# VACCA's response to the Exposure Draft - Family Law Amendment Bill 2023

Victorian Aboriginal Child Care Agency

February 2023

**VACCA**
PO Box 494, Northcote Plaza
Northcote VIC 3070
**e.** vacca@vacca.org

VACCA
Connected by culture

VICTORIAN ABORIGINAL
CHILD CARE AGENCY

## Acknowledgment

We acknowledge the Traditional Owners of the lands across Victoria that we work on, and pay our respects to their Elders, both past and present and to their children and young people, who are our future Elders and caretakers of this great land.

## Note on Language

We use the term 'Aboriginal' to describe the many Aboriginal and Torres Strait Islander Peoples, Clans and Traditional Owner Groups whose traditional lands comprise what is now called Australia.

We use the term 'Indigenous' as it relates to Indigenous peoples globally as well as in the human rights context.

The terms 'First Peoples' and 'First Nations' are employed in the Australian context, by recognising that Aboriginal and Torres Strait Islander peoples are the First Peoples/First Nations of this land, it directly relates to their inherent un-ceded sovereignty.

# Table of Contents

## About VACCA

Established in 1976, the Victorian Aboriginal Child Care Agency (VACCA) is the lead Aboriginal child and family support organisation in Australia and the largest provider of Aboriginal family violence, justice support and homelessness services in Victoria. We work holistically with children, young people, women, men, and families to ensure they have the necessary supports to heal and thrive. We do this by advocating for the rights of children and providing everyone who walks through our doors with services premised on human rights, self-determination, cultural respect and safety.

As an Aboriginal Community Controlled Organisation (ACCO), VACCA shows respect for observance of and compliance with Aboriginal cultural protocols, practice and ceremony. VACCA emerged from a long and determined Aboriginal Civil Rights movement in Victoria. Today, we continue to act, serve and lobby for the rights of Aboriginal Victorians, especially children, women and families.

We provide support services to over 4,500 children and young people, and their families and carers each year. VACCA provides support services for Stolen Generations through Link-Up Victoria, which has been in operation since 1990. Across our six regions, we deliver over 80 programs tailored to the needs of the communities we serve including child and family services, child protection, family violence and sexual assault supports, youth and adult justice supports, early years, education, homelessness, disability, alcohol and other drugs, cultural programs and supports for Stolen Generations. We employ over 1000 staff, making us one of Victoria's biggest employers of Aboriginal people. Our Aboriginality distinguishes us from mainstream services and enables us to deliver the positive outcomes we achieve for our people.

VACCA is guided by *Cultural Therapeutic Ways*, our whole-of-agency approach to our practice of healing for Aboriginal children, young people, families, community members and carers who use our services.The framework acts at the intersection of cultural practice with trauma and self-determination theories. The aim of this practice is to integrate

Aboriginal culture and healing practices across the organisation and guide our service delivery approach to be healing, protective and connective.

## Recommendations

VACCA makes the following recommendations for consideration:

1. Provide compulsory and ongoing cultural competency training on unconscious bias, Aboriginal culture and childbearing practices and trauma-informed approaches for all court staff, judges, magistrates and legal practitioners.
2. Increase sustainable, flexible funding for Aboriginal legal services in order to increase access to culturally appropriate legal assistance and supports for Aboriginal families facing family law matters.
3. Resource ACCOs to develop and deliver Aboriginal Family Dispute Resolution programs, involving elements of AFLDM model to families involved in Family Law matters. This could be allocated through funding already committed to under the National Agreement on Closing the Gap.
4. Ensure that culture is a primary consideration when determining the best interests of an Aboriginal child by amending language under subsection (s60CC(3)) to be strong, mandatory, rights-based and consistent with:
    a. The rights stipulated in the UNDRIP,
    b. The concept of 'cultural continuity' as per Canadian legislation,
    c. The ATSICPP as per *Children, Youth Families Act 2005 (Vic),* and
    d. Statement of Recognition in the *Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022.*
5. Include explicit language around accountability and responsibility for how cultural rights will be implemented when an Aboriginal child is placed with a non-Aboriginal carer.

