



Victorian Aboriginal Child Care Agency

**Response to the Inquiry into  
Application of the United Nations  
Declaration on the Rights of  
Indigenous Peoples**

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## INTRODUCTION

The Victorian Aboriginal Child Care Agency (VACCA) is the lead Aboriginal child and family welfare organisation in Australia and the largest provider of Aboriginal family violence services in Victoria. We work holistically with children, young people, women, men, Elders and families to ensure they have the necessary supports to heal and thrive.

VACCA welcomes the opportunity to provide feedback to the Inquiry into Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia. As an Aboriginal Community-Controlled Organisation (ACCO), VACCA has been a strong advocate for the rights of Aboriginal peoples and communities since its formation in 1976. The UNDRIP recognises that Indigenous peoples across the globe hold self-determining rights in issues concerning health, education, wellbeing, social housing, law, justice, family violence and children and families. VACCA's role in providing services across this continuum, makes us well placed to provide input on the federal and state government's efforts to implement all principles of UNDRIP.

We provide services to over 3,000 children and young people, and over 500 families, with strong connections not only to clients, but across community. Our submission has a particular focus on what implementation of the UNDRIP means within the context of Aboriginal-led, culturally safe service delivery.

VACCA's submission offers the following observations and recommendations as they pertain to the children, young people, and families with who we work.

## KEY POINTS

- To date, no Australian government has formally committed to implementing UNDRIP into law, policy or practice. Though all governments have committed to the National Agreement on Closing the Gap, which would be the key platform addressing the principles of UNDRIP, minimal progress has been made on these targets. Under the newly elected Labor Government, there is an opportunity to build on their commitment to the Uluru Statement from the Heart, to see a plan to negotiate with Aboriginal peoples to develop an approach to enacting UNDRIP across the country.
- Australian governments have historically neglected and actively breached the rights of Aboriginal peoples, with numerous intentional strategies suppressing rights and perpetrating cultural genocide. The impact of historical and ongoing discriminatory and damaging policies and practices has led to the current systemic discrimination and overrepresentation of Aboriginal people in key health and social outcomes.
- In acknowledging that sovereignty has never been ceded, Aboriginal peoples must be seen as rights holders rather than stakeholders. Any reform and negotiation must be driven and led by Aboriginal voices not simply as a party to consult or co-design.
- Internationally, there are recent examples of jurisdictions taking initial steps toward or enacting UNDRIP within legislation, including in enabling self-determination over child welfare matters for Indigenous children.
- While federal and state governments have taken a number of steps that in their intent would support stronger adherence to UNDRIP, further efforts are needed to enable full implementation. Existing political and legal structures will continue to limit what might be possible in protecting Aboriginal rights in Australia and therefore requires transformation of existing power structures resulting in more equitable power sharing between Aboriginal peoples and the state.



- Under the National Agreement on Closing the Gap, governments have made a commitment to reduce the overrepresentation of Aboriginal children in out-of-home care by 45% by 2031. Delivering on this commitment is vital for protecting the rights of Aboriginal children to grow up with family, community, culture and Country, as guaranteed under the UNDRIP and the UN Convention on the Rights of the Child.
- Whilst the Aboriginal Children in Aboriginal Care (ACAC) program is ahead of self-determination reforms in the child and family welfare space in other jurisdictions, significant challenges and areas for improvement remain. Reforms are focused on the out-of-home care sector, ignore the failings of the child protection system as a whole and fail to embed the Victorian Government's commitment to self-determination in family support and justice services sector. As well as continuing to dismiss key recommendations from the 1997 *Bringing them Home* report to develop Aboriginal community-designed and led child welfare and protection systems.
- A potential barrier to accessing future treaty rights and Native Title rights will be the significant number of Aboriginal children in out-of-home care who do not hold a Confirmation of Aboriginality and are not registered with their Traditional Owner Corporation(s). Additionally, there must also be specific considerations for Stolen Generations who may still be seeking their family history to know which Country they belong to.

#### 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.
- The term 'Indigenous' is used in the international context when referring to peoples who, as distinct cultural and social groups that share collective ties to the lands where they live or have been displaced from, hold collective rights under the UNDRIP.

#### VACCA RECOMMENDATIONS

1. For all legislative and policy reform to align with the UNDRIP principles, including the right of Indigenous peoples to be self-determining in issues related to child and family wellbeing
  - a. Adopt a national approach to early intervention and targeted support for Aboriginal children to address the disparity in investment in early intervention and family support programs for ACCOs.
  - b. A renewed commitment to implementing, monitoring and reporting on all 54 recommendations of the *Bringing them Home* report.
2. Strong recognition of the unique needs of Aboriginal children in contact with the child protection and justice systems including out-of-home care and the Stolen Generations in implementing the rights enshrined in UNDRIP
  - a. That ACCOs be resourced appropriately to undertake the actions necessary to ensure that all Aboriginal children in out-of-home care and in the justice system have access to Confirmation of Aboriginality.
  - b. That governments continue to sustainably resource ACCOs, including Link Up Victoria, to provide culturally appropriate support services to children in out of home care and the justice systems; and to enable historical and contemporary Stolen Generations to reconnect with Traditional Owners and Country, and access Native Title and any future treaty rights to which they are entitled.
3. For Australian governments to take immediate action to ensure that the right to self-determination is recognised in Australian law and aligned with the UNDRIP
  - a. For the Victorian Government this means amending the Charter of Human Rights and Responsibilities to recognise the right to self-determination.
  - b. The Commonwealth Government must develop a national Bill of Rights, which includes

the right to self-determination.

