces a range of resources to educate Indigenous Australians on the Australian electoral system, which include posters, brochures, materials that promote enrolment and voting,

[318] Megan Davis, Mark McKenna, et al., 'After Uluru: Australia's Politics of Contempt Threatens the Soul of the Nation' (ABC Religion and Ethics, 24 November 2017) <https://www.abc.net.au/religion/after-uluru-australias-politics-of-contempt-threatens-the-soul-o/10095186>; Lina Caneva, *Indigenous Referendum Rejection 'Profoundly Disappointing'* (Pro Bono Australia, 1 November 2017) <https://probonoaustralia.com.au/news/2017/11/indigenous-referendum-rejection-profoundly-disappointing/>; Michelle Grattan, 'Indigenous constitutional recognition a difficult goal for Scott Morrison and Ken Wyatt' (*The Conversation*, 12 July 2019) <https://www.abc.net.au/news/2019-07-12/indigenous-constitutional-recognition-a-difficult-political-goal/11302246>.

[319] *History of the Indigenous Vote* (Australian Electoral Commission, 2015) <http://www.aec.gov.au/indigenous/history.htm>; Will Sanders, 'Delivering Democracy to Indigenous Australians: Aborigines, Torres Strait Islanders and Commonwealth Electoral Administration' in Marian Sawer, *Elections: Full, Free & Fair* (Federation Press, 2001) 161.

videos, images, audio files, publications on the history of the Indigenous vote and electoral milestones. It also produces specific materials on elections and referendums.[320]

In particular, the Aboriginal Electoral Education Program has sought to educate Aboriginal Australians that reside in remote communities of Western Australia, South Australia and the Northern Territory on Australia's political system.[321] The AEC also encourages Indigenous youth to be more politically aware of how the Australian Government and parliamentary processes operate in its National Indigenous Youth in Parliament Program. The National Indigenous Youth in Parliament Program selects Indigenous youth representatives across the country to travel to Canberra to attend Commonwealth Parliament for a week to learn about federal political processes.[322]

The Indigenous Electoral Participation Program also employs Indigenous Engagement Officers across Australia to be involved in a professional capacity during elections.[323] Those measures are of particular importance in contemporary times since the new system for voting Senate preferences at federal elections has been established in 2016. Since the new Senate voting system has been introduced, many electors have been confused by AEC instructions and as a result have incorrectly filled in their ballot papers.[324]

Thus, educational support measures and a considerable increase of AEC mobile polling teams dispersed across Australia, that target remote town camps with high Indigenous populations, would be beneficial and supportive of Indigenous political participation.[325] However, these programs administered by the AEC have suffered either extinguishment entirely or limitations placed upon its operations as a result of Australian government budget cuts to make savings. This occurred in 1996

[320] History of the Indigenous Vote, ibid.
[321] Ibid.
[322] *Highlights from NIYP 2014* (Australian Electoral Commission, 2016) <http://www.aec.gov.au/Indigenous/niyp/2014/>.
[323] *Indigenous Electoral Participation Program* (Australian Electoral Commission, 2018) <http://www.aec.gov.au/Indigenous/iepp.htm>; *Voting Options* (Australian Electoral Commission, 2018) <http://www.aec.gov.au/Voting/ways_to_vote/>; *Temporary and Election Employment* (Australian Electoral Commission, 2016) <http://www.aec.gov.au/employment/temp/index.htm>.
[324] Damon Muller, *The New Senate Voting System and the 2016 Election* (Parliament of Australia, 25 January 2018) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/SenateVotingSystem>; Stephen Morey, *So, how did the new Senate voting rules work in practice?* (The Conversation, 5 August 2016) <https://theconversation.com/so-how-did-the-new-senate-voting-rules-work-in-practice-63307>.
[325] Indigenous Electoral Participation Program, ibid; Voting Options, ibid.

under the administration of the John Howard Government and again in 2009 under the Kevin Rudd Government.[326]

Despite those cuts, the *JSCEM Report* suggested that Indigenous targeted outreach programs would require additional funding to financially support initiatives like mobile polling teams for example, that would target Aboriginal citizens whose vote at federal elections is particularly important given their minority status.[327]

Each of the electoral initiatives implemented by the AEC that work to increase Indigenous staff as part of the AEC's Reconciliation Action Plan ('AEC RAP') have sought to deliver electoral services that represent the needs and aspirations of Indigenous Australians.[328] However, despite their establishment, it is clear statistically in Australia[329] that they are not enough to fully enhance and empower Aboriginal political participation. The statistics alone of the lack of Aboriginal engagement apparent across Australia, through voting and candidacy, are evidence of that.

VIII. CONCLUSION

Australia lacks full adherence to principles of political equality that underpin its representative democracy regime. This is evidenced just in acknowledgement of both direct and indirect legislative limitations placed upon Aboriginal citizens' rights when we compare those experiences to non-Indigenous citizen experiences and access to such rights. The *Australian Constitution* through its legislative powers and control over electoral laws and processes, limits full access of what internationally recognised threshold requirements require for universal suffrage. This has implications for the political presence of Aboriginal members in federal parliament and for voting engagement amongst Aboriginal citizens.

Legislatively, the *Australian Constitution* electoral provisions that impact elector and candidacy qualification, and the *Commonwealth Electoral Act 1918*, both qualify and disqualify citizens equally in terms of their application. The blanket-ban application on persons without additional regard to their differentiating backgrounds and individual circumstances – like, for instance, taking

[326] Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (ANU E Press, 2012) 48.
[327] *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (Commonwealth of Australia, 2009) 32.
[328] *Indigenous Australians* (Australian Electoral Commission, 2016) <http://www.aec.gov.au/Indigenous/>.
[329] *Additional Performance Information – AEC Annual Report 2015–16* (aec.gov.au, 2017) <http://annualreport.aec.gov.au/2016/performance/additional.html>.

into account a person's cultural identity – goes against principles of justice and representative democracy.

Under current Commonwealth electoral laws and processes, Aboriginal disenfranchisement is a major issue. Historically, their democratic inclusion and experiences have been vastly different and unequal compared to non-Indigenous citizens as a result of their colonisation and political, financial and social oppression within Australia. Of all citizens, electoral reform of key provisions that limit their political participation should take prioritisation.

In terms of electoral law reform, this thesis recommends that s 93 (8AA) of the *Commonwealth Electoral Act 1918*, which is the prisoner disqualification provision, be repealed. The premise for that recommendation is that there is a greater need for structural issues within Australia's criminal justice system to be reformed also, given the high and disproportionate rates of Indigenous incarceration and, deaths in custody.[330] Limiting the franchise of those most subject to the failures of the criminal justice system only further continues to contribute to the overall marginalisation and institutional and political oppression of Indigenous people. The changes required, that would protect the cultural identity and lives of Indigenous people incarceration issues statistically target the most, are reliant on political interest, investment and advocacy to reform those structural issues. The pathway forward to achieve that end, is reliant on the political participation through voting, of those who are most subject to its detrimental effects who are Indigenous people.

In addition, this thesis suggests s93 (8) (a) of the *Commonwealth Electoral Act 1918*, which is the 'unsound mind' disqualification provision, also be repealed or in the alternative, be expanded upon in both legislative wording and policy reform, to provide greater consideration and protection of Indigenous people. The premise here is that Indigenous people are subject to racial bias within Australia's healthcare system and the history of their disenfranchisement as a people was reliant on justifying their exclusion from the franchise on a false presumption that they lacked the capacity and intelligence to understand voting at a political election.[331] This section, if repealed, would adopt an approach that is more inclusive of the Indigenous franchise. That approach would show a more

---

[330] Tim Rowse, 'The Royal Commission, ATSIC and Self-Determination: A Review of the Australian Royal Commission into Aboriginal Deaths in Custody' (1992) 27 (3) *The Australian Journal of Social Issues* 153; *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 1, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 2, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 3, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 4, 15 April 1991); *4517.0 - Prisoners in Australia* (abs.gov.au, 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>.

[331] *Commonwealth Franchise Act 1902*, s4 (repealed).

mature understanding by the Australian government, of the range of mental health issues Indigenous people still experience, post publication of the *Closing the Gap Report*,[332] that the Australian government still needs to address. This again, is reliant on the political advocacy and investment of political candidates elected by people whose interests they best represent. The people whom this disqualification mostly disenfranchises are Indigenous people. They are also a group of people who are most vulnerable to health care racial discrimination and require significant political advocacy in healthcare support and treatment. As such, Indigenous Australians should have full access to exercising their voting rights at Commonwealth elections to afford them better chance for their interests to be properly politically represented in combating some of those issues.[333]

Furthermore, the AEC engagement initiatives targeting Aboriginal citizens and communities have not had the impact required to compensate for the lack of political participation. Incarceration, literacy, mental health, and birth registration all remain barriers to participation in the democratic process. These are not yet embraced by the AEC initiatives.

Given the Australian constitutional framework is grounded within the idea of being a representative democracy, the interaction between electoral laws and constitutional provisions in the face of intergenerational structural barriers to Indigenous political participation highlights a deficit in the Australian institutional framework. A consideration of the capacity of similar jurisdictions to support Indigenous political participation may reveal the means of improving the Australian system.

[332] Department of Prime Minister and Cabinet, 'Closing the Gap Report' (Commonwealth of Australia, 2018).
[333] Ibid; *4433.0.55.005 - Aboriginal and Torres Strait Islander People with A Disability* (abs.gov.au, 2012) <http://abs.gov.au/ausstats/abs@.nsf/mf/4433.0.55.005>.

CHAPTER 3
INDIGENOUS POLITICAL PARTICIPATION WITHIN CANADA AND NEW ZEALAND

> Maori and indigenous leadership are about the work being done and how leaders are preparing the next generation of leaders to accommodate the needs of our people. You can't be an effective leader if you don't work with the community or understand them in their world.[1]

I. INTRODUCTION

Citizens within Commonwealth jurisdictions most at risk of being the most excluded politically are Indigenous colonised peoples.[2] The colonial past shared by Indigenous peoples of Commonwealth jurisdictions has resulted in subjection not only directly, through immediate and ongoing acts of dispossession from their land[3] and racial discrimination,[4] but also more indirectly through disempowerment and oppression arising from the operation of political institutions themselves.[5]

Commonwealth political systems, including in Australia, Canada and New Zealand, have a historical background that evidences a political and cultural intent by non-Indigenous leaders to limit the access to political participation and representation of their Indigenous peoples.[6] A lack of

---

[1] Dr Margie Maaka (Karaitiana Taiuru, 2020) <https://www.taiuru.maori.nz/maori-leaders-quotes-sayings/dr-margie-maaka/>.

[2] Mick Dodson, 'Towards the Exercise of Indigenous Rights: Policy, Power and Self-Determination' (1994) 35(4) *Race & Class* 65; Aileen Moreton-Robinson, 'Patriarchal Whiteness, Self-determination and Indigenous Women: The Invisibility of Structural Privilege and the Visibility of Oppression' in Barbara A. Hocking, *Unfinished Constitutional Business? Rethinking Indigenous Self-determination* (Aboriginal Studies Press, 2005) 61; Miranda Johnson, 'Reconciliation, Indigeneity, and Postcolonial Nationhood in Settler States' (2011) 14(2) *Postcolonial Studies* 187.

[3] Kate Galloway, 'Indigenous Dispossession in the 21st Century' (2015) 40(1) *Alternative Law Journal* 32; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; Fiona McCormack, 'Indigeneity as Process: Maori Claims and Neoliberalism' (2012) 18(4) *Social Identities* 420; Colin Samson, 'Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims' (2016) 31(01) *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 93.

[4] *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 1, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 2, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 3, 15 April 1991); *Royal Commission into Aboriginal Deaths in Custody* (National Report Volume 4, 15 April 1991); *Bringing them Home Report* (1997) <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>; Nicholas D. Spence et al, 'Racial Discrimination, Cultural Resilience, and Stress' (2016) 61(5) *The Canadian Journal of Psychiatry* 300; *Our children – Keepers of the sacred knowledge* (Final Report of the Ministers National Working Group on Education, 2002); Ricci Harris et al, 'Effects of Self-Reported Racial Discrimination and Deprivation on Maori Health and Inequalities in New Zealand: Cross-Sectional Study' (2006) 367(9527) *The Lancet* 2.

[5] This reflects the operation of levels of power described by Steven Lukes in *Power: A Radical View* (Palgrave Macmillan Ltd, 2nd ed, 2004).

[6] Samantha Stronge et al, 'Perceived Discrimination Predicts Increased Support for Political Rights and Life Satisfaction Mediated by Ethnic Identity: A Longitudinal Analysis' (2016) 22(3) *Cultural Diversity and Ethnic Minority Psychology* 2–3. Maori political representation in parliament dates from the passing of the *Maori*

prior, sought-after consent, consultation and the means of overall inclusion of Indigenous peoples within institutions of governance, are key examples of longstanding political exclusion from the colonial order.[7] Consequently, Indigenous peoples are vulnerable to laws and policies that have not considered and do not represent their interests. The blindness of legislation and policy to Indigenous needs leaves First Nations peoples exposed to systematic injustices evidenced, for example, by overrepresentation in incarceration statistics, and negative outcomes in health, education, housing and other measures of equality.[8] As canvassed in Chapter 2, such systemic issues have flow-on effects to access to voting and political candidacy, thus reinforcing structural disadvantage.

Aligned with the colonial purpose of securing territories for empire,[9] political regimes in the early post-colonial era of many Commonwealth jurisdictions evolved as one means of maintaining control over Indigenous colonised peoples who may well have been subjects of the Crown[10] but whose civil rights were suppressed.[11] In the longer term, the foundations of colonial governance systems constrained equality of Indigenous citizens relative to the broader population including through voting and political candidacy.

Despite this foundation, some jurisdictions have adapted their governance institutions to accommodate Indigenous peoples' political participation, albeit to varying degrees. Progressive changes, however, are dependent on the way in which Indigenous peoples were colonised and how successive leaders have guided and influenced change domestically.

Representation Act 1867 where the intent was to ensure Maori interests were formally acknowledged through designated seats in parliament; however, Maori representation was limited to four seats which should have been twenty at the time seats were established. John Borrows, 'Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation' (1994) 24(1) *UBC Law Review* 16; Daiva Stasiulis and Radha Jhappan, 'The Fractious Politics of a Settler Society: Canada' in Daiva Stasiulis, Nira Yuval-Davis, *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (SAGE, 1995) 95–96.

[7] In the Australian context, see, eg, the Constitutional Conventions in the lead up to Federation in A. Twomey, 'Constitutional Conventions, Commissions and Other Constitutional Reform Mechanisms' (2008) 19 *PLR* 308, and the Australian Government's seemingly endless inquiries into constitutional recognition of Indigenous Australians eg, in Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond Law Review* 335–346.

[8] See the Department of Prime Minister and Cabinet, 'Closing the Gap Report' (Commonwealth of Australia, 2018) chs 2–7.

[9] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) ch 3; Nicole Graham and Alain Pottage, *Lawscape: Property, Environment, Law* (Routledge, 2011) ch 4; Anthony Burke, *Fear of Security: Australia's Invasion Anxiety* (Cambridge University Press, 2008) 15.

[10] See Gavin Loughton, 'Calvin's Case and the Origin of the Rule Governing 'Conquest' in English Law' (2004) *Australian Journal of Legal History* 8; Harvey Wheeler, 'Calvin's Case (1608) and the McIlwain-Schuyler Debate' (1956) 61(3) *The American Historical Review* 588.

[11] Henry Reynolds, 'Aborigines and the 1967 Referendum: Thirty Years On' (Papers on Parliament No. 31, June 1998) [6]; *A Native Policy for Australia* (Aborigines Protection League, Adelaide 1932) 4; Vic Satzewich and Terry Wotherspoon, *First Nations: Race, Class and Gender Relations* (University of Regina Press, 2000) 228; Alan Ward, 'An Unsettled History' (1999) 9(2) *New Zealand Studies* 34.

Canada and New Zealand are examples of Commonwealth democracies that have overcome some of the major substantive political inequality barriers their Indigenous peoples have faced historically. Without claiming that these systems are perfect, and acknowledging serious contemporary issues in terms of how these jurisdictions treat Indigenous rights,[12] there are nonetheless beneficial legislative and policy measures that have been implemented domestically that provide relevant comparators for analysing the institutional framework in Australia.

First, this chapter uses the case study of Canada enhancing political access to its First Nations in the face of prisoner electoral voting disqualification. Like Australia, First Nations of Canada are disproportionately represented in imprisonment[13] and, like Australia, Canada's current electoral legislation[14] disqualifies persons incarcerated for two years or more from enrolling and voting at elections.[15] The key difference this chapter highlights is the way in which courts of Canada[16] have deployed the *Charter of Rights and Freedoms* to find disqualification ineffective and constitutionally invalid.[17] Consequently, legislative disqualification of prisoners in Canada is not applied and instead electoral policy measures and services seek to engage its prisoners, particularly those of First Nation descent, to enroll and to vote at elections through mobile prison voting stations.

Secondly, this chapter examines how the New Zealand political system has reformed itself to benefit and include Maori politically. In particular, it analyses the Maori Electoral Roll Option and establishment of designated seats in parliament that work hand in hand to empower Maori to identify as culturally autonomous and differentiated citizens through enrolling on their own Maori electoral roll.

The aim of this chapter is to identify a comparative framework of governance designed to overcome the barriers to political participation of Indigenous peoples in colonised states.

---

[12] Annie L. Booth and Norman W. Skelton, '"There's a Conflict Right There": Integrating Indigenous Community Values into Commercial Forestry in the Tl'azt'en First Nation' (2010) 24(4) *Society & Natural Resources* 368; Michael Ignatieff, *The Rights Revolution* (House of Anansi, 2008) 97; Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 *Alternatives* 118; Dominic O'Sullivan, 'The Treaty of Waitangi in Contemporary New Zealand Politics' (2008) 43(2) *Australian Journal of Political Science* 973.
[13] *The Incarceration of Aboriginal People in Adult Correctional Services* (www150.statcan.gc.ca, 2009) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2009003/article/10903-eng.htm>.
[14] *Canada Elections Act 2000*, s 4 (e).
[15] *Canada Elections Act 2000*, s 4 (e).
[16] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.
[17] *Canadian Charter of Rights and Freedoms 1982*.

II. CANADA PRISONERS' ELECTORAL RIGHTS

Canada is a representative democracy[18] that, like Australia, was colonised and politically influenced by the United Kingdom. At the time of drafting the governing framework of Canada, First Nations were not included or consulted. Furthermore, First Nations were not provided with an opportunity to give their prior and informed consent to being subjected to a system of governance under non-Indigenous leadership.[19]

As a result, the Canadian governance system and laws and policies that followed after its construction pre-1982, were drafted without First Nation political and cultural input, and without formal acknowledgement of their rights and interests.[20] Much of Canadian First Nation experiences reflect clear forms of racial discrimination and political exclusion from law and policymaking processes implemented by the Canadian Government that negatively impact upon their affairs as a people.[21]

Change and progressiveness only truly started to occur in Canada post-confederation when successive governments began to reform the *Canadian Constitution Act 1982* and entrenched the *Canadian Charter of Rights and Freedoms 1982*.[22] Both legislative instruments recognise the importance of the political inclusion of First Nations and reaffirm values upon which the Canadian democratic regime is based, namely equality and self-determination.[23]

The *Canadian Constitution Act 1982* and the *Canadian Charter of Rights and Freedoms 1982* have, alongside the establishment of treaties across the nation between First Nations and the Canadian

[18] Paul Howe, Peter H. Russell, *Judicial Power and Canadian Democracy* (McGill-Queen's Press, 2001) 118; Paul Howe, Richard Johnston, André Blais, *Strengthening Canadian Democracy* (IRPP, 2005) 3; Stanley Bréhaut Ryerson, *French Canada: A Study in Canadian Democracy* (Progress Books, 1980).
[19] Vivien Hart, 'Democratic Constitution Making' (United Nations Institute of Peace Special Report 107, July 2003) 3–4; Angela M. Banks, 'Expanding Participation in Constitution Making: Challenges and Opportunities' (2008) 49(2) *William & Mary Law Review* 1046; Jeremy Webber, 'Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 271.
[20] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002) 4–5; John Borrows, 'Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation' (1994) 24(1) *UBC Law Review* 14; Patrick Macklem, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) *McGill Law Journal* 383.
[21] D. C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989); B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986).
[22] *St Catherine's Milling and Lumber Co v R* (1888) 14 App. Cas. 46, [54]; *Calder v Attorney-General British Columbia* (1973) SCR 313, [145]; Patricia A. Monture-Angus and Jasmin Habib, 'Journeying Forward: Dreaming First Nations' Independence' (2002) 29(1–2) *Resources for Feminist Research* 150.
[23] Patrick James, *Constitutional Politics in Canada after the Charter* (UBC Press, 2010) 6; John Borrows, 'Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics' (1994) 43 *University of New Brunswick Law Journal* 19.

Government, guided and influenced Canadian constitutional conventions.[24] Those actions have also progressively shifted post-colonial treatment of First Nations in Canada in terms of respecting and protecting their democratic rights to political participation and representation.[25]

While there are multiple features of the framework of the *Canadian Constitution* and *Charter* that promote the civil rights of First Nation peoples,[26] of interest here is the case study of the effect of this framework on First Nation political participation through its impact on electoral disqualification of prisoners. Like Australia, Canada's 4 per cent First Nations population[27] is overrepresented within its national incarceration statistics that comprise almost 25 per cent of the overall prison population.[28]

The *Canada Elections Act 2000* disqualifies persons from enrolling and voting at federal elections if they have been sentenced to a term of imprisonment of two years or more.[29] However, since the case of *Sauvé v Canada (Chief Electoral Officer)*[30] the legislative provision no longer applies – despite the lack of its repeal.[31] It is entrenched provisions of the *Canadian Constitution Act 1982* and the *Canadian Charter of Rights and Freedoms 1982*,[32] interpreted by the Canadian courts, that provide the vital institutional framework to overcome laws that would otherwise indirectly impede First Nations people's franchise.

To fully explore the effect of the prisoner disqualification on Canadian First Nations political participation, this part will first analyse political participation under the *Canadian Constitution* and *Charter*, followed by a close examination of its electoral legislation. Finally, it assesses the effect of this legal framework on prisoner participation, including through the efforts of Elections Canada, the electoral commission with oversight of voting in Canada.

---

[24] *R v Derriksan* (1976) 4 (SCC) 575; B. Slattery, 'Aboriginal Sovereignty and Imperial Claims: Reconstructing North American History' (1991) 29 *Osgoode Hall Law Journal* 681; B. Ryder, 'The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations' (1991) 36 *McGill Law Journal* 308.

[25] B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal People of Canada* (Institute of Intergovernmental Relations, 1985); Emily Grabham, 'Law v Canada: New Directions for Equality under the Canadian Charter?' (2002) 22(4) *Oxford Journal of Legal Studies* 641; Vic Satzewich and Terry Wotherspoon, *First Nations: Race, Class and Gender Relations* (University of Regina Press, 2000) 103.

[26] *Canadian Charter of Rights and Freedoms 1982*, s 25; *Constitution Act of Canada 1982*, s 35.

[27] *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit* (www12.statcan.gc.ca, 2018) <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>.

[28] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133 (2017) 197.

[29] *Canada Elections Act 2000*, s 4 (e).

[30] [2002] 3 SCR 519.

[31] Alecia Johns, 'The Case for Political Candidacy as a Fundamental Human Right' (2016) 16 *Human Rights Law Review* 36.

[32] *Canadian Charter of Rights and Freedoms 1982*, s 3.

A. Political Participation under the Canadian Constitution and Charter of Rights and Freedoms

At the core of protections for Canadian First Nations lies the political participation provisions of the *Canadian Constitution* and the democratic rights contained within the entrenched *Charter of Rights and Freedoms 1982*.[33] Canadian courts have pluralistically treated citizen democratic rights to vote in Canada as incorporating several other fundamental political participation rights such as rights to effective political representation; meaningful political participation; equal participation; and a free and informed vote.[34]

This part discusses provisions that have been developed over some 230 years to enhance the political standing and participation of First Nations through their access to voting rights as citizens. In particular, it addresses the rights of those sentenced to a term of imprisonment.

The first Constitution in Canada was the *Constitutional Act 1791* (Imp)[35] which separated Upper and Lower Canada through an Act of the British Parliament. A primary step towards confederation in Canada, its voting franchise standards were inclusive to the extent it enfranchised Canadian women who owned private property in Lower regions of Canada during the 18th and early 19th centuries. However, it was not yet inclusive for all citizens equally in terms of access to the franchise.[36]

Many historians have criticised the 1791 Act for its failure to align with responsible government for *all* persons.[37] Despite the broadness of its franchise provisions, particularly as it did not expressly exclude women from the franchise, the Act was still limiting for citizens who fell outside of the broad qualifying provisions including First Nations who did not consider themselves as citizens and subject of the monarch but rather as their own sovereign people; [38] there were also First Nations

---

[33] *Canadian Charter of Rights and Freedoms 1982*, s 3; Christopher D. Bredt and Markus F. Kremer, 'Section 3 of the Charter: Democratic Rights at the Supreme Court of Canada' (2004/2005) 17 *National Journal of Constitutional Law suppl. Constitutional Update* 20; Yasmin Dawood, 'Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter' (2013) 51(1) *Osgoode Hall Law Journal* 254.
[34] *Reference re Secession of Quebec* [1998] 2 SCR 217, [61]; *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200, [67]; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [1]; Yasmin Dawood, 'Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter' (2013) 51(1) *Osgoode Hall Law Journal* 258.
[35] 31 Geo III c 31; *Belczowski v Canada* [1992] 2 FC 440, [458].
[36] Pierre Tousignant, 'Constitutional Act 1791' (2006) *The Canadian Encyclopaedia.*
[37] Nadia Urbinati, 'Condorcet's Democratic Theory of Representative Government' (2004) 3(1) *European Journal of Political Theory* 67; Jeffrey L. McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada* (University of Toronto Press, 2000) 345; James Bowden, '1791: The Birth of Canada' (2015) *The Dorchester Review* 1791.
[38] Margaret A. Banks, 'The Franchise in Britain and Canada' (1967) 17(1) *The University of Toronto Law Journal* 187; W. L. Morton, 'The Extension of the Franchise in Canada: A Study in Democratic Nationalism' (1943) 22(1) *The*

who were not landowners or paid minimal rent, and others convicted of a serious criminal offence or treason.[39]

The initial disenfranchising provision of persons attainted for treason or a serious criminal offence reflected the common law at the time on matters concerning the qualification of electors and candidates for the House of Commons.[40] The rationale for disqualifying candidates was that persons attainted of treason and felony 'could not answer the description in the writs of the election of knights, citizens and burgesses as being persons of discretion, in the sense of prudence and sound judgment'.[41] According to Blackstone, those persons were 'unfit to fit anywhere [in the House of Commons]'.[42]

With respect to electors, Blackstone considered several statutes that were of the view that 'persons who were convicted of perjury or subornation of perjury were incapable of voting at any election'.[43] Disqualification of members was then further included within the *Union Act 1840* (Imp) which came into force after the rebellion of 1837 and lasted until confederation in 1867.[44] Section 7 of the *Union Act 1840* (Imp) disqualified Legislative Councillors attainted of treason or convicted of a felony 'or of any infamous crime'.[45]

After Confederation in Canada, the *British North America Act 1867* (Imp) was established.[46] Section 31(4) of the *British North America Act 1867* (Imp)[47] carried over the disqualifying provision of Canadian members of parliament in replacement of the *Union Act 1840* (Imp). Its establishment forms a major part of Canada's *Constitution Act of 1867*.[48] Both instruments form Canada's federal system of governance; however, in contemporary times, the *Constitution Act of 1867* describes Canada's federal and political system and framework, its electoral system and processes and how powers are divided between federal and provincial governments.[49]

Canadian Historical Association 80; R. Perin, 'National Histories and Ethnic History in Canada' (1993) 20 *Cahiers de Recherche Sociologique* 120.

[39] Pierre Tousignant, 'Constitutional Act 1791' (2006) *The Canadian Encyclopaedia*; *Belczowski v Canada* [1992] 2 FC 440, [458].

[40] Francis James Newman Rogers, *Rogers on Elections* (Nabu Press, 2010) [30]–[31].

[41] Sir Edward Coke, *Institutes of the Laws of England* (1798), Pt 4, Ch 1 [48]; Sir John Comyns, *A Digest of the Laws of England*, 4 (Collins & Hannay, 1824) [185]–[187].

[42] William Blackstone and Thomas Andrew Green, *Commentaries on the Laws of England* (University of Chicago Press, 2nd ed, 1979) 169.

[43] Blackstone Ibid, 167; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [56] (Gummow, Kirby and Crennan JJ).

[44] 3 & 4 Vict c 35.

[45] *Union Act 1840* (Imp), s 7.

[46] 30 & 31 Vict c 3.

[47] 30 & 31 Vict c 3.

[48] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [57] (Gummow, Kirby and Crennan JJ).

[49] *Constitution Act of Canada 1867*.

Despite the exclusion of First Nations of Canada during the drafting and negotiation phases of the *Constitution Act of 1867*,[50] the *Constitution Act of 1867* still regulates the way in which First Nation citizens are governed. Federal electoral voting rights, however, are contained within the *Constitution Act 1982* in Part 1 of the *Canadian Charter of Rights and Freedoms 1982* under 'Democratic Rights'. Section 3 of the *Charter* provides express voting rights for Canadian citizens and their qualification for running for public office.[51]

This evidences a clear distinction from Australia's implied right to vote.[52] Further, it has also prevented the Canadian Parliament overriding those rights through the implementation of electoral legislation that would, without reasonable justification, limit voting rights under s 33 (1) of the *Charter*.[53] This means that, in accordance with the principle of universal suffrage emblematic of representative democracy,[54] voting rights in Canada can only be limited if parliament can demonstrate its reasons for doing so are reasonably justified in a free and democratic society. [55]

Despite an express, enshrined right to vote, the struggle to uphold voting rights[56] and to protect them from being overridden by parliament[57] has caused interpretive and application issues in Canadian common law.[58]

Canada's 1991 Supreme Court ruling *Reference re Provincial Electoral Boundaries* held that s 3 of the *Charter* should be interpreted so that equality of voting power amongst citizens guides the capacity for 'effective representation'.[59] The majority held that 'factors like geography, community history, community interests and minority representation may need to be taken into account' so that Canadian legislative assemblies *effectively* represent all citizen interests no matter how diversified they are.[60]

---

[50] James (n 23) 195; Roberto Perin, 'National Histories and Ethnic History in Canada' [2011] (20) *Cahiers de Recherche Sociologique* 120; John Milloy, 'Indian Act Colonialism: A Century of Dishonour, 1869–1969' (Research Paper for the National Centre for First Nations Governance, May 2008) 1–3.
[51] *Canadian Charter of Rights and Freedoms 1982,* s 3.
[52] *Commonwealth of Australia Constitution Act 1901,* ss 7, 24; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[53] *Canadian Charter of Rights and Freedoms 1982*, ss 33(1).
[54] Harold J. Laski, 'Present Position of Representative Democracy' (1932) 26(4) *American Political Science Review* 629–641; Jamin B. Raskin, 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141(4) *The University of Pennsylvania Law Review* 1392; Paul B. Kern, 'Universal Suffrage without Democracy: Thomas Hare and John Stuart Mill' (1972) 34(3) *The Review of Politics* 306.
[55] *Constitution Act of Canada 1982*, s 1.
[56] *Canadian Charter of Rights and Freedoms 1982,* s 3.
[57] *Canadian Charter of Rights and Freedoms 1982*, s 33(1).
[58] *Constitution Act of Canada 1982*, s 1.
[59] *Reference re Prov. Electoral Boundaries (Sask.)* [1991] 2 SCR 158, [35].
[60] *Reference re Prov. Electoral Boundaries (Sask.)* [1991] 2 SCR 158, [36].

The ruling in *Reference re Provincial Electoral Boundaries* established Canada's longstanding electoral principle that recognises individual voting power within s 3 must also acknowledge the importance of communities of interest and identity. In doing so, the interpretation of s 3 may also include special measures to ensure genuine electoral equality.[61] This can involve differentiated treatment of persons associated with different minority cultural and group identities that require additional support to enhance their political participation so that meaningful minority representation is present.[62] This can be contrasted with the Australian blanket approach to electoral disqualification.[63]

In terms of political candidacy rights of Canadian citizens, like Australia, the *Constitution Act of 1867* disqualifies persons incarcerated to a term of imprisonment from becoming a member of the Senate.[64] This disqualification of members is vague as s 31 (4) lacks specificity as to whether the disqualification ends once a sentence is served. This has, like voting rights, been a contentious issue before the Canadian courts.[65]

Ultimately, electoral rights within the *Canadian Constitution* are protected through statutory interpretation provided by the courts, and formally through the rule of law[66] and principles of equality acknowledged formally in the *Canadian Constitution* and *Charter*.[67] Courts have approached their role of statutory interpretation for those provisions to achieve, so far as possible, substantive justice and not a denial of it.[68] The formal acknowledgment and constitutional entrenchment of such provisions for such fundamental democratic rights of citizens together show

[61] *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912, [21]; *Haig v Canada* [1993] 2 SCR 995; *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876; *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 SCR 877.
[62] Kent Roach, 'Chartering the Electoral Map into the Future' in John C. Courtney, Peter MacKinnon and David E. Smith, *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Fifth House Publishers, 1992) 200–19; Kent Roach, 'One Person, One Vote? Canadian Constitutional Standards for Electoral Distribution and Districting' in David Small, *Research Studies of the Royal Commission on Electoral Reform and Party Financing – Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform* (Dundurn Press, 1991) 3.
[63] *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[64] *Constitution Act of 1867*, s 31 (4).
[65] *Vriend v Alberta* [1998] 1 SCR 493, [138]–[39]; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 51; *Belczowski v Canada* [1992] 2 FC 440.
[66] *Canadian Charter of Rights and Freedoms 1982*, s 15 (1).
[67] *Constitution Act of Canada 1982*, s 15 (1).
[68] Justice Stephen Rothman, 'The Impact of *Bugmy* & *Munda* on Sentencing Aboriginal and Other Offenders' (Paper Delivered at the Ngara Yura Committee Twilight Seminar, 25 February 2014) 10; M. Ann Hayward, 'International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications' (1985) 23 *University of Western Ontario Law Review* 9; Luc B. Tremblay, *Rule of Law, Justice, and Interpretation* (McGill-Queen's Press, 1997) 184.

how at a constitutional level the *Canadian Constitution* recognises the importance of protecting *all* citizens' rights equally.[69]

Statutory interpretation by courts of those provisions has led to a shift in the application of Canada's electoral laws, in particular, rendering provisions disqualifying prisoners from voting as both ineffective and inoperative. The electoral system has moved towards placing a greater emphasis on citizen political participation, including representation, as democratically important. The shift has highlighted key barriers to First Nation political participation and representation including their overrepresentation in prison.

B. Canada Elections Act 2000 and the Canadian Charter

In addition to rights under the *Constitution* and *Charter*, like Australia, Canada provides mechanisms for the enactment of its representative system through electoral laws. Comparing the *Canada Elections Act 2000* to Australia's electoral legislation reveals many similarities. For instance, Part 1 of the *Canada Elections Act 2000* provides Canadian citizens with 'electoral rights' under s 3: 'every Canadian citizen who is 18 years of age or older on polling day is qualified as an elector'.[70]

Further, like Australian electoral legislation, s 4 of the *Canada Elections Act 2000* temporarily disenfranchises prisoners from voting at federal elections if they are serving a term of imprisonment of two years or more.[71] The Canadian term is one year less than that in Australia.[72] Another point of difference in voting disqualifications is that the *Canada Elections Act 2000* does not disqualify persons of 'unsound mind' whereas Australian electoral legislation does.[73]

In terms of candidacy limitations, the *Canada Elections Act 2000* provides that a person is ineligible for running as a political candidate if imprisoned in a correctional institution.[74] This disqualification mirrors Australian electoral legislation that similarly disqualifies persons from running as a political candidate if they are serving a term of imprisonment of one year or more. The disqualification ends after the sentence has been served.[75]

---

[69] Luc B. Tremblay, *Rule of Law, Justice, and Interpretation* (McGill-Queen's Press, 1997) 184; *Constitution Act 1982*, Part 1; F. L. Morton and M. J. Withey, 'Charting the Charter, 1982–1985: A Statistical Analysis' (1987) 65 *Canadian Human Rights Yearbook* 72.
[70] *Canada Elections Act 2000*, s 3.
[71] *Canada Elections Act 2000*, s 4 (c).
[72] *Commonwealth Electoral Act 1918*, s 93 (8) (a).
[73] *Commonwealth Electoral Act 1918*, s 93 (8AA).
[74] *Canadian Elections Act, RSC 1985, c. E-2*, s 65 (g).
[75] *Commonwealth of Australia Constitution Act 1901*, s 44 (ii).

Canadian electoral legislation also provides similarly to Australia[76] that persons ineligible to enrol and vote as an elector under s 4 of the *Canada Elections Act 2000* are, because of that ineligibility, restricted from running as a federal political candidate in Canada.[77] However, what differentiates Canada from Australia is that Canada's prisoner disqualifying provision has no practical effect since the case of *Sauvé v Canada [2002]* ('*Sauvé*')[78] – a landmark electoral law case which rejected temporary disenfranchising prisoner legislation.[79]

Sauvé considered the amendment of s 4 (c) with Bill 58 2003[80] and how limiting such voting rights of prisoners conflicted with fundamental rights and freedoms under the *Canadian Constitution*[81] and *Charter*.[82] Prior to the repeal of s 51 (e) of the *Canadian Elections Act 1985*[83] prisoners were disqualified from voting at federal elections entirely.[84] It was only after the section was repealed with the enactment of s 4 (c) of the *Canada Elections Act 2000* that prisoner disenfranchisement from voting became a temporary limitation on those citizens' rights.

Sauvé considered the effect of Canada's prisoner voter disenfranchisement legislation alongside the application of s 1 of the *Charter* that requires the Canadian Government to show that it has a valid purpose or objective reason in any circumstances where it seeks to erode *Charter* rights. Further, it must show it is reasonable and demonstrably justified if it enacts legislation that infringes a right or freedom.[85]

McLachlin CJ and LeBel J in *Sauvé* declared it was clear that the framers of the *Charter* intentionally placed emphasis and importance on Canadian citizen voting rights under ss 3 and 33. Section 3 of the *Charter* provides that every citizen has the right to vote in elections for members of the House of Commons or of a legislative assembly and to be qualified for membership therein.[86] Section 33 limits legislative override by the Canadian federal parliament.[87]

---

[76] *Commonwealth Electoral Act 1918, s 93.*
[77] *Canadian Elections Act, RSC 1985, c. E-2,* s 65 (e).
[78] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.
[79] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519,
[80] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 2002 SCC 68.
[81] *Constitution Act of Canada 1982.*
[82] *Canadian Charter of Rights and Freedoms 1982*.
[83] *RSC 1985, c. E-2.*
[84] *Canadian Elections Act, RSC 1985, c. E-2,* s 51.
[85] *Constitution Act of Canada 1982,* s 1; *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [521]; *R v Oakes* [1986] 1 SCR 103.
[86] *Canadian Charter of Rights and Freedoms 1982,* s 3.
[87] *Canadian Charter of Rights and Freedoms 1982,* ss 3, 33; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [521].

Despite those constitutional conflicts, the Canadian Government in *Sauvé* sought to justify its actions on two bases. First, it did so to enhance prisoner civic responsibility and their respect for the rule of law. Second, it sought to provide an additional punitive measure on criminals through limiting their access to political participation rights whilst in custody.

L'Heureaux-Dubé, Gonthier, Major and Bastarache JJ were all in dissent. Gonthier J cited Tribe, who wrote:

> Every state, as well as the federal government, imposes some restrictions on the franchise. Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which democracy so ardently embraces. Moreover, in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity.[88]

All dissenting Justices held that the Canadian Government was acting within reason given persons who commit serious offences lack demonstrated respect for the community. Thus, the Canadian Government's policy position was necessary, justified and consistent with civil responsibility and respect for the rule of law.[89]

According to Gonthier J, the additional penalty imposed also sent an important message to both serious criminal offenders and the community that serious criminal activity will not be tolerated. Thus, he viewed the Canadian Parliament to have acted well within its rights in disenfranchising prisoners and that two elements of punishment were necessary. Those elements included a physical element which dealt with incarceration and the deprivation of a range of liberties normally exercised by citizens and, secondly, a symbolic element which included temporary disenfranchisement.[90]

However, the dissenting judgment lacked appropriate consideration of other extrinsic factors not included within the *Canada Elections Act 2000.* One important factor acknowledged by the majority in *Sauvé* was the historical and political oppression experienced by First Nations. Further, the majority also considered the overrepresentation of First Nations in prisons. Therefore, the court held that principles of democracy are undermined, when legislative limitations are placed upon a portion

[88] Laurence H. Tribe, *American Constitutional Law* (Foundation Press, 1995) 1084.
[89] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [525].
[90] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 585 [119].

of citizens' rights to political participation, particularly those who are already marginalised like First Nation citizens who are overrepresented in prisons.[91]

Sauvé affirmed that incarcerated First Nations must have their unique perspectives politically heard and represented at the ballot box and in parliament.[92] As in Australia, Canada's constitutional framework and electoral processes were transplanted at colonisation from the United Kingdom and Europe. First Nations were dispossessed from their lands and made wards of the State under racially discriminatory government protectionist policies which sought to obliterate their cultural and political institutions.[93] First Nations have, since the protectionist policy era, been a primary target of Canadian government agencies which have proven to execute the law on First Nation citizens with negative perceptions of them and who they are in society.[94] This history has contributed to an unreconciled and untrusting relationship between First Nations and the State.

In the view of McLachlin CJ, colonisation of First Nations was highly relevant in considering the *Charter* to determine whether prisoner-disenfranchising laws should remain in place. This is because, as McLachlin CJ highlights, there are is a 'disproportionate number of Aboriginal people in penitentiaries' and that the negative effect of s 51(e) placed upon who identify as Aboriginal, disproportionately disenfranchises Canada's already disadvantaged Aboriginal population.[95]

In addition to First Nations' experience of negative stereotyping by police, they are also a cultural population with high rates and long-term experience of intergenerational trauma. This is relevant for consideration when assessing prisoner disenfranchising legislation disproportionately comprised of a minority population that has been historically racially discriminated against, dispossessed and as a consequence has a negative relationship with the Canadian Government and authority.

Like Aboriginal Australians, First Nations of Canada experience higher levels of poverty, societal exclusion, institutionalisation and racial discrimination than other Canadian citizens.[96] Those

[91] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [526]–[257].
[92] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [556].
[93] *Royal Commission on Aboriginal Peoples* (Canada, 1996, Volume 1) 7; Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133 (2017) 197; the *Gradual Civilization Act 1857* sought to assimilate Indian people into Canadian settler society by encouraging enfranchisement. This later developed into the Indian Act, RSC, 1985, c. I-5; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 523 (McLachlin CJ).
[94] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No. 133 (2017) 197.
[95] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 523.
[96] Grace-Edward Galabuzi, 'Social Exclusion' in Dennis Raphael, *Social Determinants of Health: Canadian Perspectives* (Canadian Scholars' Press, 2016) 388; T. Wotherspoon and J. Hansen, 'The "Idle No More" Movement: Paradoxes of First Nations Inclusion in the Canadian Context' (2013) 1(1) *Social Inclusion* 21, 21–36; Grace-Edward

experiences over time contribute to an increased likelihood of First Nations acting out in frustrated antisocial behavioural ways including substance abuse, social dysfunction and destructive behaviour.[97] Chief Justice McLachlin found that these accumulated factors contribute to First Nations' involvement in criminal activity and antisocial behaviour that can further lead to their overrepresentation in rates of incarceration in Canadian prisons compared to non-Indigenous Canadians[98] borne out by First Nations comprising almost 25 per cent of the overall prison population but a mere 4 per cent of the Canadian population overall.[99]

On this reasoning, the majority in *Sauvé* held that the justifications relied upon by the Canadian Parliament were too vague and lacked adequate consideration of principles of proportionality and extrinsic factors relevant to disenfranchising citizens.[100] The majority held that electoral legislation which disenfranchises prisoners from voting should be rejected because it attributes moral unworthiness to those citizens and conflicts with citizen rights under the *Charter*.[101]

In addition, the case of *Sauvé* highlighted issues with having such electoral disqualifying legislation applied in a blanket manner.[102]

Chief Justice McLachlin highlighted that:

> Section 51(e) imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment.[103]

Accordingly, the majority held in *Sauvé* that the application of the blanket exclusion in the electoral legislation, directed at all prisoners, unnecessarily removes their fundamental constitutional rights

---

Galabuzi, *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Canadian Scholars' Press, 2006).

[97] Kim Maclean, 'The Impact of Institutionalization on Child Development' (2003) 15(4) *Development and Psychopathology* 853; Delores V. Mullings, 'The Institutionalization of Whiteness in Contemporary Canadian Public Policy' in Veronica Watson, Deirdre Howard-Wagner and Lisa Spanierman, *Unveiling Whiteness in the Twenty-First Century: Global Manifestations, Transdisciplinary Interventions* (Lexington Books, 2014) 121–122; *Neal v The Queen* (1982) 149 CLR 305, 316–17.

[98] Australian Law Reform Commission (n 93) 197; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [181].

[99] Australian Law Reform Commission, ibid; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [204].

[100] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, [522].

[101] *Canadian Charter of Rights and Freedoms 1982*, s 3 and s 33.

[102] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 523.

[103] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 553 [51].

and further punishes them as the government sees fit. Additionally, the court held that the legislative override of fundamental constitutional rights is arbitrary and conflicts with goals of sentencing. This is a particularly important aspect for consideration when First Nations overrepresented in incarceration in Canada are subject to the application of such limiting of rights legislation.[104]

The effect of *Sauvé* was to render prisoner-disenfranchising legislation in Canada unconstitutional and provide all eligible Canadian citizens, including prisoners, with access to fundamental democratic political participation rights and inclusivity when Canadian elections occur.[105]

C. Continued Political Participation of Canadian Prisoners

Since *Sauvé*, the majority decision set a standard for Canadian courts that required them to support government legislation denying citizens the right to vote *only* where there are strong justified reasons to do so.[106] *Sauvé* affirmed that disqualifying prisoners of the right to vote fell below that standard and, as such, their right to vote should be maintained provided that they have attained 18 years of age by polling day.[107]

Since *Sauvé* and despite electoral prisoner disqualifying legislation not yet being repealed, prisoners can still enrol and vote in both federal and provincial elections in Canada by way of a special ballot in general elections and referenda.[108] The special ballot process is governed by a staff member of a prisoner's correctional institution appointed by Elections Canada as a liaison officer for the election prior to it being held.[109] The liaison officer facilitates the special ballot electoral process of prisoners enrolling and voting.[110] Prisoners are responsible for signing an application for registration and special ballot[111] and a declaration[112] before the 12th day before polling day.[113]

---

[104] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 553 [51].
[105] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 523; *Crisis in Correctional Services: Overcrowding and Inmates with Mental Health Problems in Provincial Correctional Facilities* (Public Services Foundation of Canada, 2015).
[106] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, 556.
[107] *Elections Canada Online: Voting by Incarcerated Electors* (Elections.ca, 2014) <http://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90545&lang=e>.
[108] *Canada Elections Act 2000*, Part 11 'Special Voting Rules', Div 5; *Voting By Special Ballot – Elections Canada* (Elections.Ca, 2019) <https://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90540&lang=e>.
[109] *Canada Elections Act 2000*, s 248 (1).
[110] *Elections Canada Online: Voting by Incarcerated Electors* (n 107).
[111] *Canada Elections Act 2000*, s 251 (1)
[112] *Canada Elections Act 2000*, s 257
[113] *Canada Elections Act 2000*, s 251 (1).

The benefits of implementing such processes can be seen with Canada's increased registered voter population of those incarcerated. In the last 2015 federal election, there were approximately 22,000 eligible voters out of Canada's prisoner population.[114] Statistics from Elections Canada evidences an increase of the Canadian prisoner population voting at elections from 25 per cent of 36,000 inmates in 2004 to roughly 45 per cent of 38,000 prisoners in 2011.[115] The 2011 federal election had a 54 per cent turnout of prisoner voters in federal prisons, which fell just under the 61 per cent general population turnout.[116]

Given First Nations occupy high rates of incarceration as part of a minority cultural group within Canada's overall national population,[117] those measures established since *Sauvé* have improved First Nation access to citizen democratic rights in two respects. First, some prisoner voters are very politically engaged. Their objective is to use their ballots to bring change to the correctional system of Canada, particularly as it is experienced by those who experience institutionalisation through incarceration as a revolving door when reintegration support for those trying to exit the system is lacking.[118] Voting provides imprisoned people with the means of having their voice heard through the electoral process – with the means, therefore, of contributing to meaningful political change that reflects their particular experiences.

Secondly, so too has First Nations candidacy improved. Currently, there are 10 First Nation members within the federal parliament – an increase from seven in 2011.[119] Although First Nation representatives still comprise only 3 per cent of the 338 seats within the House of Commons, their political participation is strong. This is evidenced by the actual incentive they have to even run as political candidates in an election which was 54 First Nations who ran as candidates in 2015 and, [120] the amount of political opportunities and processes available for self-governing First Nations to

---

[114] *Adult Correctional Statistics in Canada, 2014/2015* (Statistics Canada, 2015) <https://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm>; Kathleen Harris, 'It's Voting Day for Canada's Prisoners' (CBC News, 2015) <https://www.cbc.ca/news/politics/canada-election-2015-prison-voting-1.3263491>; Chris Purdy, 'Canadian Prisoners to Vote This Week in Federal Election' (*The Globe and Mail*, 2015) <https://www.theglobeandmail.com/news/politics/canadian-inmates-to-vote-this-week-in-federal-election/article26650210/>.

[115] Purdy, ibid; *Voting By Special Ballot - Elections Canada* (Elections.Ca, 2019) <https://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90540&lang=e>.

[116] Harris (n 114); *Elections Canada Online: Voting by Incarcerated Electors* (Elections.ca, 2014) <http://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90545&lang=e>.

[117] *Adult Correctional Statistics in Canada, 2014/2015* (Statistics Canada, 2015) <https://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm>.

[118] Harris (n 114).

[119] Jessica Deer, '10 Indigenous Candidates Elected to the House of Commons' (CBC News, 2019) <https://www.cbc.ca/news/indigenous/indigenous-candidates-elected-2019-federal-election-1.5330380>.

[120] Nicky Woolf, 'Canada's New Parliament Is Most Diverse Ever' (*The Guardian*, 2015) <https://www.theguardian.com/world/2015/oct/22/canada-new-parliament-most-diverse-ever>.

engage with politically as sovereign people exercising their rights under an agreed upon treaty with the Canadian government.[121]

Although it is not possible to identify prisoner voting as the cause of this increase, there is clearly a stronger First Nations involvement in Canadian federal politics in recent years. Given the high rates of incarceration of First Nations peoples, removing the barrier of electoral disqualification is a vital step in enhancing political participation.

D. Elections Canada Support Programs for Indigenous Electors

In addition to the special ballot process for prisoners established from the handing down of *Sauvé*, Elections Canada has acknowledged through its research that First Nations electors remain subject to other barriers that can limit their political participation in federal elections.[122]

Some of the barriers identified include a lack of knowledge amongst Indigenous electors of Canada's Online Voter Registration Service[123] to register to vote at federal elections, and Indigenous electors, including Indigenous youth, not receiving 'voter information cards'.[124] The identification of such barriers has led to an increased consultative process undertaken by the Chief Electoral Officer of Elections Canada with national and regional Indigenous organisations. The objective behind such consultations is to ensure that First Nations electors feel supported and encouraged by the Canadian Government in exercising their right to vote at federal elections.[125]

In addition, Canada's 'Indigenous Elder and Youth Program' appoints an Indigenous Elder and young person to attend polling stations on Election Day to assist with interpretation, explain the voting process and answer general questions. This support program has already benefited Indigenous electors at federal elections with the last 2015 election appointing 285 Elders and youth to assist Indigenous electors and thus support their political participation.[126]

---

[121] Thomas J Courchene, *Aboriginal Self-Government in Canada* (Papers on Parliament No. 21, December 1993).
[122] *Information for Indigenous Voters* (Elections.Ca, 2019) <https://www.elections.ca/content.aspx?section=vot&dir=abo&document=index&lang=e>; *Survey of Electors Following the 42nd General Election* (Elections.Ca, 2018) <https://www.elections.ca/content.aspx?section=res&dir=rec/eval/pes2015/surv&document=p4&lang=e#a4>.
[123] *Survey of Electors Following the 42nd General Election* (Elections.Ca, 2018) <https://www.elections.ca/content.aspx?section=res&dir=rec/eval/pes2015/surv&document=p4&lang=e#a4>.
[124] *Facts about Voter ID and the Voter Information Card* (Elections.Ca, 2019) <https://www.elections.ca/content.aspx?section=med&dir=c76/id&document=index&lang=e>.
[125] Information for Indigenous Voters (n 122).
[126] Ibid.

Alongside appointed Indigenous Elders and youth, Indigenous electors also have access to community relations officers appointed by Elections Canada that work with local community leaders to improve access to registration and voting in communities. Since the 2015 election saw 169 community relations officers appointed to help with Indigenous electors' voting and reduce barriers, the program has since been expanded to include Métis communities as seen with Canada's last 2019 federal election.[127] Furthermore, Elections Canada has launched a pilot project in 87 remote communities across 27 electoral districts in Canada to provide greater information to voters, and to identify barriers to registration and voting so that officers can best support remote communities.[128]

Elections Canada has also set up special ballot voting services at post-secondary institutions for federal elections. In the 2015 election, this proved to be of benefit for Indigenous electors, making it easier for them to cast their ballots whilst living in remote communities. Accordingly, Elections Canada has increased these services and expanded its special ballot voting stations at post-secondary institutions since its last 2019 federal election.[129]

Elections Canada has also implemented and increased its advanced and ordinary polling stations on reserves. The 2015 federal election saw 34 reserves across Canada have access to advanced polling stations and 309 reserves have access to ordinary polling stations.[130] Those figures increased yet again in the 2019 federal election for Indigenous electors residing in remote communities.[131]

To ensure that all electors are informed as best as possible, in Canada's last 2019 federal election Elections Canada expanded its campaign advertisements for 'It's Our Vote' in the lead up to the 2019 election. The expanded campaign advertisements were available for voters to access them in English, French and/or Inuktitut on Indigenous TV, radio networks, Indigenous print publications and Indigenous digital networks.[132]

---

[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Sharanjit Uppal and Sébastien LaRochelle-Côté, *Insights on Canadian Society: Understanding the Increase in Voting Rates between the 2011 and 2015 Federal Elections* (Statistics Canada, 2016) <https://www150.statcan.gc.ca/n1/pub/75-006-x/2016001/article/14669-eng.htm>; *Retrospective Report on the 42nd General Election of October 19, 2015* (Elections Canada, 2016) 30 <https://www.elections.ca/res/rec/eval/pes2015/ege/pdf/ege_e.pdf>.
[131] Information for Indigenous Voters (n 122).
[132] Ibid.

In sum, to support the rights enshrined in the *Constitution* and *Charter*, Canada has a number of useful and practical support and outreach programs that assist Indigenous electors to enrol and vote at federal elections.

Whilst the Canadian *Charter* and *Constitution* have had a considerable effect on the operation of electoral laws that have enhanced First Nation political participation in Canada, the New Zealand mixed-member proportional system has developed over time to embrace Maori cultural identity within its political system. New Zealand offers a framework that works to enhance Indigenous political participation within its Mixed Member Proportional electoral system.

This chapter now considers important established constitutional arrangements between the New Zealand Government and Maori that align with principles of representative democracy, self-determination and political inclusivity of Maori.

III. NEW ZEALAND: MAORI VOTER ENROLMENT AND CANDIDACY

The New Zealand model for voter enrolment and candidacy within its mixed-member proportional democratic regime adheres to rights of Maori self-determination formally acknowledged in the *Treaty of Waitangi 1840*. The *Treaty of Waitangi'*s role is to acknowledge and protect Maori rights to cultural identity within New Zealand's constitutional framework.

The *Treaty*, however, makes no explicit reference to dedicated Maori representation in the New Zealand Parliament.[133] Despite that, Article 3 requires measures that create a sense of substantial equality for Maori through recognition of their sovereignty and rights to self-determination.[134]

The recognition of Maori sovereignty and self-determination rights within the *Treaty* has been of particular importance to Maori as they call for New Zealand Government actions to extend beyond mere formal equality. Formal acknowledgment would limit the practical access to and exercise of Maori self-determination rights and would limit the expression of the distinct identity of Maori people. Treating Maori as an identically equal group of citizens to New Zealand's non-Indigenous

[133] *Treaty of Waitangi 1840*; Andrew Geddis, 'A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's Electoral System' (2006) 5(4) *Election Law Journal* 352.
[134] *Treaty of Waitangi 1840*, art 3; Alexandra Xanthaki and Dominic O'Sullivan, 'Indigenous Participation in Elective Bodies: The Maori in New Zealand' (2009) 16(2) *International Journal on Minority and Group Rights* 196.

population would omit important consideration of the post-colonial detrimental effects on Maori resulting from Western structures imposed upon them under colonial rule.[135]

To determine how the *Treaty* has affected institutional governance, including the Maori franchise, this part begins with an overview of New Zealand's constitutional framework in light of the *Treaty*, followed by an analysis of its electoral system. In the final sections, it identifies two institutional responses to shore up Maori political participation: the Maori Electoral Roll Option and dedicated seats in parliament.

A. New Zealand's Constitutional Framework and the Treaty of Waitangi 1840

The New Zealand Constitution lacks the same amount of detail the *Canadian Constitution* provides in designating roles and powers between the Executive, Legislature and Judicature. Its unicameral structure also means that it does not have to pass legislative proposals through an upper house of parliament or divide powers between state and federal governments. [136] The Constitution provides for the role and powers of the Governor-General[137] and their responsibility to represent the sovereign whilst acting on the advice of ministers of the Cabinet. The New Zealand Constitution also sets out the structure of the courts and their relation to the other branches of government.[138]

The New Zealand Constitution provides for only the basic composition of parliament, how its members are elected and, the procedure by which it enacts legislation. Instead, New Zealand's constitutional framework comprises several additional legislative sources that work alongside the New Zealand Constitution as conventions and laws that guide its overall governance structure and political regime.[139]

---

[135] Douglas Rae, 'Two Contradictory Ideas of (Political) Equality' (1981) 91(3) *Ethics* 452; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report: The Interaction of Western Australian Law with Aboriginal Law and Culture* (R94, 2006) 8; Anthony Wicks, 'The Treaty and the Seats' [2008] *New Zealand Law Society Journal* 387.

[136] Jeremy Waldron, *Parliamentary Recklessness: Why We Need To Legislate More Carefully* (Maxim Institute, 2008) 20–21; Maurizio Cotta, 'A Structural-Functional Framework for the Analysis of Unicameral and Bicameral Parliaments' (1974) 2(3) *European Journal of Political Research* 545.

[137] *Constitution Act 1986*, Part 1, ss 3–3A.

[138] Philip Joseph, 'The Future of Electoral Law' (paper presented to the Reconstituting the Constitution Conference, Wellington, 2 September 2010) 7; Alan J. Ward, 'Exporting the British Constitution: Responsible Government in New Zealand, Canada, Australia and Ireland' (1987) 25(1) *The Journal of Commonwealth & Comparative Politics* 3; Jack H. Nagel, 'Expanding the Spectrum of Democracies: Reflections on Proportional Representation in New Zealand' in Markus M. L. Crepaz, Thomas Albert Koelble, David Wilsford, *Democracy and Institutions: The Life Work of Arend Lijphart* (University of Michigan Press, 2000) 116; *Constitution Act 1986* (NZ), s 23 – 24.

[139] Matthew S. R. Palmer, 'Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialised and a Politicised Constitution' (2007) 29 *Dalhousie Law Journal* 14; Kenneth Keith, 'On the Constitution of New Zealand' (1992) 44(1) *Political Science* 28; Matthew S. R. Palmer, 'New Zealand Constitutional Culture' (2007) 22 *New Zealand Universities Law Review* 574.

Prior to the establishment of the current mixed-member proportional system in New Zealand in 1996, members of parliament were elected by and accountable to mostly non-Indigenous citizens. This was because despite New Zealand being was one of the first nations in the world to give women the right to vote, its elector qualifications for voting were restrictive in that they required private property ownership to qualify. In reality, most women and minority groups like Maori lacked private property ownership and so were indirectly disenfranchised because they were unable to meet the elector qualification criteria to vote.[140]

In contrast to Australia, the New Zealand system affords Maori an additional source of rights that formally recognises and protects their right to self-determination. Those rights and recognition of Maori cultural identity, self-determination and, most relevantly, Maori political participation, are found in the *Treaty of Waitangi 1840* ('*Treaty*').[141] The *Treaty* forms part of New Zealand's collection of constitutional documents that together, guide important constitutional conventions acknowledging the partnership Maori have with the Crown.[142] The *Treaty*'s primary purpose was to transfer Maori sovereignty to the British Crown in a way that was acceptable and valid according to international law standards.[143]

The *Treaty* comprises three short articles but has had longstanding interpretative issues given that it is written in both English and Maori languages.[144] Each version of the *Treaty* conflicts with the other as to the definition of Maori rights and constraints on government powers.[145] This, of course, has raised issues surrounding which version should be applied.

