VACCA Submission to Victorian Human Rights and Responsibilities Charter Review

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Introduction, Outline of Argument and Recommendations

“Recognising the rights and respecting the rights of all the people within our communities is the hallmark of a civilised, democratic society. Democracy is strong enough to be able to respect, and to allow to be enforced, the rights of all the people within our territory and that’s what the [UK] human rights act ... does.”

Former UK Attorney General Lord Goldsmith on 7.30, ABC 1, 27 May 2011.

The Victorian Aboriginal Child Care Agency (VACCA) welcomes the opportunity to make this submission to the review of the Victorian Charter of Human Rights and Responsibilities. As an Aboriginal\(^1\) community controlled child and family services agency, we believe that the creation of domestic human rights instruments and development of a human rights policy perspective are necessary to ensure the rights and future of Aboriginal peoples and children. At VACCA much of our work is involved in overcoming centuries of governmental and dominant culture abuse and neglect of Aboriginal children, their families and communities. The Stolen Generations tragedy highlights the need for effective human rights protection. If the rights of Aboriginal children and communities had been recognised and respected it is likely that our communities would have had greater forms of legal protection and redress in the face of the on-going process of colonisation and racial discrimination and far better wellbeing and health outcomes.

While Australia has endorsed the Universal Declaration of Human Rights (UDHR), Australian governments – Federal and State/Territory – have chosen on numerous occasions to behave in ways that contravene the Declaration and other human rights instruments. In particular, Aboriginal and Torres Strait Islander peoples have historically suffered from the lack of clarity and enforcement of internationally recognised human rights.

Some examples include

- The forced removal of children from their families (the Stolen Generations) contravenes UDHR Article 12: Freedom from Interference with Privacy, Family, Home and Correspondence.
- Aboriginal people were not allowed to vote in a variety of jurisdictions until the late sixties, contravening the UDHR Article 21: Right to participate in government and in free elections; and the International Covenant on Civil and Political Rights Article 25: Right to vote.

\(^1\) The word ‘Aboriginal’ is used throughout this document to include all people in Victoria of Aboriginal and/or Torres Strait Islander descent.
Government policies that imply Aboriginal people should assimilate to non-Indigenous culture contravenes UDHR Article 27: Right to participate in the cultural life of community; and the International Covenant on Economic, Social and Cultural Rights Article 15: Right to cultural life.

We would suggest that the Charter should include specific protections for Aboriginal communities on the basis of their status as First Peoples/Nations and their rights to self-determination. We also believe that children’s rights should be included with a priority given to the protection of children’s rights to identity, culture and connection to family and community as being in the best interests of the child. Measures to prevent discrimination should acknowledge the collective rights of Indigenous communities and the need to prevent measures which are defined as potentially ‘genocidal’ in accordance with the Genocide Convention. As the former Prime Minister, Kevin Rudd, said in the National Apology, the nation must work towards

A future where this Parliament resolves that the injustices of the past must never, never happen again.

Human rights protection for Aboriginal children from potential attacks on their culture is necessary to ensure such a future.

Given the tragedy of the Stolen Generations policies of the past and the statement of the Prime Minister that this ‘would never again’ happen to our people, we believe particular attendance should be paid to Aboriginal and Torres Strait Islander children’s rights. We would welcome the strengthening of the cultural rights of children, particularly as Aboriginal child removal is still problematic within Australian society and the cultural rights of children need protection. Compliance with the Aboriginal Child Placement Principle is still haphazard even though it is in the Children, Youth and Families Act 2005. We therefore suggest that a new position – an Aboriginal Social Justice Commissioner, possibly within the Victorian Equal Opportunity and Human Rights Commission, could play a direct ombudsman-type role in ensuring the cultural rights of our children, families and communities and have powers and resources to enable investigation to influence compliance.