6. Ensure that culture is a primary consideration when determining the best interests of an Aboriginal child by amending language under subsection (s60CC(3)) to be strong, mandatory, rights-based and consistent with:
    a. The rights stipulated in the UNDRIP,
    b. The concept of 'cultural continuity' as per Canadian legislation,
    c. The ATSICPP as per *Children, Youth Families Act 2005 (Vic),* and
    d. Statement of Recognition in the *Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022.*
7. Include explicit language around accountability and responsibility for how cultural rights will be implemented when an Aboriginal child is placed with a non-Aboriginal carer.
8. Include consideration under (s60CC(3)) around non-Aboriginal carer's capacity, ability and willingness to meet an Aboriginal child's cultural rights.
9. Implementation of risk assessment, safety planning and review mechanisms in the family law court whenever there is a matter involving family violence.
10. Implementation of mandatory psychoeducational and cultural awareness training where family violence is concerned.
11. Involve ACCOs in the decision-making process regarding placement decisions.
12. Implement trauma-informed mechanisms that protect and honour a child's voice in the family law amendment.
13. Amend wording in paragraph 60CC(2)(d) to ensure structural barriers to accessing services are not conflated to an unwillingness of the individual to seek necessary supports.
14. Under subsection 4(1), subparagraph (a)(vi), expand on "in accordance with the child's Aboriginal culture" and include "adhering to Aboriginal family structures, cultural models of family, kinship and extended family".

15. Implement ALRC inquiry's Recommendation 9 which states that the legislation be "amended to provide a definition of member of the family that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case."

16. Develop a multi-tiered communications strategy that will help inform the Australian public about these amendments and the impact these will have on family law proceedings.

## Introduction

VACCA welcomes the opportunity to provide feedback on the Federal Government's *Exposure Draft - Family Law Amendment Bill 2023* (exposure draft). VACCA's feedback is based on our unique position as an ACCO providing a suite of services across the state supporting children, young people, families and community members. VACCA believes that all children have a right to feel and be safe and live in an environment that is free from abuse, neglect and violence. We are committed to promoting and upholding the rights of Aboriginal children to maintain and celebrate their identity and culture, recognising that connection to culture is critical for children's emotional, physical and spiritual wellbeing.

The exposure draft aims to place the best interests of children at the centre of the family law system and therefore, VACCA welcomes the following:

- Simplification of the list of best interest factors and language so that those without legal expertise can make sense of the factors when determining care arrangements for a child;
- Inclusion of the separate subsection (s60CC(3)) requiring a court to consider an Aboriginal child's connection and maintenance of culture and family in determining the child's best interests;
- Amendments that repel the presumption of equal shared parental responsibility and the related equal time and substantial and significant time provisions; and
- Inclusion of amendments under Schedule 5 introducing 'harmful proceedings orders' as they relate to preventing systems abuse.

## Key issues

It is VACCA's experience and that of other ACCOs that the family law system requires significant improvements for it to be effective and accessible to Aboriginal families. Recent inquiries, including the Australia Law Reform Commission's Inquiry into the Family Law System (ALRC inquiry) and the Joint Select Committee on Australia's Family Law System, have highlighted the structural and systemic challenges within the family law system. The ALRC inquiry identified that some of these issues were due to divided legislative regimes and court structures and processes that address different aspects of matters impacting on families – a federal regime that deals primarily with parenting and property matters and state and territory regimes that are responsible for child protection and family violence laws.[1] This has also been raised by VACCA staff who are often working with families at the intersection of multiple court systems.

