First Peoples' Assembly of Victoria

BALERT KEETYARRA —
YOORROOK JUSTICE COMMISSION

Balert keetyarra of: Marcus Stewart

Position: Co-Chair, First Peoples' Assembly of Victoria
Address: 48 Cambridge Street, Collingwood VIC 3066
Date: 29 April 2022

Wa Wa Gee.

I, Marcus Stewart, proud Nira illim bulluk man of the Taungurung Nation, Co-Chair, First Peoples' Assembly of Victoria (the **Assembly**), provide this balert keetyarra (witness statement) to assist the Yoorrook Justice Commission (the **Commission**) in the first stage of its inquiry.

I, and the Assembly, acknowledge the Traditional Owners of Country throughout Victoria, over which sovereignty was never ceded, and pay our respects to them, their culture and their Elders past and present.

A. BACKGROUND

Scope of this balert keetyarra

1. I have been provided with a document prepared by the Commission, titled "Rubric 1-02", which requests that I address in this balert keetyarra eight sets of issues

(below, I refer to "Rubric-1-02" as the **Commission's request**). Each set of issues contains a number of sub-issues.

2. Given the time available, in preparing this balert keetyarra, I have chosen to concentrate on those issues in the Commission's request of the greatest importance to the Commission's work and on which the Assembly can be of the greatest assistance to the Commission within the time available. I, and the Assembly, would welcome the opportunity to assist the Commission further as its inquiry develops, including by providing a further balert keetyarra or nuther-mooyoop (submission) on matters not addressed here, or not addressed in detail, or by addressing such matters in my oral pil'kneango mirnk (evidence) to the Commission.

3. Unless otherwise indicated, my pil'kneango mirnk on each of the matters addressed in the Commission's request reflects my own perspectives and positions, in my capacity as Co-Chair of the Assembly. Where my pil'kneango mirnk reflects the position of the Assembly, I have stated so. Where my pil'kneango mirnk reflects the perspectives of First Peoples in Victoria, as understood by the Assembly from its work and consultations, I have stated that below. Where relevant, this balert keetyarra also refers to matters addressed in the Tyerri Yoo-rrook Report presented by the Assembly to the Commission in June 2021 (the **Tyerri Yoo-rrook Report**).

4. Victoria has in recent decades attempted to address the history of First Peoples' dispossession. Those attempts have failed to produce meaningful change because they have failed to shift political power to enable First Peoples to have true self-determination over issues which affect them. It is not enough to have an inquiry, or to set up a new committee or advisory group, produce recommendations and even provide a budget to implement them; these reviews and committees operate within the same system that caused our problems in the first place.

5. For this reason, although the Commission's request seeks the Assembly's position on a number of specific examples of systemic injustice and proposed reform priorities, the Assembly considers that Treaty will be the only effective, meaningful and comprehensive way to start to disentangle the legacy of colonisation in Victoria. Treaty has the capacity to address those specific systemic injustices identified in the Commission's request (and also those that are not). In the

Assembly's view, it is the only way in which the injustices can be redressed and Victoria can move forward. Without Treaty, none of the specific reform priorities identified in the Commission's request can be truly effective. I address this in more detail below.

6. Everyone should have the freedom and power to make the decisions that affect their lives. But the ability of our people to determine our own destiny was shattered by invasion and the racism and disadvantage that came with it has held us back ever since. This is what we need to repair. Not just to right the wrongs of the past, but to ensure that we can build a better future together based on understanding, respect and a shared love for this place we call home.

7. The Assembly asks the Commission, in its Interim Report, to recognise the vital role that self-determination and empowerment of First Peoples must play in building the foundations for a new relationship between First Peoples, the State and all Victorians, based on truth and justice, to prevent the recurrence of injustices experienced by First Peoples. We urge the Commission to highlight that Treaty is the primary means by which self-determination of First Peoples can be achieved in Victoria. Treaty is the means by which First Peoples' voices will decide First Peoples' issues. Treaty can deliver the freedom and power for First Peoples to make the decisions about our Communities, our culture and our Country. It is important for the Commission to reflect the urgency of Treaty in its reports.

8. On that basis, this balert keetyarra is structured as follows:

   a. at [9]-[13], I provide an overview of my personal background;

   b. at [15]-[25.c], I provide an overview of the work of the Assembly;

   c. at [27]-[34], I address the Assembly's position on the importance of Treaty; and

   d. at [35]-[179], I address my pil'kneango mirnk on each of the specific matters raised by the Commission's request.

My background

9. I am one of the elected Co-Chairs of the Assembly and, together with the other Co-Chair, Aunty Geraldine Atkinson, have held this position since the Assembly was established in 2019. I was elected to the Assembly by the Taungurung Land and Waters Council.

10. I grew up in our Community and have devoted my career to supporting and empowering First Peoples.

11. I started my career in the child protection system, working in out-of-home care and then as a child and family therapist. I have post-graduate qualifications in Family Therapy. Through my experience and study in this area, I have come to understand the importance of keeping First Peoples' children and families together and how the child protection system disempowers, disconnects and disadvantages First Peoples' communities. At [98]-[111] below, I address specific systemic injustices relevant to child protection.

12. I have also worked as a cultural advisor to the Victorian Department of Justice, where I gained a deeper understanding of the justice system and how it significantly impacts First Peoples. At [112]-[120] below, I address specific reform priorities relevant to the Victorian justice system.

13. Immediately prior to being elected to the Assembly, I was the Chief Executive Officer of the Federation of Victorian Traditional Owner Corporations. In that role, I negotiated with the Victorian Government to secure various key initiatives for Victorian Traditional Owners, including in respect of water and cultural fire. My work at the Federation of Victorian Traditional Owner Corporations has directly informed my work through the Assembly on advancing the Treaty process. I address the importance of Treaty throughout my pil'kneango mirnk below.

14. Prior to my work with the Federation of Victorian Traditional Owner Corporations, I was the Chief Executive Officer of Taungurung Land and Waters Council. In that role, I had direct experience negotiating with Government under the *Traditional Owner Settlement Act 2010* (Vic). I address the problems with that legislative framework below at [83] - [88].

The work of the Assembly

15. The Assembly is the elected voice for First Peoples in the Treaty process in Victoria. In everything we do, we are fighting to ensure First Peoples have the freedom and power to decide First Peoples' issues. This is what drives us as a collective voice. This is what we hear echoed to us from our Community: First Peoples must be in the driver's seat.

16. The Assembly's role as the voice of First Peoples in the Treaty process is provided for in statute.[1] The Assembly was formed following a recommendation by the Victorian Treaty Advancement Commissioner, which was an independent office set up to maintain the momentum for Treaty and establish the "Aboriginal Representative Body" for the purposes of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (**Treaty Act**).[2]

17. The function of the Assembly is to represent the diversity of Traditional Owners and Aboriginal peoples living in Victoria in working with the State to establish, by agreement, elements necessary to support the negotiation of a Treaty in this State.[3] To that end, the Treaty Act prescribes guiding principles for the Treaty process (Pt 3) and certain mechanisms required to be established for the purposes of that process, including the Treaty Authority (Pt 4), the Treaty Negotiation Framework (Pt 5) and the Self-Determination Fund (Pt 6). Each of those mechanisms must be established by the Assembly working together with the State.[4]

18. The Assembly is currently made up of 31 elected Members, who are all proud Traditional Owners of Country in Victoria.[5] These leaders were chosen by their Communities to represent Community views. Twenty-one representatives were determined by a State-wide First Peoples Community vote based on 5 electorates and 10 representatives were appointed to reserved seats by formally recognised

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1 On 4 December 2019, the Assembly was declared to be the "Aboriginal Representative Body" for the purposes of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic). See that Act, s 11; Victoria, *Victoria Government Gazette*, S502 (6 December 2019), 1.

2 State of Victoria, "Treaty Bodies" (6 October 2021), <https://www.firstpeoplesrelations.vic.gov.au/treaty-bodies#victorian-treaty-advancement-commission>.

3 Treaty Act, s 10(1).

4 Treaty Act, ss 27, 30(1), 35(1).

5 As is required by s 10(3) of the Treaty Act.

Traditional Owner Groups who cover approximately 75% of Victoria's land mass. The Assembly is led by a nine-person Board, which was elected by the Assembly's Members, and includes two Co-Chairs.

19. A video that demonstrates the power of the collective voice and ethos of the Assembly, as expressed by its members, is available online at the following link: <https://www.youtube.com/watch?v=8LxOnuE4zL0>. I would be grateful if the video could be played as part of my oral pil'kneango mirnk to the Commission.

20. The Assembly's Constitution sets out its object and guiding values.

21. The object of the Assembly is to promote the empowerment of Traditional Owners and Aboriginal Victorians, their advancement and addressing disadvantage in our Community and providing relief, by:[6]

    a. advancing the Treaty process with Aboriginal Victorians, including Treaty-making between Traditional Owners and the State of Victoria;

    b. acting as the Aboriginal Representative Body to support future Treaty negotiations;

    c. enabling Traditional Owners and Aboriginal Victorians to exercise sovereignty;

    d. enabling Traditional Owners and Aboriginal Victorians to exercise their right to self-determination;

    e. enabling the exercising of rights, including those contained in the United Nations Declaration on the Rights of Indigenous Peoples; and

    f. working with governments to establish or be a First Nations' Voice to government or Parliament.

22. In pursuing its object, the Assembly is guided by the following values:[7]

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6 Constitution of the Assembly, cl 1.1.
7 Constitution of the Assembly, cl 1.2.

a. traditional laws, lore, and legal tradition, cultural values and practices;

b. respect and equality;

c. respect for Elders past, present and emerging; and

d. participation of young people.

23. The core of the Assembly's work at the moment is progressing negotiations with the State on the Treaty Negotiation Framework. At [130]-[135] below, I provide further details about the Assembly's work in advancing Treaty.

24. In addition to its core work, the Assembly is working to ensure that as many First Peoples' voices as possible are heard throughout the various stages of Treaty negotiations. We are boosting enrolment numbers, so the greatest number possible of Victoria's eligible First Peoples population can participate in elections and the Assembly's work. With community feedback, we have developed a model for additional pathways to Assembly reserved seating. In these critical ways, we are working to rebuild (or, in some cases, build) First Peoples' trust in democracy and governance institutions. We do so as a means of encouraging First Peoples' investment in designing and participating in institutions that genuinely serve their needs and which are based on First Peoples' cultures (with such institutions to be negotiated through Treaty).

25. The Assembly's processes are led by First Peoples, empower self-determination and are based on First Peoples' ways of knowing, being and doing. Hearing from Community about the structures and resources they want when it comes to negotiating Treaty is at the heart of those processes. To that end, the Assembly consults and engages with First Peoples in Victoria in relation to various aspects of its work, including:

a. At a general level, Assembly Members engage meaningfully with Communities in the Region they represent, or with their Traditional Owner Group and its members, if selected by a Traditional Owner Group. The views and information gathered from Communities and Traditional Owner Groups, in turn, inform discussions that occur between Members of the Assembly, in

Chamber, and in deliberations of Members as part of Committees. The Assembly's Committees are where a significant portion of the Assembly's work is done.

b. Parallel to the discussions and decisions of the Committees and Chamber, Assembly Members oversee a community engagement program to ensure a steady two-way stream of updates and feedback is maintained through various conversations, consultations, community meetings, surveys, and online events, which are operationalised by Assembly staff. The Assembly Members actively engage with Community to build community awareness of, and meaningful participation in the Assembly's work. Activities include:

    i. Public events, such as the Assembly's Yarning Treaty, which is a series of sessions conducted throughout Victoria designed to provide Community with an opportunity to hear about the Assembly's Treaty-related work and provide input.

    ii. Targeted on-on-one conversations with Community members.

    iii. Surveys of First Peoples, such as the first Treaty Survey that is currently under way, to assist in developing the elements and outcomes of Treaties in Victoria.

    iv. Consultation on issue-specific discussion papers.

    v. Building stakeholder relations with First Peoples' organisations and Traditional Owner Corporations.

    vi. Social media, such as through Facebook live broadcasts and via the Assembly's Twitter and Instagram accounts.

    vii. Use of traditional media, to attract attention to the Assembly's work generally, and in respect of Treaty in Victoria.

c. The Assembly recently undertook an intense period of consultation with First Peoples in order to inform the Assembly's Tyerri Yoo-rrook Report to the Commission. That Report was prepared in order to ensure that the

Commission's work would be guided by the voices of our Communities (as required in the Letters Patent) and to start a broader conversation that might endure throughout, and beyond the life of, the Commission. The Tyerri Yoo-rrook Report was informed by feedback received from First Peoples across Victoria, between September 2020 to May 2021, through input from First Peoples' Communities, organisations and individuals (including Elders, Traditional Owners, elected representatives of the First Peoples Community in Victoria and Members of the Assembly). The process by which that consultation occurred is set out at pp 8-9 and 11 of the Tyerri Yoo-rrook Report.

