

# Submission to Expert Mechanism on the Rights of Indigenous Peoples: Indigenous Peoples and the Right to Self-Determination

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To the Expert Mechanism on the Rights of Indigenous Peoples

Re: Indigenous Peoples and the Right to Self-Determination

**The Jumbunna Institute's submission to this study is enclosed.**

We appreciate the opportunity to contribute to this study, recognition for and the exercise of Indigenous peoples' right to self-determination, including areas of progress as well as challenges and barriers.

The right to self-determination, for peoples to freely determine their political status and pursue their economic, social and cultural development, is a cornerstone of the modern international human rights frameworks. However, despite recognition of Indigenous peoples right to self-determination, in particular through the Declaration on the Rights of Indigenous Peoples, many Indigenous peoples, including in Australia, are not meaningfully able to exercise this right, to maintain and strengthen their distinct cultural and political identities, to fulfil obligations to Country, or to respond to social challenges and prevent the ongoing intervention of the settler-colonial state in their communities, families, and in the lives of their children.

The Research Unit at the Jumbunna Institute at the University of Technology Sydney is an interdisciplinary team of scholars and practitioners, working according toward a common principle that our work is driven by Aboriginal and Torres Strait Islander people, and contribute to their strength, self-determination, sustainability and wellbeing. Our work has a considerable focus on the right to self-determination, including efforts supporting the ongoing development of First Nations governance structures and institutions, as well as recognition of the importance of self-determination as a policy framework to address the disproportionate intervention of the state in First Nations communities through child protection and justice systems. This will provide the basis for our submission.

We are happy to provide further information regarding the matters raised within this submission.

Regards,

Distinguished Professor

Larissa Behrendt

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## Introduction

Self-determination, understood as the right of peoples to freely determine their political status and freely pursue their social, economic and cultural development, is a cornerstone of the international human rights framework. The exercise of the right to self-determination is critical to effective public policy, promoting legitimacy in the exercise of authority, ensuring that collective efforts to improve outcomes for Indigenous children, families and communities are consistent with their own cultural values and perspectives, priorities and aspirations, as well as providing a mechanism for consent. Recognition of Indigenous peoples' right to self-determination was a key achievement of the UN Declaration of the Rights of Indigenous People (UNDRIP), although tension remains in the realization of this right, including for First Nations in Australia.

In this context, and in the absence of formal treaties that characterize the relationships between colonial states and Indigenous peoples in other parts of the world, First Nations in Australia have demonstrated an enduring commitment to securing their right of self-determination. These efforts include approaches to mobilise internally to revive and reimagine political institutions for governance, promote accountability, and to expand the exercise of authority, particularly in response to harmful policies from Australian governments. This paper will explore the status of First Nations self-determination in Australia, and some of the efforts to secure this right. This is not intended to be an exhaustive analysis of initiatives aimed to promote or assert self-determination in Australia. In particular, it does not include detailed review of national policy processes and debates such as the campaign for constitutional recognition of a representative voice for First Nations peoples (*Uluru Statement/Voice to Parliament*), or recent developments in the Closing the Gap campaign (specifically the *National Agreement on Closing the Gap*). Rather, we focus on specific initiatives related to our work supporting the aspirations and advocacy of First Nations.

## Recognition of the Right to Self-Determination

Since the Australian colonial project began, First Nations here have been firm on their inherent and retained right to self-rule and sovereignty over their lands, waters and Country. Australian governments have not met that sovereignty head on. Australian courts have roundly rejected First Nations' claims to retained self-rule. Even major shifts in Australian government thinking about First Nations and peoples here — like Mabo, the Native Title Act, and the now-abolished ATSIC — have ruled out contemporary sovereignty as a guiding principle. Still, our claims of sovereignty persist.

Just as the settler political and social sphere has adapted to events over the past decades, so too has First Nations' strategy around articulating and realizing sovereignty. Contestations of sovereignty before Australian courts are fewer, as both settler Australian states and many First Nations recognize the perversity of asking one sovereign to determine the sovereignty of another. Despite this, recent moves towards Treaty at a state level offer some hope to First Nations that at least recognition of an inherent and retained sovereignty may still be on the table.