Data from the Attorney-General's Department shows that in 2018–19, 57 per cent of dispute resolution services delivered by Aboriginal and Torres Strait Islander Legal Services related to family law matters.[2] In Victoria, there continues to be an increase in the number of Aboriginal families accessing family law services. Between 2017 and 2020, the Victorian Aboriginal Legal Service (VALS) experienced a threefold increase in engagement with their family law services.[3] This may in part have been due to the impact of COVID-19 restrictions and lockdowns on intimate relationships and families.[4] It also indicates a risk that without improvement and strengthening of culturally safe, trauma informed approaches there is risk of causing further harm to families in distress.

[1] Australian Law Reform Commission (2019). Family Law for the Future — An Inquiry into the Family Law System: Final Report. Commonwealth of Australia. Retrieved from Weblink

[2] Attorney-General's Department. (2020). Attorney-General's Department submission to the Joint Select Committee on Australia's Family Law System Weblink

[3] VALS data and trends shared with VACCA in February 2023. See VALS' submission to the *Family Law Amendment Bill 2023* for further detail.

[4] Relationships Australia, COVID-19 and its Effects on Relationships, May 2020. Retrieved from weblink

The *Family Law Act 1975* (Cth) has also been critiqued as being overly complex and confusing and therefore inaccessible for many lawyers, let alone families.[5] A legacy of underfunding the family law system has meant that children and families have limited time to have their matters heard.[6] Both issues have significant implications for fair judicial proceedings for Aboriginal families who are already experiencing a number of barriers when accessing courts including unconscious bias as well as culturally unsafe practices or legal services.[7] Another key concern identified has been the lack of support for children to express their views on parenting arrangements.[8]

VACCA and Aboriginal legal service organisations[9] have also found a lack of cultural safety for Aboriginal families in the family law system, including:

- Limited understanding of the importance of the cultural and identity rights of Aboriginal children,
- Inequity of access to culturally appropriate legal services,
- Limited understanding of Aboriginal family structures by judges and favouring of a nuclear family structure,
- Limited culturally appropriate services for Aboriginal families.

Unconscious bias and institutional racism are regularly experienced by our communities in legal processes and courts more broadly. The family law system is no exception, and this can act as a barrier to accessing the system or trusting that court processes will result in fair outcomes. Academics have noted that biases in the family law system against Aboriginal families may consist of privileging nuclear family structures and Western values at the

[5] Australian Law Reform Commission (2019).
[6] Ibid.
[7] Ibid.
[8] Commonwealth of Australia (2021). Joint Select Committee on Australia's Family Law System - Improvements in family law proceedings. Second interim report. Retrieved from Weblink.
[9] NATSILS (2018). Submission to the Australian Law Reform Commission's Inquiry: Family Law for the Future — An Inquiry into the Family Law System. Retrieved from Weblink ; VALS (2018). Australian Law Reform Commission Review of the Family Law System. Retrieved from Weblink

expense of Aboriginal values, cultural traditions or rights.[10] To overcome this and improve cultural safety and access to the family law system, it is necessary for all operatives of the court to receive ongoing cultural competency training on unconscious bias, Aboriginal culture, family structures and methods of care giving and parenting well as trauma-informed approaches. In addition, increasing funding for Aboriginal legal services can support Aboriginal families' access to culturally appropriate legal assistance when facing family law matters.

**VACCA recommends for the Federal Government to:**

1. Provide compulsory and ongoing cultural competency training on unconscious bias, Aboriginal culture and childbearing practices and trauma-informed approaches for all court staff, judges, magistrates and legal practitioners.
2. Increase sustainable, flexible funding for Aboriginal legal services in order to increase access to culturally appropriate legal assistance and supports for Aboriginal families facing family law matters.

## General feedback

VACCA's position is that the family law system must first and foremost be rights-based and centred on the best interests of children. This includes an Aboriginal child's right to safety as well their cultural rights being upheld and respected.