For instance, Article 1 in the English version of the *Treaty* cedes Maori sovereignty over their land to the British Crown and assumes an implied right of unlimited legal authority.[146] However, when translated in the Maori version, the term 'kawanatanga' means 'governorship' which means that

[140] Joseph (n 138) 6.
[141] *Royal Commission on the Electoral System: Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) 110.
[142] Ibid; R. G. Mulgan and Peter Aimer, *Politics in New Zealand* (Auckland University Press, 2004) 58–9.
[143] Michael King, *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) 151–67; D. R. Simmons, *The Great New Zealand Myth: A Study of the Discovery and Origin Traditions of the Maori* (AH & AW Reed, 1976); Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008) 154–68; David Round, *Truth or Treaty? Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, 1998) 110–3.
[144] Mulgan (n 142) 60.
[145] Ibid, 51.
[146] *Treaty of Waitangi Act 1975*, sch 1.

only Maori governance is ceded. This does not extend to ceding sovereignty over Maori land, and it limits the English version's Crown implied right of unlimited legal authority.[147]

Second, Article 2 of the English version guarantees Maori chiefs and tribes' full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties. It also grants the Crown the sole right to purchase land from the Maori.[148] However, in contrast, the Maori version guarantees all the people of New Zealand the 'unqualified exercise of their chieftainship (*tino rangatiratanga*) over their lands (*whenua*), villages (*kainga*) and all their treasures (*taonga*)'.[149] The Maori version, therefore, entrenches Maori land rights, chief powers, and political autonomy, and speaks to the heart of Maori leadership through self-determination.

Lastly, Article 3 of the English version of the *Treaty* provides Maori with 'all the Rights and Privileges of British Subjects'.[150] The Maori version translates to mean the 'Queen will give [Maori] the same rights and duties of citizenship as the people of England', thus requiring that the Crown grant the same rights and privileges to Maori as to non-Indigenous citizens.[151]

Ultimately, when interpretation issues arise with conflicts that exist with the meanings that underpin each of the three articles of both versions of the *Treaty*, both parties take a purposive approach and are guided by the 'spirit and meaning' of the document.[152]

As a consequence of the content of the *Treaty* and the interpretive approach, other formally recognised constitutional legislative instruments that recognise in finer detail ways in which Maori are to assert and exercise their political voice and politically participate are considered alongside the *Treaty*. Maori rely, for example, on voting rights found in several instruments in New Zealand. Of particular note, a prominent legislative measure established in contemporary times permits Maori to opt to enrol to exercise their right to vote: the Maori Electoral Roll Option.

B. The New Zealand Electoral System

The New Zealand electoral system was, prior to 1996, a first-past-the-post electoral system.[153] This system is known for being one of the oldest and simplest electoral systems because candidates that

[147] *Treaty of Waitangi Act 1975*, sch 1; Ian H. Kawharu, 'Translation of Maori Text' in I. H. Kawharu, *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford University Press, 1989) 319.
[148] *Treaty of Waitangi 1840*, art 2; *Treaty of Waitangi Act 1975*, sch 1.
[149] *Treaty of Waitangi 1840*, art 2; *Treaty of Waitangi Act 1975*, sch 1.
[150] *Treaty of Waitangi Act 1975*, sch 1.
[151] *Treaty of Waitangi Act 1975*, sch 1; Kawharu (n 147).
[152] *Treaty of Waitangi Act 1975*, sch 1; King (n 143) 159.
[153] *Electoral Act 1956* (repealed).

receive the most votes from their district win.[154] In this system, each elector gets one vote to choose a political candidate they believe best represents their interests from a single-member electoral district.[155] In addition, the political party that wins the most seats in parliament usually forms the majority government and if it becomes the governing party, it then makes public policy decisions until the next election.[156] However, this system was detrimental to smaller parties that represented minority interests in terms of considering their chances of securing enough votes to win any seats in parliament.[157] As a result, minor parties tended to go underrepresented compared to major parties that were typically overrepresented.[158]

The first-past-the-post system based on Great Britain's Westminster system was established early post-colonisation in New Zealand as a result of New Zealand becoming a British colony under the Crown's authority in 1840.[159] The colonisation of New Zealand extended the Crown's power over New Zealand so that it assumed control over the activities of New Zealand subjects and regulations surrounding the purchasing of land from Maori.[160]

The original first-past-the-post electoral system was originally labelled an 'elective dictatorship' as it offered minimal measures of ensuring government accountability as elections were initially held every five years until 1881. From 1881 onwards election periods were shortened to every three years with the exception of the years 1914–19, 1931–35 and 1938–43 where parliaments ran longer.[161] In addition, the electoral system was heavily dependent on entrenched democratic values and conventions that required Cabinet ministers to adhere to their electoral commitments and party

[154] André Blais, *To Keep or To Change First Past the Post?* (Oxford University Press, 2008) 1; Stephen Levine and Nigel S. Roberts, 'The New Zealand Electoral Referendum and General Election of 1993' (1994) 13(3) *Electoral Studies* 245; Jack Vowles, 'Systematic Failure, Coordination, Contingencies: Understanding Electoral System Change in New Zealand' in André Blais, *To Keep or To Change First Past The Post? The Politics of Electoral Reform* (Oxford University Press, 2008) 163.
[155] Ethan Scheiner, *Electoral Systems and Political Context* (Cambridge University Press, 2012) 1.
[156] *Blais* (n 154); Raymond Miller, *Democracy in New Zealand* (Auckland University Press, 2015) 85.
[157] *Royal Commission on the Electoral System: Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) 94.
[158] Ibid 95.
[159] Andrew Geddis, *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, 2007) 26; Dominic O'Sullivan, 'The Treaty of Waitangi in Contemporary New Zealand Politics' (2008) 43(2) *Australian Journal of Political Science* 317; Roger B. Evans, *The Truth about the Treaty: Division or Harmony*? (Lal Bagh Press, 2004).
[160] Keith Hooper and Kate Kearins, 'The Walrus, Carpenter and Oysters: Liberal Reform, Hypocrisy and Expertocracy in Maori Land Loss in New Zealand 1885–1911' (2008) 19(8) *Critical Perspectives on Accounting* 1248; Geddis (n 159) 26.
[161] *Electoral Act 1956*; Nigel S. Roberts, *Electoral systems* (Te Ara – the Encyclopedia of New Zealand, 2020) <http://www.TeAra.govt.nz/en/electoral-systems/print>.

principles; members of parliament to act in the interests of electors from their electorate and consultation with interest and minority groups.[162]

Over time, it became clear that the reliance and trust in government officials to adhere to those democratic conventions was not enough to create appropriate levels of political accountability. New Zealand members of parliament instead continuously broke election promises and party principles, ignored interest groups and used their extensive powers in ways which conflicted with citizen interests rather than working in their favour.[163] Under those circumstances, major structural reform of New Zealand's electoral system was deemed necessary by the government in 1992 and by 1993 the majority of the New Zealand public was ready to put their faith in a radically different electoral system.[164]

The first-past-the-post electoral system established under the *Electoral Act 1956* was therefore repealed and replaced with the *Electoral Act 1993*, which introduced the mixed members proportional electoral system.[165] New Zealand's electoral legislation is an important source of law that forms part of New Zealand's important constitutional documents since its approval and implementation following New Zealand's 1993 Referendum.[166] This is due to New Zealand's electoral legislation outlining the way elections are to take place within New Zealand, how they are regulated and how New Zealand's governance institutions are formed.[167]

The mixed-member proportional system exemplifies a true show of political proportionality in terms of the way in which it provides political parties with winning seats, proportionate to their share of the national party vote.[168] It also established the New Zealand Electoral Commission which

[162] J. Hight and H. D. Bamford, *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs, 1914) 9; John Wanna, 'New Zealand's Westminster Trajectory: Archetypal Transplant to Maverick Outlier' in Haig Patapan, John Wanna and Patrick Moray Weller, *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific* (UNSW Press, 2005) 161–165.
[163] William Keith Jackson, *The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House* (University of Toronto Press, 1972) 182.
[164] Mulgan (n 142) 64; John E. Martin, 'Political Participation and Electoral Change in Nineteenth-Century New Zealand' (2005) 57(1) *Political Science* 39–40; Roger Douglas, *The Politics of Successful Structural Reform* (R. Douglas, 1989) 3.
[165] *Electoral Act 1993*, ss 4–15.
[166] K.J Scott, *The New Zealand Constitution* (Oxford: Claredon Press, 1962) 8–9; Andrew Geddis, 'Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change' (2016) 14(1) *International Journal of Constitutional Law* 106.
[167] Martin (n 164) 39–40; Geddis, ibid.
[168] Joseph (n 138) 129; Frank C. Thames and Martin S. Edwards, 'Differentiating Mixed-Member Electoral Systems' (2006) 39(7) *Comparative Political Studies* 907; David Denemark, 'Thinking Ahead To Mixed-Member Proportional Representation' (1996) 2(3) *Party Politics* 410.

became responsible for overseeing the registration of political parties and promoting public awareness of electoral matters.[169]

The mixed-member proportional system redefined the way in which constituencies are represented in New Zealand by providing electors with two votes instead of just the one offered by the previous first-past-the-post system. Votes under the mixed-member proportional system provide electors with one vote for choosing their preferred political party and a second vote to choose their preferred political candidate from their electorate.[170]

Consequently, two types of political members were represented within the New Zealand Parliament: members that represent their geographical electorate; and members elected from party lists (if they can secure 5 per cent of the nationwide vote).[171] The additional vote for electing members from a party list provides parties with their proportional share of seats in parliament.[172]

The proportional system thus also better represents minority interests. It does so through creating proportionality of citizen interests represented within a more multi-party representative parliament. Having a multi-party representative parliament decreases the likelihood of majority dominance in parliament that could previously occur under a first-past-the-post system. As a result, the new proportional system has shown to constrain government powers more effectively than its predecessor.[173]

New Zealand's electoral system also has a Representation Commission, which is an independent body that oversees the adjustment of electorate seats if there is any movement in national population statistics but so that the size of parliament does not change.[174] Furthermore, the Commission also determines the allocation of seats for parties based on their share of the party vote after seats have been allocated to winning electorate members.[175]

---

[169] *Electoral Act 1993*, ss 4–15.
[170] Nicholas Aroney and Steve Thomas, 'A House Divided: Does MMP Make an Upper House Unnecessary for New Zealand?' [2012] *New Zealand Law Review* 403; David Denemark, 'Thinking Ahead To Mixed-Member Proportional Representation' (1996) 2(3) *Party Politics* 410; Frank C. Thames and Martin S. Edwards, 'Differentiating Mixed-Member Electoral Systems' (2006) 39(7) *Comparative Political Studies* 907.
[171] Thomas Carl Lundberg, 'Politics Is Still an Adversarial Business: Minority Government and Mixed-Member Proportional Representation in Scotland and in New Zealand' (2012) 15(4) *The British Journal of Politics and International Relations* 612; Geddis (n 166) 241–2; Mulgan (n 142) 64–5.
[172] Geddis, ibid, 241–2; Lundberg, ibid.
[173] John Wanna, 'New Zealand's Westminster Trajectory: Archetypal Transplant to Maverick Outlier' in Haig Patapan, John Wanna and Patrick Moray Weller, *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific* 153 (UNSW Press, 2005) 180 –181.
[174] *Constitution Act 1986*, s 28; Philip Joseph, *Constitutional & Administrative Law in New Zealand* (Thomson Reuters New Zealand Ltd, 2014) 345.
[175] *Constitution Act 1986*, s 28.

The mixed-member proportional system in New Zealand offers more flexibility than its previous first-past-the-post system, reflecting its goal of ensuring interests are proportionately represented.[176]

Integral to an understanding of the New Zealand electoral system is the influence of the *Treaty of Waitangi 1840* on electoral laws, policies and processes, and the New Zealand Constitution. Because of the *Treaty*, all legislative instruments guide and protect Maori political participation through formal and substantive acknowledgment of Maori rights to self-government and self-determination – principles and rights that underpin Maori citizenship rights within New Zealand. One such example is the Maori Electoral Roll Option.

C. The Maori Electoral Roll Option

This section considers the current voting framework within New Zealand, highlighting the historic development of Maori enfranchisement. This provides context for and an explanation of why the Maori Electoral Roll Option is beneficial to Maori cultural identity and political participation in New Zealand.

Like Australia, the right to vote is inferred from the New Zealand Constitution. Sections 6 and 10 of the New Zealand Constitution require Ministers of the Executive Council be elected as persons already members of parliament[177] and those be elected in accordance with the provisions of the *Electoral Act 1993*.[178]

In addition, voting rights in New Zealand are also recognised under the 'Democratic and Civil Rights' part of the *New Zealand Bill of Rights Act 1990*. However, unlike Canada's *Charter* the *New Zealand Bill of Rights Act 1990* is not a constitutionally entrenched legislative instrument. The *New Zealand Bill of Rights Act 1990* does, however, in s 12, provide that every New Zealand citizen who is of or over the age of 18 years has the right to vote in genuine periodic elections of members of the House of Representatives. It also requires that those elections be by equal suffrage and by secret ballot.[179]

---

[176] Mulgan (n 142) 71; Thomas Gschwend, Ron Johnston and Charles Pattie, 'Split-Ticket Patterns in Mixed-Member Proportional Election Systems: Estimates and Analyses of Their Spatial Variation at the German Federal Election, 1998' (2002) 33(01) *British Journal of Political Science* 109; M. S. Shugart and M. P. Wattenberg, *Mixed-Member Electoral Systems: The Best of Both Worlds?* (New York: Oxford University Press, 2001).
[177] *Constitution Act 1986*, s 6.
[178] *Constitution Act 1986*, s 10; *Electoral Act 1993*, s 74.
[179] *New Zealand Bill of Rights Act 1990*, s 12 (a).

The right to vote in New Zealand is also a compulsory obligation placed upon persons once qualified to register to vote as electors of electoral districts.[180] Registered persons must be a New Zealand citizen[181] or a permanent resident[182] of New Zealand, and have resided continuously in New Zealand for a period of not less than one year.[183] Accordingly, persons disqualified from voting include New Zealand citizens who have not been in New Zealand within the last three years[184] or who are permanent residents of New Zealand that have not been in New Zealand within the last 12 months.[185]

Despite the electoral system forming part of New Zealand's system of representative democracy, the proportionate representation of minority rights, for example of Maori, has been slow-moving. This is because as a minority group comprising approximately 14 per cent of the total population,[186] Maori have lacked a political voice relative to non-Indigenous New Zealand citizens, at least partly as a consequence of historically unequal and limited access to voting rights.[187]

For instance, Maori have historically lacked the private property ownership that limited their ability to meet this voting qualification.[188] Property ownership as a voter qualification omitted consideration of the communal ownership more likely in Maori communities.[189] In addition, from 1893 and until 1975, enrolment to vote as an elector was categorised by an individual's ancestry (or blood quantum).[190] Maori deemed 'full-blooded' were required to be on a separate Maori roll. Those with less than 50 per cent 'Maori blood' were included on the European roll.[191] During this

[180] *Electoral Act 1993*, s 82 (1).
[181] *Electoral Act 1993*, s 74 (a) (i).
[182] *Electoral Act 1993*, s 74 (a) (ii).
[183] *Electoral Act 1993*, s 74 (b).
[184] *Electoral Act 1993*, s 80 (1) (a).
[185] *Electoral Act 1993*, s 80 (1) (b).
[186] *Live New Zealand Population Clock 2018 – Population of New Zealand Today* (2018) <https://www.livepopulation.com/country/new-zealand.html>.
[187] Raymond Miller, *Democracy in New Zealand* (Auckland University Press, 2015) 184; Jack Vowles, 'The Politics of Electoral Reform in New Zealand' (1995) 16(1) *International Political Science Review* 107; W. K. Jackson and G. A. Wood, 'The New Zealand Parliament and Maori Representation' (1964) 11(43) *Historical Studies: Australia and New Zealand* 383; *He Aha i Pērā Ai? The Maori Prisoners' Voting Report* (Wai 2870, Waitangi Tribunal Report 2020) 33.
[188] *Constitution Act 1852* (UK) 15 & 16 Vict, ss 7 and 42.
[189] Rozalind Dibley, *Maori Representation in Parliament: The Four Maori Seats* (MA Thesis, Victoria University of Wellington, 1993) 4; Philip Joseph, *The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress* (New Zealand Business Roundtable, Wellington, 2008) 5; Lara M. Greaves et al, 'Maori, A Politicized Identity: Indigenous Identity, Voter Turnout, Protest, and Political Party Support in Aotearoa New Zealand' (2018) 7(3) *International Perspectives in Psychology: Research, Practice, Consultation* 155; *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285, 324.
[190] Geddis (n 159) 353; Lara Greaves and Danny Osborne, 'Identity and Demographics Predict Voter Enrolment on the Maori Electoral Roll: Findings from a National Sample' (2017) 6(1) *MAI Journal: A New Zealand Journal of Indigenous Scholarship* 4.
[191] See *In re Raglan Election Petition (No 4)* [1948] NZLR 65, [87]–[88] where the Election Court disqualified 15 votes from a European electorate due to the voters possessing over 50 per cent Maori blood.

period, only those considered 'half-castes' were able to choose either roll. In 1975 electoral policy reform gave all Maori electors the option of choosing either roll.[192]

In another example of differential treatment, Maori were prohibited from voting on the same day as non-Indigenous New Zealanders – a rule which did not change until 1951. In addition, unlike the broader population, before 1956 the Maori vote was not compulsory. For many years, Maori paid taxes and lived under laws of the New Zealand Parliament the same as the majority population with unrestricted access to fundamental civil rights, yet Maori themselves were limited both directly and indirectly from the franchise[193] which also limited their political representation.[194]

In terms of voter disqualifications, the New Zealand electoral legislation is similar to Australia in that persons deemed of unsound mind[195] and/or detained in a prison to a sentence of imprisonment imposed after the commencement of the *Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010* are disqualified from voting.[196]

Like the Aboriginal Australian and First Nations of Canada experiences with electoral disqualifications, Maori of New Zealand are also vulnerable to high and disproportionate levels of incarceration. Despite comprising 14 per cent of the total New Zealand population,[197] Maori occupy 50 per cent of the national prison population.[198] Like Aboriginal Australians and First Nations of Canada, the Maori imprisonment population of New Zealand largely comprises Maori from communities of scarcity and deprivation as a result of their colonisation. The high and disproportionate figures of the Maori imprisonment population and, the New Zealand prisoner voter disqualification (which disqualifies persons sentenced to a term of incarceration of three years or more) limits Maori voting participation at New Zealand elections.[199]

New Zealand electoral legislation also disqualifies persons who are detained in a hospital under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* or are detained in a secure facility

---

[192] Geddis (n 159) 352.
[193] Sarah McClelland, 'Maori Electoral Representation: Challenge to Orthodoxy' [1997] 17(3) NZULR, [272]–[275]; Joseph (n 187) 6–8.
[194] Geddis (n 159) 352.
[195] *Mental Health (Compulsory Assessment and Treatment) Act 1992,* ss 45 (2) and s 46*; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003,* s 29 (1)*; Electoral Act 1993,* s 80 (1) (c); *Criminal Procedure (Mentally Impaired Persons) Act 2003,* ss 24, 31, 33; *Criminal Justice Act 1985,* s 118.
[196] *Electoral Act 1993*, s 80 (1) (d); *Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010,* s 4.
[197] Population of New Zealand Today (n 186).
[198] *Corrections Department NZ – Prison Facts and Statistics – March 2018* (Corrections.govt.nz, 2018) <https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2018.html>.
[199] *Electoral Act 1993*, s 80 (1) (d); *Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010,* s 4.

under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*.[200] That disqualification works as an equivalent to what Australia has within its electoral legislation as the 'unsound mind' disqualification. However, the disqualification is a lot narrower than what Australian electoral legislation affords its citizens. This New Zealand electoral disqualifier only applies to persons subject to a court order that declares their mental impairment[201] or compulsory treatment order.[202]

In addition, New Zealand electoral legislation has compulsory enrolment however it does not have a compulsory requirement to vote which offers some protection for citizens that do not wish to exercise their right to vote.[203] The New Zealand electoral system also affords Maori additional voter incentives legislatively recognised to mitigate those barriers and encourage Maori to vote and politically participate. Section 76 of the *Electoral Act 1993* introduced the Maori Electoral Roll Option in 1975,[204] providing Maori electors with an opportunity to decide which electoral roll they wish to be enrolled on.[205] As such, Maori electors can choose to register their enrolment to vote on a Maori electoral district or a general electoral district.[206]

The Maori Electoral Roll Option operates by providing Maori with a period of four months after the Minister of Justice has published a notice in the *Gazette* to register their enrolment as electors for New Zealand elections on the Maori roll or general roll.[207] The Electoral Commission must also issue a notice to Maori electors to clarify whether they are registered for a Maori electoral district or general electoral district.[208]

After Maori electors have received those notices, they must stipulate whether they wish to remain registered on the roll they are already registered on, or whether they wish to change rolls.[209] Once Maori electors receive notice of their enrolment status and do not exercise the option given by s 76 (1) during the option period, they will continue to remain registered on the roll as an elector of the electoral district in which they are currently registered.[210] Regardless of the choice of the electoral

[200] *Electoral Act 1993*, s 80 (c).
[201] *Electoral Act 1993*, s 80 (c) (1) (i) (ii).
[202] *Electoral Act 1993*, s 80 (c) (1) (iii).
[203] *Electoral Act 1993*, s 83; *What is New Zealand's System of Government?* (Electoral Commission, 2020) <https://elections.nz/democracy-in-nz/what-is-new-zealands-system-of-government/>.
[204] Miller (n 185) 185.
[205] *Maori Representation* (Electoral Commission, 2004) <http://www.elections.org.nz/voting-system/maori-representation>.
[206] *Electoral Act 1993*, s 76 (1).
[207] *Electoral Act 1993*, s 77.
[208] *Electoral Act 1993*, s 78 (2).
[209] *Electoral Act 1993*, s 78 (3), (4).
[210] *Electoral Act 1993*, s 78 (9).

roll, and where they live, the voting system ensures that all electors have the same list of political parties to choose from when using their party vote.[211]

A key benefit of the Maori Electoral Roll Option is that its statistical data is collated with annual census data of Maori that is then used to determine whether adjustments need to be made to Maori designated seats in parliament. Both sources of data are considered by the Electoral Commission when revising whether electorate boundaries need to be adjusted.[212]

As a result, the Maori Electoral Roll Option provides Maori electors with an incentive to register to vote through an enhanced chance of gaining more Maori seats in parliament. Since the introduction of the Maori electoral option, Maori designated seats in New Zealand Parliament have increased from the original four to seven.[213] In terms of political participation, a system of designated seats cannot be overlooked as a key institutional adaptation. The following section, therefore, considers the historical development and contemporary benefits of Maori designated seats.

D. Maori Designated Seats in Parliament

Maori designated seats in parliament are a key feature of the New Zealand electoral system. They are viewed as not only a symbolic but a practical expression of Maori self-determination and constitutional legitimacy in accordance with the *Treaty*.[214] In that context, Maori designated seats exemplify an assertion by Maori of substantive parliamentary representation of Maori cultural identity as *required* by the *Treaty*.[215]

At first instance, s 10 of the New Zealand *Constitution*[216] provides that persons qualified for membership of the House of Representatives must be already qualified as electors to vote at elections.[217] More specifically though, Maori representation is outlined in s 45 of the *Electoral Act 1993* which provides that it is the duty of the Representation Commission, for the purpose of the representation of the Maori people in the House of Representatives, to divide New Zealand into

---

[211] Maori Representation (n 205).
[212] Ibid.
[213] Ibid.
[214] Tama W. Potaka, 'Legislation and the Legislature' in M. Mulholland and V. Tawhai, *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 83, 96; *Royal Commission on the Electoral System: Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) 86.
[215] See Electoral Law Reform Committee, *Report on the Electoral Reform Bill* (1993) *Australian Journal of Human Rights* C17, 12; MMP Review Committee, Report of the MMP Review Committee: Inquiry into the Review of MMP (2001) *Australian Journal of Human Rights* 23, 20–1; Tariana Turia Co-leader of the Maori Party, Maori and Parliament (speech given at Maori and Parliament: the 8th Parliamentary Conference, Parliament Buildings, Wellington, 8 May 2009).
[216] *Constitution Act 1986*, s 10 (4).
[217] *New Zealand Bill of Rights Act 1990*, s 12 (b); *Electoral Act 1993*, s 27.

Maori electoral districts from time to time.[218] This is to ensure that Maori representation in the House of Representatives is proportionate to their population.

The introduction of Maori designated seats under the *Maori Representation Act 1867* has been considered tokenistic.[219] Designated seats were originally introduced to provide guaranteed representation to Maori. However, in a more practical sense, they were restrictive because they were disproportionate to the Maori population at the time of their introduction. If seats were reflective of the Maori population in 1867, there would have been 20 allocated seats out of the 70 in existence.[220] The New Zealand Government at the time was concerned to ensure that the 70 European electorates were not 'swamped' by Maori voters.[221] Proportionate Maori representation was therefore restricted significantly – only four seats were allocated to Maori representatives. [222]

Following the repeal of the *Electoral Act 1956* by the *Electoral Act 1993* introducing the mixed-member proportional system, Maori electorates were recalculated and adjusted according to the number of Maori registered to vote on the Maori electoral option.[223] The seven Maori electorates established provide Maori with their own special category of an electorate that covers the whole of New Zealand and overlies the 64 general electorate seats.[224]

Maori electorates provide a better opportunity for proportionate Maori representation to occur in New Zealand politics as they afford Maori voters with a more direct voice for Maori representation that would best represent their interests as a minority culture. In doing so, the special category of Maori electorates prioritises the protection of Maori property and self-determination rights[225] that

[218] *Electoral Act 1993*, ss 45, 269.
[219] See eg: Miller (n 185) 186; Helena Cook, 'Pacific People in Parliament: A Case Study of Minority Representation in New Zealand' (PhD Thesis, Victoria University of Wellington, 2008) 41; T. Arseneau, 'The Representation of Women and Aboriginal Peoples Under PR: Lessons From New Zealand' (1997) 18(9) *Policy Options* 2; Maria Bargh, *Maori and Parliament: Diverse Strategies and Compromises* (Huia Publishers, 2010) 1913.
[220] Augie Fleras, 'From Social Control towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand' (1985) 18(3) *Canadian Journal of Political Science* 551; Alan Ward, *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Auckland University Press, 1973) 209.
[221] Alexandra Xanthaki and Dominic O'Sullivan, 'Indigenous Participation in Elective Bodies: The Maori in New Zealand' (2009) 16 *International Journal on Minority and Group Rights* 191; Miller (n 185), 185; E. Bohan, *Edward Stafford: New Zealand's First Statesman* (Hazard Press, 1994) 325.
[222] Ward (n 215); Xanthaki, ibid; Richard S. Hill, *State Authority, Indigenous Autonomy: Crown–Maori Relations in New Zealand/Aotearoa 1900–1950* (Victoria University Press, 2004) 146; *Maori Representation Act 1867*, s3.
[223] John Wallace, *Royal Commission on the Electoral System: Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (New Zealand Government Printer, 1986) 83; *Electoral Act 1993* (NZ), s2.
[224] Jennifer Curtin, Jack Vowles and Hilde Coff, *A Bark But No Bite* (ANU Press, 2017) ch 10.
[225] *Treaty of Waitangi 1840*, art 2.

both work hand and hand, and are fundamental to, Maori cultural identity and their fair share of citizen benefits in New Zealand.[226]

Both measures since their introduction to New Zealand's electoral system have increased enrolment on the Maori electoral roll, which by 1996 had resulted in an increase in Maori designated seats in parliament from four to five.[227] By 1996, designated seats for Maori increased to six and by 2002, they had increased again to seven, the current number.[228]

Despite designated Maori seats securing and increasing Maori representation in parliament, the most significant impact on Maori representation has been the introduction of party lists.[229] Party lists allow for the additional representation of Maori representatives and are not restrictive. For example, in 1996, five Maori representatives were elected into Maori electorate seats and one was elected into a general seat. In contrast to their electorate representation, 11 Maori representatives were elected on party lists and, to date, between one-third and one-half of all Maori members of parliament are elected from party lists.[230]

As a consequence of the capacity for a wider distribution of power to a more diverse range of candidates, most parliamentary parties now include Maori in their line-up of candidates. Over time this has boosted numbers of Maori members of parliament, including ministers.[231] In addition, Maori have two registered political parties, the Maori and Mana parties, which offer distinct self-determined Maori perspectives to executive and legislative agendas.[232]

New Zealand party lists, however, have posed issues in terms of their predetermined rankings from the honours board system that make it harder for electors to distinguish genuine list candidates from those that have been added purely to bolster a party's image.[233] This can be particularly problematic

---

[226] *Treaty of Waitangi 1840*, art 3; Susan Banducci, Todd Donovan and Jeffrey Karp, 'Minority Representation, Empowerment and Participation' (2004) 66(2) *Journal of Politics* 536; Ann Sullivan, 'Effecting Change through Electoral Politics: Cultural Identity and the Maori Franchise' (2003) 112(3) *The Journal of the Polynesian Society* 220.
[227] C. Iorns, 'Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation of Indigenous Self-determination' (2003) 10 *Murdoch University Electronic Journal of Law*; Xanthaki (n 221) 196.
[228] Xanthaki, ibid; Geddis (n 159) 351–352.
[229] *Royal Commission on the Electoral System: Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) 102.
[230] Ibid, 93.
[231] Catherine I. Magallanes, 'Dedicated Parliament Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination' (2003) 10(4) *Murdoch University Electronic Journal of Law*; Parliamentary Library, *The Origins of the Maori Seats: Parliamentary Library Research Paper* (Parliamentary Library, Wellington, 2009) 27–9.
[232] Magallanes (n 256); Ross Bowden, 'Tapuandmana: Ritual Authority and Political Power in Traditional Maori Society' (1979) 14(1) *The Journal of Pacific History* 50; Fiona Barker and Elizabeth McLeay, 'How Much Change? An Analysis of the Initial Impact of Proportional Representation on the New Zealand Parliamentary Party System' (2000) 6(2) *Party Politics* 135.
[233] Royal Commission on the Electoral System (n 229) 102.

for electors reliant on candidates to represent and fulfil policy promises and objectives surrounding minority interests like Maori rights. Maori rights and the political representation of those rights is of particular importance given the colonial dispossession those interests have been oppressed by and, their status as a minority cultural group of people. Further, despite Maori representation increasing slowly over time, their proportionate political representation still lacks entrenchment and protection within the New Zealand Constitution. There is argument however, that the lack of constitutional entrenchment of such representation, would avoid concerns that Maori members of Parliament in reserved seats, would decide who formed governments. Yet, the lack of reserved seats constitutional entrenchment also provides Maori members with real bargaining and even veto power over legislation affecting Maori interests in parliamentary law-making processes.[234]

Designated Maori representation has remained a contested issue even without considering constitutional entrenchment.[235] In 2013, the Constitutional Advisory Panel issued a report which considered arguments for and against the retention and abolition of Maori seats in parliament.[236]

Arguments in favour of abolishing Maori designated seats drew upon findings within the 1986 *Report of the Royal Commission on the Electoral System*.[237] The Report suggested that whilst there is a special significance for Maori obtaining designated seats in parliament, the mixed-member proportional system would achieve the same benefit given that it is entirely based on political proportionality and representation within the electoral system. On this argument, there is no further need for separate representation.[238]

The 'undemocratic argument' in favour of abolishing designated seats suggests that they undermine principles of equality.[239] They seek to safeguard Maori representation in parliament, applying only to a portion of New Zealand society and not the rest.[240] There is a presumption under that line of

[234] Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (The Federation Press, 2016) ch 3.
[235] Miller (n 185) 191; Sustainable Future Institute, *Effective Maori Representation in Parliament: Working Towards a National Sustainable Development Strategy* (Sustainable Future Institute Limited, 2010) 86.
[236] Douglas Graham, former Minister of Justice of New Zealand, 'Should the Maori Seats be Retained, Entrenched, Abolished or Should Parliament Contain a Maori House?' (speech to the Faculty of Law, University of Auckland, 2009); Miller, ibid, 185.
[237] The *Report of the Royal Commission on the Electoral System* which first recommended New Zealand adopt the Mixed Member Proportional voting system was submitted to the Governor-General on 11 December 1986.
[238] Graham (n 236).
[239] William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (W. H. Freeman, 1982); Augie Fleras, 'Aboriginal Electoral Districts for Canada: Lessons from New Zealand' in Robert A. Milen, *Aboriginal Peoples and Electoral Reform in Canada* (Dundurn, 1991).
[240] Peter Dunne, 'Time to let the people decide', *Dominion Post* (New Zealand, 18 March 2008) B5; Then Prime Minister of Australia, Malcolm Turnbull, used a similar argument to reject calls for a Voice to Parliament in Australia. See, eg, Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (December, 2018) 30(2) *Bond Law Review* 335–346.

reasoning that, if designated seats are maintained, Maori will continue to be treated in a more privileged way politically than others.[241] This stance, however, fails to acknowledge the historic political exclusion and oppression Maori have faced since colonisation. On the contrary, the political inequality in New Zealand's representative electoral system was derived from a foundation of white privilege and colonial dominance over all other cultures.[242]

Additionally, the Report considered perspectives that suggested designated seats create a form of apartheid in that Maori representatives are not only separated in parliament and government but under their designated seats their roles diminish in both institutions.[243] This perspective observes the impure reasons for creating the seats originally, namely to restrict Maori political representation rather than protect and increase it.[244] Even since their creation, the Royal Commission has observed how the non-Indigenous majority government continues to dominate Maori representatives, making it difficult for those representatives to fully advocate for and protect the interests of their people.[245]

The third argument speaks of multiculturalism effects. It criticises racial separatism in politics labelling it unfair for other ethnic groups such as Pacific peoples and Asians.[246] This argument calls for the abolition of all race-based legislation including the designated Maori seats in parliament. However, it ignores that under the mixed-member proportional system Maori representation is already reasonable and proportionate to their population.[247]

In the alternative view, the Report notes arguments that support maintaining designated seats. Firstly, it notes that the seats represent and draw upon treaty principles of partnership and self-determination rights of Maori. Designated seats for Maori in that context represent symbolically and practically the legitimacy of Maori rights in partnership with the Crown.[248] This establishes a dual

---

[241] David Round, *Truth or Treaty? Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, 1998) 21; Raymond Miller, *Democracy in New Zealand* (Auckland University Press, 2015) 197–8.
[242] Elizabeth Maggie Penn, 'Citizenship Versus Ethnicity: The Role of Institutions in Shaping Identity Choice' (2008) 70(4) *The Journal of Politics* 956; Jack Nagel, 'Social Choice in a Pluralitarian Democracy: The Politics of Market Liberalization in New Zealand' (1998) 28(2) *British Journal of Political Science* 223.
[243] Royal Commission on the Electoral System (n 237) 113.
[244] Miller (n 185) 198.
[245] Royal Commission on the Electoral System (n 237) 90.
[246] Bob Jones, 'Maori seats give unwarranted influence based on race' (2008) *New Zealand Centre for Political Research* <www.nzcpr.com>; David Round, *Truth or Treaty? Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, 1998) 21. Race has also been a basis for rejecting constitutional reform to recognise Indigenous Australians. See, eg, John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 7.
[247] Royal Commission on the Electoral System (n 237) xxiii.
[248] Tariana Turia Co-leader of the Maori Party (speech given at Maori and Parliament: the 8th Parliamentary Conference, Parliament Buildings, Wellington, 8 May 2009); Mason Durie, 'Tino Rangatiratanga' in M. Belgrave, M. Kawharu and D. Williams, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, 2005) 14; Xanthaki (n 221) 205.

political effort through both parties participating in decision-making processes within parliament and recognises important treaty principles and constitutional conventions that place respect and value on Maori representation. On these arguments, Maori designated seats in the sovereign parliament are an important act by which government highlights that relationship and the respect due to Maori.[249]

The Report also notes arguments that support the constitutional entrenchment of Maori designated seats to prevent future abolition of the seats without a 75 per cent majority vote in support.[250] The challenge for constitutional entrenchment is that principles that underpin treaty partnership as understood by its Maori interpretation conflict with its English version. According to the English interpretation, the Maori interpretation threatens State sovereignty through the formal application of self-determination rights.[251] Furthermore, the entrenchment of seats would be unlikely to gain non-Indigenous majority support if there is a perceived threat of more radical changes being explored – such as the creation of a Maori parliament and an entirely separate Maori nation-State.[252]

Despite those concerns, the report did note that without Maori seat protection, levels of Maori representation could quickly decline as was seen in the early 2000s with the Mana Motuhake movement.[253] The Mana party had one parliamentary seat and lost it in 2014, affecting the gains made in the political representation of its electors' interests.[254]

Nonetheless, at a bare minimum, the Report notes the amount of strong support for Maori seats amongst party voters.[255] The abolishment of seats would mean that the interests of Maori electors would be reliant on the goodwill of party elites. Maori rights to exercising self-determination would

[249] Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, 1984); Rein Taagepera and Matthew Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems* (Yale University Press, 1989).
[250] *Electoral Act 1993*, s 268(2); Mason Durie, 'A Framework for Considering Constitutional Change and the Position of Maori in Aotearoa' in C. James, *Building the Constitution* (Victoria University of Wellington, 2000) 417.
[251] R. P. Boast, 'The Treaty of Waitangi: A Framework for Resource Management Law' (1989) 19 *Victoria University of Wellington Law Review* 1–4; *Treaty of Waitangi 1840*, art 2 of Maori version; *Report of the Waitangi Tribunal on the Orakei Claim* (Waitangi Tribunal, Department of Justice, 1st ed, 1987) 340.
[252] Miller (n 185) 200–201; John Dawson, 'The Resistance of the New Zealand Legal System to Recognition of Maori Customary Law' (2008) 12(1) *Journal of South Pacific Law* 56; Augie Fleras, 'From Social Control towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand' (1985) 18(3) *Canadian Journal of Political Science* 565.
[253] Hal Levine and Manuka Henare, 'Mana Maori Motuhake: Maori Self-Determination' (1994) 35(2) *Pacific Viewpoint* 197; Ann Sullivan, *Torangapu – Maori and political parties – Ratana, Labour and Mana Motuhake* (Te Ara – the Encyclopedia of New Zealand, 2012) <http://www.TeAra.govt.nz/en/torangapu-maori-and-political-parties/page-3>.
[254] Mason Durie, 'Mana Maori Motuhake: The State of the Maori Nation' in R. Miller, *New Zealand Politics in Transition* (Oxford University Press, 1997) 372.
[255] Ibid.

then be implicitly limited. On the other hand, if the seats are to remain, Maori electors' political control over the way in which their cultural and political interests are represented.[256]

Despite ongoing examination of the system of designated seats, there is no immediate call for change to the current arrangements for Maori representation in parliament. Given the benefits of having separate, self-regulated and maintained Maori seats, Maori have a political avenue for self-determined political representation both through their engagement with the Maori Electoral Roll Option and through its related system of designated parliamentary seats.[257]

IV. CONCLUSION

In contrast to the Australian framework of political participation, both Canada and New Zealand offer a range of institutional responses that, while not perfect, enhance Indigenous peoples' political participation.

In Canada, even in the face of parliamentary attempts to disqualify incarcerated citizens from the vote, they are protected in practical terms by Canada's constitutional makeup. Despite Canadian electoral legislation formally disqualifying from voting those incarcerated for two years or more, these provisions have been declared ineffective and are not applied.[258] Overriding case law[259] has recognised that the restriction of voting rights is undemocratic and constitutionally invalid. This analysis depends upon the interpretation of the constitutionally entrenched *Charter of Rights and Freedoms*[260] as protecting the democratic voting rights of all Canadian citizens.

Elections Canada also has far more effective support initiatives established for its First Nations compared to those of the Australian Electoral Commission in support of Indigenous Australian electors. Further, the Canadian initiatives are focused on more practical outcomes that immediately address barriers to First Nations people in terms of their voting at Canadian elections. In addition, data collected annually track the progression and success of such initiatives and is continuously reviewed and acted upon. As a result, the Canadian system is a relatively effective, supportive and inclusive system for *all* citizens, including its First Nations.

[256] Levine (n 253) 197.
[257] Miller (n 185) 197.
[258] *Canada Elections Act 2000*, s 4 (e).
[259] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.
[260] *Charter of Rights and Freedoms 1982.*

Although not constitutionally entrenched as in Canada, the New Zealand electoral system provides within its constitutional framework a further example of an institutional framework that supports the political candidacy of its Indigenous people. Firstly, and in contrast to the *Australian Constitution's* disqualifying provisions,[261] the New Zealand Constitution does not explicitly disqualify persons in any of its provisions. Given the lack of detail in New Zealand's Constitution and the way in which its electoral system is guided by several legislative instruments, it is better equipped to reform and adapt. As a consequence of the role of the *Treaty* in interpreting the Constitution and legislation more broadly, the contemporary institutional framework for Maori political participation better represents Indigenous self-determination than in Australia.

As part of the New Zealand institutional approach, Maori citizens are encouraged to self-identify, a key component of self-determination and cultural identity, through the Maori Electoral Roll Option. This initiative is reflective of New Zealand's commitment to adhering to principles of political equality and proportionality that underpin its democratic regime.[262]

Lastly, the Maori Electoral Roll Option data, together with Maori census data, determine whether Maori designated seats in parliament are increased and electorate boundaries require further adjustment. Having separate seats designated for Maori representatives in New Zealand Parliament adheres to principles of proportionality and representation of Maori interests and identity that are hallmarks of self-determination within a representative democracy.[263]

Electoral laws in both Canada and New Zealand depend upon the constitutional framework to quite a different extent from the Australian electoral system. Rights of self-determination, whether situated within a constitution, treaty, or charter, are common to both of these legal systems and absent from Australia. The role that these rights play within a domestic system becomes apparent in Australia's past experiences with Indigenous representative bodies.

---

[261] *Commonwealth of Australia Constitution Act 1901*, s 25, s 41.
[262] Tim Schouls, 'Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation versus Voter Equality' (1996) 29(04) *Canadian Journal of Political Science* 736.
[263] Schouls, ibid, 735; Philip A. Joseph, *The Maori Seats in Parliament* (New Zealand Business Roundtable, 2008) 6; S. A. McClelland, 'Maori Electoral Representation: Challenge to Orthodoxy' (1997) 17 *New Zealand Universities Law Review* 272, 276.

CHAPTER 4
INDIGENOUS REPRESENTATIVE BODIES WITHIN AUSTRALIA

> We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution. Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination. We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history. In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.[1]

I. INTRODUCTION

Beyond the features of electoral systems including voting and candidacy rights, this thesis explores the potential in representative institutions designed to give voice to particular concerns of Indigenous peoples. Nationally recognised representative bodies for Indigenous people are an essential component in meeting the need for their political representation through providing an institutional means of exercising their rights to self-determination. As argued in this thesis,[2] this is an essential ingredient in protecting cultural identity and heritage. This chapter engages with the experience of national Indigenous representative bodies within Australia.

This chapter posits that the Australian political system has not yet been able to implement such a body as it lacks a correct understanding of self-determination.[3] To do so, it reflects on government actions that historically have limited the expression of Indigenous Australians' self-determination and which have also limited the longevity, support of and respect for past and present Indigenous representative bodies. It highlights the effect of the absence of constitutional entrenchment and protection of those bodies, allowing successive governments to repeal their establishing legislation

[1] *Uluru Statement from the Heart 2017*.
[2] As argued in Chapter 1 of this thesis.
[3] Larissa Behrendt and Alison Vivian, *Indigenous Self-Determination and the Charter of Human Rights and Responsibilities* (Victorian Equal Opportunity and Human Rights Commission, 1st ed, 2010); S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009); See *Concluding Observations of the Human Rights Committee: Australia*, UN Doc. A/55/40 (24 July 2002) 506–508; Stephen Cornell, 'Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States' in Robyn Eversole, John-Andrew McNeish and Alberto D. Cimadamore, *Indigenous Peoples and Poverty: An International Perspective* (Zed Books Ltd., 2013) ch 11.

and abolish them. Those government actions have disregarded the purpose of establishing such bodies – namely, to provide a differentiated political and cultural platform for advocacy by Indigenous people so they are fairly represented.

This chapter explores a contemporary example of flawed government actions undertaken in the absence of an established representative body to advocate on laws affecting Indigenous peoples' cultural affairs: the Northern Territory Emergency Response.[4] It then considers current calls for substantive political equality within the *Uluru Statement from the Heart* (Uluru Statement).[5] The Uluru Statement is built on three key themes to be embodied in three types of institutional Indigenous representation designed, together, to facilitate Indigenous Australians to exercise self-determination. Those themes are voice, treaty and truth.[6]

Although there are several constitutional law reform proposals included within the Uluru Statement, this chapter focuses on the proposal to establish national Indigenous representative bodies which aim to safeguard Indigenous inclusion in decision-making processes within mainstream federal politics on matters that concern their cultural identity and affairs. Those bodies include the Voice to Parliament, the Makarrata Commission, and the Truth-Telling Commission,[7] and the final part of this chapter explores the broad, preliminary suggested role and design of each of the proposed bodies.

II. INDIGENOUS SELF-DETERMINATION

Self-determination is a foundation right vital for Indigenous peoples that goes some way to remedy the failure of ostensibly representative democratic regimes with colonial backgrounds.[8] Its objective is to realise the cultural rights and heritage of Indigenous people without limitations placed upon

[4] Nicole Watson, 'The Northern Territory Emergency Response – Has It Really Improved the Lives of Aboriginal Women and Children?' (2011) 35(1) *Australian Feminist Law Journal* 147, 147–163; *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).
[5] *Uluru Statement from the Heart 2017*.
[6] Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011); *Final Report of the Referendum Council* (Commonwealth of Australia, 2017); Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501.
[7] Final Report 2017, ibid 30–32.
[8] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Res, 107th Plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007); Jeff Corntassel, 'Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination' (2012) 1(1*) Decolonization: Indigeneity, Education & Society* 87; Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People' (2008) 41(4) *Vanderbilt Journal of Transnational Law* 1149 –1150.

those rights by a government.[9] To achieve this object, a government is required to seek free, prior and informed consent from its Indigenous people[10] and consult with them in decision-making processes that concern matters affecting their cultural affairs both directly and indirectly.[11]

From an Australian perspective, the current legislative official view of the right of self-determination is recognised in s 3 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth). Section 3 requires the Australian government ensure the maximum participation of Aboriginal persons and Torres Strait Islanders in the making and implementation of government policies that affect them. In addition, it also requires the Australia government to promote the development of self-management and self-sufficiency among Aboriginal and Torres Strait Islander peoples.[12]

Despite the legislative understanding of self-determination, there still remains differing interpretations of self-determination in terms of how it is exercised by Indigenous people in practice.[13] Historically, the Australian government has perceived self-determination as a threat to its sovereignty, particularly when certain Indigenous groups interpret self-determination as an exercise of their sovereignty over land and deciding their political status and self-government. Successive Australian governments have in that context, limited self-determination by interpreting it more narrowly compared to international standards which is in contrast, a broad understanding of self-determination that aims to decolonise and politically empower Indigenous people.[14]

The pathway to undertaking such consultative tasks that seek to place Indigenous people at the forefront with decision-making on matters that concern their cultural affairs within Commonwealth democracies is to ensure that its westernised institutions are accepting and inclusive of Indigenous practices of traditional governance. To negate or even limit, that kind of self-determination of

---

[9] Jeff Corntassel and Cheryl Bryce, 'Practicing Sustainable Self-Determination: Indigenous Approaches to Cultural Restoration and Revitalization' (Spring/Summer 2012) 18(2) *Brown Journal of World Affairs* 151; Bernard Nietschmann, 'The Fourth World: Nations versus States' in George J. Demko and William B. Wood, *Reordering the World: Geopolitical Perspectives on the 21st Century* (Westview Press, 1995) 239; Russel Lawrence Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80(2) *The American Journal of International Law* 370.

[10] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976), art 1; *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (Oxford University Press, 3rd ed, 2013) ch 1; Jenny Macklin, 'Statement on the United Nations Declaration of Indigenous Peoples' (Media Release, 3 April 2009).

[11] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) arts 2, 3, 25, 26 and 27; Joseph and Castan, ibid.

[12] *Aboriginal and Torres Strait Islander Act 2005* (Cth), s3.

[13] David Roberts, *Self-determination and the Struggle for Equality* (University of Queensland Press, 2004) 259.

[14] Ibid, 259-260.

Indigenous people further constrains meaningful progression towards reconciliation.[15] It is thus imperative for the Australian Government to ensure its institutions and overall governance provide Indigenous groups with the ability to freely develop and maintain their cultural identities.[16] As a signatory to the several International Conventions that recognised standards of self-determination,[17] Australia too must adhere to those recognised standards of self-determination that respect and acknowledge the special and distinct identity of Indigenous Australians as a people.[18]

Enacting self-determination requires a relationship to be formed between Indigenous people and the Settler State that fosters partnership and mutual respect – as much of the exercise and practice of self-determination is relational. Such a relationship is vital in representative liberal democracies like Australia that place a strong emphasis on citizenship through political participation. Self-determination is therefore exercised by Indigenous citizens within representative democracies through their political participation evidenced by the exercise of free choice through voting at elections[19] and their overall engagement in political decision-making processes by providing sought-after prior consent without limitation and domination.[20]

Whilst much of self-determination is best understood as political participation,[21] the right extends also to inclusive self-governance.[22] Self-governance provides Indigenous people with a sense of cultural autonomy in matters relating to their internal and local affairs.[23] This is manifested in

---

[15] Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 *Alternatives* 105, 107–108; Chris Gibson, 'Cartographies of the Colonial/Capitalist State: A Geopolitics of Indigenous Self-Determination in Australia' (1999) 31(1) *Antipode* 45, 59–66.
[16] Anaya (n 3) 131.
[17] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976, art 1; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007); Joseph and Castan (n 10); Australia announced its support of the UNDRIP on 3 April 2009: see, eg, Macklin (n 10).
[18] Fernand de Varennes, 'Indigenous Peoples and Language' (1995) *Murdoch University Electronic Journal of Law* 2.
[19] Mary Ellen Turpel, 'Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25(3) *Cornell International Law Journal* 582.
[20] Iris Marion Young, 'Two Concepts of Self-Determination' in Austin Sarat and Thomas R. Kearns (eds), *Human Rights, Concepts, Contests and Contingencies* (University of Michigan Press, 2001) 25; Benedict Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in Pekka Aikio and Martin Scheinin, *Operationalizing the Right of Indigenous Peoples to Self-determination* (Institute for Human Rights, 2000) 19.
[21] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976, arts 2 and 25; *Universal Declaration of Human Rights*, G.A. res. 217 A (III) U.N. Doc. A/810 (10 December 1948) [71]; *Report of the Working Group on Indigenous Populations on its Eighth Session*, U.N. Doc. E/ CN.4/Sub.2/1990/42, [49].
[22] Gibson (n 12) 45; *National Housing and Community Infrastructure Needs Survey* (Aboriginal and Torres Strait Islander Commission, 1992); M. Langton, *"Well, I hear it on the radio and I saw it on the television . . .": An Essay for the Australian Film Commission on the Politics and Aesthetics of Filmmaking by and about Aboriginal People and Things* (Australian Film Commission, 1993) 8.
[23] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007), art 4; Ashjborn Eide, 'Indigenous Populations and

Australia through a continuous call for political empowerment by Indigenous Australians.[24] The problem within Australia, however, has been the lack of acceptance of their differentiated citizenship identity by the Settler State.

Australia, like other Commonwealth democracies with a colonial background, has been reluctant to accept differentiated citizenship expressed through Indigenous self-governance.[25] Instead, its push for such groups to integrate and assimilate into a common national identity[26] has been the dividing factor behind the unreconciled relationship that exists between Indigenous people and the Settler State. Those actions have led to an even greater indifference and resentment experienced by Indigenous Australians.[27]

There are a variety of ways forward for modern Commonwealth democracies like Australia to support Indigenous claims to identity which may be seen through the establishment of a treaty[28] and other frameworks and institutions of self-determination within federal regimes.[29] Those options provide an avenue to accommodate the political aspirations of Indigenous people.[30]

Whichever way Indigenous self-determination is exercised, it must be supported by a State in a culturally appropriate way.[31] This requires a government to establish a mutually respectful negotiation process between the majority culture and Indigenous people as the minority. From

---

Human Rights: The United Nations Efforts at Midway' in Jens Brosted, *Native Power: The Quest for Autonomy and Nationhood of Indigenous Peoples* (Oxford University Press, 1986) 196; Turpel (n 19) 583.

[24] Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8(19) *Indigenous Law Bulletin* 15; *Yirrkala bark petitions 1963*; *The Barunga Statement 1988*; *Uluru Statement From The Heart 2017*; *Victorian Government to begin talks with First Nations on Australia's first Indigenous treaty* (ABC News, 26 February 2016); 'NT signs historic Barunga agreement to begin Indigenous treaty talks' (*The Guardian*, 8 June 2018).

[25] Gerald Fallon and Jerald Paquette, 'A Critical Analysis of Self-Governance Agreements Addressing First Nations Control of Education in Canada' (2012) (132) *Canadian Journal of Educational Administration and Policy* 9; Ryan Bowie, 'Indigenous Self-Governance and the Deployment of Knowledge in Collaborative Environmental Management in Canada' (2013) 47(1) *Journal of Canadian Studies* 93; Andrew Ladley, 'The Treaty and Democratic Government' (2005) 1(1) *Policy Quarterly* 21–22; Lisa Ford and Tim Rowse, *Between Indigenous and Settler Governance* (Routledge, 2013) 135.

[26] Kay Morris Matthews and Kuni Jenkins, 'Whose Country is it Anyway? The Construction of a New Identity Through Schooling for Maori in Aotearoa/New Zealand' (1999) 28(3) *History of Education* 340; Sarah Maddison, 'Indigenous Identity, "Authenticity" and the Structural Violence of Settler Colonialism' (2013) 20(3) *Identities* 289; Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (UBC Press, 2011) 69.

[27] W. Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1995) 185.

[28] Jane Robbins, 'The Howard Government and Indigenous Rights: An Imposed National Unity?' (2007) 42(2) *Australian Journal of Political Science* 325.

[29] See generally, Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2016).

[30] W. Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford University Press, 1998) 129.

[31] Megan Davis, Mark McKenna, et al., *After Uluru: Australia's Politics of Contempt Threatens the Soul of the Nation* (ABC Religion and Ethics, 24 November 2017) <https://www.abc.net.au/religion/after-uluru-australias-politics-of-contempt-threatens-the-soul-o/10095186>; Appleby and Davis (n 6) 509; Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' [2004] 26(3) *Sydney Law Review* [3].

there, a more reconciled process towards national unity can be achieved in democracies with differentiated citizen identities and interests.[32] Citizen unity of this kind shifts the focus of citizens to achieve a shared goal. That goal is to be part of a modern and reformed system that provides them with the free and equal opportunity to contest and reshape previous rules and norms that have historically failed them, not least by creating a sense of separatism within society.[33]

The process of implementing self-determination can include 'constitutionalism' whereby a colonial State's constitution provides recognition of the different cultures of its citizens.[34] Again, this requires adherence to conventions that oblige mutual contribution, consultation and consent by all citizens, including those who are of Indigenous descent.[35] This process of negotiation and equal contribution forges unity of citizens through the affirmation of cultural differences, public acknowledgement and respect exercised within governing institutions free from the impoverishment of one's own identity.[36]

Since federation, the Australian Government had not adhered to the currently recognised standards of adequate consultation with *all* the people it governs.[37] This was particularly so during the drafting phases of its governing institutional order and structures.[38] Rather, some of its citizens, especially women and Indigenous Australians, were unjustifiably excluded according to contemporary standards of democratic governance.[39]

The result of the exclusion of women and Indigenous people is the creation of institutions that function in a way that is discriminatory, and frequently detrimental to their interests.[40] Further, their

---

[32] Eyassu Gayim, 'The United Nations Law on Self-Determination of Indigenous Peoples' (1982) 51(1) *Nordic Journal of International Law* 52; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) 215; Jorge Valadez, *Deliberative Democracy, Political Legitimacy, and Self-determination in Multi-cultural Societies* (Routledge, 2001) ch 7.
[33] D. Ivison, *Postcolonial Liberalism* (Cambridge University Press, 2002) 166.
[34] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 7; Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) *Yale Law School Faculty Scholarship Series* 772; Jon Elster and Rune Slagstad, *Constitutionalism and Democracy* (Cambridge University Press, 2003) 2.
[35] Alec Stone Sweet, 'Proportionality Balancing and Global Constitutionalism' (2008) *Yale Law School Faculty Scholarship Series* 92; Cass R. Sunstein, 'Constitutionalism and Secession' (1991) 58 *University of Chicago Law Review* 637.
[36] Tully (n 34) 197; Kirsty Gover, 'Comparative Tribal Constitutionalism: Membership Governance in Australia, Canada, New Zealand, and the United States' (2010) 35(03) *Law & Social Inquiry* 689.
[37] Anaya (n 3) 104–5.
[38] Castan (n 24) 15.
[39] George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38(4) *Osgoode Hall Law Journal* 647; George Williams, *Human Rights Under the Australian Constitution* (Melbourne: Oxford University Press, 1999) 47–50.
[40] Kate Galloway, 'The Unwritten Rules' (2013) *Griffith Review* 10; Deborah Bird Rose, 'Land rights and Deep Colonising: The Erasure of Women' (1996) 3(85) *Aboriginal Law Bulletin* 6–13; Jon C. Altman, *The Economic Status of Indigenous Australians* (Centre for Aboriginal Economic Policy Research, 2000) 1; Geoffrey Stokes, 'Australian Democracy and Indigenous Self-Determination, 1901–2001' in Geoffrey Brennan and Francis G. Castles, *Australia*

lack of representation within those institutions, because of those embedded structures, has also worked to maintain their institutional oppression and subordinate status as differential and distinct groups.[41]

For Indigenous peoples, it is essential that representation exercised through their own institutions is Indigenous-led and controlled. Their control must not just be inclusive of service deliverables, but most importantly their broader decision-making on laws and policies that affect their cultural affairs and organisational objectives.[42]

In the face of a longstanding struggle for Indigenous self-determination in Australia,[43] theorists have observed that there is no threat to its national identity if diverse political arrangements or differentiated rights are created.[44] Increasing support amongst the international community with a growing number of international legislative instruments that recognise the importance of Indigenous rights to self-determination, including acceptance of cultural and political freedoms, further evidence this.[45]

To achieve self-determination in Australia thus requires a shift away from minimalistic and symbolic ways of recognising such rights and international standards, towards more substantive change.[46] The next part examines the extent to which the Australian settler State has adhered to

---

Reshaped: 200 Years of Institutional Transformation (Cambridge University Press, 2002) 181; Tikka Jan Wilson, 'Feminism and Institutionalized Racism: Inclusion and Exclusion at an Australian Feminist Refuge' (1996) 52 *Feminist Review* 3.

[41] Lena Dominelli and Jo Campling, *Anti Oppressive Social Work Theory and Practice* (Palgrave Macmillan, 2014) 38; Iris Young, 'Five Faces of Oppression' in Lisa Heldke and Peg O'Connor, *Oppression, Privilege, & Resistance* (McGraw Hill, 2004) 5.

[42] Anaya (n 3) 205; Allan P. Dale and Marcus B. Lane, 'Strategic Perspectives Analysis: A Procedure for Participatory and Political Social Impact Assessment' (1994) 7(3) *Society & Natural Resources* 257.

[43] Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 204; Lisa Ford and Tim Rowse, *Between Indigenous and Settler Governance* (Routledge, 2013) 121; Patrick Sullivan, 'Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper 4, Desert Knowledge CRC, March 2007) 15.

[44] Jane Robbins, 'The Howard Government and Indigenous Rights: An Imposed National Unity?' (2007) 42(2) *Australian Journal of Political Science* 325; Susan Dodds, 'Citizenship, justice and Indigenous group-specific rights – citizenship and Indigenous Australia' (1998) 2(1) *Citizenship Studies* 105–107; Gibson (n 12) 165–166; Emma Kowal, 'The Politics of the Gap: Indigenous Australians, Liberal Multiculturalism, and the End of the Self-Determination Era' (2008) 110(3) *American Anthropologist* 341; Alfred Michael Dockery, 'Culture and Wellbeing: The Case of Indigenous Australians' (2010) 99(2) *Social Indicators Research* 316.

[45] S. Cornell, 'The Importance and Power of Indigenous Self-governance: Evidence from the United States' (Presentation to Reconciliation Australia Indigenous Governance Conference, Canberra, 3–5 April 2002); Robbins (n 44); Corntassel (n 15) 108; Benjamin J. Richardson, 'Indigenous Peoples, International Law and Sustainability' (2001) 10(1) *Review of European, Comparative & International Environmental Law* 1–12; A. Cassese, *Self-determination of Peoples* (Cambridge University Press, 1995) 57–62; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 XV (14 December 1960) art 2; *Charter of the United Nations*, signed 26 June 1945 (entry into force 24 October 1945) art 1 (2), art 55; *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976) art 1 (1); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007) art 4.