Premier Ted Baillieu’s speech on ‘closing the gap’ on March 24 this year emphasised the need for

- promoting Aboriginal Victorians aspirations, thus engendering hope and enhancing their capacity to build a better future,
- putting in place processes and protocols encouraging mutual accountability, between the Aboriginal communities and the Victorian State Government,
- putting in place processes and protocols encouraging engagement and inclusiveness, and
• encouraging a partnership approach where all sectors – government, community, business and philanthropic – work together, so that our resources and expertise can most effectively be harnessed.

Clearly the Premier has placed an emphasis on the quality of relationships between Aboriginal peoples and the non-indigenous community as fundamental to improving outcomes. We welcome this approach and believe that strengthening the Victorian Charter of Human Rights and Responsibilities is in line with the principles and aspirations outline in his speech.

The great benefit of the Charter is that government and parliament have to consider how laws and policies impact on peoples’ human rights. Public servants have to respect human rights, and any breaches would need to be remedied.

We believe that critical for the Charter of Rights and Responsibilities is

a) the recognition of Aboriginal peoples as the First Peoples of Victoria/Australia and consequently that there are inherent rights which arise from this recognition,
b) the recognition of international human rights principles and instruments which are based on the right of all people and all peoples as distinct cultural communities to self-determination and therefore that due regard must be paid to the various forms of Aboriginal self-determination and
c) the strengthening of mechanisms to ensure the human rights of the First Peoples are adequately protected for example
• The right to a distinct status and culture, which helps maintain and strengthen the identity, spiritual and cultural practices of Indigenous communities.
• The right to land, which provides the spiritual and cultural basis of Indigenous communities.
• The right to self-determination, which is a process where Indigenous communities take control of their future and decide how they will address the issues facing them.
• Protection of the rights of children.
• Protection from all forms of genocide.

Therefore VACCA recommends
• The incorporation of the right of self-determination in the Charter.
• The inclusion of additional human rights into the Charter as prescribed in the International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
• The creation of the position of Victorian Aboriginal Social Justice Commissioner as part of the Victorian Equal Opportunity and Human Rights Commission to ensure compliance to the United Nations Declaration on the Rights of
Indigenous Peoples and increase awareness and understanding of the Charter in Victorian Aboriginal communities.

In the next section of this submission we address the specific terms of reference of the inquiry to support our above recommendations as to increasing the level of human rights protection we would like the committee to recommend to the government for adoption. In the section following we go into greater depth to support our view by outlining the critical contextual issues and the matters of principle involved.

Inclusion of the right to self-determination

Article 2 of the UN Charter and Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights enshrine the rights of all peoples to self-determination. There are two different concepts which relate to self-determination: internal, which involves recognition of population within a State, and external, which involves formation of a new State by distinct peoples. The principle of self-determination suggests that a people or political community has a fundamental right and ability to determine their own governance model and practices. The principle of self-determination enables Indigenous communities to determine their own priorities and strategies, and recognises them as political communities of peoples with their own governance arrangements. Article 1 of the International Covenant on Civil and Political Rights (ICCPR) defines the right of self-determination as involving the free choice of political status and the freedom to pursue economic, social and cultural development. The ICCPR is binding on Australia. Importantly, international law does not prioritise a nation state's organisational sovereign form over the rights of its constituent members. In fact, the integrity of the nation state is “dependent on it remaining representative and being truly of the people”.

As former Chairperson of the United Nations Working Group on Indigenous Populations, Madame Erica-Irene Daes said:

The concept of ‘self-determination’ has... taken on a new meaning in the post-colonial era. Ordinarily, it is the right of the citizens of an existing, independent State to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences. The international community... discourage(s) secession as a remedy for the

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abuse of fundamental rights, but, as recent events around the world demonstrate, secession cannot be ruled out completely in all cases. The preferred course of action, in every case except the most extreme ones, is to encourage the State in question to share power democratically with all groups, under a constitutional formula that guarantees that the Government is 'effectively representative'...

Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.³

VACCA believes that self-determination is a critical principle for effective Indigenous child and family welfare. The issue of self-determination was a key concern of the Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families Report.