26. The Assembly's approach to community participation and consultation also recognises the crucial role of Elders in informing and guiding the Assembly's work, providing us with their cultural knowledge and wisdom. We have established our Interim Elders' Voice, which is conducting community meetings and one-on-one yarns open to Elders, so that Elders can participate in designing the structure, role and responsibilities of our permanent Elders' Voice.

B. PIL'KNEANGO MIRNK

The importance of Treaty

27. As I note above, the Commission's request seeks the Assembly's position on specific systemic injustices and reform priorities in which the Commission is interested at this early stage of its inquiry. Although I address these below, it is important that the Commission appreciates the significance of Treaty for addressing the full impact of colonial dispossession on First Peoples.

28. First Peoples in Victoria live in the shadow of colonisation. It follows them wherever they go within Australian society, tarnishing all interactions they may have with the systems and instrumentalities of the State. Accordingly, while targeted, issue-specific reform may cast discrete beams of light into the lives of First Peoples, only more profound structural change can remove the shadow of Colonisation.

29. To that end, the Assembly considers that the kind of structural change needed to start to address the legacy of Colonisation can only be achieved through a Treaty which enshrines First Peoples' political voice and power. This structural reform would acknowledge that governments' past approaches to addressing issues affecting First Peoples have only paid lip-service to the concepts of empowerment and self-determination. Those past approaches have predominantly involved governments consulting with individual members of our Community, cherry-picked by government to represent First Peoples' interests, without giving First Peoples any substantive control over the decision-making that affects them. Past approaches have also left First Peoples' fates to be determined by political will that fluctuates with the electoral cycle. Centuries have shown that the platitudes of the powerful cannot bring the kind of change that First Peoples really need. On that basis, Treaty is about giving First Peoples political power and legal authority to decide First Peoples' issues and the freedom to live a good life, and to decide what a good life looks like.[8] It is about giving First Peoples a voice in governance that is determinative and not merely advisory. The injustices of Colonisation cannot be undone through Treaty today. But only Treaty can provide the first step to addressing the issues that inhibit First Peoples' empowerment in various aspects of their lives, including deficits of trust and cultural knowledge, structural biases and systemic racism. The Assembly asks the Commission to find that empowering the political voice of First Peoples through Treaty is urgently needed.

30. The Assembly has heard from our Community that only truth can lay the foundation for Treaty. In this way, part of the impetus for the Commission was the need for a process of in-depth, patient and sometimes uncomfortable truth-telling, to reveal the true position of First Peoples within the Victorian community, including the burdens of Colonisation under which they labour on a daily basis. That truth-telling process is necessary to open hearts and minds within Victoria to the possibility of doing things differently — to help the Victorian community to appreciate that if we keep doing the same things, we'll keep getting the same result.

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8 Erica-Irene Daes, "Striving for self-determination for indigenous peoples" In Y.N. Kly & Diana Kly (eds), *In pursuit of the right to self-determination*, Clarity Press, 2000.

31. The road to structural change has started with the election of the Assembly as a representative voice for First Peoples in the Treaty process.

32. The institutional form of First Peoples' voice in Victoria will grow and evolve through the process of negotiating and agreeing Treaty. But for Treaty to be meaningful, the Victorian community needs properly to understand the impetus for change — to understand why what has been done in the State for over two centuries has not served First Peoples and why the status quo cannot be maintained. I address the importance of truth-telling further at [38]-[44] below.

33. The significance of Treaty to First Peoples is recognised in the Letters Patent establishing the Commission, which make clear that the Commission's inquiry is intended directly to inform the Treaty-making process (see, particularly, the last bullet point in the "Background" section of the Commission's Letters Patent and paras 5(c) and (e) and 7(a)). First Peoples are ready, through the Assembly and through future representative structures, to act on the Commission's findings and recommendations.

34. The subject matters for potential inclusion in a State-wide Treaty and/or local Treaties must be guided by Community, as expressed through consultation and their elected representative body. The Assembly is consulting on those issues, including in its Treaty Survey. To date, the Assembly has heard from Community that issues important for self-determination and which might be considered for inclusion in a Treaty or Treaties include: resources and reparations; social services; health; healing; law and justice; Country and land; culture and identity; language; education; tackling racism and prejudice; and Indigenous Data Sovereignty. I note too that although Treaty-making that puts First Peoples in control of First Peoples' issues is critical and should be reflected in the Commission's findings, other reforms that enhance self-determination and justice for First Peoples in Victoria should not wait for Treaty. I address some of those other reforms further below.

Foundational matters in the Commission's Letters Patent

35. The Commission's request asks me to provide an expanded explanation of the matters set out in the first five bullet points in "Background" section of the Letters Patent establishing the Commission. Those matters are that:

a. the First Peoples include the Traditional Owners of the lands currently known as the State of Victoria, over which they maintain that their sovereignty was never ceded (Letters Patent, "Background", first bullet point).[9]

b. First Peoples' experiences of Colonisation have included grave historic wrongs, past and ongoing injustices and intergenerational trauma (Letters Patent, "Background", second bullet point).

c. the State of Victoria acknowledges:

i. the continuing impacts arising from historical injustices and the ongoing strength and resilience of First Peoples and survival of their living cultures, knowledge and traditions;

ii. its responsibility to advance and uphold the human rights of Victorian citizens, including First Peoples, under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the Treaty Act, the *Traditional Owner Settlement Act 2010* (Vic), native title rights and other rights protected by law; and

iii. the importance of non-discrimination, uncovering truth, providing justice and reparation, supporting wellbeing and preventing further harm to First Peoples —

(Letters Patent, "Background", third to fifth bullet points.)

36. Broadly, insofar as the above matters are relevant to the work of the Assembly and the perspectives of First Peoples, they are directed to two important conditions that, in the Assembly's view, are vital to achieving substantive redress for the wrongs

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9 Note that in this balert keetyarra I also use the term 'First Peoples' to also include Aboriginal and Torres Strait Islander Peoples living in the lands now known as Victoria.

done to First Peoples, creating a space to negotiate a more equal relationship between First Peoples and other Victorians and securing better outcomes for First Peoples in Victoria.

a. The first condition is the process of truth-telling necessary to enable Victorians who are not First Peoples to genuinely see, and attempt to understand, the experiences of First Peoples since Colonisation.[10] The matters at [35.a] and [35.b] above are directed to this process of truth-telling.

b. The second condition is that the State take responsibility for its role in the past injustices done to First Peoples and for providing the means necessary for First Peoples and other Victorians to create a shared future as equals. The matters at [35.c] above are directed to the State's responsibility in those respects.

37. I address the significance of these two conditions below in more details.

The importance of the truth-telling process

38. When the colonisers arrived on the lands that are now known as Victoria, the traditional custodians of these lands had already been here for over 60,000 years. By the advent of Colonisation, we had experienced millennia of successes and celebrations, of challenges and resilience and of stories passed down through generations about our people living on the land and speaking our languages. When that rich and unbroken history met with Colonisation, we struggled for our survival against all odds. And despite the trauma and the injustice we have endured, our Communities have shown incredible resilience and resistance.

39. Never has our sovereignty over these lands been ceded and never has it formally been recognised by a treaty. Our sovereignty reflects the ancestral tie between the land and First Peoples.

40. The means by which the colonisers sought to avoid recognising our sovereignty were violent, insidious and complex (some of those means are addressed further at [49]-[93] below). In the two-and-a-half centuries since Colonisation, we have been

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10 "Colonisation" is defined in the Commission's Letters Patent as colonisation of the lands which are currently known as Victoria since 1788.

fighting for our land, our culture, our languages and our lives. We have been constantly regrouping in the face of seemingly insurmountable obstacles. The last two-and-a-half centuries of our over 60-millennia history have been brutal and unrelenting. They might have destroyed us. But the tenacity, the strength and the resilience of First Peoples have brought us here. We are still here. And we aren't going anywhere.

41. The Commission was born of the Assembly recognising, through generations of activism, that you cannot build a house on rotten foundations — that is, that truth-telling is critical to enabling First Peoples and other Victorians to chart a course together for how to address the devastating impact of Colonisation on Victoria's First Peoples, through structural change. In this respect, the Assembly learned from its consultations with First Peoples that there was an overwhelming desire to tell our stories and to be heard. That desire formed the basis for the Assembly's advocacy of the State to establish the Commission and the input received from First Peoples as part of the Assembly's consultations informed the mandate and structure of the Commission, as designed in negotiation with the State.

42. In establishing a public record based on First Peoples' experiences since Colonisation, the Commission will not start from a blank slate. But the need for truth-telling in this moment partly arises from the limited and often misleading way in which our history is addressed in mainstream dialogue. The colonial nation-building project in Victoria was built on false mythologies about the "civilising" mission of the colonialists. Australian children are not taught the full history of what our people have experienced at the hands of colonisers and the brutal aspects of our experiences are seldom acknowledged in discourse outside the First Peoples Community. This silence does a disservice to all Victorians, because it prevents us from moving forward together. It allows false mythologies to persist uncorrected. By sharing our history and our truths, the Assembly hopes that they will become everyone's history and everyone's truths.

43. However, truth-telling is not a process unique to this moment. Rather, truth-telling has been occurring for generations within our Community and is an important part of our history. Truth-telling was also central to Uluru Statement from the Heart.

44. Nor is truth-telling intended to inflict shame, torment or retribution on Victorians who are not First Peoples, or to allow us all collectively to wallow in the injustices of the past. Instead, the truth-telling process is a necessary step towards reckoning with our past, committing to unpicking the tangled impact of Colonisation facing First Peoples today, and to motivating us all to do better. To be better. Indeed, the intention of the Commission's truth-telling mandate is that it gather evidence and create a comprehensive public record of our historical and ongoing oppression and dispossession, so that that evidence and public record may form the blueprint for how to repair the structures that continue to oppress and dispossess us. Truth and justice must go hand in hand.

The importance of the State taking responsibility for the past and future

45. While truth-telling will help us find the path forward together, meaningful change cannot be achieved without the State first accepting responsibility for the past and for our future. In this respect, the State — and the Colony of Victoria before it — played a critical role in the dispossession of First Peoples and in perpetuating the injustices inflicted upon First Peoples by the colonisers (I address that role further at [91]-[93] below). Unless the State accepts responsibility for past wrongs, the formal instruments of the State cannot fully be brought to bear — with open eyes and open minds — on the task of making good those wrongs and implementing reform to ensure that they cannot be repeated. Those formal instruments include legislation and public funds, but the most significant of all is Treaty. Only Treaty will provide a dotted line, signed by the Government, to hold it, and future governments, to account for our shared future. The State acknowledging responsibility for both our past and our future is a necessary first step on the road to Treaty. Without Treaty, what is now called Victoria will remain — in our peoples' hearts, minds and reality — the colony of Victoria.

Objectives in the Commission's Terms of Reference

46. The Commission's Letters Patent outline seven objectives to direct the Commission's work. Those objectives are to:

a. establish an official public record based on First Peoples' experiences of systemic injustice since the start of Colonisation;

b. develop a shared understanding among all Victorians of the individual and collective impact of systemic injustice and the intergenerational trauma that has flowed from them since the start of Colonisation;

c. determine the causes and consequences of systemic injustice including the role of State policies and laws and which State Entities or Non-State Entities bear responsibility for the harm suffered by First Peoples since the start of Colonisation;

d. develop a shared understanding among all Victorians of the diversity, strength and resilience of First Peoples' cultures, knowledge, and traditional practices;

e. help build the foundations for a new relationship between First Peoples and the State of Victoria and all Victorians, based on truth and justice to prevent the recurrence of injustice;

f. support the Treaty-making process between the State of Victoria and First Peoples, including through the identification of subject matters for potential inclusion in a Treaty or Treaties; and

g. identify systemic injustice which currently impedes First Peoples achieving self-determination and equality and make recommendations to address them, improve State accountability and prevent continuation or recurrence of systemic injustice.

47. Some of these objectives look "back" to acknowledge First Peoples' lived experiences of Colonisation, the ongoing impact, and identify who was responsible for the harms. Others look "forward" to create a new public narrative that includes positive stories of resilience and resistance, to identify the changes needed to repair and prevent new harm. These objectives accord with the expectations First Peoples have consistently expressed to the Assembly, namely, that the truth-telling process must be different from past royal commissions, in that it must be done in a culturally-safe way, that avoids further trauma. It must let First Peoples be heard

on our own terms. This means First Peoples leading and First Peoples deciding. It must hold the State to account for its role in past and ongoing injustices and it must lead to fundamental change. And through Treaty, the State must be held accountable to implement these reforms rather than just leaving them on the shelf to gather dust.

48. To the extent that the Commission's request asks me to explain the basis for, and importance of, each the objectives identified in the Commission's Letters Patent, I refer to my pil'kneango mirnk above on the importance of truth-telling ([38]-[44] above) and the State taking responsibility for the past and future ([45] above).

