

VACCA Discussion Paper

on treaty, self-determination and the
Aboriginal community-controlled
services sector



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CHILD CARE AGENCY





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VACCA consulted with a number of ACCOs, Traditional Owners and Aboriginal leaders in Victoria, as well as other key stakeholders on the issues raised in this paper. The views put forward however are VACCA's and are not intended to be a representative voice. VACCA would like to acknowledge the following people and organisations for their knowledge, guidance and expertise in the development of this Discussion Paper:

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Background

The Victorian Government is currently engaging with the Aboriginal community in Victoria to develop a treaty process and has established consultation and representative mechanisms to advance treaty-making. Victorian Aboriginal Community Controlled Organisations (ACCOs) are an established network which provide service delivery, advocacy and cultural connection to Aboriginal children, young people, families and communities; they have been a voice for all Aboriginal people living in Victoria. ACCOs were formed invariably as a means for advocating for the rights of Aboriginal people and providing services, by and for community. The Victorian Aboriginal Child Care Agency (VACCA) has been a strong advocate for self-determination since its formation in 1976 and, in recent years, has been advocating for the development of a treaty process in Victoria.

How ACCOs with service delivery and advocacy roles operate in the context of a future treaty or treaties requires careful consideration. Treaty offers Traditional Owners/Clans, Aboriginal people in Victoria and ACCOs the potential to develop new arrangements to chart the future of Aboriginal affairs in this state so that Aboriginal people are empowered, their rights are affirmed and the provision of services align with the principle of Indigenous self-determination. As Marcia Langton has said concerning a modern treaty – but in the national context – it is essentially about First Nations peoples having a ***negotiated place in the Australian polity***.¹

To date there has been little discussion about the place of ACCOs in a treaty framework. This is undoubtedly because of the focus on key issues of representation, recognition of the status of Traditional Owners and the task of how one formulates a treaty-making process in the current social and legal environment. However, given the importance of this sector to the Aboriginal community and to government (the latter in terms of the investment of public funds) there is a critical need to discuss this question.

The purpose of this paper is to explore the possible implications of Treaty for Aboriginal Community Controlled Organisations (ACCOs), highlight international examples of how treaty holders and Aboriginal agencies have established agreements for service delivery, advocacy and support, and provide some options on how similar arrangements might be established in Victoria. The paper also discusses how the rights of Aboriginal people in Victoria who are off country are upheld (many of whom were removed from family, community and country due to Stolen Generations policies) including their right to self-determination within a treaty environment. Removal brought a lot of Aboriginal people to Victoria, who were displaced and dispossessed. For many Aboriginal people living in Victoria, ACCOs are their main access to the Aboriginal community and often their link back to culture. VACCA has consulted with a number of ACCOs, Traditional Owners and Aboriginal leaders in Victoria, as well as other key stakeholders on the issues raised in this paper. The views put forward however are VACCA's and are not intended to be a representative voice.

¹ Marcia Langton (2000), "A Treaty Between our Nations", Arena Magazine, Melbourne at <https://arena.org.au/a-treaty-between-our-nations/>

Executive Summary

The paper discusses the ongoing development of the advancing treaty process in Victoria.² In terms of issues of sovereignty over the lands and waters, the *treaty negotiation process* is viewed as strictly a matter for Traditional Owner/Clan groups and the State as the parties to any proposed treaty/ies. However, in addition to this co-sovereignty process and to ensure that the self-determination rights of all Aboriginal people living in Victoria are maintained and advanced, our view is that the advancing treaty process should also involve commitments and agreed processes to establish self-determination-based, authorising environments and, potentially, some form of Indigenous self-government.³ In Victoria, this could include the negotiation of self-determination-based compacts concerning areas such as health, education, social housing, law, justice, family violence, community development and child and family wellbeing.

After outlining the historical and current day issues that have led to the need for treaties and structures that enable the expression of self-determination for Aboriginal people in Victoria the paper outlines a number of questions that need to be resolved.

Treaties are defined as legally binding agreements between Indigenous peoples and governments that can only be changed by the consent of both parties. The concept of treaty acknowledges the internationally agreed status of Indigenous Peoples as political communities, that because of the injustices and impacts of the past as well as pre-existing rights,, establishes a process of negotiation and has an outcome of formal agreement between the parties including the affording of rights and responsibilities. Self-determination as a concept is described in accordance with international human rights law and conventions. The issue of sovereignty is discussed with the concluding view that in Australia sovereignty is an unsettled question as both Federal and State governments have co-sovereignty within Australia's federated

commonwealth system and that Indigenous sovereignty has never been ceded.

With reference to both international and national evidence it is clear that self-determination is beneficial for Indigenous peoples as it provides agency in our lives. The question as to how sovereignty and Indigenous polity can be defined in modern day Victoria is resolved by acknowledging two distinct areas – *sovereignty* in accordance with the un-ceded rights of Traditional Owners/Clans of the lands and waters of Victoria and *polity* in accordance with current day expressions of Indigenous self-determination in Victoria. We suggest that an outcome of the treaty process could involve the pursuit of all aspects of self-determination, including potentially a level of self-government for the general Aboriginal community. True self-determination requires the State to devolve control and delivery of social services to our community.

The paper also outlines how treaties can be protected from governmental change through legislative requirements, noting the potential need for broader protection of treaties at a Commonwealth level.

The requirement of the *UN Declaration of the Rights of Indigenous Peoples* that Indigenous Peoples must have self-determination rights where it comes to issues concerning health, education, wellbeing, social housing, law, justice, family violence and children and families suggests that ACCOs whose stated purpose concerns these areas should be considered as associated parties in the treaty making process. In the Victorian context this would mean that the advancing treaty process must go beyond settling questions of sovereignty over land and waters and support the broader Aboriginal community to build on current expressions of self-determination including through new agreements between treaty-holders and ACCOs. There are currently three strands of agreements and dialogue between the Victorian

² We are using the term 'advancing treaty process' to include all the various consultation, discussion, promotion and research activities associated with the process.

³ Indigenous self-government is a term used in the domestic and international literature to describe attributes and elements of nation building that support the attainment of self-determination for Indigenous peoples. It particularly relates to Indigenous control of key decision-making processes.

Government and Aboriginal people in Victoria: land, waters and economic development; treaty; and services. The advancing treaty process offers the potential to bring these three under one self-determination focused framework; better aligning all agreements and dialogues with Aboriginal rights and aspirations. From a state of Victoria perspective, there is also the *Victorian Charter of Human Rights and Responsibilities* which establishes an internal legal framework for consideration of rights upon which an Indigenous rights framework can also be leveraged.

Treaty-making centuries after invasion and colonisation is complex. However, Indigenous peoples across many nations have navigated this complexity and the paper highlights international treaty and self-determination arrangements from which lessons can be learned. This work shows that treaties can provide sustainable mechanisms for ACCOs to establish formal partnerships and agreements with treaty-holders so that the self-determination rights of Aboriginal peoples can be acknowledged, maintained and strengthened. Alongside any agreements struck between treaty-holders and ACCOs, a future Treaty/Self-determination Framework Act could establish parameters for a renegotiation of contracts between ACCOs and the State Government based on Indigenous rights as well as the Victorian Aboriginal community's aspirations for self-governing structures, not just the alleviation of poverty, addressing perceived dysfunction and service delivery on behalf of government.

The final section of the paper outlines three scenarios detailing the potential role of ACCOs; one which involves ACCOs at the state level, one which does not involve ACCOs necessarily and a final model which sees the advancing treaty process arriving at a state-wide treaty which establishes guiding principles.⁴

Our conclusion is that ACCOs should continue to be involved and acknowledged in the advancing treaty process and have a strong and secure place at a local and state-wide level once a treaty or treaties are established. Specifically that ACCOs,

- involvement is necessitated according to the *Advancing the Treaty Process with Victorian Aboriginal People Act 2018*,
- are a legitimate and profound expression of the self-determination of all First Peoples living in Victoria,
- experience, expertise and expression of Indigenous governance after decades of development provides proven options for both Traditional Owner/Clan entities and the general Aboriginal community in Victoria to secure services, assistance and supports consistent with their both their Indigenous rights and human rights (ie. Rights of children in care), and
- can make an immediate contribution to the work of the First People's Assembly of Victoria in their specific task of developing the treaty negotiation framework.

If the First People's Assembly continues as a long-term role of representative body for the broader Aboriginal community then state-wide ACCOs could participate in an advocacy/ service provider chamber, providing advice and expertise to Traditional Owners/Clans and the Assembly to enable the development of First Peoples to State governmental arrangements that promote Indigenous rights and better outcomes for children, families and communities.

⁴ Of course, ACCOs are already involved in the advancing treaty process in Victoria including through promoting the rights of traditional owners to treaty, encouraging the participation of their staff and membership in Treaty Advancement Commission forums and supporting broader public education regarding Treaty.

Introduction

*... before colonisation, Aboriginal and Torres Strait Islander nations and peoples lived under laws and customs that governed their relationships with their lands and waters, with each other, and with other nations and peoples. They were self-governing peoples exercising sovereignty over their lands and waters. On what basis, then, did British colonisation proceed in the several colonies? ... when Captain James Cook first visited the east coast of Australia in 1770, he carried instructions from the Admiralty, issued in 1768, that provided, among other things: 'You are also with the consent of the natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain.'*⁵

In the lands and waters we now call Australia lies a deep division which determines the relationship between the First Nations peoples and the non-indigenous migrants and descendants of migrants. Its cause is the unsettling question regarding invasion and 'settlement'. The above quotation from the Expert Panel into Constitutional Recognition underlines that at the heart of all Aboriginal policy is the fundamental failure of the colonisers to enter into a treaty with the First Peoples. As we know, there was no seeking 'the consent of the natives', no negotiations held and no consent given. The one attempt at treaty by John Batman in 1835 was disallowed by the Governor of New South Wales.⁶ There is no settlement, there is no treaty, there is just the "structure of invasion"⁷ founded on the assumption of sovereignty by the British crown. As Godfrey Mundy observed in 1852:

*We hold [the land] neither by inheritance, by purchase, nor by conquest, but by a sort of gradual eviction. As our flocks and herds and population increase... the natural owners of the soil are thrust back without treaty, bargain or apology ... depasturing licenses are procured from government, stations are built, the natives and the game on which they feed are driven back ... the graves of their fathers ... trodden underfoot.*⁸

'Gradual eviction' is no foundation for a nation; it is unjust, illegal and merely built on sand. The violence, dispossession and oppression of this eviction process in Victoria, and, indeed Australia, occurred "without treaty, bargain or apology". For those loose foundations to be maintained means forever a divided people. First Nations peoples, and our supporters, have been calling for a process to close that gap and deal with the unfinished business of treaty for decades. In particular, the Federal Parliament looked at a proposed treaty process in the late 70s and early 80s and the Council for Aboriginal Reconciliation proposed a treaty process in 2000.

In the last decade the landscape of Aboriginal and Torres Strait Islander Affairs across Australia saw a shift of focus to Constitutional Reform. In 2010 Prime Minister Julia Gillard held a minority government, so the Australian Labor Party committed, with the Greens, and Independent Member for Lyne, the Honourable Rob Oakeshott, to "hold referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution"⁹. An Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution was then appointed, co-chaired by Patrick Dodson and Mark Leibler. The task of the Expert Panel was to consider "possible options

⁵ Expert Panel, (2012), *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, Canberra: Blue Star Print, p 205.

⁶ Ibid. p. 191.

⁷ Patrick Wolfe, (1999). *Settler Colonialism and the Transformation of Anthropology: The politics and poetics of an ethnographic event*. London: Cassell, p. 2.

⁸ Godfrey Charles Mundy, (1852), *Our Antipodes: Or Residence and Rambles in the Australian Colonies*, London: Richard Bentley, p. 226.

⁹ Megan Davis, (2011) "Constitutional Reform and Aboriginal and Torres Strait Islander People: Why Do We Want It Now?", *Indigenous Law Bulletin*, (Vol 7, Issue 25, 2011), 8.

for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for these options”.¹⁰ The Expert Panel released its final report in January 2012 and recommended potential forms of constitutional recognition, such as the removal of the Constitution’s ‘race’ provisions, protection against racial non-discrimination, approaches to a referendum, and a draft Bill.¹¹

It was evident from the *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Final Report* that there was a clear message in the public hearings held across Victoria in 2014 that there was concern that Constitutional Reform would negatively impact future treaty and sovereignty aspirations, and that this proposed commonwealth reform agenda was not enough.¹² In the 2014 State Labor Party Platform a commitment was outlined to ‘support Victorian promotion of a National Treaty at COAG with Australia’s First Nations people.’¹³ In 2015, Premier Daniel Andrews’s Close the Gap speech launched the State Government’s commitment towards achieving self-determination for Aboriginal peoples living in Victoria.