While not in the scope of this amendment, given the policy intent of building in stronger provisions about a child's best interests into the Act, VACCA stipulates that the family law system must take a holistic approach that seeks to resolve conflict in a culturally appropriate and trauma-informed way. We therefore support NATSILS' position in their 2018 submission to the ALRC's inquiry that the family law system should aim to resolve and deescalate conflict

[10] Titterton, A. (2017). Indigenous access to family law in Australia and caring for Indigenous children. *UNSWLJ*, *40*, 146.; Dewar, J. (1997). Indigenous children and family law. *Adelaide Law Review, The, 19*(2), 217-230.

outside of the court system.[11] It is VACCA's contention that the key to this approach is to effectively resource Family Dispute Resolution (FDR) processes, case management and mediation that is child-centred, culturally appropriate, trauma-informed and aims to resolve conflict and create new positive relationships within families. In cases where there is family violence present, a trauma-informed approach is central, ensuring that the safety of children and affected family member is central to any decisions made by the court. This should also be coupled with an understanding of the trauma and coercion placed on the affected family member, as well as the gendered implications if the affected family member is a mother.

A promising example that could be adopted for conflict resolution in the family law system is VACCA's Aboriginal Family Led Decision Making program (AFLDM). This program is for children and families involved with the Child Protection system and supports families to make safe decisions for children. We offer Aboriginal decision making which is guided by the family and respectful of culture that aims to build on the strengths in family and kinship networks so that the needs of children can be met. Our program also aims to empower families to make good decisions and plans in relation to the safety and wellbeing of their children. We also actively involve the child's family, Elders and other significant people in the child's life in decision-making.

Often our families can be caught up at the intersection of many systems, therefore implementing some of the shared elements of the AFLDM model could assist with improving integration with and access between systems. An AFLDM like approach could include family members, including children, specialists, support workers, community members in a safe environment to look at the best outcomes for the family unit with the children's best interests at the core of the decision making process. Bringing in aspects of the AFLDM model into the FDR process may assist in keeping families out of the courts where possible and finding manageable solutions where all family members feel heard and respected. In addition to involving children and families, it is also crucial that a range of specialists with trauma-informed and cultural training are a part of this process.

[11] NATSILS (2018). Submission to the Australian Law Reform Commission's Inquiry: Family Law for the Future — An Inquiry into the Family Law System. Retrieved from Weblink

Implementing elements of the AFLDM model into Family Law FDR's would also provide an opportunity for referring families to additional Aboriginal services such as family support or family violence support. This could ensure that a continuous therapeutic healing model of care is adopted to wrap around families, which may result in more effective resolution of conflict, improving relationships and providing opportunities for healing.

VACCA supports the Joint Select Committee on Australia's Family Law System Second interim report recommendation for funding and expansion of legally-assisted FDR pilot for Aboriginal families.[12] Given there is funding through the National Agreement on Closing the Gap to expand FDR for Aboriginal families, it is crucial for ACCOs to be resourced to provide are culturally safe and trauma-informed FDR to Aboriginal families. This is particularly important because FDR often involves members of the extended family and support from community members, so ensuring that ACCOs are funded to deliver FDR processes can help tailor FDR to the needs of each community and family and promote flexible service design.

**VACCA recommends for the Federal Government to:**

3. Resource ACCOs to develop and deliver Aboriginal Family Dispute Resolution programs, involving elements of AFLDM model to families involved in Family Law matters. This could be allocated through funding already committed to under the National Agreement on Closing the Gap.

## Schedule 1: Amendments to the framework for making parenting orders

### Best interest factors

#### *Cultural rights*

VACCA welcomes the changes to the legislative framework for making parenting orders, in particular the inclusion of subsection (s60CC(3)) which states that the court must consider "the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having

[12] Commonwealth of Australia (2021).

the opportunity to connect with, and maintain their connection with, their family, community, culture, country and language" when making parenting arrangements. It is promising to see this amendment is included as was recommended by the ALRC inquiry.[13]

VACCA understands that the amendments aim to create a specific provision for Aboriginal children as per s60CC(1)(b) to ensure cultural considerations when determining the best interests of an Aboriginal child. While we welcome this, VACCA seeks to raise that the language of 'enjoy' is not appropriate and we recommend that stronger, rights-based wording centred on belonging and identity to be instead included.

