

**Royal Commission into Institutional Responses to  
Child Sexual Abuse**

**OUT-OF-HOME CARE  
CONSULTATION PAPER**

**Submission of the  
Victorian Aboriginal Legal Service**

## **Acknowledgements**

The Victorian Aboriginal Legal Service acknowledges this paper was written on the lands of the Wurundjeri peoples of the Kulin Nations. Without our elders' guidance we would not have the knowledge we do today.

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## Executive Summary

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This submission is made by the Victorian Aboriginal Legal Service (VALS) to assist with the inquiry into out-of-home care conducted by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). Aboriginal children are 10 times more likely to enter the child welfare system than non-Indigenous children,<sup>1</sup> placing them extraordinarily and disproportionately at risk of child sexual abuse in an institutional setting. In 2013-2014, Aboriginal children (at 5.5% of the population aged 0-17) made up 35% of children in out-of-home care (OOHC).<sup>2</sup>

The increased numbers of Aboriginal children removed from the home leads to an increased risk that they will experience institutional child sexual abuse. It is therefore important to decrease the rate of removal in favour of evidence-based policies and programs that aim to support the family to stay together, while still acting in the best interests of the child.

This submission includes recommendations for reducing the high-rate of removal for Indigenous Australians as well as recommendations that mitigate the effects of widespread removal. It acknowledges that child protection workers are under a statutory obligation to ensure that cultural support plans are in place should an Aboriginal child be placed with a non-Indigenous family.<sup>3</sup> However in spite of the principles and policies in place, around 30 per cent of Indigenous children and young people state they have a poor connection to their cultural heritage.<sup>4</sup>

The submission draws on data and evidence that demonstrates the effects of out-of-home care on culture and the futures of those leaving the system. It draws on information gathered by VALS in public forum settings and interviews, as well as existing research on child protection practices. The submission shows that only seven per cent of Aboriginal children in out-of-home care are in placements provided by Aboriginal Community Controlled Organisations (ACCOs), a decline of 15%

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<sup>1</sup> Australian Government: Australian Institute of Health and Welfare, *Child Protection Australia 2011-2012*, pp 41-42.

<sup>2</sup> Australian Government: Australian Institute of Health and Welfare, *Children in Care 2015*, <https://aifs.gov.au/cfca/publications/children-care>.

<sup>3</sup> Victorian Government, "Aboriginal Child Placement Principle: Guide", August 2002, [http://www.dhs.vic.gov.au/data/assets/pdf\\_file/0006/580614/aboriginal-child-placement-principle-guide-2002.pdf](http://www.dhs.vic.gov.au/data/assets/pdf_file/0006/580614/aboriginal-child-placement-principle-guide-2002.pdf), accessed 30 March 2015.

<sup>4</sup> Joseph McDowall, CREATE Foundation, 'CREATE Report Card 2013 - Experiencing Out-Of-Home Care in Australia: The views of children and young people' (2013).

since 2002.<sup>5</sup> The decline has been met with an increase in the number of children placed in out of home care.

The submission illustrates the strong relationship between entry into child protection and concomitantly, the juvenile justice system. 62% of Indigenous men with a child protection notification were also under supervision in Victoria, compared with 12% for non-Indigenous men, while 19% of Indigenous women had been under supervision, compared with 4% of non-Indigenous.<sup>6</sup> Further, in 2008 it was reported that those in residential care were 9 times more likely than those in home-based care to have criminal involvement.<sup>7</sup>

The 2013 Victorian Equal Opportunity and Human Rights Commission's report *Koori women and the justice system* found that a significant proportion of Koori women in prison were clients of child protection services as children. That report involved interviews with previous wards of the State, who commented that they had gone from out-of-home care to juvenile justice and then to the adult prison system.<sup>8</sup> The report found that in Victoria in 2010, 78 per cent of those aged 10-12 with youth justice orders or who had experienced remand at this age were known to child protection services.<sup>9</sup> Of these, it states, 60 per cent were known to child protection before their seventh birthday.<sup>10</sup> This submission will highlight Australia and Victoria's responsibilities to these children, under human rights protection frameworks.

A child protection system that aims to correct these issues and intervene early must address the underlying causes of Indigenous over-representation in both the justice and child-protection systems. This requires strong collaboration between Child Protection and Juvenile Justice workers, as well as related services, for children who have entered either system. This also requires collaboration with Indigenous communities, which is necessary before forming an effective early intervention strategy that meets the needs of children and community holistically.

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<sup>5</sup> Victorian Aboriginal Community Controlled Organisations and community Service Organisations "Koorie Kids: Growing Strong in their Culture", November 2013, page 16, <http://www.cyp.vic.gov.au/downloads/submissions/submission-koorie-kids-growing-strong-in-their-culture-nov13.pdf> accessed 12 March 2015.

<sup>6</sup> Australian Institute of Health and Welfare, "Children and Young People at Risk of Social Exclusion: Links between homelessness, child protection and juvenile justice", Data Linkage Series No. 13, 2012, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542238>, accessed 30 March 2016.

<sup>7</sup> The Youth Parole Board and Youth Residential Board of Victoria, 'The Youth Parole Board and Youth Residential Board Annual Report 2010-11' (2011).

<sup>8</sup> Victorian Equal Opportunity & Human Rights Commission, "Unfinished Business: Koori women and the justice system", August 2013, page 39 [http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Unfinished\\_business\\_-\\_Koori\\_women\\_and\\_the\\_justice\\_system.pdf](http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Unfinished_business_-_Koori_women_and_the_justice_system.pdf), accessed 30 March 2016.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

## **Recommendations**

This submission makes the following recommendations:

### *1. Keeping Aboriginal children in the family home*

1.1 Administer child-protection programs that aim to keep children in the family home by offering comprehensive support programs for parents that provide skills necessary to uphold a safe and healthy family structure. This must be achieved through early-intervention so that children are protected before they are at risk of harm.

1.2 A wide range of services should be engaged to provide support to encourage families to work together to provide a safe space, and limit the number of children in out-of-home care.

1.3 Work in consultation with Indigenous communities to plan and administer these programs so as to tailor the services to meet specific needs of Indigenous families.

### *2. Addressing Family Conflicts*

2.1 Assist those at risk of family violence through administering programs that provide culturally appropriate responses to Indigenous people who are involved in family violence. These programs must educate families about causes of family violence, and provide them with approaches that limit resorting to violence or abuse, so as to ensure safer environments for children and families.