However, the Commonwealth of Australia, as well as its states and territories, continues to resist accepting First Nations sovereignty as a matter of formal law or informal policy. They prefer instead the language of self-determination. This is ostensibly in response to both the advocacy of First Nations peoples, and evidence that

self-determination is a critical public policy setting for achieving improved outcomes for Indigenous peoples.<sup>1</sup>

While Australian governments may increasingly invoke the language of self-determination as a core value or principle in public policy regarding First Nations, they do not apply it, but rather misrepresent both its scope and meaning. They misrepresent the 'self' by taking consultation from individuals they have selected rather than through a community-representative model, and they misrepresent 'determination' by treating it as a right to be heard, rather than a right to make decisions. In some policy domains including child protection, the right to self-determination is sometimes framed as an individual concern, almost synonymous with the concept of individual agency – the right to participate in decisions about one's own life. Misrepresenting the collective right of self-determination in this way obfuscates the reality that government systems exert their own influence by determining the context and scope of those decisions, retaining and routinely exercising state power to intervene in the lives of children and families if decisions exceed the bounds accepted by settler governments, including the forced removal of children. This misrepresentation of the right to self-determination seeks to create distance between current policies and those of the past that have been consistently acknowledged as harmful, while preserving the broader context and assumptions of those past policies – namely the legitimacy of settler-colonial intervention in First Nations families and communities. This is a continuation of colonial violence against First Nations families and children, framed as acceptance of and compliance with contemporary human rights frameworks. Genuine recognition of self-determination in this domain would enable the design and administration of new systems and practices by and for First Nations, according to their own processes and perspectives.

In our experience, Australian governments routinely constrain First Nations self-governance. This includes inviting First Nations to *participate* in the delivery of social services, but limited to frameworks, programs and outcomes established by settler governments for First Nations peoples, or otherwise establishing the 'acceptable' parameters of First Nations decision making. Far from recognising the right of peoples (including Indigenous peoples) to freely determine their political status and freely determine their social, economic and cultural development, the right to self-determination continues to be routinely diminished by Australian governments.

We submit that self-determination is exercised when First Nations peoples are able to shape their own futures, free from the unwarranted interference of states; decisions that are determined through First Nations processes, that reflect First Nations, perspectives, priorities and aspirations, consistent with the full enjoyment of their rights. In particular, a key test of state's recognition of the right to self-determination is the right to implement decisions that are contrary to the position or approach of states. If First Nations peoples are prevented from implementing such decisions, either due to the intervention of settler governments, or the withholding or withdrawal of necessary resources that might otherwise have been available, then settler government claims to uphold the right to self-determination are clearly baseless.

Increasingly, governments are using the language of 'partnership' to talk about this dynamic. With the exception of a few initiatives that are led by First Nations communities, they are not true partnerships. Communities involved have little say in how issues are framed and understood, the process or scope of decision making, or the implementation of initiatives intended to secure (generally settler-led outcomes) for First Nations communities. Instead, what takes place in this 'contact zone' is the receipt

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<sup>1</sup> Cornell, S. and Kalt, J. (1998) 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today', *American Indian Culture and Research Journal*, Vol. 22 (3), pp. 187-214.

of feedback, documentation and narrow contracting of government-determined services.

This is a poor foundation from which a government partnership could begin. While many state-level Treaty processes are commendable, they are not immune from this tendency. For example, the South Australian government unilaterally withdrew from Treaty discussions after an election in 2018 — making it clear that the terms of engagement are firmly within the government’s control. This is not a partnership as much as it is a perceived delegation of power.

In comparison, other Treaty processes in Australia (like those in Victoria) have been strategically withdrawn from by First Nations to set the terms of the negotiation. #NoTreesNoTreaty was a campaign by the Djab Wurrung to object to treaty negotiations with an Australian government that was still exercising authority over contested lands, and violence against cultural sites. It is too early to know whether this is an effective strategy in terms of the political conversation regarding the establishment of a Treaty. However, there has nevertheless been a cost imposed, through the desecration and destruction of an irreplaceable cultural site, a potent reminder of the lingering threat of force and violence that undermine the concept of “good faith” negotiations towards Treaty. Both partnership and self-determination deviate from the larger question of First Nations sovereignty, because they keep relational power informal, ad hoc, and firmly in the hands of the Commonwealth and States.

In the absence of Treaties or other instruments that would regulate the contact zone, First Nations in this inventive and novel context have taken different paths to put sovereignty back in the centre. In our submission, we highlight some of the ways that First Nations assert sovereignty and exercise the right to self-determination, despite governments that both co-opt and cut off any formal moves to self-governance.

## First Nations efforts to promote self-determination

### Establishing stable and effective political institutions

Indigenous nation re-building is emerging as an influential international paradigm informing the revitalisation of Indigenous political authority and its effective exercise for Aboriginal self-determination and community benefit. Over a 30-year period, the Harvard Project on American Indian Economic Development and the Native Nations Institute at the University of Arizona found the defining characteristic common to thriving North American Native nations was stable political governance. This is manifest in Indigenous political societies asserting decision-making control over their affairs; implementing effective and culturally legitimate institutions of self-government (newly created or reinvigorated); strategic direction; and community-spirited leadership. These principles comprise Indigenous nation building as the process by which an Indigenous collective enhances its own foundational capacity for effective self-governance and self-determined development.<sup>2</sup> Consistent with the North American experience, Australian research suggests nation building can enable Aboriginal and Torres Strait Islander First Nations collectives to achieve the stable political self-