## **RESPONSE TO THE INQUIRY'S TERMS OF REFERENCE**

### **THE HISTORY OF AUSTRALIA'S SUPPORT FOR AND APPLICATION OF THE UNDRIP**

In 2007 the Howard Government voted against adopting the UNDRIP, one of four settler-states to do so. This action cemented Australia's legacy of racism and discrimination towards Aboriginal peoples that has continued for over 200 years. Citing concerns "over provisions of self-determination, land and resources rights and giving Indigenous peoples a right of veto over national legislation and state management of resources", the Australian government rejected the Declaration.<sup>1</sup>

Eventually, in 2009, Australia signed onto the UNDRIP as the last country to do so, however little changed realistically in protecting Aboriginal peoples in Australia. As of now, Australia has not implemented the UNDRIP into law, policy and practice and has failed to negotiate with Aboriginal peoples about a National Plan or Strategy to implement the UNDRIP. Despite claiming to promote the UNDRIP through the Closing the Gap Strategy, as the leading policy platform on Aboriginal matters, the Australian government has failed to progress meaningful change.

The Australian Government has continued to disregard the protection of Aboriginal peoples' rights in the constitution and in Parliament, often treating Aboriginal peoples as minorities whilst withholding collective rights. This has been evident through the dismissal and unwillingness to adopt the Uluru Statement From the Heart, which was first presented calling for Voice, Treaty and Truth in 2017. Then prime minister Malcolm Turnbull rejected the proposal, and his opposition to the proposal included the inaccurate perception that the Voice to Parliament was equivalent to a third chamber in Parliament.<sup>2</sup> This notion has largely been rejected by constitutional experts, and the Albanese government has committed to a referendum on the Voice in the first term and to implementing the Statement in full.<sup>3</sup> This was not the first iteration of Aboriginal polity, the Aboriginal and Torres Strait Islander Commission (ATSIC) was a representative body including region-based structure and provided a range of services to community. It was decommissioned in 2005 during the Howard era after a review which called for structural change.<sup>4</sup>

These accumulative instances of the denial of rights, lack of parliamentary acknowledgement and repeated dismissals of governing participation for Aboriginal peoples in the Australian Government have led to an absence of involvement and engagement. VACCA's response to the Inquiry into the Application of the UNDRIP welcomes the opportunity to provide our perspective on the possibilities inherent in protecting the fundamental human rights of Aboriginal peoples as specified in the UNDRIP through full adoption and legislation.

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<sup>1</sup> Australian Broadcasting Corporation. (2007, 14 September). Australia opposes UN rights declaration. *ABC News*. Retrieved from: <https://www.abc.net.au/news/2007-09-14/australia-opposes-un-rights-declaration/669612>

<sup>2</sup> The Hon. Malcolm Turnbull MP Prime Minister, Senator the Hon. George Brandis QC Attorney-General, Senator the Hon. Nigel Scullion Minister for Indigenous Affairs, Joint Media Release "Response to Referendum Council's report on Constitutional Recognition", 26 October 2017.

<sup>3</sup> Michael Pelly, "Indigenous Voice won't be 'third chamber': Law Council" (*Australian Financial Review*, May 25, 2022)

<sup>4</sup> Review Panel, (2003), *In The Hands Of The Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, Canberra: Government Printers

## THE CURRENT AND HISTORICAL SYSTEMIC AND OTHER ASPECTS TO TAKE INTO CONSIDERATION REGARDING THE RIGHTS OF FIRST NATIONS PEOPLE IN AUSTRALIA

Australian governments have historically neglected and actively breached the rights of Aboriginal peoples in numerous ways. Intentional strategies by successive Australian federal and state governments have suppressed the rights of Aboriginal people and perpetrated cultural genocide. From the moment of colonisation and the implications of the declaration of terra nullius, and forced removal of Aboriginal children from their families, early Australian governments attempted to erase the existence and rights of the First Peoples of these lands.

Forced removal policies enabled not just removing children from their families but also the violent dispossession of Aboriginal peoples from their lands by moving them onto missions and reserves, denying access to their cultural practices and ways of being, taking children from their parent's arms and forcing them to become domestic servants or grow up with non-Aboriginal families, not knowing who they were or where they belong. Some children have never found their way home.

Further, Australian government policies of assimilation, lack of citizenship and voting rights, and Australia's initial refusal to become a signatory to the UNDRIP, are all indicators of the systemic neglect and suppression of the rights of Aboriginal people and communities perpetrated by state and federal governments.

These factors speak to an Australia that was not interested in upholding the rights of Aboriginal peoples, nor anyone that did not reflect the 'Australian identity' that they wanted to promote. Acknowledging the rights of Aboriginal peoples requires Australia as a nation to address the issue of sovereignty, treaties and truth-telling, including the (ongoing) atrocities committed against Aboriginal peoples by the state since invasion. If we are, as a country to reckon with the fact that that sovereignty has never been ceded, Aboriginal peoples must be seen as rights holders rather than stakeholders, so any reform and negotiation must be driven and led by Aboriginal voices, not simply as a party to consult.