For Aboriginal peoples, the best interests of the child cannot be separated from their collective cultural rights. Connection to culture and community is fundamental for our children and young people's wellbeing, being strong in their identity and knowing who their mob is and who their family are. Being connected to culture creates a sense of belonging and assists in creating a strong sense of identity. When connection to culture is broken, families and communities are weakened, and Aboriginal people are at threat of being lost not only to their culture but also to themselves.[14] Being immersed in one's culture equips people with the confidence and knowledge to develop and function within your culture and community and the broader society; drawing strength and contributing to the survival and development of their history and culture.

In international law, the right to culture is articulated internationally in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Indigenous rights are recognised as collective rights that are derived from the unique legal status of Indigenous peoples as distinct communities. The UNDRIP also recognises the rights of Indigenous families and communities "to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child."[15] Article 13 further stipulates

[13] From ALRC Final report, Recommendation 6: The Family Law Act 1975 (Cth) should be amended to provide that in determining what arrangements promote the best interests of an Aboriginal or Torres Strait Islander child, a court must consider the child's opportunities to connect with, and maintain the child's connection to, the child's family, community, culture, and country.

[14] SNAICC. (2012). Healing in practice: Promising practices in healing programs for Aboriginal and Torres Strait Islander children and families. Fitzroy, Victoria: SNAICC

[15] UN General Assembly. (2007). United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, Retrieved from Weblink

that "Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons."[16] It is crucial for the family law amendment to uphold the rights set out in the UNDRIP and ensure that the language under subsection (s60CC(3)) reflects this.

Internationally, the Canadian child welfare legislation, Bill C-92 *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, begins with a statement that it must be interpreted and administered according to the principles of the best interests of the child. It further elaborates that a child's ongoing relationships, community and connections to culture should be a "primary consideration" when determining the best interests of the child.[17] The Canadian legislation also includes the principle of "cultural continuity" which emphasises the relationship between an Indigenous child's wellbeing and their connection to their culture and community. Strong, mandatory language in family law legislation is crucial to address judicial bias and ensure cultural rights are central to best interests interpretations and decisions. VACCA believes that including language such as that in the Canadian legislation would strengthen the family law amendment and ensure that culture as a primary consideration when determining the best interest of the child.

The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) is a framework designed to promote policy and practice that will reduce the overrepresentation of Aboriginal children in the child protection system. The ATSICPP highlights the importance of connections to family, community, culture and Country in child and family welfare legislation, policy and practice, and asserts that self-determining communities are central to supporting and maintaining those connections.[18] The ATSICPP aims to ensure that culture underpins and supports the safety and wellbeing of Aboriginal children, that the rights of

[16] UN General Assembly. (2007). United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, Retrieved from Weblink

[17] Yellowhead Institute (2019). The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children, Youth and Families. Retrieved from Weblink

[18] SNAICC (2019). The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation. Retrieved from Weblink

Aboriginal children, families and communities protected and to strengthen their self-determination.[19]

In the Victorian *Children, Youth Families Act 2005*, the 'Connection' element of the ATSICPP in regard to placement with non-Aboriginal family is stipulated in paragraph (s13(2)(c)). It states that "any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community."[20] While the ATSICPP is specific to Aboriginal children in out-of-home care, the Federal Government should legislatively enshrine how ATSICPP should be applied in family law matters. This would include strengthening the wording under the amendment (s60CC(3)) to improve accountability and ensure protection and maintenance of cultural rights for Aboriginal children who are separated from their Aboriginal parents, alongside their participation in decisions regarding their care.

In addition to including the above wording related to cultural rights, the family law amendment could draw on the Statement of Recognition in the *Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Bill 2023* that was presented to Parliament on the 23rd February 2023. The Statement of Recognition seeks to strengthen recognition of the rights of Aboriginal children and families by acknowledging the "distinct cultural rights of Aboriginal people and the right to self-determination" subsection (s7A(7)). Implementing the cultural elements of the CYFA in the family law amendment can also contribute to greater cohesion between state and national systems.