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<sup>2</sup> Jorgensen, M. 2007. ‘Editor’s Introduction’. In M. Jorgensen (ed.), *Rebuilding Native Nations: Strategies for Governance and Development*. Tucson: U of Arizona Press, xii. Cornell, S. & Kalt, J. 2007. ‘Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t’, in M. Jorgensen (ed.), *Rebuilding Native Nations: Strategies for Governance and Development*, Tucson: University of Arizona, 3–33; Cornell, S. 2015. ‘Processes of Native Nationhood: Indigenous Politics of Self-Government’ *International Indigenous Policy Journal* 6(4), 4.

governance needed for sustaining self-determined community and economic development.<sup>3</sup>

Indigenous nation building is a significant driver of the new approaches signalled, though not yet materialised, in Australian federal and state policy-formation in Aboriginal affairs. The unique political history of Australia as a settler-colonial society that has never realised a genuine treaty or accord with First Nations authorities leaves Australia without clear precedent or proven process for the negotiation of political settlements of this nature. However, recent signs indicate Australia is poised to enter into a new era of potential agreement-making and reconciliation between settler states and Indigenous authorities. Despite the pitfalls, misgivings and halts we have indicated above, it is evident that several Australian state governments do intend to create treaty negotiation processes with First Nations authorities in their territorial jurisdictions. At the national level, the Australian federal government is now considering an Indigenous Voice to Parliament and Government and have launched consultation on the Interim Report concerning the form, nature and scope of a potential Indigenous Voice to Parliament.<sup>4</sup> While Australian law has never acknowledged the status of Aboriginal collectives as 'peoples' as of right, as understood in international law, these recent developments suggest a movement is underway towards new forms of political association in Australia. The legal, political and policy landscape in Australia therefore appears to be shifting; it is potentially moving to accommodate treaties co-designed by settler states and Indigenous authorities, mutually engaged as coexisting powers. In this context, it appears Australian political society is experiencing an unprecedented opportunity to redefine settler-colonial coordinates of relationship on new terms of alliance and collaboration, with increased potential to enable Indigenous self-determination.

To support new legislative and policy settings, Australia urgently needs improved understanding about the conditions of engagement conducive to political partnerships that enable Indigenous nation building. In short, Australia needs a robust conceptualisation of political collaboration able to sustain the positive coexistence of multiple polities. To be defined as 'treaties', negotiated agreements would require the cooperative development of power-sharing arrangements between settler States and Indigenous nation authorities who are intent on rebuilding their peoples' capacities for self-governance as a necessary means to secure their rights to self-determination.<sup>5</sup> Such principles of right were formally recognised by Australia in 2009 when it endorsed the UNDRIP, but they have not been enacted through Australia's legislature or material practices of government. Agreements such as the UNDRIP and the International Labour Standards Convention 169 elevate the importance of Indigenous communities' collective rights. A significant problem arises for Australia in this context: the systemic and overriding unilateral nature of settler-colonial governance, coupled with the lack of precedent for treaty in Australia, means that Australian governments lack models for understanding the nature and significance of political and legal pluralism as the institutional basis for effective collaboration in postcolonial transformation. Furthermore, Australian federal and state governments have little experience of engaging politically with Indigenous peoples acting as self-determining authorities with inherent powers of self-government.

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<sup>3</sup> Vivian, A., M. Jorgensen, A. Reilly, M. McMillan, C. McRae and J. McMinn. 2017. 'Indigenous Self-Government in the Australian Federation', *Australian Indigenous Law Review* Vol.20, 215-242; Gooda, M. (ATSI Social Justice Commissioner). 2014. *Social Justice and Native Title Report*. Australian Human Rights Commission; Hunt, J. & D. Smith, 2011. 'Understanding and Engaging with Indigenous Governance: Research Evidence and Possibilities for Engaging with Australian Governments' *Journal of Australian Indigenous Issues* 30, 14(2-3).

<sup>4</sup> See <https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf>

<sup>5</sup> For a recent discussion of 'treaty' prospects in the Australian context, see Williams, G. & H. Hobbs. 2020. *Treaty*. Sydney: Federation Press.



Evidence suggests that the consequences of this knowledge gap and these uneven power relations have been serious and detrimental. Socioeconomic indicators show First Nations disadvantage is entrenched or is improving at such a slow rate that parity may never be achieved. Indeed, delivering the 2019 Closing the Gap report, Prime Minister Morrison claimed that the policy was 'set up to fail' because it was a 'top down approach' and he recommitted his government to a 'new era ... of partnership'.<sup>6</sup> Government departments in New South Wales, Victoria and South Australia are likewise ostensibly revising their policy frameworks and practice principles towards partnership approaches: expanding First Nations input to planning and committing to service delivery managed by regional First Nations authorities. The future of participating First Nations, as well as the social potential of Australia, rests significantly on the objectives and the success of the negotiation processes currently under development. In 2016, the states of Victoria and South Australia each expressed their commitment to a formal process of treaty-making with First Nations peoples. Community discussions are ongoing in Victoria as the First Nations, individuals and groups occupying this region attempt to form a unified and representative body to be known as the First Peoples' Assembly of Victoria to enter into an intergovernmental agreement. By contrast, a change in the South Australian Government in March 2018 has led to its retreat from an earlier commitment to negotiating a series of distinct accords/treaties co-signed with the individual Indigenous governing authorities residing in this jurisdiction. While uneven in their progress and diverse in form, the various treaty processes currently unfolding in Australia have potential for enabling the formal recognition of Indigenous structures of culturally appropriate governance, decision-making and exercise of jurisdiction.