The nature, processes and extent of the dispossession of First Peoples from their lands and waters since Colonisation

49. The Commission's request asks for an explanation of the nature, processes and extent of the historic and ongoing dispossession of First Peoples from their lands and water, including by specifically addressing the role of the State (which I address at [91]-[93] below). Before addressing these matters in detail, I note that, although the Commission's Letters Patent define Colonisation as starting in 1788 (when the First Fleet arrived at the lands of the Eora people in what is now NSW), invasion and occupation of the lands now known as Victoria started from the 1830s.

Historic dispossession

50. Prior to Colonisation, First Peoples occupied every part of what is now Victoria.

51. From the 1830s, European occupation of the coast, as well as occupation of the inland by explorers and overlanders from New South Wales, resulted in the displacement of First Peoples from their lands. This occupation and gradual displacement occurred without consent or Treaty.

52. This period of expanding pastoralism brought conflict, which, along with the reduction in availability of food resources, and introduction of diseases, led to the

deaths of many of the First Peoples population.[11] Dispossession was an attempt by the colonisers to destroy our connection to Country, our language our local economies and our culture. As First Peoples trauma expert and Juman and Bundjalung woman, Emeritus Professor Judy Atkinson, contends, the process of Colonisation goes through various stages. They include physical violence (invasion, disease, death and destruction), structural violence (enforced dependency, legislation, reserves and child removals) and psycho-social dominance (cultural and spiritual genocide).[12] All First Peoples communities in Victoria have undergone these debilitating stages of Colonisation.

53. Some stories of historical dispossession and colonial policies to advance that dispossession have been documented elsewhere, and the key features are set out below. But the whole story has not been heard before, as is made possible by the breadth of the Commission's Terms of Reference. The Assembly considers that it will be important for the Commission to hear the full history and experiences of First Peoples during its hearings. It is not my role to speak for the experiences of all First Peoples. First Nations Testimony will be an important part of the truth-telling process necessary for effective reforms (I have addressed above the importance of truth-telling in this respect).

54. In consultation with the Assembly, First Peoples have identified that First Peoples have been subjected to diverse means of harm as part of the process of their dispossession, including:

a. battles and massacres;

b. land theft;

c. genocide;

d. the Black Wars;

e. the Stolen Generations and ongoing removal of First Peoples' children;

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11 See, for example: State of Victoria, "Fact Sheet: Aboriginal Historical Places" (6 October 2021), <https://www.firstpeoplesrelations.vic.gov.au/fact-sheet-aboriginal-historical-places>.

12 Judy Atkinson, *Trauma Trails: Recreating Song Lines – the Transgenerational effects of Trauma in Aboriginal Australians*, (Spinifex Press, 2002).

f. human slavery and domestic servitude;

g. rape and sexual violence;

h. forced detention in missions and other forms of institutionalisation, restrictions on freedom of movement and racial apartheid;

i. forced suppression of First Peoples' languages; and

j. forced cessation of cultural practices.

55. I address a few of the key features of the historic dispossession of First Peoples below.

Massacres, battles and conflict

56. Colonial expansion throughout Victoria was often brutal and bloody. Colonists in Victoria were met with active resistance from First Peoples Communities.[13] On the frontiers, the colonists used violence and policing. The conflicts continued for decades, and included massacres of adults and children within First Peoples Communities. First Peoples' acts of resistance were criminalised, such that the police and the criminal justice system became "sharp instruments of dispossession".[14] The reality for our people is that the conflict has never stopped. There has been no peace.

57. Recent and ongoing research at the University of Newcastle has sought to provide a more comprehensive and rigorous record of frontier massacres across Australia than has previously been available.[15] The research defines a massacre as the murder of six or more undefended people in one operation. It describes frontier massacres as a defining strategy to contain and eradicate Indigenous resistance to invasion.[16]

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13 See generally, Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance of the European Invasion of Australia*, (University of New South Wales Press, 2006).

14 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2nd ed), (Federation Press, 2016), quoted in Julian Murphy, "Book review: Harry Blagg, Crime, Aboriginality and the Decolonisation of Justice (2nd ed, 2016)" (2017) 91 Australian Law Journal 419.

15 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/introduction.php>.

16 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/>.

It notes that the overwhelming majority of the victims of frontier massacre were Aboriginal people, killed by colonists. It also notes that, "[f]rontier massacres have a traumatic and enduring impact on Aboriginal communities and are remembered to this day in oral histories, paintings, petroglyphs, and dance".[17]

58. The University of Newcastle research only records frontier massacres for which there is reliable evidence. Massacres were usually carried out in secret, and so the full story may never be known. Massacres in the area of Victoria are plotted on a map[18] and explained in statistical graphs.[19] I encourage the Commission to hear directly from those First Peoples and Nations who have a connection to these horrific events. I note, for the Commission's context, that the research shows that in Victoria, there was a concentration of frontier massacres from the 1830s to 1850s, including:

a. a series of massacres in Gippsland from 1843, led by Angus McMillan,[20] in which hundreds of Aboriginal people were killed;[21] and

b. the Convincing Ground Massacre that occurred in "Portland Bay" in 1834, in which 20 Aboriginal people were killed.

59. Against these forms of top-down control, First Peoples have resisted.

60. A key example of resistance in the 19th Century is the Eumeralla Wars in the south-west of what we now call Victoria (approximately in the area between current day Port Fairy and Portland) between British colonists and Gunditjmara people. The conflicts occurred from the mid-1830s to the 1860s and were particularly intense between 1834 and 1844. The Gunditjmara employed guerrilla tactics and economic warfare against the livestock and property of the British colonists, occasionally killing colonists. The colonists killed individuals and massacred larger groups of

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17 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/introduction.php#conclusions>.

18 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/map.php>.

19 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/statistics.php>.

20 See, for example, Ciaran O'Mahony, "The Scottish explorer who became the butcher of Gippsland" (Guardian Australia, 8 March 2019), < https://www.theguardian.com/australia-news/2019/mar/08/the-scottish-explorer-who-became-the-butcher-of-gippsland>.

21 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/map.php>.

First Peoples, including women and children, by armed groups of whalers, settlers, station workers, and members of the Border Police and the Native Police Corps. They also rounded up the local people and forced them onto temporary reserves.[22] I would encourage the Commission to speak to those impacted by these historic events.

61. A high-profile example of First Peoples' resistance in the 20th Century is the Cummeragunja Mission walk-off in 1939, in which First Peoples walked off Cummeragunja Station in protest against conditions and management. Again, I would encourage the Commission to speak to those with direct connections to this event.

62. Frontier violence and policing were intertwined. The frontier massacres throughout Australia include records of police involved in killings, as Harry Blagg and Thalia Anthony have pointed out.[23] Mounted police were involved in the killing of 40 Aboriginal people at Rochester, Campaspe Plains, in 1839.[24] A white Commandant, Henry Dana, and Native Police hunted down and killed 26 Aboriginal people at Barmah Lake in 1843, in retaliation for stolen sheep.[25]

63. Colonial policing models reflected a belief that First Peoples were inferior, and were criminal.[26] Policing was used as tool of political suppression, which labelled resistance by First Peoples as criminality, rather than dissent by sovereign peoples.[27] And this fundamental relationship between police and First Nations people in Australia has remained unchanged to this day.[28] First Peoples are

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22 Ian D. Clark, "Scars in the Landscape: A register of massacre sites in Western Victoria, 1803-1859", Australian Institute of Aboriginal and Torres Strait Islander Studies, (Canberra, 1995).

23 Thalia Anthony and Harry Blagg, "Enforcing assimilation, dismantling Aboriginal families: a history of police violence in Australia" (The Conversation, 19 June 2020), <https://theconversation.com/enforcing-assimilation-dismantling-aboriginal-families-a-history-of-police-violence-in-australia-140637>

24 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/detail.php?r=508>.

25 University of Newcastle, "Colonial Frontier Massacres in Australia, 1788-1930", <https://c21ch.newcastle.edu.au/colonialmassacres/detail.php?r=536>

26 Thalia Anthony and Harry Blagg, "Enforcing assimilation, dismantling Aboriginal families: a history of police violence in Australia" (The Conversation, 19 June 2020), <https://theconversation.com/enforcing-assimilation-dismantling-aboriginal-families-a-history-of-police-violence-in-australia-140637>

27 See e.g. Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2nd ed), (Federation Press, 2016).

28 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2nd ed), (Federation Press, 2016), quoted in Julian Murphy, "Book review: Harry Blagg, Crime, Aboriginality and the Decolonisation of Justice (2nd ed, 2016)" (2017) 91 Australian Law Journal 419.

persistently over-represented at all points of the Victorian justice system (which I address in more detail below) and there is a direct line between structural conditions of Colonisation, including policing practices, and the contemporary criminal justice system which continues to "reproduce marginalised peoples as criminal sub-groups".[29]

Forced child removal

64. The final report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (the **Bringing Them Home report**) recounted in haunting detail the segregation of our people, and the practices and policies of forcible removal of our children in the area of Victoria (and in other parts of Australia) since the time of European Colonisation. Those processes commenced at the earliest stages of Colonisation. To that end, the Bringing Them Home Report observed:[30]

> Indigenous children have been forcibly separated from their families and communities since the very first days of the European occupation of Australia.
>
> Violent battles over rights to land, food and water sources characterised race relations in the nineteenth century. Throughout this conflict Indigenous children were kidnapped and exploited for their labour. Indigenous children were still being "run down" by Europeans in the northern areas of Australia in the early twentieth century.
>
> …
>
> Governments and missionaries also targeted Indigenous children for removal from their families. Their motives were to "inculcate European values and work habits in children, who would then be employed in service to the colonial settlers" (Ramsland 1986 quoted by Mason 1993 on page 31). In 1814 Governor Macquarie funded the first school for Aboriginal children. Its novelty was an initial attraction for Indigenous families but within a few years it evoked a hostile

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29 Chris Cunneen, "Postcolonial Perspectives for Criminology", (2011) UNSWLRS 6, 20 January 2011 < http://classic.austlii.edu.au/au/journals/UNSWLRS/2011/6.html>. See Royal Commission into Aboriginal Deaths in Custody, *National Report* (April 1991), Vol 2, Pt C.

30 Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, "Bringing Them Home" (April 1997), Pt 2, Section 2 (National Overview).

> response when it became apparent that its purpose was to distance the children from their families and communities.
>
> Although colonial governments in the nineteenth century professed abhorrence at the brutality of expansionist European settlers, they were unwilling or unable to stop their activities …

65. In essence, the related strategies of missions, reserves and child removal were part of a war waged against First Peoples, which continues to be waged on various fronts to this day.

66. The Bringing Them Home report concluded that, nationally, between 1 in 3 and 1 in 10 Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970.[31] The trend of removing First Peoples' children from their homes has continued to this day, which I address further below.

Forced relocation and detention on missions and reserves

67. Insofar as Victoria is concerned, the Bringing Them Home Report extensively documented the historical systemic injustices that facilitated the removal of First Peoples' children from their homes in Victoria (in Pt 2, Section 4). All of the relevant findings of that report have not been restated here, but provide important context for my pil'kneango mirnk.

68. A brief summary of relevant practices in Victorian is as follows:[32]

    a. The colonial occupation of what is now Victoria commenced in 1835. From that point on, when not actively engaged in violent dispossession, government policy was to segregate Indigenous people, and suppress Indigenous culture in an attempt to ensure assimilation with Western culture.

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31 Bringing Them Home report, above n 30, Pt 2, Section 2 (National Overview).
32 Bringing Them Home report, above n 30, Pt 2, Section 4.

b. A system of Aboriginal protectorates was introduced, with George Augustus Robinson presiding as Chief Protector from 1839. This was the first site of assimilation, but was scrapped by 1849.

c. From 1860, the Central Board for the Protection of Aborigines was tasked with overseeing the establishment of reserves to which Aboriginal people were to be confined. By 1867, it was managing reserves at Framlingham and Coranderrk, and had indirect control of other missions.

d. In 1869, the Colony of Victoria enacted its first law to allow Aboriginal children, specifically, to be removed from their families.[33] The law was used to separate Aboriginal children in Victoria from their parents and to place them in dormitories on the Lake Hindmarsh, Coranderrk, Ramahyuck, Lake Tyers and Lake Condah reserves.[34]

e. From the 1880s, the Aborigines' Protection Board pursued policies based on insidious classifications of what the colony perceived to be different groups of First Peoples. These classifications were and remain offensive to First Peoples. The Board pursued a policy of "merging" Aboriginal people classified as "half-castes" into the non-Indigenous community, by sending children away from their families on reserves out to work. The Board sought to segregate on stations those Aboriginal people classified as "full bloods", from those labelled "half-castes" or "part-Aborigines". Young Aboriginal people were forced off stations.

f. Aboriginal people faced hostility and serious discrimination in non-Indigenous society, including in welfare assistance, employment, and access to accommodation. In addition, when First Peoples soldiers returned from the First World War, they were denied access to the soldier settlement program.[35]

g. Missions and stations were phased out in the 1920s (although some of the land which was once part of the missions is now under the control of our

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33 The *Aborigines Protection Act 1869* (Vic) pursuant to which regulations provided for the removal of First Peoples' children. See generally: Bringing Them Home report, above n 30, Pt 2, Section 4, and Appendix 2 (Victoria).