Clearly, the implementation of self-determination is important for juvenile justice, child welfare, adoption and family law matters. It is the principle grounding a right for Indigenous people to exercise control over matters directly affecting their children, families and communities. The Indigenous perspective on self-determination provides for the development of control over these areas of social life through processes which may involve some form of autonomy or self-government.⁴

The Bringing Them Home Report recommendation 43 suggests various measures to enable self-determination for Indigenous communities in the area of child welfare and protection.⁵

Before informed decisions can be made there needs to be proper negotiation between government and Indigenous communities and organisations relating to self-determination in juvenile justice, welfare and adoption matters. Communities must be in a position to make choices about what they see as suitable long-term solutions to particular issues.⁶

In regards to self-determination we believe that there is a corresponding need for greater protection of Aboriginal cultural interests and a commitment to processes of cultural restoration. Disconnection from culture has been cited in Department of

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⁵ Bringing Them Home, p. 580.
⁶ Bringing Them Home, p. 577.
Human Services Inquiries into Child Deaths as a critical issue facing Aboriginal children and families. We therefore believe protection, restoration and promotion of culture is essential for human rights and addressing disadvantage.

On May 12, 2010 VACCA, VCOS, VACCHO, VAEEAI, VACSAL and VALS held the Aboriginal and Torres Strait Islander Victorians-Participants not Recipients-Human rights and self determination’ forum⁷. When asked what self determination meant to the participants, responses ranged from the issues relating to greater choice and control, promotion and protection of cultural identity, greater inclusion and rights protection were expressed. Aboriginal Community Controlled Organisations were seen as an ‘expression of self determination’. The inclusion of the right to self-determination is integral to ensuring the rights of Aboriginal people and communities are upheld. Self-determination, as Professor Behrendt states, ‘...is an inherent right of Aboriginal people, in that it already exists and is not to be ‘given’ by a government...[it] is recognised by international law.”⁸

At this stage the definition of self-determination within the Charter would need to be expressed as a broad right for First Peoples. As Behrendt and Vivian suggest, self-determination ‘...is not an easy ... to define.... [and] depends upon the aspirations of the individual or group involved’.⁹ We contend that at some stage in the future it should be further defined in the Charter after further consultation and negotiations with Victorian Aboriginal communities.

Inclusion of other additional rights


United Nations Convention on the Rights of the Child

International human rights instruments recognise that children as well as adults have basic human rights. It is also understood that children have the right to special protection because of their vulnerability. There are several human rights instruments

⁷ Aboriginal and Torres Strait Islander Peoples – ‘Participants not Recipients’ Self Determination and Human Rights Forum DRAFT
⁸ Aboriginal and Torres Strait Islander Peoples – ‘Participants not Recipients’ Self Determination and Human Rights Forum Report.
specific to children's rights. In 1959 the United Nations General Assembly adopted the Declaration on the Rights of the Child. The Declaration affirms some of the most basic principles of children’s rights, including the provision of health care, housing, social security, education, and protection from neglect, cruelty and exploitation.

In November 1989 the United Nations General Assembly adopted the Convention on the Rights of the Child, the most widely ratified human rights treaty in the world. The Convention incorporates civil, political, economic, social and cultural human rights and sets out the specific ways these should be ensured for children and young people. The Convention recognises that the degree to which children can exercise these rights independently is influenced by their evolving maturity. It also emphasises the rights and responsibilities of parents where applicable.

The key principles in the Convention are
- the right to survival and development
- respect for the best interests of the child as a primary consideration
- the right of all children to express their views freely on all matters affecting them
- the right of all children to enjoy all the rights of the Convention without discrimination of any kind.

Article 30 of the Convention on the Rights of the Child explicitly recognizes the right of indigenous children to enjoy their traditional culture, practice their own religion and use their traditional language.

The Aboriginal Child Placement Principle governs the practice of Aboriginal child protection in Victoria. It is endorsed by the Secretariat of National Aboriginal and Islander Child Care and is incorporated into the Victorian government’s Children, Youth and Families Act, 2005. The Principle aims to strengthen children’s connections with their family, community and cultural identity particularly in response to previous detrimental policies as revealed in reports such as the Bringing Them Home Report.