*It’s not government’s job to dictate to our Aboriginal communities what a good future looks like and feels like. Instead, we need to ask them... I want to hear it from them – in their own voice.*¹⁴

With these considerations in mind, the Victorian Government held a state-wide self-determination forum in February 2016, inviting the Aboriginal community in Victoria to help set the agenda and priorities for future policy and practice. The message from the meeting was

clear, treaty and self-determination were the two key priority areas, and, in Victoria, there was a government who was open to dialogue on these foundational issues. Aboriginal Affairs Minister, Natalie Hutchins, released her Statement on Self-Determination following the forum reflected clearly that,

*Our engagement with Victorian Aboriginals and the recent debate around constitutional recognition has restarted the issue of treaty in Victoria and it is a subject we are determined to resolve.*¹⁵

After a series of regional consultations and state-wide forums, Victoria is now undergoing a process of treaty-making based on the principle of self-determination. In January 2018 Jill Gallagher was appointed the Treaty Advancement Commissioner and the Treaty Advancement Commission was established. The historic *Advancing the Treaty Process with Aboriginal Victorians Bill 2018* was passed in Victorian Parliament in June 2018 to progress the conversation with the Aboriginal community in Victoria. While not in itself a treaty, the Act is a significant step towards advancing the self-determination rights of Aboriginal communities.

Our research question is:

What role do Aboriginal Community Controlled Organisations have in informing and participating in the treaty/treaties/self-determination process in Victoria?

Before we go to that question we will first look at what the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* says and its implications and then address some preliminary questions.

¹⁰ Expert Panel on Constitutional Recognition of Indigenous Australians (2012) *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, Australian Government, January, p. xi.

¹¹ Ibid

¹² Commonwealth of Australia, (2015), “Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples Final Report”, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Final_Report

¹³ Victorian Labor, Platform 2014. <http://www.viclabor.com.au/wp-content/uploads/2014/05/Victorian-Labor-Platform-2014.pdf>

¹⁴ Premier Daniel Andrews, *Closing the Gap – Premier’s Speech*, 2015. <https://www.premier.vic.gov.au/closing-the-gap-premiers-speech/>

¹⁵ Natalie Hutchins, *Statement of Self-Determination*, 2016. <http://www.nataliehutchins.com.au/media-releases/statement-on-self-determination/>

Advancing Treaty Act

The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* recognises

that Victorian Traditional Owners/Clans contend that their sovereignty has never been ceded and articulates key principles for the treaty-making process. As the Act states in its preamble;

the state recognises the importance of the treaty process proceeding in a manner that is consistent with principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent.

In Part Three, the Act specifies that the guiding principles involve

- self-determination and empowerment (section 22),
- fairness and equality (section 23),
- partnership and good faith (section 24),
- mutual benefit and sustainability (section 25) and
- transparency and accountability (section 26).

In terms of the treaty negotiation framework, Section 30 of the Act states that the Aboriginal Representative Body and the State must ensure that it provides for treaty/treaties that

- a) recognise historic wrongs; and
- b) address ongoing injustices; and
- c) help heal wounds of the past; and
- d) support reconciliation; and
- e) bring pride to Victorians; and
- f) have positive impact for Victoria; and
- g) promote the fundamental human rights of Aboriginal peoples, including the right to self-determination and
- h) acknowledge the importance of culture to Aboriginal identity; and
- i) enhance the laws of Victoria.

Our contention in this paper is that, addressing ongoing injustices and promoting the fundamental human rights of Aboriginal peoples, including the right to self-determination requires the involvement, in some shape or form, of current Aboriginal entities, such as state-wide lead and peak ACCOs who are all founded on, and guided by, the desire to overcome the ongoing impacts of the past and advocate for Aboriginal peoples' self-determination and human rights. During the current treaty/self-determination process, ACCOs have a clear role in ensuring that the voice of all Aboriginal people in Victoria concerning health, education, wellbeing, social housing and legal rights are attended to and strengthened. Any treaty making process should strengthen the foundation that has been built by past Aboriginal leaders and Elders, rather than ignore or disempower organisations which the Aboriginal community in Victoria have already established to promote our rights and well-being.

Some preliminary questions

What is a treaty?

A treaty between government and First Peoples is a legally-binding agreement:

- that, as its **premise**, acknowledges the wrongs of the past and recognises First Peoples communities as distinct political communities and polities,
- reached by way of a **process** of negotiation, and
- that arrives at a **binding, mutually-agreed arrangement/outcome** where rights and responsibilities are established that create ground rules for engagement between the parties and enable First Peoples to maintain and realise their self-determination.¹⁶

Importantly,

*While the content of negotiated agreements will differ, however, a treaty must contain more than mere symbolic recognition; an inherent right to some level of sovereignty or self-government must be recognised and provided for.*¹⁷

As Larissa Behrendt suggests:

A treaty between Indigenous and non-Indigenous Australians has been a continuing issue both because of the failure of the modern Australian state to recognise and respect the sovereignty of Aboriginal nations and because of the continuing failure to protect the rights of Aboriginal people.

*The recognition of prior ownership and sovereignty – and the rights and interests that flow from that – are part of the symbolic importance of an agreement between Aboriginal and non-Aboriginal Australians, the potential for a treaty to protect the rights of Aboriginal people ensures that it has practical and meaningful outcomes for Aboriginal people. Particularly while Aboriginal people experience poorer health, higher levels of unemployment, lower levels of education, poorer housing and higher rates of poverty, the potential for a treaty to provide a fairer playing field for Aboriginal people is an important agenda.*¹⁸

Behrendt suggests that in accounting for recognition of Indigenous sovereignty/polity and enabling the exercise of self-determination, the following issues have been identified as fundamental;

- recognition of past injustices,
- autonomy and decision making,
- property rights and compensation,
- protection of cultural practices and customary laws and
- protection of rights.¹⁹

In Australia, one example of an agreement which some contend is a treaty, is the South West Native Title Settlement which concluded in 2015 in Western Australia. The agreement package includes a number of new elements not seen in other native title settlements, including passage by the Parliament of Western Australia of the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA)*, which recognises the Noongar peoples as the 'traditional owners of lands in the south-west of the State'.

¹⁶ For example. Hobbs and Williams, (2018), "Australia's First Treaty", Australian Public Law Blog 16/4/2018 cited <https://auspublaw.org/2018/04/australias-first-treaty/> and Brennan, S., (2003), *Treaty Paper 1*, Sydney: Gilbert and Tobin.

¹⁷ Ibid.

¹⁸ Larissa Behrendt, (2006) "Introduction", *What Good Condition? Reflections on an Aboriginal Treaty 1986-2006*, Canberra, ANU, p. x.

¹⁹ Behrendt, (2003), *Achieving Social Justice*, Leichhardt, NSW: Federation Press, pp. 115f.

In debate on the Noongar Recognition Bill, then Deputy Opposition Leader Roger Cook noted:

By its very nature, the Noongar agreement is in fact a classic treaty; it is a coming together between two nations to agree upon certain things, and in doing so, finding a way forward together and recognising each other's sovereignty. By recognising each other's sovereignty, they decided how they would continue to coexist in a manner that they agreed to through negotiation. Yothu Yindi sung 'treaty now', and that is what we are doing here; this is a treaty between the government of Western Australia representing the newcomers and the nation of Noongar people.²⁰

Hobbs and Williams contend that this is a treaty:

First, the treaty recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians. ...

Second, the Settlement was agreed to via a political negotiation respectful of each party's equality of standing, evincing a commitment to secure a just relationship between Indigenous peoples and the State. In recognising the Noongar nation, the Settlement emphasises the interconnectedness and interrelationship of Indigenous and non-Indigenous Australians in South West Western Australia. Repeatedly highlighted is the idea that the Agreement is 'ultimately an investment in both the Noongar community and the shared future of the Western Australian community as a whole. ...

Third, the settlement contains more than mere symbolic recognition. In consideration of surrendering their native title rights and interests and validating all potentially invalid acts committed on their territory, the Noongar people receive a package of benefits similar to those negotiated under Canada's modern treaty-making process. The Noongar are guaranteed a sizeable land base, non-

exclusive rights to resources over an extended area, a large and sustained financial contribution from the State Government, and enhanced cultural heritage protection. Together, these elements serve two goals key to any treaty: they acknowledge the injustices of the past, and serve the Noongar people's future by strengthening culture and enhancing economic opportunities. It is true that the self-governance rights are not as extensive under the Noongar Settlement. However, as we noted above, these elements are not necessary to constitute a treaty; what is required is the recognition or establishment, and resourcing, of institutions and structures of culturally appropriate governance and means of decision-making and control that amount to at least a limited form of self-government. Such a relationship is consistent with art 4 of the UNDRIP and the arrangements found in the modern treaty-making process in Canada.²¹

While it didn't involve the Federal or Western Australian governments, the *Indigenous Land Use Agreement* between the Traditional Owners, the Kimberley Land Council and Argyle Diamonds in 2005 is a useful example of a high-level agreement, and highlights the many elements to an agreement which may be useful in suggesting what elements could be in a treaty. This agreement also set up two trust funds – the Gelganyem Trust, a charitable trust, which secures a capital fund for future generations and creates funds to support Law and culture, education and training, and community development partnerships, and the Kilkayi Trust, which allows for benefits to be provided to the Traditional Owners for the agreement area.²² These trusts are a useful model for how the Self-Determination Fund could be set up, with two separate types of beneficiaries and income streams, one for land based agreements and the other around civil services.

²⁰ Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

²¹ Harry Hobbs; George Williams, *The Noongar Settlement: Australia's First Treaty*, 40 Sydney L. Rev. 1 (2018), pp. 35-7.

²² Agreements, Treaties and Negotiated Settlements Project, *Argyle Diamonds Indigenous Land Use Agreement*. <https://www.atns.net.au/agreement.asp?EntityID=2591>

The key to treaty-making discussions in Australia is that it concerns redefining the relationship between First Peoples and 'invader/settler' governments so that Indigenous sovereignty and self-determination is **recognised, ongoing** and **effective**.

What is self-determination?

*There is no single concept of Indigenous rights, but rather an ever-growing body of law, opinion and practice, much of it developed during the twentieth century and arising from both the demands of Indigenous peoples themselves and from the concessions made by governments, international bodies and others to recognise various special rights and interests, and to accommodate them.*²³

The right to self-determination is protected under international law. 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.

*The United Nations General Assembly has, through the adoption of the Declaration, affirmed that indigenous peoples have the right to self-determination and, hence, the right to freely determine their political status and freely pursue their economic, social and cultural development. Article 3 of the Declaration mirrors common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.*²⁴

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 people.²⁵ The principle of self-determination suggests that a people or political community – such as an Indigenous people – has a fundamental right and ability to determine their own governance models and practices, priorities and strategies, as political communities or polities.

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.

The *UN Declaration of the Rights of Indigenous Peoples* defines self-determination as a right for Indigenous peoples to act with agency according to their needs and aspirations. Australia is one of the signatories to the declaration.

²³ Langton, Marcia; Palmer, Lisa; Tehan, Maureen and Shain, Kathryn. *Honour Among Nations?: Treaties and Agreements with Indigenous People*, Carlton, Vic.: Melbourne University Press, 2004. Carlton, Vic.: Melbourne University Press, 2004. p 3.

²⁴ United Nations Human Rights, Office of the High Commissioner, "Indigenous Peoples and the United Nations Human Rights System", Fact Sheet No.9/Rev.2. P4

²⁵ Brennan, Sean; Gunn, Brenda; Williams, George, (2004), "Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments," *Sydney Law Review* 15; (2004) 26(3).

What is sovereignty?

Sovereignty is a fluid concept in many respects. Firstly, there is a distinction between external and internal sovereignty which is basically reflective of the difference between foreign affairs and domestic politics, between international law and the constitutional law of a state. External sovereignty is about who deals externally with other nation-states. Internal sovereignty is about the distribution of political and legal power within the nation-state.²⁶ In Australia's case that is through our federal system and the constitutional and political laws and conventions that enable the separation of powers between different arms of government.