The impact of historical and ongoing discriminatory and damaging policies and practices has led to the current systemic discrimination and overrepresentation of Aboriginal people in the following key health and social outcomes:

- Aboriginal children are 20 times more likely to be living in out-of-home care than their non-Aboriginal peers in Victoria<sup>5</sup>
- Aboriginal children in Victoria are 9 times more likely to be under youth justice supervision than their non-Aboriginal peers in Victoria<sup>6</sup>
- Aboriginal people are the most incarcerated population in the world<sup>7</sup>
- Low age of criminal responsibility disproportionately affects Aboriginal children, accounting for 67% of these younger children in prisons<sup>8</sup>

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<sup>5</sup> Australian Institute of Health and Welfare. (2022). *Table S5.10: Children in out-of-home care, by Indigenous status and state or territory, 30 June 2021*. Retrieved from: <https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2020-21/data>

<sup>6</sup> Australian Institute of Health and Welfare. (2022). *Table S7c: Young people aged 10-17 under on an average day by Indigenous status and age, states and territories, 2020-21 (rate)*. Retrieved from: <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>

<sup>7</sup> Indigenous Justice Clearinghouse. (2019). *Indigenous people in Australia and New Zealand and the intergenerational effects of incarceration*. Retrieved from: <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/intergenerational-effects-of-incarceration-fa.pdf>

<sup>8</sup> Australian Institute of Health and Welfare. (2022). *Table S7b: Young people under supervision during the year by*

- There have been 500 deaths in custody since the 1991 Royal Commission into Aboriginal Deaths in Custody<sup>9</sup>
- Aboriginal people are significantly more likely to experience homelessness, making up 28% of the clients assisted by specialist homelessness services in 2020-21<sup>10</sup>

In Victoria, formal Treaty and Truth-Telling processes have begun, which are a welcome step forward in acknowledging past and ongoing harm perpetrated against Aboriginal peoples and advancing self-determination rights for all Aboriginal people living in Victoria. The Yoorrook Justice Commission has been established in Victoria and is the first truth-telling body in Australia. Truth-telling through Yoorrook will be a fundamental step in acknowledging the human rights violations experienced by Aboriginal peoples and promoting the voices of the communities who have been harmed, it must also be an opportunity for healing. This process will help Australian governments and society to understand the full breaches of human rights against Aboriginal people here in Victoria since colonisation, in order to understand the scope of the problem and the reparation that will be required. We believe that enhancing legislative, policy and program and practice frameworks through treaties that entrench the implementation of self-determination in relation to the needs of our children and their rights continues to be integral and is the only way forward.

On a federal level, there has been much resistance to taking similar steps, however we are hopeful that the recently elected Labor Government will follow through on their commitment to implement the Uluru Statement from the Heart in full, including Treaty and truth-telling processes. Past government resistance to ensuring the specific rights and self-determination of Aboriginal peoples in this country is evidenced by the reluctance to implement the Uluru Statement or engage in truth-telling processes to reshape the national dialogue on the discrimination, genocide and human rights violations experienced, as well as the resilience, strength and sovereignty of Aboriginal and Torres Strait Islander peoples.

Aboriginal children experience a number of systemic barriers that inhibit their ability to exercise their rights, not least of which includes the lack of access to culturally safe services and supports. ACCOs receive disproportionately low funding compared to mainstream services, despite the implications of colonisation and discriminatory practices on their health and social and emotional wellbeing. Furthermore, during the COVID-19 pandemic, ACCOs and Aboriginal communities were further disadvantaged and disregarded, despite being more vulnerable to greater harm from the virus and related restrictions.

Self-determination is an 'ongoing process of choice' to ensure that Aboriginal communities are able to meet their social, cultural and economic needs. It is not about creating a separate Aboriginal 'state'. The right to self-determination is based on the simple acknowledgment that Aboriginal peoples are Australia's first people, as was recognised by law in the historic Mabo judgement. Without self-determination it is not possible for Aboriginal peoples in Australia to fully overcome the legacy of colonisation and dispossession.

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*Indigenous status and age, states and territories, 2021-21.* Retrieved from: <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>

<sup>9</sup> Allam, L. (2021, December 6). 'Beyond heartbreaking': 500 Indigenous deaths in custody since 1991 royal commission. *The Guardian: Australia Edition*. Retrieved from: <https://www.theguardian.com/australia-news/2021/dec/06/beyond-heartbreaking-500-indigenous-deaths-in-custody-since-1991-royal-commission#:~:text=Five%20hundred%20Aboriginal%20and%20Torres,deaths%20in%20the%20justice%20system>

<sup>10</sup> Australian Institute of Health and Welfare. (2021). *Specialist homelessness services annual report 2020-21*. Retrieved from: <https://www.aihw.gov.au/reports/homelessness-services/specialist-homelessness-services-annual-report/contents/indigenous-clients>

For Aboriginal children and young people in child welfare, acquiring skills related to self-determination is vitally important. This is because their freedom to move around, express themselves clearly or interact with others may look different than what other children living at home and in their community typically do. Self-determination is about empowerment. It is where Aboriginal children experience:

- Freedom – to plan their own lives with necessary supports
- Dignity and respect – all people have a right to be treated with respect
- Choice and control – Aboriginal have the right to change what they will do with their lives and to exercise their right to make their own choices
- Participation – full and effective participation and inclusion in society, community
- Accessibility – access to services and supports freely available to all
- Partnerships – recognising and respecting cultural differences, strengths and a shared commitment to building deep, respectful and genuine relationships and work to address power imbalances
- Systemic equality – systems have policies, programs and practices and decision-making that take account of individual differences
- Informed decision making – capacity to make their decisions their way. It is about the right to make decisions about and exercise these rights over the course of their lives
- Self-determination principles complement best interest principles when it comes to Aboriginal children in child protection.