Aboriginal children and young people have an inherent right to know their own family and culture. Past policies of child removal from Aboriginal families have had devastating effects on Aboriginal communities and cultures. The over-representation of Aboriginal people in criminal justice and welfare systems is a direct consequence of these policies which failed to respect the culture and families of Aboriginal children.

The Aboriginal Child Placement Principle includes the following:
- Removal of any Aboriginal child must be a last resort.
- If, after consultation with community controlled Indigenous Welfare agency, removal of a child from its family is unavoidable then the authorities must have regard to the direction of the Indigenous agency.
- If such a removal is necessary, then the child must be placed within the extended family, or if this is not possible, the child may be placed within the Indigenous community, within close proximity to the child’s natural family.
- If there is not an Aboriginal placement available, then in consultation with the relevant Indigenous agency the child may be placed with a non-indigenous family on the assurance that the child’s culture, identity and contact with the Aboriginal Community are maintained.

In Victoria, since 1992, a protocol between the Department of Human Services and VACCA has been established to ensure that there are culturally appropriate and effective responses to protecting Indigenous children from harm in accordance with the Aboriginal Child Placement Principle. Current Victorian legislation recognises self-determination for Indigenous peoples in relation to child welfare.\(^\text{10}\)

From the perspective of Aboriginal communities we believe that the child’s rights to culture, which acknowledges that protection of culture and identity are in the best interests of the child, should be part of the Charter.

VACCA is concerned by the Victorian Government Attorney General’s recent announcement that he will be introducing statutory minimum sentencing for gross violence for juvenile (16-17 year olds) and adult offenders. This seems to be in direct violation of the rights of the child as defined in the Convention on the Rights of the Child\(^\text{11}\). Article 40; section 2)iii states that, “...taking into account his or her age or situation...” is in accordance with the best interests of the child when sentencing. Section 4 further develops the understanding that:

“A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

To achieve this, there needs to be an individual assessment of each case and cannot be effective in ensuring the best interest of the child is upheld. VACCA hopes that the Sentencing Advisory Council advises against mandatory sentencing. Children’s Court President, Judge Paul Grant argues that, “...some young people have complex and difficult problems. There is no simple connection between “locking them up” and stopping offending behaviour. We need to address in a co-ordinated and comprehensive way the problems in that person’s life...detaining young offenders does not appear to


impact on the crime rate.” The opportunity for rehabilitation back into general society should be paramount for young offenders; these harsh penalties will greatly impact the reality of obtaining this.

Genocide Convention

The 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide was ratified by Australia in 1949 and it came into force in 1951. The Convention confirms that genocide is a crime against humanity. This expressed a shared international outrage about genocide and defines Genocide as

...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a. killing members of the group;
b. causing serious bodily or mental harm to members of the group;
c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. imposing measures intended to prevent births within the group;
e. forcibly transferring children of the group to another group (article 2).

Genocide does not just mean the immediate physical destruction of a group or nation. The Polish jurist Raphael Lemkin, the author of the term and the major proponent of the United Nations Convention, defined genocide to include ‘deliberate separation of families for depopulation purposes subordinated to the criminal intent to destroy or to cripple permanently a human group’. The separation of Aboriginal children from their parents and their community could result in the disappearance of the group as a cultural unit and therefore the Genocide convention seeks to ensure that minority cultural groups are respected and protected.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):

The principle of non-discrimination on the grounds of race is clearly stated in the Preamble of the Charter of the United Nations, which reaffirms “faith in fundamental human rights, in the dignity and worth of the human person”. The 1948 Universal Declaration of Human Rights (UDHR) and other international human rights instruments which specifically refer to the principle of non-discrimination on the basis of race have been adopted by the United Nations. In 1963 the UN adopting a Declaration on the

12 Judge Paul Grant, "Paper of Young People and Sentencing"
Elimination of All Forms of Racial Discrimination and in 1965, the General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). This Convention specifies the measures that States agree to undertake to eliminate racial discrimination when they ratify the Convention. These international human rights instruments are therefore crucial for any racial minority group and, in the case of Indigenous peoples, any racial group who have suffered from systemic racism.