34 Bringing Them Home report, above n 30, Pt 2, Section 4.

35 Tony Wright, ' "A woman does love her own little home": How ANZAC mother's dream was dashed' (The Age, 24 April 2018).

Communities).[36] By 1923, there remained a sole official Aboriginal station in Victoria, at Lake Tyers. As missions and stations closed, people there were often forced to find a place to live, far away from their traditional country and cut off from their rights, responsibilities and culture as First Peoples.

h. Victoria pursued an active assimilationist policy from the late 1950s until 1970, including the forcible removal of Aboriginal children from their families. From the 1950s, police used powers under child welfare laws to forcibly remove children. Many children were also removed by informal or private processes, which made it very difficult for removed children to discover how they were taken. By 1961, six government institutions had been opened to cope with the increasing numbers of children moved.[37] Children were distributed across a range of organisations, institutions and foster families.[38]

69. The Commission may wish to seek further pil'kneango mirnk on this history and other features of the period.

Dispossession by classification

70. As former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has identified, Colonisation robbed First Peoples of their power and autonomy, as well as land.[39] Colonial power structures rested on the premise that white European colonialists were superior to First Peoples, and to their culture and traditional systems of governance. Commissioner Gooda's Social Justice Report 2011 provides a useful summary of how that premise was given legal force by the colonial legislation, which classified First Peoples for the purpose of subjecting them to systems of State control, using complex and abhorrent blood quantum

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36 See, for example: State of Victoria, "Fact Sheet: Aboriginal Historical Places" (6 October 2021), <https://www.firstpeoplesrelations.vic.gov.au/fact-sheet-aboriginal-historical-places>.

37 Bringing Them Home report, above n 30, Part 2, Chapter 4.

38 Ian Clark, "Indigenous Children and Institutions", p 168, Chapter 9 in Doreen Mellor and Anna Haebich (eds.), *Many Voices: Reflections on experiences of Indigenous child separation*, National Library of Australia, 2022.<https://books.google.com.au/books?printsec=frontcover&vid=ISBN0642107548&redir_esc=y#v=onepage&q&f=false>

39 AHRC, Aboriginal and Torres Strait Islander Commissioner, "Social Justice Report 2011", p 57 <https://humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport11/pdf/sjr2011.pdf>.

calculations.[40] Colonial governments purported to define who was Aboriginal or Torres Strait Islander and, in doing so, First Peoples' own existing tribal, clan and family divisions were ignored, and undermined.

71. This system of classification set up tensions and divides within First Peoples Communities. The Social Justice Report 2011 details how these colonial practices created the conditions for lateral violence within First Peoples Communities.[41] Lateral violence can stem "from the sense of powerlessness that comes from oppression".[42] And today, 200 years later, First Peoples' lives and identities continue to be controlled and defined by the state. Whether coercive or benign, government laws and policies often force First Peoples' communities to conform to departmental "boxes" rather than having their needs and aspirations addressed holistically, based on First Peoples' agency.

72. The Treaty process is about breaking this state of powerlessness. It is about putting power back in the hands of the original peoples of Victoria, so that First Peoples can define their own identity and destiny. State-wide Treaty will be negotiated by a powerful, elected voice for First Peoples. And the Assembly envisages the negotiation of localised Traditional Owner Treaties, which will celebrate the pluralism of our Communities State-wide. In this way, Treaty offers the structural moment to move beyond colonial classifications and divisions.

Dispossession affecting women

73. Several of the processes by which First Peoples have been dispossessed have uniquely affected women. The targeting and dehumanisation of our women was a trigger for broader frontier conflict and lives on in deep, intergenerational trauma that is experienced by First Peoples communities today. Women experienced specific forms of normalised violence on a male-dominated colonial frontier, such as sexual slavery and domestic servitude. Oral histories, as well as documentary evidence received by the Assembly, record European sealers raiding camps to kidnap women for their swimming and sealing skills, exacerbating conflict, and

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40 Social Justice Report 2011, above n 39, see pp 62 – 63.
41 Social Justice Report 2011, above n 39, pp 63 – 64.
42 Social Justice Report 2011, above n 39, p 56.

severing cultural and family connections by taking women to other locations far from Country. In later periods, our women faced attacks on their reproductive autonomy as part of genocidal assimilationist policies and practices.[43]

74. The Commission should also explore the experience of First Nations people with different lived experiences, including First Nations LGBTQIA+ communities and those living with a disability.

Data sovereignty

75. First Peoples have been active keepers of their information and knowledge since time immemorial. However, since invasion, settler-colonial institutions in Victoria have disrupted – and continue to disrupt – First Peoples' rights to create, collect, use, store, and control access of data by, about and for First Peoples in Victoria.

76. A lack of power by First Peoples over their own data and narratives is one reason that the Commission's work is so important. I address Indigenous Data Sovereignty in more detail below from [155].

Ongoing dispossession through law

77. Government structures and laws perpetuate dispossession today. Below, I provide a few examples of this, by reference to laws that provide some protections to First Peoples.

<u>*Native Title Act 1993* (Cth)</u>

78. The decision in *Mabo v Queensland (No 2)*[44] is rightly celebrated as overturning the lie that Australia was *terra nullius*. However, since that decision, native title case law, particularly that concerning the *Native Title Act 1993* (Cth) (**NTA**), has developed in ways that disenfranchise those Traditional Owners most impacted by

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43 Tyerri Yoo-rrook Report.

44 (1992) 175 CLR 1 (***Mabo No. 2***).

the violence of Colonisation. It acts to validate and make legal the invasion of our lands and the massacre of our people.

79. The NTA fails to provide justice for Victorian Traditional Owners in a number of ways:

a. It validates the colonial policy of forced and often violent removal of our people from Country. As was established in *Yorta Yorta Aboriginal Community v Victoria*[45] the severance of "connection" to land for any reason, whether through violence or racist policy, will extinguish our rights, so that the so-called "tide of history"[46] will wash away any claim we may have to the land.

b. It validates the theft of all land now held as private property, confirming that all Aboriginal rights were extinguished upon grant from the Crown to a settler.[47] This means that an NTA claim can only be lodged over Crown land, and that two-thirds of Victoria is forever beyond the reach of any NTA claim.[48]

c. It ensures we are denied compensation for any land stolen before 31 October 1975, on the basis that this was the date upon which the *Racial Discrimination Act 1975* (Cth) came into force, and prior to this date the seizure of land upon racially discriminatory grounds was valid and non-compensable.[49]

80. The NTA is set within these parameters because the legislation reflects *Mabo No. 2* and the common law. As the High Court has stated, the "acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state."[50]

81. This means that Australian courts can never examine, let alone compensate or resolve, the full breadth of dispossession, or the wider crimes and injustice of

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45 (2002) 214 CLR 422 (***Yorta Yorta***).

46 *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [1998] FCA 1606, [129].

47 *Mabo v Queensland (No 2)*, [81] (Brennan J).

48 Department of Environment, Land Water and Planning, "Crown land in Victoria (Overview): Good Governance Fact Sheet No. 12", Victorian Government, Melbourne, < https://www.delwp.vic.gov.au/__data/assets/ pdf_file/0028/527950/11.-Crown-land-inVictoria-Overview.pdf>.

49 Sean Brennan, "Timber Creek and Australia's Second Chance to Grasp the Opportunity of Mabo", Australian Public Law, 3 April 2019 <https://auspublaw.org/2019/04/timber-creek-and-australias-second-chance/>.

50 *New South Wales v Commonwealth* [1975] HCA 58; (1975) 135 CLR 337 [14].

Colonisation. What is required is a political solution, such as that represented by the Victorian Treaty process, underpinned by findings of fact, such as those we implore the Commission to make.

82. In addition to the injustice imbedded in these founding conditions, the NTA has additional issues:

a. For the reasons set out above, it is incredibly difficult for an NTA claim to succeed in Victoria, or in any heavily colonised space. Indeed, Victoria has seen only 4 positive native title determinations in almost 30 years of the NTA.

b. However, even where successful, an NTA claim does not return stolen land. Instead it only recognises some of our rights, allowing us to carry out traditional activities on the land such as hunting, fishing, and gathering for our personal needs, and to access the land for the purposes of ceremony and to camp.

c. The rights we receive have been defined and limited by the courts through Western interpretations of our culture, and what they deem acceptable for recognition through the narrow lenses of native title.

d. This means, for instance, that all positive findings of native title in Victoria have found the rights to be "non-exclusive". That is, our rights are only recognised as existing alongside, and often as subservient to, the rights of the Crown or of settlers also claiming rights in the land. This means we are unable to control access to our lands, or to determine how they are used and developed.

e. This also means that, with exception of only a handful of native title cases (none in Victoria), there is no general recognition of a commercial component to our rights. For that reason, native title provides no basis for us to derive wealth from our land. Resources or wealth to be derived from the land – whether through minerals, oil and gas, water, renewable energy, fishing, game, farming production or tourism – are all retained by the Crown while our people remain in poverty.

f. In some limited circumstances, when third parties seek to exploit our resources, we are able to negotiate some small financial benefit through the Future Act

regime under the NTA. That regime applies when a third party wishes to access and exploit land over which we hold native title rights, and their activities may impact our enjoyment of those rights. In most circumstances it provides only limited procedural protection, often only amounting to the right to receive notice of the activity or to make comment. Where activities may significantly impact or extinguish rights, native title holders and claimants are provided the Right to Negotiate.

g. The Right to Negotiates requires the State, the proponent of the activity, and the native title holders to negotiate in good faith with the aim of obtaining the consent of the native title party. The NTA does not permit the native title holders to reject or simply veto the proposal, but may allow them to agree some rules around how the activity will occur, and potentially receive some compensation for the impact on their rights.

h. If agreement cannot be reached within six months of good faith negotiations, any of the parties can apply to the Tribunal for mediation or determination of the matter. While the Tribunal has the power to determine whether or not the activity can proceed, it has been criticised as favouring "the interests of resource developers ahead of those of native title parties".[51] It has been argued that, in practice, governments and proponents have little to fear if native title parties attempt to oppose future acts before the Tribunal.[52]

i. Such processes have the potential to cause division and dispute in our Communities when a project is opposed. Examples are evident in almost every State and Territory. The powerlessness provided by the NTA will see some members of the Community try to compromise and receive at least some benefit from the destruction, while others will hold out. This inevitably sets the Community against itself, and continues the cycle of division set in place by Colonisation, as the true owners of the land are unable freely to determine their own future and decide the best use of their traditional lands.

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51 Tony Corbett and Ciaran O'Faircheallaigh, "Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions" (2006) 33 UWAL Rev 153, p 160.

52 Ibid, p 172.

83. While the above sets out some of the structural issues with the NTA, it does not address others. For instance, the extraordinary length of time it takes to hear and determine NTA claims, and the emotional, financial and time constraints the process places on the Community.

Traditional Owner Settlement Act 2010 (Vic)

84. To its credit, the Victorian Government has previously attempted to address some of the problems with the NTA through the *Traditional Owner Settlement Act 2010* (Vic) (**TOS Act**).

85. The TOS Act attempted to:

a. develop a flexible approach to prior extinguishment and issues of rigid connection requirements established by *Yorta Yorta*; and

b. provide an efficient method to the resolution of claims.

86. Despite its intentions, the TOS Act:

a. does not address or overcome many of the structural issues embedded in native title law, such as failing to examine the full breadth of dispossession, or the wider crimes and injustice of Colonisation, including examining past grants of freehold property or any acts that pre-date 1975;

b. largely replicates the NTA processes of not returning stolen land, by only recognising limited non-commercial rights with respect to the land, from which it is not possible to generate inter-generational wealth, and limits the group's ability to determine or influence how, or if, land is developed;

c. where it does provide Traditional Owners with access to freehold land, it only makes available "surplus Crown land", meaning land that has no economic or other benefit to the Crown;

d. provides a financial package not based on any compensatory principles, and which does not consider advances in native title compensation law, and instead was developed internally by the State without Traditional Owner consultation,

(based on the perceived financial needs of a Traditional Owner group servicing a TOS Act agreement).

87. Additionally, the TOS Act has not achieved its central aim of providing a more efficient system of claim resolution, with only 2 agreements finally resolved in the 12 years since the introduction of the legislation.