### INTERNATIONAL EXPERIENCES OF ENACTING AND ENFORCING UNDRIP

Internationally, there are recent examples of jurisdictions taking initial steps toward or enacting UNDRIP within legislation upon which all Australian governments could draw, including within New Zealand and Canada. New Zealand committed to fully implement the UNDRIP and announced their intention to begin formal consultations with Māori on an implementation plan, with the aim of developing a framework for UNDRIP implementation by the end of 2022.<sup>11</sup> With Canada significantly more advanced in relation to UNDRIP implementation, this section will provide an overview of some of the steps the Canadian Government has taken thus far, particularly as they relate to child welfare.

#### THE UNDRIP IN CANADA

In Canada, at the federal level, the *United Nations Declaration on the Rights of Indigenous Peoples Act* became law in 2021. Under the Act, the Canadian Government is required to ensure that the laws of Canada are consistent with the UNDRIP, develop and implement an action plan to achieve compliance, and prepare an annual report to Parliament on its progress in implementing the UNDRIP principles.<sup>12</sup> At the time of writing, the Government of Canada is currently in the process of consulting with First Nations, Inuit and Métis communities to develop a draft action plan and initial implementation measures.<sup>13</sup> In British Columbia, the provincial government passed the first legislative framework aimed at implementing the UNDRIP, the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*, and are in the process of developing a plan for implementation. Both the Canadian and British Columbian legislation require governments to amend existing laws to ensure they do not contravene the principles of the UNDRIP, and for future laws and policies to be developed and applied in a way that is consistent with the UNDRIP. First Nations, Inuit and Métis leaders have expressed optimism at

<sup>11</sup> New Zealand Government. (2021, October 14). *Next steps in action plan for Indigenous rights kicks off* [Press release]. Retrieved from: <https://www.beehive.govt.nz/release/next-steps-action-plan-indigenous-rights-kicks>

<sup>12</sup> Government of Canada. (2022). *About the Act*. Retrieved from: <https://www.justice.gc.ca/eng/declaration/legislation.html>

<sup>13</sup> Government of Canada. (2022). *Next Steps*. Retrieved from: <https://www.justice.gc.ca/eng/declaration/engagement/index.html>

the potential for UNDRIP implementation, noting that it is a “helpful tool for Indigenous communities to hold governments accountable politically.”<sup>14</sup> Yet, they caution that a major challenge will be defining and codifying what principles, such as self-determination, and free, prior and informed consent mean in practice.<sup>15</sup>

There have also been specific efforts to enact the UNDRIP within the context of First Nations, Inuit and Métis children’s rights. *Bill C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, which is designed to recognise and enable Indigenous peoples’ jurisdiction over child welfare, states its purpose as contributing to the implementation of the UNDRIP. Notably, this approach differs from forms of delegated authority that operate within the Victorian child welfare system. It has the potential to move beyond a form of self-government that is limited to operational administration and entrench the implementation of self-determination in relation to the needs of children.

As of January 2022, 54 Indigenous governing bodies submitted notice to the federal government stating their intent of exercising jurisdiction in child welfare, this includes the ability to develop and administer their own laws.<sup>16</sup> In its 2022 budget, the Canadian Government committed \$87.3 million over 3 years to support Indigenous communities in their negotiations with government to exercise jurisdiction. In addition, the budget provides \$340.8 million to the Wabeseemoong Independent Nations’ to enact and deliver services under its own child welfare authority.<sup>17</sup> It remains to be seen whether this model will fulfill its purpose of strengthening self-determination and creating meaningful change in the lives of Indigenous children and families, with leaders cautioning the lack of a clear commitment for long-term, substantive funding to develop, implement, and sustain child welfare arrangements.<sup>18</sup>

## AUSTRALIAN FEDERAL AND STATE GOVERNMENT’S ADHERENCE TO THE PRINCIPLES OF THE UNDRIP

VACCA is particularly focussed on what implementation of UNDRIP means within the context of the rights of Aboriginal children and young people. Aboriginal children and young people experience serious disadvantage and discrimination within Australian society, including breaches to their rights by federal and state authorities. Stronger adherence to the principles contained within the UNDRIP would be an important commitment toward improving outcomes for Aboriginal children and young people.

Further efforts are needed to enable full implementation of UNDRIP. Existing political and legal structures will continue to limit what might be possible in protecting Aboriginal rights in Australia and will require a transformation of existing power structures resulting in a more equitable power sharing between Aboriginal peoples and the state. Without effective jurisdiction or sovereign control over substantive decision-making, Indigenous peoples find it difficult to exercise their right to self-

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<sup>14</sup> Yellowhead Institute. (2020). *The UN Declaration on the Rights of Indigenous Peoples: Lessons from BC*, p. 5. Retrieved from: <https://yellowheadinstitute.org/wp-content/uploads/2020/12/yellowhead-institute-bc-undrip-report-12.20-compressed.pdf>

<sup>15</sup> Ibid.