From an Aboriginal and Torres Strait Islander Peoples' perspective, the polity embodied in the Constitution represents 'invader-society' or 'the settler state'²⁷ and fails to include or recognise our polities or Indigenous sovereignties. Of critical importance is the question, in the case of Australia, where there has been no consent given or treaty made, of what is the legal basis of the sovereignty of the crown now that the Mabo Decision has dismissed the notion of Australia as a *terra nullius*? As Professor Mick Dodson suggests, "the sovereign pillars of the Australian state are arguably, at the very least, a little shaky."²⁸

In Australia, the states, as former colonies, were the colonial bodies who assumed legal status over the lands and waters of the First Peoples. At Federation, the states retained a status of shared sovereignty with the Commonwealth, as demonstrated by the fact that they had Governors, and not Lieutenant Governors, who directly related to the British Crown. While the relationship changed with the passing of the *Statute of Westminster 1931* which meant that 'dominions' of the British Empire were no longer bound by Imperial Law and the subsequent

passing of the *Australia Acts 1986* which cut all legal appeal ties to the UK, the basic position of shared sovereignty remains. According to Constitutional legal expert, Anne Twomey,

The power to amend or repeal those fundamental statutes that form our Constitution, the Commonwealth of Australia Constitution Act 1900, the Statute of Westminster 1931, and the Australia Acts 1986 was transferred by s 15 of the Australia Act 1986 (UK) not to the Commonwealth but collectively to the Commonwealth and all the state parliaments. If all the state parliaments request the Commonwealth Parliament to do so, it can now amend or repeal these foundational constitutional provisions. This is the ultimate recognition that no matter how much our federal system is trammelled and distorted by Commonwealth laws or High Court decisions, sovereignty in Australia remains vested collectively in the Commonwealth and the states.²⁹

While Twomey's view above suggests that the State Government can act on issues of sovereignty there is also the question of which level of government has jurisdiction when it comes to First Peoples' issues. Ironically, it is the 'race powers' in Section 51.26 which enables the Federal Government to make laws regarding First Peoples. However, unlike Canadian law, where the federal government has "exclusive jurisdiction over the Aboriginal peoples of Canada and provincial law only applies to Aboriginal people with laws of general application"³⁰, in Australia there is no explicit constitutional power which excludes State governments from making laws or agreements in regards to First Peoples.

²⁶ Ibid.

²⁷ Sarah Maddison and Morgan Brigg, (2011), Introduction, in Maddison and Brigg (eds), *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance*, Leichhardt, NSW: Federation Press.

²⁸ Mick Dodson, 'Sovereignty' (2002) 4 Balayi: Culture Law and Colonisation 18

²⁹ Anne Twomey, (2008), "The States, the Commonwealth and the Crown—the Battle for Sovereignty", Papers on Parliament No. 48, January 2008.

³⁰ Larissa Behrend, Amanda Porter, Alison Vivian, (2018) "Indigenous self-determination within the justice context: Literature Review", Sydney, NSW: University of Sydney, Jumbunna, p53.

Marcia Langton, in commenting on Henry Reynolds' study of Aboriginal sovereignty, suggests,

*His conclusion is that sovereignty in Australia can be understood as residing within the distinct Indigenous and settler nations, and as such is compatible within the framework of the sovereign state. Such an arrangement need not be regarded as threatening the dismemberment of the existing state, or as separatism. As arrangements elsewhere in the world demonstrate, there is compatibility between a nation's sovereignty and a state's sovereignty. This is the essence of federalism.*³¹

The question of sovereignty is paramount here as the sovereignty of the First Peoples has never been ceded and there is no desire for it to be ceded. Recognition of Indigenous sovereignty within the broader Australian polity would require a co-existence of 'sovereignties', similar to the levels of government – Federal, State and Local.³²

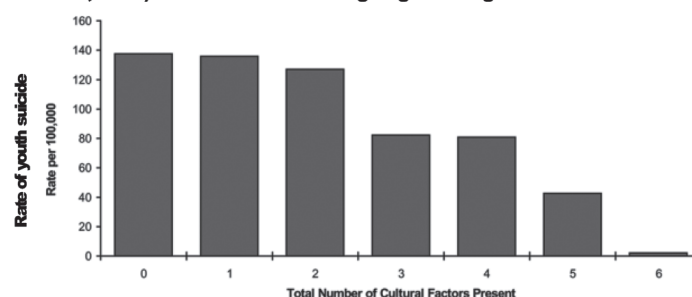
Is self-determination beneficial?

*Not only is self-determination a right of Indigenous communities, but there is robust and consistent Australian and international evidence that self-determination and self-governance are critical to Indigenous communities achieving their economic, social and cultural goals.*³³

International research and practice demonstrate the importance and benefits of self-determination, including self-government and culture as a means through which Indigenous communities can overcome disadvantage.³⁴ Michael Chandler and Travis Proulx for the *International Academy for Suicide Research* have pointed out through their study of Aboriginal youth suicide rates in Canada that as measures for self-determination and provision of culturally-informed services increase, youth suicide rates dramatically decrease. As the chart below demonstrates, 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 OF 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.



Suicide rates by number of factors present in the community (1987-1992). (Taken from Chandler M and Proulx T. *Changing selves in changing worlds: youth suicide on the fault lines of colliding cultures*. *Archives of Suicide Research* 2006; 10: 125-140. 2006).

³¹ Langton, Marcia; Palmer, Lisa; Tehan, Maureen and Shain, Kathryn. (2004), *Honour Among Nations?: Treaties and Agreements with Indigenous People* [online]. Carlton, Vic.: Melbourne University Press, 2004. Carlton, Vic.: Melbourne University Press, p.16.

³² Local government sovereignty/polity being dependent on the State government recognition – as there is no recognition of local government in the National constitution.

³³ Larissa Behrendt, Amanda Porter and Alison Vivian (2018) *Indigenous self-determination within the justice context: Literature review*, Sydney: Jumbanna Institute, UTS, p. 20.

³⁴ Bourke, Sarah, Alyson Wright, Jill Guthrie, Lachlan Russell, Terry Dunbar, and Raymond Lovett. (2018), "Evidence Review of Indigenous Culture for Health and Wellbeing." *The International Journal of Health, Wellness, and Society* 8 (4): 11-27



Being on your own land, having a form of self-government, having Indigenous community-controlled health and welfare services, and justice systems, all combine to create better outcomes for young Indigenous people.

In the USA,

The results of federal policies of self-determination must be judged an overall success in terms of their impacts on the economic, social, cultural and political status and well-being of the Indian nations. Many prior decades of federal management of virtually all tribal affairs found American Indians on reservations to be the most distressed populations in the United States. Under self-determination, these conditions are, overall, being abated, sometimes at astoundingly high rates. Sustained economic growth has taken hold and is closing income gaps between Native Americans and the rest of U.S. society. Although still distressing, health, housing and education are generally on the upswing. Culturally and politically, self-determination has clearly empowered the Indian nations to assert themselves, and has enabled Native communities and their governments to begin to break long-standing patterns of dependency and second-class status.³⁵

In Australia, there is a growing body of research that points to similar impacts on well-being outcomes for First Peoples when the ingredients of agency and culture are given priority for policy and practice. One of the most comprehensive reviews of the literature is Katy Osborne, Fran Baum, Lynsey Brown's *What works? A review of actions addressing the social and economic determinants of Indigenous health* by the Australian Institute of Health and Welfare. The review analysed various health and wellbeing programs targeted at Aboriginal people including healing camps, Elder-led gatherings and trips to country

for young people, art and narrative therapy, clinical services, culture mapping, bush skills development and family reunions for Stolen Generations. The key characteristics that successfully supported connection to culture, country and community were

- *being delivered by organisations with a clear direction, planning and vision;*
- *being locally driven and led and owned by Aboriginal communities working in collaboration with community organisations;*
- *building on traditional approaches and activities as pathways from healing;*
- *involving Elders in the teaching of traditional culture and skills;*
- *drawing on land and Country as a means to heal; and*
- *building on the strengths of Aboriginal Australians and cultures to enable healing.³⁶*

A more recent study by Zardo on cultural strengthening programs points out that:

For all human beings our health and wellbeing is bound up with our social experience. Identity is formed through our relations with and within our families, communities and culture. In Australia, colonisation and the forced removal of children, and the racism that underpins these issues, can negatively affect Aboriginal and Torres Strait Islander peoples' opportunity and ability to engage in cultural practice, and to learn about and teach their culture and history within their communities.

³⁵ Cornell, Stephen, and Joseph P. Kalt. (2010), "American Indian Self-Determination: The Political Economy of a Policy that Works". HKS Faculty Research Working Paper Series RWP10-043, John F. Kennedy School of Government, Harvard University, pp. 26f.

³⁶ Katy Osborne, Fran Baum, Lynsey Brown (2013) "What works? A review of actions addressing the social and economic determinants of Indigenous health" *Issues Paper no. 7* produced for the Closing the Gap Clearinghouse, December 2013.

Programs that support Aboriginal communities to engage with, share, learn about and teach culture have been found to have a positive impact on the health and wellbeing of Aboriginal people living in both remote and urban settings. Culturally focused programs that have been most effective in improving health and wellbeing outcomes are those that have been identified, developed and delivered by, or in collaboration with, the Aboriginal community in which the program is to be implemented.³⁷

Aboriginal researchers in Australia have suggested the following factors which protect Aboriginal social and emotional wellbeing which relate to cultural identity.

Connection to land, spirituality and ancestry, kinship networks, and cultural continuity are commonly identified by Aboriginal people as important health-protecting factors. These are said to serve as sources of resilience and as a unique reservoir of strength and recovery when faced with adversity, and can compensate for, and mitigate against, the impact of stressful circumstances on the social, emotional wellbeing of individuals, families and communities.³⁸

With the greater role that self-determination and community-control would play in a treaty context, it is extremely likely that greater agency for First Peoples communities and organisations would further empower the cultural and nation building inputs that are proven as central to delivering better outcomes for First Peoples.

How would sovereignty and self-determination be exercised today?

To put it concisely, there is the sovereignty of the First Peoples according to our traditional lands and waters over which there has been no legal transfer of sovereign rights; merely the assumption of sovereignty over those lands and waters by Great Britain in the 18th Century. There are also present-day forms of self-determination exercised by First Peoples in the face of the dominant culture which could be defined as modern First Peoples' polities; like ACCOs, sporting and social clubs etc.

The question for us is how will the self-determination and treaty-making process in Victoria respect and encompass the various forms of sovereignty and self-determination which currently exist for the First Peoples. They include self-determination

- according to *sovereignty over land, waters and cultural heritage* involving the Traditional Owners/Clans³⁹;
- according to *geographically defined communities* that may have a mixture of Aboriginal and Torres Strait Islander peoples on country and people who are off-country;
- as expressed by Traditional Owners and other Aboriginal and Torres Strait Islander people through *local community-controlled organisations*; and
- as expressed by *state peak and lead Aboriginal and Torres Strait Islander organisations* which may be portfolio based (such as VACCHO, VALS, VACCA, VAEAI, VACSAL, Djirra, AHB) or representative based (such as the proposed Aboriginal Representative Body, now to be called the First Peoples Congress of Victoria).

³⁷ Zardo, P. (2015), *Connection to Culture: Literature Review for the Yarra Ranges Council and Healesville Indigenous Community Services Association*, Onemda VicHealth Group, The University of Melbourne, Melbourne, p. 3.

³⁸ Stephen R. Zubrick, Carrington CJ Shepherd, Pat Dudgeon, Graham Gee, Yin Paradies, Clair Scrine and Roz Walker, "Social Determinants of Social and Emotional Wellbeing" in Pat Dudgeon, Helen Milroy and Roz Walker (eds), (2013), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, Commonwealth of Australia.

³⁹ This would build on the roles and expertise already exercised by the Victorian Federation of Traditional Owners and the Aboriginal Heritage Council.



The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* clearly suggests a process covering both the Traditional Owners/Clans of the lands and waters now called Victoria and the Aboriginal community who live in Victoria in general.

A 'layered' process of treaty-making to encompass all of these expressions of self-determination, as identified above, could be a viable option. The Victorian advancing treaty process, based as it is on the principle of 'inclusion', should encompass all expressions of self-determination and harness the community and cultural knowledge and expertise that has been built up over the last century in the current incarnations of Aboriginal community organising.

For example, Victorian treaties with First Peoples that deal with the question of sovereignty over lands, waters and cultural heritage could be between either the State Government and a state-wide Traditional Owner/Clan entity or with each Traditional Owner/Clan protected and enabled within a treaty-making framework act. The proposed *Treaty Authority* could, among its other functions, act as an external dispute mechanism/umpire to settle disputes between the state and the Traditional Owner/Clans and possibly disputes between Traditional Owners/Clans. Compensation and reparations for stealing of land and the associated disconnections and trauma produced should also be part of all treaties, particularly given the stated intent in Section 30(3)(a) in the *Advancing the Treaty Process with Aboriginal Victorians Act*. Consideration must also be given to truth-telling in the general Victorian community and healing processes for Aboriginal communities in Victoria.