Australia’s recent poor performances before the Committee on the Elimination of Racial Discrimination, particularly in relation to the previous Federal Government’s response to native title, dismantling of ATSIC and Northern Territory Emergency Intervention, underlines the need for greater protections for Aboriginal peoples against discrimination.

The Human Rights Charter should, as the Committee on the Elimination of Racial Discrimination (CERD) suggest,

Ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.¹³

It is clearly the view of the CERD that Australia’s human rights instruments are currently inadequate in their protection for Aboriginal peoples against systemic racism and recognition of Aboriginal peoples self-determining rights. Strengthening the Charter in this way would greatly strengthen the position of Victoria’s Indigenous peoples if it includes measures which address issues of racial discrimination and racial respect.

Social, Economic and Cultural Rights

VACCA supports the notion that economic, social and cultural rights be incorporated fully into The Charter. As Article 5 of The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states,

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Victoria’s Aboriginal communities’ experience “substantial inequalities in health, education and social outcomes.”\textsuperscript{14} If the additional rights as listed above as well as the right to self-determination were included in the Charter it would require greater commitment by the Government to ensure better outcomes for Aboriginal children and their families as well as accountability.

In addition to this VACCA recommends that the other rights cited in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also be included. As Mick Dodson argues,

\begin{quote}
The most urgent and pressing concerns of Indigenous peoples cluster around our economic, social and cultural rights; our rights to a decent standard of health, housing, water, education...[T]he rights which most Australians probably overlook because they can take them for granted. We do not have that privilege. Any framework that is currently being developed to protect rights will have to span all categories of rights.\textsuperscript{15}
\end{quote}

Given the legal complexities involved we would, at this stage, suggest that the office of the Victorian Aboriginal Social Justice Commissioner (as recommended above and explored below), be given the power to advise on whether public authorities are operating in a manner which confirms to the UNDRIP.

**Operation and effect of the Charter**

For the Charter to be effective and relevant there needs to be regular auditing of public authorities, to further the scope and impact of the Charter there needs to be direct consequences for not complying to the Charter’s rights. Rather than simply ‘considering’ whether laws/policies/regulations comply it should be regulated that offending parties are prosecuted or reprimanded, otherwise how does it really protect those most vulnerable who may not have access to the right avenues for complaint.

As per Recommendation 163 of the Aboriginal Deaths in Custody Review Report the Victorian Government should,

\begin{quote}
In partnership with the Indigenous community, develop a set of standards for Indigenous participation modelled, as a minimum, on the principles and practices of the Victorian Aboriginal Justice Agreement, and that these minimum standards be enshrined in legislation and incorporated into specific Indigenous
\end{quote}

\textsuperscript{14} Ibid P12
\textsuperscript{15} Mick Dodson "The Unique Nature of the Australian Indigenous Experience" Without Prejudice, No 9 (June 1996) p 4
strategies across government to meet identified needs, as agreed to with the specific and relevant Indigenous parties.\textsuperscript{16}

Along with mandatory compliance reporting all public authorities should have to function within the parameters of the Charter, VACCA is concerned that the Youth Residential Board and the Youth Parole Board are both declared as not being a public authority and therefore exempt from having to comply. This will come under review in 2013. VACCA urges their exemption to be revoked.