88. The TOS Act has resulted in a rigid and inflexible approach to reaching agreement with Traditional Owners. The rights delivered to Traditional Owners are largely uniform. The State's intention in negotiating agreements under the TOS Act with Traditional Owners is that such agreements will preclude future native title claims and will "continue in perpetuity".[53] In that way, agreements finalised under the TOS Act freeze Traditional Owner rights in time and fail to allow for development and adequate recognition of Traditional Owner rights and interests.

Aboriginal Heritage Act 2006 (Vic)

89. Failures of current legislative protections are widespread and not unique to Victoria. Many places of significance are legally impacted after documentation in order to make way for development.

90. The approval process for Cultural Heritage Management Plans (**CHMP**) illustrates the failures of the current legislative protections in Victoria. A Registered Aboriginal Party can either approve the CHMP or refuse to approve it, but only if it does not satisfy the requirements of s 61 of the *Aboriginal Heritage Act 2006* (Vic) (**AH Act**). That provision only requires that the activity be conducted in a way that minimises harm to Aboriginal cultural heritage. While the AH Act has placed increased emphasis on Traditional Owners as the owners of their own heritage, the AH Act still enables cultural heritage to be lawfully destroyed. Further, the AH Act makes clear that the colonial hierarchy of interests remains as follows: the State; the developer; and then Traditional Owners.

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53 See the second reading speech for the Traditional Owner Settlement Bill 2010 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 2010, 2752 (John Brumby, Premier).

The responsibility of the State and State entities for First Peoples' dispossession

91. In consultations undertaken by the Assembly, many First Peoples have emphasised the State's past and ongoing role as a perpetrator of injustice against First Peoples. In some cases, the State directly violated First People's rights (through enacting legislation and administering that legislation against First Peoples) and, in other cases, the State acquiesced in First Peoples' dispossession.

92. As to the State's direct responsibility for First Peoples' dispossession, the State has imposed various laws or policies that contributed to or perpetuated structural and systemic racism, including through limiting recognition of First Peoples, limiting their movement or restricting their political participation. For example, as I have addressed above, from 1869, the Colony of Victoria, and then the State of Victoria, enacted a suite of legislation enabling First Peoples' children to be removed from their homes.[54] (I address child protection further below, in the context of systemic injustice, as well as other systemic injustices for which the State is responsible).

93. In other cases, the State acquiesced in First Peoples' dispossession by failing to hold responsible individuals to account. For example, the State has played a key role in celebrating individuals for their colonial conquests. Such celebration can be an ongoing source of pain for First Peoples where the individuals celebrated were involved in crimes against First Peoples. Indeed, one individual with whom the Assembly consulted described the glorification of early colonisers, such as Angus McMillan, as "[t]rauma every day seeing an Aboriginal skull in his saddlebag" and said that "the reverence of these so-called glorified heroes must be stopped and reversed for all people to see and feel the truth". The State's failure properly to teach the history of our dispossession in schools (see [42] above) is another example of the State acquiescing in the dispossession of First Peoples.

94. Emblems of dispossession also live on in English names used for traditional lands. Places with offensive names like "Jim Crow Creek" on Dja Dja Wurrung Country, carry connotations of racism and segregation. It is only after a long campaign by local Community that the Mount Alexander Shire Council is considering

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54 Bringing Them Home report, above n 30, Appendix 2 (Victoria).

reinstating the Dja Dja Warrung peoples' traditional name for the area, the name Larni Barramal. I would encourage the Commission to speak to those involved in such campaigns.

Systemic injustice

95. The impacts of trauma inflicted on First Peoples by Colonisation are still carried by our Community today. This intergenerational trauma gives rise to childhood mortality, educational deficits, unemployment, poverty and reduced life expectancy. It is also perpetuated by systemic injustices that permeate all levels of Australian society.

96. The Commission's request asks me to address key systemic injustices experienced by Victorian First Peoples. Although the Commission's request asks me separately to address historical and ongoing injustices, for First Peoples, the links between massacres, exile from Country, stolen generations and deaths in custody today do not fall neatly into discrete categories of historic systemic injustice and ongoing systemic injustice. On that basis, my pil'kneango mirnk addresses both historic and ongoing injustices as points on a spectrum of systemic injustice experienced by First Peoples. Further, my pil'kneango mirnk focuses on three key areas of systemic injustice: child protection; criminal justice; and health. I have chosen to focus on these areas because they impact First Peoples in myriad, complex and sometimes interrelated ways and because, within the time available, my pil'kneango mirnk on these issues can be of the greatest assistance to the Commission at this early stage of its inquiry. I would encourage the Commission to also seek pil'kneango mirnk from First Peoples who have direct experience of these injustices and who have powerful stories to share.

97. The Commission's request also asks me to address, for any ongoing systemic injustice that I identify, its relationship with relevant processes for the dispossession of Victorian First Peoples, the basis for its continuation and structural changes required to stop it from further occurring. Although I have attempted to give some pil'kneango mirnk on such matters below, these are very substantial topics and the Assembly is conscious that other experts and Community-led organisations will be able to provide useful input on them (some, no doubt,

informed by research and expertise not available to the Assembly in preparing this balert keetyarra, or not available within the time available). The Assembly strongly urges the Commission to seek pil'kneango mirnk from suitably qualified experts and Community-led organisations to inform its work on systemic injustice.

Child protection

98. The harmful and discriminatory practice of removing First Peoples' children from their homes was historic and remains ongoing. Through my professional experience, I have observed first-hand the impact that becoming involved in the child protection system can have on the well-being of First Peoples. Some of the historical practices relating to "child protection" (as forceable removal of children from their families) is addressed at [64]-[68] above.

99. Today, First Peoples' children remain over-represented at virtually every point of the child protection system.[55] This over-representation is worsening (see [102.c] below) and the resulting disconnection from family, Community, culture and Country is both a cause and consequence of the systemic injustice experienced by First Peoples in Australia.

100. The current impact of the child protection system on First Peoples is reflected in the recent work of the Family Matters campaign, which is led by the Secretariat of National Aboriginal and Islander Child Care (**SNAICC**).

101. That campaign aims to eliminate the overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care within a generation (by 2040)[56] and, to that end, each year, the campaign produces a report that:[57]

a. focuses on what governments are doing to turn the tide on over-representation and the outcomes for Aboriginal and Torres Strait Islander children;

b. highlights Aboriginal and Torres Strait Islander-led solutions and calls on governments to support and invest in the strengths of Aboriginal and Torres

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55 Family Matters et al, *Family Matters Report 2021*, <https://www.familymatters.org.au/wp-content/uploads/2021/12/FamilyMattersReport2021.pdf>, p 12.

56 Family Matters Report 2021, see above n 55, p 5.

57 Family Matters Report 2021, see above n 55, p 5.

Strait Islander peoples to lead on child wellbeing, development and safety responses for our children; and

c. contributes to efforts to change the story by explaining the extent of the challenges, reporting on progress towards implementing evidence-informed solutions, and profiling promising policy and practice initiatives.

102. Relevantly for present purposes, the 2021 Family Matters Report stated that:[58]

a. 21,523 Aboriginal and Torres Strait Islander children were in out-of-home care as at 30 June 2020, which represents one in every 15.6 Aboriginal and Torres Strait Islander children living in Australia. 79% (17,068) of those children live permanently away from their birth parents.

b. Children are predominantly placed with non-Indigenous carers, with the proportion of children placed with Aboriginal and Torres Strait Islander carers dropping from 53% to 42% between 2013 and 2020.

c. The number of our children living in out-of-home care is projected to increase by 54% over the next decade, if the current trajectory is not interrupted by profound and wholesale change to legislation, policy and practice.

103. The national picture is replicated in Victoria. A 2016 report by the Commission for Children and Young People found that, as of 30 June 2015, 17.6% of children in out-of-home were Aboriginal, despite Aboriginal people representing only 1.6 percent of all children in Victoria, and that Aboriginal children in Victoria are 12.9 times more likely than non-Aboriginal children to be placed in out-of-home care.[59]

104. The reasons why Aboriginal children are over-represented in the out-of-home care system include that a history of separation from Community, family, land and culture has left a legacy of disempowerment and trauma, which has produced

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58 Family Matters Report 2021, see above n 55, pp 12-13.

59 Commission for Children and Young People, "Always Was, Always Will Be Koori Children", Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria, (October 2016), p 22.<https://www.parliament.vic.gov.au/file_uploads/CCYP_-_Always_was__always_will_be_Koori_children_Systemic_Inquiry_report_October_2016_QZZbp4gC.pdf>.

corresponding negative impacts on family stability, early childhood health, education and wellbeing.[60]

105. That is, the legacy of colonial "child protection" practices has followed our children through the generations, creating a cycle of trauma and dislocation. The significance of intergenerational trauma in this context cannot be ignored. Broadly speaking, intergenerational trauma can be understood in the following terms:[61]

> the subjective experiencing and remembering of events in the mind of an individual or the life of a community, passed from adults to children in cyclic processes as "cumulative emotional and psychological wounding" … [H]istorical trauma can become normalised within a culture because it becomes embedded in the collective, cultural memory of a people and is passed on by the same mechanisms through which culture, generally, is transmitted.

106. On the relationship between colonial child protection practices and intergenerational trauma, the National Sorry Day Committee (**NSDC**) has observed:[62]

> Trauma, loss and grief are constant accompaniments to Indigenous life … The effects of trauma, loss and grief on the Stolen Generations were documented, in their own words, in the [*Bringing them Home*] report, and the National Apology drew further attention to the issues they face. Despite this, the issues are still not well enough understood, and there is insufficient recognition and understanding of:
>
> - the scope of the trauma, loss and grief of Stolen Generations survivors, the impacts on all domains of wellbeing, and thus on all aspects of the health and wellbeing of the Stolen Generations
>
> - the ways this trauma, loss and grief affect the Stolen Generations' families and communities

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60 Commission for Children and Young People, above n 59, p 22.

61 Australian Law Reform Commission, "Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples" (Final Report, December 2017), [2.92].

62 NSDC, "Bringing them Home: Scorecard Report 2015", p 33.

- the additional trauma, loss and grief which occur as the Stolen Generations witness the intergenerational impacts of forcible separations.

107. Despite numerous initiatives intended to redress the effect of harmful historical child protection practices on First Peoples (including the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families and the National Apology), progress has been slow and inadequate. Indeed, this is a theme that arises in the context of each area of systemic injustice that I address in this balert keetyarra; that numerous reports and inquiries in relation to these issues have failed to deliver substantive change. These examples illustrate that, without a genuine shift in control and decision-making power, the same outcomes for First Peoples can be expected.

108. In the context of child protection specifically, the NSDC reported in 2015 on the progress made in implementing the 54 recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families and found that only two of the 54 recommendations had been fully implemented.[63]

109. The Commission for Children and Young People subsequently summarised the NSDC's findings, as they relate to those recommendations concerning the current generation of children, as follows:[64]

> Of the recommendations relating to the current generation of Aboriginal children, two have been implemented:
>
> - *Recommendation 44 – The creation of minimum national standards of treatment for all Indigenous children.* This has been achieved through the *National framework for protecting Australia's children 2009–2020.*[170]
>
> - *Recommendation 54 – Amendments to the Family Law Act 1975* introduced in 2006 recognised and specified that Aboriginal and Torres Strait Islander children have the right to enjoy their respective cultures;

63 NSDC, "Bringing them Home: Scorecard Report 2015", Appendix A.
64 Commission for Children and Young People, above n 59, Appendix 7.

to maintain their connection to culture in a manner that is promoted, supported and consistent with the child's age and development.

Progress on the other recommendations specific to the current generation of Aboriginal children has been assessed by the NSDC as being poor, with a 'fail' recorded against many of the indicators. Of relevance to this Inquiry are the following Bringing Them Home recommendations that have not been fully implemented:

- *Recommendations 45a and 45b – National standards for Indigenous children under state, territory or shared jurisdiction*. NSDC cites funding cuts by government to key peak advisory bodies and agencies that have input to and oversight of standards as being a threat to the efficacy of this recommendation.

- *Recommendations 46a and 46b – Best interests of the child – factors*. The NSDC found that while there are standards established to maintain Aboriginal children with family, community and culture, that in practice Aboriginal children are still being removed from their Indigenous families and communities, and are more likely to be in out-of-home care than non-Aboriginal children.

- *Recommendation 47 – When best interests are paramount*. The NSDC has assessed poor progress on this indicator as linked to the high rates of Aboriginal children in the child protection system.

- *Recommendation 48 – When other factors apply*. The NSDC has assessed poor progress on this indicator as linked to the high rates of Aboriginal children in the child protection and juvenile justice systems.

- *Recommendation 49 – Involvement of accredited Indigenous organisations in decision-making and consultation*. The NSDC has assessed poor progress on this indicator as linked to the high rates of Aboriginal children in the child protection system.

- *Recommendation 50 – Judicial decision-making*. The NSDC has assessed poor progress on this indicator as linked to the high rates of Aboriginal children in the child protection system.