In terms of treaty/ies between the State Government and the Aboriginal community in Victoria in general, there needs to be considerations as to how Aboriginal communities in Victoria organise themselves as modern day polities and how our self-

determination rights are recognised, maintained and strengthened. We suggest that in addition to the treaty-making process for Traditional Owners/Clans, there be consideration of ongoing structures for representation of Aboriginal communities to Government and Parliament, and for service provision under self-determination frameworks that ensure community control, such as AEC, Aboriginal Children's Forum, Dhelk Dja, Aboriginal Justice Forum and so on.

Lessons need to be learnt from previous incarnations of Indigenous polity in Australia, such as ATSIC, and current examples. ATSIC was representative and included a region-based structure and provided a range of services to First People communities. A review into ATSIC suggested a level of decentralisation and a strengthening of the regions.⁴⁰ Unfortunately, the then Howard Federal Government's response was to decommission ATSIC, against the recommendations of the review. The ACT currently has an elected body that plays an advisory role to the ACT Government and the Torres Strait Islander Regional Authority is also an elected body with members having portfolios in a variety of policy areas.

ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB) has seven members, elected by Aboriginal and Torres Strait Islander people who reside in the ACT, who are tasked with representing the interests of their constituents and providing advice to the ACT government. While *ATSIEB's* role is important in terms of providing a voice to government, its powers are limited and dependent on how the ACT government chooses to take on that advice. The *Torres Strait Regional Authority (TSRA)* Board consists of 20 elected Members who are all Torres Strait Islander or Aboriginal people living in the region and determines TSRA's policies and budget. TSRA has significant regional power, similar to a local council, with the ability to engage in economic development in the region.

⁴⁰ Review Panel, (2003), *In The Hands Of The Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, Canberra: Government Printers.

In researching the possibility of a shared sovereignty or shared polity approach between First Peoples and governments, the *Aboriginal and Torres Strait Islander Commission (ATSIC) Scoping Paper on Resourcing Indigenous Development and Self Determination* in 2000 suggested recognition of Indigenous polity or, as the paper terms 'governance' as "a new order within the Australian Federation".

*This terminology of an Indigenous order of governance within a federation has been successfully used in Canada for over a decade and has led to the conceptualisation of Canada as a 'diverse' federation within which different peoples and orders of government belong in different ways.*⁴¹

Critical to such an approach is recognition of particular First Peoples' collective rights and responsibilities in areas that are cultural, economic, social and political and, with that recognition, capacity building to ensure the adequate resourcing of community-control and governance. The areas in which Indigenous governance could operate would be in matters which pertain to issues that are "internal to the group, integral to its distinct culture and essential to its operation as a political and cultural community."⁴²

The approach suggested by the paper included: *the allocation of rights and responsibilities for a wide range of functions and decisions. Some of the areas over which decisions would be made could include:*

- *establishment of governing structures, elections and membership;*
- *maintenance of Indigenous languages, culture and religion;*
- *child welfare, education, health and social services;*
- *administration and enforcement of Indigenous laws;*

- *land and resource management, including zoning, service fees, land tenure and access;*
- *development of own-source revenue opportunities;*
- *management of public works, infrastructure, housing, local transport; and*
- *licensing, regulation and operation of businesses located on Indigenous lands.*⁴³

Critically, First Peoples' leaders are seeking recognition as polities to be engaged with as equals rather than as disadvantaged Australians. As Darryl Cronin suggests "the major problem ... is that the vast majority of Indigenous organisations have no jurisdictional authority and are dependent upon annual grant funding".⁴⁴ As the *Redfern Statement* notes, programs and services should be designed and delivered by First Peoples' services.⁴⁵

*Self-determination is a right of peoples, including Indigenous peoples, which is acknowledged in international law. Further, countries, such as Australia have an obligation to facilitate that right to self-determination by engaging with Indigenous peoples through their own political and legal institutions.*⁴⁶

As the Aboriginal Victoria website states:

The Victorian Government is committed to self-determination as the guiding principle in Aboriginal Affairs and is working closely with the Aboriginal community to tackle some of the most important issues for Aboriginal Victorians.

Ensuring co-sovereignty and co-polity is therefore essential if self-determination is to become the guiding principle of the relations between First Peoples and governments and how rights are to be given effect and outcomes to be improved.

⁴¹ *Resourcing Indigenous Development and Self-Determination: A Scoping Paper* Prepared by the Australia Institute for ATSIC National Policy Office, Strategic Development Team September 2000, p. iv.

⁴² Ibid. p. v.

⁴³ Ibid.

⁴⁴ Darryl Cronin (2003) in AIATSIS (2003), *Treaty – Let's get it right!* Canberra: AIATSIS, p. 155

⁴⁵ Redfern Statement Alliance (2016), *The Redfern Statement*, Sydney.

⁴⁶ Larissa Behrendt, Amanda Porter and Alison Vivian (2018) *Indigenous self-determination within the justice context: Literature review*, Sydney: Jumbanna Institute, UTS, p. 20.

Protecting treaty rights

One of the issues concerning effectiveness of treaties is how to protect them from unilateral change by governments. During the national constitutional recognition process, a large number of First Peoples and non-Government organisations contended that an 'internal' treaty-making power was required in the Federal constitution, via a proposed constitutional amendment under s128 to enable and protect the Commonwealth when making treaties. Otherwise, treaties could be either challenged at the High Court or overturned by subsequent governments.

In the Victorian context, the State's constitution already has an Acknowledgment of Aboriginal People in the preamble (section 1A), it is not legally binding or provide any enforceable rights, it is clear that symbolic language is not enough. We therefore propose that a necessary legal mechanism for the enablement and protection of treaty rights and self-determination, a *Treaty/Self-determination Framework Act* be established. Within this Act, and perhaps in the state constitution as well as, a rule requiring a special majority or state referendum (see below) to amend or overturn the Act, or a treaty created through the enabling powers of the Act should be inserted. This would be required unless there was agreement of by both parties to the treaty, to make changes to the terms of the treaty or overturn it.

It needs to be noted that the state constitution is itself an act of parliament and Section 18 of the *Constitution Act 1975* allows for three methods by which the Constitution can be changed. These are by referendum of the Victorian electors; by a special majority, meaning 3/5ths of the whole number of Members of the Assembly and the Council respectively; and by an absolute majority of the whole number of the Members of the Assembly and the Council respectively.⁴⁷ We would suggest that a future *Treaty/Self-determination Framework Act* should require 3/5ths of both houses, as well as a referendum to allow any changes to the Act. However, given the current race powers (section 51.26) in the Federal Constitution, it could be possible for a Federal Government to negatively affect state-based treaties, for example by declaring them invalid. Therefore, a further future protection for treaties in Victoria could be to seek a change to the Commonwealth Constitution which would include the following principles that any treaties made:

- do not require formal ceding of sovereignty
- identify the scope of Indigenous self-governance, and
- include measures to protect treaties from non-indigenous unilateral intervention.

To proceed on discussion of this issue, this paper assumes that the Victorian Government has the legal authority to enter into a treaty process acknowledging the co-sovereignty of Aboriginal peoples in Victoria. The treaty process, as stated in the Act, should therefore enable and protect the self-determining rights of both Traditional Owners/Clans and Aboriginal peoples in Victoria. The latter by means of institutionalising Aboriginal representation to parliament and government and self-governance structures that cover the areas of health, community services, education and welfare. The question remains, what would this look like?

⁴⁷ Parliament of Victoria, *Fact Sheet D4: Altering Victoria's Constitution*. <https://www.parliament.vic.gov.au/2-legislative-assembly/articles/2481-fact-sheet-d3>

What is the role of service-based community-controlled organisations?

State-wide ACCO policy and service providers represent the broader polity of Aboriginal people in Victoria and therefore have an ongoing role in being the First Peoples' voice on policy and service provision matters in their area of expertise to ensure Indigenous self-determination rights are being addressed in accordance to international principles and covenants (such as the UN Covenant on the Rights of Children); particularly the following articles from UN DRIP.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

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.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the

enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.⁴⁹

While there is reasonable clarity as to how self-determination can be actualised when an Indigenous polity is located solely on land over which they have been assigned sovereignty, it is less clear how diaspora communities can exercise self-determination or at least have their Indigenous rights protected.

⁴⁸ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly at its 61st session, 2 October 2007, A/RES/61/295.

The Victorian context

In Australia, self-determination has been expressed by First Peoples through the creation of community-controlled organisations, at a local/regional level or through state/national community policy and service organisations. Organisations and representative bodies have also developed in response to land rights and native title legislation. At the national level there was the *National Congress of Australia's First Peoples* (at the time of publication the Congress has gone into administration) which sought to provide a voice for individual and organisational members. As mentioned above, there is also the *ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB)* and the *Torres Strait Islander Regional Authority*.

In Victoria, state-wide/peak ACCOs have specific roles of advocacy and service provision for the legal rights, education, health, community services, and child and family welfare of Aboriginal people in the state. In addition, currently, there are 32 local ACCOs in Victoria, many of whom have decades of experience in delivering services to their local communities in areas such as health, welfare, justice, housing, community services and the arts. Local ACCOs are often an important focal point within their communities and provide services for all Aboriginal and Torres Strait Islander people in their area. In most cases, local Traditional Owners are present in these local ACCO bodies, as board members and employees and Traditional Owner Elders provide an important culturally authoritative role.

When considering treaties and self-determination frameworks for Aboriginal and Torres Strait Islander peoples in Victoria, there are also specific demographic features to consider. There are many Aboriginal and Torres Strait Islander peoples who live in Victoria but whose traditional lands and waters are outside Victoria. According to the 2016 Census, the Aboriginal and Torres Strait Islander population in Victoria was over 47,000 with the median age at 23. While there are no formal statistics

on the proportion of the Aboriginal population who have current or historical connections to Victorian Traditional Owner/Clan groups, it has been estimated that only about quarter of Aboriginal children currently in the child welfare system in Victoria have connections to Victorian lands and waters, and that about 15% live on country in Victoria⁴⁹. It is reasonable to surmise that the proportion of the Aboriginal population who have current or historical connections to Victorian Traditional Owner/Clan groups is likely to be less than half at the very least, and of those an even smaller proportion who are able to live on country. Given this complexity, while acknowledging the aspirations of many Traditional Owners to be self-determining, consideration must be given to what mechanisms are required to enable this. In the current treaty process, the question remains as to how non-Victorian Traditional Owner/Clan Aboriginal people are to have their self-determination rights acknowledged other than through the *First Peoples Assembly of Victoria*.

The *Victorian Charter of Human Rights and Responsibilities*, established in 2006, provides a legal context for consideration of the rights of Aboriginal and Torres Strait Islander people living in Victoria. In particular, culture and heritage rights are given prominence in the Act and provide a legal framework for the future expansion of those rights. Interestingly, in Victoria, legal recognition of the principle of self-determination has existed in its child and family legislation, and is an area of future consideration in the Victorian *Charter of Rights and Responsibilities*.

Given that there is legislated recognition of Aboriginal child and family welfare entities having a role in the expression of Indigenous self-determination, we use VACCA as an example of an ACCO that balances its role as an expression of self-determination and as a service provider.

⁴⁹ Victorian Government Department of Education and Early Childhood Development (2010), *The State of Victoria's Children: Aboriginal children and young people In Victoria*, Melbourne, Victoria: State of Victoria, p. 46.

At the state-wide level, VACCA builds on its role in child and family welfare under the current protocols and arrangements it has with the Victorian Government. This means that VACCA balances its role as an ACCO advocacy and service agency with its role as a formally recognised and registered service provider of child and family welfare services. VACCA both represents the voices of the Aboriginal communities in Victoria, as they concern child welfare, and operate professionally within the dominant culture legal/political structures of Victoria and Australia. In the majority of areas in which VACCA operates, its clients live in cross-cultural situations largely controlled and dominated by the non-Indigenous community, and its political, economic and legal institutions. VACCA has a clear role in facilitating self-determination for Aboriginal communities in Victoria in the area of child and family services. Governments' relationships to VACCA must at all times respect this principle of self-determination. Nevertheless, VACCA is accountable to government for the funding it provides for service delivery and, through these mechanisms, is also accountable to its clients, community and the public. At all times it is also the Aboriginal communities of Victoria to which VACCA is accountable through its model rules as a co-operative and through its community cultural mechanisms, and for which VACCA attempts to give purposeful expression of self-determination in the area of child and family services.