### *3. Supporting Aboriginal Children in Care*

3.1 Assist those children currently in out-of-home care through:

- Investigating the reason why a large proportion of cultural support plans have not been fulfilled;
- Increasing support and funding for Aboriginal child-protection places so that there are a sufficient number to cope with the number of Aboriginal children in out-of-home care;
- Increasing funding for Aboriginal Community Controlled Organisations (ACCOs) to enable implementation of cultural support plans and ensure safety for children in out-of-home care;
- Increasing accountability measures in place for organisations with responsibility for developing, implementing plans and funding for administering these cultural support plans;
- Determining how cultural support plans will work and what impact they have on outcomes for children.

3.2 Ensure that families registered in public housing, as well as being investigated by child-protection, be connected with healing centres to receive culturally-appropriate interventions to support the well-being of the family, with prospective evaluation of specifically designed interventions including:

- Temporary accommodation and food;
- Parenting support;
- Drug and alcohol support;
- Connection with culture and community.

#### *4. Implementing a Comprehensive Redress Scheme for Past Survivors of Sexual Abuse in OOHC*

4.1 Institute a comprehensive redress scheme that includes cultural loss and cultural abuse in the as a head of damage, in order to remedy past colonial and historical experiences that lead to intergenerational trauma.

#### *5. Ensuring Indigenous Child Legislation Conforms to International and Domestic Human Rights Principles*

5.1 The UN Declaration on the Rights of Indigenous Peoples and the UN Convention on the Rights of the Child outline strict standards of care and maintenance of Indigenous children and their culture. Any legislation pertaining to Indigenous children should conform to these international standards, as well as those set out in the Victorian Charter of Human Rights and Responsibilities, in particular Section 19.2 which pertains to Aboriginal Cultural Rights in Victoria.

## Introduction

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Aboriginal children and young people who are removed from their home are vulnerable to institutional child sexual abuse. Their safety must be of chief concern to the Victorian and Federal government, and to all those involved in child protection.

The *Children, Youth and Families Act 2005 (VIC) (CYAF Act)* requires members of the child-welfare system and carers to act in the 'best interests' of the child. This relates to their safety, stability, cultural development and wellbeing. All services in this sector must have regard to the 'best interest' principles in making decisions about these children. It is vital to have the full picture of the risks that of harm can occur in out-of-home care in order to accurately determine a child's best interest.

This submission surveys increases in the number of Aboriginal children in out-of-home care, arguing that in the interests of reducing institutional child sexual abuse, regard must be had to seriously decreasing the number of children in the child protection system.

Child Protection aims to provide services that are focused on protecting children and families from significant harm caused by abuse or neglect in a domestic setting. It aims to enable children and young people to receive services in a safe environment in order to mitigate the effects abuse and neglect has on their wellbeing and development. However, VALS believes that the inter-generational traumas caused by colonisation and ongoing racism towards Aboriginal families must also be addressed to ensure that Aboriginal children are not subjected to removal from the family home and exposed to the risks of sexual abuse within OOHC in the first instance.

VALS is aware that recent legislative changes (*Children, Youth and Families Amendment (Permanent Care and other matters) Act 2014*) have not yet fully come into effect. It is our view that, at a minimum, data related to children entering child protection now should be made available to leading community organisations, and that the Department of Human Services must be required to undertake rigorous evaluation by independent researchers and provide feedback and review mechanisms to assess the standards and efficacy of today's child protection system.



## Victorian Aboriginal Children in Care

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Aboriginal children are 10 times more likely to enter the child welfare system than non-Indigenous children,<sup>11</sup> placing them extraordinarily and disproportionately at risk of institutional sexual child abuse. Aboriginal people in Victoria comprise 1% of the population, while they make up 12% of the total children in OOHC.<sup>12</sup> The disproportionality of children in OOHC amongst Indigenous Australians is considerably higher than other developed countries with Indigenous populations.<sup>13</sup> This high rate has also been steadily increasing over the past five years.<sup>14</sup> In Victoria alone, between 2001 and 2013, there was a 26.8% increase in the number of Aboriginal children taken into OOHC.<sup>15</sup>

The *National Framework for Protecting Australia's Children 2009-2020* stresses that OOHC is a last resort for keeping children safe.<sup>16</sup> However, there is persistent and widespread concern in the Aboriginal community about the current rates removal of Aboriginal children from their families. In 2013-2014 Aboriginal children (at 5.5% of the population aged 0-17) made up 35% of children in OOHC.<sup>17</sup>

This increased rate of Aboriginal children that are removed from care axiomatically leads to a risk that they will experience institutional child sexual abuse. There is therefore an impetus to curb the rate of removal in favour of evidence-based policies and programs that aim to support the family to stay together, while acting in the best interests of the child. It is VALS's view that the fewer children that are in out-of-home care, the fewer instances of institutional child sexual abuse that may arise.

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<sup>11</sup> Australian Government: Australian Institute of Health and Welfare, *Child Protection Australia 2011-2012*, pp 41-42.

<sup>12</sup> Victorian Government Department of Justice, "Royal Commission in Institutional Response to Child Sexual Abuse: Responses to issues paper 4 – Preventing sexual abuse of children in out of home care", 2013, Page 14.

<sup>13</sup> Susan Baidawi, Philip Mendes, Bernadette Saunders, "Indigenous Young People Leaving Out of Home Care in Victoria: A literature review", *Indigenous Law Bulletin*; 8(7) July/August 2013; 24-27, at 24.

<sup>14</sup> *Ibid.*

<sup>15</sup> Department of Human Services, "Aboriginal Children in Out of Home Care as at 2012-13", 2013, <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research,-data-and-statistics/aboriginal-children-in-out-of-home-care-as-at-2012-13>, accessed 30 March 2016.

<sup>16</sup> Council of Australian Governments, *National Framework for Protecting Australia's Children 2009-2020*, 2009.

<sup>17</sup> Australian Government: Australian Institute of Health and Welfare, "Children in Care 2015", <https://aifs.gov.au/cfca/publications/children-care>, accessed 30 March 2016.