A key concern of ours remains how cultural rights will be met when an Aboriginal child is placed with a non-Aboriginal parent/carer. The family law amendment provides little around the accountability, responsibility, implementation, and what evidence will be provided by the non-Aboriginal parent/carer to ensure that the cultural rights of children are met. On the other hand, (s60CC(2)(d)) provides more explicit instruction around a carer's "capacity" to meet the child's developmental, psychological and emotional needs and their "ability and willingness to seek support to assist them with caring". To ensure responsibility in meeting

[19] Ibid

[20] Child Youth and Families Act 2005 (Vic). Act Number 95/2005 Version 121. Retrieved from Weblink

cultural rights, (s60CC(3)) could be strengthened through the inclusion of wording from (s60CC(2)(d)). Therefore, in determining the best interests of a child, the Court must also consider the non-Aboriginal carer's capacity, ability and willingness to meet an Aboriginal child's cultural rights and this must be reflected under (s60CC(3)).

Further, SNAICC's practice guide for implementing the ATSICPP emphasises that "if a child is removed to ensure their safety, they must have the most appropriate placement with processes, supports and accountabilities in place to ensure their safety and enable cultural continuity and connection."[21] Thereby, connection to culture and safety are not mutually exclusive and if a child has been placed with their non-Aboriginal parent as part of a family law determination, processes, supports and accountabilities must be in place and stipulated by the legislation to ensure a child's cultural rights are met.

VACCA also notes that the definition of 'carer' under paragraph (s60CC(2)(a)(ii)) assumes that carers are only people with parental responsibility. We recommend for this to be simplified to "each person who has the care of the child" which can better allow for Aboriginal family structures, kin, stepparents or grandparents.

## Equal shared parental responsibility

*Family violence*

Previous inquiries as well as practice experience detailed by Victoria Legal Aid have highlighted that the concepts of "equal shared parental responsibility" and "time spent with the child" are often conflated and confusing to parents. While it is VACCA's understanding that "equal shared parental responsibility" did not apply to cases where family violence is present, we note that often experiences of family violence, including coercive control may not be visible within the context of the family law proceeding, nor reported to authorities and therefore unproven which poses safety concerns to women and children who might be affected by any determination made. VACCA emphasises the need for a lens of safety for children and women to be applied in all matters and the removal of the presumption of

[21] SNAICC (2019). The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation. Retrieved from Weblink

equal shared parental responsibility will go some way to support this approach, noting that this may prevent or limit exposure to a user of family violence.

While VACCA supports the removal of the presumption of equal shared parental responsibility and holds the safety of children as central, we highlight that courts often falsely scrutinise Aboriginal families and women due to unconscious bias and institutional racism and this can have implications for placement decisions and access to a child's Aboriginal family.

Our frontline program staff report that Aboriginal women are often misidentified as users of family violence. In a 2021 review, the Victorian Family Violence Implementation Monitor found high rates of misidentification among Aboriginal women. Between 2016 and 2020, nearly 80 per cent of Aboriginal women who were identified by police as the respondent in family violence incidents had also been previously recorded as a victim-survivor (compared with nearly 60 per cent for all female respondents).[22] VACCA is aware that Victoria Police is strengthening their practice and training to try and minimise this occurring, but considerable work remains.

Victoria's Multi-Agency Risk Assessment and Management (MARAM) Framework is a cross sector tool that is used to identify, assess and manage family violence risk, it allows the sharing of information between services to ensure that people using violence are kept in view and children and victim survivors safe and supported. VACCA recommends for the implementation of risk assessment and safety planning, such as the MARAM Framework, in the family law court whenever there is a matter involving family violence. We also call for mandatory psychoeducational and cultural awareness training where family violence is concerned.