In the *Children, Youth and Families Act* (2005) the principle of self-determination is aligned with decision making processes for Aboriginal children for whom there are safety concerns. The Act:

- recognises the principle of self-determination and self-management for Aboriginal communities as part of the decision-making process regarding Aboriginal children (Section 12),
- requires compliance with the Aboriginal Child Placement Principle, in recognition of children's right to be raised in their own culture and the critical role of extended family, kinship networks, culture and community in raising Aboriginal children (Section 14),
- states that the Principal Officer of Aboriginal agency can be authorised to perform functions and exercise powers regarding Protection Orders (Section 18)⁵⁰, and
- mandates preparation of cultural plans for Aboriginal children subject to guardianship or long-term guardianship orders (Section 176).

The VACCA example suggests that there is a role for advocacy and service based ACCOs to ensure the maintenance of the self-determination rights of the Aboriginal community in general, in Victoria. Alongside the sovereign rights of First Peoples to land, water and cultural heritage that should be protected in treaty negotiations, there is an opportunity to secure/mandate self-determination rights for all Aboriginal Victorians.

⁵⁰ In 2015 additional amendments were made to section 18 to enable a delegation framework within Aboriginal agencies as a means of transferring guardianship authority back to Aboriginal communities.



For example, VACCA is currently implementing *Cultural Therapeutic Ways*, a whole of agency approach to guide VACCA's practice of healing for Aboriginal children, young people, families, community members and carers who come into contact with our services, as well as creating a safe and supportive workplace for staff. It is the intersection of cultural practice with trauma and self-determination theories. The aim of this program is to integrate Aboriginal culture and healing practices with trauma theories to guide an approach that is:

- healing (trauma informed based on neurological care);
- protective (providing safe spaces and safe relationships); and
- connective (to culture).

The realisation of self-determination is about "enabling people to negotiate spaces and situations to survive and flourish"⁵¹. It will see the creation of frameworks that place culture and trauma-informed theory at the heart of VACCA's policy and practice. It enables an organisational model underpinned by principles of the rights of the child and self-determination, setting a completely new precedent across Australia for how ACCOs work within the sector, and with communities. All VACCA programs contribute to developing monitoring and evaluation plans, and staff are supported to plan, implement, evaluate and adapt throughout the program cycle. The primary toolkit for this implementation is a newly built database which allows each program to track how they are working towards self-determined goals.

As an ACCO, we believe that self-determination is about instilling behaviours, attitudes, skills and knowledge in our staff to recognise and support Aboriginal people's collective and individual rights to self-determination; where the lived experience of Aboriginal peoples is acknowledged and promoted in everyday practice and where our non-Indigenous staff are skilled in supporting Aboriginal people in a culturally informed practice. For the families we support, we believe the pursuit of self-determination is about ensuring that they are provided with information, resources and supports to assist them in making an informed decision; that they know their rights and responsibilities, and we ensure that their voices are heard and respected.

VACCA is committed to working with families to create safe and supportive environments where Aboriginal children's rights, including that of self-determination, are protected and promoted. We believe that Aboriginal children have the right to identify as Aboriginal without fear of retribution or questioning of their identity. They should have access to an education that strengthens their culture and identity, and that we can support, maintain or foster a connection to their land and country. We believe Aboriginal children have the right to be taught their cultural heritage by their Elders, and to know and practice their cultural responsibilities. We believe that children have a right to access programs and services, and practice frameworks where their culture is embedded. We know that children need very clear expectations, protection from harm, and loving guidance from the adults in their lives. Self-determination principles complement best interest principles when it comes to Aboriginal children in child protection.

⁵¹ VACCA, *A significant journey of change: The implementation of Cultural Therapeutic Ways*.

International Models

International examples provide a valuable insight into the intersection of treaty rights of Indigenous peoples and self-determination. What follows are discrete case studies looking at the negotiated treaty/treaties in New Zealand, the USA and Canada, and how these agreements have impacted and informed Indigenous people's ability to practice self-determination and/or nation building, particularly in the area of child and family welfare.

In **Aotearoa/New Zealand**, the Te Tiriti o Waitangi (the Treaty of Waitangi) was agreed to over a number of years starting in 1840, between the British Crown and approximately 540 Maori rangatira (chiefs). This treaty was written in both Maori and English, and although there is significant disparity between the two versions which has led to contestation over the legal interpretation and enactment, crucially the Maori maintain their sovereignty⁵².

The treaty includes a number of core principles which "must be considered in the development of draft legislation and which help guide judicial interpretation of legislation...[they] can be seen as a mechanism by which Maori tribes are able to assert rights underpinning self-determination."⁵³ The treaty is viewed as the basis of the delivery of human services in Aotearoa/New Zealand. In s396 of the *Children, Young Persons, and Their Families Act 1989* (New Zealand) detailed the policy of devolution to an 'iwi authority', which represent the signatories to the Treaty. This clause was problematic for urban Maori communities which make up over 80% of the Maori population, but where community-controlled service provision faced hurdles with funding and resources.

The legal rights of urban Maori peoples were first claimed in 1994 in the Waitangi Tribunal. The claim was "about testing and extending the boundaries of what legalities and rights were afforded to Māori under the Treaty of Waitangi, as well as the judicial duties and responsibilities of the Crown." They were fighting for the legal recognition of the urban Maori community, including adequate funding for the provision of social services. It led to a new approach of interpreting the Treaty,

*This new approach would mean focusing more on the purpose and intent of the Treaty, to better reflect contemporary concerns and recognising that the true purpose and intent of the Treaty lay in the protection of all Māori, and not just the previously narrowly defined approach of traditional kin-based groups or iwi. It was this departure that set the foundation of the concept of what it means to be Urban Māori.*⁵⁴

In the Te Whanau O Waipareira Report by the Waitangi Tribunal it also clearly determined that when applying social policy for the delivery or funding of social services to Maori "all interaction between Crown and community should enhance the exercise of that rangatiratanga [sovereignty]."⁵⁵

Te Whanao O Waipareira provides services for Urban Maori children, families and elders in the Auckland Region. This example is relevant because it identifies the need for community-controlled organisations who deliver services to all Maori people to be protected and afforded the same rights as Maori Traditional Owners. This example specifically points to the risk that, if treaties are solely between Traditional Owners/Clans and Government, then Aboriginal people who are not Victorian-based Traditional Owners/Clan members or not living on traditional lands may not have their rights protected.

⁵² Waitangi Tribunal (2014) 'Report on Stage 1 of the Te Paparahi o Te Raki Inquiry Released', NZ Government.

⁵³ Alice Petrie, (2018), "Treaties and self-determination: Case studies from international jurisdictions: Treaty series", Department of Parliamentary Services, Parliament of Victoria.

⁵⁴ Kia Pu Te Aai O Pareira, Catalysts of Whanau Health and Wellbeing in West Auckland. P15. https://www.waipareira.com/wp-content/uploads/2017/11/W1.Kia_Pu-te_Wai_o_Pareira_%E2%80%93_Catalysts_of_Wh_nau_Health_and_Wellbeing_in_West_Auckland.pdf

⁵⁵ Waitangi Tribunal, "T E Whanau O Waipareira Report" 2018. P235-6

The Waitangi Tribunal, set up by the *Treaty of Waitangi Act* 1975, is a “permanent commission of inquiry that makes recommendations on claims brought by Māori relating to Crown actions which breach the promises made in the Treaty of Waitangi.”⁵⁶ In this way, the Tribunal provides a legal process by which Maori Treaty claims are investigated.

It should also be noted that there are four designated Maori seats in Parliament which were established by the Maori Representation Act of 1876, although “their origins owe much to the New Zealand Constitution Act”⁵⁷.

In the USA, Native American treaty rights are upheld in Clause 2 of the American Constitution and are distinct sovereign parties, there are more than 370 historic treaties and as of November 2018 there were 573 recognised tribes and communities in the United States⁵⁸. These tribes have various governance structures and the lived experiences of each tribe vary across the country. In 1975 the *Indian Self-Determination and Education Assistance Act* enabled a shift in administration of government programs known as ‘self-determination contracting’ or ‘638 contracts’⁵⁹, where “the tribe agrees to administer a particular program, and the associated federal funds are transferred to the tribal government.”⁶⁰ This includes provision for health, housing, child and family welfare and justice (limited to on reserve). There are limitations in these 638 contracts as funding cannot be re-allocated in response to shifting needs of the community. The *Tribal Self Governance Act* 1994 enables tribes to receive a lump sum of payments for all services it is allocated to provide which allows more flexibility in providing services on the basis of need.⁶¹ These provisions have been successful in some circumstances however if effective

governance infrastructure isn’t enabled then the capacity to provide services will be severely impacted.⁶²

The *Indian Child Welfare Act* 1978 created a self-determining child welfare framework for American Native Nations/tribes. The Act recognises that “that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe” and that because of the treaties already established have “assumed the responsibility for the protection and preservation of Indian tribes and their resources”⁶³ It was passed by the US Congress in response to the recommendations of the American Policy Review Commission’s which explored current law and practice as it affected American native people. It recommended that American native peoples would be best placed to determine what was in the best interests of Native American children. Child and family welfare services for Native Americans in the United States where tribal sovereignty is recognized and guarded by the *Indian Child Welfare Act* 1978, “Indian nations exercise exclusive jurisdiction over the care, placement, and adoption of Indian children.”⁶⁴

The *Indian Child Welfare Act* 1978 transfers legislative, administrative and judicial decision making to federally recognised Indian bands where children live on a reserve.⁶⁵ State and Tribal courts have shared jurisdiction over Indian children who are not residing on reserve, but State courts must transfer proceedings to the relevant Tribal Court unless given appropriate cause.⁶⁶ Importantly, the ICWA funds the system of Indian Child Welfare through the federal budget.

⁵⁶ Waitangi Tribunal Website: <https://www.waitangitribunal.govt.nz/>

⁵⁷ New Zealand Parliament, “The Origins of the Maori Seats”, May 2009.

⁵⁸ National Conference of State Legislatures, *Federal and State Recognized Tribes*. Accessed November 2018, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx>

⁵⁹ The Harvard Project on American Indian Economic Development, (2008), *The State of Native Nations*, Oxford: Oxford University Press, p. 20.

⁶⁰ Ibid. p.21.

⁶¹ Ibid.

⁶² Ibid. pp.23f

⁶³ See s1901(2)& (3) of the Indian Child Welfare Act 1978

⁶⁴ The Harvard Project on American Indian Economic Development, (2008), *The State of Native Nations*, p.236.

⁶⁵ See s1911(a) of the Indian Child Welfare Act 1978

⁶⁶ See s1911(b) of the Indian Child Welfare Act 1978

According to the 'Guidelines for Implementing the Indian Child Welfare Act' released in December 2016 many states have implemented their own child welfare legislation, "to establish protections beyond the minimum Federal standards"⁶⁷. Section 109. [25 U.S.C. 1919] authorises 'Tribal-State agreements' that address "care and custody of Indian children and jurisdiction over child custody proceedings"⁶⁸.

For example, the *Confederated Salish and Kootenai Tribes* which include the Bitterroot Salish, Upper Pend d'Oreille, and the Kootenai, at the Flathead Indian Reservation in Montana, include, as part of their self-governance arrangements or 'tribal governments', the delivery child and family services within the Flathead Reservation by their own Tribal Social Services Department who perform full child protection services.⁶⁹

In **Canada**, treaty rights are protected under s35 of the Canadian Constitution. Like Australia and the USA, Canada is a federation with the provinces (similar to Australia's states). In Canada there are both historic and modern treaties. Modern day treaties provide the most relevant examples of agreements which include self-determination and self-governance. Modern day treaties are being entered into in British Columbia, there is a wide breadth of examples to learn and influence our understanding of what should be included in a treaty in Victoria.

In Canada the provincial government has responsibility for child welfare:

*While Provincial legislation with respect to First Nations children differs across Canada, there is a trend towards tripartite negotiated agreements with First Nations and Aboriginal peoples. These recognise the specificity of Indigenous peoples' children's needs and the benefits of local control over children's services and decision making. In many instances in legislation, but otherwise in practice, the importance of including Aboriginal agencies in all aspects of decision making with respect to Aboriginal children is recognised.*⁷⁰

In **Canada** there are various jurisdictional funding models⁷¹ relating to child and family welfare service delivery. "Canada has a decentralized child welfare system in which over 300 provincial and territorial child welfare agencies operate under the jurisdictions of 13 Canadian provinces and territories."⁷² These include, but are not limited to;

- delegated agreement (similar to current service delivery model),
- tripartite agreement (Federal, State and ACCO),
- self-government and treaties.