- *Recommendation 51 – Indigenous child placement principle*. While all jurisdictions recognise this principle, in practice there are concerns that compliance is not measured adequately.

- *Recommendation 52 – Adoption as a last resort*. The NSDC reports that many jurisdictions in Australia provide no legal representation to parents to exercise their legal rights to appeal a proposed adoption or to fully understand the ramifications of making an adoption order.

- *Recommendations 53a and 53b – Juvenile justice*. Australia-wide, Aboriginal children are 31 times more likely to be incarcerated, according to the NSDC.

110. Ultimately, the over-representation of First Peoples in the child protection system has secondary impacts on other aspects of First Peoples' lives. Indeed, between 2020-2021, of those child deaths reported to the Commission for Children and Young People as having involved some interaction with the child protection system, over a quarter of the children concerned were Aboriginal.[65] Further, there is a direct link between the over-representation of Aboriginal children in the child protection system and their over-representation in the youth justice system (which I address further below).[66] To that end, in 2017, the Australian Law Reform Commission observed that, "[r]esearch suggests that the links between [the child protection and criminal justice systems] is so strong that child removal into out-of-home care and juvenile detention should be considered as key drivers of adult incarceration".[67]

111. As I address further below in the context of the criminal justice system, Treaty would enable First Peoples to redress some of the systemic injustices arising from the child protection system, by putting First Peoples in control and enabling us to imagine and reshape the relevant structures and systems with which our people interact. However, Treaty is a long-term solution and its negotiations should not delay urgent reforms necessary to address systemic injustice and the ongoing

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65 Commission for Children and Young People, "Giving back power to Aboriginal children and community key to ending over-representation" (Media Release, 28 October 2021).

66 Commission for Children and Young People, "Our youth, our way", Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, (2021), p 21.

67 Australian Law Reform Commission, above n 61, p 485. See generally Ch 15 of that report.

impacts of Colonisation on First Peoples. Accordingly, even before Treaty is negotiated, greater investment should be made (of financial and other resources) in keeping Aboriginal families together, in order to minimise the negative and enduring impacts of the child protection system on our people.

Criminal justice

112. Through my professional experience, I have witnessed first-hand the profound impact that engagement with the criminal justice system can have on our people. Many of those impacts (such as deaths in custody) have been the subject of other inquires and research by other Community-led bodies, which have re-iterated the legacy of Colonisation in justice outcomes for First Peoples.[68] The Assembly urges the Commission to seek out such material to inform its consideration of this complex issue. Nevertheless, I make some general observations on this topic below.

113. From the 1980s, the overrepresentation of our people in the criminal justice system became apparent and the rate of representation continued to increase.[69]

114. Today, First Peoples remain significantly over-represented in Victoria's prisons compared to the general population and the Indigenous imprisonment rate in this State almost doubled between 2010 and 2020. [70]

115. The trend for our children and young people is similarly alarming.

    a. Nationally, despite Aboriginal and Torres Strait Islanders accounting for only about 5.8% of the population of young people aged 10-17, over half of the children aged 10-17 who were under supervision in 2020-2021 were our children,[71] our children (aged 10-17) are 16 times more likely than non-

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68 See also paragraphs [56] – [63] above.

69 Australian Law Reform Commission, above n 61, [2.19].

70 Sentencing Advisory Council, "Victoria's Indigenous Imprisonment Rates" (online, accessed 5 April 2022), <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>.

71 Australian Government, Australian Institute of Health and Welfare, "Youth Justice in Australia: 2020-21" (2022), p 11.

Aboriginal children to be under supervision[72] and our children generally enter youth justice supervision at a younger age than non-Aboriginal children.[73]

b. In Victoria, our children and young people remain over-represented in the Victorian youth justice system and the rate ratio (calculated by dividing the rates of Indigenous and non-Indigenous child supervision) is 11.0.[74]

116. Over 30 years ago, the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) highlighted the disproportionate numbers of Aboriginal people in custody, as well as the systemic defects which caused the deaths of our people in custody, and found that the social, economic and cultural disadvantages experienced by First Peoples was the most significant contributing factor to the overrepresentation of our people in the criminal justice system.[75]

117. Incarceration also compounds other disadvantages already facing our people.[76] For example, where a parent is incarcerated, their child is at higher risk of entering the welfare system and we regularly see First Peoples dying in custody, when they should not have been there in the first place. Indeed, our people are still dying in custody — at least 489 Indigenous people have died in custody across Australia since the RCIADIC's report.[77] Important work and advocacy on the issue of First Peoples' deaths in custody has been done by Community-led organisations, such as the Victorian Aboriginal Legal Service (**VALS**), and the Assembly suggests that the Commission may wish to seek further evidence from such bodies (including VALS) on this topic.

118. In any case, it is evident from what I have said above that the overrepresentation of First Peoples in the criminal justice system is both caused by, and causes, the disadvantages to which First Peoples are subject. In this way, as in the context of

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72 Australian Government, Australian Institute of Health and Welfare, "Youth Justice in Australia: 2020-21" (2022), p 11.

73 Australian Government, Australian Institute of Health and Welfare, "Youth Justice in Australia: 2020-21" (2022), p vi.

74 Australian Government, Australian Institute of Health and Welfare, "Youth Justice in Australia: 2020-21" (2022), p 11, Figure 3.1.

75 Royal Commission into Aboriginal Deaths in Custody, National Report (April 1991), Vol 1, [1.7.1], (**RCIADIC Report**).

76 Australian Law Reform Commission, above n 61, [2.101].

77 Australian Government, Australian Institute of Criminology, "Deaths in Custody" (online, accessed 5 April 2022), < https://www.aic.gov.au/statistics/deaths-custody>.

child protection, intergenerational trauma and the legacy of colonial dispossession cannot be ignored.

119. Despite the RCIADIC recommending that the elimination of the disadvantage that caused our overrepresentation in the criminal justice system required empowerment and self-determination of Indigenous people,[78] self-determination has yet to be realised at either a national or State level. Further, successive governments have failed to implement most of the recommendations from the RCIADIC.[79]

120. In a Victorian context, the Assembly considers that Treaty is the clearest and most effective way in which the Victorian Government can enable First Peoples the degree of empowerment and self-determination necessary to address the overrepresentation of our people in the criminal justice system (and consequent impacts of that over-representation on our wellbeing and prosperity).[80] Relevantly, Treaty is an opportunity to reform Victoria's laws, agencies and systems of government so that First Peoples are empowered to make the decisions that impact our lives. In this way, the important work for Treaty in the criminal justice context (and, as I note at [111] above, in the context of child protection) is that it would enable First Peoples to reshape and reimagine the systems with which our people interact, so that they no longer perpetuate and compound historic injustices. Without any genuine transfer of control and decision-making power, we will continue to see the same failures to implement recommendations and the same poor outcomes.

Health

121. There is a clear gap in health outcomes for First Peoples, which has been extensively documented and studied elsewhere. The Assembly encourages the Commission to seek out alternative sources of material related to First Peoples'

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78 RCIADIC Report, above n 75, National Report (April 1991), Vol 1, [1.7.6].

79 See generally: T Anthony et al, "30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented", Australian National University (CAEPR Working Paper No. 140/2021) (April 2021).

80 See generally: T Anthony et al, above n 79, pp 7-8.

health, although I make the following observations to assist the Commission at this early stage of its inquiry.

122. Health outcomes for First Peoples are generally poorer. For example, our people die earlier, and spend more years of their lives in ill-health, than Australians who are not First Peoples.[81] Further there is a growing mental health crisis, with suicide a leading cause of death for our men and with the suicide rate across our population increasing in recent years.[82]

123. The causes of poor First Peoples' health outcomes are many and complex. However, two are immediately apparent:

a. the socio-economic disadvantages of First Peoples; and

b. structures within the health system that do not adequately allow for First Peoples' decision-making with respect to health and do not appropriately take account of the unique needs of our community in designing health responses.

124. As to the first matter, socio-economic factors such as income, education and housing are key determinants in health outcomes and the socio-economic circumstances of First Peoples are generally poorer than Australians who are not First Peoples.[83] For that reason, at a base level, addressing the health of First Peoples requires investment in improving the socio-economic circumstances of First Peoples.

125. As to the second matter, in order for health services to be responsive to the needs of First Peoples, they must be tailored to the specific cultures, experiences and communities of our people, including by catering for the connection to Country of people living in different locations.[84] For that reason, involving First Peoples in health decision-making is critical to ensuring the effectiveness of the health

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81 Australian Institute of Health and Welfare, "Australian Burden of Disease Study: Impact and causes of illness and death in Aboriginal and Torres Strait Islander People 2018" (Summary Report, 2022), pp 25-7.

82 Considering the increase in suicide rate from 2008 to 2017: Australian Medical Association, "2018 AMA Report Card on Indigenous Health" (November 2018), p 9.

83 2018 AMA Report Card on Indigenous Health, above n 82, p 16; Australian Department of Health, "National Aboriginal and Torres Strait Islander Health Plan 2021-2031" (2021), p 20.

84 Australian Department of Health, "National Aboriginal and Torres Strait Islander Health Plan 2021-2031" (2021), p 7.

services with which they engage. Further, intergenerational trauma and racism continue to negatively affect First Peoples' health outcomes,[85] so involving First Peoples in health decision-making will go some way towards addressing the trust deficit that exists between First Peoples and State health authorities.

126. The Victorian Government has recognised that self-determination is critical for producing effective and sustainable health outcomes for First Peoples.[86] However, despite that recognition, the Victorian health system continues to fall short of delivering the health outcomes our people need. That reality has been well-illustrated by the COVID-19 pandemic — in that context, a lack of comprehensive plan for guiding action in respect of the First Peoples community, and deficient engagement with First Peoples, was found by the Inquiry into the Victorian Government's response to the COVID-19 Pandemic to have hampered the COVID-19 response in respect of our people, including by delaying the delivery of necessary health services.[87]

127. Given the significance of self-determination for First Peoples' health, the Assembly considers that, as for the issues concerning child protection and the criminal justice identified above, the poor health outcomes experienced by First Peoples could be addressed, at least partially, through Treaty.[88]

128. The Assembly suggests that the Commission may be assisted by seeking further pil'kneango mirnk from First Community-led organisations working on health issues, such as the Victorian Aboriginal Community Controlled Health Organisation and the Victorian Aboriginal Child Care Agency.

Reform priorities

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85 2018 AMA Report Card on Indigenous Health, above n 82, p 9; Victorian Government, "Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017-2027", pp 43, 45.

86 Victorian Government, "Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017-2027", pp 21.

87 Inquiry into the Victorian Government's response to the COVID-19 Pandemic (Final report, February 2021), pp 199-203 (findings 115-117).

88 See also: Jill Gallagher AO, Chief Executive Officer of the Victorian Aboriginal Health Community Controlled Health Organisation's article "Treaty will ensure First Peoples are not left behind in post-COVID recovery" (The Age, 22 February 2022).

129. The Commission's request asks me to explain the Assembly's position, and perspectives, on work and advocacy under way in respect of a number of specified reform priorities. My pil'kneango mirnk in relation to those specified reform priorities is below.

Constitutional and structural reforms required to enable First Peoples' self-governance and self-determination in Victorian political and governmental systems

130. The primary way in which the Assembly is pursuing constitutional and structural reforms required to enable First Peoples' self-governance and self-determination in Victorian political and governmental systems is through laying the foundations for Treaty.

131. To that end, since its first meeting in December 2019, the Assembly has been working to establish the key Treaty elements required under the Treaty Act, which, in the immediate term, includes four foundational elements that will support future Treaty negotiations. Those foundational elements are:

a. developing an interim dispute resolution process to resolve disputes between the Assembly and the State during the negotiation of the Treaty elements. The Assembly and the State formally agreed the interim dispute resolution process in April 2021;

b. designing the Treaty Negotiation Framework, which will set out the process and parameters for First Peoples of Victoria and Traditional Owners to negotiate a future Treaty or Treaties with the State;

c. designing and establishing a Treaty Authority, which will act as an independent umpire to facilitate and oversee Treaty negotiations. The Assembly and State have agreed in principle to a Treaty Authority model which is led by First Peoples. It will be genuinely independent of the State and will operate according to Aboriginal Lore, Law and Cultural Authority; and

d. creating a First Peoples' controlled Self-Determination Fund, which will mean First Peoples are making decisions about First Peoples' financial resources, empowering Victorian First Peoples to build future capacity, wealth and

prosperity. The Fund will support Victorian First Peoples to participate on an equal footing with the State in Treaty negotiations.

132. The Assembly has also worked to establish elements of the Treaty process not required by legislation. For example, the Assembly and the State have agreed on a set of protocols that govern conduct in negotiations between the Assembly and the State, as well as established the Commission. The Assembly has also established an interim Elders' Voice, which will assist with establishing a permanent Elders' Voice to provide wisdom and cultural oversight to the Assembly's decision-making.