## Institutional Child Sexual Abuse in Child Protection

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The Royal Commission has heard during its investigations that sexual abuse in out-of-home care is significant. It has heard accounts of sexual, physical and emotional abuse of children in these institutions. OOHC is the largest category of institutions identified, with over 40 per cent of all reports of child sexual abuse.<sup>18</sup> This despite warnings in the *Bringing Them Home* report that indicated that children in placements were vulnerable to sexual abuse and exploitation, demonstrating that girls were particularly at risk of sexual assault in foster placements.<sup>19</sup> The *Bringing Them Home* report collated data from decades previous and its data is therefore limited to a discussion of historical child-protection practices, however it is useful in demonstrating that what we describe in this submission occurred on a large scale. In many ways it contributes to the abuse of children in Indigenous communities today, through intergenerational trauma. There are significant numbers of children living as victims or at risk of becoming victims of child sexual abuse in OOHC, and urgent policy reform is needed to address these issues.

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<sup>18</sup> Royal Commission into Institutional Response to Child Sexual Abuse, "Executive Summary: Out-of-home care", <http://www.childabuseroyalcommission.gov.au/policy-and-research/out-of-home-care/consultation-paper/executive-summary>, visited 16/3/16

<sup>19</sup> Human Rights and Equal Opportunity Commission, "Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families", 1997, Page 140.

## Keeping children at home

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### Identifying at risk families and children – early intervention

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Early identification of risks, including from intergenerational trauma, that exist for Aboriginal children in their family can enable interventions at a critical stage. Culturally appropriate, skilled interventions targeted to specific issues of concern have the potential to decrease the number of placements in OOHC. Early intervention can promote recovery of children and the family, and decrease the level of harm involved.<sup>20</sup>

The Victorian Aboriginal Child Care Agency (VACCA) has initiated an early intervention approach to combat the removal of Aboriginal children from their families. The program aims to reduce child protection involvement for parenting interventions. This service also operates to strengthen a child's cultural connection and support the family's cultural experience through an integrated and specialised program.

Importantly, it aims to provide an early intervention service to support children to remain in care of their parents, family and community. It does this by aiming to reduce the number of children, being harmed and entering the OOHC system. This program takes a whole-of-family approach to work alongside Aboriginal families to deliver these services.<sup>21</sup> Early intervention approaches are a key area to be expanded upon so that children are better cared for earlier, and families have a higher chance of being reunited or staying together.

### Support services for Families

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The provision of supports for families and parents at an early stage is also an important component for lowering the number of Aboriginal children in care. Aboriginal and Torres Strait Islander child protection systems require an element of integrated cultural competency, in terms of behaviours, attitudes and policies that allow for an effective system that works in cross-cultural environments. In Victoria, this could manifest as one that caters for diverse values, beliefs and behaviours, which facilitates cultural, social and linguistic needs to be met. There are several models that could be

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<sup>20</sup> Department of Human Services, *Responding to Child Abuse*, January 2002, page 5.

<sup>21</sup> Australian Institute of Family Studies, "Victorian Aboriginal Child Care Agency: Early Intervention and Family Services", updated 21 July 2015, <https://apps.aifs.gov.au/ipppregister/projects/victorian-aboriginal-child-care-agency-vacca-early-intervention-and-family-services>, accessed 23/3/16.

adopted in Victoria that employ a range of services to meet the multi-faceted needs of families at risk. These are detailed below.

### **Suspected Child Abuse and Neglect (SCAN) Model**

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The Suspected Child Abuse and Neglect (SCAN) model is an across-service response team that investigates child abuse concerns and applies early intervention procedures. It is comprised of representatives from the Department of Communities, Child Safety and Disability Services, the police, and services such as education and health. Other representatives from services such as disability, housing and mental health may also be invited to participate in the meetings.

In VALS's consultation, it was acknowledged by participant organisations and individuals, that it is important to incorporate the capacity to address immediate problems as well as long-term issues in a collaborative manner with other organisations and government departments. For instance, short-term accommodation for children at risk is to be accompanied by a comprehensive response that included addressing parenting issues, financial management, substance abuse, health issues and education. It is also important that the service assist young people and their families to develop and maintain strong and positive family relationships and community networks.

The program uses information sharing between the SCAN team members in order to plan and coordinate actions to respond to the needs of children who are at risk of harm.<sup>22</sup> It orchestrates interventions based on shared information and can therefore assist in the early identification of child abuse and neglect and respond with specific tailored interventions to promote healthy relationships and families.

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<sup>22</sup> Queensland Government Department of Child Safety and Disability Services, "Suspected Child Abuse and Neglect (SCAN) Team System", 27 May 2015 <https://www.communities.qld.gov.au/childsafety/partners/our-government-partners/suspected-child-abuse-and-neglect-scan-team-system> accessed 23/3/16.

## Family Court

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The Family Court in when considering whether to remove a child will look at the *best interests of the child*. The focus will be on protecting children from neglect, physical harm, and psychological harm.<sup>23</sup> The court will also consider the benefit of children having a meaningful relationship with both parents. The Family Court takes a view that Aboriginal children must be removed from the home if the home is unsafe for that child. This view results in many children being removed as a last resort when the situation at home has become desperate.

This Family Court method can work in combination with early intervention services that focus on family support provided early intervention programs are well resourced and well managed. Family Relationship Centres which operate around Australia also work in conjunction with the Family Court to provide information and advice to families in difficult situations.<sup>24</sup> These services could be expanded so that families are better equipped to deal with these legal cases, and are linked with services that assist them in rehabilitation so that the child can return home.

## Healthy Lifestyle programs

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Healthy lifestyle programs run by Aboriginal community organisations can provide services to those who are at risk of or are experiencing family violence. These programs educate, raise awareness as well as provide strategies around living without abuse. These programs aim to assist in dealing with stress, and how to be better role models for children and communities.<sup>25</sup> Healthy lifestyle programs can also offer youth programs for children who are at risk of family violence.

They are structured to build self-esteem, leadership skills and teamwork. These programs provide an added tool that can be used by child services or in combination with child services to promote self-determination and healthy relationships. Healthy lifestyle programs can deliver parents skills that

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<sup>23</sup> Victoria Legal Aid, "What the court considers when making a parenting order", 22 February 2016, <https://www.legalaid.vic.gov.au/find-legal-answers/parenting-arrangements-and-child-contact/parenting-orders/what-court-considers-when-making-parenting-order>, accessed 30 March 2016.

<sup>24</sup> Family Law Council, "Improving the Family Law System for Aboriginal and Torres Strait Islander Clients", February 2012, page 29.