When the scope of a treaty extends to negotiation of jurisdiction or powers of self-government, it demands signatories have a legitimate authority and recognised representative responsibility for the decisions taken on behalf of the territories and the people who will be subject to the terms of the agreement. International research finds that First Nations who succeed after colonisation have rebuilt capable organs of self-government that are affirmed by the Nation's citizens as legitimate and representative; this happens when the nation's governing institutions achieve a 'cultural match' between their peoples' traditional worldviews, and the governance technologies required for political interaction in the contemporary context.<sup>7</sup> A nation-building approach to self-governance is well established in the political systems, institutional practices, environmental policies and socio-economic aspirations of many Native Nations in the US and Canada, and is materialising in Australia as a lens through which some First Nations publics are finding it useful to understand, organise and advance their activities. Research conducted jointly by Jumbunna Institute of Indigenous Education and Research (Jumbunna) at the University of Technology Sydney and the Native Nations Institute (NNI) at the University of Arizona has found that by 'identifying, organising and acting' as an Aboriginal nation<sup>8</sup>, governance activities refocus on a more holistic vision for the future of citizens: beyond building managerial capacity for delivery of services decided and funded by non-Indigenous powers, Indigenous community leaders instead strive to create institutions of governance and decision-making that can support the cultural values and economy of a flourishing community and enable the expansion of jurisdiction over the lands, resources and peoples within the nation's borders.

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<sup>6</sup> Australian Government, 2020. *Closing the Gap Report 2020*. Canberra: Dept. of Prime Minister and Cabinet; Morrison, S. 2020. Statement to the House of Representatives (14 Feb 2019) <<https://www.pm.gov.au/media/statement-house-representatives-closing-gap-2019>>.

<sup>7</sup> Cornell, S. & Kalt, J. 2007. 'Two Approaches to the Development of Native Nations: One Works, the Other Doesn't', in M. Jorgensen (ed.), *Rebuilding Native Nations: Strategies for Governance and Development*, Tucson: University of Arizona, 3–33.

<sup>8</sup> Cornell, S. 2015. 'Processes of Native Nationhood: Indigenous Politics of Self-Government' *International Indigenous Policy Journal* 6(4), 4



Early evidence emerging from First Nations who wish to increase their collective organisational capacities suggests that the 'identify-organise-act' model is not simply descriptive but also can be used prescriptively as a starting point for creating self-governance mechanisms. As Cornell notes,<sup>9</sup> in recent decades in Australia and internationally, there has been a growing tendency for Indigenous political collectives to preferentially identify and/or organise at the local (Indigenous nation) level rather than at the national (nation state) level. The former Australian Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, made a similar observation: "I am now attending meetings in New South Wales, Queensland and Victoria where I don't hear Koori or Murri. But I am hearing Wiradjuri, Kamileroi, Bunjalang, Yuen, Kaanju, Koombumeri, Quandamooka and Waayni".<sup>10</sup> This reclamation by First Nations of their preferred local names, connected with the lands and waters over which they originally exercised jurisdiction, is a powerful precursor to taking control of their own destinies. Cornell and Gooda each highlight Indigenous peoples' preference to organise as nation collectives, but there is also strong evidence of the benefits of doing so. Strategies for First Nation identification are perhaps especially crucial in settler-colonial contexts; Indigenous story-telling is recognised as an important and culturally relevant technique for reclaiming submerged histories, disrupting colonial mythologies and disconnecting the problematic politics of knowledge reinforced by the colonial archive.<sup>11</sup> This, of course, is an essential element of the truth-telling procedures commonly understood as prerequisite for a process of social healing and reconciliation. A renewed focus by First Nations on telling their own story is also a significant feature of the Indigenous nation civics education necessary for First Nations communities who suffered dislocation, dispersal and cultural alienation under colonial policies of assimilation and who now are striving to understand who is 'the self' at stake in their efforts towards self-determination.<sup>12</sup>

By re-identifying, organizing and acting as self-determining nations, First Nations peoples in Australia are making important decisions about self-governance, resource management and service delivery. Australian and international evidence identifies political organisation as a precursor to Indigenous communities fulfilling their self-defined economic, social, cultural and political goals. Yet clearly, Indigenous peoples face considerable challenges in identifying, organising and acting as First Nations political collectives in Australia, which never has acknowledged – either by treaty or through its Constitution, legislation or case law – the status of First Nations peoples as 'peoples' as understood in international law. Namely it has not acknowledged Indigenous peoples as having status as political collectives with inherent rights to self-government and self-determination. Limited acknowledgment of collective rights exists in Australia through native title, cultural heritage and land rights state or federal legislation, but First Nations, communities, societies and peoples are not legal entities as of right.