133. Looking ahead, the Assembly will continue to focus on establishing the structures required by the Treaty Act and culturally significant elements of the Treaty negotiation process that are not required by that Act. All of these processes will benefit from the feedback that Community share with the Commission and the subsequent recommendations the Commission makes.

134. Although the substance of any proposed State-wide Treaty is yet to be determined, the Assembly considers that State-wide Treaty should provide for fundamental reforms, including constitutional change, to establish the structures and powers necessary for First Peoples to decide the issues that affect them. That may relevantly include the creation of a new First Peoples' representative decision-making body whose decisions have the effect of law, and who can hold Government to account. Options for constitutional reform may also include providing for consultation mechanisms between the new body and the Parliament of Victoria, the creation of seats reserved for First Peoples in the Parliament of Victoria and/or quotas for ministerial appointments.

135. The Assembly also considers that local Traditional Owner Treaties should also be negotiated, which provide for particular Traditional Owner groups to take control of decision-making in respect of issues that uniquely affect them. Such local Treaties would allow for variations in local context and locally-driven outcomes.

Justice-related reforms

136. The Commission's request seeks my pil'kneango mirnk on three justice-related issues:

a. finalisation of a public health model to support the repeal of public drunkenness laws;

b. legislative amendments regarding the age of criminal responsibility; and

c. implementation of independent oversight in the case of police (with particular regard to their interaction with Victorian First Peoples).

137. The Assembly's work principally involves supporting other Community-led organisations that have dedicated work and expertise on these issues. Accordingly, the Assembly suggests that the Commission may be assisted by seeking pil'kneango mirnk from other organisations taking a lead role in advocacy on these issues, such as VALS.[89] Community-led organisations must have adequate and secure resources for their work in addressing systemic injustices. Those organisations, along with First Peoples Communities, have been calling for specific reforms on each of the issues for years. Urgent reforms can happen now: it is untenable for the Government to hide behind the cloak of Treaty.

138. Further, it is important that the Commission appreciates that there are other reform priorities relevant to First Peoples, which are not addressed in the Commission's request and which are nevertheless equally urgent. One example is the issue of bail reform. The number of children held on remand in Victoria more than doubled in the eight years to June 2019,[90] with young First Peoples over-represented at every step. Community-led organisations like VALS have identified changes to and deficiencies of the punitive bail system which have driven these outcomes.[91]

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89 The Human Rights Law Centre is also running campaigns on the issues of public drunkenness, police accountability and raising the minimum age, which may usefully inform the Commission's work.

90 Sentencing Advisory Council, "Two Third of Children Held on Remand Aren't Ultimately Sentenced to Detention: New Report" (Media Release, 29 September 2020), <https://www.sentencingcouncil.vic.gov.au/news-media/media-releases/two-thirds-children-held-remand-arent-ultimately-sentenced-detention-new>

91 See e.g. VALS submission to the Inquiry into Victoria's Criminal Justice System, p 56, available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Submissions/139._VALS_Eastern_Australian_Aboriginal_Justice_Services_Ltd_Redacted.pdf

Current bail laws will continue to disproportionately affect First Peoples until bail reform is prioritised. The Assembly supports VALS' and other organisations' calls for bail laws to be fixed by:[92]

a. repealing the reverse-onus provisions in bail laws;

b. creating a presumption in favour of bail for all offences;

c. inserting an explicit requirement in bail laws that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and

d. repealing the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

139. Achieving systemic change also requires re-thinking the education and training of those who make up the system. In the case of systemic criminal justice issues, the Commission may wish to consider seeking pil'kneango mirnk and making recommendations in respect of reforms in legal education and the legal profession, secondary education and the public service. I note that recommendations on these issues were made by the Canadian Truth and Justice Commission.[93]

Finalisation of a public health model to support the repeal of public drunkenness laws

140. Last year, the Victorian Parliament enacted legislation to decriminalise public drunkenness in this State.[94] This legislation was a response to one of the key recommendations made by the RCIADIC,[95] and followed decades of advocacy on the issue by First Peoples such as the family of Aunty Tanya Day[96] and the families of others who have died in custody, and organisations such as VALS and the

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92 See VALS, "The Andrews government must not kick bail reform down the road", 24 March 2022, available at <http://www.vals.org.au/the-andrews-government-must-not-kick-bail-reform-down-the-road/; and Human Rights Law Centre "Explainer: Victoria's broken bail laws" <https://www.hrlc.org.au/factsheets/2021/8/3/explainer-victorias-broken-bail-laws>

93 Truth and Reconciliation Commission of Canada: Calls to Action, 2015, recommendations 27, 28, 62 and 57.

94 The Summary Offences Amendment (Decriminalisation of Public Drunkenness) Act 2021 (Vic).

95 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 December 2020, 3925 (Jill Hennessy, Attorney-General).

96 Human Rights Law Centre, "Aunty Tanya Day – Overview of the Coronial Inquest into her Death in Police Custody", < https://www.hrlc.org.au/tanya-day-overview#:~:text=The%20Human%20Rights%20Law%20Centre%20is%20representing%20the,and%20respected%20member%20of%20the%20Victorian%20Aboriginal%20>.

Dhadjowa Foundation. Ahead of the changes coming into effect in November this year, further reform is still required in order to ensure that the decriminalisation of public drunkenness becomes a reality on the ground. In particular, the Victorian Government should implement a response to public drunkenness, as it affects First Peoples, which is Community-led and public health-based, as well as properly resource Community-led organisations to provide culturally-safe support services to First Peoples in respect of public drunkenness.[97]

Legislative amendments regarding the age of criminal responsibility

141. In Victoria the age of criminal responsibility is 10 years old.[98] Children in this State can be locked up before they lose all their baby teeth. Given the over-representation of our children in custody and the negative and enduring impact of incarceration on First Peoples (as I have addressed above, in my pil'kneango mirnk on systemic injustice), the low age of criminal responsibility disproportionately affects our Community.

142. The current age of criminal responsibility is also inconsistent with international human rights standards and current knowledge on child development and criminology.[99] Further, a Parliamentary inquiry on Victoria's criminal justice system recently recommended that the age of criminal responsibility be raised.[100] For those reasons, the Assembly's position is that the age of criminal responsibility should be raised to at least 14 years old and that that change should be made as a matter of urgency. Children should not graduate from primary school to prison. The

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97 See Victorian Aboriginal Legal Service, Community Factsheet: decriminalising public intoxication, <https://www.vals.org.au/wp-content/uploads/2022/03/Community-fact-sheet-Decriminalisation-of-public-intoxication.pdf>.

98 *Children, Youth and Families Act* 2005 (Vic), s 344.

99 See generally: Legal and Social Issues Committee, Parliament of Victoria, Inquiry into Victoria's criminal justice system, (Final Report, March 2022), Vol 1, xiv, xxxiv and 71 (recommendation 10), 123-134. See also "Statement from organisations to Council of Attorneys-General on raising the age", (19 May 2021), < https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/60a431a0c1675068081a0e5f/1621373344888/Public+statement+to+accompany+CAG+submissions+v2.pdf >; and "Open letter from health organisations on the medical evidence for raising the age to at least 14", (6 December 2021), <https://static1.squarespace.com/static/5eed2d72b739c17cb0fd9b2d/t/61ae9561288f4528f5ac9a06/1638831458385/Open+letter+-+health+evidence+for+raising+the+age+to+14+%281%29.pdf>

100 Legal and Social Issues Committee, Parliament of Victoria, Inquiry into Victoria's criminal justice system, (Final Report, March 2022), Vol 1, pp xiv, xxxiv and 71 (recommendation 10), 123-134.

Commission may be assisted by further pil'kneango mirnk on this issue from VALS.

Implementation of independent oversight in the case of police (with particular regard to their interaction with Victorian First Peoples)

143. The Assembly notes that the Victorian Government has committed to legislation for a "robust" and "victim-centred" police oversight and complaints system – to be introduced in *this term of Government* – and is currently completing a systemic review of Victoria's Police oversight system as recommended by the Royal Commission into the Management of Police Informants in 2021. [101] The Assembly hopes that the Commission's interim report can meaningfully inform this long-called-for legislative reform. Our Communities feel the full brunt of systemic racism and the violence that police dish out, because no government has ever had the guts to create a truly independent body to police the police.

144. For over 40 years, Communities in Victoria have been calling for independent investigations of police misconduct allegations. We need to stop pretending that police investigating other police is acceptable.

145. In fact, independent investigation of police misconduct was a key recommendation of the RCIADIC in 1991. Recommendation 226 called for the independent investigation of complaints against police, as well as the employment of Aboriginal people in an independent police complaints body.[102]

146. VALS recently summarised the significance of policing practices to First Peoples as follows:[103]

> Systemic racism in Victoria Police impacts Aboriginal communities on a daily basis and manifests itself in the way that Aboriginal people are over-policed, over-represented in police custody and under-served when they seek assistance

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101 See the Engage Victoria portal for that review, which contains a link to a consultation paper released by the Victorian Government in respect of the review: <https://engage.vic.gov.au/systemic-review-police-oversight>; Department of Justice and Community Safety, "Systemic review of police oversight" (Consultation Paper, 25 November 2021).

102 Royal Commission into Aboriginal Deaths in Custody, "National Report" (April 1991), Vol 5..

103 VALS, "Reforming Police Oversight in Victoria" (VALS Policy Brief, 2022), 2 (citations omitted).

> from police. It is also evident in police use of force and explicit racial abuse against Aboriginal people. The continuing over-policing of marginalised people leads to shamefully high incarceration rates for Aboriginal people, which were identified more than thirty years ago as the main driver of Aboriginal deaths in custody by the Royal Commission into Aboriginal Deaths in Custody.

147. Currently, Victoria Police investigate themselves when there is a death in police custody, or when there is a complaint of torture, degradation, abuse, ill-treatment, assault, racial abuse or excessive force. Although allegations of misconduct by Victoria Police members can be investigated by the Independent Broad-based Anti-corruption Commission (**IBAC**), in practice, IBAC only investigates approximately two percent of the police misconduct allegations that it determines should be investigated and refers the majority to Victoria Police.[104] Further, IBAC's powers are not comparable to those of other police investigative bodies in other Australian jurisdictions.[105]

148. Leaving it to police officers to investigate the misconduct and crimes of their own colleagues is nonsensical. It is effectively perpetuating a system of State-sanctioned cover ups. How many more of our people have to be killed before real action is taken?

149. In a landmark ruling on 9 April 2020, at the conclusion of the Coronial Inquest into the death in police custody of Yorta Yorta woman, Aunty Tanya Louise Day, the Coroner acknowledged concerns about Victoria Police's role in *investigating its own officers* when it comes to Aboriginal deaths in custody.[106] The Coroner notified the Director of Public Prosecutions that there may have been an indictable offence committed by Police in the circumstances.[107] This ruling came after a long battle for justice by the family of Aunty Tanya Day, who have consistently raised

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104 Parliament of Victoria, Independent Broad-based Anti-Corruption Commission Committee, "Inquiry into the external oversight of police corruption and misconduct in Victoria", (September 2018), p xviii, < https://www.parliament.vic.gov.au/file_uploads/IBACC_58-06_Text_WEB_2wVYTGrf.pdf>.

105 Department of Justice and Community Safety, "Systemic review of police oversight" (Consultation Paper, 25 November 2021), p 12. See generally pp 12-14.

106 Victorian Deputy State Coroner's "Finding Into Death With Inquest, in relation to Tanya Louise Day", 9 April 2020, [626] – [644] <https://www.coronerscourt.vic.gov.au/sites/default/files/2020-04/Finding%20-%20Tanya%20Day-%20COR%202017%206424%20-%20AMENDED%2017042020.pdf>

107 Victorian Deputy State Coroner's "Finding Into Death With Inquest, in relation to Tanya Louise Day", above n 106, [625].

concerns about the independence of police investigating the death during the inquest.[108] Despite the Coroner's damning findings, the Director of Public Prosecutions chose, several months later, not to prosecute the police officers involved.[109]

150. After that news, the family of Aunty Tanya Day renewed their demands upon the Andrews Government to commit to independent investigations of deaths in custody.

> *"Our mum's case shows why it's wrong for police to be investigating the actions of their own colleagues. From the outset, we asked for an independent investigation – instead, we got police discarding important evidence that made it look like they were covering up. When someone dies at the hands of the police, the law should require a transparent investigation, so that there can be truth and accountability."*[110]

151. The concerns raised by Aunty Tanya Day's family echo those of too many other bereaved families seeking the truth through the coronial process. The coronial system in Victoria plays a vital role in the independent investigation of deaths in police custody for the purpose of finding their causes and preventing further deaths. Numerous Coroners around Australia, as well as the Victorian Parliament's Law Reform Committee, have raised issues with police investigations in findings.[111]

152. The current framework for police oversight is entirely inadequate to address the issues of police contact deaths, misconduct, corruption and racism that affect First Peoples. Only a strong, victim-centred, transparent and entirely independent mechanism for oversight of Victoria Police can ensure that over-policing (including as a result of systemic racism) does not contribute to the over-representation of First Peoples in custody and that the conditions of custody do not exacerbate existing disadvantages and vulnerabilities of First Peoples. An oversight body

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108 Human Rights Law Centre, "Police officers involved in Tanya Day's death avoid prosecution", (26 August 2020), <https://www.hrlc.org.au/news/2020/8/26/police-officers-involved-in-tanya-days-death-avoid-prosecution>.