Reviewing some of the governmental programs and initiatives that were implemented in 2010 with accordance with the Charter there have been some positive outcomes. The Balurt Boorron: the Victorian Plan for Aboriginal Children and Young People (2010-2020) and the Wannik Education Strategy for Koori Students are both positive measures showing commitment to ensure the rights of Aboriginal youth to quality education. The Department of Sustainability and Environment and the Department of Transport have also engaged in various projects especially around employment programs and engagement with local community groups. The Gunaï/Kurnai People Native Title Agreement was a historic agreement and shows the scope the Charter holds, rather than having to go to court to resolve native title issues the Charter’s explicit rights detailing Victorian Aboriginal peoples right “... to enjoy their culture and identity, to maintain a distinctive spiritual, material and economic relationship with the land and its natural resources, and to conduct cultural and spiritual activities on the land... [it has created] a new culture around the way in which the State Government does business with traditional owners”.\textsuperscript{17}

Reform or improvement of the Charter

Another key area which was reviewed in the recently released report ‘Talking Rights: Consulting with Victoria’s Indigenous community about the right to self-determination and the Charter’ was to heighten awareness of the role of the Charter as, “Indigenous peoples are their own strongest advocates: an awareness of the role of the Charter, the application of the Charter and the role of the Commission is important in ensuring the Charter is engaged with and utilised”.\textsuperscript{18} Respondents also expressed the view that the Charter was important as a protective mechanism and as a means to hold government accountable and therefore needed to be is easily available and accessible to the


\textsuperscript{17} Victorian Equal Opportunity and Human Rights Commission, “Talking Rights – Consulting with Victoria’s Indigenous community about the right to self determination and the Charter” 2011 p44

\textsuperscript{18} Victorian Equal Opportunity and Human Rights Commission, “Talking Rights – Consulting with Victoria’s Indigenous community about the right to self determination and the Charter” 2011 p24
individual and communities. What was reported as impeding the utilisation of the Charter was when there is confusion over how it works.\textsuperscript{19}

The findings from the ‘Talking rights: Consulting with Victoria’s Indigenous community about the right to self-determination and the Charter’ gave voice to key areas which reflect the need for further consultation and engagement with Aboriginal community members. Establishing a working group where this could happen was one of the recommendations.

The 2009 State of Victoria’s Children Report stated that Aboriginal children were 11 times more likely to be the subject of a care and protection order than all other children in Victoria and 11.3 times more likely to be in out-of-home care.\textsuperscript{20} Reading through the 2010 Charter Compilation Report’s Highlights of activities undertaken by Victoria’s public authorities during 2010, not one highlight from the Department of Human Services (DHS) was directly linked to its care of Aboriginal children. This data should directly correlate to increased funding and support for Aboriginal children in care and their family.

Both within the aforementioned forum as well as VCOSS’ Budget Submission 2010/2011,\textsuperscript{21} the need to have a Victorian Aboriginal Social Justice Commissioner was reiterated which was a recommendation from the Aboriginal Deaths in Custody Implementation Review Report, VACCA also supports this recommendation. This role is vital in providing a key advocate to help “overcome the systemic, structural discrimination that Indigenous Victorians continue to experience.” Behrendt and Vivian argue that the role of the Social Justice Commissioner could help facilitate discussion about what self determination means and how it plays out in practice among Aboriginal people as well as liaising with government in regards to monitoring policies and legislation and ensuring that all rights stipulated in the charter, including self-determination are incorporated appropriately.\textsuperscript{22}

The establishment of this state based role would complement the national position and would also show Victoria’s commitment to address the immense social and economic disadvantage experienced by Victorian Aboriginal communities. The appointment of a Victorian Aboriginal Social Justice Commissioner could help rectify and achieve areas

\textsuperscript{19} Ibid
\textsuperscript{20} Department of Education and Early Childhood Development, Victoria’s State of the Children Report 2008 P211
\textsuperscript{21} VCOSS State Budget Submission 2010/2011
around leadership, participation and voice that were raised at the community forum on self-determination.

Background to our recommendations:
The critical importance of human rights protection for Aboriginal peoples.