Nonetheless, this lack of recognition has not prevented First Nations peoples in Australia from claiming their right to interact with the nation state as distinct collectives. Indeed, the lack of treaties in Australia means that Indigenous peoples in this region are often required to be inventive in designing innovative self-governance methods and technologies of self-determination, in relation to settler-colonial powers. While the relationship between First Nations and settler-colonial nations remains a point of contest regardless of the presence or absence of treaties, the absence of formal treaty

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<sup>9</sup> Cornell, S. 2015. 'Processes of Native Nationhood: Indigenous Politics of Self-Government' *International Indigenous Policy Journal* 6(4), 4

<sup>10</sup> Gooda, M. (ATSI Social Justice Commissioner). 2014. *Social Justice and Native Title Report*. Australian Human Rights Commission.

<sup>11</sup> See Archibald, J. 2008, *Indigenous Storywork: Educating the Heart, Mind, Body and Spirit*. Vancouver: UBC Press.

<sup>12</sup> See Nakata, S. 2020. 'Who is the self in Indigenous self-determination?' In T. Rowse, T. & L. Rademaker (Eds.) *Indigenous Self-determination in Australia: Histories and Historiography*. Canberra: ANU Press, 335-353.

relations in Australia has resulted in the organic emergence of innovative and strategic governance practices as Aboriginal and Torres Strait Islander peoples try to assert and exercise their rights. Over time, such practices may then crystallise as frameworks of right in the Australian context (where treaty agreements and associated rights are absent); emergent self-governance practices effectively materialise rights of self-determination, which can gradually become institutionalized through the legislature and as policy standards. In this respect, the situation of First Nations peoples in Australia offers an interesting and potentially useful comparison with the more common international legal understanding of the conditions supporting self-determination, where recognised and guaranteed rights pre-exist and safeguard the exercise and enjoyment of cultural and political practices.

Research that provides Indigenous communities with information about factors and strategies that facilitate the creation of effective and culturally legitimate governing structures can be invaluable for Indigenous nations engaged in strategic planning towards long term and sustainable community well-being. Knowledge of efficient technologies for political organization and robust communication amongst citizens is likewise advantageous for materializing Indigenous rights to self-determination through effective and legitimate self-governance, and for building parity in relations with settler-colonial powers. Strategies of nationhood can assist in strengthening cultural identity, civic participation, social cohesion and political efficacy, suggesting that Indigenous nation rebuilding can play a valuable role in the process of negotiating treaty. A strategic programme of Indigenous nation rebuilding may furthermore help First Nations polities in Australia to confront new governance challenges in the emerging legal-political context of treaty. From time immemorial, First Nations have worked both to fulfil their obligations to Country and to achieve their communities' development aspirations. Expanding jurisdiction over Country is crucial for First Nations peoples obligated (under First Nations legal systems) to protect traditional lands and waters, and significant headway is being made in this area through Indigenous nation rebuilding and the revitalisation of Indigenous governance bodies that reclaim the political authority to 'speak as Country' and create jurisdictional space for the implementation of Indigenous Law.<sup>13</sup> In the contemporary era, these efforts have included success at (re)acquiring an array of property rights, for example through freehold purchases, native title determinations, declarations of Indigenous Protected Areas, varied co-management agreements, and recognition of national heritage or World Heritage status. However, current mechanisms in Australian law, including those provided by the Corporations (Aboriginal and Torres Strait Islander) Act, state incorporation legislation, and co-management agreements, do not provide governance structures that simultaneously support First Nations to fulfil their obligations to Country under their own lore/law and to manage their external relationships with local, state, national and international governments under settler colonial law. A new model of collaborative governance is needed to address this concern. In particular, statutory authorities, embedded in Commonwealth or state law, have the potential to facilitate appropriate land jurisdiction within a genuinely pluralist legal structure. Statutory authorities are therefore a possible response to First Nations' need for pluralist governing structures through which they can exercise land jurisdiction, fulfil responsibilities to Country and manage relationships with settler-colonial governments. Research is needed in the Australian context to investigate the capacity of statutory authority models to meet individual First Nations' needs, provide for efficient management of nations' internal and external responsibilities, outlast settler political cycles and elevate the application of Indigenous law.

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<sup>13</sup> See Hemming, S., D. Rigney, S. Bignall, S. Berg & G. Rigney. 2019. 'Indigenous nation building for environmental futures: Murrundi flows through Ngarrindjeri country', *Australasian Journal of Environmental Management*, 26:3, 216-235.