<sup>25</sup> Wuchopperern Health Service Limited, "Healthy Lifestyle Programs", <http://www.wuchopperern.org.au/health-services/healthy-lifestyles-program/>, accessed 23/3/16.

enable them to better respond to stressful family situations, and thus help to protect children at risk of direct or indirect harm.

## **Tackling Family Violence**

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It is important to understand the nature of family violence in the Indigenous community in order to understand how and why it causes children to be placed in out-of-home care. Indigenous definitions of the nature and forms of family violence are broader and more encompassing than those used in the mainstream.

Indigenous family violence encompasses a range of acts that are criminal, such as physical and sexual assault, and non-criminal, such as emotional and spiritual abuse. Community violence, or violence within the Indigenous community (often between Indigenous families), is also an emerging concern for local areas in Victoria. This violence contributes to overall levels of violence reported by Indigenous people and the trauma experienced within families and kinship networks. Family violence includes intergenerational violence and abuse. It involves extended families and kinship networks. An individual can be both a perpetrator and a victim of family violence.<sup>26</sup>

There has long been a held perception that violence is somehow an inherent part of Indigenous communities and culture in Australia and that interference to prevent violence is somehow a 'stifling' of cultural practices and does not require the intervention. On a practical level, this means that when people report about violence between Aboriginal people, there has been a reluctance to intervene because of a misguided fear that this is culturally inappropriate.<sup>27</sup>

Family violence within Indigenous communities is complex because Indigenous communities, family structures and the issues faced are complex. With a history of colonisation, dispossession, and break-down of cultural practices and language and denial of expressions of identity, this means that the traditional factors that feature in a person's resilience (identity, family supports, kinship) are absent.

The 'normalising' behaviours that are set out in other non-Indigenous nuclear families with traditional roles of a male and female parent does not apply neatly to Aboriginal families, where the importance of uncles, aunties and cousins (related by blood or not) are held paramount. There are

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<sup>26</sup> *Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities: 10 Year Plan* (2008)

<sup>27</sup> Victorian Aboriginal Legal Service, "Royal Commission into Family Violence: Submission Paper from the Victorian Aboriginal Legal Service", <http://www.rcfv.com.au/getattachment/A132563E-EB5C-4964-BC5A-19D5B3B2EFE4/Victorian-Aboriginal-Legal-Service>, accessed 30 March 2016.

often specific expectations of what relations are required to do for each other, which clash with non-Aboriginal organisations and their method of service delivery.<sup>28</sup>

### **Family Violence and Child Protection**

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Family violence is a driver of removal of children. There have been cases where clients have been told if they do not remove a member of family from the household the children will be removed.<sup>29</sup> This is not supporting the victim of family violence; rather it is impacting on the fear that they are already facing. Proper assessment is needed; with follow-up for family violence victims to ensure that are not simply falling through the gap. Considering the best interests of the child could also be achieved through consultation with those children, to determine what they believe is in their best interests.

Across all jurisdictions, sexual abuse was the least common type of substantiation for Indigenous children (9% nationally and 14.9% for non-Aboriginal children). In Victoria, sexual abuse accounted for 6.7% of Aboriginal substantiations, compared to 13.9% for non-Aboriginal Victorians.<sup>30</sup>

### **Indigenous Family Violence Court**

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One of the programs currently operating is the Koori Family Violence Court Support Program. This was developed by the Victorian Department of Justice in collaboration with various organisations to provide both support and culturally appropriate responses to Indigenous people who are involved in a family violence matter at the Melbourne Magistrates' Court. This kind of program supports Indigenous people by providing Koori Men's and Women's support workers who assist people applying for or responding to a family violence intervention order or family violence safety notice. This kind of program urgently needs to be extended to further courts in Victoria so as to assist in dealing with these difficult matters in a fast and effective way, which allows the families to focus on moving forward and supporting children.

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Victorian Aboriginal Legal Service, "Royal Commission into Family Violence: Submission Paper from the Victorian Aboriginal Legal Service", <http://www.rcfv.com.au/getattachment/A132563E-EB5C-4964-BC5A-19D5B3B2EFE4/Victorian-Aboriginal-Legal-Service>, accessed 30 March 2016.

## Supporting children in care

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### Aboriginal Child Placement Principle

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Policy approaches in recent times have sought to mitigate the effects of removal by instituting a principle that determines where Indigenous children will be placed. The Aboriginal and Torres Strait Islander Child Placement Principle seeks to ensure cultural rights are protected for children who come into contact with child protection services across Australia.<sup>31</sup> The principle requires priority placement with the child's extended family (kin); the child's Indigenous community (kith); or other Indigenous people.<sup>32</sup> In 2014-2015 however, 65% of placements for Aboriginal children in Victoria were in non-Aboriginal homes or non-Aboriginal residential care.<sup>33</sup> Section 13 of the *CYAF Act* enshrines this principle, which prioritises placement of the child with other Aboriginal and Torres Strait Islander people.

Community consultations revealed a deep concern at the loss of culture caused by current child removal practices. The Aboriginal and Torres Strait Islander Child Placement Principle and use of Cultural Plans demonstrate that maintaining cultural links is a policy focus for the Victorian government, but this aim is not being fulfilled adequately for a number of reasons, including that there are insufficient Aboriginal community placements.<sup>34</sup>

### Cultural Support Plans

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Due to the impacts of the Stolen Generations, many Aboriginal children were removed from their communities and experienced loss of culture, language and community relationships. This has had a tremendous effect on Aboriginal people and communities. Keeping Aboriginal children in contact or connected to their families, communities and culture is now seen as a paramount concern to prevent similar effects as the Stolen Generations in today's children.

Discussions conducted with the community highlighted the fundamental importance of children being taught about their culture, even in such situations where they are placed with non-Aboriginal

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<sup>31</sup> Susan Baidawi, Philip Mendes, Bernadette Saunders, "Indigenous Young People Leaving Out of Home Care in Victoria: A literature review", *Indigenous Law Bulletin*; 8(7) July/August 2013; 24-27, at 24

<sup>32</sup> *Ibid.*

<sup>33</sup> Australian Government: Australian Institute of Health and Welfare, *Children in Care 2015*, p 101.