As a result of over 200 years of colonisation, the Aboriginal communities of Australia have been subject to a series of culturally inappropriate impositions and policy arrangements. These impositions have denied the reality of Aboriginal communities, ignored their laws and customs and, ultimately, failed to recognise these communities as sovereign political and legal entities. At Federation no Aboriginal person was consulted or involved, no recognition was given to Aboriginal sovereignty or governance. The myth of terra nullius prevailed. The constitution’s only mention of Aboriginal people specifically excluded them from being counted as citizens and one of the early acts of Federal Parliament in 1902 denied Aboriginal people voting rights.23 Aboriginal communities have suffered from policies of ‘protection’, assimilation and integration.

While there have been changes in the recognition of rights for Aboriginal persons, particularly as a result of the 1967 Referendum, these rights have primarily focused on the rights of Aboriginal persons as individuals and not on Aboriginal peoples as self-determining communities. Therefore, even today, the practice of Aboriginal affairs by governments in Australia has been determined by non-Aboriginal forms of governance. Whereas other colonised countries have been prepared to accept a limited Aboriginal order of governance within their broader governmental framework, the debate in Australia has been confined to improving the prevailing government-directed, welfare-based/community service model. This model emphasises the provision of services to Aboriginal peoples by defining them as a category of disadvantaged Australians. Particularly as a result of the dismantling of ATSIC, itself a non-Aboriginal model of governance, funding to Aboriginal communities is at the discretion and direction of Commonwealth, State and Territory governments and agencies. We believe that any human rights based charter must regard Aboriginal communities as self-determining peoples and not merely as ‘client-groups’ if we are to ‘close the gap’ and improve outcomes for Aboriginal peoples.

Decades of racially-based Aboriginal child removal occurred within a framework where Aboriginal sovereign and self-determining rights were denied and the assimilation policies of state/territory and Federal Governments were prominent. These Government policies sought to determine the future of Aboriginal and Islander

23 William Deane, Opening Address at the Indigenous Governance Conference, April 2002, Canberra, p. 3, available at www.reconciliation.org.au. The original intention of the bill as introduced was to confer voting rights but the bill was amended to exclude rather than include Indigenous persons.
communities rather than allow Aboriginal and Islander communities determine their own futures. In response to the trauma and injustice caused by the Stolen Generations policies it is important to today recognise Aboriginal communities' self-determining role in relation to their children. Aboriginal leaders have continually sought the restoration of this right in their on-going struggle for recognition and rights.

The issue of Aboriginal children's rights was prominent in the demands of the first Aboriginal political organisations in the nineteen-twenties. In 1927 the New South Wales based Australian Aboriginal Progressive Association sent the Premier a petition which called on the Government to, "... restore to us that share of our country of which we should never have been deprived", and requested that, "the family life of the Aboriginal people shall be held sacred and free from invasion and that the children shall be left in the control of their parents." In 1938, Bill Ferguson and J. T. Patten signed a declaration calling for the abolition of the Aboriginal Protection Board and the "repeal of all existing legislation dealing with Aborigines". Amongst other reasons for this call, they mentioned the Boards' powers to apprentice children and to "assume full control and custody of the child of any Aborigine." 24

When VACCA was formed by the late Auntie Molly Dyer in 1977 as the first Aboriginal community-controlled child welfare agency in Australia, self-determination was the critical organisational principle. It is with this historical background in mind that we believe that a human rights framework that recognises not only the rights of individuals but the self-determining rights of Aboriginal peoples is essential for Aboriginal communities today.

It is just over 3 years ago since many of us witnessed the First Welcome to Country to open Federal Parliament and the long awaited National Apology to the Stolen Generations.

We have policy commitments from Federal and State Governments to 'Close the Gap' between the First Peoples of the land and rest of the nation. But while there is a welcome focus on addressing the statistical disadvantage gap between Aboriginal and non-indigenous peoples in Australia, there is much to be done when it comes to closing the gap between us as peoples.

That is, the gap in our understandings and our relationships. The gap in our differing accounts of the world and of each other. From our perspective as Aboriginal peoples we tend to see everything from the framework of our stories and our relationships.

It is not just our stories concerning the creator spirits and the establishment of traditional law/lore but our stories of resistance which define our world along with our relationships to family, kith and kin, and the land.