[46] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 25.

those international standards of self-determination of Indigenous Australians. In doing so, it considers the structures of previous Indigenous representative bodies and assesses whether those bodies have, through their design, been able to properly represent the interests of Indigenous Australians.[47]

III. HISTORY OF ABORIGINAL REPRESENTATIVE BODIES

Despite self-determination being first formally recognised as Australian policy by the Whitlam government in 1972,[48] its recognition was significantly limited compared to what was required in accordance with international standards.[49] Although the Australian Government supported an increase of Indigenous political participation and engagement with its decision-making processes on Indigenous affairs, it only provided a constrained degree of control for Indigenous-led service delivery.[50]

Nonetheless, successive Australian governments have managed to establish a number of nationally recognised Indigenous representative bodies. However, despite those advancements, the issue remains as to how long those bodies survive and how much meaningful impact they bring to Indigenous lives under what is the limited guise of self-determination.[51]

The Australian Aborigines League was one of the first Indigenous representative bodies to be established and was formed in Victoria in 1934.[52] Under the leadership of Aboriginal rights activist William Cooper, the Aborigines League made significant ground with Indigenous political representation progression when it petitioned to King George V for the inclusion of Aboriginal

[47] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
[48] Will Sanders, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Centre for Aboriginal Policy Research, 2002) 1; Gary Foley, 'Whiteness and Blackness in the Koori Struggle for Self-determination: Strategic Considerations in the Struggle for Social Justice for Indigenous People' (September 2000) 20 *Just Policy: A Journal of Australian Social Policy* 74 – 88; Catherine H. Berndt et al, *Going It Alone? Prospects for Aboriginal Autonomy: Essays in Honour of Ronald and Catherine Berndt* (Aboriginal Studies Press, 1990); Ian Anderson, 'The End of Aboriginal Self-Determination?' (2007) 39(2–3) *Futures* 137.
[49] See, eg, the *United Nations Declaration on the Rights of Indigenous Peoples*, art 4.
[50] A central legislative outcome of the era of self-determination was the *Aboriginal Councils and Associations Act 1976* (Cth). This gave Indigenous peoples the statutory right to form associations. Over 3000 Aboriginal councils, associations and corporations, including Aboriginal land trusts, town councils and business enterprises, have been incorporated under the Act. See Tim Rowse, 'Culturally Appropriate Indigenous Accountability' (2000) 43(9) *The American Behavioral Scientist* 1514, 1517.
[51] Thalia Anthony, 'A New National Indigenous Representative Body... Again' (2010) 7(18) *Indigenous Law Bulletin*, 5.
[52] Bain Attwood and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines League* (Aboriginal Studies Press, 2004) 1.

representation in the Australian Parliament. The agenda was to enable increased Aboriginal advocacy for full and equal citizenship rights of Aboriginal people.[53]

Three years later in 1937, the Aborigines Progressive Association was formed and run by William Ferguson, Pearl Gibbs and Jack Patten.[54] The Aborigines Progressive Association collaboratively worked with the Aborigines League to bring together Aboriginal Australians for Australia's very first 'Day of Mourning' in 1938.[55] That conference is a monumental milestone for Aboriginal citizenship rights. The first Day of Mourning marked a day where Aboriginal Australians could rally together and advocate for full and equal access to citizenship rights in Australia.[56] In that same year, the Aborigines Progressive Association advocated for the abolition of the *Aborigines Protection Act 1909* (NSW) and Aboriginal designated seats in parliament. However, the association ended in 1944 – another short-lived lifespan of seven years for an Indigenous representative body that advocated and contributed significantly to achieving national recognition of Indigenous citizenship in Australia.[57]

The next organisation of note was the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI). The FCAATSI was established in the late 1950s and campaigned for constitutional reform and played a crucial role for advocating for Indigenous rights during the lead up to the last successful referendum in 1967.[58] Advocacy led by the FCAATSI was at a time when Australia had hit a peak in advocating for Indigenous politics and citizenship. As time passed, this movement of advocacy shifted from individual Indigenous citizenship rights to their broader collective rights and identification as their own distinct peoples.[59]

By 1973 the FCAATSI became a self-managed and controlled organisation. Alongside its gradual progression with functioning as a self-managed and controlled organisation from 1972 until 1975, the Northern Territory cultivated an increased Indigenous representative sector. The intent behind the Northern Territory instigating an Indigenous representative sector was to ensure delivery of

[53] Ibid; *Collaborating for Indigenous Rights 1957–1973* (2014) Indigenousrights.net.au <http://indigenousrights.net.au/organisations/pagination/australian_aborigines_league>.
[54] Zoe Pollock, *Aborigines Progressive Association* (2008) Dictionaryofsydney.org <http://www.dictionaryofsydney.org/entry/aborigines_progressive_association>.
[55] John Maynard, 'Fred Maynard and the Australian Aboriginal Progressive Association (AAPA): One God, One Aim, One Destiny' (1997) 21 *Aboriginal History Journal* 2.
[56] Ibid, 91.
[57] Zoe Pollock (n 54).
[58] Megan Davis and Marcia Langton, *It's Our Country* (Melbourne University Press, 2016) 60; Sue Taffe, *Black and White Together: FCAATSI: The Federal Council for the Advancement of Aborigines and Torres Strait Islanders 1958–1973* (University of Queensland Press, 2005); See generally *Attwood and Markus* (n 52).
[59] Dylan Lino, *Constitutional Recognition* (The Federation Press, 2018) 17.

services to Indigenous communities was Indigenous-led and run.[60] Despite those efforts, the FCAATSI struggled to survive with structural mechanisms being increasingly established at both local and national levels.[61] With an increase of structural mechanisms being created, funding was eventually cut which significantly limited the capacity of the FCAATSI to continue delivering its services and continue its operations. As a result of lost funding, the FCAATSI was extinguished by 1978.[62]

Before the end of FCAATSI, the Council for Aboriginal Affairs (CAA) had begun operation, although it lasted only from 1968 until 1971. Although the CAA came under the guise of advocating for Aboriginal rights, it did not truly represent their voices given that it was led by three non-Indigenous men.[63] This was a very similar set up to the Office of Aboriginal Affairs that worked alongside the CAA and was incorporated into the Prime Minister's Department. The Office of Aboriginal Affairs also held little weight and value as an advisory body within the Prime Minister's Department and more generally.[64]

By 1973 the CAA and Office for Aboriginal Affairs joined to form the Department of Aboriginal Affairs (DAA).[65] Unlike its predecessors, the DAA employed Aboriginal people to provide a more accurate representation of Aboriginal people and their cultural affairs.[66] The DAA's primary function was to provide advice directly to the Australian Government on Aboriginal affairs through recognition and exercise of self-determination rights.[67] Unlike previously established bodies, DAA lasted for 17 years from 1973 to 1990 when it was dissolved and replaced by the Aboriginal and Torres Strait Islander Commission (ATSIC).[68]

In terms of considering representative bodies comprised of representatives self-determined and chosen by Aboriginal electors, the first to be established was the National Aboriginal Consultative

---

[60] Ibid; Sean Brennan, '*Whitlam and the Value of Law in Indigenous Affairs: Lessons for Contemporary Debate on Reconciliation and a Treaty?*' in Jenny Hocking and Colleen Lewis (eds), *It's Time Again: Whitlam and Modern Labor* (Circa, 2003) 138. On the Indigenous sector, see Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal Australia* (UNSW Press, 2002) 1–25.
[61] Davis and Langton (n 58).
[62] Lino (n 59) 17; Brennan (n 60).
[63] Melinda Hinkson and Jeremy Beckett, *Appreciation of Difference: WEH Stanner and Aboriginal Australia* (Aboriginal Studies Press, 2009) 43.
[64] Delephene Fraser, 'History of Government and Aboriginal Affairs Prior to 1967 and After' (2013) *Thestringer.com.au* <http://thestringer.com.au/history-of-government-and-aboriginal-affairs-prior-to-1967-and-after-2-4871#.WHgTc1N95hE>.
[65] J. C. Altman, *Aboriginal Employment Equity by the year 2000* (Centre for Aboriginal Economic Policy Research Australian National University, 1991) 2.
[66] Vanessa Castejon, 'Aboriginal Affairs: Monologue or Dialogue?' (2002) 26(75) *Journal of Australian Studies* 27.
[67] Ibid; Ben Bartlett and John Boffa, 'The Impact of Aboriginal Community Controlled Health Service Advocacy on Aboriginal Health Policy' (2005) 11(2) *Australian Journal of Primary Health* 53, 53 – 61.
[68] Ibid.

Committee (NACC) in 1972.[69] However, like previously formed Aboriginal representative bodies, the NACC only held advisory functions that the Australian Government gave very little weight to when considering any form of guidance and recommendations it would receive.[70]

By 1989, the Labor government passed the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). John Howard, the Opposition leader at the time, stated to the House of Representatives in parliament that:

> The only way to bring about a proper accord between Aboriginal and non-Aboriginal Australians is to embrace Aborigines fully within the Australian community; to treat their deprivation and their disadvantage – which I do not dispute – as a manifest responsibility of the entire Australian community. The Government will not lift up Aborigines, embrace them, and right their wrongs by signing treaties or creating black parliaments. It will bring upon them more distrust, more hostility and more misunderstanding.[71]

John Howard's statement evidenced a clear position of the Opposition that misinterpreted and misunderstood internationally recognised obligations Commonwealth governments owed to Indigenous Australians by providing opportunities for them to self-represent culturally through an established national body. Howard's position would later limit significantly the objectives and lifetime of ATSIC.[72]

ATSIC is one of the most prominent bodies Australia established to represent the interests of Aboriginal and Torres Strait Islander citizens. The body was from the outset empowering and had culturally internal electoral processes for electing members that mirrored parliamentary electoral processes. Aboriginal and Torres Strait Islanders constituents elected their preferred cultural representatives from their regional councils every three years,[73] to represent their interests in providing advice to parliament on areas for reform for Aboriginal and Torres Strait Islander economic, social, political and cultural wellbeing.[74]

---

[69] L. R. Hiatt, 'ATSIC: A New Aboriginal National Organization' (1990) 26(3) *Oceania* 235, 235–237.
[70] H. C. Coombs and C. J. Robinson, 'Remembering the Roots: Lessons for ATSIC' in Patrick Sullivan, *Shooting the Banker: Essays on ATSIC and Self-Determination* (North Australia Research Unit: Australian National University, 1996) 1; Sally M. Weaver, 'Australian Aboriginal Policy: Aboriginal Pressure Groups or Government Advisory Bodies?' (1983) 54(1) *Oceania* 85.
[71] John Howard, 'Ministerial Statement: Administration of Aboriginal Affairs', *House of Representatives Hansard* (11 April 1989) Parliament of Australia, 1328.
[72] Coombs and Robinson (n 70) 1.
[73] Ibid.
[74] This was mandated under s 94(1) of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

In terms of ATSIC's functions, it operated at a national and regional level so that funding could be allocated and utilised with community-based organisations.[75] However, there were a number of constraints that emerged over time from the Howard government that limited ATSIC's representative voice and service delivery rollout. For instance, parliamentary representatives were only obliged to merely *consider* ATSIC recommendations which, without veto power, left ATSIC vulnerable to being sidelined in parliamentary processes.[76]

That formal recognition of self-determination lay only within the preamble of the ATSIC Act was telling. As a preambular commitment only, it was easy for parliamentarians to ignore and those who opposed formal recognition of self-determination preferred more limiting language to define ATSIC's functions – such as 'self-management'.[77] Consequently, despite being legislatively recognised as a 'self-managed' body, ATSIC became increasingly placed under a microscope by the Australian Government through administrative compliance obligations and reporting.[78] This was a significant issue for ATSIC as it was frequently provided with inadequate funding to fulfil its obligations and ongoing performance evaluations under s 76 of the ATSIC Act.[79] In time, it became abundantly clear that ATSIC was more of an accountable body rather than one that was self-managed or self-determined as it was originally envisioned to be.[80] Thus, it was evident under those circumstances that the Howard government placed less emphasis on self-determination than on formal equality, uniform processes and national cohesion.[81]

By 24 March 2005, almost inevitably, ATSIC was abolished with bipartisan support.[82] During this process, ATSIC representatives and Aboriginal and Torres Strait Islander communities were not consulted and, given the lack of funding, powers, control and opportunity ATSIC was given to

---

[75] Robbins (n 44) 322; Scott Bennett and Angela Pratt, *The End of ATSIC and the Future Administration of Indigenous Affairs: Current Issues Brief No. 4 2004–05* (Department of Parliamentary Services, 2004); Larissa Behrendt, *The Abolition of ATSIC: Implications For Democracy* (Analysis and Policy Observatory, 2005) 1 <http://library.bsl.org.au/jspui/bitstream/1/679/1/200511_behrendt_atsic.pdf>; Michele Ivanitz, 'The Demise of ATSIC? Accountability and the Coalition Government' (2000) 59(1) *Australian Journal of Public Administration* 1, 3–12.

[76] Thalia Anthony, 'Aboriginal Self-determination after ATSIC: Reappropriation of the "Original Position"' (2005) 14(1) *Polemic* 4, 5.

[77] Senator Tate (on behalf of Minister Hand) 'Foundations for the Future', *Senate Hansard*, 18 December 1987, 3433.

[78] Anthony (76) 6.

[79] Each of the 33 offices, containing up to 1000 public servants, was reviewed each quarter; see Lois O'Donoghue, 'Addresses to the United Nations' (Speech delivered at the United Nations Working Group on Indigenous Populations, Geneva, July 1992). See also s 78, *Aboriginal and Torres Strait lslander Commission Act 1989* (Cth).

[80] Frank Brennan, 'ATSIC – Seeking a National Mouthpiece for Local Voices' (1990) 2(43) *Aboriginal Law Bulletin* 4.

[81] Robbins (n 44) 326; Scott Bennett and Angela Pratt, 'The End of ATSIC and the Future Administration of Indigenous Affairs: Current Issues Brief No. 4, 2004–05' (Department of Parliamentary Services, 2004) 7; The Hon John Howard, 'Ministerial Statement: Administration of Aboriginal Affairs' (House of Representatives, Debates, 11 April 1989) 1328.

[82] *History of the Indigenous Vote* (2015) Australian Electoral Commission <http://www.aec.gov.au/indigenous/history.htm>.

achieve its objectives and meet its obligations, the Australian Government labelled ATSIC and self-determination as failures.[83] Howard stated 'the experiment in separate representation, elected representation, for [I]ndigenous people has been a failure'.[84] However, most of the policy areas termed 'failures' fell under the control and oversight of mainstream government departments, especially health and education.[85]

The role of ATSIC received significant criticism throughout its lifespan, divided into two conflicting opinions. At one end of the spectrum there were those who thought ATSIC divided the nation's identity and at the other end there were those who argued it lacked enough autonomy and was in that respect too accountable to mainstream processes.[86] In practice, the limitations placed on ATSIC by the Australian Government strategically made it an inadequate vehicle of true self-determination. Instead, ATSIC became a mechanism for the government to replace its accountability for its failure to empower Indigenous peoples.[87]

On those terms, the Australian Government directed the failure of ATSIC and self-determination towards ATSIC representatives. In doing so, it failed to acknowledge the significant constraints it placed upon ATSIC which effectively set ATSIC up for failure. ATSIC barely came close to having full self-management rights to represent the wants and needs of Aboriginal and Torres Strait Islander Australians.[88] Despite this, ATSIC did set a useful example as to how Aboriginal and Torres Strait Islanders can self-determine their own representatives through the utilisation of Westernised democratic election processes.[89]

A year after ATSIC was established, the Council for Aboriginal Reconciliation (CAR) was established to investigate all options that would advance reconciliation between Indigenous and non-Indigenous Australians. CAR was also established as a fall-back option from previous

[83] Paul Coe, 'ATSIC: Self-Determination or Otherwise' (1994) 35(4) *Race & Class* 35; Sullivan, Patrick, *Shooting the Banker: Essays on ATSIC and Self-Determination* (North Australia Research Unit: Australian National University, 1996) 1; 'Clark and ATSIC Board have Failed' (*The Australian*, 31 March 2003) 8.
[84] M. Priest, 'Howard to Abolish ATSIC' (*Australian Financial Review*, 16 April 2004) 3; 'Howard Silences Aboriginal Advocates' (*The Sydney Morning Herald*, 16 April 2004) <https://www.smh.com.au/national/howard-silences-aboriginal-advocates-20040416-gdiqvv.html>; 'Joint Press Conference with Senator Amanda Vanstone' (*Parliament House*, 15 April 2004) <https://pmtranscripts.pmc.gov.au/release/transcript-21205>.
[85] Robbins (n 44) 323; Larissa Behrendt, *The Abolition of ATSIC: Implications For Democracy* (Analysis and Policy Observatory, 2005) 4.
[86] J. Robbins, 'The Failure of ATSIC and the Recognition of Indigenous Rights' (2004) 7(4) *Journal of Australian Indigenous Issues* 5.
[87] T. Rowse, 'The Political Identity of Regional Councillors' in P. Sullivan, *Shooting the Banker: Essays on ATSIC and Self-Determination* (North Australia Research Unit, Australian National University, 1996) 43.
[88] Kathy Marks, 'Outrage as Australia Abolishes "Failed" Aboriginal Council', *The Independent*, UK (16 April 2004) 1.
[89] *History of the Indigenous Vote* (2015) Australian Electoral Commission <http://www.aec.gov.au/indigenous/history.htm>.

unsuccessful efforts under Prime Minister Hawke's leadership.[90] Its primary purpose was to promote awareness amongst Australian society of Indigenous disadvantage and history, and to consult with Indigenous communities, to make formal recommendations to the Commonwealth Government on negotiating documents beneficial to achieving reconciliation.[91]

Membership of the CAR comprised Indigenous and non-Indigenous leaders including Patrick Dodson as the initial chair.[92] By 1996 when the Howard government had come into power and just five years after its establishment, CAR was at its peak and had generated a range of educational material and projects to reach the broader Australian population with its promotion of reconciliation.[93] One of the most noteworthy achievements of CAR was its promotion in the year 2000 of the popular 'bridge walks' which over a million people turned up for to advocate for reconciliation in Australia.[94]

Despite CAR's successes, systemic and long-standing government failure concerning the treatment of Indigenous Australians was being revealed by the so-called Stolen Generations Inquiry. The Inquiry by the Human Rights and Equal Opportunity Commission (HREOC) into past policy failures of forcible removal of Aboriginal children sparked debate and criticism by Indigenous Australians of past and present government actions.[95] The report brought to light the extent to which policies introduced during the White Australia policy era paved the way for what has been described as genocide of Indigenous Australians.[96] The Inquiry recommended the Commonwealth Government compensate victims of the policy and apologise formally for past government actions.[97]

---

[90] M. Grattan, 'Introduction' in M. Grattan, *Reconciliation: Essays on Australian Reconciliation* (Black Inc., 2000) 7; F. Brennan, *Sharing the Country* (Penguin Australia, 1992) 83.
[91] R. Tickner, Second Reading Speech, Council for Aboriginal Reconciliation Bill 1991, Parliamentary Debates House of Representatives, 30 May 1991, 4498.
[92] P. Dodson, Unpublished speech given at Flinders University, Adelaide, 18 August 1993.
[93] A. Gunstone, 'The Formal Australian Reconciliation Process: 1991–2000', National Reconciliation Planning Workshop, Old Parliament House, Canberra, 30–31 May 2005 (Centre for Australian Indigenous Studies, Monash University) 6.
[94] Reconciliation Australia, 'Reconciliation Timeline' (2004) <http://reconciliationaustralia.org/timeline_print.html.>
[95] D. Jopson, 'Time Bomb', *Sydney Morning Herald* (29 April 1997) 15; Marcia Langton, 'Trapped in the Aboriginal Reality Show' (2008) 19 *Griffith Review* 143 -159; Richard Howitt, 'Sustainable Indigenous Futures in Remote Indigenous Areas: Relationships, Processes and Failed State Approaches' (2010) 77(6) *GeoJournal* 818.
[96] Human Rights and Equal Opportunity Commission, *Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997) ch 2.
[97] Ibid; M. Steketee, 'Sorry – The Hardest Word', *The Australian* (24 May 1997) 22.

The Howard government rejected a formal apology to Indigenous Australians and instead declared that all efforts made towards achieving reconciliation under Howard government leadership would not involve different treatment of law or systems of accountability based on race.[98]

Despite the Howard government's reluctance to meet the wants and needs of its Indigenous citizens and CAR as their representative body,[99] CAR maintained its advocacy for reconciliation with its publication of *The Australian Declaration Towards Reconciliation*[100] and *Roadmap for Reconciliation*[101] reports.[102] The reports were conservative, modest aspirations and expressions of reconciliation which sought to advance 'Indigenous economic independence, overcoming disadvantage, recognising rights and sustaining the reconciliation process'.[103]

In spite of those efforts, the Howard government did not give its full support to CAR's recommendations and instead provided CAR with a preferred, revised *Declaration Towards Reconciliation*.[104] The revision deleted recommendations on self-determination, respecting the rights and cultural identity of Indigenous Australians, and taking active measures to empower them fully. The goal was to ensure that all citizens remained under a unitary system of law and its Indigenous citizens be given no concession to differentiated treatment because of their cultural identity.[105]

The only exception to the Howard government refusal for acting on CAR's recommendations was its establishment of the Productivity Commission to report nationally on Indigenous disadvantage.[106] Since its establishment, it has paved the way for further government reconciliation policies and practical outcomes to be implemented and achieved that surround Indigenous social and economic disadvantage.[107]

---

[98] I. Davis, 'Aborigines Face Major Shake-Up' *The Canberra Times* (26 May 2007) 1; C. Forbes, 'Speech Backfires in Ultimate Insult', *The Australian* (27 May 1997) 1.
[99] *ATSIC News*, 'The Road to Corroboree' (4 June 2000) 4; D. Shanahan, 'Howard Abandons Deadlines – No Reconciliation by Centenary' *The Australian* (28 May 2000) 1.
[100] Council for Aboriginal Reconciliation, *Australian Declaration Towards Reconciliation* (Council for Aboriginal Reconciliation, 27 May 2000), *Australian Politics.com* <www.australianpolitics.com/news/2000/00-05-27a.shtml>.
[101] Council for Aboriginal Reconciliation, *Roadmap for Reconciliation* (Council for Aboriginal Reconciliation, 2000) <http://www8.austlii.edu.au/au/other/IndigLRes/car/2000/10/index.htm>.
[102] *ATSIC News*, 'The Road to Corroboree' (4 June 2000).
[103] S. Brennan et al, *Treaty* (Federation Press, 2005) 20.
[104] John Howard, Reconciliation Documents, Prime Minister's News Room: Media Release, 11 May 2000 <http://www.pm.gov.au/news/media_releases/2000/reconciliation1105.htm>.
[105] Ibid; Senate Legal and Constitutional References Committee, *Reconciliation: Off Track* (Parliament of Australia, 2003) 6.
[106] Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators* (Productivity Commission, 2003); Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators* (Productivity Commission, 2005).
[107] Robbins (n 44) 322.

By 2003, the Howard government had made very little effort in implementing any other recommendations CAR provided in both reports. Its lack of response was later criticised by the Senate Legal and Constitutional References Committee as a failure of national leadership on one of the most critical issues in Australia.[108]

Since 2003, there has been a void in the advancement and establishment of nationally recognised Indigenous representative bodies in Australia.[109] The National Congress of Australia's First Peoples was formed in 2010 as an incorporated company independent from the Australian Government. Its independence was a key design feature based on the lessons learnt from the demise of ATSIC.[110] As with ATSIC electoral processes, the National Congress provides Indigenous Australians with an electoral process for annually electing its executives – representatives from Aboriginal organisations and communities, as well as individuals.[111]

The Congress had its own ethics council responsible for the oversight of the integrity and ethics of officeholders. [112] However, although the National Congress represented a unified voice for several thousand Aboriginal and Torres Strait Islander people, advocating for full access to self-determination rights, it went into administration in June 2019 due to a lack of government funding to meet its objectives.[113] The lack of sustainable funding is a recurring issue for Indigenous representative bodies which affects their ability to meet their objectives, including reaching members across the country. Ongoing dependence on government funding leaves Indigenous representative bodies at the mercy of political imperatives and is a function of entrenched disenfranchisement from political participation.

The recent demise of the Congress leaves the Aboriginal Provisional Government (APG) and the recently established Prime Minister's Indigenous Advisory Council as the two remaining national Indigenous representative bodies. However, given the constraints on their powers and contingency

---

[108] Senate Legal and Constitutional References Committee, *Reconciliation: Off Track* (Parliament of Australia, 2003) v.
[109] Thalia Anthony, 'A New National Indigenous Representative Body ... Again' (2010) 7(18) *Indigenous Law Bulletin* 5.
[110] Ibid; Tim Rowse, 'The Royal Commission, ATSIC and self-determination: a review of the Australian Royal Commission into Aboriginal Deaths in Custody' (1992) 27(3) *The Australian Journal of Social Issues* 153–172; Sam Muir, 'The New Representative Body for Aboriginal and Torres Strait Islander People: Just One Step' (2010) 14(1) *Australian Indigenous Law Review* 86–99.
[111] Jody Brown, 'Shaping Change: The National Congress of Australia's First Peoples Explores the Path towards Constitutional Reform' (2011) 7(25) *Indigenous Law Bulletin* 37.
Bulletin <http://www8.austlii.edu.au/au/journals/ILB/2011/39.pdf>.
[112] Alister Thorpe et al, *Engaging First Peoples: A Review of Government Engagement Methods for Developing Health Policy* (Lowitja Institute, 2016) 14.
[113] Lorena Allam, 'Dodson, Burney Call For Government To Fund National Congress of Australia's First Peoples', *The Guardian*, 12 June 2019 <https://www.theguardian.com/australia-news/2019/jun/12/national-congress-of-australias-first-peoples-fights-for-financial-survival>.

of funding, they will struggle to provide a meaningful improvement in the lives of Indigenous people.[114]

The APG was formed in 1990 and grounds itself in representing Aboriginal sovereignty, self-determination and self-government while rejecting any form of assimilation of Aboriginal people.[115] On those terms, the APG works to provide Aboriginal people with Aboriginal passports and birth certificates as contemporary measures to assert their differentiated Aboriginal citizenship. In addition, the APG also sends its own diplomatic delegates overseas to assert Aboriginal sovereignty to the international community.[116] Although the Australian Government rejects differentiated Aboriginal citizenship in these contexts, particularly Aboriginal passports,[117] the establishment and continuation of the APG itself, alongside its initiatives, give Aboriginal people a mechanism to assert their sovereignty in de facto terms.[118]

Like the current proposed Voice to Parliament, the Prime Minister's Indigenous Council established in 2004 is responsible for advising the Australian Government on all matters and proposed laws that concern Aboriginal and Torres Strait Islander affairs.[119] The Council is guided by Australia's Minister for Indigenous Australians[120] and is comprised of members who are experts and practitioners that advise the Australian Government on policy design, implementation and practice that advance Indigenous affairs.[121]

---

[114] Jens Korff, *Aboriginal Representative Bodies* (Creative Spirits, 2018) <https://www.creativespirits.info/aboriginalculture/selfdetermination/aboriginal-representative-bodies>.
[115] Michael Mansell, 'Why Norfolk Island but not Aborigines?' in Barbara Hocking, *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, 2014) 84.
[116] Ibid, 88.
[117] Angela M. Pratt, '*Indigenous Sovereignty – Never Ceded: Sovereignty, Nationhood and Whiteness in Australia*' (PhD thesis, Faculty of Arts, University of Wollongong, 2003) <http://ro.uow.edu.au/theses/271>; John Chesterman, 'Natural-Born Subjects? Race and British Subjecthood in Australia' (2005) 51(1) *Australian Journal of Politics and History*, 33.
[118] Chesterman, ibid. On the difference between de jure and de facto sovereignty, see, eg, Kent McNeil, 'Indigenous Sovereignty and the Legality of Crown Sovereignty: An Unresolved Constitutional Conundrum' (2017); Kent McNeil, 'Indigenous and Crown Sovereignty in Canada', paper presented at the University of Saskatchewan College of Law, 24 October 2019; Kent McNeil, 'Sovereignty and Indigenous Peoples in North America' (2015) 22 *UC Davis Journal of International Law & Policy* 81.
[119] Paul Kildea, 'Achieving Citizen Engagement in the Referendum on Indigenous Recognition' (2011) 7(25) *Indigenous Law Bulletin* 27, 27–30.
[120] Paul Kildea, 'Expert Panels, Public Engagement and Constitutional Reform' (2014) 25 *Public Law Review* 33; Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January, 2012); Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011) 3 and 24; A. Twomey, 'Constitutional Conventions, Commissions and Other Constitutional Reform Mechanisms' (2008) 19 *PLR* 308, 323; G. Williams and D. Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 32.
[121] *Prime Minister's Indigenous Advisory Council: Department of the Prime Minister and Cabinet* (2019) <https://pmc.gov.au/indigenous-affairs/prime-ministers-indigenous-advisory-council>.

However, the current Minister for Indigenous Australians is also a representative of the Liberal Party which has, over the last two terms of its national leadership, rejected and made little progress with calls for substantial equality and self-determination by Indigenous people across Australia.[122] As a result, whilst the council supports the *Uluru Statement from the Heart*, the co-design process of the Voice to Parliament that is currently being coordinated through the council is very much led by Aboriginal political elites and dominated by non-Indigenous bureaucratic conservative decision-making. Those views lack support of the constitutional entrenchment of a Voice to Parliament which strays away from the proposals called for by community-led local Aboriginal groups, land councils and elders from the *Uluru Statement from the Heart*.[123]

As a result, Indigenous Australians and their calls for improved access and support with advancing their cultural identity and political participation – comprising the heart of self-determination – has remained significantly limited in this current leadership climate.

IV. IMPACT OF THE ABSENCE OF INDIGENOUS REPRESENTATION

Whilst Australia currently has two key and differing nationally recognised Aboriginal representative bodies (the National Congress of Australia's First Peoples and the Aboriginal Provincial Government) that specifically advocate for equal citizenship rights for Aboriginal and Torres Strait Islander people, their existence alone does not suggest that self-determination rights have been fully exercised by Indigenous people. Nor does the existence of those bodies imply that any of them holds meaningful weight and consideration in decision-making processes concerning Indigenous affairs.

In fact, as of July 2019, the National Congress of Australia's First Peoples was forced out of operation mostly due to government funding cuts it relied upon to fulfil its obligations as an adviser

[122] Pat Anderson, Megan Davis and Noel Pearson, 'Don't Silence our Voice, Minister: Uluru Leaders Condemn Backward Step', *The Sydney Morning Herald* (20 October 2019) <www.smh.com.au/national/don-t-silence-our-voice-minister-uluru-leaders-condemn-backward-step-20191020-p532h0.html>; Natassia Chrysanthos, 'Uncertainty and Cause for Concern: Uluru Statement Leaders Voice Disapproval at Wyatt' *The Sydney Morning Herald* (20 October 2019) <https://www.smh.com.au/politics/federal/uncertainty-and-cause-for-concern-uluru-statement-leaders-voice-disapproval-at-wyatt-20191020-p532hd.html>; Katharine Murphy, 'Ken Wyatt Says He Has Indigenous Voice to Parliament Plan for Scott Morrison' *The Guardian* (17 October 2019) <https://www.theguardian.com/australia-news/2019/oct/17/ken-wyatt-says-he-has-indigenous-voice-to-parliament-plan-for-scott-morrison>.

[123] Michael Koziol, 'Liberal senator warns Indigenous Voice must not become 'Aboriginal political elite'' (*The Sydney Morning Herald*, 19 February 2020) <https://www.smh.com.au/politics/federal/liberal-senator-warns-indigenous-voice-must-not-become-aboriginal-political-elite-20200217-p541fl.html>.

to government on behalf of Indigenous Australians.[124] As a result, whilst it still advocates for Indigenous rights as a body, it does so in a more limited capacity reliant on government grants, charitable donations and bequests and other revenues.[125]

It is self-evident that the restriction of access to self-determination rights through institutionalised Indigenous representation is ongoing, supported by the absence of government commitment to meaningful change. As many have argued,[126] continued colonial oppression of Indigenous Australians limits the national identity of Australia, limits the cultural identity and protection of Indigenous Australians, and interferes with the achievement of reconciliation between Indigenous and non-Indigenous Australians.

A contemporary example of the ramifications of the Australian Government's failure to provide adequate voice and representation of Indigenous people on Indigenous issues is evidenced in the numerous flawed decisions that led to the 2007 Northern Territory Emergency Response (NTER) or 'Intervention package'.[127] The NTER shows how the settler-State can, whenever it likes, implement racially discriminatory measures, and assert its control over, Indigenous communities.[128] It shows a national failure of cultural progressiveness, thorough consultation, and consent, and a lack of consideration of and respect for Indigenous people, their communities, and representatives.[129]

The NTER significantly limited and indirectly targeted Aboriginal Australians through discriminatory laws and policies as a government response to the *Little Children are Sacred Report* (*LCS Report*).[130] The *LCS Report* found that excessive consumption of alcohol in remote Northern Territory communities was caused by poverty, unemployment, a lack of education, boredom and

---

[124] Cassandra Morgan, 'National Congress of Australia's First Peoples' closure a step back for Aboriginal people: Rod Little' (*The Canberra Times*, 17 October 2019) <https://www.canberratimes.com.au/story/6443649/closure-of-aboriginal-organisation-means-loss-of-first-peoples-voice-former-co-chairman/>.
[125] 'National Congress of Australia's First Peoples Ltd' (*Australia Charities and Not-For-Profit Commission*, 2020) <https://www.acnc.gov.au/charity/fa998367662051d9a9a242efada8961c#overview>.
[126] Aileen Moreton-Robinson, 'Whiteness, Epistomology and Indigenous Representation' in Aileen Moreton-Robinson, *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 76–77; A. Dirk Moses, 'Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency' (2011) 15(2) *Citizenship Studies* 145, 149–159.
[127] L. J. Thompson and R. Hill, 'Disrupting the New Orthodoxy: Emergency Intervention and Indigenous Social Policy' (2009) 7(1) *New Community Quarterly* 5.
[128] J. C. Altman, 'The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?' (Centre for Aboriginal Economic Policy Research, Topical Issue No. 16/2007) 7.
[129] James Walter and Paul Strangio, *No, Prime Minister: Reclaiming Politics From Leaders* (UNSW Press, 2007); Peter Saunders and James Walter, *Ideas and Influence: Social Science and Public Policy in Australia* (UNSW Press, 2005); Clive Hamilton and Sarah Maddison, *Silencing Dissent – How the Australian Government is Controlling Public Opinion and Stifling Debate* (Allen & Unwin, 2007).
[130] Rex Wild and Pat Anderson, *Report of the Northern Territory Board of Inquiry into The Protection of Aboriginal Children from Sexual Abuse* (Northern Territory Government of Australia, 2007).

overcrowded and inadequate housing.[131] The *LCS Report* also found that alcoholism combined with the use of drugs and petrol sniffing lead to violence and the sexual abuse of children.[132]

From those findings, the Australian Government decided, in the absence of sought-after consent and consultation within its preliminary stages of the NTER, to mitigate the issues identified by the *LCS Report*. The minimal consultation that was undertaken with persons living within targeted communities indicates that views expressed by Aboriginal people affected were not respected or taken into adequate consideration.[133]

The effect of the Intervention has been a reimposition of the colonial order involving greater disempowerment of and indirect racial discrimination against Aboriginal people within those communities.[134]

The Australian Government termed its targeted actions 'special measures' which were introduced under s 132 (1) of the *Northern Territory Emergency Response Act 2007* (Cth).[135] The 'special measures' sought to quarantine people's income, limit land leases over declared Aboriginal land, restrict alcohol consumption, license community stores, establish business managers in communities, restrict pornography and control public-funded computers.[136]

The Australian Government also, under s 132 (2) of the *Northern Territory Emergency Response Act 2007* (Cth), immunised the NTER from legal allegations of racial discrimination by exempting it from the *Racial Discrimination Act 1975* (Cth).[137] The issue here was that, firstly, one of the government's 'special measures' included enhanced law enforcement measures in the targeted and high populated Aboriginal communities within the Northern Territory referred to as 'prescribed

---

[131] Ampe Akelyernemane Meke Mekarle, 'Little Children are Sacred' (Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, by Rex Wild and Patricia Anderson, 30 April 2007).
[132] Rex Wild and Pat Anderson, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Northern Territory Government of Australia, 2007) 12.
[133] *This Is What We Said: Australian Aboriginal People Give Their Views on the Northern Territory Intervention* (Concerned Australians, 2010) 8; Irene Watson, 'What is saved or rescued and at what cost?' (2009) 15(2) *Cultural Studies Review* 54; Marion Scrymgour, 'Whose National Emergency? Caboolture and Kiribilli? or Milikapti and Mutitjulu?', Charles Perkins Oration, 26 October 2007.
[134] See, eg: Rebecca Stringer, 'A Nightmare of the Neocolonial Kind: Politics of Suffering in Howard's Northern Territory Intervention' (2007) 6(2) *Borderlands* 13; Alissa Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46(3) *Australian Journal of Political Science* 519; Jon Altman, 'The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?' (2018) *Centre for Aboriginal Economic Policy Research*, Topical Issue No. 16/2007; Tom Calma, 'The Northern Territory Intervention-It's Not Our Dream' (2009) 27 *Law Context: A Socio-Legal Journal* 14.
[135] Calma ibid, 22.
[136] Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78.
[137] *Racial Discrimination Act 1975* (Cth), Part 2, ss 8, 9 and 10 were suspended so that that the NTER could be fully implemented; Simon Young, Jennifer A. Nielsen and Jeremy Patrick, *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (The Federation Press, 2016) 21.

communities'.[138] This triggered significant critique and controversy given the extent to which the 'special measures' intruded upon the lives of those living within targeted communities–notably, Aboriginal Australians.[139]

For those who fell under the measures, the new program was a stark reminder of the harsh actions imposed by Australian governments during Australia's Protection Board era. For instance, during the Protection Board era, the Australian Government deployed army personnel to Indigenous communities to enforce laws that would significantly restrict and at times, totally suspend, their access to civil rights. The actions by the Australian Government and their outcomes were seen yet again in Australian contemporary times with the rollout of the NTER package.[140]

The NTER was also criticised in highlighting the capacity of parliament to utilise unchecked, constitutional powers to racially discriminatory ends. Parliament is able to pass laws on the basis of race, which does not necessarily need to benefit those persons explicitly affected.[141] This has been confirmed by Australian courts[142] and shows the significant fragility of the *Racial Discrimination Act 1975*[143] and Australia's adherence to its international obligations.[144]

This is but one example of the consequences of the failure by the Australian Government to embrace the establishment and maintenance of national Indigenous-led, controlled and represented bodies. In light of the NTER, such representative bodies might have provided the opportunity to give voice and guidance on laws and 'special measures' taken by the government that have adversely affected the lives of so many Aboriginal people. To do so would require negotiating a

[138] Peter O'Mara, 'Health Impacts of the Northern Territory Intervention' (2010) 192(10) *The Medical Journal of Australia* 546.
[139] Jennifer Martiniello, 'Howard's New Tampa: Aboriginal Children Overboard' (2007) 26 *Australian Feminist Law Journal* 123. The Intervention – In a modified form – remains government policy under the title of 'Stronger Futures'. Its restrictions are being extended: see Shelley Bielfeld, 'Compulsory Income Management, Indigenous Peoples and Structural Violence – Implications for Citizenship and Autonomy' (2015) 18(1) *Australian Indigenous Law Review* 99; *Wurridjal v Commonwealth* [2009] HCA 2.
[140] Martiniello, ibid; Bielfeld, ibid; *Wurridjal v Commonwealth* (2009) 237 CLR 309.
[141] C*ommonwealth of Australia Constitution Act (1901),* s 51 (xxvi); George Williams, 'The Races Power and the 1967 Referendum' (2007) 1 (SE) *Australian Indigenous Law Review* 10.
[142] *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 376.
[143] *Northern Territory Emergency Response Act 2007,* s 132.
[144] In 2010, the CERD Committee stated its concern about 'the absence of any entrenched protection against racial discrimination in the federal Constitution and that sections 25 and 5I (xxvi) of the Constitution in themselves raise issues of racial discrimination ... The Committee also recommends that the State party draft and adopt comprehensive legislation providing entrenched protection against racial discrimination'. Report of the CERD, Sessional/Annual Report of Committee A/65/ 18, 31/10/2010, 24.

relationship and partnership between Indigenous bodies and the Australian Government guided by mutual respect and inclusivity in national decision-making processes.[145]

Preferably, and learning from what has gone before, those bodies should be established as separate from the Australian Government to give independence, but be entrenched constitutionally, so that the Australian Government cannot totally defund those bodies, limit their capacity to achieve objectives and on that basis decide their extinguishment through repeal of their establishing legislation, such as occurred with ATSIC.[146] Further, the creation of such bodies should steer away from previously taken top-down approaches that have not historically empowered and alleviated poverty of Indigenous communities. Indigenous representative bodies must be self-determined, managed and represented from the bottom-upwards so that grassroots Aboriginal advice, consent and consultation occurs that gives differentiating Aboriginal communities meaningful control over their affairs.[147]

In the face of ongoing government resistance, there has remained a continuous call for change by Indigenous Australians and non-Indigenous allies across the country – most recently in the *Uluru Statement from the Heart*.

V. ULURU STATEMENT FROM THE HEART

The beginning of Australian contemporary Indigenous resurgence started in 1999. During that year, Prime Minister John Howard put forth to the Australian people a proposal for a referendum to reform the *Australian Constitution's* preamble and recognise Aboriginal and Torres Strait Islander peoples. This proposal was limiting as it only pursued formal recognition of Aboriginal and Torres Strait Islander peoples and not structural reform alongside constitutional recognition – a key recommendation of the CAR and the suggested statutory reconciliation process.[148] Despite those recommendations, the Howard government rejected the views of Aboriginal and Torres Strait

[145] *Building a Sustainable National Indigenous Representative Body – Issues for Consideration* (An Issues Paper prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner, in accordance with section 46 C (1) (b) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), 2008).
[146] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
[147] Responding to the Intervention, the HRC suggested Australia 'redesign measures in direct consultation with the Indigenous peoples concerned, in order to ensure that they are consistent with the RDA and the ICCPR'. This participatory approach was promoted in Stavenhagen's 2007 HRC report on the human rights of Indigenous peoples, where he stated 'no project should be imposed from outside'; UN HRC, Report of the Special Rapporteur Rodolfo Stavenhagen, 'Situation of human rights and fundamental freedoms of indigenous people', 15 November 2007, 219.
[148] Alison Vivian et al, 'Indigenous Self-government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 218; Megan Davis, 'The Long Road to Uluru Walking Together: Truth before Justice' (2018) 60 *Griffith Review* 15.

Islander peoples and cultural authorities and backed its own alternative form of recognition proposals which failed to take hold in the public imagination.[149]

By 2007, when the Kevin Rudd Labor government came into power, the National Indigenous Reform Agreement was signed by the Council of Australian Governments. The significance of that agreement was that it provided six objectives to improve Indigenous outcomes in education, health, life expectancy, economic participation, healthy homes, safe communities, governance and leadership.[150] In 2008, the Rudd government delivered, finally, a formal apology to the Stolen Generations,[151] adopted *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) into its domestic laws,[152] and established the National Congress.[153] Most notably for these purposes, however, the Rudd government appointed an Expert Panel to investigate ways in which the Commonwealth Parliament should advance constitutional recognition of Indigenous Australians.[154] The Expert Panel was tasked with consulting with Indigenous Australians across the country to determine ways they wished to be recognised within the *Australian Constitution*.[155]

The national inquiry ran from 2010 until 2012. From May to October 2011, the Expert Panel captured the aspirations of Indigenous Australians through publishing a discussion paper, a formal public submissions process, a website and public consultations across the country.[156] It also sought advice for potential unintended consequences surrounding proposed constitutional reforms from constitutional law experts.[157] The intention was to prepare Australia for a referendum on issues

[149] Tanja Dreher, Kerry McCallum and Lisa Waller, 'Indigenous Voices and Mediatized Policy-Making in the Digital Age' (2015) 19(1) *Information, Communication & Society* 30; Davis, ibid.
[150] Davis, ibid, 16.
[151] Speech from Kevin Rudd 'Apology to Australia's Indigenous People' (13 February 2008) <http://www.unitcare.com.au/pdfs/Sorry_Transcript.pdf>.
[152] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007).
[153] Megan Davis, 'Constitutional reform and Aboriginal and Torres Strait Islander People: Why Do We Want it Now?' (2011) 7(25) *Indigenous Law Bulleti*n 8; Megan Davis, 'Indigenous Struggles in Standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439; Eddie Synot, 'The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluru Statement from the Heart' (2019) 73(4) *Australian Journal of International Affairs* 320, 320–325.
[154] Jill Webb, 'Indigenous Peoples and the Right to Self Determination' (2012) 7(13) *Journal of Indigenous Policy* 97.
[155] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Commonwealth of Australia, 2012) v (Expert Panel Report).
[156] Referendum Council, 'Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (Law Council of Australia, 19 May 2017); Luke Beck, 'Jack Balkin's Constitutionalism and Constitutional Recognition of Indigenous Australians' (2014) 37(2) *UNSW Law Journal* 409.
[157] Davis (n 148) 18.

identified in the thorough consultation that took place with constitutional experts and Indigenous Australians across the country.[158]

The inquiry and the Expert Panel's recommendation gained the support of the Coalition.[159] At the time it was anticipated that this meant the Expert Panel recommendations were sufficient to secure widespread support in a potential future referendum.[160] However, issues arose that began to threaten bipartisan support when details of the type of structural changes and preferred substantial protections from government discrimination emerged.[161] While Indigenous Australians had moved away from mere symbolic gestures of recognition, resistance to substantive change became firmer.[162]

The Expert Panel report recommended that s 25 'Provision as to races disqualified from voting' and s 51 (xxvi) the 'Races Power' of the *Australian Constitution* be repealed. That a new s 51A 'Recognition of Aboriginal and Torres Strait Islander peoples' be inserted which recognises Aboriginal and Torres Strait Islander peoples as first occupiers of the Australian continent with continued exercise of their cultural identity and rights to land and language.[163]

The report also recommended that a new s 116A be inserted into the Australian Constitution which prohibits racial discrimination and that a new s 127A be inserted which recognises that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of Australia's national heritage.[164]

The Expert Panel report also reflected Indigenous Australians' preferences for substantive change.[165] The recommendations[166] were subsequently presented to an inquiry of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (JSC).[167] In June 2015, the JSC made 10 recommendations for the constitutional recognition of Aboriginal

[158] Natasha Robinson and Lex Hall, 'Macklin Vows to Consider Indigenous Recognition in Constitution', *The Australian* (9 August 2010) 1.
[159] Patricia Karvelas and Lex Hall, 'Coalition to Put Aboriginal Recognition to Referendum', *The Australian* (10 August 2010) 1.
[160] Lino (n 59) 49; Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) 3.
[161] Expert Panel Report 2012, ibid, 112–5.
[162] Ibid.
[163] Ibid, xvii.
[164] Ibid.
[165] Ibid, xviii. For an overview, see, eg, Kate Galloway, 'Cutting through Legal Arguments: Constitutional Recognition' (2014) 8(15) *Indigenous Law Bulletin* 3.
[166] Expert Panel Report 2012 (n 160) xviii.
[167] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (June 2015) 31–3, 49–53, 63–4, 83.

and Torres Strait Islander people which included advice that a referendum takes place 'when it has the highest chance of success'.[168] Most of JSC's recommendations centred on what was termed more 'radical' ideas of establishing a treaty and acknowledging sovereignty and self-determination rights from Indigenous activists.[169]

From December 2016 to 2017, under the leadership of the Turnbull government, the Expert Panel conducted a series of First Nations Regional Dialogues.[170] There were 12 dialogues held across the country with an additional information session hosted by the United Ngunnawal Elders Council in Canberra.[171]

In May 2017, the regional dialogues culminated into a National Constitutional Convention held at Yulara and Mutitjulu near Uluru. Previous dialogues held in the lead up to the National Constitutional Convention were necessary for informing and guiding discussion led by the legitimate cultural authority of the country – the traditional owners of the First Nations.[172] This aspect of the process was important to ensure cultural authority and consent was received prior to any progression with ideas of proposed constitutional reform options. Second, it exemplified just how consent and consultation should be sought after by Indigenous and non-Indigenous agencies, that recognised and respected self-determination rights of First Nations.[173]

On those terms, the National Constitutional Convention comprised a culmination of 250 Aboriginal and Torres Strait Islander delegates from across the nation who came together to debate and consider proposals for Indigenous constitutional recognition and moving forward with reconciliation.[174]

From the Convention, the *Uluru Statement from the Heart* was drafted and presented to the Australian public calling for substantive measures to better include Indigenous voices in federal

[168] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (Commonwealth of Australia, 2015) xi, xii–xvi (JSC Final Report).
[169] Lino (n 59) 15; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, ibid, 69.
[170] Shireen Morris and Noel Pearson, 'Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives' (2017) 91 *Alternative Law Journal* 353; 'Dialogues' (*Referendum Council*, 2020) <https://www.referendumcouncil.org.au/dialogues.html>.
[171] Davis (n 148) 27.
[172] Ibid.
[173] Ibid, 18; *Final Report of the Referendum Council* (Commonwealth of Australia, 2017) 20.
[174] Thomas Mayor, 'The Torment of our Powerlessness: The Uluru Statement and Enshrining a Voice for Indigenous Peoples' (2018) 87, *Australian Options*, 9; Gabrielle Appleby and Gemma McKinnon, 'Indigenous Recognition: The Uluru Statement' (2017) 37 *Law Society of NSW Journal* 36.

decision-making.[175] It focused on three key elements that captured the political and cultural wants and needs of Indigenous Australians which surrounded voice, treaty and truth-telling.[176] These three key elements were crucial in providing the foundation for proposals to establish three types of Indigenous representative body.

The Voice to Parliament would act as a body similar to ATSIC, comprised of First Nation representatives to provide advice and guidance to the Commonwealth Parliament on laws and policies that affected First Nation affairs.[177] The Voice to Parliament would not have a power of veto nor would it decide on every piece of legislation. It is proposed as a modest advisory body to parliament on laws and policies that affect Indigenous affairs.[178]

The element of the treaty would underpin the establishment of a treaty supervising commission known as the 'Makarrata Commission' to oversee treaty disputes and negotiation processes between First Nations and the Commonwealth and state and territory parliaments. Both the Voice to Parliament and Makarrata Commission are proposed to be constitutionally entrenched to protect them from being legislatively repealed and extinguished by the parliament.[179]

The element of truth-telling, intended to occur prior to negotiations for the co-design of the proposed institutions, is likely to fall outside constitutional entrenchment and instead be established as a legislative body. This would create a Truth-Telling Commission to provide an informative educational purpose of telling the full version of Australian history incorporating Indigenous experiences and perspectives.[180]

The Voice to Parliament represented an exercise of Indigenous self-determination through its guided process of development by, and political inclusion of, Indigenous Australians. Despite this, the Prime Minister dismissed the Voice to Parliament proposal. His rejection was significant given

[175] *Uluru Statement from the Heart*, 2017; P. L. Dodson, *Final Report: Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (Parliament of the Commonwealth of Australia, 2018) 7.
[176] Cheryl Saunders, 'The Australian Constitution and Our Rights' in *Future Justice* (Future Leaders, 2010) 117.
[177] Gabrielle Appleby and Gemma McKinnon, 'Indigenous Recognition: The Uluru Statement' (2017) 37 *Law Society of NSW Journal* 38.
[178] Darryl Cronin, 'Trapped by History: Democracy, Human Rights and Justice for Indigenous People in Australia' (2017) 23(2) *Australian Journal of Human Rights* 220, 220–241; Elliot Johnston, 'Malcolm Turnbull's Big Let-Down' (2018) 87 *Australian Options* 4, 4–6.
[179] Adrian Little, 'The Politics of Makarrata: Understanding Indigenous–Settler Relations in Australia' [2019] *Political Theory* 1; Appleby and Davis (n 6) 501.
[180] Appleby and Davis, ibid, 503.

that the Voice to Parliament comprised the key elements of political participation sought by Indigenous Australians.[181]

Reminiscent of the objections to the Maori designated seats,[182] the Prime Minister's rejection turned on the incorrect assertion that the Voice to Parliament would amount to a 'third chamber' of the parliament,[183] but also that the proposal conflicted with principles of equality and the rule of law given its differentiated Indigenous citizen only, representation status. [184] It was clear the rejection had no regard for self-determination rights and international standards pertaining to the rights of Indigenous colonised people.[185]

Despite Turnbull's rejection, the Voice to Parliament has remained on the table as a key representation of the type of recognition Indigenous Australians want within Australia's contemporary liberal democracy. It is clear that from the *Uluru Statement from the Heart*[186] and the Final Report[187] that many Indigenous Australians are seeking substantive measures of equality to be implemented that give them a political voice. This would require structural reform of Australia's political system so that full access to self-determination rights is respected, protected and not limited. Thus, establishing meaningful national Indigenous representative bodies is integral.

As the Final Report identifies, separatist structures are necessary for improving the effects of past discrimination and the colonisation of Indigenous people.[188] The following sections consider further details on each key representative body proposal, including consideration of their proposed functions, structure and the benefits they might bring in terms of political participation.[189]

---

[181] Davis (n 148) 13.
[182] E. M. McLeay, 'Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation' (1991) 43 (1) *Political Science* 35; Catherine I. Magallanes, 'Dedicated Parliament Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination' (2003) 10(4) *Murdoch University Electronic Journal of Law* 106, 106 –117.
[183] Calla Wahlquist, 'Indigenous voice proposal "not desirable", says Turnbull' (*The Guardian*, 26 October 2017) <https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull>; Malcolm Turnbull 29th Prime Minister of Australia 2015-2018, 'Response to Referendum Council's report on Constitutional Recognition' (Media Release, 26 October 2017).
[184] Elliot Johnston, 'Malcolm Turnbull's big let-down' (2018) 87 *Australian Options* 4, 4–6; Malcolm Turnbull 29th Prime Minister of Australia 2015-2018, ibid.
[185] Julianne Schultz, 'Whispering in our hearts: Time to learn from the past' (2018) 60 *Griffith Review* 8; Rudi Maxwell, 'Fury as government rejects Voice to Parliament' (*Guardian*, 15 Nov 2017) 3; Fergus Hunter, 'Government rejection of referendum proposal sends "shockwaves" through Indigenous community' (*The Age*, 26 October 2017).
[186] *Uluru Statement from the Heart*, 2017.
[187] *Final Report of the Referendum Council* (Commonwealth of Australia, 2018) <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf>
[188] Shireen Morris, 'Agreement Making – The Need for Democratic Principles, Individual Rights and Equal Opportunities in Indigenous Australia' (2011) 36 *Alternative Law Journal* 189.
[189] *Uluru Statement from the Heart*, 2017; P. L. Dodson, *Final Report: Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (Parliament of the Commonwealth of Australia, 2018).

A. The Makarrata Commission

Prior to the 2017 Uluru convention, national debate about a treaty had already been undertaken in Australia between 1979 and 1983.[190] This was the decade before the landmark decision in *Mabo (No 2)*[191] and a time when Indigenous connections to the international community were at a peak – notable connections with jurisdictions that shared Australia's colonial past: New Zealand, Canada and the United States.[192]

Treaty debates had been instigated by the National Aboriginal Conference[193] which adopted the Yolngu word 'Makarrata' given that 'treaty' was rejected by the Fraser government.[194] By 1981, the *Senate Committee on Constitutional and Legal Affairs* examined reforms that would be necessary to establish a Makarrata between Aboriginal Australians and the Commonwealth.[195] Ultimately the Senate Committee concluded that the idea of 'recognition' of Indigenous Australians within a treaty during this era centred around acknowledging Aboriginal and Torres Strait Islander peoples' separate cultural identities, heritage and pre-existing land rights.[196] Acknowledgement of those rights would entail recognition of self-determination rights, the return of traditional lands, compensation for dispossession and socioeconomic equality.[197]

---

[190] Lino (n 59) 17.
[191] Blackstone's *Commentaries*, as quoted (at 201) and relied upon (at 243–4) by Blackburn J in *Milirrpum v Nabalco* (1971) 17 FLR 141, maintaining the established legal position that Australia was a 'settled' colony, rather than a conquered or ceded territory. That position was heavily qualified, though confusingly not completely overturned, in *Mabo v Queensland* (No. 2) (1992) 175 CLR 1 (Mabo (No 2)).
[192] Ravi de Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (UNSW Press, 2006) ch 4; Jennifer Clark, *Aborigines & Activism: Race, Aborigines and the Coming of the Sixties to Australia* (University of Western Australia Press, 2008) ch 9; Russel McGregor, 'Another Nation: Aboriginal Activism in the Late 1960s and Early 1970s' (2009) 40 *Australian Historical Studies* 343; Bain Attwood, *Rights for Aborigines* (Allen & Unwin, 2003) ch 13; Sue Taffe, *Black and White Together: FCAATSI: The Federal Council for the Advancement of Aborigines and Torres Strait Islanders 1958–1973* (University of Queensland Press, 2005) chs 7–8; Miranda Johnson, *The Land is Our History: Indigeneity, Law, and the Settler State* (Oxford University Press, 2016); Geoffrey Stokes, 'Citizenship and Aboriginality: Two Conceptions of Identity in Aboriginal Political Thought' in Geoffrey Stokes (ed), *The Politics of Identity in Australia* (Cambridge University Press, 1997) 158.
[193] Fenley (n 177) 376–7.
[194] Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, 200 Years Later…: *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal People* (1983) 17–21.
[195] Ibid.
[196] Ibid, 121.
[197] Ibid, 126– 7.

When the Hawke government came into power in 1983, Makarrata stagnated. Instead, the Australian Government chose to focus on implementing land rights legislation – a plan that was later abandoned in 1986.[198]

In the lead up to 1988, treaty advocacy re-emerged under the banner of the 'Treaty 88' campaign that protested the bicentenary of Australian colonisation.[199] The idea of 'recognition' at this point 'blended constitutional and international recognition' in lieu of a treaty.[200] These conceptions and identification of rights that would form part of a treaty were outlined in the Barunga Statement:

> We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights, including self-determination, land, compensation, culture and equality.[201]

The Barunga Statement of 1988 also called for 'a treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom'.[202] Both the Treaty '88 campaign and Barunga Statement sought to 'force recognition of our full inherent entitlements'.[203]

When ATSIC replaced the National Aboriginal Conference in 1989, it continued to advocate for Indigenous recognition and establishing a treaty.[204] However, calls for a treaty throughout the 1990s were ignored by the Hawke government in favour of calls for reconciliation.[205] Reconciliation took the form of social justice in the 1990s under the advocacy work of several government-funded Indigenous organisations including ATSIC, the Council for Aboriginal Reconciliation and the Social Justice Commissioner.[206] Although they lacked influence, they did continue linking the

---

[198] Ronald T. Libby, *Hawke's Law: The Politics of Mining and Aboriginal Land Rights in Australia* (University of Western Australia Press, 1989); L. R. Hiatt, 'Treaty, Compact, Makarrata ...?' (Dec 1987) 58(2) *Oceania*, 140; Andrew Gunstone, 'Reconciliation, Peacebuilding and Indigenous Peoples in Australia' in H. Devere, K. Te Maiharoa and J. Synott, *Peacebuilding and the Rights of Indigenous Peoples* (Springer, Cham, 2016) 17.
[199] Kevin Gilbert, *Aboriginal Sovereignty: Justice, the Law and Land* (Burrambinga Books, 3rd ed, 1993); *Treaty '88*, Australian Institute of Aboriginal and Torres Strait Islander Studies <http://aiatsis.gov.au/collections-online/digitised-collections/treaty-88>.
[200] Lino (n 59) 23.
[201] 'The Barunga Statement' (1988) 1(33) *Aboriginal Law Bulletin* 16.
[202] Ibid.
[203] Treaty '88 Campaign, '1988: Make a Treaty This Time', Campaign Advertisement (nd [c1987]) 7 <http://aiatsis.gov.aau/collections/collections-online/digitalised-collections/treaty/treaty-88>.
[204] Lino (n 59) 26.
[205] John Gardiner-Garden, 'From Dispossession to Reconciliation' (Research Paper No. 27, Parliamentary Library, Parliament of Australia, 1999) 11–16 <http://www.aph.gov.au/binaries/library/pubs/rp/1988-99/99rp27.pdf>; Andrew Gunstone, *Unfinished Business: The Australian Formal Reconciliation Process* (Australian Scholarly Publishing, 2009); Angela Pratt, *Practising Reconciliation? The Politics of Reconciliation in the Australian Parliament, 1991–2000* (Parliamentary Library, Parliament of Australia, 2005); *Council for Aboriginal Reconciliation Act 1991* (Cth).
[206] ATSIC, Native Title Social Justice Advisory Committee, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (ATSIC, 1995); Council for Aboriginal Reconciliation, *Going Forward: Social Justice for First Australians – A Submission to the Commonwealth Government* (Australia Government Publishing

conceptions of 'social justice' and 'recognition' with a treaty.[207] By 2000, a community poll found that 53 per cent of Australians would vote yes to a treaty.[208]

The Howard government in power during this period rejected any progress on a treaty[209] and the ascension of the Gillard government to power in 2010 revisited the notion of 'recognition' of Aboriginal Australians. By 2016, however, Indigenous communities across Australia opted for more radical visions of sovereignty and self-determination to the extent that having a treaty was of more importance than constitutional recognition.[210]

The *Statement from the Heart* revived Makarrata, and a treaty has now re-entered the political landscape.[211] Contemporary proposals envisage a treaty body, namely the Makarrata Commission that would be entrenched in the *Australian Constitution*. Its role would be to oversee agreement-making and truth-telling processes of Aboriginal and Torres Strait Islander peoples.[212] Implementing an institutional response is crucial for agreement-making so that the body, in the most efficient and transparent way possible, ensures principles of equality and cultural respect are adhered to during consultations and negotiations between Indigenous Australians and all governments.[213] In short, the Makarrata Commission aims to ensure the best cultural practice.[214] This alone represents a facet of self-determination and engages Indigenous Australians in political processes.