<sup>34</sup> Department of Human Services, 2012, *Child Protection Manual*. At <http://www.dhs.vic.gov.au/cpmanual/out-of-home-care/placement-of-aboriginal-children-and-young-people/1432-aboriginal-child-placement-principle/3> (viewed 14 October 2015).



families in foster care.<sup>35</sup> Due to the loss of culture through the generations, there must be a more robust commitment to implementing 'cultural plans' for children in out-of-home care, so that they remain connected with their culture.<sup>36</sup>

The intergenerational effects of removal of children and institutionalisation are made clear by examples of children that are taken away in successive generations, thus creating a cycle of intergenerational child removal.<sup>37</sup> In order to ensure cultural education, the Victorian Government introduced cultural support plans. They aim to support Aboriginal children in maintaining connections to their Aboriginal and/or Torres Strait Islander heritage.<sup>38</sup>

Specifically, these plans are in place to facilitate and strengthen ties to cultural identities, to assist in the understanding of community networks, and to assist children to increase their knowledge and understanding of their place in their family, kinship and community structure.<sup>39</sup> Child protection workers are therefore under a statutory obligation to ensure that cultural support plans are in place should an Aboriginal child be placed with a non-Indigenous family.<sup>40</sup> However in spite of the principles and policies in place, around 30 per cent of Indigenous children and young people state they have a poor connection to their cultural heritage.<sup>41</sup>

## Implementation

In 2013 an audit was conducted into the treatment of 194 Aboriginal children in out of home care by the Department of Human Services. The audit revealed that although under legislative requirements, only 15 children out of the 194 (8%) had a completed Cultural Support Plan in place.<sup>42</sup> This indicates that despite the increase in the number of Aboriginal children in care, there are failures to meet fundamental legislative requirements. More information regarding the reasons behind the lack of

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<sup>35</sup> Victorian Aboriginal Legal Service et al, "A Victorian Redress Scheme for Institutional Child Abuse: Public Consultation Paper" (2015) Part C.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Victorian Government Department of Human Services (2005) *Aboriginal and Torres Strait Islander Cultural Support Plan: Guide*, 2005.

<sup>39</sup> Queensland Government, "Cultural Support Plan – Child Safety Services, Department of Communities, Child Safety and Disability Services" 13 October 2015, <https://www.communities.qld.gov.au/childsafety/about-us/our-performance/representation-of-indigenous-children/cultural-support-plan>, accessed 30 March 2016.

<sup>40</sup> Victorian Government, "Aboriginal Child Placement Principle: Guide", August 2002, [http://www.dhs.vic.gov.au/\\_data/assets/pdf\\_file/0006/580614/aboriginal-child-placement-principle-guide-2002.pdf](http://www.dhs.vic.gov.au/_data/assets/pdf_file/0006/580614/aboriginal-child-placement-principle-guide-2002.pdf), accessed 30 March 2015.

<sup>41</sup> Joseph McDowall, CREATE Foundation, 'CREATE Report Card 2013 - Experiencing Out-Of-Home Care in Australia: The views of children and young people' (2013).

<sup>42</sup> Department of Human Services (2013) *Information about cultural support plans for child protection clients*, November 11 2013.

cultural support plan implementation is needed to understand the issues in relation to low fulfilment of this requirement.

The low compliance rate may stem from low investment and resources given to carers to develop Cultural Support Plans. Aboriginal Community Controlled Organisations (ACCOs) under the *Protecting Victoria's Vulnerable Children Inquiry* have responsibility for enhancing self-determination and providing a practical means to strengthen cultural links for children.<sup>43</sup> Despite this significant role, instead their prominence has declined in terms of the provision of out of home care. Now only seven per cent of Aboriginal children in out of home care are in placements provided by ACCOs, a decline of 15% since 2002.<sup>44</sup> The decline has been met with an increase in the number of children placed in out of home care.

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<sup>43</sup> Department of Premier and Cabinet, Victoria (2012) *Report of the Protecting Victoria's Vulnerable Children Inquiry Volume 2*, p. 310.

<sup>44</sup> Victorian Aboriginal Community Controlled Organisations and community Service Organisations "Koorie Kids: Growing Strong in their Culture", November 2013, page 16, <http://www.ccyp.vic.gov.au/downloads/submissions/submission-koorie-kids-growing-strong-in-their-culture-nov13.pdf>, accessed 30 March 2016.

## Addressing Intergenerational Trauma

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Many Indigenous children who are in out-of-home care come from families that are still feeling the effects of intergenerational trauma. Much of what we know about intergenerational trauma is informed by studies of Holocaust survivors,<sup>45</sup> and studies of residential schools in Canada.<sup>46</sup> In the Australian context, the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) and the *Bringing Them Home Report* sought to (among other objectives) record the testimonies of Aboriginal and Torres Strait Islander peoples' trauma-related experiences, and in so doing, helped to discover the extent of intergenerational trauma.<sup>47</sup>

The impacts of institutional abuse and associated traumas impact in multiple ways, including individual, family and community trauma.<sup>48</sup> Importantly, historical trauma, left unacknowledged and unattended to 'compounds and compacts'.<sup>49</sup> This results in what has been described as the 'cascading' effects of intergenerational trauma.<sup>50,51</sup>

In the disparities between Indigenous and non-Indigenous Australians there is a continuation of abuse through the generations that suggests contemporary trauma and historical trauma are interlinked and cannot be seen in isolation.<sup>52</sup>

In taking a more holistic approach, ongoing prejudices against Indigenous peoples should be considered in the broader context of colonisation and historical injustice, and not simply as discrete events. For instance, everyday acts of racism negatively impact on both the individual and the community.<sup>53</sup> This contributes to the 'cascading' effects of trauma through the generations.<sup>54</sup> There

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<sup>45</sup> Theo de Graaf, 'A Family Therapeutic Approach to Transgenerational Traumatization' (2008) 233 *Family Process* 37 (2).

<sup>46</sup> Rosemary Barnes, Nina Josefowitz and Ester Cole, Residential Schools: Impact of Aboriginal Students' Academic and Cognitive Development (2006) 18 *Canadian Journal of School Psychology* 21 (1/2).

<sup>47</sup> Victoria University, *Moondani Balluk Indigenous Learning Centre*, Transcript of interview, conducted 25 April 2015.

<sup>48</sup> Judy Atkinson, Jeff Nelson, Robert Brooks, Carlie Atkinson, Kelleigh Ryan (2010) 'Addressing individual and community transgenerational trauma' in Nola Purdie, Pat Dudgeon and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice* (Australian Government Department of Health and Ageing, 2010).

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Victoria University, *Moondani Balluk Indigenous Learning Centre*, Transcript of interview, conducted 24 April 2015.