For us to talk about human rights we need to talk about how they help us close the gap in our stories and our relationships. We can do this through mutual respect. We want to begin by recognizing and paying respect to the non-indigenous story. The human rights movement is a key Western story which has the potential to create a meeting place between our peoples. The election of President Obama reminds us of the ironies in the Western narrative of the evolution of the human rights tradition. After all, as an African American, he now lives in a symbol of that Western human rights tradition – the White House – which was built by slaves. So we have the hope of human rights which the White House is supposed to embody with the reality of its construction as a product of slavery.

More recently, human rights was a response to the terrors of Nazism, particularly the genocide of the Holocaust. Very few people protested about the treatment of the Jews prior to the Second World War – the only protest in Australia that we are aware of was the one made by our people when William Cooper led a delegation from the Australian Aborigines League to protest outside the German Consulate in Melbourne. They were driven by the knowledge that what happened to them and their people was now happening to another people and recognized the importance of solidarity between oppressed peoples. The human rights story is not a dry story of law books and diplomatic memos and resolutions – it comes from a lived experience of what happens when individuals and minority groups' rights are ignored. There are dire consequences when the state and the whims of the majority are seen as absolutes. Central to that story is the realization of the notion of self-determination for all people and all peoples.

We see the story of human rights as basically about creating a platform for how we relate to each other as individuals and as peoples. Human rights is a basis for respectful relationships and a protection against inhumanity.

As we consider the Charter of Rights and Responsibilities it is important to realize that human rights are about principles not ideology. When we don't have all the evidence about how to proceed we need to establish fair principles to guide our policies and actions. Human rights are therefore a meeting place between the narratives of Western culture and Indigenous cultural narratives. Human rights are based on the principle of freedom and self-determination. Recognition of rights can therefore assist in creating the ground rules for cross-cultural engagement.

Human rights can also be a foundation for addressing disadvantage – through freedom and empowerment not paternalism. It therefore forms a basis for responsible action and a re-focusing of our efforts for the future. VACCA believes that the issue of human rights is not just a theoretical issue but has practical ramifications. Issues of
disadvantage in Aboriginal communities are best addressed by taking seriously 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 the dominant culture. Respecting self-determination and building capacity are the critical principles which will lead to positive outcomes for our children and families. They are a foundation through which rights protection can lead to positive outcomes.

International research and practice also demonstrates the importance of culture as a means through which Indigenous communities can overcome disadvantage. A recent study from Canada by Michael Chandler and Travis Proulx for the International Academy for Suicide Research has pointed out that as measures for self-determination and culturally-based services increase, youth suicide dramatically decreases. As demonstrated by the following chart, the more Nation or tribal groups – here referred to as ‘bands’ – have control over and cultural input into governance, health, education, policing, resources and seeking title to land, the lower the incidence of youth suicide.

**EXAMPLE OF COMMUNITY-LEVEL INDICATORS AND THEIR RELATIONSHIP TO A HEALTH OUTCOME – FIRST NATIONS COMMUNITIES, British Columbia, CANADA**

An index of "cultural continuity" comprised of six marker variables: degree to which each of B.C.’s individual bands have already secured 1) some measure of self government; some control over the delivery of 2) health, 3) education, 4) policing services, and 5) cultural resources; and 6) are otherwise at work litigating for Aboriginal title to traditional lands.  


Being on your own land, having a form of self-government, having Aboriginal health services and policing; all combine to create a sense that there is not only a proud past – but a promising future for young Aboriginal people. It is clear from this that self-determination and cultural connection has a positive impact on the social determinants
that relate to Aboriginal wellbeing and health and can create a platform for better outcomes for Aboriginal children.

Conclusion

We hope that the Inquiry will acknowledge and address the specific rights issues of Aboriginal peoples in its recommendations to the Government. The denial of Indigenous rights has led to the current situation of gross Indigenous disadvantage. By recognising and establishing measures to protect our rights, proposed human rights laws can go a long way in establishing just relationships between our peoples.