The internally transformative process of Indigenous nation revitalisation through strategic processes of 'identifying, organising and acting' collectively as a political entity, connects with the wider societal change envisaged by a paradigm of 'ex-colonialism' or 'exit from colonialism'.<sup>14</sup> This envisages relations of mutuality and respect among the settler colonial state and self-determining Indigenous authorities. The necessarily collaborative nature of an 'exit from colonialism' raises important questions about existing power imbalances and the potential for Indigenous authorities to enjoy parity in negotiations with settler state powers. An 'exit from colonisation' can only happen if Indigenous peoples have the self-governing institutions they need to enter into reformed relations. Evidence from Australia and North America suggests that techniques of nation building that strengthen Aboriginal polities can enhance scope for 'exiting from colonisation' towards negotiated leader-to-leader and government-to-government relations. Furthermore, Indigenous nation building supports parity in engagement and negotiations among the settler colonial state and Indigenous authorities. As such, nation rebuilding for political recovery and self-governance provides Indigenous communities with a framework that supports self-determination, a means to socio-economic recovery, and a basis for more effective engagement with settler State powers.

### **Accountability**

While nation building initiatives focus on establishing stable and effective First Nations political institutions, there has also been renewed attention to accountability, particularly at the interface or 'contact zone' between First Nations and settler-colonial governments. While governments commonly think of accountability in terms of acquittal of funding, elections and reports, First Nations are building new hybrid ways of thinking about accountable relationships that place the control within communities. These first require —

- Internal accountability of a leadership or operative group  
Mechanisms for internal governance that fit cultural models of responsibility. This accountability is ongoing, concerned with relationships and outcomes, and takes place within the whole community and whole person: not just within organisations and organizational roles.
- Clear internal representative mandate  
The group is clear about who and what they represent — often a First Nation, but sometimes a diasporic Aboriginal and Torres Strait Islander community with historic connections — and can delineate what it is authoritative over. This also means the group can strategise around who represents it in external 'self-determination' government partnerships, and the position they present on behalf of the group. They will also be answerable to the group for decisions made.
- Access to and control of data, information and interpretation  
The group can control what it knows about itself, what others know about it, and what information is used to make decisions. If there are external decision-makers (like a state government), this is a way to guide and shape decisions even if refused a decision-making role.
- Acknowledgement of the colonial context  
Acknowledging that all of this occurs in a highly-imbalanced field — it is a requirement that groups enact accountability in a highly-coordinated way and that they are positioned relative to governments with clear terms of

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<sup>14</sup> Bignall, S. 2014. "The Collaborative Struggle for Excolonialism", *J. Settler Colonial Studies*, 4:4, 340-356.

reference in partnerships that address this imbalance in power and the threat of violence against First Nations and Country.

- Adequate, unconditional resourcing  
For the obvious reason that none of this can take place on communities already strained by the economic and social impact of colonisation.

### **Extending authority regarding responsibility for Country**

First Nations are also asserting sovereignty over their Country through dissent to and refusal of extractive industries. Gomeri people have mobilized against two key projects — Shenhua mines near Gunnedah and Santos CSG projects in the Pilliga. They have done so through refusing community consent through pre-approval processes, utilizing existing consultation and partnership procedures to their fullest extent and litigating beyond what is possible. They are also working outside of formal law by approaching private sector collaborators and community sector supporters. Other nations, like Wangan and Jagalingou, who are further along in this process, have responded to failed avenues of appeal in partnership and litigation to asserting sovereignty through the conducting of ceremony and physical presence of key parts of their Country.

### **Performing statehood**

Some First Nations are reflecting and adopting the behavior of Statehood as a way of asserting sovereignty. The Yidinji Government, for instance, have a regulatory framework befitting a small sovereign state — including counter-terrorism regulations, license plates, travel instruments, environmental regulations and the issuing of visas. While not formally recognized by the Australian government, this strategy has critical success in generating publicity and delivering small strategic jurisdictional wins, including a case dismissed for trespass when the Yidinji foreign minister Murrumu attempted to establish an embassy.

### **Cultural revitalization**

Communities are also mobilizing to revitalise languages and cultural practices. For example, 'Birthing on Country' initiatives seek to promote maternal and newborn health and wellbeing through cultural practices that were strengthened over thousands of generations and have only relatively recently been disrupted by non-Indigenous intervention. Given the significant disparities in maternal and newborn health between First Nations communities and other Australians, Birthing on Country models seek to promote practices that are governed by local communities, provide for the inclusion of traditional practices, incorporate holistic understandings of health and wellbeing and valuing connection to Country, as well as First Nations ways of knowing in the delivery of infant and maternal health services.<sup>15</sup>