The National Congress of Australia's First Peoples has identified two spheres of operation of a Makarrata Commission. First, it would seek to address intergenerational trauma, which remains an

---

Service, 1995); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice: Strategies and Recommendations* (Office of Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995).
[207] Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights* (nd [c2000]) <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/pg3.htm>.
[208] 'Treaty – Yes!: Opinion Poll Supports Call for an Agreement', *The Koori Mail* (Lismore), 15 November 2000, 1.
[209] John Howard in an interview with John Laws, 2UE Radio (29 May 2000) PM Transcripts <https://pmtranscripts.dpmc.gov.au/release/transcript-22788>.
[210] Chris Graham, 'Recognise Rejected: Historic Meeting of 500 Black Leaders Unanimously Opposes Constitutional Recognition' (*New Matilda*, 8 February 2016) <https://newmatilda.com/2016/02/08/recognise-rejected-historic-meeting-500-black-leaders-unanimously-opposes-constitutional-recognition>; 'Githabul Elder Says Constitutional Recognition is Terrorism', *ABC News*, 20 November 2015 <http://www.abc.net.au/news/2015-11-20/sovereign-union/6958104>.
[211] Eliza Milliken, 'Acknowledging Makarrata' (2019) 11(1) *The NSW Doctor* 16, 16–19; Pip Hinman and Peter Boyle, 'Treaties are an essential first step' (2017) 1143 *Green Left Weekly* 8; Megan Davis, 'Treaty, Yeah? The utility of a treaty to advancing reconciliation in Australia' (2006) 31(3) *Alternative Law Journal* 127, 127–129.
[212] Prime Minister's Indigenous Advisory Council, *Submission 419*, 11.
[213] Shireen Morris, 'Agreement Making – The Need for Democratic Principles, Individual Rights and Equal Opportunities in Indigenous Australia' (2011) 36 *Alternative Law Journal* 190.
[214] Ibid.

enormous barrier to Aboriginal Australians in giving full expression of their civic engagement.[215] Secondly, the Commission would facilitate a greater connection to culture for Aboriginal and Torres Strait Islander peoples.[216] In addition, an educational role was also highlighted as integral to 'a process of consultation, education, healing and meaningful reconciliation'.[217] A treaty established from a Makarrata process would be binding on its own terms. Its proposed recognition of its establishment and functions within the *Australian Constitution* would also provide authority to the Australian Government to implement terms of the treaty/treaties.

Many submissions to the Joint Select Committee[218] referred to the role and other relevant considerations of state and regional Indigenous land rights agreements as an indication of the mechanisms for carrying out treaty terms.[219] The most comprehensive agreement negotiated so far has been the South West Native Title Settlement ('Noongar Settlement') formed between the Western Australian Government and the South West Aboriginal Land and Sea Council, comprised of six groups of Noongar native title claimants.[220] The Noongar Settlement is significant because it sets out the framework of preliminary steps to agreement making, including seeking prior consent from persons affected, consulting with those persons, and negotiating the terms of the agreement with those persons. Although not without falling under native title legislation,[221] the Noongar Agreement was registered in the National Native Title Tribunal.[222]

The Noongar Settlement was recognised by many stakeholders as amounting to a treaty,[223] given the extent of its terms – such as rescission by Noongar claimants of their rights to claim native title

---

[215] *Appleby and Davis* (n 6) 501–509; Eliza Milliken, 'Acknowledging Makarrata' (2019) 11(1) *The NSW Doctor* 16, 16–19; David Brown, 'Pathways to Justice: Indigenous democracy and the Uluru Statement from the Heart' in Pat Carlen and Leandro Ayres Franca, *Justice Alternatives* (Routledge, 2019) ch 8.
[216] National Congress of Australia's First Peoples, *Submission 292*, 9.
[217] Indigenous Peoples Organisation, *Submission 338.2*, p. i.
[218] P. L. Dodson, *Final Report: Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (Parliament of the Commonwealth of Australia, 2018).
[219] Harry Hobbs, *Submission 189*, 4; Reconciliation Victoria, *Submission 339*, 5; Victorian Aboriginal Child Care Agency, *Submission 346*, 2; Aboriginal Peak Organisations Northern Territory, *Submission 356*, [2]–[3]; Central Land Council & Northern Land Council, *Submission 357*, 9; Reconciliation Western Australia, *Submission 389*, 7; Shireen Morris, 'Agreement Making – The Need for Democratic Principles, Individual Rights and Equal Opportunities in Indigenous Australia' (2011) 36 *Alternative Law Journal* 188.
[220] Government of Western Australia, *South West Native Title Settlement* <https://www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.apsx> retrieved 6 November 2018; Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1.
[221] *Native Title Act 1993* (Cth).
[222] *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*; National Native Title Tribunal, 'South West Indigenous Land Use Agreements Registered' (Media Release, 17 October 2018) <http://www.nntt.gov.au/News-and-Publications/latestnews/Pages/South-West-Indigenous-Land-Use-Agreements-Registered.aspx>, archived at <https://perma.cc/PA25-UX9E>.
[223] Harry Hobbs and George Williams, 'Treaty Making in the Australian Federation' (2019) 43 (1) *Mebourne University Law Review* 180; *Hobbs and Williams* (n 215) 1; *South West Native Title Settlement*, signed 8 June 2015 (not yet

in the area, land and money to be granted to the Noongar by the government – and that the West Australian Parliament passed legislation that recognised the Noongar as traditional owners of that country.[224]

Some aspects of the Final Report have found currency in other, state contexts such as the Victorian Government's policy of self-determination.[225] For instance, a working group has been established comprising Traditional Owners, Aboriginal community-controlled organisations, and young people from across the state[226] to advise on the formation of an Aboriginal Representative Body in Victoria. The Aboriginal Representative Body would advise the Victorian community and government throughout the treaty-making process,[227] establishing 'treaty authority' and creating a guiding framework with the Victorian Government for treaty negotiations to take place.[228] The end of 2017 saw Victoria hold an Aboriginal Community Assembly, comprised of independently selected Aboriginal representatives who further contributed to the working group's recommendations on the design of an Aboriginal Representative Body.[229]

In 2018, Victoria established its Treaty Advancement Commission and Commissioner – both of which work collaboratively with the working group in further consulting with the Victorian Aboriginal population on matters related to the treaty.[230] The Advancing the Treaty Process with Aboriginal Victorians Bill 2018 was passed, advancing the treaty process; establishing the Aboriginal Representative Body to support future treaty negotiations; enshrining principles of the treaty process; and requiring the Aboriginal Representative Body and Victorian Government work together for future treaty negotiations.[231]

The most important part of this legislation is that it solidifies, legislatively, the approach and view the Victorian Government will have towards the Aboriginal Representative Body once it's

entered into force); Michael Owen, 'Aboriginal People Failed by "Expensive Gesture" Treaties', *The Australian* (online, 11 June 2018).
[224] Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, 10.
[225] *Self-Determination* (2019) Vic.gov.au <https://www.vic.gov.au/aboriginalvictoria/policy/self-determination.html>.
[226] Dodson (n 218) 149.
[227] Victorian Government, *Aboriginal Treaty Working Group* <https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-bodies/aboriginal-treaty-workinggroup.html> retrieved 6 November 2018.
[228] Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, [15].
[229] Ibid [14]–[15].
[230] Dodson (n 218) 150.
[231] Parliament of Victoria, *Advancing the Treaty Process with Aboriginal Victorians Bill 2018* <https://www.parliament.vic.gov.au/publications/research-papers/download/36-researchpapers/13861-advancing-the-treaty-process-with-aboriginal-victorians-bill-2018> retrieved 6 November 2018.

established, which is to recognise it as an equal partner throughout every stage of negotiation with the state.[232]

This type of reconciliation and political inclusion of Indigenous Australians is still yet to be achieved at a Commonwealth level in Australia. That type of progression with creating representative body mechanisms for which Aboriginal Australians will use to voice their concerns on all matters related to their cultural affairs is typically viewed incorrectly by non-Indigenous political elites as discrimination and in conflict with principles of equality. The argument from that perspective questions whether a society based on equality should give its Aboriginal Australians special authoritative powers to make constitutionally binding agreements with the government.[233]

B. A First Nations Voice to Parliament

In 2014, leading up to the 2017 Uluru Convention and amidst campaigning for Indigenous recognition and constitutional reform, Noel Pearson, an influential member of the Expert Panel, spoke of Australia needing its own Indigenous advisory body to parliament.[234] This was the first formal instance of such a proposal and was notable for its support from constitutional conservatives,[235] the Aboriginal Provisional Government, and Indigenous advocates.[236]

In its Final Report, the Joint Select Committee acknowledged the broad stakeholder support for establishing and constitutionally entrenching a First Nations Voice to Parliament.[237] The proposed role of the Voice to Parliament aims to create a permanent mechanism for Aboriginal and Torres

[232] Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, 15.
[233] Morris (n 180) 188.
[234] Noel Pearson, 'A Rightful Place: Race, Recognition and a More Compete Commonwealth' (2014) 55 *Quarterly Essay* 1.
[235] See Greg Craven, 'We Need to Work Out How Indigenous Voices Can Be Heard', *The Australian* (Sydney), 13 September 2014, 14; Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (20 May 2015) <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>; Damien Freeman and Shireen Morris, *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016).
[236] See Sarah Martin, 'Land Councils Get Behind Pearson Recognition Plan', *The Australian* (Sydney), 1 May 2015, 6; Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples When Making Laws for Indigenous Affairs' (2015) 26 *Public Law Review* 166 172; Celeste Liddle, '87% of Indigenous People Do Not Agree on Recognition. You'd Know if You Listened', *The Guardian* (19 June 2015) <https://www.theguardian.com/commentisfree/2015/jun/19/87-of-indigenous-people-do-not-agree-on-recognition-youd-know-if-you-listened>; Davis and Langton (n 58).
[237] Dodson (n 218) 80.

Strait Islander people to provide input, consent and guidance on laws and policies that govern their cultural affairs.[238]

The objective behind creating a distinct First Nations Voice to Parliament is to reconcile the historically unequal and unjust relationship First Nations of Australia have had with the Australian Government. The representative body for First Nations will essentially represent formal recognition of their equal status and partnership relationship with the Crown given their sovereignty has never been ceded.

Proposals put forth for the constitutional entrenchment of the Voice to Parliament are crucial to its success and the enhancement of Indigenous political participation for several reasons. Firstly, constitutional entrenchment would provide a long-awaited commitment to institutionalising the security of First Nations' voices in federal decision-making on matters that concern their cultural affairs.[239] As illustrated in the history cited above, this has not occurred yet in Australia. Notably, the only formalised recognition of First Nations representative bodies has occurred through either an administrative or legislative means where bodies have been defunded and extinguished at the will of successive Australian governments.[240]

Second, entrenching the Voice also provides a sense of symbolic formalised respect for First Nations. The *Australian Constitution* maintains a historic narrative that excludes acknowledgment of First Nations having the prior occupation of the land and, given First Nations' sovereignty has never been ceded, their role in partnership with the Crown on laws and policies concerning First Nations peoples. At the heart of the argument in this thesis, such acknowledgement is integral to uphold political equality and self-determination of Indigenous Australians within Australia's democratic regime.[241]

The Voice will also be able to support legislated Aboriginal representative bodies. Its guidance to the Commonwealth Parliament on 'making and breaking' legislation under Australia's constitutional race powers provision[242] will protect the longevity and existence of legislation creating such bodies. It will also have the capacity to advise on mitigating historical suspension of

[238] Ibid; Human Rights and Equal Opportunity Commission, *Building a Sustainable National Indigenous Representative Body – Issues for Consideration* (2008), 100, available at <http://www.hreoc.gov.au/SociaLJustice/repbody/repbody_paper2008.pdf>.
[239] Ms Patricia Anderson AO, Professor Megan Davis, Noel Pearson, Sean Brennan, Gabrielle Appleby, Dylan Lino, Gemma McKinnon, *Submission 479*, 4–5.
[240] Ibid.
[241] Gilbert + Tobin, *Submission 315.1*, 1.
[242] C*ommonwealth of Australia Constitution Act (1901),* s 51 (xxvi).

the *Racial Discrimination Act*[243] and Australia's compliance with its international obligations surrounding racial discrimination[244] – in other words, to avoid a replay of the NTER package.[245]

Entrenchment of the Voice to Parliament is vital to the representation of Aboriginal and Torres Strait Islander Peoples' interests in the review of legislation and advice given to the Executive, to overcome continued post-colonial disadvantage.[246] Constitutional entrenchment would have the additional advantage of securing ongoing funding through the implied obligation to uphold constitutional institutions.[247] Financial independence will ensure that the institution remains in control of its own affairs and is treated equally to and in partnership with the Crown.[248]

This is of particular importance because it protects the Voice to Parliament from being forced into ceasing its operation like the National Congress of Australia's First Peoples and legislative extinguishment like ATSIC. Thus, whilst the Voice would have an advisory role like its predecessors, that role would be protected from extinguishment if the Voice is put to a constitutional referendum, was successful in getting a yes vote and from there became constitutionally entrenched. The Voice would be in that context, better protected, continuous and formally valued.

---

[243] *Racial Discrimination Act 1975* (Cth); *Maloney v The Queen* (2013) 298 ALR 308; *Gerhardy v Brown* (1985) 159 CLR 70, [13]; *Western Australia v Ward* (2002) 213 CLR 1.

[244] *International Covenant on Civil and Political Rights* (signed 16 December 1966) (entry into force 23 March 1976); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No. 49, UN Doc A/RES/61/295 (13 September 2007); *International Covenant on Economic, Social and Cultural Rights* (signed 16 December 1966) GA Res 2200A (XXI) (entry into force 3 January 1976); Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Rights of Indigenous Peoples*, 51st sess, UN Doc A/52/18 (18 August 1997) Annex V, [4].

[245] *This Is What We Said: Australian Aboriginal People Give Their Views on the Northern Territory Intervention* (Concerned Australians, 2010) 8; *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007–2008 2007* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007–2008 2007* (Cth).

[246] National Congress of Australia's First Peoples, *Submission 292.1*, 24.

[247] Bo Seo, 'The Indigenous voice to Parliament explained' (*Financial Review*, 10 July 2019) <https://www.afr.com/politics/federal/the-indigenous-voice-to-parliament-explained-20190710-p525s6>; Final Report 2017 (n 6) Appendix F.

[248] Human Rights and Equal Opportunity Commission, *Building a Sustainable National Indigenous Representative Body – Issues for Consideration* (2008), 101–2, available at <http://www.hreoc.gov.au/SociaLJustice/repbody/repbody_paper2008.pdf>.

C. The Truth-Telling Commission

Lastly, the *Statement from the Heart* also called for a Truth-Telling Commission to oversee measures implemented by the Australian Government that would educate and provide a more thorough account of Australian history that acknowledged Indigenous experiences.

While less familiar in Australia, the international community acknowledges truth-telling of past injustices as a starting point for reconciliation and understanding of past conflicts, upheaval or injustices.[249] Since the 1970s, countries across the globe have established formalised processes, including commissions such as that envisaged in the Statement from the Heart, to engage citizens in comprehending past wrongs and their ongoing impacts as a precursor to reconciliation and a greater sense of peace amongst society.[250]

In Australia, despite the injustices experienced by Aboriginal and Torres Strait Islander peoples since colonisation,[251] there is widespread ignorance about this history.[252] There is, consequently, an urgent need for Indigenous Australians to be given an opportunity to share their experiences to ensure a fuller understanding of Australia's history by the broader public.[253] This need was expressed clearly and consistently in the regional dialogues.[254]

Although currently in the broader debate about the Statement from the Heart, truth-telling has been proposed before in Australia: the CAR acknowledged the need for truth-telling in its final report delivered in 2000. After nearly a decade of undertaking thorough consultation with Indigenous communities across the country, it found there was:

> a strong desire within the Australian community to make amends for the past, to recognize and value the unique status of Aboriginal and Torres Strait Islander peoples, and to work towards a future

[249] David Mendeloff, 'Truth-Seeking, Truth-Telling, and Post conflict Peacebuilding: Curb the Enthusiasm?' (2004) 6 *International Studies Review* 355; Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (University of British Columbia Press, 2010); *Appleby and McKinnon* (n 169) 39.
[250] *Truth-Telling Central to Reconciliation Process* (Reconciliation Australia, 10 May 2018) <https://www.reconciliation.org.au/truth-telling-central-to-reconciliation-process/>.
[251] National Congress of Australia's First Peoples, S*ubmission 292*, 10.
[252] Truth-Telling Central to Reconciliation Process (n 250); *Final Report of the Referendum Council* (Commonwealth of Australia, 2018) [6.17] <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> ; National Health Leadership Forum, *Submission 101*, 1.
[253] Final Report 2018, ibid.
[254] Ibid, [6.3].

> where all Australians enjoy their rights, accept their responsibilities and have the opportunity to achieve their full potential.[255]

Whilst truth-telling should have an emphasis on ensuring non-Indigenous Australians are aware of the historical negative impacts colonisation have had and continue to have on Indigenous Australians,[256] it also provides Aboriginal and Torres Strait Islander people with a chance to share their cultural identity with those within their community and the broader population at large.[257]

Given its widespread acceptance as an essential element for reconciliation and healing to occur,[258] the *Statement from the Heart* proposed the Makarrata Commission supervise a process of agreement-making and truth-telling.[259] This was supported by the National Congress of Australia's First Peoples which suggested its primary role should be to address intergenerational trauma and facilitate a greater connection to culture for Aboriginal and Torres Strait Islander people.[260]

Unlike the Makarrata Commission and the Voice to Parliament, there is no proposal to constitutionally entrench the Truth-Telling Commission. Instead, it is likely to part of the Makarrata Commission[261] as a further institutional response to the question of political participation through supporting a foundation for justice and equality within the polity more broadly.

VI. CONCLUSION

In the past, legislated Indigenous representative bodies in Australia have operated without financial stability or control over their operations.[262] The historical and continuing relationship between the Australian Government and Indigenous Australians excludes them from political participation through an absence of understanding and support of their experiences and issues. The aim of the modern Australian Government should instead showcase a meaningful commitment to achieving cultural reconciliation in Australia and closing the gap of opportunity arising from intergenerational exclusion.[263] Political participation is the key.

---

[255] Truth-Telling Central to Reconciliation Process (n 250).
[256] Final Report 2018 (n 252) [6.12].
[257] Ibid, [6.8], [6.10]; Dr Jacqueline Durrant, *Proof Committee Hansard*, Wodonga, 24 September 2018, 27.
[258] Final Report 2018 (n 252) [5.4], [6.1].
[259] *Uluru Statement from the Heart*, 2017; Mr Barry Richard Miller and Mrs Paula Ann Miller, *Submission 426*; Mr Thomas Wilkie-Black, *Submission 450*, 6.
[260] National Congress of Australia's First Peoples, *Submission 292*, 9.
[261] Prime Minister's Indigenous Advisory Council, *Submission 419*, 12.
[262] Davis and Langton (n 58) 60.
[263] Morris (n 180) 192.

As this chapter has outlined, the expression of Indigenous political participation in Australia, however, has been hampered through the absence of constitutional recognition and the inability of institutions to protect self-determination rights of Indigenous Australians. The system itself has limited the capacity of Indigenous Australians to influence the political agenda as a minority group not only colonised but also both economically and socially marginalised.[264]

Attempts to overcome such marginalisation through the establishment of national Indigenous representative bodies have been limited, and the attempts made have failed to achieve their goals. Indigenous representative bodies have been used as tools of accountability for the government rather than as a meaningful voice, respected and valued, and that represent the interests of Indigenous Australians. Successive Australian governments have controlled such bodies, which have been relatively short-lived, have lacked funding to carry out their objectives and make meaningful change, or have lacked necessary respect and inclusion during decision-making processes on their cultural affairs.

Ongoing exclusion of Indigenous Australians through institutional representation has resulted in a lack of their adequate representation of their best interests when circumstances like the NTER occur which significantly limit their access to full civil rights. While more institutions might be created, past experience shows that, without constitutional entrenchment, expression of cultural identity and empowerment through institutional representation remain at risk.[265]

The *Statement from the Heart* was presented to the Australian people as a call for recognition of self-determination for Indigenous Australians. The three key proposals for reform represent three different types of representative bodies. Each of those bodies, however, must have financial and substantive operational autonomy if they are to remain sufficiently independent from the Australian Government as a measure of self-determination. Failure to secure sustainable finances for an independent institutional voice will constrain those bodies in their capacity to support the delivery of services, implementation of policy, and implementation of independent governance, which will support a culturally appropriate and therefore inclusive process that will promote Indigenous political participation.[266]

[264] Jill Webb, 'Indigenous Peoples and the Right to Self Determination' (2012) 7(13) *Journal of Indigenous Policy* 100.
[265] Ibid.
[266] Thalia Anthony, 'Aboriginal Self-determination after ATSIC: Reappropriation of the "Original Position"' (2005) 14(1) *Polemic* 4, 7–8.

CHAPTER 5
INDIGENOUS REPRESENTATIVE BODIES WITHIN NEW ZEALAND AND CANADA

> A warrior confronts colonialism with the truth in order to regenerate authenticity and recreate a life worth living and principles worth dying for. The struggle is to restore connections severed by the colonial machine. The victory is an integrated personality, a cohesive community, and the restoration of respectful and harmonious relationships.[1]

I. INTRODUCTION

This chapter analyses the distinct ways in which equivalent Commonwealth jurisdictions have interpreted and applied rights to self-determination of Indigenous peoples through enhanced political participation. It examines Canadian and New Zealand frameworks for self-determination that afford Indigenous peoples a degree of control over their lands, resources and cultural governance. In particular, New Zealand and Canada have each established treaties between their Indigenous peoples and the State, and those treaties guide constitutional arrangements and conventions that generate representative bodies.[2]

Part II explores self-determination frameworks established in New Zealand for Maori. At first contact in New Zealand, Maori–Crown relations (or Indigenous–State relations) recognised Maori as Aotearoa (or sovereign).[3] That recognition paved the way for Maori to exercise self-determination, self-governing in their own territories. The rights established under the *Treaty* have been fundamental to Maori establishing practical self-determination through national representative bodies.[4] Maori representative bodies have served as primary consultative mechanisms for Maori

---

[1] Gerald R. Alfred, *Wasase* (University of Toronto Press, 2009).
[2] Stephen E. Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States* (Native Nations Institute for Leadership, Management and Policy, 2006) 5.
[3] Barbara Hocking, *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005) 118; Maivan Clech Lam, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Transnational Publishers, 2000) 8213; Siegfried Wiessner, 'Rights and Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12(57) *Harvard Human Rights Journal* 57; Paul Havemann, *Indigenous Peoples Rights in Australia, Canada and New Zealand* (Oxford University Press, 1999); S. James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996); Russel Lawrence Barsh, 'Indigenous Peoples in the 1990's: From Object to Subject of International Law?' (1994) 7(33) *Harvard Human Rights Journal* 33; Robert A. Williams Jr, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660; Glenn T. Morris, 'In Support of the Right of Self-Determination for Indigenous Peoples under International Law' (1986) 29 *German Yearbook of International Law* 277.
[4] For Indigenous peoples generally, historical treaty-making provided recognition not only of their juridical capacity as subjects of international law, and thus sovereign entities, but also of their collective rights as peoples in international

with the New Zealand Government, maintaining Maori political presence at a national level on laws and policies that impact upon Maori affairs.

Secondly, this chapter analyses the experiences of First Nations in Canada and the means by which they assert and exercise self-determination including a degree of self-governance. As with Maori, Canada has established treaties with First Nations. But by contrast, in Canada, these rights are constitutionally entrenched. In Canada these two legal mechanisms of treaty and constitution interact, empowering First Nations to choose how they govern themselves as distinct people.

In comparing the outcomes for Indigenous peoples in Canada and New Zealand, this chapter evaluates the role of Indigenous representative bodies in representing the rights and interests of Indigenous peoples, as a means of promoting political participation.

II. MAORI SELF-DETERMINATION

The New Zealand Constitution does not explicitly oblige the government to recognise the self-determination rights of Maori.[5] However, there are other important constitutional documents and national Maori organisations that do recognise such rights.[6] This part provides an overview of New Zealand's constitutional history to highlight how it has come to accept and formally recognise Maori self-determination as part of its constitutional arrangements with Maori citizens.

As with the Australian experience, Maori have been subjected to the forces of colonisation, facing the loss of land and governmental refusal to recognise claims to self-determination and self-government. In contrast to the Australian experience, however, Maori rights were enshrined in the Treaty of Waitangi. While not always adhered to, over time its provisions have effectively curtailed

law in confirming their autonomy, self-government and self-determination. This was in accordance with the contemporary non-Indigenous states-based international law whose ideal instrument for recognition or transfer of sovereignty was the treaty. A reasonable conclusion is that at the time of treaty-making (that is, during the era of the Law of Nations), there was widespread recognition by both parties, State and Indigenous, that each party was a sovereign entity juridically capable of concluding treaties: Jose R. Martinez Cobo, *Study on the Problem of Discrimination Against Indigenous Populations* (987) E/CN.4/Sub.2/1986/7/Add.1-8 [104], [110]. However, in Australia, sovereign status for the Aboriginal and Torres Strait Islander peoples was disputed at the politico-legal level until the decision of the High Court in *Mabo v State of Queensland* (No. 2) (1992) 107 ALR 1.

[5] John Buick-Constable, 'A Contractual Approach to Indigenous Self-Determination in Aotearoa/New Zealand' (2002) 20(1) *UCLA Pacific Basin Law Journal* 113; B. V. Harris, 'The Constitutional Future of New Zealand' (2004) *New Zealand Law Review* 269; Jovan James Mokaraka-Harris, Michelle Thompson-Fawcett and Christina Ergler, 'Te Manako: The Desire for Self-Determination' (2016) 12(3) *AlterNative: An International Journal of Indigenous Peoples* 251.

[6] Jovan James Mokaraka-Harris, Michelle Thompson-Fawcett and Christina Ergler, 'Te Manako: The Desire for Self-Determination' (2016) 12(3) *AlterNative: An International Journal of Indigenous Peoples* 251–2; M. Bargh, *Resistance: An indigenous response to neoliberalism* (Huia Publishers, 2007) 192; B. Forest, *Political representation* (Elsevier, 2009); T. R. Warren, 'Constructing "Traditional" Concepts: The Case of Maori Governance' (CIGAD Working Paper Series 3/2006, Massey University, Centre for Indigenous Governance and Development) 5.

the worst excesses of governmental exclusion of Indigenous political participation. But not without a struggle. The following section details that struggle for recognition of a Maori polity represented through recognised institutions, to demonstrate the longer-term effect of treaty rights in the New Zealand experience. The sections after that each outline a particular representative body, highlighting the capacity for self-determination – and therefore political participation – through particular representative structures.[7]

A. The Maori Struggle

The starting point for advocacy for a more representative form of governance over New Zealand slowly emerged from colonists between 1840 and 1852, seeking to replace the Constitution of the Crown colony with one that aligned more so with the principle of responsible government.[8]

Maori, however, were reluctant to accept the notion of a new Constitution to establish an independent New Zealand Government.[9] Most Maori were insistent in their refusal to have any dealings with the governor or government as their acknowledged authority given those representatives had not signed the *Treaty*.[10] Following New Zealand's independence and emancipation from Great Britain under the establishment of the *New Zealand Constitution Act 1852*, Maori continued to perceive their rights to be threatened by the authority of the New Zealand Government given it was not technically a party to the *Treaty*.[11] In the face of New Zealand's independence, British officials continued to reassure Maori of the 'special relationship' they had as a people with the Crown under the *Treaty*.[12] The New Zealand Government was still required to uphold its obligations under the *Treaty* on behalf of the Crown against the aspirations of colonisers, to ensure the protection of Maori rights and privileges.[13]

---

[7] *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, Waitangi Tribunal Report 2020) 31 – 32.
[8] J. Hight and H. D. Bamford, *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs Ltd 1914) 157, 195; Geoff Kemp, 'The Politics of the Ancient Magna Carta and the Ancient Constitution in New Zealand' in Stephen Winter and Chris Jones, *Magna Carta and New Zealand: History, Politics and Law in Aotearoa* (Palgrave Macmillan, 2017) 111.
[9] M. P. K. Sorrenson, 'Colonial Rule and Local Response: Maori Responses to European Domination in New Zealand Since 1860' (1976) 4(2) *The Journal of Imperial and Commonwealth History* 128; Paul McHugh, 'Sovereignty this Century – Maori and the Common Law Constitution' [2000] *Victoria University of Wellington Law Review* 16, 7. Richard S. Hill, *Crown–Maori Relations in New Zealand/Aotearoa 1900–1950* (Victoria University Press, 2004) 31.
[10] Claudia Orange, *The Treaty of Waitangi* (Allen & Unwin, 1987) 110.
[11] For details on the structures established by the Act, see Lindsay Cox, *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, 1993) [34]–[37]; Hiwi Tauroa, *Healing the Breach: One Maori's Perspective on the Treaty of Waitangi* (Collins New Zealand, 1989) 40.
[12] James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 83; Orange (n 10) 132; I. H. Kawharu, *Waitangi: Maori and Pakeha Perspectives* (Oxford University Press, 1990) 64.
[13] A. H. McLintock, *Crown Colony Government in New Zealand* (R. E. Owen, 1958) 53; F. M. Brookfield, 'Maori Rights and Two Radical Writers: Review and Response' [1990] *New Zealand Law Journal* 406; F. M. Brookfield, 'Kelsen, The Constitution and the Treaty' (1992) 15 *New Zealand Universities Law Review*, 163; F. M. Brookfield, 'The Treaty, the 1840 Revolution and Responsible Government' [1992] *Canterbury Law Review* 4; F. M. Brookfield,

Despite their 'special relationship' with the Crown, Maori citizens have experienced long term and continuous struggles with holding the New Zealand Government accountable for its actions towards Maori when it acts on behalf of the Crown as per the *Treaty*.[14] Quite often, Maori rights are left neglected compared to non-Indigenous citizens who oppose Maori cultural identity protection and rights recognition as they largely represent non-Indigenous interests as the majority status quo.[15]

By 1856, the New Zealand Constitution was amended to establish government accountability through formal acknowledgment of the principles of responsible government.[16] It was, however, only symbolic so that the Crown had no real political or legislative power in New Zealand. Instead, conventionally, the Crown acted upon advice provided by New Zealand Government ministers.[17] But the amendments also affirmed the British Crown's continued control over Maori affairs.[18] As a result, Maori rights were left vulnerable within both British and New Zealand governance institutions: the Crown's power over Maori affairs was symbolic, but the New Zealand settler government continued to fail to uphold *Treaty* obligations[19] on behalf of the Crown.[20]

By 1858 and, in response to their political disempowerment, in 1858 Maori selected a common King to represent their interests and protect sovereignty over Maori land.[21] This became known as the 'Maori King Movement' which sought to assert greater control over Maori affairs.[22] Meanwhile, wars over land between Maori and Pakeha (non-Maori New Zealander) had spread across New Zealand and peaked between 1860 and 1864.[23] Maori warriors were fighting for control over Maori land while the Maori King Movement sought control over Maori cultural affairs, the 'Queen's

---

'Parliament, the Treaty, and Freedom – Millennial Hopes and Speculations' in P. A. Joseph, *Essays on the Constitution* (Brookers, 1995) 41.

[14] R. A. Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Oxford University Press, 1990) 266; Claudia Orange, *The Treaty of Waitangi* (Allen & Unwin, 1987) 136.

[15] Orange (n 10) 141.

[16] Leicester Webb, *Government in New Zealand* (Department of Internal Affairs, 1940) 7.

[17] Barry Gustafson, *Constitutional Changes Since 1870* (Heinemann Educational Books, 1969) 2.

[18] S. Elias, 'The Treaty of Waitangi and the Separation of Powers in New Zealand' in B. D. Gray and R. B. McClintock, *Courts Policy: Checking the Balance* (Brookers, Wellington, 1995) 206; Sir K. Keith, 'The Roles of the Tribunal, the Courts and the Legislature' (1995) 25 *Victoria University of Wellington Law Review* 129, 139.

[19] *Treaty of Waitangi 1840*, art 2.

[20] Webb (n 16).

[21] J. E. Gorst, *The Maori King: Or, The Story of Our Quarrel with the Natives of New Zealand* (Cambridge University Press, 2011) 3–5; Thomas Buddle, *The Maori King Movement in New Zealand: Full Report of the Native Meetings Held at Waikato, April and May, 1860* ('New Zealander' Office, 1860) 3–4.

[22] James Belich, 'The Governors and the Maori' in Keith Sinclair, *The Oxford Illustrated History of New Zealand* (Oxford University Press, 1990) 87–8; Toon Van Meijl, 'The Poukai Ceremny of the Maori King Movement: An Ethnohistorical Interpretation' (September, 2009) 118(3) *The Journal of the Polynesian Society* 233, 233–258; Keith Sinclair, 'Maori Nationalism and the European Economy, 1850–60' (1952) 5(18) *Historical Studies: Australia and New Zealand* 119, 119 –134.

[23] Philippa Mein Smith, *A Concise History of New Zealand* (Cambridge University Press, 2012); Tom Brooking, *The History of New Zealand* (Greenwood Publishing Group, 2004) 54.

mana' (political sovereignty) to be reasserted, and Maori chieftainship and land rights restored.[24] Overall, the Maori King Movement acknowledged the importance of the partnership between Maori self-determination and self-governance, and the Queen's sovereignty established under the *Treaty*.[25]

Maori self-determination became a reality following the wars with the establishment of a Maori Parliament in 1892[26] to represent Maori tribal and intertribal grievances through passing laws and resolutions on matters that concerned Maori affairs. Importantly, it functioned without any administering authority.[27] The Maori Parliament remained until it was disbanded in 1902[28] as a result of its members failing to cooperate with one another – creating a barrier to achieving its objectives.[29] While the Maori Parliament functioned, it proved a useful mechanism for Maori representation during a period in which the Crown had gradually withdrawn from Maori affairs and land management in New Zealand.[30]

With the dawn of the 'Liberal Era' and party politics in New Zealand in 1891,[31] the possibility of protection under Crown *Treaty* obligations was increasingly under threat by the domination of the settler-State order.[32] Nevertheless, Maori continued to appeal unsuccessfully to the British Crown for protection from the 1880s to early 1900s.[33]

By 1907 New Zealand became a self-governing Dominion[34] and with the passing of the *Statute of Westminster Adoption Act 1947*, the New Zealand Parliament gained full law-making powers from Britain.[35] The *Constitution Act 1986* later replaced the *New Zealand Constitution Act 1852* (Imp)

---

[24] Barry Gustafson, *Constitutional Changes since 1870* (Heinemann Educational Books, 1969) 3; Orange (n 10) 180; Toon Van Meijl, 'Recognition, Redistribution and Reconciliation in Postcolonial Settler Nation-States' (September, 2003) 112(3) *The Journal of the Polynesian Society* 205, 260–279.
[25] Orange, ibid, 142–143.
[26] Allan Davidson and Peter J. Lineham, *Transplanted Christianity: Documents Illustrating Aspects of New Zealand Church History* (Dunsmore Press, 1987) 171.
[27] John A. Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909* (University of Washington Press, 1969) 48.
[28] Jane McRae, 'The Function and Style of Ruunanga in Maori Politics' (September 1984) 93 (3) *The Journal of the Polynesian Society* 283; Basil Keane, 'Kotahitanga' in Maria Bargh, *Maori and Parliament: Diverse Strategies and Compromises* (Huia Publishers, 2010) 1881.
[29] Williams (n 27) 98–112.
[30] Steven C. Bourassa and Ann Louise Strong, 'Restitution of Land to New Zealand Maori: The Role of Social Structure' (2002) 75(2) *Pacific Affairs* 227; Maria Humphries, 'Working With our Differences: A Contribution from New Zealand' (1992) 16(4) *Journal of Management Education* 28.
[31] R. P. Boast, 'The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891–1912' (2014) 12 *New Zealand Journal of Public and International Law* 81–2.
[32] David Hamer, 'Centralisation and Nationalism (1891–1912)' in K. Sinclair, *A History of New Zealand* (Allen Lane, 1980) 125.
[33] Orange (n 10) 205–25.
[34] J. Hight and H. D. Bamford, *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs Ltd, 1914) 381.
[35] *Statute of Westminster Adoption Act 1947*.

which meant from thereon institutional ties between New Zealand and Britain were finally severed.[36]

Since New Zealand independence, Maori have continued to struggle to ensure that their rights are protected and have turned to various domestic legislative agreements to do so. Domestic legislation explicitly focused on restoring and upholding Maori rights has become a new mechanism for guiding the expression of the New Zealand Government's relationship with Maori, through legislative and institutional acknowledgement of Maori self-determination rights[37] which together have acknowledged Maori independence and cultural autonomy within New Zealand[38] with implications for political participation.

The *Waikato Act*,[39] for instance, legislates the Deed of Settlement made on 22 May 1995 between the Crown and Waikato-Tainui (one of several Maori tribes).[40] The *Waikato Act* provides for the transfer of available Crown land in the Waikato region back to the Waikato-Tainui tribe along with compensation.[41] The Act formalises, through legislation, acknowledgement of past injustices concerning Maori land rights and is representative of the New Zealand Government's progressive commitment to providing compensation to Maori citizens for past government actions that have conflicted with rights recognised within the *Treaty*.[42]

Similarly, the *Ngai Tahu Act 1998* [43] provides a legislative mechanism that highlights failures of the Crown in honouring treaty conditions when purchasing Ngai Tahu land.[44] The Ngai Tahu claim on which the Act is based on identified issues of overexploitation and expropriation of Ngai Tahu sea

[36] *New Zealand Constitution Act 1852*; Barry Gustafson, *Constitutional Changes Since 1870* (Heinemann Educational Books, 1969) 7.
[37] Hocking (n 4)119. For example: The *Treaty of Waitangi 1840*, the *Waikato Raupatu Claims Settlement Act 1995*, the *Ngati Turangitukua Claims Settlement Act 1999*, the *Pouakani Claims Settlement Act 2000* and the *Principles for Crown Action on the Treaty of Waitangi*.
[38] E. Daes, Indigenous Peoples Permanent Sovereignty Over Natural Resources (Paper presented at the National Native Title Conference, Adelaide, Australian Human Rights and Equal Opportunity Commission, Sydney, 2004).
[39] *Waikato Raupatu Claims Settlement Act 1995.*
[40] Julie Walling, Desi Small-Rodriguez and Tahu Kukutai, 'Tallying Tribes: Waikato-Tainui in the Census and Iwi Register' (2009) 36 *Social Policy Journal of New Zealand* 2; Marama Muru-Lanning, 'The Analogous Boundaries of Ngaati Mahuta, Waikato-Tainui and Kiingitanga' (March, 2011) 120(1) *The Journal of the Polynesian Society* 9, 9–41
[41] Barbara Hocking, *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005) 123.
[42] The Act might be compared with the outcome of the Noongar Settlement, albeit in the context of a treaty that is absent in Australia: see Government of Western Australia, *South West Native Title Settlement* <https://www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.apsx> retrieved 6 November 2018; Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1; *Treaty of Waitangi 1840*.
[43] *Ngai Tahu Claims Settlement Act 1998.*
[44] N. Carrell, 'Innovation in Reconciliation – the Ngai Tahu Claims Settlement Act 1998' (1999) 3 *New Zealand Journal of Environmental Law* 179.

fisheries and the destruction of Ngai Tahu mahinga kai (traditional food gathering sources).[45] The Act has sought to rectify those wrongs through compensation for Maori affected.

Further examples of the New Zealand Government commitment to adhere to treaty principles[46] are found in both the *Waikato Act*[47] and *Ngai Tahu Act.*[48] Both statutes, most importantly, acknowledge Maori tribal sovereignty and self-determination by providing frameworks for Maori tribes to recover compensation for land loss as a result of wrongful past government actions.[49]

The *Waikato Act 1995*[50] and the *Te Runanga O Ngai Tahu Act 1996* also establish Maori corporate bodies so that each tribe is recognised as a distinct legal personality, enabling them to receive and manage settlement assets.[51] Both acts, alongside similar pieces of legislation like the *Maori Affairs Act 1953*, indicate a slow emergence within New Zealand of reformed Maori and New Zealand Government relations that point to a partnership between both parties.[52]

The rise of Maori self-determination throughout the 20th century, exercised through Maori body representation, has provided Maori with differentiated cultural representation within the overarching framework of governance under the colonial legal system.[53] In addition, representation has been undertaken by collective Maori interest groups.[54] These bodies have different functions[55] and objectives from legislated bodies, but nonetheless provide perspectives and support for Maori self-determination. Through continuous consultation with the New Zealand Government, before it takes action on matters connected to the collectives, Maori voices can be accommodated within the

[45] Nicola Wheen and Jacinta Ruru, 'Providing for Rahui in the Law of Aotearoa New Zealand' (June, 2011) 120(2) *The Journal of the Polynesian Society* 169, 169–182; Meredith Gibbs, 'The Ngai Tahu (Pounamu Vesting) Act 1997' (2000) 4 *New Zealand Journal of Environmental Law* 257; R. P. Boast, 'Maori Fisheries 1986–1998: A Reflection' (1999) 30 *Victoria University Wellington Law Review* 111.
[46] B. J. Lowe et al, 'Consultation, Collaboration and Dissemination' (2009) 39(4) *Journal of the Royal Society of New Zealand* 225; *Treaty of Waitangi 1840.*
[47] *Waikato Raupatu Claims Settlement Act 1995.*
[48] *Ngai Tahu Claims Settlement Act 1998.*
[49] Hocking (n 41) 123.
[50] *Waikato Raupatu Claims Settlement Act 1995.*
[51] Hocking (n 41) 124. By contrast, Aboriginal and Torres Strait Islander groups are required to form and register a prescribed body corporate upon a native title determination, to hold and manage native title rights and interests. See *Native Title Act 1993* (Cth), s 56.
[52] *New Zealand Maori Council Te Wahanga Tuatahi* (known as the *Kaupapa* 'Brown Paper' 1983); Maori Affairs Bill 1987 (no 124), Explanatory Note, 'The Genesis of the Bill' (NZ).
[53] James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901) 51.
[54] *Royal Commission on Social Policy* (New Zealand Government Printer, 1988), [2], [77].
[55] Louise Humpage, 'Revision Required: Reconciling New Zealand Citizenship With Māori Nationalisms' (2008) 10(3) *National Identities* 248; Iris Marion Young, 'Residential Segregation and Differentiated Citizenship' (1999) 3(2) *Citizenship Studies* 237; Nicole Roughan, 'Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy' (2005) 3 *New Zealand Journal of Public and International Law* 285; Dominic O'Sullivan, 'Maori Self-determination and a Liberal Theory of Indigeneity' in Marc Woons, *Restoring Indigenous Self-Determination* (E-International Relations, 2014) 65.

body politic and, more particularly, in governmental decision-making on matters affecting Maori themselves.[56]

B. Differentiated Maori Interests

Alongside the constitutional, legislative and treaty arrangements that collectively promoted aspects of Maori self-determination, there was an increase in formal representative bodies.[57] This section examines some of the principal bodies to illustrate models of Indigenous political participation.

As early as 1840, a Protectorate was established which, although a government-established body and not in that sense representative of Maori voices,[58] had the intent behind its establishment to protect Maori rights under the *Treaty of Waitangi* by advising the Governor on Maori affairs.[59] The Protectorate would also provide Maori interpretative services for New Zealand courts, colonial officials and the military.[60] In a similar vein, but much later, the Native Department provided support services for Maori with land management and healthcare, later focusing on achieving economic equality and employment for Maori.[61] Throughout the mid-1900s, the Department took on more of a welfare role for Maori citizens. By 1947, it was then renamed to the 'Department of Maori Affairs' with the word 'native' being substituted with 'Maori' in all official references and dealings with the Department.[62]

---

[56] B. J. Lowe et al, 'Consultation, Collaboration and Dissemination' (2009) 39(4) *Journal of the Royal Society of New Zealand* 227.

[57] Dominic O'Sullivan, 'Maori Self-determination and a Liberal Theory of Indigeneity' in Marc Woons, *Restoring Indigenous Self-Determination* (E-International Relations, 2014) 65; W. Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1996); T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, 1999); K. Shaw, *Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (Routledge, 2008) 8–9; R. Maaka and A. Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, 2005); M. Stewart-Harawira, *The New Imperial Order. Indigenous Responses to Globalization* (Zed Books, 2005).

[58] Alan Lester and Fae Dussart, 'Trajectories of Protection: Protectorates of Aborigines in Early 19th Century Australia and Aotearoa New Zealand' (2008) 64(3) *New Zealand Geographer* 206; J. G. A. Pocock, 'Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi' (1997–1998) 43 *McGill Law Journal* 484; John Luxton, *Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress* (The Ministry of Maori Development, 2008) 5 <file:///C:/Users/danil/Downloads/Working-paper-4-te-puni-kokiri.pdf>.

[59] Rachel Standfield, 'The Vacillating Manners and Sentiments of these People: Mobility, Civilisation and Dispossession in the Work of William Thomas with the Port Phillip Aboriginal Protectorate' (2011) 15(9) *Law Text Culture* 162.

[60] John Luxton, *Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress* (The Ministry of Maori Development, 2008) 6 <file:///C:/Users/danil/Downloads/Working-paper-4-te-puni-kokiri.pdf>.

[61] Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Auckland University Press, 2013) 151.

[62] Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation* (University of British Columbia Press, 1995) 156–7; Allan Davidson and Peter J. Lineham, *Transplanted Christianity: Documents Illustrating Aspects of New Zealand Church History* (Dunsmore Press, 1987) 171.

From the mid-1900s until 1989, the Department's portfolio also continued to expand to include the office of the Maori Trustee; housing, vocational training, relocation; the administration of New Zealand's Pacific Island affairs for those living in New Zealand (including the protection of their welfare); and Maori language revival.[63] Those expansions in the Department led to the establishment of district Maori councils and the New Zealand Maori Council to represent Maori interests in New Zealand policies.[64] However, it should be noted that each adaptation of the Department, despite the intent and objectives behind those actions, were government-led and were not a representative result of Maori consultation reflective of distinct Maori cultural needs and aspirations.

In contrast to government-centred departmental consideration, there are a number of prominent bodies comprising Maori themselves such as the Federation of Maori Authorities, the Maori Women's Welfare League, the Te Ohu Kaimoana Trustee Limited and the Tuhono. Each of these functions in a different way.

The Tuhono is a charitable trust established under the *Electoral Act 1993* responsible for holding a register of iwi (tribe) affiliation to facilitate their communication and interaction between one another, including their members.[65] Tuhono links Maori to their iwi organisation through the collection of consenting Maori voters' up-to-date electoral data.[66] In reconnecting Maori citizens, tribes and services, this organisation has promoted an empowered and united community amongst Maori and iwi organisations across New Zealand.

Other bodies are established under the *Maori Fisheries Act 2004*, focusing on specific aspects of Maori rights that form important components of Maori cultural identity and self-determination. For instance, the Federation of Maori Authorities is responsible for the promotion and development of sound management and economic advancement rights of national Maori Authorities.[67]

Also concerned with fishing rights, the Te Ohu Kaimoana Trustee Limited (also known as the Maori Fisheries Trust) is responsible for creating and sustaining an environment for successful 'iwi'

[63] Davidson and Lineham, ibid.
[64] Ibid, 159; Augie Fleras, 'From Social Welfare to Community Development: Maori Policy and the Department of Maori Affairs in New Zealand' (1984) 19 *Community Development Journal* 32.
[65] Sections 111A to 111F of the *Electoral Act 1993* require the Electoral Commission to seek the consent of Maori electors to provide their electoral information to the Tuhono Trust. The Tuhono Trust then provides iwi organisations and other Maori organisations with Maori elector information to establish and maintain registers of iwi affiliations.
[66] John Taylor, 'Indigenous Peoples and Indicators of Well-Being: Australian Perspectives on United Nations Global Frameworks' (2007) 87(1) *Social Indicators Research* 121.
[67] *Maori Fisheries Act 2004.*

management of their commercial, customary and recreational fisheries.[68] Te Ohu Kaimoana provides policy advice on fisheries to iwi, the Maori Fisheries Settlement entities and industry groups which cover management issues, stock abundance and sustainability, regulations around fisheries compliance, marine protected areas, customary regulations and aquaculture management.[69] The body is comprised of seven directors who are appointed by Te Kawai Taumata (Maori Fisheries Electoral College) – a mechanism promoting its authority as a representative body.[70]

This organisation must ensure iwi receive 20 per cent of designated Aquaculture Management Areas under the *Maori Commercial Aquaculture Settlement Act 2004*.[71] It has allocated $500 million of fisheries assets to Maori ownership and management through effective consultation with iwi stakeholders on legislative, regulatory and policy developments that affect Maori Fisheries Settlements.[72]

Finally, the Maori Women's Welfare League focuses on promoting wellbeing amongst Maori women through the spiritual, physical, social and economic development. This body is comprised of eight regional representatives to allow for Maori women's representation to include Taitokerau, Tamaki Makaurau, Tainui, Tairawhiti, Waiariki, Aotea, Ikaroa and Te Waipounamu women's interests.[73]

Each of those bodies illustrates the operation of differentiated Maori interests represented through a recognised body. Each body can focus on achieving beneficial outcomes for the specific interests they represent and provides a mechanism for consultation by the New Zealand Government and consent by those affected.

In addition to these localised bodies, there are two Maori representative bodies that exist within the broader governance structure, namely the Waitangi Tribunal and New Zealand Maori Council. Both are tasked with quite broad functions at a national level in New Zealand, representing Maori rights and interests in New Zealand laws and policies that affect their cultural affairs.

---

[68] Te Ohu Kaimoana is established under s 33 of the *Maori Fisheries Act 2004*; *Iwi – Maori Dictionary* (Maoridictionary.Co.Nz, 2019) <https://maoridictionary.co.nz/search?keywords=iwi>.
[69] Sir T. O'Regan, 'Speech Notes for the Maori Commercial Fisheries Conference' (Heritage Hotel, 11 May 1999).
[70] R. Townsend, *Case Studies in Fisheries Self-Governance* (Food and Agriculture Organisation of the United Nations FAO, Communication Division, 2008) 323.
[71] *Maori Commercial Aquaculture Settlement Act 2004.*
[72] *What We Do* (Te Ohu Kaimoana, 2019) <https://teohu.maori.nz/what-we-do/>.
[73] *Maori Fisheries Act 2004*, sch 5 ss 5, 29; *Who We Are – Maori Women's Welfare League* (Maori Women's Welfare League, 2019) <http://mwwl.org.nz/who-we-are/>; Mira Szaszy and Anne Else, 'Recording the History of the Maori Women's Welfare League' (1990) 6(1) *Women's Studies Journal* 17; Linda Bryder and Derek A. Dow, 'Introduction: Maori Health History, Past, Present and Future' (2001) 3 (1) *Maori Health and History* 3.

C. The Waitangi Tribunal

The Waitangi Tribunal, established under the *Treaty of Waitangi Act 1975*, plays an important role in protecting Maori self-determination rights through its role as a permanent commission of inquiry. The Tribunal makes recommendations on claims brought by Maori relating to Crown actions that breach the promises made in the *Treaty*.[74]

Breaches of *Treaty* promises generally occur when there is a conflict with interpretations of the Te Reo Maori and English versions of the *Treaty*.[75] When that occurs, the Tribunal must determine the meaning and effect of articles contained within both versions of the *Treaty*, based on claims that come before it.[76] Previously, claims that dealt with breaches of the partnership between the Crown and Maori identified in *Treaty* principles went disregarded by courts and tribunals.[77]

The *Queen v Symonds*[78] was the first New Zealand case of political controversy surrounding Maori rights that considered the extent the Crown could have control over profits to be made in the process of extinguishing Maori title and making land available to incoming settlers. It was not until that decision of *The Queen v Symonds*[79] and its flow on effect seen in subsequent progression in New Zealand case law surrounding Maori rights, and the first substantive report of the Waitangi Tribunal in 1983,[80] that the Maori version of the *Treaty* (Te Tiriti) was given proper respect and value in the New Zealand legal system. Before that, the views and legal standards from over two centuries of case law in colonial and English courts took precedence.[81]

The Tribunal must, under the *Treaty of Waitangi Act 1975*, 'determine the meaning and effect of the *Treaty* as embodied in the two texts and to decide issues raised by the differences between them'.[82] To do so, the Tribunal takes a Maori approach to interpret the *Treaty* to imply that its Wairau or

[74] *Waitangi Tribunal* (Waitangitribunal.govt.nz, 2018) <https://waitangitribunal.govt.nz/>
[75] R. G. Mulgan and Peter Aimer, *Politics in New Zealand* (Auckland University Press, 2004) 60.
[76] *Waitangi Tribunal* (Waitangitribunal.govt.nz, 2018) <https://waitangitribunal.govt.nz/>.
[77] Ian Hugh Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, 1989) 80; *Treaty of Waitangi 1840*.
[78] *The Queen v Symonds* (1847) NZ PCC 387.
[79] *The Queen v Symonds* (1847) NZ PCC 387, [390] (Martin CJ and Chapman J).
[80] *The Motunui–Waitara Report* (1983).
[81] *The Queen v Symonds* (1847) NZ PCC 387, [390] (Chapman J).
[82] *Treaty of Waitangi Act 1975*, s 5 (2).

spirit is something more than a literal construction of the actual words used.[83] The spirit of the *Treaty* in that context goes far beyond its written words.[84]

The Tribunal's work has been significant in protecting Maori rights and claims to protecting their rights to cultural identity. For example, in the *Te Atiawa Report 1983*, the Tribunal identified in its recommendations surrounding Maori fishery rights that the Maori language version of the *Treaty* does not explicitly refer to fishing grounds of Maori. [85] Thus, it was unclear as to whether those rights fell within the purview of the *Treaty*.

However, fishing grounds were provided for within the English version of the *Treaty* and so the Tribunal, in applying a broad purposive approach to interpreting the scope of rights covered by the *Treaty*, held that those rights were at the very least implied in the Maori version.[86] The Tribunal has been fundamental to ensuring those types of cultural rights are protected and, as such, has made recommendations in successive reports that those rights are covered within other legislative instruments in New Zealand and are taken into consideration.[87]

Another example of how the New Zealand Government has had to not only recognise Maori cultural interests but, most importantly, actively protect those interests, can be found with the Tribunal's role in New Zealand's 'Manukau claim' which is considered one of New Zealand's most wide-ranging claims.[88] The Tribunal produced a report from that claim with several recommendations the Tribunal has had to consider.[89] The Manukau Report findings from the Waitangi Tribunal recognised the importance and history behind Maori development and exploitation of natural resources.[90] The Manukau claim highlighted significant ongoing

---

[83] Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' [2004] 26(3) *Sydney Law Review* 307, part c; Maui L. Hudson and Khyla Russell, 'The Treaty of Waitangi and Research Ethics in Aotearoa' (2008) 6(1) *Journal of Bioethical Inquiry* 62; Louise Humpage, Augie Fleras, 'Intersecting Discourses: Closing the Gaps, Social Justice and the Treaty of Waitangi' (July, 2001) 16 *Social Policy Journal of New Zealand* 44.

[84] *Te Atiawa Report 1983*, [10.1]; Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (Government Press, Wellington, 1989); *New Zealand Maori Council v Attorney-General* [1994] NZLR 513.

[85] Ian Hugh Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, 1989) 80; *Treaty of Waitangi 1840.*

[86] *Te Atiawa Report 1983*, [10.1].

[87] Ian Hugh Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, 1989) 81. For example, the *Treaty of Waitangi Act 1975; Maori Commercial Aquaculture Settlement Act 2004; Maori Fisheries Act 2004; Waikato Raupatu Claims Settlement Act 1995; Ngai Tahu Claims Settlement Act 1998.*

[88] Keri Mills, 'The Changing Relationship between Maori and Environmentalists in 1970s and 1980s New Zealand' (2009) 7(3) *History Compass* 690; *Report of the Waitangi Tribunal on the Kaituna Claim (Wai 4)* (Government Printing Office, 1984) 32.

[89] *Finding of the Waitangi Tribunal on the Manukau Claim* (WAI 8/1985) [8.3] <https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68495207/The%20Manukau%20Report%201985.pdf>; *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, 1989).

[90] Manukau Claim, ibid, [1]; Maori and Pakeha Perspectives, ibid.

industrialisation and pollution of the Manukau Harbour and identified the impact that the loss of certain surrounding lands of the Manukau tribes have had on their protection of cultural identity under the *Treaty*.[91] The claim alleged there was a failure of recognition of the Crown's promise to protect Maori rights to having undisturbed possession of their lands, homes and fisheries.[92] Maori rights of those from the Manukau and lower Waikato river areas were limited or completely denied.[93]

As such, the Tribunal identified historic and contemporary issues that continue to limit or deny Maori from Manukau and lower Waikato river areas of their rights and, from that information, made numerous law and policy reform recommendations to the New Zealand Government.[94]

The Tribunal's role and function also extend to contributing to protecting the Maori language as was seen in its consideration of and advice given in the Te Reo claim of 1985.[95] The Te Reo (meaning 'language') claim advocated for official recognition of Te Reo in New Zealand for all purposes.[96] The Tribunal was tasked with taking into consideration the history of the Maori language since the *Treaty of Waitangi*. In doing so, it acknowledged precedents of parliamentary proceedings during the establishment of the colonial government of 1852, in both Maori and English.[97]

When the Tribunal considered the historical context of Maori use of language and elders' testimony it identified that those rights had been limited, particularly through the prohibition on children in schools from speaking their native tongue.[98] Limitations were exacerbated as more Maori moved from rural areas to the city, affecting knowledge of Te Reo with the inevitable consequence that most Maori lost fluency in Te Reo.[99]

---

[91] Manukau Claim (n 89) [1].
[92] Bryce Ringer, 'What happened at mangere in 1863?' (2010) 22(1) *New Zealand Legacy* 9, 9–13; Chris Jacobson et al, 'Mainstreaming Indigenous Perspectives: 25 Years of New Zealand's Resource Management Act' (2016) 23(4) *Australasian Journal of Environmental Management* 331, 331–337.
[93] Manukau Claim (n 89) [2].
[94] Ibid, [98–99].
[95] Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation* (University of British Columbia Press, 1995) 188.
[96] *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Waitangi Tribunal Department of Justice, 2nd ed, 1989) [3.1.1]; Rachael Ka'Ai-Mahuta, 'The Impact of Colonisation on Te Reo Maori: A Critical Review of the State Education System' (2011) 4 *Te Kaharoa* 196.
[97] Armitage (n 95) 189.
[98] Report of the Waitangi Tribunal (n 96) [3.2.4].
[99] Ibid, [3.2.10].

In that context, the Tribunal was tasked with firstly establishing its jurisdiction under Article 2 of the Maori version of the *Treaty*.[100] The Tribunal held that Article 2 of the Maori version assured protection of chief authority over 'all their treasures' or 'valued possessions' and that language was a 'valued possession'.[101] The Tribunal reviewed all evidence put forth in the claim that showed clear restrictions on, and limited protection of, Maori speaking Te Reo.[102] On the evidence, the Tribunal was able to conclude that Maori interests in New Zealand courts, education and broadcasting had been disregarded and efforts should be made to rectify the impacts of such restrictions to Maori cultural identity.[103]

The recommendations made by the Tribunal included the establishment of a permanent body to supervise the use of Te Reo by Maori in New Zealand courts and Maori dealings with government agencies. The Tribunal also recommended that an inquiry be conducted into New Zealand Department of Education policies to enable Te Reo to be taught in schools; expansion of the use of Te Reo in broadcasting; and designated positions in the State Services Commission marked as bilingual.[104] Those recommendations were all accepted by the New Zealand Government despite opposition raised by broader society. The Tribunal played the vital role of protecting Teo Reo – a fundamental aspect of Maori cultural identity and thus self-determination.[105]

The Tribunal has in that context, contributed significantly to the protection of Maori cultural identity since 1985 where its function was expanded from hearing only current claims to being enabled to investigate events dating back to 1840. The expanding upon the types of claims the Tribunal can hear and investigate has meant that hundreds of historical claims by Maori could be heard which in turn, has required the Tribunal to group those historical claims into district inquiries.

---

[100] Roy W. Perrett, 'Indigenous Language Rights and Political Theory: The Case of Te Reo Maori' (2000) 78(3) *Australasian Journal of Philosophy* 405.
[101] *Treaty of Waitangi 1840*, art 2; Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation* (University of British Columbia Press, 1995) 189; *Report of the Waitangi Tribunal* (n 96) [4.2.3].
[102] *Report of the Waitangi Tribunal* (n 97) 8.
[103] Armitage (n 95) 189; *Report of the Waitangi Tribunal* (n 96) [6.3.6].
[104] Report of the Waitangi Tribunal, ibid, 51.
[105] *New Zealand Yearbook* (Department of Statistics, 1990) [217] <https://www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1990/NZOYB_1990.html#idpreface_1_218>; The Tribunal's role is enhanced through its interpretive approach as evidenced with the interpretative principles set out in the 1987 Report on the Orakei Claim (Orakei Claim) when it considers and makes recommendations on differing claims that come before it. See Report of the Waitangi Tribunal (n 97) 51; C. H. Schreuer, 'The Interpretation of Treaties by Domestic Courts' (1971) 45 *British Year Book of International Law* 255; *Report of the Waitangi Tribunal on the Orakei Claim* (The Waitangi Tribunal Department of Justice, 1st ed, 1987) 179.

By 2015, the Tribunal had registered 2501 claims, fully or partly reported on 1028 claims, issued 123 final reports and issued district reports covering 79 percent of New Zealand.[106]

The primary function of the Tribunal is to inquire into Maori claims made before it that concern the practical implementation of the *Treaty of Waitangi 1840* and whether the New Zealand government has acted inconsistently with treaty principles. If the Tribunal finds that the New Zealand government has acted inconsistently with treaty principles, it must then determine whether its actions are prejudice to Maori claimants. If it finds that they are, it must then determine what actions should be taken to compensate for, remove or prevent the prejudice.[107] The Tribunal can also refer claims to mediation, and in certain circumstances, make binding recommendations for the return of land owned by the Crown where the Crown and the claimants have not been able to negotiate a settlement.[108]

The Tribunal's structure includes a chairperson and up to 20 members who must be appointed by the Governor-General. Maori Land Court judges and members who hold legal qualification can also serve as inquiry presiding officers. As part of its broader structure, the Tribunal also has a 'Governance Group' which is convened by the chairperson and is responsible for the strategic direction, and reviews the progress of, the Tribunal's work programme. [109] The Ministry of Justice of the Tribunal is responsible for providing operational support to the Tribunal through the Waitangi Tribunal Unit which delivers a range of services including being a registrar, undertaking event management, research, report writing, and administrative services.[110]

Overall, the Tribunal is the primary forum in New Zealand for hearing and reporting on Maori claims against the Crown that allege breaches of the Treaty. In doing so, it contributes to fair resolutions of Treaty claims and to uphold the partnership relationship between Maori and the Crown.[111]

Therefore, the Tribunal provides a useful example of Maori representation that protects the expression of their cultural identity. It establishes a mechanism that affords Maori a sense of control over their affairs through their ability to bring claims seeking to uphold principles of responsible

[106] 'Past, Present & Future of the Waitangi Tribunal' (*Waitangi Tribunal*, 2017) <https://waitangitribunal.govt.nz/about-waitangi-tribunal/past-present-future-of-waitangi-tribunal/>.
[107] *Strategic Direction 2014-2025* (Waitangi Tribunal, 2014) 2.
[108] Ibid.
[109] Ibid, 1.
[110] Ibid, 1.
[111] Ibid.

government and accountability under obligations owed to them under the *Treaty*. This has allowed Maori to ensure the New Zealand Government seeks their prior consent on matters concerning Maori affairs and land, through consultation on and inclusion in decision-making processes.[112]

Although the Tribunal's powers are limited to only acting as an advisory body,[113] its recommendations are given weight[114] and support the legitimacy of New Zealand constitutional arrangements involving Maori.[115] The Tribunal's function, powers, and interpretative principles all exemplify how an Indigenous representative body can self-govern, culturally empower and protect Indigenous cultural identity whilst providing a mechanism of representation, accountability and consultation for Maori citizens.