In addition to risk assessment and safety planning mechanisms, we call for a review mechanism to be implemented including a safety contact worker to determine safety and patterns of behaviour in cases where a child is placed away from their Aboriginal family due

[22] Crime Statistics Agency (2020): Magistrates' Court Data Tables 2019–20, Table 4. Outcome of FVIO applications by gender of respondent, July 2015 to June 2020.

to an Aboriginal parent using violence. This can allow assessment as to whether behaviours have improved, so that a child can have more access to that parent.

***Child's voice***

Aboriginal children have a right to be heard and for their needs to be respected. Ensuring our children's voices are heard relies on an understanding of Aboriginal culture, history, family, belonging, and community. Aboriginal children are part of families and communities that have historically not had a voice and continue to be denied the right to self-determination.

> *"We need to tell our Aboriginal kids that they are valued and loved and that their culture is valued and respected. The best protection we can offer any child is to give them a sense of belonging and a sense that they are active players in determining their future."*
>
> - Muriel Bamblett and Peter Lewis[23]

VACCA therefore recommends for trauma-informed mechanisms that protect and honour a child's voice to be implemented in the family law amendment, including enshrining the ATSICPP. Honouring a child's voice is particularly important in situations where children do not want to be placed with a particular carer.

***ACCO involvement in decision making about placement decisions***

ACCOs have the cultural and kinship expertise to support the children and families in ways that are reflective of Aboriginal child rearing practices and customs. It is therefore crucial for ACCOs to be actively involved by the Court in the decision-making process around best interests and placement decisions. This can support Aboriginal families to feel heard, improve cultural safety and increase levels of satisfaction with family law processes. VACCA contends that consideration should be given to our recommendation to adopt elements of the AFLDM model into FDR's so that ACCOs are involved in the decision making process and can provide necessary supports.

[23] Bamblett, M. & Lewis, P., (2006) Speaking Up Not Talking Down: Doing the Right Thing by Strengthening Culture for Indigenous Children.

***Carers with a disability***

Proposed paragraph 60CC(2)(d) speaks to the "capacity" of carers to care for their child as well as their "ability and willingness to seek supports to assist them with caring". While VACCA notes that it is important for parents to have the ability and willingness to seek supports, often our practitioners have highlighted the structural barriers that parents with disabilities can face in accessing the necessary supports that can assist them with caring for their children, irrespective of their willingness to seek such supports. This is in part due to a lack of culturally safe, accessible services as well as difficulties in navigating the NDIS and disability sector as experienced by many VACCA families.[24]

The language used in paragraph 60CC(2)(d) reflects an individualistic framing rather than a more holistic, trauma-informed and therapeutic approach that stipulates the shared responsibility of the service system to ensure a carer has the best opportunity to care for their child. We therefore recommend that this section be reworded to ensure structural barriers to access do not get conflated into an individuals unwillingness to seek necessary supports.

**VACCA recommends for the Federal Government to:**

4. Ensure that culture is a primary consideration when determining the best interests of an Aboriginal child by amending language under subsection (s60CC(3)) to be strong, mandatory, rights-based and consistent with:
    - The rights stipulated in the UNDRIP,
    - The concept of 'cultural continuity' as per Canadian legislation,
    - The ATSICPP as per *Children, Youth Families Act 2005 (Vic),* and
    - Statement of Recognition in the *Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022.*

[24] See VACCA's response to 'Issues Paper: The Experiences of First Nations Peoples with Disability in Australia' for further detail.

5. Include explicit language around accountability and responsibility for how cultural rights will be implemented when an Aboriginal child is placed with a non-Aboriginal carer.
6. Include consideration under (s60CC(3)) around non-Aboriginal carer's capacity, ability and willingness to meet an Aboriginal child's cultural rights.
7. Implementation of risk assessment, safety planning and review mechanisms in the family law court whenever there is a matter involving family violence.
8. Implementation of mandatory psychoeducational and cultural awareness training where family violence is concerned.
9. Involve ACCOs in the decision-making process regarding placement decisions.
10. Implement trauma-informed mechanisms that protect and honour a child's voice in the family law amendment.
11. Amend wording in paragraph 60CC(2)(d) to ensure structural barriers to accessing services are not conflated to an unwillingness of the individual to seek necessary supports.