<sup>16</sup> Government of Canada. (2022, January 6). *Act Respecting First Nations, Inuit and Métis Children, Youth and Families celebrates its second anniversary* [Press release]. Retrieved from: <https://www.canada.ca/en/indigenous-services-canada/news/2022/01/the-act-respecting-first-nations-inuit-and-metis-children-youth-and-families-celebrates-its-second-anniversary.html>

<sup>17</sup> Government of Canada. (2022, April 7). *Moving forward on reconciliation* [Press release]. Retrieved from: <https://www.canada.ca/en/department-finance/news/2022/04/moving-forward-on-reconciliation.html>

<sup>18</sup> Yellowhead Institute. (2019). *The promises and pitfalls of C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*. Retrieved from: <https://yellowheadinstitute.org/wp-content/uploads/2019/07/the-promise-and-pitfalls-of-c-92-report.pdf>



determination. Self-government that is limited to operational administration, allowing Indigenous peoples to administer services that were once administered by somebody else, is not effective self-determination.

### **SELF DETERMINATION IN CHILD PROTECTION**

All Australian governments have committed to a nationally coordinated approach to improving the lives of Aboriginal peoples through the National Agreement on Closing the Gap. The National Agreement on Closing the Gap represents a fundamental shift in the approach of governments, one that is built upon genuine and meaningful partnerships with the ACCO sector and the wider Aboriginal community. The original Closing the Gap policy, agreed in 2008 by the Council of Australian Governments (COAG), never had full ownership from Aboriginal peoples and was always considered an initiative of government. The new National Agreement on Closing the Gap, signed in July 2020 sets out a different way of Governments working in partnership with Aboriginal peoples to achieve better life outcomes. It includes four priority reform areas:

1. Shared decision making
2. Building the ACCO sector
3. Improving mainstream institutions
4. Ensuring First Nations access to relevant data and information<sup>19</sup>

Under the National Agreement, governments have made a commitment to reduce the overrepresentation of Aboriginal children in out-of-home-care by 45% by 2031. Delivering on this commitment is vital for protecting the rights of Aboriginal children to grow up within their family, community, culture and Country, as guaranteed under the UNDRIP and the UN Convention on the Rights of the Child. Achieving the target requires that ACCOs are enabled to determine children's best interests and invested in to support families.

Unfortunately, the current trajectory suggests that Victoria is unlikely to meet this target as the number of Aboriginal children entering out-of-home care continues to rise year upon year. To address the overrepresentation, the Victorian Government has committed to reforms that seek to increase the involvement of ACCOs in the design and delivery of child and family services and implement the right to self-determination.

The *Children and Health Legislation Amendment Act (Statement of Recognition and Other Matters) Bill 2022*, which sets out a number of proposed amendments to the *Children, Youth and Families Act (CYFA) 2005* is currently before the Victorian Parliament. The Bill includes a number of amendments that seek to strengthen recognition of the rights of Aboriginal children and families, including a Statement of Recognition which acknowledges the "distinct cultural rights of Aboriginal people and their right to self-determination" (section 7A(7)).

Yet, we also note that the Bill includes proposed additional functions for the Commission for Children and Young People, including to advocate for the human rights of protected children; but the definition of human rights is limited to those rights included in the Victorian Charter of Human Rights and Responsibilities, which excludes the right to self-determination:

- 30B Commission's functions in relation to 5 protected children or young persons
- (1) The Commission may provide advice, information and support to a protected child or young person.

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<sup>19</sup> Australian Governments., & the Coalition of Aboriginal and Torres Strait Islander Peak Organisations. (2020). *National Agreement on Closing the Gap*. Retrieved from: <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap>

(2) The Commission may advocate for the safety, welfare, wellbeing and human rights of a protected child or young person

***In this section— human right means a human right protected by the Charter of Human Rights and Responsibilities Act 2006<sup>20</sup>***

Article 3 of the UNDRIP recognises the right of Indigenous peoples, including children, to self-determination, which includes the right to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>21</sup> The development of the CYFA embedded the principles of self-management and self-determination in decision-making as it relates to Aboriginal children. Most notably, section 18 of CYFA enables transfer of authority to the CEO of Aboriginal agencies to undertake functions usually performed by the Secretary of the Department of Fairness, Families and Housing.<sup>22</sup> In practice, this means that an ACCO takes on all statutory decision-making responsibilities for an Aboriginal child on a care and protection order, under what is known as the Aboriginal Children in Aboriginal Care (ACAC) program.

Whilst CYFA 2005 originally established a broad recognition of the right to self-determination within child protection delivery, it did not clarify what this looks like practically, or how the principle would be applied. As discussed further under *Community and Stakeholder Efforts to Ensure the Application of UNDRIP*, significant advocacy by Aboriginal organisations and communities resulted in the development of a practice approach for implementing section 18.