D. The New Zealand Maori Council

In addition to the Tribunal, Maori of New Zealand also have an established New Zealand Maori Council to represent their cultural identity and interests as a consultative and representative body on their behalf, with the New Zealand Government. The New Zealand Maori Council, alongside the advice and representation the Tribunal provides, also works to guide necessary policy reform within New Zealand that impacts upon Maori self-determination rights and cultural identity.

The New Zealand Maori Council had initially formed part of the Kotahitanga (unity) movement and creation of Maori parliaments during the 1800s.[116] The Kotahitanga movement was aimed at unifying Maori in a non-traditional and non-tribal specific way to assert collective cultural autonomy and independence.[117] The movement was guided by Maori chiefs from across New Zealand who had even chosen a separate flag and signed a declaration of independence to officially acknowledge the unification of Maori tribes as independent from the State.[118] Both the unification and increasing independence of Maori aspects of the Kotahitanga movement have been fundamental

---

[112] *Report of the Waitangi Tribunal on the Orakei Claim* (The Waitangi Tribunal Department of Justice, 1st ed, 1987) 179.
[113] Amy L. Catalinac, 'The Establishment and Subsequent Expansion of the Waitangi Tribunal: The Politics of Agenda Setting' (June, 2004) 56(1) *Political Science* 21; Meredith Gibbs, 'Justice as Reconciliation and Restoring Mana in New Zealand's Treaty of Waitangi Settlement Process' (2006) 58(2) *Political Science* 15.
[114] Kerensa Johnston, 'The Treaty of Waitangi' (2004) *New Zealand Law Review* 613.
[115] Ian Hugh Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, 1989) 15; *Treaty of Waitangi (State Enterprises) Act 1988.*
[116] Basil Keane, Kotahitanga – Unity Movements (2012) <https://teara.govt.nz/en/kotahitanga-unity-movements>; I. H. Kawharu, 'Kotahitanga: Visions of Unity' (September, 1992) 101(3) *The Journal of the Polynesian Society* 221, 221–240.
[117] Margaret Ann Franklin, 'Maori Politics and the Treaty of Waitangi' (1989) 61(2) *The Australian Quarterly*, 292; Hal Levine and Manuka Henare, 'Mana Maori Motuhake: Maori Self-Determination' (1994) *Pacific Viewpoint* 193.
[118] Angela Ballara, 'Pakeha Uses Takitimutanga Who Owns Tribal Tradition?' (March, 1993) *Stout Centre Review* 17.

to Maori and their exercise of self-determination,[119] notably through the establishment of Maori Councils at national and district levels, arising from the Kotahitanga movement.[120]

Maori District Councils were the first to be established by 1945[121] and by 1962 the New Zealand Maori Council was established as a national legislative body under the *Maori Welfare Act 1962*.[122] The New Zealand Maori Council is comprised of an executive which has up to three delegates from each of the 16 District Maori Councils across New Zealand.[123] The delegates hold a three-year tenure until the next election cycle.[124] Its functions and role are set out under the *Maori Community Development Act 1962*, to ensure it continuously consults with Maori Committees and makes representations on their behalf to Ministers and other stakeholders.[125] The consultation undertaken by the Council has been beneficial for and integral to connecting all District Maori Councils to the New Zealand Government on matters that concern Maori rights and affairs.[126]

As a national and community-based policy adviser, the Council deals predominantly with policies that affect the partnership, protection, consultation and compensation for Maori.[127] The Council undertakes that task through providing policy advice and guidance to the New Zealand Government according to the objectives of and Maori rights embodied in the *Treaty of Waitangi*, alongside and complementary to the Waitangi Tribunal. The Council assists with claims and disputes before the Waitangi Tribunal and frequently represents Maori where Maori seek outcomes in common, rather than where they seek outcomes concerned with iwi (their tribe) alone.[128] The following sections outline the impact of the Maori Council on self-determination, outlining three important claims.

1 The Land Case

The Council's first landmark dispute was the '*Land Case*'.[129] The *Land Case* came as a result of New Zealand's fourth Labour Government enacting significant social reforms and involved the

[119] Keane (n 116).
[120] *Our History* (Maori Council, 2018) <https://maoricouncil.com/about-us/our-history/>.
[121] Richard S. Hill, 'Social Revolution on a Small Scale: Official Maori Committees of the 1950s' (Paper presented to the New Zealand Historical Association Conference, 24–27 Nov 2005) 7–8.
[122] The *Maori Welfare Act 1962* renamed the *Maori Community Development Act 1962* and later replaced by s 19(1) of the *Maori Purposes Act 1979*.
[123] Richard S. Hill, 'Social Revolution on a Small Scale: Official Maori Committees of the 1950s' (Paper presented to the New Zealand Historical Association Conference, 24–27 Nov 2005) 9.
[124] Claudia Orange, 'An Exercise in Maori Autonomy: The Rise and Demise of the Maori War Effort Organisation' in P. Whitney Lackenbauer, R. Scott Sheffield and Craig Leslie Mantle, *Aboriginal Peoples and Military Participation* (Canadian Defence Academy Press, 2007) 237.
[125] Te Puni Kokiri, 'Inquiry into the Maori Community Development Act 1962: Advisers Report to Maori Affairs Committee' (October 2010) 12.
[126] *Our Purpose* (Maori Council, 2018) <https://maoricouncil.com/about-us/our-purpose/>.
[127] Ibid.
[128] Ibid.
[129] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

enactment of the *State-Owned Enterprises Act 1986* which allowed assets and land owned by the Crown to be transferred to State-Owned Enterprises.[130]

Before the enactment of the *State-Owned Enterprises Act 1986*, the Waitangi Tribunal issued an interim report following the introduction of the Bill in the House of Representatives on 30 September 1986.[131] The report expressed concerns that with land being transferred to State-Owned Enterprises such as the Forestry Corporation or Land Corporation, the Crown would lack the power to return the land to iwi.[132] Furthermore, the land would likely be sold to a private buyer from a State-Owned Enterprise or the State-Owned Enterprise would be unlikely to sell the land back to the Crown.[133]

The New Zealand Government's response to the interim report was to introduce amendments to the *State-Owned Enterprises Act 1986*. Under s 9, 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the *Treaty of Waitangi*'.[134] In addition, s 27 made provision for land claims: where a claim had not been submitted to the Tribunal before 18 December 1986, the land could be transferred to a State enterprise with the conferral of registered title, and that State enterprise could dispose of the land in the course of its ordinary business activities.[135] This raised serious concerns for the New Zealand Maori Council, as significant amounts of land were implicated in the Act's procedures.[136]

Consequently, the New Zealand Maori Council challenged limitations to Maori land rights under s 27 of the Act in the *Lands Case*.[137] It argued that although the Crown may still compensate according to loss of land rights, the prospect of the restoration of the land to Maori ownership following a later claim would be slim.[138]

Ultimately the court in the *Land Case* found in favour of the Maori Council's claim and as a result the government was prevented from alienating land and resources subject to the Waitangi Tribunal and *Treaty of Waitangi*, in transfers to State-Owned Enterprises.[139]

---

[130] R. K. Paterson, 'Protecting Taonga: The Cultural Heritage of the New Zealand Maori' (1999) 8(1) *International Journal of Cultural Property* 108; *State-Owned Enterprises Act 1986*, s 29A.
[131] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 707*; The Treaty of Waitangi Act 1975 Interim Report* (The Waitangi Tribunal, 1986).
[132] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 707–709.
[133] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 707–709.
[134] *State-Owned Enterprises Act 1986,* s 9.
[135] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 653.
[136] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 643.
[137] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 687.
[138] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 689.
[139] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, [29].

2 Muriwhenua Fishery Claim

The Maori Council has also contributed to the protection of Maori fishing rights in the Muriwhenua fishery claim.[140] This claim identified that Maori fishing rights can be classified as property similar to land rights, differing though as to the extent of activities contemplated.[141] For instance, the term 'fisheries' as identified in the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* is inclusive of the fishing location, the types of fish caught, the right to catch them and even the methods used to catch them. Fishing rights have been key to not only Maori survival but also to their economy in terms of inter-tribal trade.[142]

Post-colonisation laws and policies had restricted Maori fishing rights to satisfying personal needs only.[143] The restrictions enabled the government to manage fisheries in place of traditional Maori systems[144] and consequently the national fishing industry ignored already established Maori fishing communities that had the potential to develop a fishing trade.[145] Non-Maori commercial operations of fishing led to serious overfishing in the inshore fishery industry by the mid-1900s which threatened the ancient tradition and connection to the seas of the Muriwhenua people.[146]

By 1986, the New Zealand Government introduced a quota management system apportioning the total commercial catch to individual commercial fishers.[147] The quota system conflicted with *Treaty* principles as it apportioned full, exclusive and undisturbed possession of the property in fishing to non-Maori that had been guaranteed to Maori under the *Treaty*.[148] In response, Muriwhenua brought a claim seeking to restore their tribal base, and re-establish their ancestral association with the seas to provide opportunities 'for their employment, the development of an industrial capability, the restoration of their communities and the protection of their resource'.[149] The claimants included leading tribal elders of the Muriwhenua area who represented Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takoto and Ngati Kahu. The claim included Maori incorporations and authorities of the district.[150]

---

[140] *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (WAI 22)* (GP Publications, 2nd ed, 1989).
[141] Ibid, 96.
[142] Ibid, 16.
[143] Ibid, 239.
[144] Ibid.
[145] Ibid, [xviii]
[146] Ibid, [S3.1].
[147] Ibid, 25.
[148] Ibid, [S5.2].
[149] Ibid, [S6.2].
[150] Ibid, [1.4].

The claim was successful and in 1987 the High Court granted an injunction to stop the implementation of the quota management system in the Muriwhenua district on the basis of a breach of Maori fishing rights under the *Treaty*.[151] In 1989 the Crown and the Maori parties entered an interim agreement[152] which later developed into a full a final settlement in 1992.[153]

Subsequently, the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* was passed to ensure the Deed of Settlement bound non-parties.[154] The *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* required the Crown to pay the Treaty of Waitangi Fisheries Commission $150 million so that it could buy a 50 per cent share in Sealord Ltd (New Zealand fishing company that held 26 per cent of the total fishing quota).[155] Maori were also required under the Act to stop certain civil proceedings to fisheries, endorsement of the quota management system and to give up claims to commercial fishing rights.[156]

The Muriwhenua claim that resulted in the Fisheries Settlement was fundamental for Maori self-determination. The Settlement formed the foundation of Maori management of resources by establishing property rights in those resources legislatively acknowledged outside of Maori law.[157]

3 Wai 150 (Broadcasting Rights)

In 1990, Sir Graham Latimer lodged the Wai 150 claim on behalf of the New Zealand Maori Council, seeking an interim ruling to place a caveat on the radio spectrum policy contained within the *Radio Communications Act 1989.* The intent was to stop implementation of the radio spectrum policy within the Act until negotiations and an agreement had been entered into that protected Maori title to radiofrequency products identified within the Act.[158]

In the absence of an agreement, the claim submitted that the sale of frequency management licences under the *Radio Communications Act 1989* would breach the *Treaty of Waitangi* and Maori interests.[159] The claim was successful and it was held that the *Radio Communications Act 1989*

---

[151] *New Zealand Maori Council v Te Runanga o Muriwhenua* [1987] NZHR (Greig J); *Ngai Tahu Maori Trust Board v Attorney-General* [1987] NZHR (Greig J).
[152] J. Kelsey, *A Question of Honour? Labour and the Treaty 1984–1989* (Allen & Unwin, 1990) 295.
[153] Waitangi Tribunal, *The Fisheries Settlement Report* (1992).
[154] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* (1993) 2 NZLR [301]–[308].
[155] Shane Heremaia, 'Native Title to Commercial Fisheries in Aotearoa/New Zealand' (2000) 4(29) *Indigenous Law Bulletin* 15.
[156] *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (WAI 22)* (GP Publications, 2nd ed, 1989) 130.
[157] Heremaia (n 155).
[158] *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Brooker and Friend Ltd, 1990) [11]; *The Radio Spectrum Management and Development Final Report (Wai 776)* (GP Publications, 1999) [11] <https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68205950/Wai776%20final.pdf>.
[159] *The Radio Spectrum Management and Development Final Report (Wai 776)* (GP Publications, 1999) [11] <https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68205950/Wai776%20final.pdf>.

prohibits the Crown from alienating management rights to the spectrum from 9 kHz to 3000 GHz, without consultation with Maori.[160] Also, the Act was held to not provide Maori with a fair and equitable share of those rights. The court acknowledged in this claim that Maori have the right to the technological exploitation of that spectrum under the *Treaty of Waitangi*.[161]

In these three case studies of advocacy by the New Zealand Maori Council, it is clear that it functions to promote Maori self-determination through culture with implications for the protection of economic interests. It does so as a grassroots representative body, governed according to Maori norms, that has a voice within the New Zealand system of governance. Importantly, however, it is supported in its work through the provisions of the *Treaty*. It is, however, its formal recognition as a Maori institution that promotes substantive political participation and outcomes for Maori self-determination.

III. CANADIAN FIRST NATIONS' SELF-DETERMINATION

Like New Zealand, Canada's Constitution does not explicitly recognise First Nation rights to self-determination. However, Canada's *Constitution Act 1867* did recognise the special constitutional relationship that exists between the First Nations of Canada and the Crown.[162] Section 91 (24) provided an accountability provision of the Crown to legally and politically protect the rights of Canadian First Nations.[163]

In the same way that the race power in the *Australian Constitution* is not required to be read beneficially,[164] so too has the Canadian provision been applied by the Canadian Parliament to regulate almost all aspects of First Nation lives, define the Indian status of First Nations and restrict their movement on and off reserves. The exercise of these powers has historically deprived First Nations of equal access to civil rights.[165]

Since the implementation of the *Constitution Act 1982* and entrenchment of the *Charter of Rights and Freedoms 1982*, recognition of First Nation rights in Canada has been better defined and

[160] *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Brooker and Friend Ltd, 1990) [4.1]–[4.2].
[161] Ibid, 45; *Treaty of Waitangi 1840*.
[162] Brian Slattery, 'First Nations and the Constitution: A Question of Trust' (1992) 71 *Canadian Bar Review* 264; M. Asch and P. Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on R v Sparrow' (1991) 29 *Alternative Law Review* 498.
[163] Alan Pratt, 'Federalism in the Era of Aboriginal Self-Government' in David C. Hawkes, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Carleton University Press, 1989) 23.
[164] See, eg, *Hindmarsh Island Bridge Case* (1998) 195 CLR 337.
[165] Pratt (n 163) 52.

protected. For instance, the *Charter of Rights and Freedoms 1982* expressly protects treaty rights and democratic rights of First Nations or Aboriginal people. Although s 25 of the *Charter* does not create any new rights, it does protect Aboriginal (or First Nation) rights against the abrogation or derogation of existing Aboriginal, treaty, or other, rights or freedoms.[166]

The constitutional protection of s 25 is sympathetic to the longstanding history of treaty-making, land loss, and paternalistic federal administration of First Nations of Canada. The State's historical approach to regulating First Nations has restructured First Nation political relationships and group boundaries, with implications for the ways in which, and the extent to which, those groups self-determine as a community.[167]

The damage has been exacerbated through the *Indian Act 1876* which imposed Westernised standards on First Nations in its legislative identification of Aboriginal groups as 'bands' and land, on which those bands resided, as reserves.[168] Most relevantly though, the *Indian Act 1876* replaced Indigenous governmental forms with Westernised practices that were assimilationist in nature.[169] Consequently, the *Indian Act 1876* was considered to be a complete regulatory framework for managing all of Indian/First Nation affairs including how they would sell land and gain citizenship.[170]

By 1946 a review was undertaken by a joint committee of the Senate and the House of Commons, of the Canadian Governments' administration of Indian affairs.[171] The joint committee published a series of reports that set out new guidelines for future Indian policy,[172] including recommendations

[166] *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (L'Heureux-Dubé J); *Reference re Secession of Quebec* [1998] 2 SCR 217; *Kapp, supra*; *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 (Bastarache J); *R v Agawa* [1988] OJ No 1248 (ONCA)[1988] SCCA No 501 SCC; *Campbell v BC (Attorney General)* [2000] BCJ No 1524; *Rice, Agence du revenu du Québec* [2016] SCCA No 263 SCC.
[167] Stephen E. Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States* (Native Nations Institute for Leadership, Management and Policy, 2006) [24]; C. H. Scott, 'Custom, Tradition, and the Politics of Culture: Aboriginal self-government in Canada' in N. Dyck and J. B. Waldram, *Anthropology, Public Policy and Native Peoples in Canada* (McGill-Queen's University Press, 1993) 322.
[168] Megan Furi and Jill Wherrett, 'Indian Status and Band Membership Issues' (Parliamentary Research Branch – Political and Social Affairs Division, February 1996 and revised February 2003) 5.
[169] Cornell (n 167) 24.
[170] Armitage (n 95) 91.
[171] Laurie Meijer Drees, 'Citizenship and Treaty Rights: The Indian Association of Alberta and the Canadian Indian Act, 1946–1948' (2000) *Great Plains Quarterly* 141; Canada, *Parliamentary Debates*, House of Commons, 13 May 1946, 1446.
[172] Drees, ibid, 143. See, eg, the 'Special Joint Committee of Senate and House of Commons on Indian Act, Minutes of Proceedings' (4th Report, 1948).

for the Canadian Government to protect and recognise the right of Indian self-government, and to support the exercise of that right through providing financial support for bands.[173]

The measures implemented following the report included agreements with provinces to roll out services to Indian peoples, along with revisions of the *Indian Act 1876* considerate of equal access for Indian education, economic development, federal–provincial relations, political development, welfare and local government.[174] However, progress with self-government initiatives for Indian people took a step backwards in 1969 when the Canadian Government issued a White Paper flagging its intention to remove its responsibilities for Indian affairs, transferring them to provinces, and the repeal of the *Indian Act 1876*.[175]

In seeking to suppress the legal and political acknowledgment of the differentiated cultural identity of Indian people, the White Paper is seen as a final step in assimilation of Indians.[176] Further, the White Paper sought to render Indian reserves as fee-simple property of bands.[177] Indians would be legally identified as Canadians and only identify as Indian in reference to their ethnic origin.[178] Those who identified as Indian, Aboriginal, and First Nation people of Canada rejected the White Paper and by 1973 it was formally withdrawn.

After the White Paper was withdrawn First Nation communities across Canada became increasingly vocal in their advocacy and calls for the Canadian Government to recognise their rights to independently govern and internally decolonise themselves.[179] Whilst self-governance rights of First Nations are recognised and protected as part of First Nation treaty rights within s 35 of the *Canadian Constitution*,[180] more practical measures for self-governance of First Nations was

---

[173] Armitage (n 94) 92; John L. Tobias, 'Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy' (1976) 6(2) *Western Canadian Journal of Anthropology* 24–5; Special Joint Committee of the Senate and the House of Commons Appointed to Consider the Indian Act, *Minutes of Proceedings and Evidence* (Ottawa, 14 June 1946) 217.
[174] H. B. Hawthorn, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies* 2 (Indian Affairs Branch, 1966); S. M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–70* (University of Toronto Press, 1981).
[175] Canada, Indian and Northern Affairs, 'Statement of the Government of Canada on Indian Policy' (Ottawa: Department of Indian and Northern Affairs, 1969) 6; Bonita Lawrence, 'Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview' (2003) 18(2) *Hypatia* 13.
[176] Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (first session, 28th Parliament, Ottawa, 1969); Richard John Perry, *From Time Immemorial: Indigenous Peoples and State Systems* (University of Texas Press, 2001) 150; Stephen E. Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States* (Native Nations Institute for Leadership, Management and Policy, 2006) 7; Armitage (n 95) 80.
[177] For an example of how a transfer of indigenous-held lands to fee simple can constitute dispossession, see, eg, Kate Galloway, 'Indigenous Dispossession in the 21st Century: The Northern Frontier' (2015) 40(1) *Alternative Law Journal* 28.
[178] Minister of Indian Affairs and Northern Development (n 176); Perry (n 176) 150; Cornell (n 176) 7; Armitage (n 95) 80.
[179] Armitage, ibid, 93.
[180] *Constitution Act 1982*, s 35.

recognised by the House of Commons Special Committee on Indian Self-Government in 1983. That Special Committee was comprised of members of parliament and three non-voting representatives from First Nations organisations.[181]

The Special Committee's report called for an expansion of the concept of self-government to formally recognise and protect the distinct form of government of Indian First Nations.[182] In doing so, the Special Committee acknowledged ways in which band administration could be further strengthened. This included the exercise of their self-governance rights over their community's welfare, education and economic development which has enabled bands to establish economic enterprises on their reserve lands.[183]

Furthermore, the report highlighted the importance of settling outstanding land claims with Aboriginal peoples in Quebec, the Northwest Territories, and the Yukon Territory.[184] It noted the integral role of Canadian courts in formally acknowledging the legitimacy of First Nation land rights under differing bands' relevant treaties they have established.[185] The result has seen a significant and progressive development in Canadian case law that has been used as a legislative and policy reform framework to provide legal recognition of self-determination and self-governance rights of First Nations of Canada.[186]

An exercise of such rights by First Nations of Canada has been practiced through First Nation native title rights. Native title can provide successful First Nation claimants with an exclusive right to their claimed land and the ability to decide how the land is used and the right to benefit from those uses.[187]

Prior to the establishment of the native title system in Canada, the Crown was required to consult with Aboriginal people of Canada in good faith about their proposed uses of the land. However, since the establishment of the native title system in Canada, the Crown comply with its fiduciary

[181] Canada, House of Commons, Report: Special Committee on Indian Self-Government (Queen's Printer 1983); Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation* (University of British Columbia Press, 1995) 94.
[182] House of Commons Report, ibid; Erich Steinman, 'Indigenous Nationhood Claims and Contemporary Federalism in Canada and the United States' (2005) 24(1) *Policy and Society* 111.
[183] Armitage (n 95) 94.
[184] Paul Tennant et al, 'The Report of the House of Commons Special Committee on Indian Self-Government: Three Comments' (June, 1984) 10(2) *Canadian Public Policy / Analyse de Politiques* 214.
[185] Ibid.
[186] *Delgamuukw v British Columbia* (1997) 3 SCR 1010; *The Queen v Van der Peet* [1996] 2 SCR 507; *The Queen v Sparrow* [1990] 70 DLR 385; *Guerin v The Queen* [1985] 13 DLR 321; *Calder v Attorney-General for British Columbia* [1973] SCR [395]; *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257.
[187] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257.

obligations owed to Aboriginal people in accordance with s 35 of the *Canadian Constitution*.[188] Section 35 requires Canadian governments (both federal and provincial governments are subject), to must demonstrate, if they implement measures that might interfere with Aboriginal rights and their self-government, they are justified in doing so and that such infringement is required for some large purpose.[189]

In those cases, the Supreme Court in Canada encourages dispute resolution through political negotiations rather than litigation.[190] This has been beneficial in the northern territories of Canada where there is no provincial government. Furthermore, the negotiations and agreements reached have also been bilateral.[191]

The following sections provide case studies of models of self-determination in Canada – from the innovation of self-government as the fullest expression of self-determination, through to particular representative bodies at the national level, all of which have the effect of enhancing political participation through embracing Indigenous rights to have a say in matters affecting them.

A. First Nations Self-Government

Reflecting its genesis within different cultural contexts, self-government of First Nations has taken a variety of different forms that have also depended upon the terms of the negotiated agreements or treaties with the Canadian Government.[192]

The Nunavut and Nisga'a nations provide examples of self-governance for differing tribes within the same State. Both tribes exercise self-governance through autonomous political, legal and cultural practices that are independent of the State. Both have maintained their status as distinct peoples in dealings with the federal government.[193]

---

[188] *Constitution Act 1982*, s 35.
[189] Barbara Hocking, *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005) 180; *Delgamuukw v British Columbia* (1997) 3 SCR [1010]; *Constitution Act 1982*, s 35.
[190] Michael D. Blackstock, 'Where is the Trust: Using Trust-based Mediation for First Nations Dispute Resolution' (2001–2002) 19(1) *Conflict Resolution Quarterly* 9; J. B. Kelly and M. Murphy, 'Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor' (2005) 35(2) *Publius: The Journal of Federalism* 220.
[191] Christopher Alcantara, 'To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada' (Spring, 2008) 38(2) *The Journal of Federalism* 343.
[192] *Royal Commission on Aboriginal Peoples Report* (Canada Communications Group, 1996, Volume 2, Part 1) 172.
[193] Jens Dahl, Jack Hicks and Peter Jull, *Nunavut: Inuit Regain Control of Their Lands and Their Lives* (Copenhagen, International Work Group for Indigenous Affairs, 2000) 175.

The Nunavut government represents the rights and interest of the Inuit people of Canada and was established by an Act of the Canadian Parliament.[194] It is now regarded as the closest self-governance system in Canada of First Nations – a comprehensive model of self-determination while remaining within the colonial polity.[195]

Similarly, the Nisga'a nation established Canada's first modern treaty with Canada and British Columbia. The terms of the *Treaty* include land rights and self-government, and it has constitutional status.[196]

Previously, British Columbia governments were opposed to complying with the *1763 Royal Proclamation*[197] that required those governments to recognise native title rights through treaty agreements with First Nation owners when acquiring land for a new settlement.[198] By 1973, the Supreme Court of Canada recognised Nisga'a native title in British Columbia in the landmark *Calder* case.[199] However, even after *Calder* was decided, the government of British Columbia did not abandon the strict policy of terra nullius, which it upheld until the 1990s.[200] From the 1990s, the British Columbia government finally worked with the federal government to negotiate a comprehensive treaty agreement with the Nisga'a Nation. British Columbia also established a treaty-making process to recognise Nisga'a land rights at a provincial level.[201]

Those rights and the Nisga'a system of governance were challenged in early 2000,[202] on the basis that the Nisga'a Agreement was unconstitutional in recognising Nisga'a sovereignty.[203] Williamson J of British Columbia's highest trial court overruled the challenge and reaffirmed their right to self-governance as First Nations.[204]

---

[194] Peter Jull, 'Building Nunavut: A Story of Inuit Self-Government' (1988) 1 *The Northern Review* 59; Ross Hoffman and Andrew Robinson, 'Nisga'a Self-Government: A New Government has Begun' (2010) 2 *The Canadian Journal of Native Studies* 237.
[195] Hocking (n 41) 180.
[196] Hocking (n 41), 181.
[197] 'The Royal Proclamation' (The King, A Proclamation, George R, 7 October 1763).
[198] Hocking (n 41) 181.
[199] *Calder v Attorney-General British Columbia* (1973) SCR 313.
[200] Michael Asch, 'Calder and the Representation of Indigenous Society in Canadian Jurisprudence' in Hamar Foster, Heather Raven and Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2011) 101.
[201] Hocking (n 41) 182.
[202] J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty Making in Canada* (Toronto: University of Toronto Press, 2009) 251; The Nisga'a treaty was passed into federal law by the *Nisga'a Final Agreement Act* SC200 c7 and into provincial law by the *Nisga'a Final Agreement Act SBC 1999* c2.
[203] Michael Asch, 'From Calder to Van der Peet: Aboriginal Rights and Canadian Law, 1973–96' in Paul Haveman, *Indigenous Peoples Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) 430; *Nisga'a Final Agreement Act* SC200 c7; *Nisga'a Final Agreement Act SBC 1999* c2.
[204] Hocking (n 41) 182–3.

The only real limitation on the Nisga'a Nation occurs when their laws conflict with federal and provincial laws, which are supreme.[205] Despite that limitation, Nisga'a people are empowered to manage their lands, their constitution, citizenship, and to maintain and foster their language and culture.[206]

Overall, the Nisga'a and Nunavut tribes have set the standard for treaty agreements and self-governance frameworks in Canada.[207] Both have been enabled to protect their cultural identity in multiple forms, including public order, environmental protection, education, health, social welfare, language, culture and citizenship.[208]

This chapter now considers the history of self-governance rights being exercised by Canadian First Nations through their own nationally recognised representative bodies to determine whether they have had a meaningful impact in representing the rights and interests of First Nation affairs.

B. First Nation Representative Bodies

While self-government took a long time to evolve in Canada, as with Australia and New Zealand, there have been a number of nationally recognised representative bodies that have afforded the capacity for a degree of political participation in national affairs.

The 19th century saw a number of First Nation representative bodies in Canada, including the Grand General Indian Council of Ontario and Quebec,[209] resisting the control of Indian affairs and Indian status imposed under the *Indian Act 1876*;[210] the League of Indians of Canada in Ontario, concerned with the loss of land and legislative restrictions on hunting, education, administrative practices, economic liberty and accessing health services on reserves;[211] and the National Indian Brotherhood that led opposition to the White Paper.[212] The Brotherhood survived and became the Assembly of First Nations (which this chapter later discusses) to represent broader First Nation

[205] *Nisga'a Final Agreement* (1999) 25.
[206] *Hocking* (n 41) 182.
[207] Hocking, ibid, 180; *Delgamuukw v British Columbia* (1997) 3 SCR [1010].
[208] Hocking, ibid, 182.
[209] James S. Frideres, *Native Peoples in Canada: Contemporary Conflicts* (Prentice Hall, 1988) 263.
[210] Armitage (n 95) 110.
[211] Eric Story, '"The Awakening Has Come": Canadian First Nations in the Great War Era, 1914–1932' (2015) 24(2) *Canadian Military History* 12;
[212] Douglas Sanders, 'The Rights of the Aboriginal Peoples of Canada' (1983) 61 *Canadian Bar Review* 314.

interests.[213] In addition, there were other bodies specifically advocating for land rights, including the Allied Tribes of British Columbia, and the Nisga'a Land Committee.[214]

Other more focused First Nation representative bodies of Canada include the Tapiriit Kanatami, representing Inuit people across four Inuit regions which are Nunatsiavut (Labrador), Nunavik (northern Quebec), Nunavut, and the Inuvialuit Settlement Region in the Northwest Territories.[215] It deals with issues that surround Inuit environmental protection and sustainability and other social, cultural and political issues that affect those four regions.[216]

Similarly, the Metis National Council represents the rights and interests of Metis people within national and international forums and, in doing so, ensures it conducts ongoing consultation with the Metis federal representatives and leaders that are chosen.[217] It is comprised of executive council leaders who are elected from Metis governments from Ontario westward. [218]

The national Native Women's Association represents the rights and interests of Canadian Aboriginal women (particularly those who identify as First Nations and Metis).[219] It highlights the increased awareness the Canadian Government has of intersectional discriminatory experiences First Nation women of Canada still experience within social and political decision-making processes.[220]

As with Indigenous Australians and Maori, government departments and legislated bodies were, from time to time, charged with oversight of Indigenous affairs. The Department of Indian Affairs and Northern Development,[221] for example, continues to oversee governmental obligations to represent and protect the federal constitutional interests of First Nations, Inuit and Metis.[222] The

[213] Armitage (n 95) 111–2.
[214] Frideres (n 209) 264.
[215] *Report on the Inuit Tapiriit Kanatami Education Initiative, Summary of ITK Summit on Inuit Education and Background Research* (Northwest Territories, 15–17 April 2008).
[216] *Representative Bodies: Institute of Intergovernmental Relations* (Queensu.ca, 2019) <https://www.queensu.ca/iigr/links/aboriginal-rights-and-governance/canada/representative-bodies>.
[217] Ibid.
[218] Joe Sawchuk, 'Negotiating an Identity: Metis Political Organizations, the Canadian Government, and Competing Concepts of Aboriginality' (2001) 25 *American Indian Quarterly* 13.
[219] Joanne Barker, 'Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism' (2006) 7(1) *Meridians* 130.
[220] Lisa J. Udel, 'Revision and Resistance: The Politics of Native Women's Motherwork' (2001) 22(2) *Frontiers: A Journal of Women Studies* 50.
[221] *Department of Indian Affairs and Northern Development Act 1985*, RSC, c I-6.
[222] Frideres (n 209) 244; 'About Indigenous and Northern Affairs Canada' (*Government of Canada*, 2017) <https://www.aadnc-aandc.gc.ca/eng/1100100010023/1100100010027>.

department delivers programs and funding through partnerships with First Nation communities through federal–provincial or federal–territorial agreements.[223]

In its contemporary guise, the Department (now comprising two departments) provides beneficial policy frameworks that guide and enable First Nations to self-govern.[224] That it does so highlights self-governance rights of First Nations as inherent in the *Constitution Act 1982,*[225] the *Canadian Charter of Rights and Freedoms*[226] and *Canada's Inherent Right Policy 1995*[227] and its most recently renewed 2019 collaborative self-government fiscal policy.[228]

Against a broader context of historical and local or issues-based representation, the following sections outline key features of two representative bodies that represent the rights and interests of all First Nations in Canada: the Assembly of First Nations and the Congress of Aboriginal People.

1 The Assembly of First Nations

The Assembly of First Nations (AFN) is one of Canada's most prominent national First Nation representative bodies which develops First Nations policy and represents First Nations interests to the federal government.[229] The AFN replaced the National Indian Brotherhood in 1982 following the *Declaration of First Nations* (signed in December 1980)[230] and represents First Nations with Indian status whose name is on a list according to the *Indian Act 1876.*[231] In doing so, it has aimed to establish a First Nation political presence within Canada's central democratic institutions through upholding the distinct special status and identity of First Nations.[232]

---

[223] Christopher Alcantara, 'Preferences, Perceptions, and Veto Players: Explaining Devolution Negotiation Outcomes in the Canadian Territorial North' (2012) *Political Science Faculty Publications* 167; Kent McNeil, 'The Constitutional Rights of the Aboriginal Peoples of Canada' (2010) 4 *Supreme Court Law Review,* 255; *Crown–Indigenous Relations and Northern Affairs Canada* (Canada.Ca, 2019) <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html>.
[224] *Self-Government* (Government of Canada, 2019) <https://www.rcaanccirnac.gc.ca/eng/1100100032275/1529354547314>.
[225] *Constitution Act 1982,* s 35.
[226] *Canadian Charter of Rights and Freedoms 1982,* s 25.
[227] *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Government of Canada, 2019) <https://www.rcaanccirnac.gc.ca/eng/1100100031843/1539869205136#inhrsg>.
[228] 'Canada's Collaborative Self-Government Fiscal Policy' (*Government of Canada,* 2020) <https://www.rcaanc-cirnac.gc.ca/eng/1566482924303/1566482963919#7>.
[229] Armitage (n 95) 146; *About AFN: Assembly of First Nations* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/>.
[230] *Declaration of First Nations* (1980) <https://www.afn.ca/about-afn/declaration-of-first-nations/>.
[231] *Indian Act 1876,* s 12 (1) (b).
[232] Tim Schouls, 'Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation versus Voter Equality' (1996) 29(04) *Canadian Journal of Political Science* 731.

The AFN receives advice and guidance from regional First Nation Chiefs who are elected every three years by Chiefs and members of their respective communities.[233] First Nation Chiefs represent the rights and interests of First Nations from regions across Canada and attend Chief Assemblies twice a year where they contribute to passing resolutions that guide the work of the AFN.[234] The AFN represents this advice and guidance to the federal government of Canada.[235]

The AFN's structure is comprised of a national executive which includes the National Chief who is elected by Chiefs every three years, 10 Regional Chiefs, and the Chairs of the Elders, Women's and Youth councils.[236] The consultative process for both regional and national members and Chiefs to contribute to the dialogue surrounding First Nations rights in Canada is imperative.[237]

The National Chief of the AFN facilitates and coordinates the advocacy work undertaken by the national executive council to ensure that it is reflective of First Nations across all regions, on legal and policy reform concerning their affairs.[238] The AFN also ensures that is seeks prior consent and consultation from First Nations all levels of governance so that their interests are included and represented during decision-making processes on matters that concern First Nation affairs.[239]

The AFN derives its mandate from cultural consent sought from *all* First Nation community members. To achieve that, the AFN is designed to capture all voices from differing First Nation communities through sub-groups in the form of interest-based Councils. For instance, the Elders Council is comprised of prominent elders of First Nation communities who represent community interests from an Elder's perspective.[240] Elders from the Elders Council communicate their community messages as representatives selected to participate at one of AFN's 10 region Councils.

The advice and guidance provided from representatives of the Elders Council integrate ancient cultural knowledge, spirituality and political guidance into AFN policies and consultations with the Canadian federal government and other national and international organisations.[241] Therefore, the

---

[233] Tonina Simeone and Shauna Troniak, 'Legislative Summary of Bill S-6: An Act Respecting the Election and Term of Office of Chiefs and Councillors of Certain First Nations and the Composition of Council of Those First Nations' (Publication No. 41-1-S6-E, 30 January 2012) 1.
[234] Ibid.
[235] *About AFN: Assembly of First Nations* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/>.
[236] Ibid.
[237] Ibid.
[238] Sally M .Weaver, 'A New Paradigm in Canadian Indian Policy for the 1990s' (1990) 22(3) *Canadian Ethnic Studies* 9.
[239] About AFN (n 235).
[240] Margaret Holm and David Pokotylo, 'From Policy to Practice: A Case Study in Collaborative Exhibits with First Nations' (1997) 21(1) *Canadian Journal of Archaeology* 35.
[241] Barbra A. Meek, 'Respecting the Language of Elders: Ideological Shift and Linguistic Discontinuity in a Northern Athapascan Community' (2007) 17(1) *Journal of Linguistic Anthropology* 31.

Elder Council's advice is given high regard and is integral to protecting ancient First Nation cultural identity and to best inform First Nation treaty rights and self-governance frameworks.[242] Other areas of interest the Elders Council contributes advice to range from protection of lands and resources, mitigating climate change, new governance relationships and nation-building, the health and well-being of First Nations and language.[243]

Another sub-group of the AFN is the Women's Council which recognises the importance of gender balance within First Nation community perspectives.[244] The Women's Council promotes the rights and aspirations of First Nation women on laws and policies concerning First Nation affairs, and these are taken to the Canadian Government and other stakeholder entities.[245] The representative work of the Women's Council has included, over recent years, their involvement in the National Inquiry into Missing and Murdered Indigenous Women and Girls.[246]

Finally, the Youth Council provides advice and guidance to the AFN on First Nation issues surrounding youth. It comprises 20 members with one male and one female representative from each of the 10 AFN regions.[247] Those representatives are chosen by their regional youth councils or their Regional Chief and advocate for issues surrounding First Nations youth which include protection of languages, healthy lifestyles, culture and education.[248]

All Councils that inform the AFN meet and consult with one another at AFN Tri-Council meetings which enable all Councils to strategise and work out ways to best support one another. Tri-Council meetings and consultative efforts are also ongoing both nationally and regionally at the AFN.[249]

The AFN has represented First Nation interests in the realms of treaty rights, economic development, education, languages and literacy, health, housing, social development, justice,

---

[242] *AFN Elders Council* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/executive-committee/afn-elders-council/>.
[243] Ibid.
[244] Joan Holmes, 'Bill C-31-Equality or Disparity? The Effects of the New Indian Act on Native Women. Background Paper' (Canadian Advisory Council on the Status of Women, 1987); Bonita Lawrence and Kim Anderson, 'Introduction to "Indigenous Women: The State of Our Nations"' (Spring/Summer 2005) 29(2) *Atlantis* 3.
[245] *AFN Women's Council* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/executive-committee/afn-womens-council/>.
[246] Ibid.
[247] S. Sinclair, A. Meawasige and K. A. Kinew, 'Youth for Youth – A Model for Youth Suicide Prevention: Case Study of the Assembly of Manitoba Chiefs Youth Council and Secretariat, Canada' in Erik Blas, Johannes Sommerfeld and A. Sivasankara Kurup, *Social Determinants Approaches to Public Health* (World Health Organization, 2011) 27; Jessica K. Taft and Hava R. Gordon, 'Youth Activists, Youth Councils, and Constrained Democracy' (2013) 8(1) *Education, Citizenship and Social Justice* 87.
[248] *AFN Youth Council* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/executive-committee/afn-youth-council/>.
[249] Assembly of First Nations, *Strengthening the Family, Building the Community: Final Report on the First Canadian Indian-Native Child Welfare Conference* (Assembly of First Nations, 1988).

taxation, land claims and environment.[250] In particular, the AFN's involvement with First Nation representation on issues concerning child welfare has influenced much of its policy development with self-government. For example, the 1989 report on First Nations child care called for immediate funding of community-controlled native child-care.[251] It arose from two AFN conferences[252] that considered a national strategy for First Nations child and family services including self-governance frameworks for First Nations to have greater control over First Nations child care. Steps towards self-governance included initiatives that would enable First Nation community traditions and approaches, to be implemented on child welfare at both national and regional levels. Further, self-governance initiatives have provided government support that has contributed to reduced rates of First Nation children entering into the out-of-home through their own independent implemented approaches on governing such issues.[253]

Overall, the AFN's continuous and extensive consultative efforts for First Nation interest groups and regions provides an open and collaborative mechanism and representative voice for First Nations across Canada. Its commitment to developing self-governance frameworks across all societal and political issues that affect First Nations shows clear outcomes in protecting First Nation cultural identity and is a prime example of the benefits of representative bodies for political participation.

2 The Congress of Aboriginal Peoples

Unlike the AFN, the Congress of Aboriginal Peoples (CAP) does not specifically deal with individual members and service delivery programs.[254] However, it provides a useful model for supporting affiliate organisations on Aboriginal issues. The overall objective of CAP is to ensure Aboriginal citizens of Canada are treated with respect, dignity, integrity, and equality.[255]

CAP's affiliate organisations[256] span 10 provinces and territories and work with CAP to advocate for better socio-economic conditions for off-reserve status and non-status Indians, Metis and

---

[250] *Representative Bodies: Institute of Intergovernmental Relations* (Queensu.ca, 2019) <https://www.queensu.ca/iigr/links/aboriginal-rights-and-governance/canada/representative-bodies>.
[251] Assembly of First Nations, *Report of the National Inquiry into First Nation Child Care* (Assembly of First Nations 1989) viii; Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation* (University of British Columbia Press, 1995) 146; M. Greenwood and P. Shawana, *Whispered gently through time – First Nations Quality Child Care: A National Study* (Assembly of First Nations, 2000).
[252] Assembly of First Nations (n 239); Assembly of First Nations, *For Discussion: National Strategy on First Nations Child and Family Services* (Assembly of First Nations, 1991).
[253] Assembly of First Nations (1991) ibid; Armitage (n 95) 147.
[254] Frances Abele, 'Urgent Need, Serious Opportunity: Towards a New Social Model for Canada's Aboriginal Peoples' (CPRN Social Architecture Papers, Research Report F39, Family Network, 2004) 14.
[255] *Our Mandate* (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/our-mission/>.
[256] *CAP Affiliates* (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/en/capaffiliates/>.

Southern Inuit living in urban or rural areas.[257] Its affiliate organisations have their own constitutions and rules for membership, their own elected officers, and their own administration. Affiliates have an elected President or Chief for each organisation who is elected by delegates at their annual assembly. Those organisations can also have several regional and local groups that fall under them.[258] In turn, the consultation and inclusion of all stakeholders and interest groups are expansive.

CAP's board is composed by the National Chief, the National Vice-Chief (each elected for a four-year term), the National Youth Representative (elected for a two-year term), the National Elder Representative and an elected representative from each affiliated organisation.[259] The board meets several times a year, between annual general assemblies, and is the main decision-making body of CAP. Directors are elected annually and hold a one-year term.[260] The governance structure allows for representation reflective of changing Aboriginal perspectives in CAP decision-making.

Accountability is provided through annual general assemblies, comprising the national executive and representatives and delegates from affiliated organisations.[261] Examination of financial statements and program delivery assists the assembly to identify issues that form the basis of further resolutions and policies.[262]

As with the AFN, CAP also has a National Youth Council and National Elders Council which represent the authority of elders and their perspective and provide Aboriginal youth with a voice to communicate their perspectives. Both Councils have membership from the provincial and territorial affiliates.[263]

CAP was the first National Indigenous Organization in Canada to formalise its relationship with the Canadian Government through a Political Accord.[264] The Political Accord has been fundamental for formalising a co-designed and jointly agreed set of objectives, policy priorities and a process for

[257] Michael J. Prince and Frances Abele, 'Paying for Self-Determination: Aboriginal Peoples, Self-Government, and Fiscal Relations in Canada' in Michael Murphy, *Canada, The State of the Federation 2003* (Published for the Institute of Intergovernmental Relations School of Policy Studies, Queen's University by McGill-Queen's University Press, 2005) 187, 215
[258] Ibid.
[259] Ibid.
[260] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (UBC Press, 2011) 188; *Our Mandate* (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/our-mission/>.
[261] Abele (n 254) 18.
[262] Prince (n 257).
[263] *Representative Bodies: Institute of Intergovernmental Relations* (Queensu.ca, 2019) <https://www.queensu.ca/iigr/links/aboriginal-rights-and-governance/canada/representative-bodies>.
[264] Joan Kendall, 'Circles of Disadvantage: Aboriginal Poverty and Underdevelopment in Canada' (2009) 31(1–2) *American Review of Canadian Studies* 43.

implementation with resources and funding between CAP and the Canadian Government.[265] The objective of the Political Accord is to ensure the relationship between CAP and the Canadian Government is a cooperative, respectful, rights-based partnership to achieve socio-economic reconciliation between Aboriginal peoples and non-Indigenous Canadians.[266] The Accord provides CAP with a formal legislative tool to draw upon when it is faced with holding the Canadian Government accountable for achieving reconciliation within the partnership.[267] Many Indigenous representative bodies around the world lack such a formalised and respected agreement with their national government.

Political Accords have been a feature of the relationship between CAP and the Canadian Government since 1994.[268] The latest Political Accord of 2018 reflects a renewed relationship with the Canadian Government in response to the 2016 decision in *Daniels v Canada (Indian Affairs and Northern Development)*.[269]

Daniels was a landmark unanimous decision in the Supreme Court of Canada that affirmed the first declaration sought in this case which was that Metis and non-status Indians are 'Indians' according to s 91(24) of the *Constitution Act 1867*.[270] Section 91 (24) provides the Canadian federal government with the power to legislate for Indians and lands reserved for the Indians. That power is also found in the *Indian Act 1986* and has namely been exercised by Aboriginal Affairs and Northern Development Canada.[271]

Two other declarations sought by CAP and others (Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey) were that the federal Crown owes a fiduciary duty to Metis and non-status Indians, and Metis and non-status Indians have the right to be consulted and negotiated with.[272]

---

[265] Prince (n 257).
[266] *Political Accord* (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/canada-congress-of-aboriginal-peoples-political-accord/>.
[267] Joe Sawchuk, 'Negotiating an Identity: Metis Political Organizations, the Canadian Government, and Competing Concepts of Aboriginality' (2001) 25(1) *American Indian Quarterly* 74.
[268] Political Accord (n 266).
[269] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 ('*Daniels*').
[270] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99, [4]; Joseph Eliot Magnet, 'Who are the Aboriginal People of Canada?' in Dwight A. Dorey and Joseph Eliot Magnet, *Aboriginal Rights Litigation* (LexisNexis Butterworths, 2003) 23 [44]; Clem Chartier, 'Indian: An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867' (1978–79) 43 *Saskatchewan Law Review* 37; Mark Stevenson, 'Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Metis' (2002) 1 *Indigenous Law Journal* 237; Noel Lyon, 'Constitutional Issues in Native Law' in Bradford W. Morse, *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Carleton University Press, 1st ed, 1989) 430.
[271] *Constitution Act 1867*, s 91 (24); *Indian Act 1986.*
[272] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99; *R v Powley* [2003] 2 SCR 207.

The court in *Daniels* highlighted the significance of granting a declaration for 'settling a live controversy between the parties'[273] and that, in granting the first declaration sought, it would enable Metis and non-status Indians to rely on guaranteed constitutional rights as opposed to 'noblesse oblige'.[274]

In that context, the court noted the importance of providing a declaration to guarantee both certainty and accountability given past experiences of Canadian history of federal and provincial governments denying legislative authority over non-status Indians and Metis.[275] That denial, as the court in *Daniels* points out, has left those Indigenous communities as a 'jurisdictional wasteland' in terms of legislative authority.[276] Furthermore, where the federal government has assumed such authority over those communities, it has only done so to achieve assimilation policy objectives.[277]

The court also referred to *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*,[278] acknowledging the distinct cultural identity of the Metis and their unique communities.[279] It also drew upon *Manitoba Metis Federation Inc v Canada (AG)*[280] which held that the Canadian Government has a fiduciary relationship with Metis and an obligation to uphold the honour of the Crown in the promise to implement the land grant. On this argument, the court in *Daniels* held that '[t]his created a duty of diligent implementation'[281] and on those terms the second and third declarations sought were not granted but, rather, acknowledged as 'settled law' that the fiduciary relationship exists.[282]

The Political Accord of 2018 took *Daniels* into consideration by formally acknowledging the government's responsibility to off-reserve Metis, status and non-status Indians, and Southern Inuit Indigenous Peoples.[283] As a result, the policy objectives incumbent upon the Canadian Government require assurance that Metis and non-status Indians are not deprived of programs, services and intangible benefits recognised by the Canadian Government.[284] Since *Daniels*, CAP has contributed

[273] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99, [11].
[274] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [3].
[275] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [14].
[276] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [14].
[277] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [5].
[278] [2011] 2 SCR 670.
[279] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [42].
[280] 2013 SCC 14.
[281] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [43].
[282] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [53]; *Delgamuukw v British Columbia* [1997] 3 SCR [1010]; *Manitoba Métis Federation Inc. v Canada (Attorney General)* (2013) SCC 14.
[283] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99 [50].
[284] *Daniels v Canada (Indian Affairs and Northern Development)* [2016] 1 SCR 99.

to and represented Aboriginal rights across many practical community-based issues within laws and policies that affect Aboriginal affairs.

In addition, the federal government has, since *Daniels*, provided CAP with funding to establish a national Daniels Symposium to create a forum of meaningful dialogue between grassroots Indigenous Peoples, stakeholders, legal experts and the Government of Canada.[285] The Daniels Symposium brings together CAP's grassroots constituency over a two-day conference, allowing attendees to make contributions on what steps need to be taken post-*Daniels* on advocacy, policy and program development initiatives.[286]

From 2013 to 2017, CAP also ran a 'National Grassroots Engagement Tour' which aimed to connect grassroots communities across Canada with CAP. [287] The tour provided grassroots community members across Canada with an opportunity to voice concerns with the management of matters affecting their rights and affairs as Indigenous people.[288]

CAP has also represented Aboriginal women, youth and Elders in its submission of its 2017 position paper for the 5th National Aboriginal Women's Summit in Toronto.[289] The National Aboriginal Women's Summit focused on empowering Indigenous women, youth, and Elders, and CAP's position paper provided recommendations on three key policy areas that affect Aboriginal women, to stimulate discussion amongst attendees with a focus on their experiences and lives as urban Indigenous women and girls.[290]

Since *Daniels*, and since various Political Accords, CAP has worked to eradicate violence against Indigenous women and girls[291] including establishing the 'Walking in her Moccasins Bundle' initiative, a collaborative effort with the White Ribbon Foundation, which equips Indigenous men and boys with the skills to respond to and prevent violence against Indigenous women and girls.[292] The 'Walking in her Moccasins Bundle' initiative engages Indigenous communities as a whole so

[285] *Daniels Symposium* (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/daniels-symposium/>.
[286] Ibid; Congress of Aboriginal Peoples, *Final Report on the Daniels Symposium* (March 21 & 22 2017, Ottawa).
[287] *A Positive Way Forward: A Grassroots Perspective Report* (Congress of Aboriginal Peoples, 2017) <http://www.abo-peoples.org/wp-content/uploads/2018/02/National-Grassroots-Engagement-Tour-Final-Report.pdf>.
[288] Ibid; *National Grassroots Engagement* (2019) <http://www.abo-peoples.org/en/national-grassroots-engagement/>.
[289] National Indigenous Women's Summit (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/en/national-indigenous-womens-summit/>.
[290] Ibid.
[291] *Violence Prevention* (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/en/violence-prevention/>.
[292] Ibid.

that the entire community can be involved in the healing process of overcoming various impacts of colonisation.[293]

CAP has also created the 'Miykiwan Toolkit' which is geared towards improving the lives of Aboriginal families living off-reserve in Canada by providing a resource that builds upon the strengths and resilience of Aboriginal communities.[294] It is an educational resource for Aboriginal families to access that encourages them to and provides them ways to live healthier lives and ways to prevent and reduce re-occurrence of the different forms of violence that may be present within their communities.[295]

CAP provides an example of what a national Indigenous representative body can look like and how it can function. The Political Accords it has established with the Canadian Government have enabled a co-development partnership, contributing to beneficial policies and initiatives in support of all Canadian Indigenous identities. This has also been integral to ensuring accountability of the Canadian Government, in terms of adhering to both its constitutional and treaty obligations.[296]

IV. CONCLUSION

Both New Zealand and Canada have implemented a diverse range of representative bodies, both local and national, that promote Indigenous political participation through self-determination with resulting meaningful impact on their respective Indigenous communities.

In New Zealand, the Waitangi Tribunal supports Maori to hold the New Zealand Government accountable for adhering to its treaty obligations and, in providing advice and recommendations from its findings, encourages Maori policy and law reform where need be.

Although the Waitangi Tribunal's powers are limited to that of an advisory body, its recommendations to the New Zealand Government are well respected, which fosters the partnership relationship established between the New Zealand Government and Maori. This is particularly so in cases where there lies uncertainty in the *Treaty's* meaning and application.[297]

---

[293] Ibid.
[294] Ibid.
[295] Violence Prevention (n 291).
[296] Political Accord (n 266).
[297] Noel S. Cox, 'The Treaty of Waitangi and the Relationship between Crown and Maori in New Zealand' [2003] *Brooklyn Journal of International Law* 124.

Overall, the functionality of the Waitangi Tribunal exemplifies a culturally empowering Indigenous representative body that protects Maori cultural identity and represents their interests to the general New Zealand law and policymaking institutions with the power to affect Maori affairs. In doing so, it serves as an institution of self-determination.

It is not the only one, however. In addition, the New Zealand Maori Council holds a statutory mandate to work for and on behalf of the greater Maori community for land, forestry, fisheries, language and radiofrequency spectrum fundamental to Maori cultural identity. Given that its role covers a range of Maori areas of interests and issues, its ongoing consultation with Maori Committees has been integral to connecting all District Maori Councils to the New Zealand Government in making representations on laws and policies that concern Maori rights and affairs.[298] This role allows the New Zealand Maori Council to advise on both national and community-based policies that affect the partnership, protection, consultation and compensation for Maori.

The New Zealand Maori Council works alongside and complementary to the Waitangi Tribunal through assistance in claims and disputes put before the Waitangi Tribunal. In doing so, the Council represents Maori who wish to be dealt with together rather than at a tribal level.

As with New Zealand, in Canada, the AFN's continuous and extensive consultation with First Nation interest groups and regions provides an open and collaborative mechanism and representative voice. Its inclusive National Executive structure has supported an effective formal consultative and election process, bringing together diverse interest group perspectives within First Nation cultural identity. Their contributions to the dialogue surrounding First Nations rights in Canada has been fundamental to First Nation legal and policy reform.[299]

Lastly, CAP formalises the terms on which it engages with the federal government through a Political Accord. The partnership with the State has contributed to holding the Canadian Government to account on its constitutional and treaty obligations.[300]

[298] *Our Purpose* (Maori Council, 2018) <https://maoricouncil.com/about-us/our-purpose/>.
[299] *About AFN: Assembly of First Nations* (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/>.
[300] Political Accord (n 256).

CHAPTER 6
CONCLUSIONS

The key finding of this thesis is that Australia lacks the institutional responses to support Indigenous political participation in Australia's representative democracy – both directly, through bodies that might articulate the aspirations of Indigenous Australians, and also indirectly through the failure of existing institutions and their processes to comprehend the lived experience of Aboriginal and Torres Strait Islander people. A wider range of colonial, culturally divisive and racially discriminatory factors contribute to this, limiting rights of self-determination and their accessibility for Indigenous peoples in Australia.

More specifically, contributing factors include racism within electoral institutions, systems, legislation, structures and policies. Without the Australian Government taking affirmative action to remove racism entrenched within its democratic institutions, Australia will maintain its longstanding low rates of Indigenous political participation.

In response to this finding, this thesis synthesises the experiences of other equivalent jurisdictions, suggesting legal institutional reform that would offer a greater opportunity for Indigenous self-determination through an enhanced opportunity for political participation. This response addresses the goal of free and equal access to political participation for all citizens – including those of Aboriginal and Torres Strait Islander descent, and including the capacity for these peoples to express collective self-determination.

The following parts suggest possible reforms focusing on the three elements of political participation: voter enrolment and participation; candidacy eligibility; and Indigenous body representation.

I. VOTING

At a preliminary stage to comprehensive reform, amendment of the *Commonwealth Electoral Act 1918* is an easy and fast reform which would make immediate progress increasing Aboriginal voter enrolment and participation. Whilst constitutional reform is the ultimate

goal to safeguard participation through the entrenchment of self-determination mechanisms, it does entail a lengthier and complex process.[1384]

Reforming the *Commonwealth Electoral Act 1918* to address identified direct and indirect barriers that limit Aboriginal access to enrolment and voting at Commonwealth elections might, therefore, be a preferable option in the first instance. Additionally, it would engage more disenfranchised Aboriginal voters to be ready to vote at a referendum for their constitutional recognition and, in turn, provide a greater chance of its success.

As this thesis identifies in Chapter 2, citizens are required to verify their identity upon enrolment for Commonwealth elections. Typically this is done by way of a person producing their photo identification in the form of their driver's license or passport number to an AEC officer in their local electorate.[1385] If a person does not have photo identification or a passport number to produce, they must be accompanied by a person already enrolled to vote at the election who can declare and vouch for their identity.[1386]

Given documented issues with registration of Aboriginal births, many Aboriginal people will not have access to the requisite identification and may not feel the incentive to bring someone to vouch for their identity. Typically, where Aboriginal births are registered their birth certificate is rarely obtained when they live in financial hardship. This is particularly the case for those living in remote communities that lack services and support.[1387] This requirement can, therefore, create a barrier and lack of incentive to enrol and vote for Aboriginal citizens. In response, the AEC should draw upon its already established policy mandates of seeking to support and enhance Aboriginal political participation and work in partnership with state and territory registries of Births, Deaths and Marriages to financially assist disenfranchised Aboriginal citizens without a birth certificate to obtain one.[1388]

This measure alone would assist those individuals to obtain necessary identification to identify themselves in a standardised way to secure their place at the polling booth. The additional benefit of a birth certificate is securing a driver's license. Driving without a licence

[1384] *Commonwealth of Australia Constitution Act 1901*.
[1385] *Commonwealth Electoral Act 1918*, ss 98AA; *Enrol to Vote* (2018) Australian Electoral Commission <https://aec.gov.au/enrol/>.
[1386] *Commonwealth Electoral Act 1918*, ss 98AA, 99.
[1387] Alison J. Gibberd, Judy M. Simpson and Sandra J. Eades, 'No Official Identity: A Data Linkage Study of Birth Registration of Aboriginal Children in Western Australia' (2016) 40(4) *Australian and New Zealand Journal of Public Health* 391.
[1388] Melissa Castan and Paula Gerber, 'Registering the Births of Indigenous Australians in Victoria' in Melissa Castan and Paula Gerber, *Proof of Birth* (Future Leaders, 2015) 48.

is a key factor in incarceration rates in some areas, resulting in disqualification from voting. Ensuring equitable access to birth certificates opens the possibility of reducing this risk.

Voter registration is also important for providing necessary data to the Australian Bureau of Statistics for state and territory population statistics. Those statistics are used to determine how many seats should be apportioned to state and territory electorates in the Commonwealth House of Representatives.[1389] Jurisdictions with high populations of Indigenous citizens whose births are not registered and who are not on the electoral rolls will be inadequately represented in the Commonwealth House of Representatives. There are multiple layers in which Indigenous people are disenfranchised through this one seemingly simple factor.

Finally, this measure also contributes to enhancing the incentive for Aboriginal citizens to run as a candidate in a Commonwealth election, given their eligibility to do so is determined by whether they are enrolled and eligible to vote at Commonwealth elections.[1390]

Second, the AEC should increase and enhance its voter education programs and support measures for Aboriginal citizens. Compared to the non-Indigenous population, Aboriginal and Torres Strait Islander Australians have lower levels of literacy and numeracy. This can make filling out the ballot, and understanding party and candidate politics, difficult and confusing. Prior to the implementation of the 2016 Senate voting system, informal Indigenous citizens' votes were high. It is only reasonable to increase support for Indigenous voters to engage in elections.

This would include enhancing political education and support in communities with a high Indigenous population, particularly ones dispersed in remote locations. It should be supported through increased remote polling stations and Indigenous liaison officers to enhance outreach to those citizens, similar to Canada's expansion of its community relations officers who are appointed to help with First Nation electors voting in Canadian elections.