<sup>52</sup> Victoria University, *Moondani Balluk Indigenous Learning Centre*, Transcript of interview, conducted 15 July 2015

<sup>53</sup> Reconciliation Australia, 'Stop, think, respect and put and end to Racism' (2014). At

<https://www.reconciliation.org.au/news/stop-think-respect-and-put-a-stop-to-racism/> (viewed 14 October 2015).

<sup>54</sup> Eduardo Duran, Bonnie Duran, Maria Yellow Horse Brave Heart, and Susan Yellow Horse-Davis, 'Healing the American Indian Soul Wound' in Yael Danieli (ed) *International Handbook of Multigenerational Legacies of Trauma* (Plenum Press, 1998).

is an inherent violence in racism, which dehumanises, disempowers and subjugates the rights of one person over another, and the colonisation of Indigenous people relies on these processes.<sup>55</sup>

The failure to adequately identify, recognise, challenge and attend to what has been characterised as a 'crisis of trauma and violence borne of colonising processes' has led to an ongoing series of life crises at the individual, family and community level<sup>56</sup> that has led to poor social or health outcomes and greater likelihood of incarceration.

## Family Dislocation

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The effects of intergenerational trauma and displacement, as well as the after-effects of colonialism, have undermined healthy parenting practices of many Indigenous Australians. Children that grow up experiencing neglect and abuse are more likely to exhibit those behaviours later in life. Children who are removed from their family must have access to positive parenting behaviours and good role models to support the next generation and mitigate these intergenerational effects.<sup>57</sup>

One of the recommendations to come out of the *Bringing Them Home* report was to provide funding to Indigenous organisations to establish parenting and family well-being programs.<sup>58</sup> These programs require feedback mechanisms and independent research to show policy-makers their efficacy and uphold accountability for these organisations, programs shown to be effective require commitments to continued and secure funding.

## Drug and alcohol use

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Research suggests that there are strong links between drug and alcohol abuse and child mistreatment.<sup>59</sup> Although statistics demonstrate that non-Indigenous Australians are more likely to consume alcohol than Indigenous Australians, they remain more likely to consume alcohol at risky

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<sup>55</sup> Victoria University, *Moondani Balluk Indigenous Learning Centre*, Transcript of interview, conducted 24 April 2015

<sup>56</sup> Judy Atkinson and Glen Woods, 'Turning dreams into nightmares and nightmares into dreams', *Borderlands*, 7 (2008) no. 2.

<sup>57</sup> Human Rights and Equal Opportunity Commission, "Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families", 1997, under "Skills and Learning".

<sup>58</sup> Human Rights and Equal Opportunity Commission, "Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families", 1997, page 348.

<sup>59</sup> Dawe, S., Harnett, P., & Frye, S. (2008). *Improving outcomes for children living in families with parental substance misuse: What do we know and what should we do?* (Child Abuse Prevention Issues No. 29). Retrieved from <[www.aifs.gov.au/nch/pubs/issues/issues29/issues29.html](http://www.aifs.gov.au/nch/pubs/issues/issues29/issues29.html)>.

levels. Research also suggests that Indigenous people may also be more likely to have used illicit drugs in the past 12 months.<sup>60</sup> Inquiries have established a link between substance misuse and child abuse and neglect.<sup>61</sup> This research suggests that drug and alcohol use may be a key factor that increases the number of children who are removed from their parents.

## Homelessness

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The intergenerational trauma experienced by indigenous peoples through policies which led to the “Stolen Generation” and through other inherently flawed policies and practices in government and non-government organisations continues to impact levels of homelessness. It is for this reason, and other reasons, mentioned above that Aboriginal people are over-represented in the homelessness population. In order to overcome this effect of intergenerational trauma, public housing must be made available to Aboriginal people and families. Housing is a central aspect of the “Closing the Gap” strategy, with plans to ensure construction of appropriate housing for each community utilising established cultural standards and knowledge as well as prevention programs around homelessness that support Aboriginal people before they become homeless.

## Healing Centres

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Cultural healing programs are another form of support that addresses many of the flow-on effects of intergenerational trauma. Healing centres can strengthen the social and emotional wellbeing of Indigenous people. A study by the Closing the Gap Clearinghouse in 2008 found that 32% of Aboriginal and Torres Strait Islander people aged 18 and over reported high or very high levels of psychological stress, double the percentage for non-Indigenous adults.<sup>62</sup> Cultural healing programs have been effective in assisting individuals in getting through their own issues and improving social and emotional wellbeing.<sup>63</sup>

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<sup>60</sup> Pink, B., & Allbon, P. (2008). *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples 2008*. Canberra: Australian Bureau of Statistics.

<sup>61</sup> Aboriginal Child Sexual Assault Taskforce. (2006). *Breaking the silence: Creating the future. Addressing child sexual assault in Aboriginal communities in NSW*. Sydney: NSW Attorney General's Department.

<sup>62</sup> Closing the Gap Clearinghouse, “Strategies and practices for promoting the social and emotional wellbeing of Aboriginal and Torres Strait Islander people”, Resource Sheet 19, February 2013, page 1.

<sup>63</sup> Ibid.

Employing a culturally appropriate model of mental health service has also been found to be effective.<sup>64</sup> This suggests that in addressing intergenerational trauma, cultural healing programs may serve to tackle the effects of past treatment and improve wellbeing for Indigenous people.

## **Redress Scheme**

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A comprehensive redress scheme should be administered for those who have suffered cultural abuse, which acknowledged the unique historical, cultural and colonial circumstances that impacted on First National Peoples. Redress provides an opportunity for survivors of institutional abuse and their families and communities to move forward. Recognition and compensation is important for healing and dealing with trauma of being abused while in care.<sup>65</sup>

Making compensation available for cultural abuse is vital for Aboriginal survivors of institutional child abuse. Redress for cultural abuse is important as an acknowledgement of the harm that denial of culture causes.<sup>66</sup> It acknowledges that child removal sought to crush Aboriginal cultures and extinguish languages. Further, a redress scheme that funds access for individuals and families to community-run cultural and healing centres will give survivors the opportunity to reconnect with cultural identity.<sup>67</sup>

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<sup>64</sup> Ibid.