The ACAC program is significantly ahead of self-determination reforms in the child and family welfare space in other jurisdictions, but challenges and areas for improvement remain. With reforms largely focused on the out-of-home care sector, there is an ongoing failure to embed the Victorian Government’s commitment to self-determination in the family support services sector. Notably, these reforms fall short of the vision outlined in the *Bringing them Home* report which recommended development of Aboriginal community-designed and led child welfare and protection systems, operating against a set of legislated minimum standards with Aboriginal agencies able to negotiate shared jurisdiction with Departments.<sup>23</sup>

As a priority, there is an urgent need for a self-determination reform strategy in this space that shifts family support services and programs into the control of Aboriginal communities in order to address the rising rates of Aboriginal children entering care in Victoria. This should, in alignment with the *Bringing Them Home* report, be built upon a long-term, self-determining vision, approach and investment to address the crisis of contemporary removals. Data shows that there is a major disparity in investment in early intervention and family support programs for ACCOs, who currently only receive 2% of early help funding, despite Aboriginal children accounting for 19% of the total number of children in out-of-home care.

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<sup>20</sup> Victorian Government. (2022). *Children and Health Legislation Amendment Act (Statement of Recognition and Other Matters) Bill 2022 Explanatory Memorandum*. Retrieved: <https://content.legislation.vic.gov.au/sites/default/files/bills/591329exi1.pdf>

<sup>21</sup> United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples*, para. 2. Retrieved from: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

<sup>22</sup> Blackstock, C., Bamblett, M., & Black, C. (2020). Indigenous ontology, international law and the application of the Convention to the over-representation of Indigenous children in Canada and Australia. *Child Abuse & Neglect*, 110, <https://doi.org/10.1016/j.chiabu.2020.104587>

<sup>23</sup> Human Rights and Equal Opportunity Commission. (1997). *Bringing them Home Report: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families*. Retrieved from: <https://humanrights.gov.au/our-work/bringing-them-home-appendix-9-recommendations>



## THE VICTORIAN TREATY PROCESS

Traditional Owners, represented by the First Peoples' Assembly of Victoria (FPAV) and the Victorian Government are currently in the process of preparing the framework required to negotiate treaty. The treaty process has the potential to implement several key principles of UNDRIP, including strengthening the right to self-determination (Article 3) and to maintain distinct political, legal, economic, social and cultural institutions (Article 5).<sup>24</sup> At this stage, it is intended that the negotiation process will include two key aspects: a state-wide treaty designed to cover all Aboriginal peoples in Victoria and which could include partial or full jurisdiction of key service sectors; and local treaties which will be focused on the rights held by Traditional Owners.<sup>25</sup>

The Victorian Treaty Process could address many of the systemic disadvantages that Aboriginal peoples, including children, experience in Victoria, and redefine the relationship between First Peoples and the state. Through the proposed state-wide treaty in particular, the positive outcomes that have been achieved in exercising self-determination within the child protection space can provide an important model for how such arrangements across education, justice, health, social housing, and family violence can further peoples' agency over their own lives, promote Aboriginal rights, and lead to better outcomes for children, families and communities.

A potential barrier to accessing future treaty rights and Native Title rights will be the significant number of Aboriginal children in out-of-home care who do not hold a Confirmation of Aboriginality and are not registered with their Traditional Owner Corporation(s). Additionally, there must also be specific considerations for Stolen Generations who may still be seeking their family history to know which country they belong to. The road to treaty must protect and embrace all Aboriginal people in Victoria, including those who are still finding their way back to community and Country. Traditional Owners have an integral role in acknowledging the experiences of Stolen Generations and Aboriginal children in out-of-home care who are disconnected from family and Country, and welcoming them home.

## THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

At the state-level, Victoria has the *Charter of Human Rights and Responsibilities* (the 'Charter'), which was established in 2006 and provides a legal context for consideration of the rights of Aboriginal peoples in Victoria. The Charter contains specific references to the rights of Aboriginal peoples, including the preamble which acknowledges that "human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters." Section 19 of the Charter recognises that Aboriginal peoples have "distinct cultural rights and must not be denied the right, with other members of their community –

- To enjoy their identity and culture; and
- To maintain and use their language; and
- To maintain their kinship ties; and
- To maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs."

Currently, the Charter falls far short of the conceptualisation of Indigenous rights contained within the UNDRIP, particularly in affirming the existence of collective rights. In international law, including UNDRIP, Indigenous rights are recognised as collective rights that are derived from the unique legal

<sup>24</sup> United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples*. Retrieved from: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

<sup>25</sup> First Peoples Assembly of Victoria. (n.d). *Big steps taken on the path to Treaty in Victoria*. Retrieved from: <https://www.firstpeoplesvic.org/media/big-steps-taken-on-the-path-to-treaty-in-victoria/>

status of Indigenous peoples as distinct communities.<sup>26</sup> However, as it currently stands, the Charter is weighted toward a western liberal framework of individual rights. This has served as a barrier to the recognition of the collective rights of Indigenous peoples, including the right to self-determination, within the Charter. Indeed, the Victorian Government's rationale for omitting the right to self-determination from the Charter was because it is a collective rather than an individual right and there is no consensus on what the right to self-determination comprises.<sup>27</sup>

Aboriginal communities have long advocated for the right to self-determination to be included within the Charter, including at its four- and eight-year reviews. At both reviews, there was significant advocacy work by Aboriginal communities in Victoria to articulate how the right to self-determination might be included.<sup>28</sup> The review processes have recognised the symbolic and practical importance of including the right to self-determination. For example, Michael Brett Young, who led the eight-year review, highlighted that inclusion of self-determination in the Charter would ““help facilitate the realisation of this right by requiring public authorities to consider self-determination of Aboriginal Victorians when developing laws and policies, delivering services, and making other decisions that affect Aboriginal people.”<sup>29</sup>

The ongoing lack of recognition of the right to self-determination, and collective rights more broadly, within Victoria's primary human rights framework is a significant gap in the state government's adherence to the principles of the UNDRIP. As a priority, the Victorian Government must commit to amending the Charter to ensure it recognises the collective right of Indigenous peoples to self-determination, in alignment with the UNDRIP.