Third, political participation would be enhanced through reform of key disqualifying provisions that create a barrier to Aboriginal enfranchisement within the *Commonwealth Electoral Act 1918*. Disqualification based on 'unsound mind' and 'incarcerated for three years or more', applied without appropriate regard to important differentiating experiences of Indigenous Australians, constitutes a structural barrier to political participation. For

[1389] Ibid.
[1390] *Commonwealth Electoral Act 1918*, s 93 (8AA).

Indigenous Australians, the consequence of one-size-fits-all disqualification is a failure to comprehend the contemporary effects of dispossession and ongoing limited access to full and equal citizenship and civil rights for Indigenous Australians.

The 'unsound mind' provision should be repealed entirely, or in the alternative, should at least address the vagueness and ambiguity in its wording to provide clarity as to who decides the requisite disqualifying state of mind, what constitutes 'unsound mind', and the process of determination. This should be guided by international standards relating to[1391] persons with a disability and the Australian Human Rights Commission.[1392]

This thesis suggests adopting a similar approach to the narrow wording contained within New Zealand electoral legislation. For instance, s 80 (c) of the *Electoral Act 1993* (NZ) only disqualifies persons who are detained in a hospital under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* or are detained in a secure facility under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*.[1393] That electoral disqualifier really only applies to persons subject to a court order that declares their mental impairment[1394] or compulsory treatment order. In turn, if inserted into the Australian *Commonwealth Electoral Act 1918*, it would potentially provide more scope for more practical support to be expanded upon by the AEC that would seek to actually enhance citizen voting participation at Commonwealth elections rather than blanket banning people for a range of different mental illnesses at differing degrees of seriousness and from differing cultural backgrounds, some of which might suffer from continued racial bias within the health care system like Indigenous Australians.[1395]

The incarceration disqualification should be repealed entirely. As observed in the Canadian context, Canada does not apply this disqualification in practice, having recognised that the provision goes against principles of justice and societal rehabilitation. With a high and

[1391] Jonathon Savery, 'Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights' (2015) 37(2) *Sydney Law Review* 287; *United Nations Convention on the Rights of Persons with Disabilities*, GA Res 61/106, A/RES/61/106 (24 January 2007, entry into force 3 May 2008) art 29.
[1392] Human Rights Committee, *General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, UN Doc CCPR/C/21/Rev1/Add7 (adopted 12 July 1996) [1] ('*General Comment 25*'); Australian Electoral Commission, Submission to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012*, Submission 2 (2012) 174.
[1393] *Electoral Act 1993*, s 80 (c).
[1394] *Electoral Act 1993*, s 80 (c) (1) (i) (ii).
[1395] *Electoral Act 1993*, s 80 (c) (1) (iii).

disproportionate Indigenous incarcerated population, and in light of the effects of colonisation in particular,[1396] it is unfair and undemocratic.

To adapt Australia's voting system, it should incorporate, alongside the already suggested reform options, its own Indigenous Electoral Roll Option that would work similarly to New Zealand's Maori Electoral Roll Option. This should be incorporated within the *Commonwealth Electoral Act 1918* to give expression to political self-determination rights of Indigenous Australian citizens, to be exercised through their identification of themselves on their own differentiated electoral roll.

The data from those registered on the Indigenous Electoral Roll Option can be used with Australian census data to determine whether more measures need to be taken by the Australian Government and AEC to increase and enhance Indigenous Australians' political participation and representation in Commonwealth politics. More specifically, the data used would also determine, like the Maori Electoral Roll Option does, the number of Indigenous electorates should be established or increased for the next election to provide cultural electoral proportionality of representation of Indigenous Australians. Like Maori designated seats in Parliament, there should be a set minimal figure of established Indigenous electorates that cannot be decreased and can only continue to be maintained or increased based on census data and data obtained from the Indigenous Electoral Roll Option.

Overall, these proposals for Commonwealth electoral law and policy reform in Australia for voter enrolment and participation would demonstrate a meaningful commitment by the Australian Government to principles of proportionality, equality, representative democracy and, most importantly, self-determination.

II. CANDIDACY

As with voting laws, electoral laws pose a barrier to Indigenous Australians standing for election and to promote political participation requires reform of the *Commonwealth Electoral Act 1918.* While changes to voting eligibility will flow through to candidacy, measures implemented in New Zealand in particular show how candidacy can be guaranteed within the parliament – namely through designated seats in the Commonwealth Parliament for Indigenous candidates.

[1396] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [89] (Gummow, Kirby and Crennan JJ).

The absence of Indigenous representatives in the national parliament has been a significant issue politically for Indigenous Australians given the advocacy undertaken within the Commonwealth arena. Yet Indigenous cultural affairs remain largely represented by non-Indigenous voices in Commonwealth decision-making processes. The disqualification of candidates who are not enrolled to vote at Commonwealth elections, together with the lack of guaranteed designated seats, have provided a minimal incentive for Indigenous citizens to run as candidates at Commonwealth elections, with consequences for political participation.

Where policy concerning cultural affairs is developed by parliamentary representatives who are not of Indigenous descent, and who lack an Indigenous perspective through experience and authentic connection to Indigenous cultural issues, Indigenous Australians remain effectively unrepresented. Despite the *Australian Constitution* requiring members of the Commonwealth Parliament to represent the interests of their electors, there remains a significant number of disenfranchised Indigenous citizens within their electorates, whether registered or not. These citizens remain without a culturally appropriate means of their own political representation relative to the majority non-Indigenous population.[1397]

Legislated guaranteed seats for Indigenous representation in Commonwealth Parliament would ensure their representation is safeguarded, and that in and of itself would support principles of self-determination and representative democracy for all, at the highest level of mainstream politics.

Further, this strategy, like New Zealand's designated seats for Maori, aligns with the proposed implementation of an Indigenous Electoral Roll Option which would be used with Indigenous census data to determine whether electorate boundaries need to be adjusted and designated seats increased. There should be, however, a minimal seat allocation in Commonwealth Parliament of Indigenous designated seats that cannot be taken away – only increased – again, similar to the framework of Maori designated seats in New Zealand.

This reform proposal would not only enhance political proportionality within Australia's Commonwealth structure but also provide a better chance for authentic Indigenous political representation in Commonwealth law-making processes. In addition, it would represent a

[1397] *Commonwealth of Australia Constitution Act 1901*, ss 62, 64; *Australian Capital Television Pty Ltd and Others v Commonwealth of Australia* (No. 2) (1992) 108 ALR 577, 631.

better likelihood for success of constitutional reform that recognises Indigenous rights and cultural identity.

III. NATIONAL BODY REPRESENTATION

Whilst Commonwealth electoral law and policy reform are necessary measures to enhance Aboriginal political participation in voting and representation at a federal level in Australian politics, those measures still require constitutional reform to safeguard such rights to recognition and protection of Indigenous cultural identity in Australia.

The absence of meaningful representation and inclusion of Indigenous Australians in Commonwealth decision-making processes is due in no small part to the absence of constitutional recognition and protection of their rights and cultural identity. Consequently, constitutional recognition and entrenchment of such rights are fundamental to enhancing and protecting Indigenous rights to cultural identity, self-determination, self-governance and political participation.

Without constitutional protection of such rights, previous national Indigenous representative bodies that have been established in Australia have been short-lived due to the parliament's unconstrained ability to repeal their establishing legislation. There has also been minimal advocacy behind protecting the financial support each of those representatives has been allocated to meet their service delivery objectives.[1398]

The importance of entrenched constitutional rights is revealed by the experiences of Indigenous peoples in other Commonwealth jurisdictions. Canada and New Zealand, for example, have constitutional arrangements that afford a recognised partnership between their national government and Indigenous citizens. While not perfect, these institutional arrangements afford enhanced inclusion of Indigenous citizens' voices in national decision-making processes, and legislative frameworks implemented to guide those dialogues.

[1398] *Building a sustainable National Indigenous Representative Body – Issues for consideration* (Issues Paper prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner, in accordance with s 46 C (1) (b) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), 2008) 17; M. Ivanitz, 'The Demise of ATSIC? Accountability and the Coalition Government' (2000) 59(1) *Australian Journal of Public Administration* 4; L. Behrendt, *Briefing Paper No. 5: National Representative Structures* (Ngiya Institute for Indigenous Law, Policy and Practice, 2005) 9; W. Sanders, 'Reconciling Public Accountability and Aboriginal Self-Discrimination/Self-Management: Is ATSIC Succeeding?' (1994) 53 (4) *Australian Journal of Public Administration* 480.

In addition to constitutional arrangements, both Canada and New Zealand have treaties between their national governments and Indigenous peoples that have supported the development of substantive rights to enhanced political participation. Canada has a constitutionally entrenched *Charter of Rights and Freedoms* that recognises First Nation rights and New Zealand has a Bill of Rights that, although not constitutionally entrenched, guides the relationship between Maori and the New Zealand Government alongside the *Treaty of Waitangi*.

Those constitutional arrangements have guided the establishment and maintenance of Indigenous national representative bodies. Most importantly, though, the Indigenous representative bodies that have been established in Canada and New Zealand have had a meaningful impact on their Indigenous peoples' affairs through their advocacy and protection of rights to self-determination and cultural identity.

Australia has proposals for constitutional reform to entrench Indigenous rights – with a mandate of First Nations obtained through recognised discursive processes. Despite the government's insistence on ever more inquiries, the Voice to Parliament and Makarrata Commission proposals meet the test of robust and equitable Indigenous political participation within the colonial legal framework. Based on the experience in Canada and New Zealand, however, and the history of Australian representative bodies, constitutional entrenchment is vital to avoid the risk of their being dismantled, or financially deprived without, at the very least, government accountability. Establishing these institutions provides the framework for a partnership between Indigenous Australians and the Australian Government that is formally recognised, respected and protected.

To shore up the advancement of Indigenous political participation requires also establishment of the proposed Truth-Telling Commission through legislation. The Commission would add value and work alongside the Makarrata Commission and Voice to Parliament to enhance and protect the overall objectives sought to recognise Indigenous cultural identity, history and experiences in Australia.

While the institutional co-design process is still underway following the appointment of an advisory panel,[1399] it is instructive to consider the experience of similar bodies in Canada and New Zealand. The role and structure of the Waitangi Tribunal offer a useful framework for how the Makarrata Commission could be structured in terms of its proposed role to supervise treaty negotiations between Indigenous Australians and the Australian Government.

The Waitangi Tribunal is empowered to investigate and hear Maori claims back to 1840 that concern the practical implementation of the *Treaty of Waitangi 1840.* It can also make determinations as to whether the New Zealand government has acted inconsistently with treaty principles and if it finds that the New Zealand government has, the Tribunal must then determine whether those actions are prejudice to Maori claimants and what actions should be taken to compensate for, remove or prevent the prejudice.[1400]

The Tribunal can also refer claims to mediation and in certain circumstances, make binding recommendations for the return of land owned by the Crown where the Crown and the claimants have not been able to negotiate a settlement.[1401]

The Tribunal has a chairperson and up to 20 members who must be appointed by the Governor-General. Maori Land Court judges and members who hold legal qualification can also serve as inquiry presiding officers. As part of its broader structure, the Tribunal also has a 'Governance Group' which is convened by the chairperson and is responsible for the strategic direction, and reviews the progress of, the Tribunal's work programme. [1402] The Ministry of Justice of the Tribunal is responsible for providing operational support to the Tribunal through the Waitangi Tribunal Unit which delivers a range of services including being a registrar, undertaking event management, research, report writing, and administrative services.[1403]

[1399] Lorena Allem, 'Indigenous groups denounce Australian budget as "punishing people in poverty"' (*The Guardian*, 3 April 2019) <https://www.theguardian.com/australia-news/2019/apr/03/indigenous-groups-denounce-australian-budget-as-punishing-people-in-poverty>; Shahni Wellington, 'Leadership Group on Indigenous Voice to Government Announced' (NITV News, 8 November 2019) <https://www.sbs.com.au/nitv/article/2019/11/08/leadership-group-indigenous-voice-government-announced1>; *Co-chairs Announced for Indigenous Voice Co-Design Process* (indigenous.gov.au, 5 November 2019) <https://www.indigenous.gov.au/news-and-media/stories/co-chairs-announced-indigenous-voice-co-design-process>.

[1400] *Strategic Direction 2014-2025* (Waitangi Tribunal, 2014) 2.

[1401] Ibid.

[1402] Ibid, 1.

[1403] Ibid, 1.

Overall, the Tribunal is an ideal model for Australia to consider in its development and co-design of the proposed Makarrata Commission as both seek to contribute to fair resolutions of Treaty claims and to uphold the partnership relationship between Indigenous people and the Crown.[1404] Therefore, part of the Makarrata Commission's supervisory role should include a mechanism of accountability on treaty claims, like the Waitangi Tribunal, that enables it to hear treaty disputes and ensure both parties adhere to their obligations prior to treaties being formed (as to process) and thereafter.[1405]

In addition, the AFN in Canada is useful for consideration for Australia's proposed Makarrata Commission because but it also deals with issues surrounding Canadian government adherence to First Nation treaty rights across Canada. Further, unlike New Zealand but more like Australia, First Nation identity in Canada is not one homogenous culture. First Nations of Canada are separate and distinct cultural identities in their own right. The AFN model, illustrates a means of accommodating consent and consultation within and between First Nation tribes of Canada, and their representation on the national executive. For instance, the AFN's national executive structure comprises the National Chief who is elected by Chiefs every three years, 10 Regional Chiefs, and the Chairs of the Elders, Women's and Youth councils.[1406] The AFN also models a consultative process for both regional and national members and Chiefs to contribute to the dialogue surrounding First Nations rights in Canada.

The AFN also offers a culturally internal democratic elective process that, if applied in Australia, would see Indigenous Australians periodically elect their own regional representatives to represent their regional interests within National Indigenous Makarrata forums on matters concerning the protection of cultural identity and rights to self-determination. As such, both the national executive structure, internal electoral processes and consultative role that the AFN takes in Canada, should be considered in Australia for the design of the Makarrata Commission to enable all differing Indigenous Australian perspectives on treaty, to be consulted and included during those processes of treaty-making and dispute resolution.

For the Voice to Parliament proposal, Australia should consider the design and structure of the New Zealand Maori Council. Whilst the Maori Council is established as a national

[1404] Ibid.
[1405] *Waitangi Tribunal* (Waitangitribunal.govt.nz, 2018) <https://waitangitribunal.govt.nz/>.
[1406] Ibid.

legislative body under the *Maori Welfare Act 1962*[1407] and is not constitutionally entrenched like what is sought after with the Voice to Parliament proposal, it is a national policy-making body inclusive of Maori voices and interests. The Maori Council is responsible for ensuring continuous consultation between the New Zealand Government and Maori Committees and makes representations to ministers and other stakeholders on behalf of Maori in law and policy-making processes. In turn, the Maori Council leads Maori policy development in New Zealand at both national and community-based levels.[1408]

Another beneficial aspect of the function of the Maori Council that the co-design process of the Voice to Parliament should be considerate of, is that it also ensures it connects all District Maori Councils to the New Zealand Government and other key stakeholders on matters surrounding Maori affairs. The New Zealand Maori Council is comprised of an executive which has up to three delegates from each of the 16 District Maori Councils across New Zealand and the delegates hold a three-year tenure until the next election cycle.[1409]

In addition, the consultation undertaken by the Council has been beneficial for and integral to connecting all District Maori Councils to the New Zealand Government on matters that concern Maori rights and affairs.[1410] This is particularly useful for Australia to consider given how diverse Indigenous cultural identities, perspectives and experiences are and, the way in which most community representative voices from remote locations across Australia, are excluded and go unheard in such law and policy making processes.[1411]

The design of the CAP in Canada is relevant also to the Voice design process. Political Accord agreements with the Canadian Government safeguard its rights and objectives as a representative body of non-status Indians. This type of agreement is useful as a governing framework for the design of the Voice to Parliament, to clarify how the Voice to Parliament's recommendations are to be considered within the Commonwealth Parliament and, where relevant, applied.

[1407] The *Maori Welfare Act 1962* renamed the *Maori Community Development Act 1962* and later replaced by s 19(1) of the *Maori Purposes Act 1979*.
[1408] *Maori Community Development Act 1962.*
[1409] Claudia Orange, 'An Exercise in Maori Autonomy: The Rise and Demise of the Maori War Effort Organisation' in P. Whitney Lackenbauer, R. Scott Sheffield and Craig Leslie Mantle, *Aboriginal Peoples and Military Participation* (Canadian Defence Academy Press, 2007) 237.
[1410] *Our Purpose* (Maori Council, 2018) <https://maoricouncil.com/about-us/our-purpose/>.
[1411] Ibid.

In terms of constitutionally entrenching the Voice to Parliament, this aspect of the proposal is reliant on the Australian government's decision to hold a referendum once the co-design process is completed. The intent behind constitutionally entrenching the Voice to Parliament is to protect it from being either legislatively or administratively extinguished, as this thesis has discussed in Chapter 5. Constitutional entrenchment would protect the Voice to Parliament from legislative override and significant funding cuts by the Australian government that would limit its capacity to function and exist.

For the Voice to Parliament to be successful at a referendum, it is reliant on strong multi-partisan parliamentary consensus for the timing of the referendum and the content and wording of the Voice to Parliament referendum proposal. The timing of the referendum should also be held at either the next federal election or the date of the 1967 referendum which was the last referendum Australia had that recognised Indigenous Australian rights.

In all of these recommendations, at the heart lies the importance of reconciling a long disconnected post-colonial relation between Indigenous Australians as peoples, and the Australian Government. To overcome that, Australia's national identity must be reformed as it manifests within political laws, policies, processes and institutions. This thesis calls for a renewed approach centred upon self-determination as a means of empowering Indigenous Australians to decide on matters that affect them. Such an approach aims to rectify past wrongs, and to take action, ensuring that Australia does so in accordance with principles of representative democracy and political participation for all citizens equally.

BIBLIOGRAPHY

I. ARTICLES/ BOOKS/ REPORTS

Aarnio, Aulis, *Essays on the Doctrinal Study of Law* (Springer Netherlands, 1st ed, 2011)

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice: Strategies and Recommendations* (Office of Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995)

Aboriginal and Torres Strait Islander Social Justice Commission 1997, Aboriginal and Torres Strait Islander Social Justice Commissioner Fifth Report, Macmillan, Sydney

Aboriginal and Torres Strait Islander Social Justice Commissioner: Human Rights and Equal Opportunity Commission 2007b (Social Justice Report, 2006)

Ackerman, Bruce, 'The Rise of World Constitutionalism' (1997) *Yale Law School Faculty Scholarship Series*

Ackerman, Bruce, *We the People: Foundations* (Harvard University Press, 1993)

Adams, Maurice and Dirk Heirbaut, *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Bloomsbury Publishing, 2014)

Aikio and Martin Scheinin, *Operationalizing the Right of Indigenous Peoples to Self-determination* (Institute for Human Rights, 2000)

Akelyernemane Meke Mekarle, Ampe, 'Little Children are Sacred' (Report of the Board Of Inquiry Into The Protection Of Aboriginal Children From Sexual Abuse, by Rex Wild and Patricia Anderson, 30 April 2007)

Alcantara, Christopher, 'Preferences, Perceptions, and Veto Players: Explaining Devolution Negotiation Outcomes in the Canadian Territorial North' (2012) *Political Science Faculty Publications*

Alcantara, Christopher, 'To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada' (Spring, 2008) 38 (2) *The Journal of Federalism* 343

Alfred, Gerald R., *Wasáse* (University of Toronto Press, 2009)

Alfred, T., *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, 1999)

Alfredsson, Gudmunder and Maria Stravropoulou (eds), *Justice Pending: Indigenous Peoples and Other Good Causes: Essays in Honour of Erica-Irene Daes* (Kluwer Academic Press, 2002)

Allen, Chadwick, *Blood Narrative: Indigenous Identity in American Indian and Maori Literary and Activist Texts* (Duke University Press, 2002)

Altman, J.C, *Aboriginal Employment Equity by the Year 2000* (Centre for Aboriginal Economic Policy Research Australian National University, 1991)

Altman, J.C., 'The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?' (Centre for Aboriginal Economic Policy Research, Topical Issue No. 16/2007)

Altman, Jon C, *The Economic Status Of Indigenous Australians* (Centre for Aboriginal Economic Policy Research, 2000)

Anaya, James, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 *Arizona Journal International and Comparative Law* 7

Anaya, S James, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004)

Anaya, S. James, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009)

Anderson, Ian, 'The End of Aboriginal Self-Determination?' (2007) 39(2-3) *Futures* 137

Anderson, Kay and Affrica Taylor, 'Exclusionary Politics and the Question of National Belonging' (2005) 5(4) *Ethnicities* 460

Ang, Ien and Jon Stratton, 'Multiculturalism In Crisis: The New Politics Of Race And National Identity In Australia' (1998) 2 *TOPIA: Canadian Journal of Cultural Studies* 1

Anthony, Thalia, ‘A New National Indigenous Representative Body... Again’ (2010) 7(18) *Indigenous Law Bulletin* 5

Anthony, Thalia, 'Aboriginal Self-determination after ATSIC: Reappropriation of the 'Original Position'' (2005) 14(1) *Polemic* 4

Appleby, Gabrielle and Megan Davis, ‘The Uluru Statement and the Promises of Truth’ (2018) 49(4) *Australian Historical Studies* 501

Appleby, Gabrielle and Gemma McKinnon, ‘Indigenous recognition: The Uluru statement’ (2017) 37 *Law Society of NSW Journal* 36

Appropriateness of Alternative Sentencing Options (Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, ALRC Report 133, 11 January 2018)

Arat, Zehra F., *Democracy and Human Rights in Developing Countries* (Lynne Reiner Publishers, 1991)

Armitage, Andrew, *Comparing the Policy of Aboriginal Assimilation* (University of British Columbia Press, 1995)

Aroney, Nicholas and Steve Thomas, ‘A House Divided: Does MMP Make an Upper House Unnecessary for New Zealand?’ [2012] *New Zealand Law Review* 403

Aroney, Nicholas, ‘Representative Democracy Eclipsed? The Langer, Muldowney and McGinty Decisions’ (1996) 19 *University of Queensland Law Journal* 75

Aroney, Nicholas, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009)

Arseneau, T., ‘The Representation of Women and Aboriginal Peoples Under PR: Lessons From New Zealand’ (1997) 18 (9) *Policy Options* 9

ARRB Transport Ltd & CARRS-Q, *Draft report for the Australian Transport Safety Bureau, RC 2321* (Australian Indigenous Road Safety, 2002)

Arthur, W.S., ‘Autonomy and Identity in Torres Strait, a Borderline Case?’ (2001) 36 (2) *Journal of Pacific History* 215

Asch, M. and P. Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow' (1991) 29 *Alberta Law Review* 498

Assembly of First Nations, *For Discussion: National Strategy on First Nations Child and Family Services* (Assembly of First Nations, 1991)

Assembly of First Nations, *Report of the National Inquiry into First Nation Child Care* (Assembly of First Nations 1989)

Assembly of First Nations, *Strengthening the Family, Building the Community: Final Report on the First Canadian Indian-Native Child Welfare Conference* (Assembly of First Nations, 1988)

ATSIC, *1996a Annual Planning Cycle*, AGPS

ATSIC, *1996b ATSIC Annual Report 1995–1996*, AGPS

ATSIC, *1997 ATSIC Annual Report 1996–1997*, AGPS

ATSIC, *1998 ATSIC Annual Report 1997–1998*, AGPS

Attwood, Bain, *Rights for Aborigines* (Allen & Unwin, 2003)

Attwood, Bain and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007)

Attwood, Bain and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines League* (Aboriginal Studies Press, 2004)

Aulich, Chris, 'From Citizen Participation to Participatory Governance in Australian Local Government' (2009) (2) *Commonwealth Journal of Local Governance* 44

Aulich C. and R. Wettenhall, *Howard's Second and Third Governments* (University of NSW Press, 2005)

Australian Crime: Facts and Figures 1998 (Australian Institute of Criminology, 1999)

Australian Electoral Commission, Submission to the Joint Standing Committee on Electoral Matters, *Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012*, Submission 2 (2012)

Australian Human Rights Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia: Social Justice* (2008)

Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017)

Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (2010)

Ballara, Angela, 'Pakeha uses Takitimutanga who owns tribal tradition?' (March, 1993) *Stout Centre Review* 2324

Banakar, Reza, 'Power, Culture and Method in Comparative Law' (2007) *International Journal of Law in Context* 69

Banducci, Susan, Todd Donovan and Jeffrey Karp, 'Minority Representation, Empowerment, and Participation' (2004) 66(2) *Journal of Politics* 534

Banks, Angela M., 'Expanding Participation in Constitution Making: Challenges and Opportunities' (2008) 49 (2) *William & Mary Law Review* 1043

Banks, Margaret A., 'The Franchise in Britain and Canada' (1967) 17 (1) *The University of Toronto Law Journal* 187

Barber, Keith, 'Indigenous Rights or Racial Privileges: The Rhetoric of Race in New Zealand Politics' (2008) 9(2) *The Asia Pacific Journal of Anthropology* 141

Bargh, Maria, *Maori and Parliament: Diverse Strategies and Compromises* (Huia Publishers, 2010)

Bargh, M., *Resistance: An Indigenous Response to Neoliberalism* (Huia Publishers, 2007)

Barker, Fiona and Elizabeth McLeay, 'How Much Change? An Analysis of the Initial Impact of Proportional Representation on the New Zealand Parliamentary Party System' (2000) 6 (2) *Party Politics* 131

Barker, Joanne, 'Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism' (2006) 7 (1) *Meridians* 127

Barnard, Catherine and Bob Hepple, ‘Substantive Equality’ (2000) 59(3) *The Cambridge Law Journal* 562

Barrett, Mark, 'The Treaty of Waitangi and Social Policy' (1998) 11 *NZ Ministry of Justice* 29

Barsh, Russel Lawrence, ‘Indigenous Peoples: An Emerging Object of International Law’ (1986) 80 (2) *The American Journal of International Law* 369

Barsh, Russell Lawrence, ‘Indigenous Peoples in the 1990s: From Object to Subject of International Law?’ (1994) 7 (33) *Harvard Human Rights Journal* 33

Bartlett, Ben and John Boffa, ‘The Impact of Aboriginal Community Controlled Health Service Advocacy on Aboriginal Health Policy’ (2005) 11(2) *Australian Journal of Primary Health* 53

Bartlett, Richard H., ‘The Content of Aboriginal Title and Equality before the Law’ (1998) 61 *Saskatchewan Law Review* 377

Bauman, Toni, ‘Nations and Tribes ‘Within’: Emerging Aboriginal ‘Nationalisms’ in Katherine’ (2006) 17 (3) *The Australian Journal of Anthropology* 322

Beck, Luke, ‘Jack Balkin's Constitutionalism and Constitutional Recognition of Indigenous Australians’ (2014) 37 (2) *UNSW Law Journal* 407

Beckman, Ludvig, ‘Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy’ (2008) 15 (1) *Democratisation* 49

Behrendt, Larissa, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003)

Behrendt, L., *Briefing Paper No 5: National Representative Structures* (Ngiya Institute for Indigenous Law, Policy and Practice, 2005)

Behrendt, Larissa, ‘Indigenous self-determination in the age of globalization’ (2001) 3 *Balayi: Culture, Law and Colonialism* 1

Behrendt, Larissa, *Lessons from the Mediation Obsession: Ensuring that Sentencing 'Alternatives' Focus on Indigenous Self-Determination* (Cambridge University Press, 2002)

Behrendt, Larissa, 'Self-determination and Indigenous Policy: The Rights Framework and Practical Outcomes' (2002) (1) *Journal of Indigenous Policy* 43

Behrendt, Larissa, 'Self-Representation, Self-Determination and Sovereignty' (2013) *Hot Topics: Legal Issues in Plain Language* 20

Behrendt, Larissa, 'Unfinished Journey: Indigenous Self-Determination' (Apr-May 2002) *Arena Magazine* 24

Behrendt, Larissa, Chris Cunneen and Terry Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009)

Behrendt, Larissa, *The Abolition of ATSIC: Implications for Democracy* (Analysis and Policy Observatory, 2005)

Behrendt, Larissa, and Alison Vivian, *Indigenous Self-Determination and the Charter of Human Rights and Responsibilities* (Victorian Equal Opportunity and Human Rights Commission, 1st ed, 2010)

Belgrave, M, M. Kawharu and D. Williams, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005)

Beresford, Quentin, Gary Partington and Graeme Gower, *Reform and Resistance in Aboriginal Education* (UWA Publishing, 2012)

Berndt, Catherine H, *Going It Alone? Prospects for Aboriginal Autonomy: Essays in Honour of Ronald and Catherine Berndt* (Aboriginal Studies Press, 1990)

Bielfeld, Shelley, 'Compulsory Income Management, Indigenous Peoples and Structural Violence – Implications for Citizenship and Autonomy' (2015) 18 (1) *Australian Indigenous Law Review* 99

Bijdragen tot de Taal-, Land- en Volkenkunde, *Politics, tradition and change in the Pacific* (Leiden, 1993)

Blackstone, William and Thomas Andrew Green, *Commentaries on The Laws of England* (The University of Chicago Press, 2nd ed, 1979)

Blackstock, Michael D., 'Where is the Trust: Using Trust-Based Mediation for First Nations Dispute Resolution' (2001-2002) 19 (1) *Conflict Resolution Quarterly* 345

Blais, André, *To Keep or To Change First Past the Post?* (Oxford University Press, 2008)

Blas, Erik, Johannes Sommerfeld and A. Sivasankara Kurup, *Social Determinants Approaches to Public Health* (World Health Organization, 2011)

Boast, R. P, 'Maori Fisheries 1986 – 1998: A Reflection' (1999) 30 *Victoria University Wellington Law Review* 30

Boast, R. P, 'The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891 – 1912' (2014) 12 *New Zealand Journal of Public and International Law* 81

Boast, R.P., 'The Treaty of Waitangi: A Framework for Resource Management Law' (1989) 19 *Victoria University of Wellington Law Review* 19

Boe, A., *The Failure of the 'Whitefella' Criminal Justice System Towards Aborigines & Torres Strait Islanders* (Brisbane: North West Queensland Aboriginal Legal Service, 1999)

Bohan, E., *Edward Stafford: New Zealand's First Statesman* (Hazard Press, Christchurch, 1994)

Boldt, Menno and Anthony J. Long, 'Tribal Traditions and European-Western Political ideology: The Dilemma of Canada's Native Indians' (1984) 18 *this JOURNAL* 537

Bollen, Kenneth A., *Cross-National Indicators of Liberal Democracy 1950 to 1990* (Codebook, University of North Carolina, 1998)

Booth, Annie L., and Norman W. Skelton, '"There's A Conflict Right There": Integrating Indigenous Community Values into Commercial Forestry in the Tl'azt'en First Nation' (2010) 24(4) *Society & Natural Resources* 368

Borrows, John, 'Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation' (1994) 24 (1) *UBC Law Review* 1

Borrows, John, 'Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics' (1994) 43 *University of New Brunswick Law Journal* 19

Borrows, John, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002)

Bos, Maarten, 'Theory and Practice of Treaty Interpretation' (1980) 27(02) *Netherlands International Law Review* 135

Bourassa, Steven C., and Ann Louise Strong, 'Restitution of Land to New Zealand Maori: The Role of Social Structure' (2002) 75 (2) *Pacific Affairs* 227

Bowden, James, '1791: The Birth of Canada' (2015) *The Dorchester Review* 28

Bowden, Ross, 'Tapuandmana: Ritual Authority and Political Power in Traditional Maori Society' (1979) 14(1) *The Journal of Pacific History* 50

Bowie, Ryan, 'Indigenous Self-Governance and the Deployment of Knowledge in Collaborative Environmental Management in Canada' (2013) 47 (1) *Journal of Canadian Studies* 91

Bowler, Shaun, David M. Farrell and Ian McAllister, 'Constituency Campaigning in Parliamentary Systems with Preferential Voting: Is there a Paradox?' (1996) 15 (4) *Electoral Studies* 461

Bradfield, Stuart, 'Separatism Or Status-Quo?: Indigenous Affairs From The Birth Of Land Rights To The Death Of ATSIC' (2006) 52(1) *Australian Journal of Politics and History* 80

Brand, Oliver, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32 (2) *Brooklyn Journal of International Law* 404

Bray, M., and A. Thomson, *Temagami: A Debate on Wilderness* (Toronto: Dundum Press, 1990)

Bredt, Christopher D. and Markus F. Kremer, 'Section 3 of the Charter: Democratic Rights at the Supreme Court of Canada' (2004/2005) 17 *National Journal of Constitutional Law, suppl. Constitutional Update* 1

Brennan, F., *Sharing the Country* (Penguin Australia, 1992)

Brennan, Frank, 'ATSIC - Seeking a National Mouthpiece for Local Voices' (1990) 2(43) *Aboriginal Law Bulletin* 4

Brennan, Geoffrey and Francis G. Castles, *Australia Reshaped: 200 Years of Institutional Transformation* (Cambridge University Press, 2002)

Brennan, Sean, Brenda Gunn and George Williams, 'Sovereignty and its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' [2004] 26 (3) *Sydney Law Review* 307

Brennan, Sean, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (The Federation Press, 2005)

Brighouse, Harry and Marc Fleurbaey, 'Democracy and Proportionality' (2010) 18 (2) *The Journal of Political Philosophy* 137

Bringing them Home Report (1997) <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>

Bromfield, Leah, Daryl Higgins, Alexandra Osborn, Stacey Panozzo and Nicholas Richardson, 'Out-Of-Home Care in Australia: Messages from Research' (A report to the Community Services Ministers Advisory Council commissioned by the Australian Government Department of Families, Community Services and Indigenous Affairs, June 2005)

Brookfield, FM, 'Kelsen, The Constitution and the Treaty' (1992) 15 *New Zealand Universities Law Review* 163

Brookfield, FM, 'Maori Rights and Two Radical Writers: Review and Response' [1990] *New Zealand Law Journal* 406

Brookfield, FM, 'The Treaty, the 1840 Revolution and Responsible Government' [1992] *Canterbury Law Review* 59

Brooking, Tom, *The History of New Zealand* (Greenwood Publishing Group, 2004)

Brooks, Adrian, 'A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise' (1993) 12 *University of Tasmania Law Review* 208

Brosted, Jens, *Native Power: The Quest for Autonomy and Nationhood of Indigenous Peoples* (Oxford University Press, 1986)

Brown, Garrett Wallace, Iain McLean and Alistair McMillan, *The Concise Oxford Dictionary of Politics and International Relations* (Oxford University Press, 2018)

Brown, Jody, ‘Shaping Change: The National Congress of Australia's First Peoples Explores The Path Towards Constitutional Reform’ (2011) 7(25) *Indigenous Law Bulletin* 39

Bryce, James Bryce, *Studies In History and Jurisprudence* (Oxford University Press, American Branch, 1901)

Bryder, Linda and Derek A. Dow, ‘Introduction: Maori Health History, Past, Present and Future’ (2001) 3 (1) *Maori Health and History* 3

Buddle, Thomas, *The Maori King Movement in New Zealand: Full Report of the Native Meetings Held at Waikato, April and May, 1860* (“New Zealander” Office, 1860)

Buick-Constable, John, ‘A Contractual Approach to Indigenous Self-Determination in Aotearoa/New Zealand’ (2002) 20 (1) *University of California Los Angeles Pacific Basin Law Journal* 113

Building a sustainable National Indigenous Representative Body – Issues for consideration (An Issues Paper prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner, in accordance with section 46 C (1) (b) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), 2008)

Burke, Anthony, *Fear of Security: Australia's Invasion Anxiety* (Cambridge University Press, 2008)

Cairns, Alan C., *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver, University of British Columbia Press, 2002)

Callister, Paul, ‘Skin Colour: Does it Matter in New Zealand?’ (2008) 4 (1) *Policy Quarterly* 18

Calma, Tom, ‘The Northern Territory Intervention: it's not our dream’ (2009) 27 (2) *Law in Context* 14

Cameron, Margaret, *Women Prisoners and Correctional Programs* (Australian Institute of Criminology, 2001)

Canada, House of Commons, Report: Special Committee on Indian Self-Government (Queen's Printer 1983)

Canada, Indian and Northern Affairs, 'Statement of the Government of Canada on Indian Policy' (Ottawa: Department of Indian and Northern Affairs, 1969)

Carlen, Pat and Leandro Ayres Franca, *Justice Alternatives* (Routledge, 2019)

Carrell, N., 'Innovation in Reconciliation - The Ngai Tahu Claims Settlement Act 1998' (1999) 3 *New Zealand Journal of Environmental Law* 179

Cassese, A., *Self-Determination of Peoples* (Cambridge University Press, 1995)

Castan, Melissa, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8 (19) *Indigenous Law Bulletin* 15

Castan, Melissa and Paula Gerber, *Proof of Birth* (Future Leaders, 2016)

Castejon, Vanessa, 'Aboriginal Affairs: Monologue or Dialogue?' (2002) 26(75) *Journal of Australian Studies* 27

Castellino, Joshua and Jeremie Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 *Macquarie Law Journal* 155

Catalinac, Amy L., 'The Establishment and Subsequent Expansion of the Waitangi Tribunal: The Politics of Agenda Setting' (June, 2004) 56 (1) *Political Science* 5

Cavadino, Michael and James Dignan, *Penal Systems: A Comparative Approach* (Sage, 2006)

Chapple, Simon, 'Maori Socio-Economic Disparity' (2000) 52(2) *Political Science* 101

Charlesworth, Hilary, 'The Australian Reluctance about Rights' (1993) 31 (1) *Osgoode Hall Law Journal* 195

Chartier, Clem, 'Indian: An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867' (1978-79) 43 *Saskatchewan Law Review* 37

Chesterman, John, 'Chosen by the people? How Federal Parliamentary Seats Might be Reserved for Indigenous Australians Without Changing the Constitution' (2006) 34 *Federal Law Review* 261

Chesterman, John, 'Natural-Born Subjects? Race and British Subjecthood in Australia' (2005) 51(1) *Australian Journal of Politics and History* 30

Chesterman, John and Brian Galligan, *Citizens without Rights* (Cambridge University Press, 1998)

Chesterman, John and David Philips (eds), *Selective Democracy: Race, Gender and the Australian Vote* (Circa Books, 2003)

Cingranelli, David and Mikhail Filippov, 'Electoral Rules and Incentives to Protect Human Rights' (2010) 72(1) *The Journal of Politics* 243

Clark, Jennifer, *Aborigines & Activism: Race, Aborigines and the Coming of the Sixties to Australia* (University of Western Australia Press, 2008)

Clarke, Anna, 'Changing Concepts of Citizenship: Gender, Empire, And Class' (2003) 42(2) *Journal of British Studies* 263

Clarke, R., *The Development of the New Zealand Constitution* (Wellington: Department of Education, 1974)

Class, T. H, *Citizenship, and Social Development* (Doubleday, 1964)

Cobo, Jose R. Martinez, *Study on the Problem of Discrimination against Indigenous Populations* (987) E/CN.4/Sub.2/1986/7/Add.1-8.

Coe, Paul, 'ATSIC: Self-Determination or Otherwise' (1994) 35(4) *Race & Class* 35

Coke, Sir Edward, *Institutes of the Laws of England* (1798) Pt 4.

Coghill, Ken and Paula Wright, '*Hear Our Voice'* (The Australian Collaboration, 2012)

Comino, Elizabeth et al, 'The Gudaga Study: Establishing an Aboriginal Birth Cohort in an Urban Community' (2010) 34 *Australian and New Zealand Journal of Public Health* S9

Commonwealth Foundation, *Summary of Analysis for the Indigenous Partner of Aotearoa*: '*Citizens and Governance: Civil Society in the New Millennium* (New Zealand, April 1999, Part V)

Comyns, Sir John, *A Digest of the Laws of England* (Collins & Hannay, 1824)

Congress of Aboriginal Peoples, *A Positive Way Forward: A Grassroots Perspective Report* (2017)

Congress of Aboriginal Peoples, *Final Report on the Daniels Symposium* (March 21st & 22nd 2017, Ottawa)

Congress of Aboriginal Peoples, *A Position Paper for the 5th National Indigenous Women's Summit* (March 6 – 8 2017, Toronto, Ontario)

Constitutional Advisory Panel, *New Zealand's Constitution: A Report on a Conversation He Kōtuinga Kōrero Mō Te Kaupapa Ture O Aotearoa* (New Zealand Government, 2013)

Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 1

Coper, Michael and George Williams, *Power, Parliament and the People* (Federation Press, 1997)

Cornell, S., 'The Importance and Power of Indigenous Self-Governance: Evidence from the United States' (Presentation to Reconciliation Australia Indigenous Governance Conference, Canberra, 3-5 April 2002)

Cornell, Stephen E, *Indigenous Peoples, Poverty And Self-Determination In Australia, New Zealand, Canada And The United States* (Native Nations Institute for Leadership, Management and Policy, 2006)

Corntassel, Jeff, 'Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination' (2012) 1 (1*) Decolonization: Indigeneity, Education & Society* 1

Corntassel, Jeff, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 *Alternatives* 105

Corntassel, Jeff and Cheryl Bryce, 'Practicing Sustainable Self-Determination: Indigenous Approaches to Cultural Restoration and Revitalization' (Spring/Summer 2012) 18 (2) *Brown Journal of World Affairs* 151

Corntassel, Jeff and Cindy Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru' (2008) 9(4) *Human Rights Review* 465

Corrigan, Matthew, 'Aboriginal Justice: Major Report Makes Key Access to Justice Recommendations to Reduce Indigenous Incarceration' (April 2018) 40 (3) *The Bulletin* 34

Costa, Ravi de, *A Higher Authority: Indigenous Transnationalism ad Australia* (UNSW Press, 2006)

Cotta, Maurizio, 'A Structural-Functional Framework for the Analysis of Unicameral and Bicameral Parliaments' (1974) 2(3) *European Journal of Political Research* 201

Council for Aboriginal Reconciliation, *Going Forward: Social Justice for First Australians – A Submission to the Commonwealth Government* (Australia Government Publishing Service, 1995)

Courchene, Thomas J, Aboriginal Self-Government in Canada (Papers on Parliament No. 21, December 1993)

Courtney, John C., Peter MacKinnon and David E. Smith, *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Fifth House, 1992)

Cox, Lindsay, *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, 1993)

Cox, Noel S., 'The Treaty of Waitangi and the Relationship between Crown and Maori in New Zealand' [2003] *Brooklyn Journal of International Law* 123

Clarke, M. 'Devolving Forest Ownership through Privatization in New Zealand' (New Zealand Forestry Department, 1999)

Crepaz, Markus M. L., Thomas Albert Koelble, David Wilsford, *Democracy and Institutions: The Life Work of Arend Lijphart* (University of Michigan Press, 2000)

Cronin, Darryl, 'Trapped By History: Democracy, Human Rights and Justice for Indigenous People In Australia' (2017) 23(2) *Australian Journal of Human Rights* 220

Crowe, Jonathan and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 *Sydney Law Review* 10

Cunneen, Chris, 'State Crime, the Colonial Question and Indigenous Peoples' [2011] *University of New South Wales Law Research Series* 2

Curtin, Jennifer, Jack Vowles and Hilde Coff, *A Bark But No Bite* (ANU Press, 2017)

Daes, Erica-Irene A., 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' (1993) 3 (1) *Transnational Law and Contemporary Problems* 75

Dahl, Jens, Jack Hicks and Peter Jull, *Nunavut: Inuit Regain Control of Their Lands and Their Lives* (Copenhagen, International Work Group for Indigenous Affairs, 2000)

Dale, Allan P. and Marcus B. Lane, 'Strategic Perspectives Analysis: A Procedure for Participatory and Political Social Impact Assessment' (1994) 7(3) *Society & Natural Resources* 253

Davidson, Alastair and Roger D Spegele, *Rights, Justice and Democracy in Australia* (Longman Cheshire, 1st ed, 1991)

Davidson, Allan, and Peter J. Lineham, *Transplanted Christianity: Documents Illustrating Aspects of New Zealand Church History* (Dunsmore Press, 1987)

Davies, I., 'Rights and Wrong. New Zealand: Land of Discrimination' (1981/1982) 61 *Canadian Forum* 42

Davis, Megan 'Aboriginal Women: The Right to Self-Determination' (2012) 16 *Australian Indigenous Law Review* 78

Davis, Megan, 'ATSIC and Indigenous Women: Lessons for the Future' (2009) 10 *Balayi: Culture, Law and Colonialism* 73

Davis, Megan, 'Constitutional Recognition Does Not Foreclose on Aboriginal Sovereignty' (2012) 8 (1) *Indigenous Law Bulletin* 25

Davis, Megan, 'Constitutional reform and Aboriginal and Torres Strait Islander People: Why Do We Want It Now?' (2011) 7 (25) *Indigenous Law Bulletin* 8

Davis, Megan, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (2015) 8 (9) *Indigenous Law Bulletin* 10

Davis, M., 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7 *Indigenous Law Bulletin* 6

Davis, Megan, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439

Davis, Megan, 'The Long Road to Uluru Walking Together: Truth Before Justice' (2018) 60 *Griffith Review* 41

Davis, Megan and Marcia Langton, *It's Our Country* (Melbourne University Press, 2016)

Davis, Megan, 'Treaty, Yeah? The Utility of a Treaty to Advancing Reconciliation in Australia' (2006) 31 (3) *Alternative Law Journal*

Davis, Richard, *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004)

Davis-Roberts, Avery and David J. Carroll, 'Using international law to assess elections (2010) 17 (3) *Democratization* 127

Dawood, Yasmin, 'Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter' (2013) 51 (1) *Osgoode Hall Law Journal* 251

Dawson, John, 'The Resistance of the New Zealand Legal System to Recognition of Maori Customary Law' (2008) 12 (1) *Journal of South Pacific Law* 56

Dawson, Peter, 'On Self-Determination and Constitutional Recognition' (Jan/Feb 2015) 8 (16) *Indigenous Law Bulletin* 3

Day, Iyko, 'Being or Nothingness: Indigeneity, Antiblackness, and Settler Colonial Critique' (2015) 1 (2) *Critical Ethnic Studies* 102

Denemark, David, 'Thinking Ahead To Mixed-Member Proportional Representation' (1996) 2(3) *Party Politics* 409

Department of Corrections Census of Prison Inmates and Home Detainees 2003 (Department of Corrections, Wellington, 2004)

Department of Families, Housing, Community Services and Indigenous Affairs, *National Indigenous Representative Body - Update November 2009* (FaHCSIA, 2009)

Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (Government Press, Wellington, 1989)

Demko, George J., and William B. Wood, *Reordering the World: Geopolitical Perspectives on the 21st Century* (Westview Press, 1995)

Devere, H., K. Te Maiharoa and J. Synott, *Peacebuilding and the Rights of Indigenous Peoples* (Springer, Cham, 2016)

Dhami, Mandeep K., 'Prisoner Disenfranchisement Policy: A Threat to Democracy?' (2005) 5(1) *Analyses of Social Issues and Public Policy* 235

Dibley, Rozalind, *Maori Representation in Parliament: The Four Maori Seats* (MA Thesis, Victoria University of Wellington, 1993)

Dinstein, Yoram, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *International and Comparative Law Quarterly* 102

Dockery, Alfred Michael, 'Culture and Wellbeing: The Case of Indigenous Australians' (2010) 99(2) *Social Indicators Research* 315

Dodds, Susan, 'Citizenship, Justice and Indigenous Group-Specific Rights - Citizenship and Indigenous Australia' (1998) 2 (1) *Citizenship Studies* 105

Dodson, Michael, 'Citizenship in Australia: An Indigenous Perspective' (1997) 22 *Alternative Law Journal* 57

Dodson, Mick, 'Towards the Exercise of Indigenous Rights: Policy, Power and Self-Determination' (1994) 35(4) *Race & Class* 65

Dodson, P. L, *Final Report: Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (Parliament of the Commonwealth of Australia, 2018)

Dominelli, Lena and Jo Campling, *Anti Oppressive Social Work Theory and Practice* (Palgrave Macmillan, 2014)

Dorey, Dwight A., and Joseph Eliot Magnet, *Aboriginal Rights Litigation* (LexisNexis Butterworths, 2003)

Douglas, Roger, *The Politics of Successful Structural Reform* (R. Douglas, 1989)

Dowding, Keith, Robert Goodin and Carole Pateman, *Justice and Democracy* (Cambridge University Press, 2004)

Drees, Laurie Meijer, ‘Citizenship and Treaty Rights: The Indian Association of Alberta and the Canadian Indian Act, 1946 – 1948’ (2000) *Great Plains Quarterly* 141

Dreher, Tanja, Kerry McCallum and Lisa Waller, ‘Indigenous Voices and Mediatized Policy-Making in the Digital Age’ (2015) 19 (1) *Information, Communication & Society* 23

Dudgeon, Pat, Michael Wright, Yin Paradies, Darren Garvey and Iain Walker, *The Social, Cultural and Historical Context of Aboriginal and Torres Strait Islander Australians* (Australian Institute of Health and Welfare, 2010)

Durey, Angela, ‘Reducing Racism in Aboriginal Health Care in Australia: Where Does Cultural Education Fit?’ (2010) 34 (1) *Australian and New Zealand Journal of Public Health* 87

Durie, Arohia, ‘Emancipatory Maori Education: Speaking from the Heart’ (1998) 11 (3) *Language Culture and Curriculum* 297

Durie, Mason, ‘Universal Provision, Indigeneity and the Treaty of Waitangi’ [2002] 33 (3-4) *Victoria University of Wellington Law Review* 591

Dyck, N. and J.B. Waldram, *Anthropology, Public Policy and Native Peoples in Canada* (McGill-Queen’s University Press, 1993)

Electoral Law Reform Committee, *Report on the Electoral Reform Bill* [1993] I AJHR C17

Elster, Jon and Rune Slagstad, *Constitutionalism and Democracy* (Cambridge University Press, 2003)

Evans, Julie, Ann Genovese, Alexander Reilly and Patrick Wolfe, *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2012)

Evans, Mark et al, *From Turnbull to Morrison, The Trust Divide* (Melbourne University Publishing, 2019)

Erdos, D., ‘Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill Of Rights Act (1990)’ (2007) 5(2) *International Journal of Constitutional Law* 343

Errico, S., ‘The Draft UN Declaration On The Rights Of Indigenous Peoples: An Overview’ (2007) 7(4) *Human Rights Law Review* 741

Evans, Roger B, *The Truth about the Treaty: Division or Harmony*? (Lal Bagh Press, Kerikeri, 2004)

Eversole, Robyn, John-Andrew McNeish, Alberto D. Cimadamore, *Indigenous Peoples and Poverty: An International Perspective* (Zed Books Ltd., 2013)

Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Commonwealth of Australia, 2012)

Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011)

Fallon, Gerald and Jerald Paquette, 'A Critical Analysis of Self-Governance Agreements Addressing First Nations Control of Education in Canada' (2012) (132) *Canadian Journal of Educational Administration and Policy* 1

Felicetti, Andrea, John Gastil, Janette Hartz-Karp and Lyn Carson, 'Collective Identity and Voice at the Australian Citizens' Parliament' (2012) 8 (1) *Journal of Public Deliberation* 1

Fellner, Jamie and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Human Rights Watch and The Sentencing Project, 1998)

Fenley, Julie, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979 – 1981' (2011) 42 *Australian Historical Studies* 372

Final Report of the Referendum Council (Commonwealth of Australia, 2017)

Finding of the Waitangi Tribunal on the Manukau Claim (WAI 8/1985)

Fitzgerald, B. F., 'Proportionality and Australian Constitutionalism' (1993) 12(2) *University of Tasmania Law Review* 263

Fitzgerald, Jennifer and George Zdenkowski, 'Voting Rights of Convicted Persons' (1987) 11 *Criminal Law Journal* 11

Flanagan, Tom, *First Nations: Second Thoughts* (Montreal, McGill-Queens University Press, 2000)

Fleras, Augie, ‘From Social Control towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand’ (1985) 18(3) *Canadian Journal of Political Science* 4

Fleras, Augie, 'From Social Welfare to Community Development: Maori Policy and the Department of Maori Affairs in New Zealand' (1984) 19 *Community Development Journal* 32

Fletcher, Christine, *Aboriginal Self-determination in Australia* (Aboriginal Studies Press, 1994)

Foley, Gary, ‘Whiteness and Blackness in the Koori Struggle for Self-Determination: Strategic Considerations in the Struggle for Social Justice for Indigenous People’, (Sept 2000) 19-20 *Just Policy: A Journal of Australian Social Policy* 74

Foley, Gary, Edwina Howells and Andrew Schaap, *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013)

Ford, Lisa and Tim Rowse, *Between Indigenous And Settler Governance* (Routledge, 2013)

Forest, B., *Political Representation* (Elsevier, 2009)

Foster, Hamar, Heather Raven, Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2011)

Frances Abele, *Urgent Need, Serious Opportunity: Towards a New Social Model for Canada’s Aboriginal Peoples* (CPRN Social Architecture Papers Research Report F39 Family Network, 2004)

Franklin, Ann Margaret, ‘Maori Politics and the Treaty of Waitangi’ (1989) 61 (2) *The Australian Quarterly* 292

Fredman, Sandra, *Discrimination Law* (Oxford University Press, 2nd ed, 2011)

Fredrickson, George M, *Racism: A Short History* (Princeton University Press, 2002)

French, Robert, Geoffrey Lindell and Cheryl Saunders, *Reflections on the Australian Constitution* (Federation Press, 2003)

Freeman, Damien and Shireen Morris, *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016)

Galabuzi, Grace-Edward, *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Canadian Scholars' Press, 2006)

Galloway, Kate, 'Indigenous Dispossession in the 21St Century' (2015) 40(1) *Alternative Law Journal* 28

Galloway, Kate, 'The Unwritten Rules' (2013) *Griffith Review* 1

Gauja, Anika, 'The State of Democracy and Representation in Australia' (2015) 51(1) *Representation* 50

Gauja, Anika and Marian Sawer, *Party Rules?: Dilemmas of political party regulation in Australia* (ANU Press, 2016)

Gawas, Vijay M, 'Doctrinal Legal Research Method A Guiding Principle in Reforming the Law and Legal System towards the Research Development' (2017) 3(5) *International Journal of Law* 128

Gentry, Kynan, *History, Heritage, and Colonialism* (Manchester University Press, 2015)

Gayim, Eyassu, 'The United Nations Law on Self-Determination of Indigenous Peoples' (1982) 51 (1) *Nordic Journal of International Law* 53

Geddis, Andrew, *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellingon, 2007)

Geddis, Andrew, *Electoral Law in New Zealand: Practice and Policy* 2 (Lexis Nexus, 2013)

Geddis, Andrew, 'A Dual Track Democracy? The Symbolic Role of the Maori seats in New Zealand's Electoral System' (2006) 5(4) *Election Law Journal* 347

Geddis, Andrew, 'Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change' (2016) 14(1) *International Journal of Constitutional Law* 99

Gerber, Paula, 'Making Indigenous Australians 'Disappear': Problems Arising from our Birth Registration Systems' (2009) 34 (3) *Alternative Law Journal* 157

Gerber, Paula and Melissa Castan, *Contemporary Perspectives on Human Rights Law in Australia* (Thompson Reuters, 2012)

Gibberd, Alison J., Judy M. Simpson and Sandra J. Eades, 'No Official Identity: A Data Linkage Study of Birth Registration of Aboriginal Children in Western Australia' (2016) 40(4) *Australian and New Zealand Journal of Public Health* 388

Gibbs, Meredith, 'Justice as Reconciliation and Restoring Mana in New Zealand's Treaty Of Waitangi Settlement Process' (2006) 58(2) *Political Science* 15

Gibbs, Meredith, 'The Ngai Tahu (Pounamu Vesting) Act 1997' (2000) 4 *New Zealand Journal of Environmental Law* 257

Gibson, Chris, 'Cartographies of the Colonial/Capitalist State: A Geopolitics of Indigenous Self-Determination in Australia' (1999) 31 (1) *Antipode* 47

Gibson, Chris, '"We Sing Our Home, We Dance Our Land": Indigenous Self-Determination and Contemporary Geopolitics in Australian Popular Music' (1998) 16 *Environment and Planning D: Society and Space* 163

Gilbert, Kevin, *Aboriginal Sovereignty: Justice, the Law and Land* (Burrambinga Books, 3rd ed, 1993)

Glasson, E. J. et al, 'An Assessment of Intellectual Disability Among Aboriginal Australians' (2005) 49 (8) *Journal of Intellectual Disability Research* 626

Gorst, J. E., *The Maori King: Or, The Story of Our Quarrel with the Natives of New Zealand* (Cambridge University Press, 2011)

Gover, Kirsty, 'Comparative Tribal Constitutionalism: Membership Governance in Australia, Canada, New Zealand, And the United States' (2010) 35(03) *Law & Social Inquiry* 689

Government on Native Title Social Justice Measures (ATSIC, 1995)

Grabham, Emily, 'Law v Canada: New Directions for Equality under the Canadian Charter?' (2002) 22 (4) *Oxford Journal of Legal Studies* 641

Graham, Nicole and Alain Pottage, *Lawscape: Property, Environment, Law* (Routledge, 2011)

Grattan, M., *Reconciliation: Essays on Australian Reconciliation* (Black Inc., 2000)

Gray, Anthony, 'The Guaranteed Right to Vote in Australia' (2007) 7 (2) *Queensland University of Technology Law and Justice Journal* 12

Gray, B. D., and RB McClintock, *Courts Policy: Checking the Balance* (Brookers, Wellington, 1995)

Gray, Jan and Quentin Beresford, 'A 'Formidable Challenge': Australia's Quest for Equity in Indigenous Education' (2008) 52 (2) *Australian Journal of Education* 197

Greaves, Lara M. et al, 'Maori, A Politicized Identity: Indigenous Identity, Voter Turnout, Protest, And Political Party Support in Aotearoa New Zealand' (2018) 7(3) *International Perspectives in Psychology: Research, Practice, Consultation* 155

Greenwood, M. and P. Shawana, *Whispered Gently Through Time - First Nations Quality Child Care: A National Study* (Assembly of First Nations, 2000)

Grimshaw, Patricia, 'Settler Anxieties, Indigenous Peoples, and Women's Suffrage in the Colonies of Australia, New Zealand, and Hawai'i, 1888 to 1902' (2000) 69 (4) *Pacific Historical Review* 553

Grimshaw, Patricia and Katherine Ellinghaus, 'White Women, Aboriginal Women and the Vote in Western Australia' (1999) 19 *Studies in Western Australian History* 1

Gschwend, Thomas, Ron Johnston and Charles Pattie, 'Split-Ticket Patterns In Mixed-Member Proportional Election Systems: Estimates and Analyses of Their Spatial Variation at the German Federal Election, 1998' (2002) 33(01) *British Journal of Political Science* 109

Guflstone, Andrew, 'The Howard Government's Approach to the Policy of Indigenous Self-Determination' (2006) 1 *Mal Review* 1

Gunstone, Andrew, *Unfinished Business: The Australian Formal Reconciliation Process* (Australian Scholarly Publishing, 2009)

Gustafson, Barry, *Constitutional Changes Since 1870* (Heinemann Educational Books, 1969)

Habermas, Jürgen, 'Reconciliation Through the Public Use of Reason' (1995) 92(3) *Journal of Philosophy* 109

Hamburger, Joseph, 'James Mill on Universal Suffrage and the Middle Class' (1962) 24 *Journal of Politics* 167

Hamilton, Clive and Sarah Maddison, *Silencing Dissent - How the Australian Government is Controlling Public Opinion and Stifling Debate* (Allen & Unwin, Sydney, 2007)

Hannaford, J., J. Huggins and B. Collins, *Report of the Review of the Aboriginal and Torres Strait Islander Commission* (Commonwealth of Australia, November 2003).

Hannum, Hurst, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 2011)

Harris, B. V., 'The Constitutional Future of New Zealand' (2004) *New Zealand Law Review* 189

Harris, Paul and Stephen I Levine, *The New Zealand Politics Source Book* (Dunmore Press, 1999)

Harris et al, Ricci, 'Effects of Self-Reported Racial Discrimination and Deprivation on Maori Health and Inequalities in New Zealand: Cross-Sectional Study' (2006) 367(9527) *The Lancet* 1

Harrison, Neil, *Teaching and Learning in Aboriginal Education* (Oxford University Press, 2012)

Hart, H. L. A., *The Concept of Law* (Oxford University Press, 1961)

Hart, Vivien, *Democratic Constitution Making* (United Nations Institute of Peace Special Report 107, July 2003)

Havemann, Paul, *Indigenous Peoples Rights in Australia, Canada and New Zealand* (Oxford University Press, 1999)

Hawkes, David C., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Carleton University Press, 1989)

Hawkes, D.C., *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989)

Hawthorn, H.B., *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, 2 (Indian Affairs Branch, 1966)

Hayward, Janine, ‘Mandatory Maori Wards in Local Government: Active Crown Protection of Maori Treaty Rights’ (2011) 63(2) *Political Science* 186

Hayward, M. Ann, ‘International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications’ (1985) 23 *University of Western Ontario Law Review* 9

He Aha i Pērā Ai? The Māori Prisoners’ Voting Report (Wai 2870, Waitangi Tribunal Report 2020).