<sup>65</sup> *Bringing Them Home Report*, 1997, Chapter 14.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

## What are the flow-on effects of OOHC?

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### Juvenile justice

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Children who are removed from their home and placed in out-of-home care have an increased likelihood of being incarcerated later in life. The Australian Institute of Health and Welfare released data on the number of indigenous children in Victoria who have child protection notifications as well as those who are placed under juvenile justice supervision. It indicates that overall, of those born in 1990-91 who had one or more child protection notifications in Victoria, 8% were also under juvenile justice supervision in Victoria. Indigenous people were more likely to have been under supervision than non-Indigenous people, and men were more likely than women.<sup>68</sup>

The statistics are starker when making comparisons between Indigenous people and non-Indigenous people. 62% of Indigenous men with a child protection notification had also been under supervision in Victoria, compared with 12% for non-Indigenous men, while 19% of Indigenous women had been under supervision, compared with 4% of non-Indigenous women.<sup>69</sup> The report illustrates the flow-on effects of child protection, which can result in an entrenched cycle of removal from families and society through child protection and then the justice system.

This relationship between child protection and incarceration has been well documented, particularly in the *Bringing Them Home* report, which identified the significant correlation between removal and subsequent contact with the criminal justice system. In Queensland, it has been found that 54 per cent of Indigenous males, and 29 per cent of Indigenous females, involved in child protection system go on to criminally offend both as juveniles and adults. This data in combination with the data available in Victoria represent significant evidence that the child protection system and justice system are not having the desired effect of addressing the causes of contact, and are not preventing ongoing significant harm, with very serious lifelong consequences.

A child protection system that aims to correct these issues and intervene early could address underlying causes of Indigenous over-representation in both systems. This would require strong collaboration between Child Safety and Juvenile Justice workers for children who have entered either system. This collaboration is necessary before forming an effective early intervention strategy that meets the needs of children and community holistically.

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<sup>68</sup> Australian Institute of Health and Welfare, "Children and Young People at Risk of Social Exclusion: Links between homelessness, child protection and juvenile justice", Data Linkage Series No. 13, 2012, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542238>, accessed 30 March 2016.

<sup>69</sup> Ibid.

## Incarceration

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As young indigenous people in out-of-home care leave, they are more likely to have poor educational experiences and be over-represented in Australian youth justice systems than non-Indigenous young people in care.<sup>70</sup> In 2008 it was reported that those in residential care were 9 times more likely than those in home-based care to have criminal involvement.<sup>71</sup> It was concluded that in general, the majority of abused or neglected do not offend; however a large number of children who do offend have experienced abusive or neglectful parenting.<sup>72</sup>

Victoria has a young and fast-growing population of Indigenous peoples. Indigenous people make up a large percentage of the overall number of people in prison, despite their small population. The Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) report from 2013 found that a significant proportion of Koori women in prison were clients of child protection services as children. That report involved interviews with previous wards of the State who commented that they had gone from out-of-home care to juvenile justice and then to the adult prison system.<sup>73</sup> The report found that in Victoria in 2010, 78 per cent of those aged 10-12 with youth justice orders or who had experienced remand at this age were known to child protection services.<sup>74</sup> Of these, it states, 60 per cent were known [to child protection] before their seventh birthday.<sup>75</sup> This VEOHRC report hypothesised that many of the young Koori women who have been in out-of-home care lack parenting skills.

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<sup>70</sup> The Youth Parole Board and Youth Residential Board of Victoria, 'The Youth Parole Board and Youth Residential Board Annual Report 2010-11' (2011).

<sup>71</sup> Ibid.

<sup>72</sup> Cashmore, J. (2011). The link between child maltreatment and adolescent offending: Systems neglect of adolescents. *Family Matters*, 89, 31-41.

<sup>73</sup> Victorian Equal Opportunity & Human Rights Commission, "Unfinished Business: Koori women and the justice system", August 2013, page 39 [http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Unfinished\\_business\\_-\\_Koori\\_women\\_and\\_the\\_justice\\_system.pdf](http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Unfinished_business_-_Koori_women_and_the_justice_system.pdf), accessed 30 March 2016.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.



# What are Federal and State government's responsibilities?

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## International human rights context

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The international human rights framework on the rights of the child establishes certain rights that are of importance to Indigenous peoples due to the ongoing legacies of colonisation, assimilation and displacement. Indigenous peoples form a distinct group, necessitating distinct and collective rights.

Indigenous children have other specific rights relating to their position as First Nations peoples. These rights are enshrined in the Declaration on the Rights of Indigenous Peoples.<sup>76</sup> This international standard solidifies the requirements for allowing self-determination, to allow indigenous people to belong to an Indigenous community or nation, access to education in their own culture and language. It also includes standards for their economic well-being, education, employment and other social standards.

For Australia therefore, rights to equality before the law and rights against discrimination can only be achieved once steps have been taken to overcome the disparities between the groups.<sup>77</sup> These steps require Australian government policy that adequately appreciates Aboriginal and Torres Strait Islander Peoples and their unique circumstances in society, due to the history of dispossession and colonisation that Indigenous peoples share.

Our federal government carries obligations to uphold the rights of Indigenous peoples as signatory to the United Nations Declaration.<sup>78</sup> Although the then Federal Government noted that these claims for self-determination were not legally binding, the Special Rapporteur on the Rights of Indigenous Peoples has recommended a review of laws, programs and policies that affect Aboriginal and Torres Strait Islander peoples as a necessary first step.<sup>79</sup>

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<sup>76</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted 13 September 2007

<sup>77</sup> The Equality Trust, *Declaration of Principles on Equality* (2008). At <http://www.equalrightstrust.org/endorse/index.htm> (viewed 14 October 2015); Australian Human Rights Commission, 2011, *Social Justice Report 2011*, p 30.

<sup>78</sup> UN Human Rights Council, *National report: [Universal Periodic Review]: Australia / submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1*, 5 November 2010, A/HRC/WG.6/10/, para 10; Jenny Macklin, 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples' (2009) 7(11) *Indigenous Law Bulletin* 6.

<sup>79</sup> S J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/15/37/Add.4 (2010), [74].

The right to self-determination is the central right of the Declaration, which makes reference in Article 3 to the specific rights of 'indigenous' peoples to 'freely determine their political status and freely pursue their economic, social and cultural development'. Related to the right to self-determination is the principle of respect for and protection of culture, which is articulated in Articles 11-13 of the Declaration specifically, whilst cultural rights form part of 17 of the 46 articles in the Declaration more generally.