VACCA also notes that Australia is one of the only western liberal democracies without a national Bill of Rights. The Victorian Equal Opportunity and Human Rights Commission has noted “this means that many core human rights and freedoms may not be adequately protected and promoted at a federal level and there is an inconsistent level of protection across Australian states and territories.”<sup>30</sup> This is of particular concern for groups who experience disadvantage and discrimination, including Aboriginal peoples. The Commonwealth Government has an important leadership role in championing the rights of Aboriginal peoples, and ensuring that regardless of where they live, all Aboriginal peoples have their collective rights to culture, land, and self-determination protected. VACCA recommends that the Commonwealth Government commit to developing a national Bill of Rights, which includes the right to Aboriginal self-determination.

## COMMUNITY AND STAKEHOLDER EFFORTS TO ENSURE THE APPLICATION OF UNDRIP PRINCIPLES IN AUSTRALIA

As the largest ACCO providing child and family welfare services in Victoria, VACCA believes in Aboriginal peoples' right to self-determination, the rights of the child and we commit to upholding Victorian Aboriginal cultural protocols.

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<sup>26</sup> Newman, D.G. (2006). Theorizing collective Indigenous rights. *American Indian Law Review*, 31(2), 273-289.

<sup>27</sup> Victorian Government. (2006). *Charter of Human Rights and Responsibilities Bill Explanatory Memorandum*. Retrieved from: [https://content.legislation.vic.gov.au/sites/default/files/19148fb1-3c53-3923-b78e-4b023778435a\\_551406exa1.pdf](https://content.legislation.vic.gov.au/sites/default/files/19148fb1-3c53-3923-b78e-4b023778435a_551406exa1.pdf)

<sup>28</sup> Victorian Equal Opportunity and Human Rights Commission. (2010). *Occasional paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*. Retrieved from: [https://www.humanrights.vic.gov.au/static/29936c72f45448d138baa59d29fcea7a/Resource-Report-Indigenous\\_self\\_determinaton-Mar\\_2010.pdf](https://www.humanrights.vic.gov.au/static/29936c72f45448d138baa59d29fcea7a/Resource-Report-Indigenous_self_determinaton-Mar_2010.pdf)

<sup>29</sup> Young, M.B. (2015). *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, p. 214. Retrieved from: [https://files.justice.vic.gov.au/2021-06/report\\_final\\_charter\\_review\\_2015.pdf?mK\\_WPBnWc3HIsZilADhtYs\\_v\\_2hkZggK=](https://files.justice.vic.gov.au/2021-06/report_final_charter_review_2015.pdf?mK_WPBnWc3HIsZilADhtYs_v_2hkZggK=)

<sup>30</sup> Victorian Equal Opportunity and Human Rights Commission.

### **CULTURAL THERAPEUTIC WAYS**

VACCA's Cultural Therapeutic Ways is a whole of agency approach to guide practice of healing for Aboriginal children, young people, families, community members and carers who come into contact with our services as well as creating a safe and supportive workplace for staff. It is the intersection of cultural practice with trauma and self-determination theories. The core premise is informed by an understanding of the trauma held by Aboriginal families as a result of colonisation and ongoing injustices.. The implementation of Cultural Therapeutic Ways places VACCA's clients at the centre of the way that services are delivered, with culture as the dorroong (Woiwurrung) – the heart – of program design. This ensures that VACCA continues to operate in a culturally safe way. Cultural Therapeutic Ways enables an organisational model, setting a completely new precedent across Australia for how ACCOs work within the sector, and with communities.

### **ABORIGINAL CHILDREN IN ABORIGINAL CARE (ACAC)**

ACAC is a policy and practice response for exercising delegated authority developed in 2013 when, following years of advocacy, VACCA, and later Bendigo and District Aboriginal Cooperative (BDAC), began case managing a small group of children on protection orders as part of the 'As If' trial. This program, unique to Victoria, is now known as Aboriginal Children in Aboriginal Care (ACAC) program and is delivered through VACCA, BDAC, Ballarat and District Aboriginal Cooperative (BADAC) and Njernda Aboriginal Corporation. Through ACAC, the Child Protection role ceases, and the ACCO takes on all statutory decision-making and responsibility for the child.

VACCA's ACAC program, officially launched in November 2017, is called Nugel. Nugel is the Wurundjeri word for "belong". Nugel have been authorised in relation to 102 children since the program commenced in November 2017. VACCA has safely returned many children home and early findings from the evaluation of the ACAC implementation highlight that based on the reunification rates for an indicative sample of 100 children from 2017-2019, the projected reunification rate in the Hume Moreland and North-East Metro Area for VACCA was higher (22%) than the reunification rate for DHHS (5%). Many of these children had been in care for years. This illustrates the success that ACCO-led services have in supporting children and their families through an approach that places culture at the centre and integrates this with theories of self-determination and trauma.