Similarly, numerous communities are undertaking programs to record and reawaken their languages.<sup>16</sup> Recognising the critical role of language in the expression of culture and self-determination as distinct peoples, projects such as the *Rediscovering Indigenous Languages Project* have engaged with First Nations to make available documentary sources and develop programs and resources to facilitate revitalization of

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<sup>15</sup> Dragon, N, (2019) 'Birthing on Country: Improving Aboriginal and Torres Strait Islander infant and maternal health', *Australian Nursing and Midwifery Journal*, 10<sup>th</sup> February 2019, see: <https://anmj.org.au/birthing-on-country-improving-indigenous-health/>; Kildea, S., Magick Dennis, F. and Stapleton, H. 2013. Birthing on Country Workshop Report, Alice Springs; 4 July 2012, Australian Catholic University and Mater Research Unit on behalf of the Maternity Services Inter-Jurisdictional Committee for the Australian Health Ministers' Advisory Council

<sup>16</sup> See <https://www.sl.nsw.gov.au/useful-resources-relating-aboriginal-language-revitalisation> for examples

First Nations languages.<sup>17</sup> Such initiatives are widespread, including health and social programs such as those noted above, as well as land use and natural resource management, education and other areas. This return to ancestral knowledge and ways of operating allows First Nations to more fully realise their sovereignty by building cohesive community identity and purpose — and setting new epistemic terms on which sovereignty is operationalized and known.

### **Self-determination and state intervention in First Nations families**

A critical area consistently raised by First Nations is the ongoing intervention of the state, backed by the use of force, in the lives of First Nations children and families. There is a long history of this intervention, from the earliest days of colonization, grounded in attitudes of cultural supremacy that contended that securing the future of First Nations children required their ‘rescue’ from First Nations society and integration and assimilation into the superior society of the colonizer. The devastating impacts of these assumptions, enacted through policy and law, continues to reverberate through First Nations families. First Nations children continue to be disproportionately subject to child protection interventions and involvement in the juvenile justice system. While there is recognition that these assumptions continue to undermine success in addressing these disparities<sup>18</sup>, the actions of successive governments still fail to address the fundamental foundations of these systems by undertaking reforms that uphold the right to self-determination for First Nations.

Numerous reports have emphasized that the right to self-determination represents a key foundation for effective public policy aimed at improving outcomes for First Nations children, families and communities. The recent *Pathways to Justice* report, examining the reasons for over-representation of First Nations people, including children, in the justice system, noting among other things the importance of First Nations leadership in addressing this critical challenge.<sup>19</sup> A key example of the benefits to greater involvement and leadership of First Nations in responding to social challenges, as outlined in the *Pathways to Justice* report, include Justice Reinvestment initiatives such as the Maranguka Justice Reinvestment Project. A place-based, community-led initiative, the Maranguka Justice Reinvestment Project enabled greater local community decision making about the service and supports they needed, supported by local data. Early impact assessments have shown the promise of such approaches, reporting improvements in family strengths, youth development and adult empowerment, with a significant return on investment both in terms of impact to the justice system as well as broader social and economic impact for the community.<sup>20</sup> In their submission to *Pathways to Justice*, Just Reinvest NSW, who coordinate the Maranguka Justice Reinvestment Project, noted “self-determination is critical.”<sup>21</sup>

Similarly, reviews of the disproportionate rate of removal of First Nations children by statutory child protection authorities have noted the central importance of self-determination in achieving change for more than two decades. The *Bringing Them Home* report identified self-determination as a core foundation for contemporary child welfare systems, and recommended Australian governments establish a framework to

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<sup>17</sup> Thorpe, K. and Galassi, M. (2014) ;Rediscovering Indigenous Languages : The Role and Impact of Libraries and Archives in Cultural Revitalisation’, *Australian Academic and Research Libraries*, Vol 45(2), pp. 81-100.

<sup>18</sup> The Hon. Scott Morrison MP, Prime Minister of Australia, *Statement on the Anniversary of the National Apology to the Stolen Generations*, 15 February 2021. Available: <https://www.pm.gov.au/media/statement-anniversary-national-apology-stolen-generations>

<sup>19</sup> Australian Law Reform Commission (2017) *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133. Available: [https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)

<sup>20</sup> KPMG (2018) *Maranguka Justice Reinvestment Project Impact Assessment*.

<sup>21</sup> Australian Law Reform Commission (2017) *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133., at 4.63 (page 141) Available: [https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf)



negotiate “the implementation of self-determination in relation to the well-being of Indigenous children and young people”, including the transfer of legal jurisdiction related to child welfare and juvenile justice, and the transfer of police, judicial and departmental functions, to First Nations communities, regions or representative organisations.<sup>22</sup>

More recently, the *Family is Culture* report examined the over-representation of First Nations children in out-of-home care in New South Wales.<sup>23</sup> Like *Bringing Them Home*, *Family is Culture* likewise identified recognition of the right to self-determination as a key structural reform necessary for addressing the over-representation of First Nations children in out-of-home care, alongside the need for improved transparency, oversight and accountability. The review provided a comprehensive analysis of the right to self-determination, and how it could be understood and promoted in the child protection system to safeguard the rights and interests of First Nations children.