At the end of 2018 the Government of Canada announced it will introduce a "co-developed federal legislation on Indigenous child and family services in early 2019"⁷³ to address the over-representation of Aboriginal children in out of home care.

⁶⁷ United States Department of the Interior 'Guidelines for Implementing the Indian Child Welfare Act' 2016 p7: <https://www.nicwa.org/icwa/>

⁶⁸ Ibid.

⁶⁹ Confederated Salish and Kootenai Tribes of the Flathead Reservation, *Child Abuse and Neglect*, 2007. <http://www.csktribes.org/services/tribal-education/71-documents/168-title-iii-chapter-2-child-abuse-and-neglect>

⁷⁰ Larissa Behrendt, Amanda Porter, Alison Vivian, (2018) "Indigenous self-determination within the justice context: Literature Review", Sydney: University of Sydney, Jumbunna, p 53

⁷¹ Nicholas Bala, Cindy Blackstock, Pamela Gogh, "Jurisdiction and Funding Models for Aboriginal Child and Family Service Agencies" (CECW Information Sheet #30E. Toronto, ON: University of Toronto, Faculty of Social Work, 2005) 4-7.

⁷² Sinha, Vandna; Kozlowski, Anna, (2013), "The Structure of Aboriginal Child Welfare in Canada" International Indigenous Policy Journal; London Vol. 4, Iss. 2, (2013): n/a.

⁷³ Government of Canada, (2018), Media Release. "Government of Canada, with First Nations, Inuit and Métis Nation leaders, announce co-developed legislation will be introduced on Indigenous child and family services in early 2019." <https://www.newswire.ca/news-releases/government-of-canada-with-first-nations-inuit-and-metis-nation-leaders-announce-co-developed-legislation-will-be-introduced-on-indigenous-child-and-family-services-in-early-2019-701636712.html>

Provincial Examples

The *Child and Family Services Authorities Act* in Manitoba delegates child and family services to four authorities; two of which are designated for First Nations, one to Métis, and one for all other people not receiving services from another authority (see s4). This came into effect in 2015. In s3 of the Act it states that;

Aboriginal rights protected

- 3 *This Act must not be interpreted as abrogating or derogating from*
- (a) *the pursuit of self-government by aboriginal peoples in Manitoba through present or future negotiations or agreements; and*
- (b) *the aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the Constitution Act, 1982.*

Section 18 of the *Child and Family Services Authorities Act* details that these four authorities are responsible for administering and providing the delivery of child and family services to persons, the authority has the same powers and duties as the director of Child and Family Services. The four authorities can then delegate service provision to agencies within their regional jurisdiction. As an example the Southern Authority⁷⁴ delegates to ten First Nations agencies across the region to provide child and family services to their communities.

In Ontario there are 46 treaties across the province, all these treaties were signed between 1781 and 1930. These treaties do not include provisions around services as detailed in British Columbia. There is one current treaty claim being negotiated in Ontario, the Algonquin land claim, if successful it will be the province's largest land claim and first modern day constitutionally protected treaty.⁷⁵ Ontario's *Child and Family Services Act 2017* governs the child and family services, part four of the Act addresses First Nations, Inuit and Métis child and family services. Section 6 details:

First Nations, Inuit and Métis peoples should

be entitled to provide, wherever possible, their own child and family services, and all services to First Nations, Inuit and Métis children and young persons and their families should be provided in a manner that recognizes their cultures, heritages, traditions, connection to their communities, and the concept of the extended family.

This Act allows a band, First Nation, Inuit or Métis community to delegate authority to a chosen First Nation, Inuit or Métis child and family services provider (s70(1)) and the Minister 'may' provide funding to the identified provider (s69(b)).

Child and Family Services Act 2017, Ontario, Canada.

Designation of child and family service authority

70 (1) *A band or First Nations, Inuit or Métis community may designate a body as a First Nations, Inuit or Métis child and family service authority.*

Agreements, etc.

(2) *Where a band or First Nations, Inuit or Métis community has designated a First Nations, Inuit or Métis child and family service authority, the Minister,*

- (a) *shall, at the band's or community's request, enter into negotiations for the provision of services by the child and family service authority;*
- (b) *may enter into agreements with the child and family service authority and, if the band or community agrees, any other person, for the provision of services; and*
- (c) *may designate the child and family service authority, with its consent, as a society under subsection 34 (1).*

Native Child and Family Services of Toronto is mandated under this Act and is Ontario's only full child protection service (or Children's Aid Society), off reserve, child welfare related initiative under the direct control of the Aboriginal community. Despite making up just over 4% of the population in Ontario, Aboriginal

⁷⁴ Southern First Nations Network of Care: Our Member Agencies - <https://www.southernnetwork.org/site/member-agencies-child-family-services-manitoba-ontario>

⁷⁵ Ontario Government, *The Algonquin Land Claim*: <https://www.ontario.ca/page/algonquin-land-claim>

children represent over 30% of foster children.⁷⁶ In 2011 John Beaucage the Aboriginal Advisor to the Minister of Children and Youth Services in Ontario reflected that “we need a whole new paradigm shift within the whole system of child welfare.”⁷⁷

In British Columbia (BC), an alternate treaty process was established which reflected the complex nature of treaty negotiations given the density of colonial settlement in the province. In fact the *Aboriginal Operational and Practice Standards in British Columbia treaty rights* are enabled and based on section 35 of the Canadian Constitution. The BC Treaty Commission was established in 1992 to independently facilitate the treaty negotiation process between the First Nation, the provincial (state) and the federal government.

So far in this process seven First Nations are implementing treaties with another 31 in the process of negotiating a treaty and 27 not currently in any negotiations.⁷⁸ Pamela Gough, Cindy Blackstock, and Nicholas Bala contend that for these modern treaties “...child welfare is often a core item over which First Nations seek jurisdiction.”⁷⁹ Within treaties where child and family services are included & provided for by the First Nations, they may have already been providing these services under a delegated agreement, established prior to entering into a treaty. The Nisga’a and Tla’amin Nation’s Final Agreements are two such examples. Interestingly in the Nisga’a Final Agreement⁸⁰, it is stipulated, in section 89, that they may create their own laws in relation to child and family services, as long as these align with provincial legislation.

Applying this measure to the current Victorian treaty process this means that organisations such as VACCA could have delegated powers by government and by the First Nations. The following is an example of how this could work.

Vancouver Case Study

Vancouver Aboriginal Child and Family Services Society (VACFSS) is an urban-based Aboriginal community-controlled child and family service based in Vancouver, British Columbia, Canada. In many respects it is very similar to VACCA. VACFSS is delegated by the Minister of Children and Family Development as per the *Child, Family and Community Service Act* to “deliver services on behalf of the urban Aboriginal community of Greater Vancouver” for child and family services. This delegation enabling agreement notes that this is possible due to the provisions set out in Section 25 of the Constitution Act (1982) which states “that its guarantee of certain rights and freedoms shall not be construed so as to abrogate or derogate any Aboriginal, treaty or other rights or Freedoms that pertain to the Aboriginal peoples of Canada.”⁸¹

VACFSS also has protocol agreements with five delegated Aboriginal agencies and one Traditional Owner/Clan band to provide “a blueprint for ensuring both parties work together with the common goal of supporting children to maintain contact with their families and communities.”⁸² As an example the VACFSS and *Haida Gwaii Child and Family Services Protocol* sets out principles of practice and delegates responsibility for who provides guardianship services, reciprocal services and family preservation program.⁸³

⁷⁶ Ontario Human Rights Commission, “Interrupted childhoods: over representation of Indigenous and Black children in Ontario child welfare” (Ontario, February 2018) 17.

⁷⁷ John Beaucage, The Aboriginal Advisor’s Report on the status of Aboriginal child welfare in Ontario, 2011. http://www.children.gov.on.ca/htdocs/English/professionals/indigenous/child_welfare-2011.aspx

⁷⁸ BC Treaty Commission (2018), BC Treaty Commission Annual Report, p28-29.

⁷⁹ Pamela Gough, Cindy Blackstock, and Nicholas Bala (2015) “Jurisdiction and funding models for Aboriginal child and family service agencies” Centre for Excellence and Child Welfare, Canada: <http://cwrp.ca/sites/default/files/publications/en/JurisdictionandFunding30E.pdf>.

⁸⁰ Nisga’a Lisims Government Website - Nisga’a Final Agreement: <http://www.nisgaanation.ca/treaty-documents>

⁸¹ Delegation Enabling Agreement; Vancouver Aboriginal Child and Family Services Society and The Director, Designated as Such Under The, Child, Family and Community Service Act by The Minister of Children and Family Development. (September 20, 2001)

⁸² Vancouver Aboriginal Child and Family Services Society, *Protocols*. <http://www.vacfss.com/about/protocols/>

⁸³ Haida Gwaii Child and Family Services Protocol: <http://www.vacfss.com/about/protocols/>

In the VACFSS and *Tsleil-Waututh Nation Protocol* there is an agreement that the “Tsleil-Waututh Nation has a right and a responsibility to be involved in the planning for member children and families wherever they reside. The Tsleil-Waututh Nation will participate and provide information for their member children’s plans of care, including the annual reviews and permanency planning.”⁸⁴ VACFSS is delegated to provide guardianship and family support services so there is an agreed set of principles and responsibilities for the provision of these services. While VACFSS is not a party to a treaty, their protocols with a treaty bearer enables it to assist in the expression of the treaty-bearer’s self-determination rights when it comes to children.

Key findings/learnings from the international perspective

From our research into the mechanisms and rights enabled through *Te Tiriti o Waitangi*, it is clear that the use of core principles have provided a mechanism by which Maori have been able to assert their treaty rights and rights to self-determination. The Waitangi Tribunal has been an effective dispute resolution authority, providing a voice to New Zealand’s Parliament. In this sense, in Victoria, the proposed Treaty Authority could take on a similar function to the Waitangi Tribunal in relation to post treaty negotiations. Furthermore the inclusion of an ‘Overarching Principles’ option based on a clear shared vision for the realisation of Maori rights allows flexibility, especially in relation to unanticipated issues which may not be addressed in the earliest iterations of a Treaty. *Te Tiriti o Waitangi* (the Treaty of Waitangi) includes a number of core principles which “must be considered in the development of draft legislation and which help guide judicial interpretation of legislation...[they] can be seen as a mechanism by which Maori tribes are able to assert rights underpinning self-determination.”⁸⁵

In the United States the *Self Determination Act* and the *Indian Child Welfare Act* have provided a legislative base for authorising self-government for Native Americans, underpinned by treaty rights.

Modern treaty negotiations in British Columbia, Canada have provided the most relevant elements and mechanisms that we believe could be implemented in Victoria, where delegated agreements, such as in the example of VACFSS described above, be considered as part of the broader negotiation of self-governance. We are aware that BC First Nations are working with the Government of Canada and the Government of British Columbia to reform the child welfare system through the development of an Indigenous child welfare system that is “based on cultures, languages and traditions”⁸⁶. They are also working towards implementing the Indigenous Child & Family Reconciliation Charter with the aim of reducing the number of First Nation children in care.⁸⁷ Hobbs and Williams reflected on the modern treaty process in Canada:

For non-Indigenous peoples, the treaties legitimate the Canadian State’s claim of sovereignty, and provide ‘a solid legal basis for future economic development’⁸⁸. More significantly, for First Nations the treaties confirm that, as politics, power and authority resides in the First Nations themselves. As such, they are a medium through which, in the words of Edward Allen, CEO of the Nisga’a Lisims Government, ‘we have negotiated our way into Canada, to be full and equal participants of Canadian society’⁸⁹

The ongoing social, economic and cultural impact of colonisation on Indigenous populations across the world have been devastating. These have been amplified by the legislation and policies that have disenfranchised and systematically disadvantaged Indigenous peoples. Treaties, and models of self-government, are a critical element in rectifying the power imbalance.

⁸⁴ VACFSS, VACFSS / Tsleil-Waututh Nation Protocol: <http://www.vacfss.com/about/protocols/>

⁸⁵ Parliamentary Library & Information Service, “Treaties and self-determination: Case studies from international jurisdictions” Treaty Series, 2018, P10.