Expressions of Indigenous peoples' right to self-determination are similarly prevalent in claims for land rights recognition, which is central to the struggle for further rights protection among Indigenous groups around the world and in Australia.<sup>80</sup> Article 26 of the Declaration states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.<sup>81</sup>

There are challenges associated with the application of global conceptions of human rights to the local context, however this must not deter efforts to comply with international human rights obligations and give effect to the general principles of the Declaration. It has now been six years since Australia made its formal commitment, and progress in realising the rights contained in the Declaration has been slow.

The following human rights instruments, of which Australia is a signatory, are also relevant to the realisation of rights to self-determination, to culture, and to land.

Cultural rights are provided for in Article 27 of the *International Covenant on Civil and Political Rights* by virtue of the right to self-determination, which includes the right to use one's own language.<sup>82</sup> Article 27 of the *Universal Declaration of Human Rights* states that 'everyone has the right freely to participate in the cultural life of the community.'<sup>83</sup> This is reflected in Article 15(1)(a) of the

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<sup>80</sup> Xanthaki, Alexandra, *Indigenous Rights and United Nations Standards* (Cambridge University Press, 2007) 237.

<sup>81</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), Art 26

<sup>82</sup> *International Covenant on Civil and Political Rights*, 1976.

<sup>83</sup> *United Nations Declaration of Human Rights*, 1948.

*International Covenant on Economic, Social and Cultural Rights*, which recognises ‘the right of everyone to take part in cultural life’.<sup>84</sup>

The Committee on Economic, Social and Cultural Rights acknowledges that in relation to the right of everyone to take part in cultural life Indigenous persons and communities require ‘special protection’.<sup>85</sup> Furthermore, the *International Convention on the Elimination of All Forms of Racial Discrimination* guarantees the ‘right to equal participation in cultural activities’, without distinction as to race, in Article 5(e)(iv).<sup>86</sup>

## **Victorian Charter of Human Rights**

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The *Charter of Human Rights and Responsibilities Act 2009* is a non-constitutional protection for human rights. The mechanisms that form part of the Charter in observing human rights standards include an interpretive obligation to take into account international standards and obligations on legislatures to consider whether statutes are in breach of human rights.

The Charter acknowledges that there are rights in international law that must not be abrogated or limited merely because they are absent or only partly included.<sup>87</sup> The Charter expressly provides that international court and tribunal decisions should be taken into account.<sup>88</sup> Furthermore, processes of pre-enactment scrutiny ensure that human rights are central to the legislation process; for example, the requirement for the sponsor of a Bill (being the relevant member of Parliament) to provide statements of compatibility with human rights.<sup>89</sup>

The development and implementation of policies and laws to ensure the preservation of cultural heritage and practices is lacking in Victoria.<sup>90</sup> Therefore, the protection and promotion of Indigenous peoples’ right to culture, as articulated in the Charter and other human rights instruments outlined above, is of central concern.

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<sup>84</sup> *International Covenant on Economic, Social and Cultural Rights*, 1976.

<sup>85</sup> Articles 36 and 37 Committee on Economic, Social and Cultural Rights, General Comment No 21: Right of Everyone to Take Part in Cultural Life, E/C.12/GC/21, 21 December 2009.

<sup>86</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 1963.

<sup>87</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 5.

<sup>88</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2).

<sup>89</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28.

<sup>90</sup> Australian Human Rights Commission, 2011, *Social Justice Report 2011*, p 40.

Section 19(2) of the Charter acknowledges distinctive cultural rights of Indigenous Australians and provides for the protection and maintenance of cultural identity, language, kinship ties, and connection to the land and waters and other resources under traditional laws and customs.<sup>91</sup> Although the Charter includes an express limitation that the rights to be protected are those of individuals, the inclusion of rights to culture in the Charter illustrates progressive recognition for Aboriginal rights within a legislative framework.<sup>92</sup> Importantly, we would see that there is a legal obligation for redress schemes for institutional abuse to observe and consider Indigenous person's right to culture under the Charter.

### **Convention on the Rights of the Child**

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The Convention on the Rights of the Child entered into force in 1990, with Australia being signatory to the Convention. VALS supports the convention and the rights upheld therein. The convention enumerates rights that are central to the interests of the child, including the notion of the 'best interests' of the child, a concept reflected in current Family Law approaches. Australia has made commitments to ratify this convention and VALS believes it should guide government approaches to legislating on the rights of the child into the future.

Article 3 outlines the best interests of the child, stating that they must be the primary consideration in public or private social welfare institutions and courts. Related to this right is Article 9, which stipulates that states shall ensure that if a child must be separated from the parent, it must be necessary for the best interests of the child. This approach is seen in the Family Law approach to determining whether a child is taken into out-of-home care.

In conjunction with this right, is Article 8, which aims to preserve the child's identity, and where they are deprived of some of the elements of their identity, State parties shall provide assistance and protection in order to re-establish their identity. Further, article 30 states that Indigenous children shall not be denied the right to enjoy their culture or use their own language.<sup>93</sup> Embedded in this human rights framework is an acknowledgement of the importance of cultural rights for children. They are inalienable rights that signatory states must consider in legislating for indigenous children.

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<sup>91</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19(2)(a-d).

<sup>92</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 6.

<sup>93</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, Article 30.

Protection from child sexual exploitation and abuse is also enshrined in article 34, which stipulates that States are required to protect the child by using all appropriate national, bilateral and multilateral measures to prevent sexual abuse.<sup>94</sup> VALS considers these rights fundamental to the protection of Indigenous children, and should therefore guide government policy in that threatens to undermine these inalienable rights.

### **United Nations Declaration on the Rights of Indigenous Peoples**

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Australia also supports the Declaration on the Rights of Indigenous Peoples, which enshrines the minimum standards for the safety, dignity and well-being of Indigenous peoples worldwide.<sup>95</sup> VALS believes this Declaration should guide the Federal Government in advancing and protecting Indigenous people.

Article 22 (2) states that governments shall take measures *in conjunction with Indigenous peoples* to ensure that Indigenous women and children enjoy protection against all forms of violence.<sup>96</sup> There is an international law basis for only instituting measures that are agreed upon through consultation and collaboration with Indigenous groups. This would lead to more considered approaches that benefits from multi-dimensional perspectives, and the standpoints of those who are most greatly affected by these programs and policies.

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<sup>94</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, article 34.

<sup>95</sup> Australian Human Rights Commission, "UN Declaration on the Rights of Indigenous Peoples", September 2007, <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/un-declaration-rights>, accessed 30 March 2016.

<sup>96</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution I adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 22.