Despite this analysis, the Government’s response<sup>24</sup> was silent on this key structural reform. In fact, the only mention of ‘self-determination’ in its response referred to offering processes for alternative dispute resolution within the Children’s Court “to encourage greater self-determination and parental decision-making through participation in Family Group Conferences”<sup>25</sup>. As noted above, this framing retained the primacy of settler-government legal frameworks, rather than recognizing the broader point regarding the need for structural change to promote the exercise of self-determination in the design and administration of child protection systems. This framing invokes the language of self-determination, while retaining settler-government authority, and in doing so undermines First Nations efforts for recognition of their rights under the Declaration of the Rights of Indigenous Peoples, and to safeguard the rights and futures of their children.

Equally concerning, the Australian government is yet to meaningfully respond to the findings and recommendations of the Pathways to Justice Report, more than two years later. However, recent developments in the *National Agreement on Closing the Gap* provide a possible vehicle for the implementation of recommendations in these and other areas of concern for First Nations. While the *National Agreement* includes negotiation with First Nations organisations, and priority reforms that seek to empower local solutions driven by First Nations and supported by access and control of data, it remains limited in key respects. In particular, there has not been significant investment in implementing the agreement, and it remains to be seen whether governments will truly enable First Nations approaches and initiatives, or if they will continue to be constrained in ways that reflect at best the delegation of settler-colonial authority, rather than the recognition of the inherent rights of First Nations to self-determination and self-governance.

## Conclusion

The right to self-determination is critical to securing the futures of Indigenous peoples. Particularly in Australia, where the absence of a formal treaty and the ongoing exercise of authority over, and violence towards, First Nations communities, culture and Country, First Nations have found innovative ways to assert and exercise the right to

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<sup>22</sup> Human Rights and Equal Opportunity Commission (1997) *Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Recommendation 43

<sup>23</sup> Davis, M., (2019) *Family is Culture Review Report – Independent Review of Aboriginal Children and Young People in OOHC*, Family Is Culture

<sup>24</sup> NSW Government (2020) ‘NSW Government response to the Family is Culture Review Report’, released 8 July 2020, see: [https://www.facs.nsw.gov.au/\\_data/assets/pdf\\_file/0005/784517/NSW-Government-Response-to-FIC.pdf](https://www.facs.nsw.gov.au/_data/assets/pdf_file/0005/784517/NSW-Government-Response-to-FIC.pdf)

<sup>25</sup> NSW Government (2020) ‘NSW Government response to the Family is Culture Review Report’, released 8 July 2020, pp. 5 see: [https://www.facs.nsw.gov.au/\\_data/assets/pdf\\_file/0005/784517/NSW-Government-Response-to-FIC.pdf](https://www.facs.nsw.gov.au/_data/assets/pdf_file/0005/784517/NSW-Government-Response-to-FIC.pdf)

determine their social, economic and cultural development. This has included efforts to expand and strengthen internal governance institutions and the exercise of authority with respect to community and Country, as well as utilizing existing, or demanding additional, mechanisms for independent accountability in the exercise of government power regarding First Nations affairs. While there has been some success in these initiatives, they remain limited in requiring the consent and facilitation of Australian governments, rather than reflecting genuine recognition of the enduring rights of First Nations to self-governance.

Ultimately, recognition of the right to self-determination and self-governance of First Nations, and its exercise in practice, raises significant challenges. In particular, it represents a direct and enduring challenge to the authority of settler-states. That is, the exercise of self-determination by First Nations peoples, whether related to social and community services, economic development, or land or resource use, necessarily establishes limits on the authority of co-located settler-colonial governments and governance, which are routinely resisted.

Further, while policy frameworks increasingly invoke the language of self-determination for First Nations peoples, or the development of partnerships approaches that share decision making, these are often illusory. Such frameworks generally position the authority of Australian governments over First Nations people as the foundation for limited participation by First Nations, constrained by what is permissible to Australian governments. In particular, where the decisions of First Nations diverge from those deemed acceptable, the wishes of First Nations are routinely overridden.

A new foundation for the relationship between First Nations and settler governments is needed, with greater accountability to First Nations, recognising the needed for negotiation between parties, addressing the enduring power imbalance between them, and including mechanisms to resolve disputes. The Commonwealth and the states could act to enshrine the principles of the Declaration on the Rights of Indigenous Peoples into domestic law, while international mechanisms can similarly apply pressure on Australian government to comply with their commitments to the Declaration on the Rights of Indigenous Peoples. Without the genuine recognition of the right to self-determination, and the opportunity to exercise that right, it is likely that existing disparities affecting First Nations children, families and communities, and undermining the full exercise of their rights, will continue.