Heldke, Lisa and Peg O’Connor, *Oppression, Privilege, & Resistance* (McGraw Hill, 2004)

Helin, Calvin, *Dances with Dependency - Out of Poverty Through Self-Reliance* (Ravencrest Publishers, 2008)

Henderson, James [Sakej] Youngblood, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Purich Publishing, 2008)

Heremaia, Shane, ‘Native Title to Commercial Fisheries in Aotearoa/New Zealand’ (2000) 4(29) *Indigenous Law Bulletin* 15

Hiatt, L.R, ‘ATSIC: A New Aboriginal National Organization’ (March, 1990) 26 (3) *Oceania* 235

Hiatt, L. R., ‘Treaty, Compact, Makarrata . . . ?’ (Dec, 1987) 58 (2) *Oceania* 140

Hiebert, Janet L. and James B. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom Experiences* (Cambridge University Press, 2015)

Hight, J. and H. D Bamford, *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs, 1914)

Hill, Lisa and K Alport 'Voting Attitudes and Behaviour Among Remote Aboriginal Peoples' (2010) *Australian Journal of Politics and History* 242

Hill, Richard S, *Crown-Maori relations in New Zealand/Aotearoa 1900 – 1950* (Victoria University Press, 2004)

Hinkson, Melinda and Jeremy Beckett, *Appreciation of Difference: WEH Stanner and Aboriginal Australia* (Aboriginal Studies Press, 2009)

Hinman, Pip and Peter Boyle, 'Treaties are an Essential First Step' (2017) 1143 *Green Left Weekly* 8

Hobbs, Harry and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40 (1) *Sydney Law Review* 1

Hobbs, Harry and George Williams, 'Treaty-Making in the Australian Federation' (2019) 43 (1) *Melbourne University Law Review* 178

Hocking, Jenny and Colleen Lewis, *It's Time Again: Whitlam and Modern Labor* (Circa, 2003)

Hocking, Barbara, *Unfinished Constitutional Business? Rethinking Indigenous Self-determination* (Aboriginal Studies Press, 2005)

Hoecke, Mark Van, *Epistemology and Methodology of Comparative Law* (Bloomsbury Publishing, 2004)

Hoecke, Mark van, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 1st ed, 2013)

Hoecke, Mark Van, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011)

Hoffman, Ross and Andrew Robinson, 'Nisga'a Self-Government: A New Government has Begun' (2010) 2 *The Canadian Journal of Native Studies* 387

Holm, Margaret, and David Pokotylo, 'From Policy to Practice: A Case Study in Collaborative Exhibits with First Nations' (1997) 21 (1) *Canadian Journal of Archaeology* 33

Holmes, Joan, *Bill C-31-Equality or Disparity? The Effects of the New Indian Act on Native Women. Background Paper* (Canadian Advisory Council on the Status of Women, 1987)

Hon. M. Rata, Second Reading of the Bill, 2 October 1974 (1974) New Zealand Parliamentary Debates 4775

Hooper, Keith and Kate Kearins, 'The Walrus, Carpenter And Oysters: Liberal Reform, Hypocrisy And Expertocracy In Maori Land Loss In New Zealand 1885–1911' (2008) 19(8) *Critical Perspectives on Accounting* 1239

Howard, Michael C., ‘Australian Aboriginal Politics and the Perpetuation of Inequality’ (1982) 53 (1) *Oceania* 82

Howe, K. R. and Claudia Orange, ‘The Treaty of Waitangi’ (1990) 95(3) *The American Historical Review* 894

Howe, Paul, Peter H. Russell, *Judicial Power and Canadian Democracy* (McGill-Queen's Press, 2001)

Howe, Paul, Richard Johnston, André Blais, *Strengthening Canadian Democracy* (Institute for Research on Public Policy, 2005)

Howitt, Richard, ‘Sustainable Indigenous Futures in Remote Indigenous Areas: Relationships, Processes And Failed State Approaches’ (2010) 77(6) *GeoJournal* 817

Hudson, Maui L and Khyla Russell, ‘The Treaty of Waitangi and Research Ethics in Aotearoa’ (2008) 6(1) *Journal of Bioethical Inquiry* 43

Hudson, Wayne and John Kane, *Rethinking Australian Citizenship* (Cambridge University Press, 2000)

Human Rights Commission, *Social Justice Report* (2007)

Human Rights and Equal Opportunity Commission, *Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Human Rights and Equal Opportunity Commission, 1997).

Humpage, Louise, ‘Revision Required: Reconciling New Zealand Citizenship with Māori Nationalisms’ (2008) 10(3) *National Identities* 247

Humpage, Louise, Augie Fleras, ‘Intersecting Discourses: Closing the Gaps, Social Justice and the Treaty of Waitangi’ (July, 2001) 16 *Social Policy Journal of New Zealand* 37

Humphries, Maria, ‘Working With our Differences: A Contribution from New Zealand’ (1992) 16 (4) *Journal of Management Education* 28

Hunold, A and R Stevens, *Freedom and Serfdom: An Anthology of Western Thought* (Springer, 2013)

Hunt, J., D. Smith, D., S. Garling and W. Sanders, *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU E-Press, 2008)

Hunter, Fergus, 'Government Rejection of Referendum Proposal Sends 'Shockwaves' Through Indigenous Community' (*The Age*, 26 October 2017)

Husa, J., *A New Introduction to Comparative Law* (Hart, 2015)

Hutchinson, Terry and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) *Deakin Law Review* 4

Ignatieff, Michael, *The Rights Revolution* (House of Anansi, 2008)

Imai, Shin, *The 2011 Annotated Indian Act and Aboriginal Constitutional Provisions (*Carswell, 2011)

Immerwahr, John, 'Hume's Revised Racism' (1992) 53(3) *Journal of the History of Ideas* 481

Indigenous and Northern Affairs Canada, *A New Approach: Co-development of a New Fiscal Relationship Between Canada and First Nations* (2016)

Iorns, Catherine, 'Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination' (2003) 10(4) *Murdoch University Electronic Journal of Law* 39

Irlbacher-Fox, Stephanie, *Finding Dahshaa: Self-Government, Social Suffering and Aboriginal Policy in Canada* (UBC Press, 2009)

Irving, Helen, *Five Things to Know About the Australian Constitution* (Cambridge University Press, 2004)

Irving, H., 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30 (1) *Sydney Law Review* 8

Irving, Helen, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999)

Ivanitz, Michele, *Straddling Two Worlds: ATSIC and the Management of Indigenous Policy* (Centre for Australian Public Sector Management, Griffith University, 1998).

Ivanitz, Michele, 'The Demise of ATSIC? Accountability and the Coalition Government' (2000) 59(1) *Australian Journal of Public Administration* 3

Ivison, D., *Postcolonial Liberalism* (Cambridge University Press, 2002)

Ivison, Duncan, Paul Patton and Will Sanders, *Political Theory and the Rights of Aboriginal Peoples* (Cambridge University Press, 2000)

Jackman, Robert W., 'Political Institutions and Voter Turnout in the Industrial democracies' (1987) 81 *American Political Science Review* 405

Jackson, W. K. and G. A. Wood, 'The New Zealand Parliament and Maori Representation' (1964) 11(43) *Historical Studies: Australia and New Zealand* 353

Jackson, William Keith, *The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House* (University of Toronto Press, 1972)

Jacobson, Jacks, Chris et al, 'Mainstreaming Indigenous Perspectives: 25 Years of New Zealand's Resource Management Act' (2016) 23(4) Australasian Journal of Environmental Management on, W. J., *New Zealand: Politics of Change* (Wellington: A. W. and A. H. Reed, 1973)

Jalata, Asafa, 'The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians' (2013) 3(3) *SAGE Open* 3

James, C, *Building the Constitution* (Victoria University of Wellington, 2000)

James H Liu, *New Zealand Identities* (Victoria University Press, 2005)

James, Patrick, *Constitutional Politics in Canada after the Charter* (UBC Press, 2010)

James S. Frideres, *Native Peoples in Canada: Contemporary* Conflicts (Prentice Hall, 1988)

Jayasuriya, Laksiri, 'Understanding Australian Racism' (2002) 45 (1) *Australian Universities Review* 40

Jayasuriya, Laksiri, David Walker and Jan Gothard, *Legacies of White Australia* (University of Western Australia Press, 2003)

Jennings, Ivor, *The Law and The Constitution* (University of London Press, 5th ed, 1959)

Johns, Alecia, 'The Case for Political Candidacy as a Fundamental Human Right' (2016) 16 *Human Rights Law Review* 29

Johnson, Miranda 'Reconciliation, Indigeneity, and Postcolonial Nationhood in Settler States' (2011) 14 (2) *Postcolonial Studies* 187

Johnson, Miranda, *The Land Is Our History: Indigeneity, Law, and the Settler State* (Oxford University Press, 2016)

Johnston, Elliot, 'Malcolm Turnbull's Big Let-Down' (2018) 87 *Australian Options* 4

Johnston, Kerensa 'The Treaty of Waitangi' (2004) *New Zealand Law Review* 211

Johnston, Richard, André Blais, *Strengthening Canadian Democracy* (IRPP, 2005)

Johnstone, Kim, 'Indigenous Birth Rates – How Reliable Are They?' (2009) 17 (4) *People and Place* 29

Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (Parliament of Australia, June 2015)

Joint Standing Committee on Migration, *Australians All: Enhancing Australian Citizenship* (1994)

Jose R. Martinez Cobo, *Study on the Problem of Discrimination against Indigenous Populations* (987) E/CN.4/Sub.2/1986/7/Add.1-8

Joseph, P. A., *Essays on the Constitution* (Brookers, Wellington, 1995)

Joseph, Philip, *Constitutional & Administrative Law in New Zealand* (Thomson Reuters New Zealand Ltd, 4th ed, 2014)

Joseph, Philip, *The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress* (New Zealand Business Roundtable, Wellington, 2008)

Joseph, Sarah and Adam McBeth, *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010)

Joseph, Sarah and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (Oxford University Press, 3rd ed, 2013)

Jull, Peter 'The political future of Torres Strait' (1997) 4 (7) *Indigenous Law Bulletin* 98

Jull, Peter 'Building Nunavut: A Story of Inuit Self-Government' (1988) 1 *The Northern Review*

Ka'Ai-Mahuta, Rachael, 'The impact of colonisation on Te Reo Maori: A critical review of the State education system' (2011) 4 *Te Kaharoa* 59

Kaiser, André, 'Parliamentary Opposition in Westminster Democracies: Britain, Canada, Australia and New Zealand' (2008) 14(1-2) *The Journal of Legislative Studies* 29

Kapferer, Bruce and Barry Morris, 'The Australia Society of the State: Egalitarian Ideologies and New Directions in Exclusionary Practice' (Fall, 2003) 47 (3) *Social Analysis* 80

Karlan, Pamela S., 'Convictions and Doubts: Retribution, Representation and the Debate over Felon Disenfranchisement' (2004) 56 *Stanford Law Review* 29

Katz, Richard S, *Democracy and Elections* (Oxford University Press, 1997)

Katherine Lindsay, *Federal Constitutional Law* (Lawbook Co. 2003)

Kawharu, I. Hugh, *Maori Land Tenure* (Clarendon Press, 1977)

Kawharu, I. H., *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989)

Kawharu, I. H., 'Kotahitanga: Visions of Unity' (September, 1992) 101 (3) *The Journal of the Polynesian Society* 221

Kee, Margaret Ah and Clare Tilbury, 'The Aboriginal and Torres Strait Islander Child Placement Principle Is about Self Determination' (1999) 24(3) *Children Australia* 4

Keith, Kenneth, 'On the Constitution of New Zealand' (1992) 44 (1) *Political Science* 1

Keith, Sir K, 'The Roles of the Tribunal, the Courts and the Legislature' (1995) 25 *Victoria University of Wellington Law Review* 39

Kelly, J. B. and M. Murphy, 'Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor' (2005) 35(2) *Publius: The Journal of Federalism* 245

Kelly, Norm, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (ANU E Press, 2012)

Kelsen, H, The Pure Theory of Law (University of California Press, 1967)

Kelsey, J., *A Question of Honour? Labour and the Treaty 1984-1989* (Allen & Unwin, 1990)

Kendall, Joan, 'Circles of Disadvantage: Aboriginal Poverty and Underdevelopment in Canada' (2009) 31 (1-2) *American Review of Canadian Studies* 43

Kern, Paul B., 'Universal Suffrage without Democracy: Thomas Hare and John Stuart Mill' (1972) 34 (3) *The Review of Politics* 306

Kildea, Paul, 'Achieving citizen engagement in the referendum on indigenous recognition' (2011) 7 (25) *Indigenous Law Bulletin*

Kildea, Paul, 'Expert Panels, Public Engagement and Constitutional Reform' (2014) 25 *Public Law Review* 33

Kincaid, John and Alan Tarr, *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's Press, 2005)

King, Michael, *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003)

Kingi, Te Kani, 'The Treaty of Waitangi: A Framework for Maori Health Development' (2007) 54 (1) *New Zealand Journal of Occupational Therapy* 4-10

Knight, Andrew and Les Ruddock, *Advanced Research Methods in the Built Environment* (John Wiley & Sons, 2009)

Koolmatrie, J. and Ross Williams, 'Unresolved Grief and the Removal of Indigenous Australian Children' (2007) 35 (2) *Australian Psychologist* 158

Kowal, Emma, 'The Politics of the Gap: Indigenous Australians, Liberal Multiculturalism, and the End of the Self-Determination Era' (2008) 110 (3) *American Anthropologist* 338

Krieken, Robert Van, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75 *Oceania* 35

Kymlicka, W., *Multicultural Citizenship* (Oxford University Press, 1995)

Kymlicka, W., *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford University Press, 1998)

Kymlicka, Will and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) *Ethics* 352

Lackenbauer, P. Whitney, R. Scott Sheffield and Craig Leslie Mantle, *Aboriginal Peoples and Military Participation* (Canadian Defence Academy Press, 2007)

Ladley, Andrew, 'The Treaty and Democratic Government' (2005) 1 (1) *Policy Quarterly* 21

Lake, Marilyn, 'The Meanings of the Self in Claims for Self-Government: Re-Claiming Citizenship for Women and Indigenous People in Australia' (1996) 14 (1) *Law in Context: A Socio-Legal Journal* 1

Lam, Maivan Clech, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Transnational Publishers, New York, 2000)

Langton, Marcia, 'Indigenous Exceptionalism and the Constitutional 'Race Power'' (2013) *Space, Place & Culture* 1

Langton, Marcia, *Settling with Indigenous People: Modern Treaty and Agreement-making* (Federation Press, 2006)

Langton, Marcia, 'The Nations of Australia' (2002) 4(1) *Balayi: Culture Law and Colonialism* 73

Langton, Marcia, 'Trapped in the Aboriginal Reality Show' (2008) 19 *Griffith Review* 143

Langton, M., *"Well, I hear it on the radio and I saw it on the television . . .": An Essay for the Australian Film Commission on the Politics and Aesthetics of Filmmaking by and about Aboriginal People and Things* (Australian Film Commission, 1993)

Larkin, Dani and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (December, 2018) 30 (2) *Bond Law Review* 201

Laski, Harold J., 'Present Position of Representative Democracy' (1932) 26 (4) *American Political Science Review* 629

Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report: The Interaction of Western Australian Law with Aboriginal Law and Culture* (R94, 2006)

Lawrence, Bonita, ‘Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview’ (2003) 18 (2) *Hypatia* 3

Lawrence, Bonita, and Kim Anderson, ‘Introduction to "Indigenous Women: The State of Our Nations"’ (Spring/Summer 2005) 29 (2) *Atlantis* 1

Lawrence, David et al, ‘Adjusting for Under-Identification of Aboriginal and/or Torres Strait Islander Births in Time Series Produced from Birth Records: Using Record Linkage Of Survey Data And Administrative Data Sources’ (2012) 12(1) *BMC Medical Research Methodology* 12

Leach, Colin Wayne, Aarti Iyer and Anne Pedersen, ‘Anger and Guilt about Ingroup Advantage Explain the Willingness for Political Action’ (2006) 32(9) *Personality and Social Psychology Bulletin* 1232

LeCouteur, Amanda, Mark Rapley and Martha Augoustinos, ‘This Very Difficult Debate About Wik: Stake, Voice and the Management of Category Memberships in Race Politics’ (2001) 40 *British Journal of Social Psychology* 35

Leigh, Andrew and Tirta Susilo, ‘Is Voting Skin-Deep? Estimating The Effect Of Candidate Ballot Photographs On Election Outcomes’ (2009) 30 *Journal of Economic Psychology* 61

Legrand, P, *Comparer Les Droits, Résolument* (Presses Universitaires de France, 2009)

Legrand, Pierre, *Extra Culturam Nihil Datur Le Droit Compare,* (Presses Universitaires de France, 2009)

Legrand, P, ‘European Legal Systems Are Not Converging’ (1996) 45 *International and Comparative Law Quarterly* 52

Legrand, Pierre, *What Do I Know? Comparative Law* (Presses Universitaires de France, 2009)

Lemezina, Zrinka, ‘Building A Sustainable National Indigenous Representative Body: Issues for Consideration’ (2008) 7(8) *Indigenous Law Bulletin* 39

Lester, Alan and Fae Dussart, ‘Trajectories Of Protection: Protectorates Of Aborigines In Early 19th Century Australia And Aotearoa New Zealand’ (2008) 64(3) *New Zealand Geographer* 205

Levine, Hal and Manuka Henare, ‘Mana Maori Motuhake: Maori Self Determination’ (1994) 35(2) *Pacific Viewpoint* 193

Levine, S., *New Zealand Politics: A Reader* (Melbourne: Cheshire, 1975)

Levine, S., *The New Zealand Political System* (Sydney: George Allen and Unwin, 1979)

Levine, Stephen and Nigel S. Roberts, ‘The New Zealand Electoral Referendum and General Election of 1993’ (1994) 13 (3) *Electoral Studies* 240

Libby, Ronald T, *Hawke’s Law: The Politics of Mining and Aboriginal Land Rights in Australia* (University of Western Australia Press, 1989)

Lijphart, Arend, ‘Australian Democracy: Modifying Majoritarianism?’ (1999) 34 (3) *Australian Journal of Political Science* 313

Lijphart, Arend, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, 1984)

Lipson, Leslie, *The Politics of Equality: New Zealand's Adventures In Democracy* (University of Chicago Press, 1948)

Lino, Dylan, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018)

Lino, Dylan, ‘The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples’ (2010) 34 (3) *Melbourne University Law Review* 839-869

Little, Adrian, ‘The Politics Of Makarrata: Understanding Indigenous-Settler Relations In Australia’ [2019] *Political Theory* 30

Lizzeri, A. and N. Persico, ‘Why Did the Elites Extend the Suffrage? Democracy and the Scope of Government, With an Application to Britain's Age of Reform’ (2004) 119(2) *The Quarterly Journal of Economics* 707

London, H. I., ‘Liberalising the White Australia Policy: Integration, Assimilation or Cultural Pluralism?’ (1967) 21(3) *Australian Outlook* 338

Loughton, Gavin, ‘Calvin’s Case and the Origins of the Rule Governing ‘Conquest’ in English Law’ (2004) *Australian Journal of Legal History* 8

Lowe, B. J. et al, 'Consultation, Collaboration and Dissemination' (2009) 39(4) *Journal of the Royal Society of New Zealand* 225

Lukes, Steven, *Power: A Radical View* (Palgrave Macmillan Ltd., 2nd ed, 2004)

Lundberg, Thomas Carl, 'Politics Is Still an Adversarial Business: Minority Government and Mixed-Member Proportional Representation in Scotland and In New Zealand' (2012) 15(4) *The British Journal of Politics and International Relations* 609

Lunt, Neil, Paul Spoonley and Peter Mataira, 'Past and Present: Reflections on Citizenship Within New Zealand' (2002) 36 (4) *Social Policy and Administration* 346 – 362

Luxton, John, *Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress* (The Ministry of Maori Development, 2008)

Maaka, R. and A. Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, 2005)

MacDonald, Lindsey Te Ata O Tu and Paul Muldoon, 'Globalisation, Neo-Liberalism and the Struggle for Indigenous Citizenship' (2006) 41 (2) *Australian Journal of Political Science* 209

Mackerras, M., and I. McAllister, 'Compulsory Voting, Party Stability and Electoral Advantage in Australia' (1999) 18 *Electoral Studies* 217

Macklem, Patrick, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) *McGill Law Journal* 382

Maclean, Kim, 'The Impact of Institutionalization on Child Development' (2003) 15(4) *Development and Psychopathology* 853

Maddison, Sarah, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Allen & Unwin, 2009)

Maddison, Sarah, 'Indigenous Identity, 'Authenticity' and the Structural Violence of Settler Colonialism' (2013) 20(3) *Identities* 288

Maddison, Sarah, *The Colonial Fantasy Why White Australia Can't Resolve Black Problems* (Allen & Unwin, 2019)

Maddison, Sarah 'White Parliament, Black Politics: The Dilemmas of Indigenous Parliamentary Representation' (2010) 45 *Australian Journal of Political Science* 663

Magallanes, Catherine I, 'Dedicated Parliament Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination' (2003) 10(4) *Murdoch University Electronic Journal of Law* 1

Making Land Work: Volume 2 Case Studies on Customary Land and Development in The Pacific (Australian Agency for International Development, 2nd ed, 2008).

Malcolmson, Patrick N and Richard M Myers, *The Canadian Regime* (Broadview Press, 1996)

Mann, Jatinder, *Citizenship in Transnational Perspective* (Springer Nature, 2017)

Mansell, Michael, *Treaty and Statehood* (The Federation Press, 1st ed, 2016)

Manza, Jeff and Christopher Uggen, 'Punishment and Democracy: Disenfranchisement of Non-Incarcerated Felons in the United States' (2004) 2 (3) *Perspectives on Politics* 491

Maori Affairs Minister Koro T., *Partnership Response* (Ministry of Maori Affairs, 1988).

Maori Policy Statement (Unpublished Draft Statement by the New Zealand Labour Party, 1984)

Markus, Andrew, *Australian Race Relations, 1788-1993* (Allen & Unwin, 1994)

Marshall, Geoffrey and Graeme Cochrane Moodie, *Some Problems of The Constitution* (Hutchinson, 5th ed, 1971)

Marshall, T. H, *Class, Citizenship, and Social Development* (Doubleday, 1964)

Martin, John E., 'Political Participation and Electoral Change in Nineteenth-Century New Zealand' (2005) 57 (1) *Political Science* 39

Martiniello, Jennifer, 'Howard's New Tampa: Aboriginal Children Overboard' (2007) 26 *Australian Feminist Law Journal* 123

Maxwell, Rudi, 'Fury as Government Rejects Voice to Parliament' (No. 1803, Guardian (Sydney), 15 Nov 2017)

Maynard, John, 'Fred Maynard and the Australian Aboriginal Progressive Association (AAPA): One God, One Aim, One Destiny' (1997) 21 *Aboriginal History Journal* 1

Maynard, John, 'Vision, Voice and Influence: The Rise of the Australian Aboriginal Progressive Association' (2003) 34(121) *Australian Historical Studies* 91

Mayor, Thomas, 'The Torment Of Our Powerlessness: The Uluru Statement And Enshrining A Voice For Indigenous Peoples' (2018) 87 *Australian Options* 7

McAllister, Ian, Steve Dowrick and Riaz Hassan, *The Cambridge Handbook of Social Sciences in Australia* (Cambridge University Press, 2003)

McCarthy, F. D., 'Aboriginal Australian Material Culture' (1936) 2 (1) *Mankind* 241

McCausland, R., 'Shared responsibility Agreements: Practical Reconciliation or Paternalistic Rhetoric?' (2005) 6 (12) *Indigenous Law Bulletin* 9

McClelland, Sarah, 'Maori Electoral Representation: Challenge to Orthodoxy' [1997] 17(3) *New Zealand Universities Law Review* 272

McConchie, Peter, *Elders: Wisdom from Australia's Indigenous Leaders* (Cambridge University Press, 2003)

McConville, Mike, *Research Methods for Law* (Edinburgh University Press, 2017)

McCormack, Fiona, 'Indigeneity as Process: Maori Claims and Neoliberalism' (2012) 18(4) *Social Identities* 417

McCorquodale, John, 'The Legal Classification of Race in Australia' (1986) 10 (1) *Aboriginal History* 7

McGregor, Russell, 'Another Nation: Aboriginal Activism in the Late 1960s and Early 1970s' (2009) 40 *Australian Historical Studies* 343

McGregor, Russell, 'Wards, Words and Citizens: A. P. Elkin and Paul Hasluck on Assimilation' (June 1999) 69 (4) *Oceania* 243

McHugh, Paul, 'The Politics of Historiography and the Taxonomies of the Colonial Past' [2012] *Making Legal History* 164

McHugh, Paul, 'Sovereignty this Century - Maori and the Common Law Constitution' [2000] *Victoria University of Wellington Law Review* 187

McLean, Janet, 'The Political, the Historical and the Universal in New Zealand's Unwritten Constitution' (2014) *New Zealand Journal of Public and International Law* 321

McLeay, E. M., 'Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation' (1991) 43 (1) *Political Science* 30

McLintock, A. H., *Crown Colony Government in New Zealand* (R.E. Owen, 1958)

McNairn, Jeffrey L., *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada* (University of Toronto Press, 2000)

McNeil, Kent, 'The Constitutional Rights of the Aboriginal Peoples of Canada' (2010) 4 *Supreme Court Law Review* 255

McRae, Heather, *Indigenous Legal Issues* (Thomson Reuters (Professional) Australia, 4th ed, 2009)

McRae, Jane, 'The Function and Style of Ruunanga in Maori Politics' (September, 1984) 93 (3) *The Journal of the Polynesian Society* 283

Mitchell, Paul, 'Voters and their representatives: Electoral institutions and delegation in parliamentary democracies' (2000) 37 *European Journal of Political Research* 335

Meek, Barbra A., 'Respecting the Language of Elders: Ideological Shift and Linguistic Discontinuity in a Northern Athapascan Community' (2007) 17 (1) *Journal of Linguistic Anthropology* 23

Meijl, Toon Van, 'The Poukai Ceremony of the Maori King Movement: An Ethnohistorical Interpretation' (September, 2009) 118 (3) *The Journal of the Polynesian Society* 233

Meijl, Toon Van, 'Recognition, Redistribution and Reconciliation in Postcolonial Settler Nation-States' (September, 2003) 112 (3) *The Journal of the Polynesian Society* 205

Melham, Daryl, *Advisory Report on the Commonwealth Electoral (Above-The-Line Voting) Amendment Bill 2008* (Commonwealth of Australia, 2009)

Mendeloff, David, 'Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?' (2004) 6 *International Studies Review* 355

Mercer, David, 'Aboriginal self-determination and indigenous land title in post-Mabo Australia' (1997) 16 (3) *Political Geography* 189

Meusburger, Peter, Michael J Heffernan and Edgar Wunder, *Cultural Memories* (Springer, 2011)

Miguel Alfonso Martinez, *Study on Treaties, Agreements and Other Constructive arrangements between States and Indigenous Peoples* (UN Doc E/CN.4/Sub.2/1999/20)

Milen, Robert. A, *Aboriginal peoples and electoral reform* (Dundern Press, 1991)

Mill, John Stuart, *Considerations on Representative Government* (Cambridge University Press, 1861)

Miller, J.R, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009)

Miller, J.R., *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (University of Toronto Press 1989)

Miller, Raymond, *Democracy in New Zealand* (Auckland University Press, 2015)

Miller, R, *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997)

Milliken, Eliza, 'Acknowledging Makarrata' (2019) 11 (1) *The New South Wales Doctor* 16

Milloy, John, 'Indian Act Colonialism: A Century of Dishonour, 1869-1969' (Research Paper for the National Centre for First Nations Governance, May 2008)

Mills, Keri, 'The Changing Relationship between Maori and Environmentalists in 1970s and 1980s New Zealand' (2009) 7(3) *History Compass* 678

Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (First Session, Twenty-Eighth Parliament, Ottawa, 1969)

Ministry of Maori Affairs, *Ka Awatea* (Ministry of Maori Affairs, 1991).

Mitchell, A. V., *Politics and People in New Zealand* (Whitcombe and Tombs, 1969)

MMP Review Committee, 'Report of the MMP Review Committee: Inquiry into the Review of MMP' [2001] 1 *Australian Journal of Human Rights* 23

Mokaraka-Harris, Jovan James, Michelle Thompson-Fawcett and Christina Ergler, 'Te Manako: The Desire for Self-Determination' (2016) 12(3) *AlterNative: An International Journal of Indigenous Peoples* 250

Monture-Angus, Patricia A., 'Journeying Forward: Dreaming First Nations' Independence' (2002) 29 (1-2) *Resources for Feminist Research* 175

Moran, Anthony, 'White Australia, Settler Nationalism and Aboriginal Assimilation' (2005) 51 (2) *Australian Journal of Politics and History* 168

Moran, Mark, 'The Courage to Reform' (2018) *Griffith Review* 60

Moran, Mark, Doug Porter and Jodie Curth-Bibb, *Funding Indigenous Organisations: Improving Governance Performance through Innovations in Public Finance Management in Remote Australia* (Issues paper no. 11 produced for the Closing the Gap Clearinghouse, September 2014)

Moreton-Robinson, Aileen, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015)

Moreton-Robinson, A., *Sovereign Subjects: Indigenous sovereignty matters* (Allen & Unwin, 2007)

Moreton-Robinson, Aileen, *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004)

Morgera, Elisa, 'Global Environmental Law and Comparative Legal Methods' (2015) 24(3) *Review of European, Comparative & International Environmental Law* 251

Morton, F.L., and M.J. Withey, 'Charting the Charter, 1982-1985: A Statistical Analysis' (1987) 65 *Canadian Human Rights Yearbook* 65

Morton, W. L., 'The Extension of the Franchise in Canada A Study in Democratic Nationalism' (1943) 22 (1) *The Canadian Historical Association* 72

Morris, Glenn T., 'In Support of the Right of Self-Determination for Indigenous Peoples under International Law' (1986) 29 *German Yearbook of International Law* 277

Morris, Kay Matthews and Kuni Jenkins, Whose Country is it Anyway? The Construction of a New Identity through Schooling for Maori in Aotearoa/New Zealand (1999) 28 (3) *History of Education* 339

Morris, Shireen, 'Agreement Making - The Need for Democratic Principles, Individual Rights and Equal Opportunities in Indigenous Australia' (2011) 36 *Alternative Law Journal* 187

Morris, Shireen, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples When Making Laws for Indigenous Affairs' (2015) 26 *Public Law Review* 166

Morris, Shireen and Noel Pearson, 'Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives' (2017) 91 *Alternative Law Journal* 350

Morse, Bradford W., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Carleton University Press, 1st ed., 1989)

Moreton-Robinson, Aileen, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (1970) 15(2) *Cultural Studies Review* 1

Moses, A. Dirk, 'An Antipodean Genocide? The Origins of the Genocidal Moment in the Colonization of Australia' (2000) 2(1) *Journal of Genocide Research* 89

Moses, A. Dirk, 'Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency' (2011) 15(2) *Citizenship Studies* 145

Muehlebach, Andrea, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism' (2003) 10 *Identities* 241

Muir, Sam, 'The New Representative Body for Aboriginal and Torres Strait Islander People: Just One Step' (2010) 14 (1) *Australian Indigenous Law Review* 87

Mulholland, M and V. Tawhai, *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010)

Mulgan, R. G and Peter Aimer, *Politics in New Zealand* (Auckland University Press, 2004)

Munger, Frank and Carroll Seron, 'Critical Legal Studies versus Critical Legal Theory: A Comment on Method' (1984) 6(3) *Law & Policy* 257

Murphy, Michael A., ‘Representing Indigenous Self-Determination’ (2008) 58 *University of Toronto Law Journal* 185

Murphy, Michael, *Canada, The State Of The Federation 2003* (Published for the Institute of Intergovernmental Relations School of Policy Studies, Queen's University by McGill-Queen's University Press, 2005)

Muru-Lanning, Marama, ‘The Analogous Boundaries of Ngaati Mahuta, Waikato-Tainui and Kiingitanga’ (March, 2011) 120 (1) *The Journal of the Polynesian Society* 9

Musson, Anthony and Chantal Stebbings, *Making Legal History* (Cambridge University Press, 1st ed, 2012)

Mutu, Margaret, *The State of Maori Rights* (Huia Publishers, 2011)

Nagel, Jack, ‘Social Choice in A Pluralitarian Democracy: The Politics of Market Liberalization in New Zealand’ (1998) 28(2) *British Journal of Political Science* 223

National Housing and Community Infrastructure Needs Survey (Aboriginal and Torres Strait Islander Commission, 1992)

Native Title Social Justice Advisory Committee, *Recognition, Rights and Reform: A report to New Zealand Maori Council Te Wahanga Tuatahi* (known as the *Kaupapa* ‘Brown Paper’ 1983)

New South Wales Law Reform Commission, *Sentencing: Aboriginal offenders Report 96* (2000)

Nielsen, Marianne O. and Linda Robyn, ‘Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada, New Zealand and the United States of America’ (2003) 4 (1) *Indigenous Nations Studies Journal* 29

New Zealand Yearbook (Department of Statistics, 1990)

Nicholson, George ‘A Racist Constitution for a Nation: A Nation of Racists?’ (2000) 25(5) *Alternative Law Journal* 211

Niezen, Ronald, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003)

Norman, Heidi, *What Do We Want? A Political History of Aboriginal Land Rights in New South Wales* (Aboriginal Studies Press, 2015)

Office of Indigenous Policy Coordination, *New Arrangements in Indigenous Affairs* (Department of Immigration and Multicultural and Indigenous Affairs, 2005)

O'Mara, Peter, 'Health Impacts of the Northern Territory Intervention' (2010) 192 (10) *The Medical Journal of Australia* 546

Ongley, P. and D. Pearson, 'Post-1945 International Migration: New Zealand, Australia and Canada Compared' (1995) 29 (3) *International Migration Review* 765

Our Children–Keepers of the Sacred Knowledge (Final Report of the Ministers National Working Group on Education, 2002)

Orange, Claudia, *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, 2015)

Orange, Claudia, *The Treaty Of Waitangi* (Allen & Unwin, 1987)

O'Regan, Sir T., 'Speech Notes for the Maori Commercial Fisheries Conference' (Auckland: Heritage Hotel, 11 May 1999)

Orr, Graeme, 'Ballot Order: Donkey Voting in Australia' (2002) 1 (4) *Election Law Journal* 575

Orr, Graeme, *Access to Electoral Rights Australia* (Country Report 2017/01, March 2017)

Orr, Graeme and George Williams, 'The People's Choice: The Prisoner Franchise And The Constitutional Protection Of Voting Rights In Australia' (2009) 8(2) *Election Law Journal: Rules, Politics, and Policy* 123

O'Sullivan, Dominic, 'The Treaty of Waitangi in Contemporary New Zealand Politics' (2008) 43(2) *Australian Journal of Political Science* 317

Palmater, Pamela D., *Beyond Blood: Rethinking Indigenous Identity* (UBC Press, 2011)

Palmer, G. W. R, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, 1987)

Palmer, Matthew S.R., 'Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicised Constitution' (2007) 29 *Dalhousie Law Journal* 1

Palmer, Matthew S. R., 'New Zealand Constitutional Culture' (2007) 22 *New Zealand Universities Law Review* 565

Palmer, Matthew, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008)

Paquette, Jonathan, Devin Beauregard and Christopher Gunter, 'Settler Colonialism and Cultural Policy: The Colonial Foundations and Refoundations of Canadian Cultural Policy' (2017) 23 (3) *International Journal of Cultural Policy* 269-284.

Parijs, Philippe van, 'La justice et la démocratie sont-elles incompatibles?' (1993) 31 *Revue Européenne des Sciences Sociales* 133

Pascoe, Bruce, *Dark Emu: Black Seeds - Agriculture or Accident?* (Magabala Books, 2014)

Patapan, Haig, John Wanna and Patrick Moray Weller, *Westminster Legacies: Democracy And Responsible Government in Asia and the Pacific* (UNSW Press, 2005)

Paterson, Robert K., 'Protecting Taonga: The Cultural Heritage of the New Zealand Maori' (1999) 8 (1) *International Journal of Cultural Property* 108

Patterson, Michelle *Commonwealth Machinery of Government in Aboriginal and Torres Strait Islander Affairs: 50 Years of Commonwealth Public Administration in Aboriginal and Torres Strait Islander Affairs* (IAG Working Paper Series, No. 1, Aboriginal and Torres Strait Islander Affairs Group, Department of the Prime Minister and Cabinet, May 2017)

Paxton et al, Pamela, 'A Half-Century of Suffrage: New Data and a Comparative Analysis' (2003) 38(1) *Studies in Comparative International Development* 93

Pearson, Noel, 'A Rightful Place: Race, Recognition and a More Compete Commonwealth' (2014) 55 *Quarterly Essay* 1

Pearson, Noel, *Our Right To Take Responsibility* (Noel Pearson and Associates, 2000)

Penn, Elizabeth Maggie, 'Citizenship versus Ethnicity: The Role of Institutions in Shaping Identity Choice' (2008) 70(4) *The Journal of Politics* 956

Perin, R., ‘National Histories and Ethnic History in Canada’ (1993) 20 *Cahiers de recherche sociologique* 113

Perrett, Roy W., ‘Indigenous Language Rights and Political Theory: The Case of Te Reo Maori’ (2000) 78(3) *Australasian Journal of Philosophy* 405

Perry, Richard John, *From Time Immemorial: Indigenous Peoples and State Systems* (University of Texas Press, 2001)

Peterson, Nicolas Will Sanders and Geoffrey Brennan, *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Cambridge University Press, 1998)

Pettifer, J. A, A. R Browning and J. K Porter, *House of Representatives Practice* (Australian Govt. Pub. Service, 1981)

Phillips, Cutright and James A. Wiley, ‘Modernization and Political Representation: 1927-1966’ (1969) 5 (2) *Studies in Comparative International Development* 23

Picker, C. B., 'Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach' (2013) 1 (1) *The Chinese Journal of Comparative Law* 21

Pink, Stephen and Joel Feinberg, ‘Social Philosophy’ (1975) 84 (2) *Philosophical Review* 306

Pocock, J. G. A., ‘Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi’ (1997-1998) 43 *McGill Law Journal* 481

Pocock, J. G. A. (ed.), *The Maori and New Zealand Politics* (Auckland: Blackwood and Janet Paul, 1965)

Pratt, Angela, *Practising Reconciliation?: The Politics of Reconciliation in the Australian Parliament, 1991 – 2000* (Parliament of Australia Parliamentary Library, 2005)

Price, Polly J., ‘Natural Law and Birthright Citizenship in Calvin's Case (1608)’ (1997) 9 *Yale Journal of Law and the Humanities* 73

Priest, M., ‘Howard to Abolish ATSIC’ (16 April 2004) *Australian Financial Review* 1

Przeworski, Adam, ‘Conquered or Granted? A History of Suffrage Extensions’ (2009) 39(2) *British Journal of Political Science* 291

Przeworski, Adam and Fernando Limongi, 'Political Regimes and Economic Growth' (1993) 7(3) *Journal of Economic Perspectives* 51

Principles Respecting the Government of Canada's Relationship with Indigenous Peoples (Department of Justice Canada, 2018)

Public Services Foundation of Canada, *Crisis in Correctional Services: Overcrowding and Inmates with Mental Health Problems in Provincial Correctional Facilities* (2015)

Rae, Douglas, 'Two Contradictory Ideas of (Political) Equality' (1981) 91(3) *Ethics* 451

Raphael, Dennis, *Social Determinants of Health: Canadian Perspectives* (Canadian Scholars' Press, 2016)

Raskin, Jamin B., 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141 (4) *The University of Pennsylvania Law Review* 1391

Rawls, John, *A Theory of Justice* (Harvard University Press, 2005)

Read, Peter, Gary Meyers and Bob Reece, *What Good Condition?: Reflections on an Australian Aboriginal Treaty 1986 – 2006* (ANU E-Press, 2006)

Referendum Council, 'Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (Law Council of Australia, 19 May 2017)

Regan, Paulette, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (University of British Columbia Press, 2010)

Reilly, Alexander, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403

Reilly, Alexander, 'Dedicated Seats in the Federal Parliament for Indigenous Australians: The Theoretical Case and its Practical Possibility' (2001) 2 (1) *Balayi: Culture, Law and Colonialism* 73

Report of the CERD Sessional/Annual Report of Committee (A/65/ 18, 31/10/2010)

Report of the Waitangi Tribunal on the Kaituna Claim (Wai 4) (Wellington: Government Printing Office, 1984)

Report of the Proceedings of the Treaty of Waitangi Hui (February 4–6, 1985)

Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies (Brooker and Friend Ltd, 1990)

Report Of The Waitangi Tribunal On The Te Reo Maori Claim (Waitangi Tribunal Department of Justice, 2nd ed, 1989)

Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (WAI 22) (GP Publications, 2nd ed, 1989)

Report of the Waitangi Tribunal on The Orakei Claim (The Waitangi Tribunal Department of Justice, 1st ed, 1987)

Report of the Working Group on Indigenous Populations on its Eighth Session, U.N. Doc. E/ CN.4/Sub.2/1990/42

Report on the Conduct of the 2007 Federal Election and Matters Related Thereto (Commonwealth of Australia, 2009)

Report on the Inuit Tapiriit Kanatami Education Initiative, Summary of ITK Summit on Inuit Education and Background Research (Northwest Territories, 15 – 17 April 2008)

Report on the Outcomes of the First Phase of Consultation for a National Indigenous Representative Body (INRB, 2008)

Reynolds, Stephane, 'Comparative Legal Analysis' (2016) 23(2) *Maastricht Journal of European and Comparative Law* 366

Rice, Geoffrey W., *The Oxford History of New Zealand*, 2nd edition (University of Oxford Press, 1992)

Richardson, Benjamin J., 'Indigenous Peoples, International Law and Sustainability' (2001) 10 (1) *Review of European, Comparative & International Environmental Law* 1

Richmond, Chantelle A.M. and Nancy A. Ross, 'Social Support, Material Circumstance and Health Behaviour: Influences on Health in First Nation and Inuit Communities of Canada' (2008) 67(9) *Social Science & Medicine* 1423

Riker, William H., *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (San Francisco: W. H. Freeman, 1982)

Ringer, Bryce, 'What Happened at Mangere in 1863?' (2010) 22 (1) *New Zealand Legacy* 1

Robins, G., 'The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand' (2006) 4 *New Zealand Journal of Public and International Law* 165

Robbins, Jane, 'The Howard Government and Indigenous Rights: An Imposed National Unity?' (2007) 42(2) *Australian Journal of Political Science* 315

Robbins, J., 'The Failure of ATSIC and the Recognition of Indigenous Rights' (2004) 7 (4) *Journal of Australian Indigenous Issues* 3

Roberts, David, *Self-determination and the Struggle for Equality* (University of Queensland Press, 2004)

Rogers, Francis James Newman, *Rogers on Elections* (Nabu Press, 2010)

Rootes, Christopher 'A Referendum On The Carbon Tax? The 2013 Australian Election, The Greens, And The Environment' (2014) 23(1) *Environmental Politics* 166

Rose, Deborah Bird, 'Land Rights and Deep Colonising: The Erasure of Women' (1996) 3 (85) *Aboriginal Law Bulletin* 6

Roughan, Nicole, 'Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy' (2005) 3 *New Zealand Journal of Public and International Law* 285

Round, David, *Truth or Treaty?: Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, Christchurch, 1998)

Rowley, C. D, *Outcasts In White Australia* (Australian National University Press, 1971)

Rowse, Tim, 'Culturally Appropriate Indigenous Accountability' (2000) 43(9) *The American Behavioural Scientist* 1514

Rowse, Tim, *Indigenous Futures: Choice and Development for Aboriginal Australia* (UNSW Press, 2002)

Rowse, Tim, 'Out of Hand: The Battles of Neville Bonner' (1997) 54 - 55 *Journal of Australian Studies* 96

Rowse, Tim, 'The Royal Commission, ATSIC and Self-Determination: A Review of the Australian Royal Commission into Aboriginal Deaths in Custody' (1992) 27 (3) *The Australian Journal of Social Issues* 153

Royal Commission into Aboriginal Deaths in Custody (National Report Volume 1, 15 April 1991)

Royal Commission into Aboriginal Deaths in Custody (National Report Volume 2, 15 April 1991)

Royal Commission into Aboriginal Deaths in Custody (National Report Volume 3, 15 April 1991)

Royal Commission into Aboriginal Deaths in Custody (National Report Volume 4, 15 April 1991)

Royal Commission on Aboriginal Peoples (Canada, 1996, Volume 1)

Royal Commission on Aboriginal Peoples: Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution (Supply and Services Canada, 1993)

Royal Commission on Aboriginal Peoples Report (Canada Communications Group, 1996, Volume 2, Part 1)

Royal Commission on Social Policy (New Zealand Government Printer, 1988)

Rubenstein, Kim, 'Citizenship in Australia: Unscrambling It's Meaning' (1995) 20 *Melbourne University Law Review* 503

Ryan, Trevor, Andrew Henderson and Wendy Bonythin, 'Voting with An Unsound Mind: A Comparative Study of The Voting Rights of Persons With Mental Disabilities' (2016) 39(3) *UNSW Law Journal* 1038

Ryder, B., 'The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations' (1991) 36 *McGill Law Journal* 382

Ryerson, Stanley Bréhaut, *French Canada: A Study in Canadian Democracy* (Progress Books, 1980)

Ryle, Michael, J.A.G. Griffith and M.A.J. Wheeler-Booth, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 1989)

Sacco, R., 'Legal Formants. A Dynamic Approach to Comparative Law' (1991) *American Journal of Comparative Law* 1

Salée, Daniel, 'Identities in Conflict: The Aboriginal Question and the Politics of Recognition in Quebec' (1995) 18(2) *Ethnic and Racial Studies* 277

Samson, Colin, 'Canada'S Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims' (2016) 31(01) *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 64

Samuel, Geoffrey, *An Introduction to Comparative Law Theory and Method (European Academy of Legal Theory Monograph Series)* (Hart Publishing, 11th ed, 2014)

Sanders, Douglas, 'The Rights of the Aboriginal Peoples of Canada' (1983) 61 *Canadian Bar Review* 314

Sanders, Will, 'Journey without End: Reconciliation between Australia's Indigenous and Settler Peoples' (Centre for Aboriginal Economic Policy Research, No. 237/2002)

Sanders, Will, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Centre for Aboriginal Policy Research, 2002)

Sanders, Will, *Reconciling Public Accountability and Aboriginal Self-Determination/Self-Management* (Australian National University, Centre for Aboriginal Economic Policy Research, 1993)

Sarat, Austin and Thomas R Kearns, *Human Rights, Concepts, Contests and Contingencies* (University of Michigan Press, 2001)

Satzewich, Vic and Terry Wotherspoon, *First Nations: Race, Class and Gender Relations* (University of Regina Press, 2000)

Saunders, Cheryl, 'The Australian Constitution and Our Rights' in *Future Justice* (Future Leaders, 2010)

Saunders, Peter and James Walter, *Ideas and Influence: Social Science and Public Policy in Australia* (UNSW Press, Sydney, 2005)

Savery, Jonathon, 'Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights' (2015) 37(2) *Sydney Law Review* 14

Saward, Michael, 'Fragments Of Equality in Representative Politics' (2016) 19(3) *Critical Review of International Social and Political Philosophy* 1

Sawchuk, Joe, 'Negotiating an Identity: Metis Political Organizations, the Canadian Government, and Competing Concepts of Aboriginality' (2001) 25 *American Indian Quarterly* 73

Sawer, Marian, *Elections: Full, Free & Fair* (Federation Press, 2001)

Schaffer, Kay, 'Manne's Generation: White Nation Responses to the Stolen Generation Report' (2001) *Australian Humanities Review* 1

Schattschneider, Elmer Emeric, *The Semi Sovereign People* (Holt, Rinehart and Winston, 1975)

Scheiner, Ethan, *Electoral Systems and Political Context* (Cambridge University Press Textbooks, 2012)

Schizophrenia Fellowship of NSW Inc., *Report on the Criminal Justice System in Australia* (2001)

Schlesinger, R.B., *Comparative Law* (University Casebook Series, 6th ed, 1998)

Schmidt, Ray, 'Canadian Political Economy: A Critique' (1981) 6 (1) *Studies in Political Economy* 65

Schouls, Tim, 'Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation versus Voter Equality' (1996) 29(04) *Canadian Journal of Political Science* 729

Schumpeter, Joseph Alois, *Capitalism, Socialism and Democracy* (George Allen & Unwin, 3rd ed, 1950)

Schreuer, C. H. 'The Interpretation of Treaties by Domestic Courts' (1971) 45 *British Year Book of International Law* 255

Schultz, Julianne 'Whispering in our Hearts: Time to Learn from the Past' (2018) 60 *Griffith Review* 7

Schwartz, B., *First Principles: Constitutional Reform with Respect to the Aboriginal People of Canada* (Kingston: Institute of Intergovernmental Relations, 1985)

Schwartz, B., *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986)

Scott, K.J, *The New Zealand Constitution* (Claredon Press, 1962)

Scow, Colin and Monica Mulrennan, 'Land and Sea Tenure at Erub, Torres Strait: Property, Sovereignty and the Adjudication of Cultural Continuity' (1999) 70 *Oceania* 146

Sharp, R. A., *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Oxford University Press, Auckland, 1990)

Sherwin, Emily, 'Legal Taxonomy' (2009) 15(01) *Legal Theory* 25

Shugart, M. S. and M. P. Wattenberg, *Mixed-Member Electoral Systems: The Best of Both Worlds?* (New York: Oxford University Press, 2001).

Senate Legal and Constitutional References Committee, *Discussion Paper on A System of National Citizenship Indicators* (1995)

Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal People* (Parliament of Australia, 1983)

Senate Standing Committee on Finance and Public Administration, *Estimates Committee Documentation and Procedures Report* (April 1991)

Shaw, K., *Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (Routledge, 2008)

Siegfried Wiessner, 'Rights and Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 (57) *Harvard Human Rights Journal* 57

Siems, Mathias M., and Daithí Mac Síthigh, 'Mapping Legal Research' (2012) 71(3) *The Cambridge Law Journal* 651

Simmons, DR, *The Great New Zealand Myth: A Study of the Discovery and Origin Traditions of the Maori* (A. H. & A. W. Reed, 1976)

Simeone, Tonina, Shauna Troniak, 'Legislative Summary of Bill S-6: An Act Respecting the Election and Term of Office of Chiefs and Councillors of Certain First Nations and the Composition of Council of those First Nations' (Publication No. 41-1-S6-E, 30 January 2012)

Sinclair, K., *A History of New Zealand* 2 (Allen Lane, 1980)

Sinclair, Keith, 'Maori Nationalism and the European Economy, 1850–60' (1952) 5(18) *Historical Studies: Australia and New Zealand* 119

Sinclair, Keith, *The Oxford Illustrated History Of New Zealand* (Oxford University Press, 1990)

Slattery, B., 'Aboriginal Sovereignty and Imperial Claims: Reconstructing North American History' (1991) 29 *Osgoode Hall Law Journal* 681

Slattery, Brian, 'First Nations and the Constitution: A Question of Trust' (1992) 71 *Canadian Bar Review* 261

Slattery, Brian, 'The Constitutional Guarantee of Aboriginal and Treaty Rights' (Fall 1982/Spring 1983) 8 (1-2) *Queen's Law Journal* 232

Small, David, *Research Studies of the Royal Commission on Electoral Reform and Party Financing - Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform*, (Dundurn Press, 1991)

Smith, Dale, *The Unbroken Machine* (Dundurn Press, 2017)

Smits, J.M., *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006)

Sorrenson, M. P. K., 'Colonial Rule and Local Response: Maori Responses to European Domination in New Zealand Since 1860' (1976) 4(2) *The Journal of Imperial and Commonwealth History* 127

Sorrenson, M. P. K., 'How to Civilise Savages: Some 'Answers' From Nineteenth-Century New Zealand' 9 (1975) *The New Zealand Journal of History* 97

'Special Joint Committee of Senate and House of Commons on Indian Act, Minutes of Proceedings' (4th Report, 1948)

Spence et al, Nicholas D., 'Racial Discrimination, Cultural Resilience, And Stress' (2016) 61(5) *The Canadian Journal of Psychiatry* 298

Spence, Nicola, 'The Unknown Factor to Forestry Investment in New Zealand' (1998) *Japan Society of Forest Planning* 7

Standfield, Rachel, 'The vacillating manners and sentiments of these people: Mobility, Civilisation and Dispossession in the Work of William Thomas with the Port Phillip Aboriginal Protectorate' (2011) 15 (9) *Law Text Culture* 162

Stanhope, J., 'Indigenous Partnerships: Taking Responsibility for Rights' *Public Administration Today* 6 (January–March 2006)

Stasiulis, Daiva, Nira Yuval-Davis, *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (SAGE, 1995)

Steering Committee for the Creation of a New National Representative Body Steering Committee, *Our Future in Our Hands: Creating a Sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples* (2009)

Stevenson, Mark, 'Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis' (2002) 1 *Indigenous Law Journal* 237

Stewart-Harawira, M., *The New Imperial Order: Indigenous Responses to Globalization* (Zed Books, 2005)

Stokes, E., *Maori Representation in Parliament* (Occasional Paper Number 14, University of Waikato, 1981)

Stokes, Geoffrey, 'The 'Australian Settlement' and Australian Political Thought' (2004) 39(1) *Australian Journal of Political Science* 5

Stokes, Geoffrey, *The Politics of Identity in Australia* (Cambridge University Press, 1997)

Strakosch, Elizabeth, *Neoliberal Indigenous policy: Settler colonialism and the post-welfare State* (Palgrave Macmillan, 2015)

Steinman, Erich 'Indigenous Nationhood Claims and Contemporary Federalism in Canada and the United States' (2005) 24 (1) *Policy and Society* 98

Stretton, Pat and Christine Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise' (1993) 25 *Australian Historical Studies* 521

Samantha Stronge et al, 'Perceived Discrimination Predicts Increased Support for Political Rights and Life Satisfaction Mediated by Ethnic Identity: A Longitudinal Analysis' (2016) 22(3) *Cultural Diversity and Ethnic Minority Psychology* 359

Submission No 90 to the Minister of State, *Electoral Reform Green Paper: Strengthening Australia's Democracy,* 2009

Sullivan, Anne, 'Effecting Change Through Electoral Politics: Cultural Identity and the Maori Franchise' (2003) 112 (3) *The Journal of the Polynesian Society* 219

Sullivan, Patrick, 'Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper 4, Desert Knowledge CRC, March 2007)

Sullivan, Patrick, *Shooting the Banker: Essays on ATSIC and Self-Determination* (North Australia Research Unit: Australian National University, 1996)

Sustainable Future Institute, *Effective Maori Representation in Parliament: Working Towards a National Sustainable Development Strategy* (Sustainable Future Institute Limited, Wellington, 2010)

Sunstein, Cass R., 'Constitutionalism and Secession' (1991) 58 *University of Chicago Law Review* 633

Sutton, Peter, 'The Politics of Suffering: Indigenous Policy in Australia Since the 1970's' (2001) 11 (2) *Anthropological Forum* 125

Sweet, Alec Stone, 'Proportionality Balancing and Global Constitutionalism' (2008) *Yale Law School Faculty Scholarship Series* 1

Synot, Eddie, 'The Universal Declaration Of Human Rights At 70: Indigenous Rights And The Uluru Statement From The Heart' (2019) 73(4) *Australian Journal of International Affairs* 320

Szaszy, Mira and Anne Else, 'Recording the History of the Maori Women's Welfare League' (1990) 6 (1) *Women's Studies Journal* 17

Taagepera, Rein and Matthew Shugart *Seats and Votes: The Effects and Determinants of Electoral Systems* (Yale University Press, 1989)

Taffe, Sue, *Black and White Together: FCAATSI: The Federal Council for the Advancement of Aborigines and Torres Strait Islanders 1958 – 1973* (University of Queensland Press, 2005)

Tauroa, Hiwi, *Healing The Breach: One Maori's Perspective On The Treaty Of Waitangi* (Collins New Zealand, 1989)

Tavan, Gwenda, 'The Dismantling Of The White Australia Policy: Elite Conspiracy Or Will Of The Australian People?' (2004) 39 (1) *Australian Journal of Political Science* 109

Tavan, Gwenda, *The Long, Slow Death Of White Australia* (Scribe Publications, 2005)

Taylor, John, 'Indigenous Peoples and Indicators of Well-Being: Australian Perspectives on United Nations Global Frameworks' (2007) 87(1) *Social Indicators Research* 111

Taylor-Henley, Sharon and Peter Hudson, 'Aboriginal Self-Government and Social Services: First Nations: Provincial Relationships' (1992) 18(1) *Canadian Public Policy/Analyse de Politiques* 13

Te Aho, Linda, 'Contemporary Issues in Maori Law and Society: Mana Motuhake, Mana Whenua' (2006) 14 *Waikato Law Review* 102

Te Atiawa Report 1983

Te Puni Kokiri, Progress *Towards Closing Social and Economic Gaps between Maori and Non-Maori* (Wellington: Te Puni Kokiri, 1998)

Te Puni Kokiri, *Progress Towards Closing Social and Economic Gaps between Maori and non-Maori: A Report to the Minister of Maori Affairs May 2000* (Te Puni Kokiri, 2000)

Te Puni Kokiri, 'Inquiry into the Maori Community Development Act 1962: Advisers Report to Maori Affairs Committee' (October 2010)

Tennant, Paul, Sally M. Weaver, Roger Gibbins and J. Rick Ponting, 'The Report of the House of Commons Special Committee on Indian Self-Government: Three Comments' (June, 1984) 10 (2) *Canadian Public Policy / Analyse de Politiques* 211

Terrill, Leon and Sasha Boutilier, ‘Indigenous Land Tenure Reform, Self-Determination, and Economic Development: Comparing Canada and Australia’ (June, 2019) 45 (1) *University of Western Australia Law Review* 34

Thames, Frank C. and Martin S. Edwards, ‘Differentiating Mixed-Member Electoral Systems’ (2006) 39(7) *Comparative Political Studies* 905

‘The Barunga Statement’ (1988) 1 (33) *Aboriginal Law Bulletin* 16

The Honourable Gerry Germain and The Honourable Lillian Eva Dyck, *Report of The Standing Senate Committee on Aboriginal Peoples: First Nations Elections - The Choice Is Inherently Theirs* (Canadian Government, 2010)

The Maori Commercial Aquaculture Settlement: Pre-Commencement Space Plan (Ministry for Primary Industries, 2014)

The Radio Spectrum Management and Development Final Report (Wai 776) (GP Publications, 1999)

The Special Committee of the House of Commons, *Indian Self-Government in Canada* (Queens Printer, 1983)

The Treaty of Waitangi Act 1975 Interim Report (The Waitangi Tribunal, 1986)

This Is What We Said: Australian Aboriginal People Give Their Views on the Northern Territory Intervention (Concerned Australians, 2010)

Thompson, LJ and R. Hill, 'Disrupting the new orthodoxy: emergency intervention and Indigenous social policy', (2009) 7 (1) *New Community Quarterly* 49

Thorpe, Alister et al, *Engaging First Peoples: A Review of Government Engagement Methods for Developing Health Policy* (Lowitja Institute, 2016)

Tickner, R., *Taking A Stand: Land Rights to Reconciliation* (Allen and Unwin, 2001)

Tobias, John L., 'Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy' (1976) 6 (2) *Western Canadian Journal of Anthropology* 13

Tousignant, Pierre, ‘Constitutional Act 1791’ (2006) *The Canadian Encyclopaedia* 1

Townsend, R, *Case Studies in Fisheries Self-Governance* (Food and Agriculture Organisation of the United Nations FAO, Communication Division, 2008)

Tremblay, Luc B., *Rule of Law, Justice, and Interpretation* (McGill-Queen's Press, 1997)

Tribe, Laurence H, *American Constitutional Law* (Foundation Press, 1995)

Tully, J., *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995)

Turpel, Mary Ellen, 'Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25 (3) *Cornell International Law Journal* 25

Twomey, A., 'Constitutional Conventions, Commissions and Other Constitutional Reform Mechanisms' (2008) 19 *Public Law Review* 308

Twomey, Anne, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125

Udel, Lisa J., 'Revision and Resistance: The Politics of Native Women's Motherwork' (2001) 22 (2) *Frontiers: A Journal of Women Studies* 43

Uhr, Gregory and John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998)

Urbinati, Nadia, 'Condorcet's Democratic Theory of Representative Government' (2004) 3 (1) *European Journal of Political Theory* 53

Urbinati, Nadia 'Representative Democracy and Its Critics' [2010] *The Future of Representative Democracy* 23

Valadez, Jorge, *Deliberative Democracy, Political Legitimacy, and Self-determination in Multi-cultural Societies* (Routledge, 2001)

Valentine, Bruce and Mel Gray, 'Keeping Them Home: Aboriginal Out-of-Home Care in Australia' (2006) 87 (4) *Families in Society: The Journal of Contemporary Social Services* 537

Van Hoecke, Mark, 'Methodology of Comparative Legal Research' [2015] (12) *Law and Method* 43

Varennes, Fernand de, 'Indigenous Peoples and Language' (1995) *Murdoch University Electronic Journal of Law* 15

Venne, Sharon H, 'The Road to the United Nations and Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 557

Vile, John R, *A Companion to The United States Constitution and Its Amendments* (ABC-CLIO, LLC, 6th ed, 2015)

Vivian, Alison, Miriam Jorgensen, Alexander Reilly, Mark McMillan, Cosima McRae and John McMinn, 'Indigenous self-government in the Australian federation' (2017) 20 *Australian Indigenous Law Review* 215

Vowles, Jack, 'The Politics of Electoral Reform in New Zealand' (1995) 16 (1) *International Political Science Review* 95

Waitangi Tribunal, *The Fisheries Settlement Report* (1992)

Wallace, John, *Royal Commission on the Electoral System: Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (New Zealand Government Printer, 1986)

Waldron, Jeremy, *Parliamentary Recklessness: Why We Need To Legislate More Carefully* (Maxim Institute, 2008)

Walker, J. L., 'A Critique of the Elitist Theory of Democracy' (1966) 60 *American Political Science Review* 285

Walker, R. J., 'The Genesis of Maori Activism' (September, 1984) 93 (3) *The Journal of the Polynesian Society* 267

Walling, Julie, Desi Small-Rodriguez and Tahu Kukutai, 'Tallying Tribes: Waikato-Tainui in the Census and Iwi Register' (2009) 36 *Social Policy Journal of New Zealand* 2