### **THE RIGHTS OF THE CHILD**

VACCA is committed to working with families to create safe and supportive environments where Aboriginal children's rights, including that of self-determination, are protected and promoted. Self-determination is a basic civil right that all human beings deserve and having opportunities for self-determination improves a person's quality of life. VACCA are currently in the process of redeveloping our child and carer information packs to improve their age and cultural appropriateness, to ensure that Aboriginal children, young people and families that come into contact with our service are informed and empowered to be actively involved in their care. Furthermore, with new Victorian Child Safe Standards coming into effect this year which specify cultural safety and child rights, VACCA is carrying out a compliance gap analysis and implementation plan to ensure that we meaningfully and actively promote the rights of the Aboriginal children and young people who we work with.

### **THE POTENTIAL TO ENACT THE UNDRIP IN AUSTRALIA**

Issues of disadvantage in Aboriginal communities are best addressed by investing in a human rights framework which respects Aboriginal communities' rights to self-determination. Fundamental to providing for Aboriginal self-determination and respecting Aboriginal governance, is also working with Aboriginal communities to restore their capacity to exercise their rights, freedoms and responsibilities in the context of mainstream society.

Respecting people's right to self-determination as individuals and as distinct communities was fundamental to the establishment of the UN and its many human rights instruments. The human rights arena for us as Aboriginal peoples is a safe place to meet, where we can feel respected as equals and valued for our difference and not despite our difference.

It is disappointing that to date, no Australian government has formally committed to implementing UNDRIP into law, policy or practice. Though all state and federal governments have committed to the National Agreement on Closing the Gap as the key platform for implementation of the principles of UNDRIP, minimal meaningful progress has been made to meet the targets for Closing the Gap since its inception. VACCA notes that it was a Labor Government in 2009 that signed onto the UNDRIP, following the previous government's opposition. Under the newly elected Labor Government, there is an important opportunity to build on this symbolic commitment and give it practical, structural effect.

In Victoria, the First Peoples' Assembly utilise the principles, articles and spirit of the UNDRIP for developing and implementing Treaty processes. The UNDRIP is considered a tool in the fight for rights and recognition, as well as a shared language and measurement of progress towards self-determination and the social, economic and cultural strength of Aboriginal peoples and communities across the country. Though without legislated backing, UNDRIP remains a guiding document in Victoria's Treaty process, rather than a legally enshrined responsibility to ensure its application.

VACCA welcomes the commitment of the federal Labor Government to the full implementation of the Uluru Statement from the Heart. With commitments to a constitutionally enshrined Voice to Parliament and a Makarrata Commission for treaty and truth-telling, we are hopeful that this government will follow through on their intentions to work in partnership with Aboriginal communities to create change. There is potential for this government to enact the UNDRIP as a part of these commitments to improving outcomes and opportunities for Aboriginal peoples in Australia.

The existing political and legal structures will continue to limit what might be possible in protecting the right to self-determination in Australia and will require a transformation of existing power structures resulting in a more equitable power sharing between Aboriginal peoples and the state. At both Commonwealth and State levels of government substantive constitutional and legislative change is needed, along with policy initiatives to reduce levels of disadvantage and strengthen the capacity of Aboriginal peoples to participate as self-determining peoples. Cultural and legislative changes are also needed to reduce the limitations inherent in the judicial system to increase the capacity of the courts to address the rights of Aboriginal people. There also needs to be a concerted effort on reducing racism to create a more tolerant and educated Australian society.

With recent legislative developments regarding the implementation and application of UNDRIP in Canada, we see a potential example of a framework to guide discussions between Aboriginal peoples and state and federal governments towards an approach that recognises and enshrines the rights and voice of Aboriginal peoples into our constitution, into policy and into practice.

VACCA calls on state and federal governments in Australia to commit to the meaningful implementation of UNDRIP into legislation and policy, through a process designed and monitored by Aboriginal communities.

## **VACCA RECOMMENDATIONS**

1. For all legislative and policy reform to align with the UNDRIP principles, including the right of Indigenous peoples to be self-determining in issues related to child and family wellbeing
  - a. Adopt a national approach to early intervention and targeted support for Aboriginal children to address the disparity in investment in early intervention and family support programs for ACCOs.
  - b. A renewed commitment to implementing, monitoring and reporting on all 54



recommendations of the *Bringing them Home* report.

2. Strong recognition of the unique needs of Aboriginal children in out-of-home care and the Stolen Generations in implementing the rights enshrined in UNDRIP
  - a. That ACCOs be resourced appropriately to undertake the actions necessary to ensure that all Aboriginal children in out-of-home care have access to Confirmation of Aboriginality.
  - b. That governments continue to sustainably resources ACCOs, including Link Up Victoria, to provide culturally appropriate support services, to enable Stolen Generations to reconnect with Traditional Owners and Country, and access Native Title and any future treaty rights to which they are entitled.
3. For Australian governments to take immediate action to ensure that the right to self-determination is recognised in Australian law and aligned with the UNDRIP
  - a. For the Victorian Government this means amending the Charter of Human Rights and Responsibilities to recognise the right to self-determination.
  - b. The Commonwealth Government must develop a national Bill of Rights, which includes the right to self-determination.

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