⁸⁶ British Columbia Assembly of First Nations: First Nations Leadership Council, *Action Framework: Reconciliation, Self-Determination, and Self-Government for Indigenous Children, Families and Nations in BC*. May 2018, p14.

⁸⁷ First Nations Summit, *Canada, British Columbia and the First Nations Leadership Council sign Reconciliation Charter committing to the care of First Nations children and youth*, April 10, 2017. Reconciliation Charter for First Nations Child and Family Well-Being in British Columbia. <http://fns.bc.ca/news/canada-british-columbia-and-the-first-nations-leadership-council-sign-reconciliation-charter-committing-to-the-care-of-first-nations-children-and-youth>

⁸⁸ Standing Senate Committee on Aboriginal Peoples, Parliament of Canada, *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process* (June 2012) 8.

⁸⁹ Edward Allen, ‘Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga’a Final Agreement’ (2004) 11(3) International Journal on Minority and Group Rights 233, 234.

Discussion

What the First Peoples and the Victorian Government are seeking from the self-determination process is a fundamental redefining of the relationships between government and First Peoples. Indeed, this process will also require a redefining of the relationship between non-Indigenous people and First Peoples in Victoria. The principle of self-determination is paramount in both of those relationships. The compacts and self-determination arrangements that emerge for ACCOs must be based on Indigenous rights and not just the alleviation of poverty and service delivery contracts.

There are questions concerning where current agreements between the Aboriginal community in Victoria, such as the *Aboriginal Justice Agreement*, fit in this process as well as current Victorian policy, legislation, regulations and funding arrangements and how the capacity of service delivery entities be maintained and strengthened. Certainly, the work that has been put into the development and formulation of agreements such as Wungurilwil Gapgapduir, Dhelk Dja and numerous others should not be thrown away. However, once a treaty has been negotiated, the various principles, processes, structures and agreements need to be applied to the existing agreements and structures to move them ahead in a treaty environment. At this stage, there is no telling what time-frame this involves.

Currently, from the perspective of Australian invader/settler law, Aboriginal and Torres Strait Islander peoples are either individual citizens under invader/settler society jurisdiction or peoples subject to the race powers in the Commonwealth Constitution. Neither position respects the actuality of First Peoples' sovereignty, nor the principles of the UN DRIP, particularly the principle of self-determination. In fact, the Commonwealth Constitution allows for laws based on race, including discriminatory laws; the *Northern Territory Emergency Intervention Act 2007* being a present and extreme example of this.

In the Victorian process, the matters of both the sovereignty of the Victorian Traditional Owners/Clans and the self-determination of all Australian First Peoples in Victoria need to be addressed as they are in some of the international examples referred to above. What we are dealing with essentially is both sovereignty (for Victorian Traditional Owners/Clans) and polity (local Victorian Aboriginal communities and the Aboriginal community as a whole in Victoria). Colonisation has cruelled the situation of First Peoples, so that there are divisions within the Aboriginal community in Victoria based on the fact that most do not live on their traditional country, some have either lost their connection to country and culture, or have had those connections significantly disrupted and many have a mixed heritage concerning connection to traditional land. To demonstrate the complexities and possibilities of the treaty-making and self-determination process, and to pay due respect to Traditional Owner/Clan sovereignty and post-invasion Aboriginal community polity we have identified three models for the next steps to help our analysis.

All of the models discussed below assumes a Treaty-making/Self-determination Framework Act, subsequent to the current Act, negotiated between the Victorian Government and First Peoples in Victoria. Treaty-making/Self-determination Framework Act would establish the process, criteria, rights and responsibilities for agreement/treaty-making which can only be changed by mutual agreement⁹⁰ with the treaty rights holder. As the current Act states, the Treaty Authority monitors the treaty/agreement making process and settles disputes between the parties.

⁹⁰ Mutual agreement would also include agreed protocols around decision making.



We propose the following criteria for assessing the efficacy of these models.

1. That the model reflects the articles of the UN DRIP and enables Indigenous self-determination, and does not detract from the individual or collective enjoyment of rights that all Australians/Victorians enjoy;
2. That the model is respectful and congruous of current expressions of Aboriginal self-determination, and, builds on this rather than detracts from it or dismantles it;
3. That the model enables effective forms of Aboriginal governance in the contemporary context, reflecting both Indigenous governance-cultural standards and mainstream standards of operation.
4. That the model respects and embraces the rich tapestry of Aboriginal peoples in Victoria history, customs and identity/ies.
5. That the model embodies a treaty/ agreement which is a 'living document' and not merely a static arrangement.

Principle Three points to the need for the operating environment of the ACCOs to be aligned with both mainstream legislation and regulations (OH&S, Employment law, Quality, Protection of individual rights, client rights) and culturally informed standards. Measures that enable Indigenous rights should not detract from the rights Aboriginal people have in common with all other Australians. The Indigenous 'state' in Victoria – however it is configured – must not be set up to fail. That means, as we suggest in our section concerning Indigenous governance, the entities that are established and the rights and responsibilities they hold must be both culturally informed and able to navigate the dominant culture. As Adjunct Professor Muriel Bamblett suggests it is a question of exercising the self-determination muscles and having an authorising environment that enables governance practice to be strengthened.

We are aware that any process towards self-determination and treaty must acknowledge that there are many Traditional Owners in Victoria who have multiple Traditional Owner identities. An added nuance is that many Traditional Owners are also involved in local and state-based ACCOs and assist in the self-determination of local and state communities. These forms of self-determination shouldn't be swept aside. Additionally, there must also be consideration paid to members of the Stolen Generations who may still be seeking their family history to know which country they belong to. We strongly believe that any model must protect and embrace all Aboriginal people in Victoria.

There is also the question of funding arrangements and how funding decisions are made given that services are funded by government. How will each model reconfigure the funding models to adapt to the treaty-making environment? How is treaty and self-determination funded and resourced by governments? To what extent is compensation to be granted for historic dispossession, loss of spiritual and cultural connection to traditional land and waters and the traumatic consequences of colonisation and systemic racism?

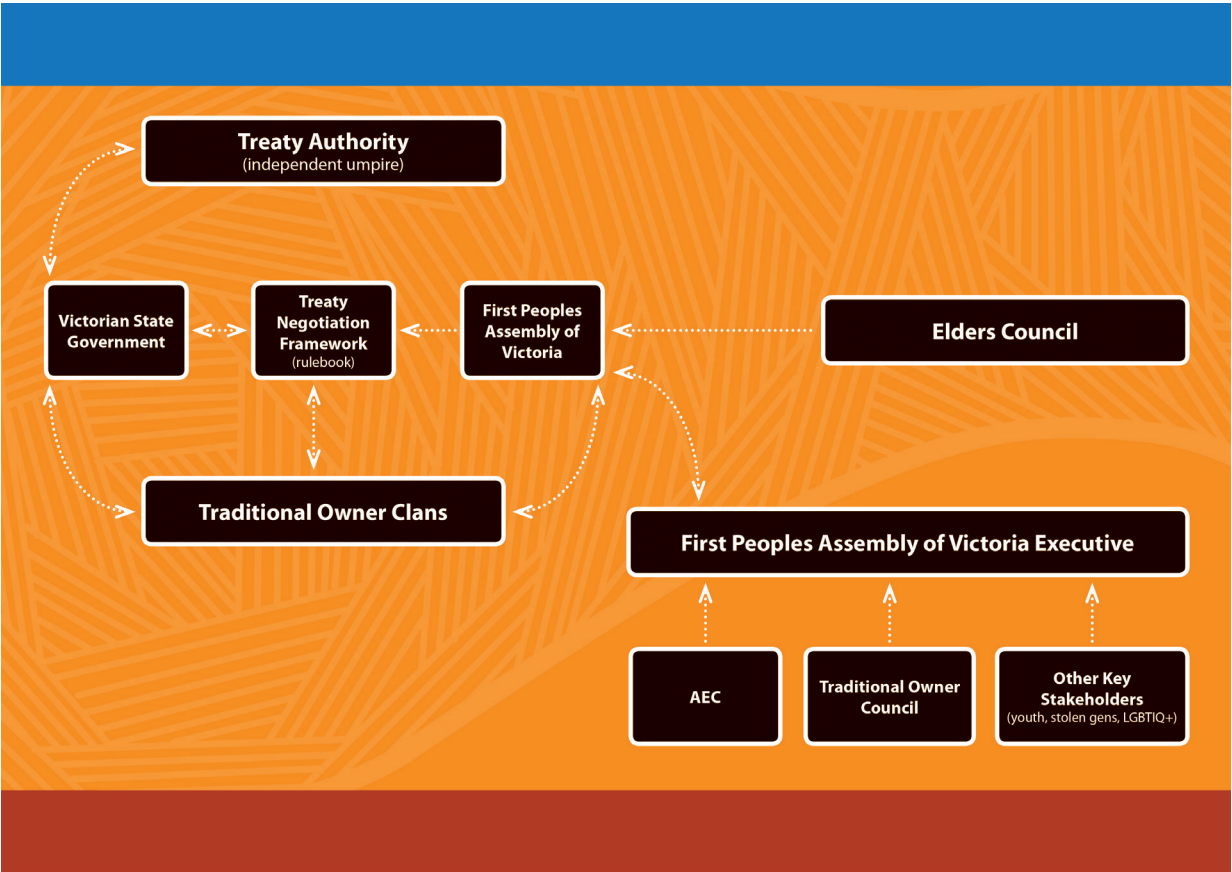
Whatever funding arrangements are developed, the State government, and potentially also the Federal Government, needs to acknowledge that the process of self-determination requires a) more than a reallocation and rebranding of current levels of funding to Aboriginal communities and organisations and b) an acknowledgement that the current wealth of the state is built on dispossession and dislocation of traditional Indigenous economies. In the future, budget decisions and allocation of funding for programs and projects should also be a matter for the Aboriginal community and not solely governments. Consideration could be given to establishing a monitoring and accountability mechanism so that funding decisions are made by a body external to, and independent of State Treasury. Funds for services to Aboriginal communities that are provided by mainstream services should be overseen by the Aboriginal community if they haven't been transferred to Aboriginal services.

The following models assume that the democratically elected *First Peoples Assembly of Victoria*'s role will continue beyond the scope of the current legislation into a body that will support, enable Traditional Owners/Clans in their treaty negotiations with government similar to the British Columbia Treaty Commission, where there is a staged approach. If it were to continue however, the issue of representation for all Aboriginal Victorians would need to be addressed. A FPAV Executive should be established, and either have designated seats, or agreed engagement protocols for seeking expertise on key issues that will be impacted by treaty negotiations. There could also be representatives on the Executive including the AEC, the Traditional Owner Council and others like the Koorie Youth Council, Stolen Generations and LGBTIQ. Alongside the locally based treaty negotiations we contend that there should be a state-wide self-determination framework which prescribe overarching benefits and outcomes like a reparations scheme, a healing process, a truth telling and reconciliation commission

as well as the appointment of someone to oversee the aforementioned monitoring and accountability mechanism to monitor progress and ensure government and civil society is held accountable.

Model One – Leveraging ACCOs as self-determination rights protectors

Model one concerns an integrated process that ties-in treaty-making with Traditional Owners/Clans with ensuring that their self-determining rights concerning education, health, housing, community and legal services and child and family wellbeing are maintained as well as the same rights for all Aboriginal and Torres Strait Islander peoples resident in Victoria.



In this model we suggest that the Treaty/Self-determination authorising environment could for example enable

- Sovereignty/land and water rights-based treaties with individual Traditional Owners/Clans;
- The *Treaty Authority* which would ensure fairness and equality in treaty negotiations and potentially act as an *Aboriginal Productivity Commission* and oversee funding arrangements between the State and Aboriginal entities, monitor legislative arrangements for gazetting and delegation of service contracts and functions and performance;
- The establishment of the proposed *First Peoples' Assembly of Victoria* (FPAV) as the ongoing voice for all Aboriginal and Torres Strait Islander peoples in Victoria through which would be a representative general voice to state government and parliament and have a role in ensuring State parliament legislation is compatible with the self-determination rights, interests and aspirations of all Aboriginal and Torres Strait Islander peoples in Victoria; and two (or more) chambers who provide advice and expertise to the FPAV's Executive Council;
 - A *Traditional Owners Council* (TOC) which would advise on sovereignty, land and cultural heritage matters,
 - An ACCO state-wide services body executive, along the lines of the current *Aboriginal Executive Council*, who would deal with education, health, community services, social housing, welfare and legal rights outcomes and provide policy and service expertise on behalf of the general Victorian Aboriginal community to the FPAV and government;
- The establishment of an *Elders Council* to provide cultural authority, oversight and input on Victorian First Peoples matters;

- Articulate agreed areas of cultural governance, reparations, healing and community truth telling between Aboriginal communities and the State.