Walter, James and Paul Strangio, *No, Prime Minister: Reclaiming Politics from Leaders* (UNSW Press, Sydney, 2007)

Ward, Alan, *A Show of Justice: Racial "Amalgamation" in Nineteenth-Century New Zealand* (Auckland University Press, Auckland, 1973)

Ward, Alan, 'An Unsettled History' (1999) 9 (2) *New Zealand Studies* 1

Ward, Alan J., 'Exporting the British Constitution: Responsible Government in New Zealand, Canada, Australia and Ireland' (1987) 25(1) *The Journal of Commonwealth & Comparative Politics* 3

Ward, Alan 'Interpreting the Treaty of Waitangi: The Maori Resurgence and Race Relations in New Zealand' (1991) 3 (1) *The Contemporary Pacific* 85

Watkins, Dawn and Mandy Burton, *Research Methods in Law* (Routledge, 2017)

Watson, A. B., 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand' (2011) 34 (2) *Seattle University Law Review* 507

Watson, Irene, 'In the Northern Territory Intervention: What is Saved or Rescued and at What Cost?' (2009) 15 (2) *Cultural Studies Review* 45

Watson, Irene, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routlege, 2015)

Watson, Irene, 'Re- Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10 (5) *AlterNative* 508

Watson, Nicole, 'The Northern Territory Emergency Response - Has It Really Improved the Lives of Aboriginal Women and Children?' (2011) 35 (1) *Australian Feminist Law Journal* 147

Watson, Veronica, Deirdre Howard-Wagner, Lisa Spanierman, *Unveiling Whiteness in the Twenty-First Century: Global Manifestations, Transdisciplinary Interventions* (Lexington Books, 2014)

Waugh, John, *The Rules: An Introduction To The Australian Constitutions* (Melbourne University Press, 1996)

Weatherburn, Don, Jackie Fitzgerald and Jiuzhao Hua, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65

Weaver, Sally M., ‘A New Paradigm in Canadian Indian Policy for the 1990s’ (1990) 22 (3) *Canadian Ethnic Studies* 8

Weaver, Sally M., ‘Australian Aboriginal Policy: Aboriginal Pressure Groups Or Government Advisory Bodies?’ (1983) 54(1) *Oceania* 1

Weaver, S.M., *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (University of Toronto Press, 1981)

Webb, Jill, ‘Indigenous Peoples and the Right to Self-Determination’ [2012] 13 *Journal of Indigenous Policy* 75

Webb, Leicester, *Government in New Zealand* (Department of Internal Affairs, 1940)

Webber, Jeremy, ‘Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform’ (1999) 21 *Sydney Law Review* 260

Webster, Steven, ‘Maori Retribalization and Treaty Rights to the New Zealand Fisheries’ (2002) 14 (2) *University of Hawai’i Press* 341

Wiessner, Siegfried, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People’ (2008) 41 (4) *Vanderbilt Journal of Transnational Law* 1141

Weller, Marc, Stefan Wolff, *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005)

White Paper on Maori Land Legislation (1973)

Wheeler, Harvey, ‘Calvin's Case (1608) and the McIlwain-Schuyler Debate’ (1956) 61 (3) *The American Historical Review* 587

Wicks, Anthony ‘The Treaty and the Seats’ [2008] *New Zealand Law Students Journal* 405

Widdowson-Kidd, Michaela, 'The Howard Government's Special Measures for Indigenous Australians' 1(2) *Queensland Student Law Review* 18

Wiessner, Siegfried, ‘Rights and Indigenous Peoples: A Global Comparative and International Legal Analysis’ (1999) 12 (57) *Harvard Human Rights Journal* 57

Wild, Rex and Pat Anderson, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Northern Territory Government of Australia, 2007)

Williams, Douglas E., *Reconfigurations: Canadian Citizenship and Constitutional Change* (McClelland & Stewart, 1995)

Williams, George, *Human Rights under the Australian Constitution* (Melbourne: Oxford University Press, 1999)

Williams, G. and D. Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010)

Williams, George, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 (4) *Osgoode Hall Law Journal* 643

Williams, George, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' (2015) 34 *University of Tasmania Law Review* 114

Williams, George, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848

Williams, George, 'The Races Power and the 1967 Referendum' (2007) 1 (SE) *Australian Indigenous Law Review* 8

Williams, John A., *Politics of the New Zealand Maori: Protest and Cooperation, 1891-1909* (University of Washington Press, 1969)

Williams, John, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005)

Williams Jr, Robert A., 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660

Wilson, Tikka Jan, 'Feminism and Institutionalized Racism: Inclusion and Exclusion at an Australian Feminist Refuge' (1996) 52 *Feminist Review* 1

Winder, Megan A., 'Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law that Australia Should Address' (2010) 19 *Pacific Rim Law and Policy Journal* 385

Windschuttle, Keith, 'Aborigines want more than a voice in parliament' (2017) 61 (9) *Quadrant* 50

Windschuttle, Keith, 'The Fabrication of Aboriginal History' (2003) 15 (1) *The Sydney Papers* 20

Winter, Stephen and Chris Jones, *Magna Carta and New Zealand: History, Politics and Law in Aotearoa* (Palgrave Macmillan US, 2017)

Weaver, John, 'Capital in Nature/Nature by Capital: Global Integration and New Zealand's Forests, 1870–2000' (2016) 21 (4) *Environmental History*

Welch, A. R., 'Aboriginal Education as Internal Colonialism: The Schooling of an Indigenous Minority in Australia' (1988) 24 (2) *Comparative Education* 203

Westerman, P. C., *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing Ltd, 2011)

Wheen, Nicola and Jacinta Ruru, 'Providing for Rahui in the Law of Aotearoa New Zealand' (June, 2011) 120 (2) *The Journal of the Polynesian Society* 169

Wolfrum, R., *Max Planck Encyclopaedia of International Law* (Oxford University Press, 2010)

Woons, Marc, *Restoring Indigenous Self-Determination* (E-International Relations, 2014)

Wotherspoon, T. and J. Hansen, 'The "Idle No More" Movement: Paradoxes of First Nations Inclusion in the Canadian Context' (2013) 1 (1) *Social Inclusion* 21

Wright, Alexis, 'Embracing the Indigenous vision' (2016) 65 (1) *Meanjin* 104

Wright, J, 'Minority groups, autonomy, and self-determination' (1999) 19 (4) *Oxford Journal of Legal Studies* 605

Xanthaki, Alexandra, 'Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land' (2007) *Cambridge University Press* 511

Xanthaki, Alexandra and Dominic O'Sullivan, 'Indigenous Participation in Elective Bodies: The Maori in New Zealand' (2009) 16(2) *International Journal on Minority and Group Rights* 181

Young, Iris Marion, 'Residential Segregation and Differentiated Citizenship' (1999) 3(2) *Citizenship Studies* 237

Young, Iris Marion, *Justice and the Politics of Difference* (Princeton University Press, 1990)

Young, Simon, Jennifer A Nielsen and Jeremy Patrick, *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (The Federation Press, 2016)

Yunupingu, Galarrwuy, Vincent Lingiari Memorial Lecture, Darwin, 20 August 1998

Zappala, Gianni and Stephen Castles, *Citizenship and Immigration in Australia* (University of Wollongong, 1998)

Ziegler, Reuven, 'Legal Outlier, Again - U.S. Felon Suffrage: Comparative and International Human Rights Perspectives' (Summer 2011) 29 (2) *Boston University International Law Journal* 197

Zweigert, Konrad and Hein Kotz, *Introduction to Comparative Law* (Clarendon Press, 3rd ed, 1998)

II. CASES

Alberta (Aboriginal Affairs and Northern Development) v Cunningham [2011] 2 SCR 670

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1

Australian Capital Television Pty Ltd and Others v Commonwealth of Australia (No 2) (1992) 177 CLR 106

Belczowski v Canada [1992] 2 FC 440

Beckman v Little Salmon/Carmacks First Nation [2010] 3 SCR 103

Calder v Attorney-General British Columbia (1973) SCR 313

Coe v Commonwealth (1979) HCA 68

Campbell v BC (Attorney General) [2000] BCJ No. 1524

Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 SCR 203

Daniels v Canada (Indian Affairs and Northern Development) [2016] 1 SCR 99

Delgamuukw v British Columbia (1997) 3 SCR 1010

Figueroa v Canada (Attorney General) [2003] 1 SCR 912

Gehardy v Brown [1985] HCA 11

Guerin v The Queen [1985] 13 DLR 321

Haig v Canada [1993] 2 SCR 995

Harvey v New Brunswick (Attorney General) [1996] 2 SCR 876

Hindmarsh Island Bridge Case (1998) 195 CLR 337

Hirst v Attorney General [2001] EWHC Admin 239

Hirst (No 2) (application no. 74025/01) (2005) ECHR 74025/01 (Grand Chamber)

Hwang v Commonwealth (2005) HCA 66

In re Raglan Election Petition (No 4) [1948] NZLR 65

King v Jones (1972) 128 CLR 246

Koowarta v Bjelke-Petersen (1982) 153 CLR 168

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Langer v Commonwealth (1996) 186 CLR 302

Mabo v State of Queensland (No 2) (1992) 175 CLR 1

Maloney v The Queen [2013] HCA 28

Manitoba Metis Federation Inc. v Canada (AG) 2013 SCC 14

McGinty v Western Australia (1996) 186 CLR 140

Milirrpum v Nabalco (1971) 17 FLR 141

Mulholland v Australian Electoral Commission (2004) 220 CLR 181

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Neal v The Queen (1982) 149 CLR 305

New Zealand Maori Council v Attorney-General [1987] 1 NZLR 6 NZAR 353

New Zealand Maori Council v Attorney-General [1994] NZLR 513

New Zealand Maori Council v Te Runanga o Muriwhenua [1987] NZHR 6

Ngati Apa kit e Waipounamu Trust v The Queen [2000] 3 NZLR 659

Ngai Tahu Maori Trust Board v Attorney-General [1987] NZLR 142

Paku v Ministry of Agriculture and Fisheries [1992] 2 NZLR 223

R v Agawa [1988] OJ No. 1248 (ONCA) [1988] SCCA No. 501 (SCC)

R v Derriksan (1976) 4 (SCC) 575

R v Gladue [1999] 1 SCR 688

R v Pearson; Ex parte Sipka (1983) 152 CLR 254

R v Powley [2003] 2 SCR 207

R v Oakes [1986] 1 SCR 103, 26 DLR (4th) 200

Re Canavan [2017] HCA 45

Reference re Secession of Quebec [1998] 2 SCR 217

Reference re Prov. Electoral Boundaries (Sask.) [1991] 2 SCR 158

Rice v Agence du revenu du Québec [2016] SCCA No. 263 (SCC)

Roach v Electoral Commissioner (2007) 233 CLR 162

Rowe and Another v Electoral Commissioner and Another (2010) 273 ALR 1

Sauvé v Canada (Chief Electoral Officer) [2002] 3 SCR 519

Singh v Commonwealth (2004) 222 CLR 322

St. Catherines Milling and Lumber Co v R (1888) 14 App. Cas. 46

Sue v Hill (1999) 199 CLR 462

Sykes v Cleary (1992) 176 CLR 77

Taylor v Attorney-General [2015] NZHC 1706

Te Runanga o Wharekauri Rekohu Inc v Attorney-General (1993) 2 NZLR 301

Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission [2000] 1 NZLR 285

Theophanous v The Herald & Weekly Times Ltd (1994) 182 CLR 104

The Queen v Sparrow [1990] 70 DLR 385

The Queen v Van der Peet [1996] 2 SCR 507

Thomson Newspapers Co. v. Canada (Attorney General) [1998] 1 SCR 877

Tsilhqot'in Nation v British Columbia [2014] 2 SCR 257

Vriend v. Alberta [1998] 1 SCR 493

Waitaha Taiwhenuaa o Waitiki Trust v Te Runanga o Ngai Tahu v Waitangi Tribunal [2001] 3 NZLR 87

Western Australia v Ward [2002] HCA 28

Wurridjal v Commonwealth [2009] HCA 2

III. LEGISLATION

Aborigines Act 1890 (Vic)

Aborigines Act 1905 (WA)

Aborigines Act 1911 (SA)

Aborigines Act 1934 (SA)

Aboriginal Affairs Act 1962 (SA)

Aboriginal and Torres Strait Islander Act 2005 (Cth)

Aboriginal Councils and Associations Act 1976 (Cth)

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Aborigines Protection Act 1886 (WA)

Aboriginal Protections Act 1909 (NSW)

Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld)

Aboriginals Ordinance 1911 (Cth)

Aboriginals Ordinance 1918 (Cth)

Aboriginal and Torres Strait Islanders Affairs Act 1965 (QId)

Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)

Aboriginal and Torres Strait Islander Commission Amendment Act (No. 1) 1999 (Cth)

Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth)

Adult Suffrage Act 1908 (Vic)

Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)

Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008 (Cth)

Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008 (Cth)

Australian Citizenship Act 2007 (Cth)

Australian Citizenship Amendment Act 1993 (Cth)

Australian Constitutions Act 1842 (Imp)

Australian Constitutions Act 1850 (Imp)

British North America Act 1867 (Imp)

Canada Act 1982 (UK) c 11, Sch B pt I (‘*Canadian Charter of Rights and Freedoms 1982’)*

Canadian Elections Act, RSC 1985, c. E-2.

Canada Elections Act, S.C. 2000, c. 9

Cape Barren Island Reserve Act 1912 (Tas)

Charter of Rights and Responsibilities 2006 (Vic)

Commonwealth Census and Statistics Act 1905

Commonwealth Electoral Act 1918

Commonwealth Electoral Act 1949

Commonwealth Electoral Act 1962

Commonwealth Electoral Legislation Amendment Act 1983

Commonwealth of Australia Constitution Act 1901

Commonwealth of Australia Constitution Act 1900 (UK)

Constitution Act 1889 (WA)

Constitution Act 1852 (NZ)

Constitution Act 1986 (NZ)

Constitution Act 1867 (Imp), 30 & 31 Vict, c 3

Constitution Act of Canada 1982 (UK) c 11, Sch B

Constitution Amendment Act (No 2) 1896 (Tas)

Constitutional Amendment (Adult Suffrage) Act 1894 (SA)

Constitution Acts Amendment Act 1899 (WA)

Constitution Amendment Act 1903 (3 Edw VII, No 17) (Tas)

Constitution of the United States 1787

Council for Aboriginal Reconciliation Act 1991 (Cth)

Crimes Act 1914 (Cth)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Criminal Law (Sentencing) Act 1988 (SA)

Crown Forest Assets Act 1989 (NZ)

Department of Indian Affairs and Northern Development Act 1985, RSC, c. I-6

Elections Act 1885 (Qld)

Elections Act Amendment Act 1905 (Qld)

Electoral Act 1905 (NZ)

Electoral Act 1907 (WA)

Electoral Act 1956 (repealed) (NZ)

Electoral Act 1993 (NZ)

Electoral Amendment Act 1950 (NZ)

Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (NZ)

Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth)

Evidence Act 1843 (Imp) (Vic)

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007

Forestry Agreement 1989 (NZ)

Franchise Act 1902 (Cth)

Income Tax Assessment Act 1993 (Cth)

Indian Act, RSC 1876, c 1-5

Indian Act, RSC, 1985, c. I-5

Male Qualifications of Electors Act 1879 (NZ)

Maori Affairs Bill 1987 (no. 124), Explanatory Note, 'The Genesis of the Bill' (NZ)

Maori Commercial Aquaculture Settlement Act 2004 (NZ)

Maori Language Act 1987 (NZ)

Maori Purposes Act 1979 (NZ)

Maori Representation Act 1867 (NZ)

Maori Welfare Act 1962 (NZ)

Minister of Home Affairs v National Institution for Crime Prevention and the Re-Integration of Offenders (NICRO) and others [2004] 5 BCLR 445 (CC)

Natives Administration Act 1905-1936 (Cth)

Native Title Act 1993 (Cth)

Native Welfare Act 1963 (WA)

New South Wales Constitution Act 1842 (UK)

New South Wales Constitution Act 1855 (Imp)

New Zealand Bill of Rights Act 1990 (NZ)

New Zealand Constitution Act 1852 (NZ)

Ngati Turangitukua Claims Settlement Act 1999 (NZ)

Ngai Tahu Claims Settlement Act 1998 (NZ)

Nisga'a Final Agreement Act SC200

Nisga'a Final Agreement Act SBC 1999

Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA)

Northern Territory Aboriginals Act 1910 (SA)

Northern Territory National Emergency Response Act 2007 (Cth)

Northern Territory Self-Government Act 1978 (Cth)

Penalties and Sentences Act 1992 (Qld)

Pouakani Claims Settlement Act 2000 (NZ)

Racial Discrimination Act 1975 (Cth)

Regulations of Elections Act 1870 (NZ)

Sentencing Act 1991 (Vic)

Sentencing Act 1995 (WA)

Social Security Act 1991 (Cth)

Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)

Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth)

South Australian Statute No 2 of 1855-56

Tasmanian Statute No 17 of 1854

The Constitution Act 1855 (Tas)

The Electoral Code 1896 (SA)

Treaty of Waitangi 1840 (NZ)

Treaty of Waitangi Act 1975 (NZ)

Treaty of Waitangi (State Enterprises) Act 1988 (NZ)

Union Act 1840 (Imp)

Trust Deed for Crown Forestry Rental Trust, April 1990 (amended 16 August 2011)

Victoria Constitution Act 1855 (Imp)

Waikato Raupatu Claims Settlement Act 1995 (NZ)

Welfare Ordinance 1953 (Cth)

Women's Franchise Act 1902 (NSW)

IV. TREATIES

Charter of the United Nations, signed 26 June 1945 (entry into force 24 October 1945)

Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Rights of Indigenous Peoples,* 51st sess, UN Doc A/52/18 (18 August 1997)

Committee on the Rights of Persons with Disabilities, *Views: Communication No 4/2011,* 10th sess, UN Doc CRPD/C/10/D/4/2011 (2-13 September 2013)

Concluding Observations of the Human Rights Committee: Australia, U.N. Doc. A/55/40 (24 July 2002)

Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993)

Convention on the Elimination of All Forms of Discrimination Against Women (signed 18 December 1979) (entered into force 3 September 1981)

Convention on the Rights of Persons with Disabilities (signed 30 March 2007) (3 May 2008)

Declaration of First Nations (1980) <https://www.afn.ca/about-afn/declaration-of-first-nations/>.

Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 XV (14 December 1960)

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms GA Res 53/144 of 9 December 1998

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res 47/135 (signed 18 December 1992)

Declaration on the Rights to Development GA Res 41/128 of 4 December 1986

Draft Declaration as Agreed Upon by the members of the Working Group, 11th sess, UNESCO, E/CN4/Sub2/1994/Add 1 (20 April 1994)

Durban Declaration and Programme of Action UN GA Res 61/149 (passed in 2006)

Expert Mechanism on the Rights of Indigenous People, *Indigenous peoples and the right to participate in decision making*, Advice No. 2, A/HRC/18/42 (2011)

Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities*), 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994)

Human Rights Committee, *General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, UN Doc CCPR/C/21/Rev1/Add7, (adopted 12 July 1996)

International Convention on the Elimination of All Forms of Racial Discrimination (signed 21 December 1965) (entered into force 4 January 1969)

International Covenant on Civil and Political Rights (signed 16 December 1966) (entry into force 23 March 1976).

International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI) (signed 16 December 1966) (entry into force 3 January 1976)

International Labour Organisation Indigenous and Tribunal Peoples Convention 1989 (No 169), opened for signature 27 June 1989 (entered into force 5 September 1991).

Peace and Friendship Treaties (1725-1779) (Canada)

Robinson Treaties and Douglas Treaties (1850-1854) (Canada)

The Numbered Treaties (1871-1921) (Canada)

Treaties of Peace and Neutrality (1701-1760) (Canada)

Upper Canada Land Surrenders and the Williams Treaties (1764-1862/1923) (Canada)

United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law* (2014)

United Nations Convention on the Rights of Persons with Disabilities, GA Res 61/106, A/RES/61/106 (24 January 2007, entry into force 3 May 2008)

Universal Declaration on Human Rights, UN GA Dec (Paris: 10 December 1948)

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007)

UN GAOR, 61s sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007)

UN HRC, *Report of the Special Rapporteur Rodolfo Stavenhagen: Situation of human rights and fundamental freedoms of indigenous people* (15 November 2007)

V. OTHER

2016 - 2018 Reconciliation Action Plan (aec.gov.au, 2016) <http://www.aec.gov.au/About_AEC/Publications/files/aec-rap-2016-18.pdf>

2016 Federal Election Key Facts and Figures <https://www.aec.gov.au/Elections/Federal_Elections/2016/key-facts.htm>

3238.0.55.001 - Estimates of Aboriginal and Torres Strait Islander Australians, June 2011 (abs.gov.au, 2013) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>

4102.0 - Australian Social Trends (abs.gov.au, 1996) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/2992cea7a4df5866ca2570ec0073eda9!OpenDocument>

4433.0.55.005 - Aboriginal and Torres Strait Islander People with A Disability (abs.gov.au, 2012) <http://abs.gov.au/ausstats/abs@.nsf/mf/4433.0.55.005>

4517.0 - Prisoners in Australia (abs.gov.au, 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>

4704.0 - The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples (abs.gov.au, Oct 2010) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter350Oct+2010>

ABC Radio, *Indigenous Australians Face Greater Difficulties Obtaining ID* (PM, 12 December 2008)

'About Indigenous and Northern Affairs Canada' (*Government of Canada*, 2017) <https://www.aadnc-aandc.gc.ca/eng/1100100010023/1100100010027>

Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body — Phase 2* (June 2017)

Aboriginal and Torres Strait Islander Social Justice, Self-determination and effective participation 'within the life of the nation': An Australian perspective on self-determination (Australian Human Rights Commission, 2003)

<https://www.humanrights.gov.au/selfdetermination-and-effective-participation-within-life-natin-australianperspective-self>

Aboriginal Peoples in Canada: Key Results From the 2016 Census (statcan.gc.ca, 2016) <http://www.statcan.gc.ca/daily-quotidien/171025/dq171025a-eng.pdf>

Aboriginal Peoples in Canada: First Nations People, Métis and Inuit (www12.statcan.gc.ca, 2018) <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>

Aboriginal Provisional Government (Apg.org.au, 2019) <http://apg.org.au/about.php>

Aboriginal Treaty Working Group (Victorian Government, 2018) <https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-bodies/aboriginal-treaty-workinggroup.html>

Aboriginal Victoria, *Victorian Treaty Advancement Commission* <https://www.vic.gov.au/aboriginalvictoria/treaty/victorian-treaty-advancement-commission.html>

About AFN: Assembly of First Nations (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/>

Absec, *Supporting Aboriginal People with Disability* (Absec.org.au, 2018) <https://www.absec.org.au/supporting-aboriginal-people-with-disability.html>

Additional Performance Information - AEC Annual Report 2015-16 <http://annualreport.aec.gov.au/2016/performance/additional.html>

Adult Correctional Statistics in Canada, 2014/2015 (Statistics Canada, 2015) <https://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm>

Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Parliament of Victoria, 2018) <https://www.parliament.vic.gov.au/publications/research-papers/download/36-researchpapers/13861-advancing-the-treaty-process-with-aboriginal-victorians-bill-2018>

AFN Elders Council (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/executive-committee/afn-elders-council/>

AFN Women's Council (Assembly of First Nations, 2019) <http://www.afn.ca/about-afn/executive-committee/afn-womens-council/>

AFN Youth Council (2019) <http://www.afn.ca/about-afn/executive-committee/afn-youth-council/>

Alfred North Whitehead Quotes (2019) <https://allauthor.com/quote/31416/>

Allam, Lorena, 'Dodson, Burney Call for Government to Fund National Congress of Australia's First Peoples' (*The Guardian,* 12 June 2019) <https://www.theguardian.com/australia-news/2019/jun/12/national-congress-of-australias-first-peoples-fights-for-financial-survival>

Allem, Lorena, *Indigenous Groups Denounce Australian Budget as 'Punishing People in Poverty'* (The Guardian, 3 April 2019) <https://www.theguardian.com/australia-news/2019/apr/03/indigenous-groups-denounce-australian-budget-as-punishing-people-in-poverty>

Altman, Jon, *The Deliberating Aftermath of 10 years of NT Intervention* (New Matilda, 28 July 2017) <https://newmatilda.com/2017/07/28/the-debilitating-aftermath-of-10-years-of-nt-intervention/>

A Native Policy for Australia (Aborigines Protection League, Adelaide 1932)

Anderson, Pat, Megan Davis and Noel Pearson, 'Don't Silence Our Voice, Minister: Uluru Leaders Condemn Backward Step', *Sydney Morning Herald* (20 October 2019)

Arabena, K., 'Not Fit for Modern Australian Society: Aboriginal and Torres Strait Islander People and the New Arrangements for the Administration of Indigenous Affairs' (Research Discussion Paper No. 16., Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, 2005)

Are the Maori seats undemocratic? (In a Strange Land, 22 October 2008) <www.inastrangeland.wordpress.com>

Australasian Federal Convention Debates, Adelaide, 1897

Australasian Federal Convention Debates, Melbourne, 3 March 1898,

Australian Government Solicitor, 'Australia's Constitution: With Overview and Notes by the Australian Government Solicitor' 7 (1995)

Australian House of Representatives, *Parliamentary Debates (Hansard)* (23 April 1902)

Australian Human Rights Commission, 'Inaugural Ethics Council Up and Running' (Press Release, 4 January 2010)

Australian National Audit Office, 'Indigenous Advancement Strategy' (Commonwealth Department of the Prime Minister and Cabinet, 2017).

Australian Senate, *Parliamentary Debates (Hansard)* (9 April 1902)

Barunga Agreement, A Memorandum of Understanding to Provide for the Development of a Framework for Negotiating a Treaty with the First Nations of the Northern Territory of Australia between the Northern Land Council, the Central Land Council, the Anindilyakwa Land Council and the Tiwi Land Council and the Northern Territory Government (2018)

Behrendt, Larissa, 'The Abolition of ATSIC- Implications for Democracy' (Democratic Audit of Australia, 2005)

Bennett, R., 'Candidates, Members and the Constitution' (Research Paper, Department of the Parliamentary Library, 2002)

Bennett, Scott and Angela Pratt, 'The End of ATSIC and The Future Administration Of Indigenous Affairs: Current Issues Brief No. 4 2004–05' (Department of Parliamentary Services, 2004)

Blick, Bill, *Accountability, The Parliament and the Executive* (aph.gov.au, 1992) <https://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/~/link.aspx?_id=B2840DA7B5CA49E696AA522F198298C0>

Bob, Jones, 'Maori Seats Give Unwarranted Influence Based on Race' (2008) *New Zealand Centre for Political Research* <www.nzcpr.com>

Briggs, Casey, Controversial Queensland MP Billy Gordon Won't Run in State Election (ABC News, 31 October 2017) <https://www.abc.net.au/news/2017-10-31/billy-gordon-will-not-recontest-cook-in-queensland-election/9094304>

Calls For Australian Constitution Racist Clauses To Go (BBC News, 2015) <https://www.bbc.com/news/world-australia-33404898>

Calculating Future Maori and General Electorates (Electoral Commission, 2018) <http://www.elections.org.nz/voting-system/electorates/electorate-boundaries-and-review/calculating-future-maori-and-general>

Canada, *Parliamentary Debates*, House of Commons, 13 May 1946

‘Canada’s Collaborative Self-Government Fiscal Policy’ (*Government of Canada*, 2020) <https://www.rcaanc-cirnac.gc.ca/eng/1566482924303/1566482963919#7>

Caneva, Lina, *Indigenous Referendum Rejection ‘Profoundly Disappointing’* (Pro Bono Australia, 1 November 2017) <https://probonoaustralia.com.au/news/2017/11/indigenous-referendum-rejection-profoundly-disappointing/>

CAP Affiliates (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/en/capaffiliates/>

Child Protection and Aboriginal and Torres Strait Islander Children (Child Family Community Australia, 2017) <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>

Chrysanthos, Natassia, ‘"Uncertainty and Cause for Concern": Uluru Statement Leaders Voice Disapproval at Wyatt’, *Sydney Morning Herald* (20 October 2019)

‘Clark and ATSIC Board have Failed’ (*The Australian*, 31 March 2003)

Co-chairs Announced for Indigenous Voice Co-Design Process (indigenous.gov.au, 5 November 2019) <https://www.indigenous.gov.au/news-and-media/stories/co-chairs-announced-indigenous-voice-co-design-process>

Cook, Helena, ‘Pacific People in Parliament: A Case Study of Minority Representation in New Zealand’ (PhD Thesis, Victoria University of Wellington, 2008)

Corrections Department NZ - Prison Facts and Statistics - March 2018 (Corrections.govt.nz, 2018) <https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2018.html>

Craven, Greg, ‘We Need to Work Out How Indigenous Voices Can Be Heard’, *The Australian*, (Sydney, 13 September 2014)

Crisis in Correctional Services: Overcrowding and Inmates with Mental Health Problems in Provincial Correctional Facilities (Public Services Foundation of Canada, 2015) <https://publicservicesfoundation.ca/sites/publicservicesfoundation.ca/files/documents/crisis_in_correctional_services_april_2015.pdf>

Cromb, Natalie, *Comment: We need Aboriginal control of Aboriginal affairs* (NITV, 23 March 2017) <http://www.sbs.com.au/nitv/article/2017/03/23/comment-we-need-aboriginal-control-aboriginal-affairs>

Crown-Indigenous Relations and Northern Affairs Canada (Canada.Ca, 2019) <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html>

Curtin, Jennifer, 'The Voice and the Vote of the Bush: Representation of Rural and Regional Australia in the Federal Parliament' (Department of Parliamentary Services, Parliamentary Library, Information and Research Services)

Daes, E., Indigenous Peoples Permanent Sovereignty Over Natural Resources (Paper presented at the National Native Title Conference, Adelaide, Australian Human Rights and Equal Opportunity Commission, Sydney, 2004)

Daniels Symposium (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/daniels-symposium/>

Davis, I., 'Aborigines Face Major Shake-Up', *The Canberra Times* (26 May 2007)

Davis, Megan, 'A Right that is Fundamental to our Aspirations', *Koori Mail* (28 November 2012)

Davis, Megan, Bad Faith Over Indigenous Voice, *The Saturday Paper* (4 November 2017)

Davis, Megan, Mark McKenna, et al., *After Uluru: Australia's Politics of Contempt Threatens the Soul of the Nation* (ABC Religion and Ethics, 24 November 2017) <https://www.abc.net.au/religion/after-uluru-australias-politics-of-contempt-threatens-the-soul-o/10095186>

Deer, Jessica, *10 Indigenous Candidates Elected to the House of Commons* (CBC News, 2019) <https://www.cbc.ca/news/indigenous/indigenous-candidates-elected-2019-federal-election-1.5330380>

Department of Prime Minister and Cabinet, 'Closing the Gap Report' (Commonwealth of Australia, 2018)

Department of Prime Minister and Cabinet, 'Closing the Gap Minister's Report' (Commonwealth of Australia, 2017)

'Dialogues' (*Referendum Council*, 2020) <https://www.referendumcouncil.org.au/dialogues.html>

Dodson P., (Unpublished Speech given at Flinders University, Adelaide, 18 August 1993)

Dodson, Mick, Asmi Wood and Peter Baily, *Indigenous Self-Determination and International Law* (Australian Institute Of International Affairs, 2017) <http://www.internationalaffairs.org.au/australianoutlook/indigenous-self-determination-international-law/>

Dr Margie Maaka (Karaitiana Taiuru, 2020) <https://www.taiuru.maori.nz/maori-leaders-quotes-sayings/dr-margie-maaka/>

Dunne, Peter, 'Time to Let the People Decide', *Dominion Post* (New Zealand, 18 March 2008)

Elections Canada Online: Voting by Incarcerated Electors (Elections.ca, 2014) <http://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90545&lang=e>

Elections – Frequently Asked Questions (Australian Electoral Commission, 2018) <https://aec.gov.au/FAQs/Elections.htm#checklist>

Electoral Milestones for Indigenous Australians (Australian Electoral Commission, 2019) <https://aec.gov.au/indigenous/milestones.htm>

Employment (Australian Electoral Commission, 2018) <http://www.aec.gov.au/employment/>

Empowered Communities (Niaa.Gov.Au, 2019) <https://www.niaa.gov.au/indigenous-affairs/empowered-communities>

Enrol to Vote (Australian Electoral Commission, 2018) <https://aec.gov.au/enrol/>

Events in Australian Electoral History (Australian Electoral Commission, 2016) <https://aec.gov.au/Elections/Australian_Electoral_History/reform.htm>

Facts about Voter ID and the Voter Information Card (Elections.Ca, 2019) <https://www.elections.ca/content.aspx?section=med&dir=c76/id&document=index&lang=e>

Foley, Gary, *ATSIC: Flaws in the Machine* (The Koori History Website, 15 November 1999) <http://www.kooriweb.org/foley/essays/essay_4.html>

Foley, Gary, *Black Power in Redfern 1968 – 1972* (The Koori History Website, 5 October 2001) <http://www.kooriweb.org/foley/resources/pdfs/228.pdfs/228.pdf>

Forbes, C., 'Speech Backfires in Ultimate Insult', *The Australian* (27 May 1997)

Furi, Megan and Jill Wherrett, 'Indian Status and Band Membership Issues' (Parliamentary Research Branch – Political and Social Affairs Division, February 1996 and revised February 2003)

Gallagher AO Victorian Treaty Advancement Commissioner, Jill, Victorian Treaty Advancement Commission, 'Proof Committee Hansard' (Melbourne, 26 September 2018)

Gardiner-Garden, John, From Dispossession to Reconciliation (Research Paper No 27, Parliamentary Library, Parliament of Australia, 1999)

Gargett, Andrew, Director of Strategy, Engagement and Community, 'Aboriginal Victoria, Proof Committee Hansard' (Melbourne, 26 September 2018)

Githabul Elder Says Constitutional Recognition is Terrorism (ABC News, 20 November 2015) <http://www.abc.net.au/news/2015-11-20/sovereign-union/6958104>

Gobbet, Hannah, *Indigenous Parliamentarians, Federal and State: A Quick Guide* (2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/IndigenousParliamentarians>

Gooda, Mick, 'Proof Committee Hansard' (Canberra, 18 October 2018)

Government Bodies: Institute of Intergovernmental Relations (Queensu.ca, 2019) <https://www.queensu.ca/iigr/links/aboriginal-rights-and-governance/canada/government-bodies>

Government of Canada to Create Recognition and Implementation of Rights Framework (Prime Minister of Canada, 2018) <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>

Graham, Chris, *Recognise Rejected: Historic Meeting of 500 Black Leaders Unanimously Opposes Constitutional Recognition* (New Matilda, 8 February 2016) <https://newmatilda.com/2016/02/08/recognise-rejected-historic-meeting-500-black-leaders-unanimously-opposes-constitutional-recognition>

Graham, Douglas, Former Minister of Justice of New Zealand, Should the Maori Seats be Retained, Entrenched, Abolished or Should Parliament Contain a Maori House? (Speech to the Faculty of Law, The University of Auckland, 2009)

Grasswill, Helen, *Jacqui Lambie's Indigenous Heritage Claims Surprise Members of Tasmania's Aboriginal Community* (ABC News, 11 September 2014) <https://www.abc.net.au/news/2014-09-08/anger-over-jacqui-lambies-aboriginal-claims/5728622>

Grattan, Michelle, *Indigenous Constitutional Recognition a Difficult Goal for Scott Morrison and Ken Wyatt* (The Conversation, 12 July 2019) <https://www.abc.net.au/news/2019-07-12/indigenous-constitutional-recognition-a-difficult-political-goal/11302246>

Gunstone, A., 'The Formal Australian Reconciliation Process: 1991–2000' (National Reconciliation Planning Workshop, Old Parliament House, Canberra. 30–31 May 2005)

Halligan, J., 'Continuity and Change in the New Zealand Parliament' (Unpublished Doctoral Dissertation, Victoria University of Wellington, 1980)

Harris, Kathleen, *It's Voting Day for Canada's Prisoners* (CBC News, 2015) <https://www.cbc.ca/news/politics/canada-election-2015-prison-voting-1.3263491>

Highlights from NIYP 2014 (Australian Electoral Commission, 2016) <http://www.aec.gov.au/Indigenous/niyp/2014/>

Hill, Richard S., 'Social Revolution on a Small Scale': Official Maori Committees of the 1950s' (Paper presented to the New Zealand Historical Association Conference, 24-27 Nov 2005)

History of the Indigenous Vote (Australian Electoral Commission, 2015) <http://www.aec.gov.au/indigenous/history.htm>

Homelessness Statistics (Homelessnessaustralia.org.au, 2018) <https://www.homelessnessaustralia.org.au/about/homelessness-statistics>

Howard, J., Reconciliation Documents, Prime Minister's News Room: Media Release, 11 May 2000, <http://www.pm.gov.au/news/media_releases/2000/reconciliation1105.htm.>

Howard, John, PM Transcripts (Interview with John Laws, 2UE Radio, 9 May 2000) <https://pmtranscripts.dpmc.gov.au/release/transcript-22788>

‘Howard Silences Aboriginal Advocates’ (*The Sydney Morning Herald*, 16 April 2004) <https://www.smh.com.au/national/howard-silences-aboriginal-advocates-20040416-gdiqvv.html>

How to Vote (Australian Electoral Commission, 2016) <https://aec.gov.au/Voting/How_to_Vote/>

Huggins, Jackie, Speech to the Cultural Heritage and Native Title Conference (speech delivered at the Cultural Heritage and Native Title Conference, Brisbane, 30 September 2003)

Human Rights and Equal Opportunity Commission, ‘Building a Sustainable National Indigenous Representative Body – Issues for Consideration’ (2008)

Hutchins, Gareth, *Reports of Confusing Advice about New Australian Senate Voting Rules* (The Guardian, 2 July 2016) <https://www.theguardian.com/australia-news/2016/jul/02/reports-of-confusing-advice-about-new-australian-senate-voting-rules>

Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (Alrc.gov.au, 2016) <https://www.alrc.gov.au/inquiries/indigenous-incarceration>

*Indigenous Australians (*Australian Electoral Commission, 2016) <http://www.aec.gov.au/Indigenous/>

Indigenous Electoral Participation Program (Australian Electoral Commission, 2018) <http://www.aec.gov.au/Indigenous/iepp.htm>

Indigenous Parliamentarians, Federal And State: A Quick Guide (Aph.Gov.Au, 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/IndigenousParliamentarians>.

Indigenous Treaty Remains on NT Government’s Agenda (NT News, 4 May 2017) <http://www.ntnews.com.au/news/northern-territory/indigenous-treaty-remains-on-ntgovernments-agenda/news-story/299369abf4b496a06aa92ee8e5d0300d>

Information for Indigenous Voters (Elections.Ca, 2019) <https://www.elections.ca/content.aspx?section=vot&dir=abo&document=index&lang=e>.

Information for Indigenous Electors (Elections.Ca, 2020) <https://www.elections.ca/content.aspx?section=vot&dir=abo&document=index&lang=e>.

Ireland, Judith, *One in Two Voters Don't Understand How to Vote for the Senate: Poll* (The Sydney Morning Herald, 2019) <https://www.smh.com.au/federal-election-2019/one-in-two-voters-don-t-understand-how-to-vote-for-the-senate-poll-20190419-p51flf.html>

Jack Patten: Do White Australians Realise That There Is Actual Slavery in This Fair, Progressive Commonwealth? Opening Address to Day of Mourning Protest - 1938 (Speakola, 2009) <https://speakola.com/ideas/jack-patton-day-of-mourning-1938>

Jackson, Annette, 'Taking Time: A Literature Review—Background for a Trauma-Informed Framework for Supporting People with Intellectual Disability' (NSW Department of Family and Community Services, 2015)

'Joint Press Conference with Senator Amanda Vanstone' (Parliament House, 15 April 2004) <https://pmtranscripts.pmc.gov.au/release/transcript-21205>

Joint Select Committee on Electoral Reform, Parliament of Australia, *The Operation During The 1984 General Election of the 1983/84 Amendments to Commonwealth Electoral Legislation* (1986) 30

Jopson, D., 'Time Bomb', *Sydney Morning Herald* (29 April 1997)

Joseph, Philip, 'The Future of Electoral Law' (Paper presented to the Reconstituting the Constitution Conference, Wellington, 2 September 2010)

Joseph, Philip, The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress (New Zealand Business Roundtable, Wellington, 2008)

Karvelas, Patricia and Lex Hall, 'Coalition to Put Aboriginal Recognition to Referendum', *The Australian* (Sydney, 10 August 2010)

Keane, Basil, *Kotahitanga – Unity Movements* (teara.govt.nz, 2012) <https://teara.govt.nz/en/kotahitanga-unity-movements>

Korff, Jens, *Aboriginal Representative Bodies* (Creative Spirits, 2018) <https://www.creativespirits.info/aboriginalculture/selfdetermination/aboriginal-representative-bodies>

Key Features & History of The Australian Electoral System (Australianpolitics.com, 2017) <http://australianpolitics.com/voting/features>

Koziol, Michael, 'Liberal senator warns Indigenous Voice must not become 'Aboriginal political elite'' (*The Sydney Morning Herald*, 19 February 2020)

<https://www.smh.com.au/politics/federal/liberal-senator-warns-indigenous-voice-must-not-become-aboriginal-political-elite-20200217-p541fl.html>

Law Council of Australia, 'Constitutional Recognition of Indigenous Australians discussion paper' (2011)

Liddle, Celeste *87% of Indigenous People Do Not Agree on Recognition. You'd Know if You Listened* (The Guardian, 19 June 2015) <https://www.theguardian.com/commentisfree/2015/jun/19/87-of-indigenous-people-do-not-agree-on-recognition-youd-know-if-you-listened>

Liddle, Celeste, Kelly Briggs, Philip Morrissey, Benjamin Gertz, 'The Panel: Who Should Indigenous Australians Vote For?' (*The Guardian*, 3 September 2013) <https://www.theguardian.com/commentisfree/2013/sep/03/indigenous-vote-australian-election>

Live New Zealand Population Clock 2018 - Population of New Zealand Today (Livepopulation.com, 2018) <https://www.livepopulation.com/country/new-zealand.html>

Love, R. N., Policies of Frustration: The Growth of Maori Politics, the Ratana/Labour Era' (Unpublished Doctoral Dissertation, Victoria University of Wellington, 1977)

Macklin, Jenny, 'Statement on the United Nations Declaration of Indigenous Peoples' (Media Release, 3 April 2009)

Madden, J.. 'Clark Wins Final Round over ATSIC Suspension', *The Australian* (7 September 2005)

Maher, Kyam, 'Treaty Speech' (Speech, Parliament House, Adelaide, 14 December 2016)
Marks, Kathy, 'Outrage as Australia Abolishes 'Failed' Aboriginal Council', *The Independent*, (the UK, 16 April 2004)

Malcolm Turnbull 29th Prime Minister of Australia 2015-2018, 'Response to Referendum Council's report on Constitutional Recognition' (Media Release, 26 October 2017)

Maori Electoral Option (Electoral Commission, 2018) <http://www.elections.org.nz/voting-system/maori-representation/maori-electoral-option>

Maori Representation (Electoral Commission, 2004) <http://www.elections.org.nz/voting-system/maori-representation>

Marszalek, Jessica, Trenton Akers, Sarah Motherwell, *Cook MP Billy Gordon Quits Qolitics* (The Courier-Mail, 31 October 2017) <https://www.couriermail.com.au/news/queensland/cook-mp-billy-gordon-quits-politics/news-story/8003bfff2696ddab865095bac3c82743>

Martin, Sarah, 'Land Councils Get Behind Pearson Recognition Plan', *The Australian* (Sydney, 1 May 2015)

Martínez, Julia, 'Plural Australia: Aboriginal and Asian Labour in Tropical White Australia, Darwin, 1911-1940' (Doctor of Philosophy thesis, Department of History and Politics, University of Wollongong, 1999) <https://ro.uow.edu.au/theses/1437>

Maxwell, Rudi, *Fury as Government Rejects Voice to Parliament* (Guardian, Sydney, No. 1803, 15 Nov 2017)

Morey, Stephen, *So, How Did the New Senate Voting Rules Work in Practice?* (The Conversation, 5 August 2016) <https://theconversation.com/so-how-did-the-new-senate-voting-rules-work-in-practice-63307>

Morgan, Cassandra, 'National Congress of Australia's First Peoples' closure a step back for Aboriginal people: Rod Little' (*The Canberra Times*, 17 October 2019) <https://www.canberratimes.com.au/story/6443649/closure-of-aboriginal-organisation-means-loss-of-first-peoples-voice-former-co-chairman/>

Morris, S., S. Lewis and B. Hickman, 'Labor to Scrap ATSIC', *The Australian* (31 March 2004)

Muller, Damon, *The New Senate Voting System and the 2016 Election* (Parliament of Australia, 25 January 2018) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/SenateVotingSystem>

Murphy, Katharine, 'Ken Wyatt Says He Has Indigenous Voice to Parliament Plan for Scott Morrison', *The Guardian* (17 October 2019)

Murphy, Katherine and Paul Karp, *Ken Wyatt accuses IPA of Engaging in Bigotry in Voice to Parliament Video* (The Guardian, 1 November 2019) <https://www.theguardian.com/australia-news/2019/nov/01/ken-wyatt-accuses-ipa-of-engaging-in-bigotry-in-voice-to-parliament-video>

National Chief (Assembly of First Nations, 2019) <http://www.afn.ca/national-chief/>

‘National Congress of Australia's First Peoples Ltd’ (Australia Charities and Not-For-Profit Commission, 2020) <https://www.acnc.gov.au/charity/fa998367662051d9a9a242efada8961c#overview>

National Congress of Australia's First Peoples, 'New Congress to Represent Aboriginal and Torres Strait Islanders' (Press Release, 2 May 2010)

National Grassroots Engagement (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/en/national-grassroots-engagement/>

National Indigenous Women’s Summit (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/en/national-indigenous-womens-summit/>

National Native Title Tribunal, ‘South West Indigenous Land Use Agreements Registered’ (Media Release, 17 October 2018) <http://www.nntt.gov.au/News-and-Publications/latestnews/Pages/South-West-Indigenous-Land-Use-Agreements-Registered.aspx>, archived at <https://perma.cc/PA25-UX9E>.

Nisga’a Final Agreement (1999)

New Zealand Standing Orders of the House of Representatives 2008, SO 1

Norberry, Jennifer and George Williams, ‘Voters and the Franchise: The Federal Story’ (Research Paper no.17 2001-02, 2002)

NT Signs Historic Barunga Agreement to begin Indigenous Treaty Talks (The Guardian, 8 June 2018)

O'Donoghue, Lois, Addresses to the United Nations (Speech Delivered at the United Nations Working Group on Indigenous Populations, Geneva, July 1992)

O’Donoghue, Lowitja, Speech at the opening of the National Congress of Australia’s First People (8 June 2011)

Official Record of the Debates of the Australasian Federal Convention (Adelaide, 15 April 1897)

Official Record of the Debates of the Australasian Federal Convention (Melbourne, 16 March 1898, vol VI - V)

Official Record of the Debates of the Australasian Federal Convention (Sydney, 1891, vol 1)

Official Record of the Debates of the Australasian Federal Convention (Sydney, 1897, vol IL)

Other Maori Organisations: Te Kahui Mangai (Tkm.govt.nz, 2018) <http://www.tkm.govt.nz/omo/>

Our History (Maori Council, 2018) <https://maoricouncil.com/about-us/our-history/>

Our Mandate (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/our-mission/>

Overview of The AEC (Australian Electoral Commission, 2018) <https://www.aec.gov.au/About_AEC/index.htm>

Owen, Michael, 'Aboriginal People Failed by "Expensive Gesture" Treaties', *The Australian* (online, 11 June 2018)

Palaszczuk, Annastacia, Jackie Trad and Leeanne Enoch, 'Historic Signing of "Tracks to Treaty" Commitment' (Media Release, 14 July 2019)

Parliament of Australia, 'Dedicated Indigenous Representation in the Australian Parliament' (Parliament of Australia, 2009)

Parliamentary Library, The Origins of the Maori Seats: Parliamentary Library Research Paper (Parliamentary Library, Wellington, 2009)

'Past, Present & Future of the Waitangi Tribunal' (*Waitangi Tribunal*, 2017) <https://waitangitribunal.govt.nz/about-waitangi-tribunal/past-present-future-of-waitangi-tribunal/>

Pearson, Noel, 'A Structure for Empowerment', *Weekend Australian* (Sydney, 16-17 June 2007)

Pettifer, J. A., A. R Browning and J. K Porter, 'House of Representatives Practice' (Australian Govt. Pub. Service, 1981)

Phillips, M., 'Howard Abolishes ATSIC', *The Courier-Mail*, (16 April 2004)

PM a "Snake" Despite U-Turn (SBS World News Headlines, 12 October 2007) <http://global.factiva.com>

Policy Development Group in Ottawa, 'The Government of Aboriginal Peoples' (A study prepared for the Sub-Committee on Indian Self-Government, 1983)

Political Accord (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/canada-congress-of-aboriginal-peoples-political-accord/>

Pratt, Angela M, 'Indigenous Sovereignty Never Ceded: Sovereignty, Nationhood and Whiteness in Australia' (PhD thesis, Faculty of Arts, University of Wollongong, 2003)

Prime Minister's Indigenous Advisory Council: Department of The Prime Minister and Cabinet (Pmc.gov.au, 2019) <https://pmc.gov.au/indigenous-affairs/prime-ministers-indigenous-advisory-council>

'Programs and Services: A New Order in Indigenous Affairs', *ATSIC News* (June 2004)

Purdy, Chris, *Canadian Prisoners to Vote This Week in Federal Election* (The Globe and Mail, 2015) <https://www.theglobeandmail.com/news/politics/canadian-inmates-to-vote-this-week-in-federal-election/article26650210/>

Queensland Labor, 'Queensland State Policy Platform 2016' (State Conference of the Queensland Branch of the Australian Labor Party, 29-30 October 2016) 93

Recognising Aboriginal and Torres Strait Islander Rights (Council for Aboriginal Reconciliation, 2000) <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/pg3.htm>

Reconciliation Timeline (Reconciliation Australia, 2004) <http://reconciliationaustralia.org/timeline_print.html.>

Representative Bodies: Institute of Intergovernmental Relations (Queensu.ca, 2019) <https://www.queensu.ca/iigr/links/aboriginal-rights-and-governance/canada/representative-bodies>

Results & Statistics (Electoral Commission, 2018) <http://www.elections.org.nz/events/maori-electoral-option-2018/results-statistics>

Reynolds, Henry, 'Aborigines and the 1967 Referendum: Thirty Years On' (Papers on Parliament No. 31, June 1998)

Robbins, J., 'Life After ATSIC: Indigenous Citizenship in an Era of Mutual Obligation' (Paper presented at the Australasian Political Studies Annual Conference, University of Otago, 28 September 2005)

Roberts, Nigel S., *Electoral systems* (Te Ara - the Encyclopedia of New Zealand, 2020) <http://www.TeAra.govt.nz/en/electoral-systems/print>Robinson, Natasha and Lex Hall,

‘Macklin Vows to Consider Indigenous Recognition in Constitution’, *The Australian* (Sydney, 9 August 2010)

Rothman AM, Justice Stephen, The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders (Paper Delivered at the Ngara Yura Committee Twilight Seminar, 25 February 2014)

Rothwell, N., ‘The Turning Point’, *The Weekend Australian* (22–23 March 1997)

Saunders, Cheryl, 'Citizenship under the Commonwealth Constitution' (Constitutional Centenary Foundation Newsletter, 1994)

Scrymgour, Marion, ‘Whose National Emergency? Caboolture and Kiribilli? Or Milikapti and Mutitjulu?’, Charles Perkins Oration, 26 October 2007

Searnacke, M., Vice-Presidential Address to the National Party (quoted in Mahuta Maori Political Representation, 1979)

Self-Determination (Vic.gov.au, 2019) <https://www.vic.gov.au/aboriginalvictoria/policy/self-determination.html>

Self-Government (Government of Canada, 2019) <https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>

Senate Brief No. 10 - The Role of The Senate (Aph.gov.au, 2017) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief10>

Senate Legal and Constitutional References Committee, ‘Reconciliation: Off Track’ (Parliament of Australia, 2003)

Senator Tate (On behalf of Minister Hand) 'Foundations for the Future' (Senate Hansard, 18 December 1987)

Seo, Bo, *The Indigenous Voice to Parliament Explained* (Financial Review, 10 July 2019) <https://www.afr.com/politics/federal/the-indigenous-voice-to-parliament-explained-20190710-p525s6>

Shanahan, D., ‘Howard Abandons Deadlines – No Reconciliation by Centenary’, *The Australian* (28 May 2000)

Sharanjit Uppal and Sébastien LaRochelle-Côté, *Insights on Canadian Society Understanding the increase in voting rates between the 2011 and 2015 federal elections* (Statistics Canada, 2016) <https://www150.statcan.gc.ca/n1/pub/75-006-x/2016001/article/14669-eng.htm>

Shahni Wellington, *Leadership Group on Indigenous Voice to Government Announced* (NITV News, 8 November 2019) <https://www.sbs.com.au/nitv/article/2019/11/08/leadership-group-indigenous-voice-government-announced1>

Shapiro, Stephen, 'Maori Wars (1845-1872)' [2011] *The Encyclopedia of War*

Sinclair, K., 'The Aborigines Protection Society and New Zealand: A Study in Nineteenth-Century Opinion' (M. A. thesis, Auckland University, 1946)

South West Native Title Settlement (Government of Western Australia, 2018) <https://www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.apsx>

Special Joint Committee of the Senate and the House of Commons Appointed to Consider the Indian Act, *Minutes of Proceedings and Evidence* (Ottawa, 14 June 1946)

Steketee, M., 'Sorry – The Hardest Word', *The Australian* (24 May 1997)

Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators' (Productivity Commission, 2003)

Stoker, Gerry, Mark Evans and Max Halupka, 'Democracy 2025 Report No. 1: Trust and Democracy in Australia' (Democratic decline and renewal, December 2018).

Strategic Direction 2014-2025 (Waitangi Tribunal, 2014)

Sullivan, Ann, *Torangapu – Maori and Political parties - Ratana, Labour and Mana Motuhake* (Te Ara - the Encyclopedia of New Zealand, 2012) <http://www.TeAra.govt.nz/en/torangapu-maori-and-political-parties/page-3>

Survey of Electors Following the 42Nd General Election (Elections.Ca, 2018) <https://www.elections.ca/content.aspx?section=res&dir=rec/eval/pes2015/surv&document=p4&lang=e#a4>

Synot, Eddie, *Ken Wyatt's Proposed 'Voice to Government' Marks Another Failure to Hear Indigenous Voices* (The Conversation, 30 October 2019) <https://theconversation.com/ken-

wyatts-proposed-voice-to-government-marks-another-failure-to-hear-indigenous-voices-126103>

Tanner, A., 'The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada Social and Economic Paper Number 12 (St. John's: Institute of Social and Economic Research, Memorial University, 1983)

Temporary and Election Employment (Australian Electoral Commission, 2016) <http://www.aec.gov.au/employment/temp/index.htm>

Ten Years On, It's Time We Learned the Lessons from The Failed Northern Territory Intervention (Socialpolicyconnections.com.au, 2017) <http://www.socialpolicyconnections.com.au/?p=11763>

Terms of Reference (Alrc.gov.au, 2017) <https://www.alrc.gov.au/inquiries/indigenous-incarceration/terms-reference>

The Hon. John Howard, 'Ministerial Statement: Administration of Aboriginal Affairs' (House of Representatives, Debates, 11 April 1989)

The Incarceration of Aboriginal People in Adult Correctional Services (www150.statcan.gc.ca, 2009) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2009003/article/10903-eng.htm>

The Government of Canada's Approach to Implementation of the Inherent Right and The Negotiation of Aboriginal Self-Government (Government of Canada, 2019) <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#inhrsg>

The Right to Vote (New Zealand Electoral Commission, 21 February 2013) <www.elections.org.nz>

The Right to Vote Is Not Enjoyed Equally by All Australians (Humanrights.gov.au, 2010) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/right-vote-not-enjoyed-equally-all-australians>

'The Road to Corroboree', *ATSIC News* (4 June 2000)

'The Royal Proclamation' (The King A Proclamation George R, 7 October 1763).

The Suspension and Reinstatement of The RDA and Special Measures in the NTER (Humanrights.gov.au, 2017) <https://www.humanrights.gov.au/publications/suspension-and-reinstatement-rda-and-special-measures-nter-1#_edn1>

Thomas, Roger, Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps* (Report, 21 July 2017)

Tickner, R., Second Reading Speech for Council for Aboriginal Reconciliation Bill 1991 (Parliamentary Debates House of Representatives, 30 May 1991, 4498)

Topsfield, Jewel, Aborigines Lack Proof of Identity (The Age, Melbourne, 23 January 2009)

Treaty '88 (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2019) <http://aiatsis.gov.au/collections-online/digitised-collections/treaty-88>

'Treaty – Yes!: Opinion Poll Supports Call for an Agreement', *The Koori Mail* (Lismore,15 November 2000)

Treaties and Agreements (Government of Canada, 2018) <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>

Truth-Telling Central to Reconciliation Process (Reconciliation Australia, 10 May 2018) <https://www.reconciliation.org.au/truth-telling-central-to-reconciliation-process/>.

Tuhono Organisation (Tuhono.Net, 2019) <https://www.tuhono.net/en/about-tuhono/tuhono-organisation>

Turia Co-leader of the Maori Party, Tariana, Maori and Parliament (Speech given at Maori and Parliament: the 8th Parliamentary Conference, Parliament Buildings, Wellington, 8 May 2009)

Twomey, Anne, *Putting Words to the Tune of Indigenous Constitutional Recognition* (The Conversation, 20 May 2015) <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>

Uluru Statement from the Heart 2017

UN Rapporteur Slams the Government's Record on Indigenous Issues, But Hopeful for Change (NITV News, 3 April 2017) <http://www.sbs.com.au/nitv/the-point-with-stan-

grant/article/2017/04/03/un-rapporteur-slams-governments-record-indigenous-issues-hopeful-change>

Vanstone, A., *Media Statement: Mr Geoff Clark* (Former Minister for Immigration and Multicultural and Indigenous Affairs website, 23 January 2004) <http://www.atsia.gov.au/Media/former_minister/media04/v04002.aspx.>

Victorian Government to Begin Talks with First Nations on Australia's First Indigenous Treaty (ABC News, 26 February 2016)

Violence Prevention (Abo-Peoples.Org, 2019) <http://www.abo-peoples.org/en/violence-prevention/>

Voting By Special Ballot - Elections Canada (Elections.Ca, 2019) <https://www.elections.ca/content.aspx?section=vot&dir=bkg&document=ec90540&lang=e>

Voting Options (Australian Electoral Commission, 2018) <http://www.aec.gov.au/Voting/ways_to_vote/>

Voting in the House of Representatives (Australian Electoral Commission, 2016) <https://aec.gov.au/Voting/How_to_Vote/Voting_HOR.htm>

Voting in The Senate (Australian Electoral Commission, 2018) <https://aec.gov.au/Voting/How_to_Vote/Voting_Senate.htm>

Wahlquist, Calla, *Indigenous Voice Proposal 'Not Desirable', Says Turnbull* (The Guardian, 26 October 2017) <https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull>

Warren, T. R., 'Constructing 'Traditional' Concepts: The Case of Maori Governance' (CIGAD Working Paper Series 3/2006, Massey University. Centre for Indigenous Governance and Development)

Waitangi Tribunal (Waitangitribunal.govt.nz, 2018) <https://waitangitribunal.govt.nz/>

Weaver, Sally, 'Towards a Comparison of National Political Organizations of Indigenous Peoples: Australia, Canada, and Norway' (paper delivered to the Institute of Social Sciences, University of Tromso, Norway, 1983)

What is New Zealand's System of Government? (Electoral Commission, 2020) <https://elections.nz/democracy-in-nz/what-is-new-zealands-system-of-government/>

What Is Suffrage? Definition of Suffrage (The Law Dictionary, 2019) <https://thelawdictionary.org/suffrage/>

What We Do (Te Ohu Kaimoana, 2019) <https://teohu.maori.nz/what-we-do/>

Who We Are - Maori Women's Welfare League (Maori Women's Welfare League, 2019) <http://mwwl.org.nz/who-we-are/>

Whyte, Sally, *Independent candidate Anthony Pesec Says Voters Were Given Wrong Instructions On How To Vote* (Canberra Times, 24 May 2019) <https://www.canberratimes.com.au/story/6180279/pesec-aec-gave-wrong-instructions/>

Williams, George, 'Old-Style Racism Still In Constitution', *The Sydney Morning Herald* (14 September 2010)

Winter, Caroline, Treaty: South Australian Government Enters Historic Discussions with Aboriginal Nations (ABC News, 15 December 2016) <http://www.abc.net.au/news/2016-12-14/southaustralia-enters-historic-treaty-discussions/8120162>

Woodward, Rosemary, 'Families of Prisoners: A Literature Review on Issues and Difficulties' (Occasional Paper No. 10, September 2003)

Women and the Right to Vote in Australia (Australian Electoral Commission, 2015) <https://aec.gov.au/Elections/Australian_Electoral_History/wright.htm>

Woolf, Nicky, *Canada's New Parliament Is Most Diverse Ever* (The Guardian, 2015) <https://www.theguardian.com/world/2015/oct/22/canada-new-parliament-most-diverse-ever>

Yaxley, Louise, *It Was Gut-Wrenching': Painful Citizenship Process for Aboriginal Parliamentarians* (ABC News, 2017) <http://www.abc.net.au/news/2017-12-05/aboriginal-parlimanetarians-describe-painful-citizenship-process/9228506>