## Schedule 3: Definition of 'member of the family' and 'relative'

VACCA welcomes the amendments under subsection 4(1), subparagraph (a)(vi) around the of the definition of a relative to include a person who, in accordance with the child's Aboriginal culture, is related to the child. However, we suggest that this language can be further strengthened beyond "in accordance with the child's Aboriginal culture" to include language around what this means, such as adhering to Aboriginal family structures, cultural models of family, kinship and extended family such as grandparents, aunties and uncles. Including this detail can better assist the Court in interpreting the legislation and ensure an Aboriginal child's cultural rights are protected. This can be further strengthened by implementing the ALRC inquiry's Recommendation 9 which states that the legislation be "amended to provide a definition of member of the family that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of

the case." We also suggest for the removal of "stepparent" and for the addition instead of the term "blended family" as this is more consistent with contemporary family structures.

**VACCA recommends for the Federal Government to:**

12. Under subsection 4(1), subparagraph (a)(vi), expand on "in accordance with the child's Aboriginal culture" and include "adhering to Aboriginal family structures, cultural models of family, kinship and extended family".
13. Implement ALRC inquiry's Recommendation 9 which states that the legislation be "amended to provide a definition of member of the family that is inclusive of any Aboriginal or Torres Strait Islander concept of family that is relevant in the particular circumstances of the case."

## Schedule 4: Independent Children's Lawyers

VACCA welcomes amendments requiring for Independent Children's Lawyers (ICLs) to meet with children and allow their views to be expressed in relation to the matters to which the proceedings relate. As discussed, it is crucial for the voices of Aboriginal children to be heard in family law matters and we stress that this must be done in culturally safe and trauma-informed manner. VACCA recommends for subsection 68LA(5A) to outline the necessary skills and training ICLs must have when supporting Aboriginal children in family law processes. These include an agreed level of cultural understanding and awareness as well as therapeutic and trauma-informed approach, especially in cases where family violence is present.

In consultation with VACCA, Victorian Legal Aid raised that this amendment will have funding implications with an increase in the demand for ICLs. We therefore call for ICLs to be well resourced and, in particular, have dedicated funding for Aboriginal Legal Services to provide ICL functions.

**VACCA recommends for the Federal Government to:**

14. Amend subsection 68LA(5A) to outline the necessary skills and training Independent Children's Lawyers must have when supporting Aboriginal children in family law processes, such as an agreed level of cultural understanding and awareness and therapeutic and trauma-informed approach.

15. Increase funding for Aboriginal legal services to deliver culturally appropriate and trauma informed Independent Children's Lawyers.

## Final Commentary

VACCA seeks consideration from the Family Law Reform Unit as to how they will communicate the final amendments to the Act and the implications these will have on family law proceedings to the Australian public. VACCA recommends that thoughtful consideration is given to developing a communications strategy that includes key messaging and resources that will help inform key stakeholders. Firstly, this involves resources for families and the legal community that supports these proceedings (including training). Secondly, a particular focus is needed on developing Aboriginal-specific and age appropriate resources to support children and young people understand these changes. Finally, resources that will help inform affected family members experiencing family violence where part of the coercive control they are experiencing results in the fear of having to share equal access of their children with their abusive partner/former partner. VACCA is in a strong position to be able to inform and develop these resources.

VACCA looks forward to seeing the progression and implementation of these proposed amendments and we welcome the opportunity to discuss our recommendations with the Family Law Reform Unit in the Attorney-General's Department.

**VACCA recommends for the Federal Government to:**

16. Develop a multi-tiered communications strategy that will help inform the Australian public about these amendments and the impact these will have on family law proceedings.

For more information, please get in touch with Sarah Gafforini, Director, Office of the CEO at sarahg@vacca.org.