The ACCO state-wide services body executive would cover the areas of health, community services, welfare, education and protection of legal rights and

- produce agreed guidelines, standards, advocate for funding formulas for state-wide services and all service-based ACCOs, that ensure mainstream and cultural standards are adhered to, and
- lead all government plans that seek to redress disadvantage and ensure that plans are culturally coherent, holistic and joined-up to ensure their effectiveness.⁹¹

The relationship between the four ongoing bodies – the Treaty Authority, the FPAV, the Traditional Owners Council (TOC) and the Aboriginal Executive Council (AEC) – would be

- the AEC would provide reports to the Executive Council of the FPAV and the TOC concerning health, community services, education, housing, well-being and law,
- the TOC would ensure that the rights of Traditional Owners/Clans are being protected
- the Elders Council of the Traditional Owners Council would ensure that government, the FPAV and the AEC would function according to appropriate cultural processes and protocols,
- the FPAV would oversee the outcomes of the AEC and government agreements
- the Treaty Authority would act as an umpire for disputes between government and treaty-rights holders and act as a Productivity Commission.

⁹¹ For example, it has been noted that in one region alone there are 46 government/departmental plans – Aboriginal specific and mainstream – for ACCOs to participate in and be accountable. What we are seeking is a joined-up approach which would hopefully lead to one plan and simplify bureaucratic processes.

Critical for these bodies and processes to work would be sufficient funding for oversight and executive functioning. Model One is a 'chambered' approach to creating the Indigenous state within the state of Victoria which enables a separation of powers to prevent the centralisation of power and different pathways for the articulation of Indigenous self-determination.

Essentially, two processes are entered into by government and Aboriginal peoples in Victoria as agreed to by the FPAV. A process with Traditional Owner/Clan entities which cover treaty-making concerning issues of sovereignty, cultural heritage and land/water resource rights and one with the entire Aboriginal and Torres Strait Islander community in Victoria, as represented by the FPAV, which is concerned with their self-determination rights as Aboriginal and Torres Strait Islander peoples in Victoria.

The AEC could negotiate a compact or compacts, on behalf of the FPAV, with the government regarding policy and service provider ACCOs' role in enabling self-determination in the areas of education, health, community services, child and family wellbeing, and law based on the UN Conventions and Covenants and DRIP principles. Current agreements could be the basis of the negotiations but enhanced through a rights-based, self-determination focused framework. The compacts would inform guidelines, standards, funding formulas for state-wide services and all service-based ACCOs and also ensure mainstream and cultural standards and legal requirements are adhered to, based on principles of self-determination and co-design. Legislating the role of the AEC within the treaty framework would provide ongoing protection for its function. The FPAV would have the final sign off with the state government. Possible outcomes would be

- separate compacts on each area of education, health, community services, legal services, and child and family welfare separately, which would then either build on current state-wide ACCOs remits or create new peak entities, or

- a compact covering all areas with the AEC which would be funded to monitor performance by both ACCO services and the state and negotiate the necessary legislative and regulation arrangements required for gazetting and delegation of service contracts, funding arrangements and functions to state-wide and local ACCOs on behalf of all Aboriginal and Torres Strait Islander peoples in Victoria. This would be a preferred outcome as it would better enable joined-up approaches to addressing current challenges concerning disadvantage.

Additionally, consideration could also be given to assigning specific portfolios to FPAV members – such as health, education, community services, child and family welfare – to ensure adequate oversight of those issues. This is currently the practice of the *Torres Strait Islander Regional Authority*.

Local ACCOs could also help in the development of Traditional Owner/Clan treaty-holding entities utilising the *Self-Determination Fund*. At the state-wide level, similarly to the Vancouver model above, policy peak/state-wide ACCOs could have Traditional Owners/Clans delegated agreements for each area covering policy development and implementation to ensure that they are designed, decided and implemented according to the state-wide policy voice of the Aboriginal community. Traditional Owners/Clans may make their own laws concerning education, health, community and legal services and child and family wellbeing as long as they align with state law and regulation. For example an agreement that

"the ... people/clan has a right and a responsibility to be involved in the planning for member children and families wherever they reside. The ... people/clan will participate and provide information for their member children's plans of care, including the annual reviews and permanency planning and the ... state-wide service is delegated to provide ... services according to the following agreed principles ..."

The protocol-style agreement process could be seen as an interim measure if Traditional Owner/Clan entities decided to eventually take up these responsibilities themselves.

In the pursuit of self-governance, state-wide compacts would be negotiated through the FPAV with the support of the AEC. These compacts would allow for the self-determination rights of all Aboriginal and Torres Strait Islander peoples in Victoria as well as the treaty rights of Traditional Owner/Clans. The best way to protect those rights is to include them within the Treaty-making/Self-determination Framework Act. With the Canadian example in mind, it would be prudent for a funded process that enables the development of protocols and delegation of services between Traditional Owner/Clan communities and ACCOs. This creates an authorising environment. It also enables future nation-building for Traditional Owner/Clan groups.

This model, or a model along these lines would ensure that the treaty-process is **recognised**, **ongoing** and **effective** and recognises the role of Traditional Owners/Clans in decision-making concerning education, health, community services, wellbeing and access to the law.

Model One

1. reflects the articles of the UN DRIP and enables Indigenous self-determination,
2. is respectful and congruous of current expressions of Aboriginal self-determination,
3. enables effective forms of Aboriginal governance in the contemporary context, reflecting both cultural standards and mainstream standards of operation,
4. respects and embraces the rich tapestry of Aboriginal Victorians history, customs and identity/ies,
5. enables agreements/treaties to be ongoing processes and living documents.

Model Two – Non-inclusion of ACCOs

Another possible model would be that after treaties are made with each Traditional Owner/Clan entity, and treaties would include principles for the establishment of decision-making rights concerning education, health, community services, family and child wellbeing, and access to law. Each Traditional Owner/Clan entity would need to work out

- what services they would provide to their communities to ensure Indigenous rights to health, community services, welfare, education and law are respected and maintained,
- whether or not and how they would relate to current state-wide policy and service provider ACCOs,
- whether or not, and how, non-Traditional Owner Aboriginal people are included in service provision.

There would need to be agreement as to their authorising and operational environments with government, particularly, how mainstream legislation and regulations are adhered to and how funding is provided.

The benefits of this model are that it

- a) prioritises Traditional Owner/Clans as the basis from which Aboriginal self-determination is restored, and
- b) re-establishes Indigenous social, economic and political rights to self-determination from the basis of Traditional Owner/Clan sovereignty who may then choose to include non-Traditional Owner/Clans Aboriginal and Torres Strait Islander to also share those rights.

The limitations of this model are that

- a) it would be a long process and could potentially stall the improvement of better outcomes by not providing current state-wide ACCOs with a self-determining relationship with the state to deal with current issues,
- b) services provided by Traditional Owners/ Clans in the area of education and well-being would not be, necessarily, coordinated at a state-wide level or provided with expertise by currently established expert ACCOs, and
- c) it leaves the self-determining rights of non-Traditional Owner Aboriginal Victorians concerning education, health, community services, law and child and family well-being in limbo until arrangements are made with Traditional Owner/Clan entities or through the FPAV.

Model two

- 1. reflects the articles of the UN DRIP and would eventually enable Indigenous self-determination,
- 2. is incongruous of current expressions of Aboriginal self-determination,
- 3. may eventually enable effective forms of Aboriginal governance in the contemporary context, reflecting both cultural standards and mainstream standards of operation,
- 4. presents uncertainty around how Stolen Generations survivors would be included in this process. It is also unclear how multiple Aboriginal Victorians with multiple Traditional Owner identities would be affected, and
- 5. may enable agreements/treaties to be ongoing processes and living documents.

Model Three – A Guiding Principles Approach

Model three would provide overarching principles of engagement, similar to the Treaty of Waitangi where these principles “must be considered in the development of draft legislation and which help guide judicial interpretation of legislation...[they] can be seen as a mechanism by which Maori tribes are able to assert rights underpinning self-determination.”⁹² This would require the Treaty Authority to be the independent umpire and the First Peoples’ Assembly of Victoria to be the ‘voice to parliament’. The Treaty Authority, if authorised similarly to the Waitangi Tribunal, would need to respond to claims where the principles of the treaty were not adhered to, as well as examining and reporting on proposed legislation and making recommendations or determinations about issues concerning First Peoples.

Model three

- 1. reflects the articles of the UN DRIP and could eventually enable Indigenous self-determination,
- 2. is incongruous of current expressions of Aboriginal self-determination,
- 3. may eventually enable effective forms of Aboriginal governance in the contemporary context, reflecting both cultural standards and mainstream standards of operation.
- 4. presents uncertainty around how Stolen Generations survivors would be included in this process. It is also unclear how multiple Aboriginal Victorians with multiple Traditional Owner identities would be affected
- 5. could be static.

While Model Three is clearly the simplest model there are no guarantees that principles will be followed by governments and it doesn’t establish a legislated foundation and authorising environment between First Peoples and Government.

⁹² Alice Petrie, (2018), “Treaties and self-determination: Case studies from international jurisdictions: Treaty series”, Department of Parliamentary Services, Parliament of Victoria.

Conclusion

Our recommended option is for model one which is based on international experience, respects current expressions of Aboriginal self-determination and maintains the self-determination rights of all First Nations peoples in Victoria throughout the treaty-making process. Model one recognises the role of Traditional Owners/Clans in the protection of rights and the provision of community services for their peoples while at the same time enabling a state-wide approach for all Aboriginal people in Victoria. A hybrid model that takes elements from Models 1 and 3 could also be considered. Whatever model or combination of models is decided upon, the most likely timeline from now is that 2019/2020 sees the establishment of the *First Peoples Assembly of Victoria* which then begins to work on the Treaty/Self-determination Framework Act, 2020/21 establishes the Treaty Authority and 2021/22 identifies the other bodies that need to be established.

There is a question of sequencing that is paramount in the consideration of the above models. Some aspects of these models could be progressed in the immediate future, other aspects of these models are aspirational, and will therefore require significant reform, negotiation and effective resourcing to make a reality. To progress there needs to be open, reflective and courageous discussions, and the FPAV will provide a necessary forum. We believe there is an overall shared aspiration for treaties to be formed that reflect and respect the rights of First Peoples of Victoria, we also believe there will be overarching benefits that will transcend from this treaty and benefit all Aboriginal people in Victoria. We contend that ACCOs will play a vital role in the realisation and negotiation of service delivery arrangements that better reflect and protect the self-determining rights of Aboriginal people in Victoria.

The promise of the treaty-making process in Victoria is now a tangible prospect but many unknowns still need to be addressed. The voices of ancestors and Elders passed have finally been heard, and now the work remains to ensure that the rights of all Aboriginal Victorians are protected and embedded across policy and legislation. The devastating effects of

colonisation, the ensuing violent dispossession and disempowerment continue to permeate today's society. While a treaty by itself may not immediately address the ongoing disadvantages faced by many Aboriginal Victorians, what it does do is create a systematic means and a basis for positive change.

Additionally, because of the severe impact of colonisation in Victoria, issues concerning the healing of past and present-day trauma and racism and the continuing presence of lateral violence must be addressed as a parallel process. Too many Aboriginal people tell of the impact of Native Title laws and how, what was meant to be a leveraging of Indigenous rights, became a source of division due to the necessity of fitting cultural practices and knowledge into a dominant culture invader/settler legal framework.

A minority of the Aboriginal and Torres Strait Islander people in Victoria has current or historical connections to Victorian traditional lands and many of those that do live off country. The key question for the treaty process is how does it deal with both issues of sovereignty regarding Victorian Traditional Owners/Clans and issues concerning the self-determination of current configurations of Aboriginal communities at a local and at a state-wide level. The intention of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* is to facilitate the self-determination rights of both Victorian Traditional Owners/Clans and Aboriginal people in Victoria. The Act makes clear that the process is about addressing both Traditional Owners/Clans sovereignty and broader Aboriginal people in Victoria polity.

Our view is that both Victorian Traditional Owners/Clans and all Aboriginal people living in Victoria must have their rights recognised and that all the expressions of self-determination by Aboriginal peoples must be acknowledged.

Appendix One – Terminology

In this paper we have chosen to use specific terminology we believe is appropriate to the context.

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

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

We have chosen to use **Aboriginal** to encompass all Aboriginal and Torres Strait Islander peoples living in Victoria.