109 Human Rights Law Centre, "Police officers involved in Tanya Day's death avoid prosecution", above n 108.

110 Human Rights Law Centre, "Police officers involved in Tanya Day's death avoid prosecution", above n 108.

111 Victorian Parliament Law Reform Committee, "Coroners Act 1985: Final Report", (2006), Parliamentary Paper 229 of Session 2003-06, p 210, Recommendation 43, <https://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/coroners_act/final_report.pdf>

should draw from best practice experience such as the "gold standard" Police Ombudsman Northern Ireland model,[112] and align with international human rights standards for investigations of human rights abuses.[113] In practice, this means an oversight body that is:

a. independent of the police (that is, hierarchically, institutionally and practically);[114]

b. transparent;[115]

c. capable of conducting an adequate investigation;[116]

d. prompt;

e. open to public scrutiny;[117] and

f. victim-centred and enables the victim to fully participate in the investigation.

153. In this respect, the Assembly supports the advocacy and position of VALS on an effective model of an independent police oversight body, details of which are addressed in VALS' policy brief, "Reforming Police Oversight in Victoria".[118]

154. The Assembly is hopeful that Treaty can produce some more innovative ways to get police violence and racism out of our Communities. But, in the meantime, the first step is obvious – create a strong and completely independent body to handle investigations of police misconduct and crime, which is equipped with meaningful powers to take necessary action.

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112 Jude McCulloch and Michael Maguire, "Reforming police oversight in Victoria: lessons from Northern Ireland", (2002) 34(1) Current Issues in Criminal Justice, pp 38-57.

113 See Police Accountability Project materials on independent investigations regarding police conduct, and sources referred to: "Why we need independent investigation of complaints regarding police conduct", < https://www.policeaccountability.org.au/issues-and-cases/independent-investigations/>

114 See e.g. McCulloch and Maguire, above n 112, at pp 46 – 47.

115 See e.g. McCulloch and Maguire, above n 112, at pp 47 – 48.

116 See e.g. McCulloch and Maguire, above n 112, at pp 49 – 50.

117 See e.g. McCulloch and Maguire, above n 112, at p 48.

118 VALS, "Reforming Police Oversight in Victoria" (VALS Policy Brief, 2022). That document is available on VALS' website: <http://www.vals.org.au/wp-content/uploads/2022/01/Reforming-Police-Oversight.pdf>.

Implementation of Indigenous Data Sovereignty principles in respect of the Commission's records, First Peoples' records and government records more broadly

155. Community feedback received by the Assembly has emphasised the importance of First Peoples' control over their own stories and data held about them. This is consistent with the concept of "data sovereignty" and the core principles of ownership, control, access and possession.

156. The Assembly views Indigenous Data Sovereignty as centring and strengthening First Peoples' rights to ownership and control of their data and as re-shaping First Peoples' ownership and control of narratives by and about First Peoples as part of supporting First Peoples' inherent right to self-determination.

157. Indigenous Data Sovereignty is practiced through Indigenous data governance, which asserts Indigenous interests in relation to data by:

a. informing the when, how, and why data is gathered, analysed, accessed, and used; and

b. ensuring First Peoples' data reflects our priorities, values, culture, lifeworlds, and diversity.

158. In respect of the Commission's records, the Commission's Letters Patent (section 4f(iv)) require the Commission to uphold the sovereignty of First Peoples over their knowledge and stories, by ensuring adequate information and data protection. The Assembly has consulted with First Peoples in relation to the issue of data sovereignty, as it arises in the context of the Commission's inquiry. Feedback received by the Assembly as part of that process suggests that the following are key concerns of First Peoples in relation to sensitive materials received by the Commission: confidentiality; informed and ongoing consent; culturally appropriate handling of data; transparency of processes; ongoing Aboriginal ownership of data; anonymity; safe storage arrangements; and controlled access.

159. First Peoples have also expressed a hope to the Assembly that materials collected through the Commission's inquiry will be managed by a body led by First Peoples upon conclusion of the Commission's inquiry. The Assembly acknowledges the

work the Commission is already doing in respect of Indigenous Data Sovereignty and is committed to working with the Commission on establishing best practice in relation to the management of its records.

160. With respect to the implementation of data sovereignty principles to other First Peoples' records and to government records more broadly, the Assembly is developing policies and processes which support the governance of data in accordance with First Peoples' rights, needs and aspirations. These policies and processes will be used during the Assembly's work and the Treaty process, and will provide principles for dealing with First Peoples' data in Victoria.

161. The Assembly has organised a Working Group consisting of Assembly Members and Aboriginal staff to promote and develop Indigenous Data Sovereignty approaches during the Treaty process. Responsibilities of the Group include:

a. developing internal Indigenous Data Sovereignty policies at the Assembly;

b. adopting best practice Indigenous Data Sovereignty Principles;

c. consulting with Community about their aspirations for Indigenous Data Sovereignty;

d. providing up-skilling and capability building opportunities for staff, Assembly Members and the Community to support these aspirations.

162. The Assembly considers it important for it, and other organisations, to respect the diversity of data sets which they may hold and remain accountable for those sets. In the Assembly's work, we collect data for different purposes, including work in shaping institutions such as the Elders' Voice, the Commission and the Treaty Elements. The Assembly will continue to be guided by information from consultations with those organisations and relevant communities - with respect to their related data as part of the Assembly's long-term data storage and access processes.

163. As part of developing the Treaty Negotiation Framework, the Assembly is ensuring that everything, including Indigenous Data Sovereignty, remains on the table for future State-wide and individual Traditional Owner Group Treaty negotiations.

Ways forward to progress Indigenous Data Sovereignty at a State-wide level will be grounded in Community consultations. Some areas for Community-determined structural reform may include:

a. opportunities for Western legislative change to support implementing Indigenous Data Sovereignty principles in Victoria, such as the principles outlined by Maiam Nayri Wingara and/or in line with best practice, as developed by the Assembly;

b. opportunities for strengthening First Peoples' rights to ownership and control of data by, about, and for them through repatriation of data held by the State;

c. centring First Peoples' ownership and self-determination regarding the way in which their data (including records) is held, stored, and accessed for future generations; and

d. supporting strong Indigenous governance processes State-wide around the control of the creation, collection, and usage of First Peoples' data in Victoria.

164. The Assembly views Indigenous Data Sovereignty in future Treaty negotiations as a potential forum to collectively respond to and seek structural change for strengthening First Peoples' needs, rights and aspirations for the sovereignty of their data in Victoria.

165. I note that the Government has committed to enacting legislation to give effect to an Indigenous Data Sovereignty scheme developed by the Assembly, if necessary.

Celebration and preservation of Victorian First Peoples' language and culture

166. Language is a fundamental part of First Peoples' culture and identity, regardless of the extent to which it is still spoken.[119] Each Traditional Owner group in Victoria has inherent rights, and their own unique Country, language, culture, stories and history which have survived colonisation and which continue.

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[119] See e.g. National Indigenous Languages Report 2020, <https://www.arts.gov.au/file/11763/download?token=rIHa1FjO>

167. But generations of First Peoples carry with them the trauma of our ancestors, who faced dispossession of culture and language alongside the loss of land. First Peoples' cultures and languages were suppressed by deliberate State policies and practices against First Peoples since contact. Colonialists imposed English on First Peoples Communities, and forcibly broke up families.[120] These were key assimilationist tools used in a deliberate attempt to destroy First Peoples' cultures and the continuation and transmission of First Peoples' languages.

168. The impact of these practices on culture and language has been stark. Take languages as an example. It is estimated that at the time of Colonisation, about 39 distinct languages were spoken in Victoria.[121] All of Australia's First Peoples languages are considered "under threat", using UNESCO language vitality indicators.[122] Now, there are no traditional language groups in Victoria who have more than 1000 self-reported speakers.[123]

169. The ripple effects of language loss has been explored in publications supported by the Victorian Aboriginal Corporation for Languages (**VACL**)[124] and reports such as the 2009 Social Justice report by the national Aboriginal and Torres Strait Islander Social Justice Commissioner.[125] Culture and cultural knowledge is carried through languages.[126] Language connects to spirit and the land.[127] Where languages are suppressed and lost, so too is cultural knowledge and identity.

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120 See above at [64] to [66].

121 VACL, "VACL Language Map of Victoria", (online, accessed 19 April 2022) <https://cv.vic.gov.au/stories/aboriginal-culture/our-story/vacl-language-map-of-victoria/≥; and Ian D. Clark, "Aboriginal Language Areas in Victoria – a reconstruction: A report to the Victorian Aboriginal Corporation for Languages", (25 August 2005), p 6 <https://ia803404.us.archive.org/14/items/clark-ian-d-2005/Clark%20Ian%20D%202005.pdf>

122 See e.g. National Indigenous Languages Report 2020, above n 119, p 50.

123 See e.g. National Indigenous Languages Report 2020, above n 119, p 50.

124 See e.g. VACL, "Principles of Language Revival: Healing", <https://www.vacl.org.au/wp-content/uploads/2021/12/language-revival-principles-healing.pdf>

125 AHRC, Aboriginal and Torres Strait Islander Social Justice Commissioner, "2009 Social Justice Report", Ch 3, <https://humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_ch3.pdf>

126 AHRC, "2009 Social Justice Report", above n 125, Ch 3, p 58.

127 For this concept, see "Introduction" by Paul Paton, then CEO of VACL in "Nyernila – Listen Continuously", (2014), available at <https://www.vacl.org.au/wp-content/uploads/2021/12/nyernila-listen-continously-2015.pdf>

170. Driving renewal in our traditional languages is an important part of creating a path to a better future for First Peoples in Victoria, in which our cultures are centred. Language revitalisation is important for health and identity.

171. Not only will efforts to revitalise the use of language benefit our people and strengthen our culture, celebrating and using our languages would open an invitation to newer Victorians to learn about and share in our culture and deepen their connection to Country. Language is a key to understanding and with understanding comes respect and harmony.

172. At the Assembly, the Yurpa Committee ensures that the Assembly's processes and governance are culturally robust, and driven by cultural protocols of doing business our way. Yurpa is a Dja Dja Wurrung word meaning to put forth or to bring into being.

173. More broadly, the Assembly supports the efforts and achievements of VACL, which has working for decades on language revitalisation, research and programs in Victoria.[128] Language revitalisation requires investing in and re-shaping our approach to language education. It requires building capacity across communities, in a way that takes account of First Peoples' different cultures and lore across Victoria.

174. Pursuing language revitalisation in Victoria requires real investment and resources, which have been lacking for a long time within the current system. Investment should be made in the Traditional Owner nations to revitalise languages.

175. The Assembly believes that Treaty can help drive a renewal in our Traditional languages and culture. Treaty is about rethinking current institutions and practices, which have long suppressed culture. It will be about implementing initiatives like dual place names, so that all Victorians can celebrate in the oldest living culture on earth.

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[128] See e.g. VACL's Projects listed on its website at <https://www.vacl.org.au/projects/>

Implementation of the United Nations Declaration into the Rights of Indigenous Peoples within Victoria and other reforms to enhance legislative human rights protections for First Peoples

176. Through its consultation, the Assembly has heard that First Peoples living in Victoria want their rights realised in ways that rise above the limitations of Australia's colonial legal framework. The Assembly agrees with the many who see useful guidance in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which enshrines a right to self-determination and support for the primacy of cultural law/lore of the various Nations of what is now Victoria. The rights enshrined in UNDRIP have not been implemented in Victoria.

177. The Assembly is working towards establishing strong foundations for negotiations of State-wide Treaty and Traditional Owner Treaties that can realise necessary structural reforms and transfer decision-making power to First Peoples. This is required to give effect to the right to self-determination and realise the full extent of the minimum standards for the survival, dignity and well-being of Indigenous peoples recognised in UNDRIP.

178. There remain gaps in legislative human rights protections in the case of First Peoples. One of these gaps is the current absence of the right to self-determination in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**). I consider that the Charter in its current form has worked to prioritise individual rights over the collective rights of our people, including the right to self-determination. Communities and Community-led organisations have long called for the right to self-determination to be recognised in the Charter, and its inclusion was a key recommendation arising from the Charter's eight-year review in 2015. However, the Victorian Government is yet to act upon this. Enhancement of legislative human rights protections for First Peoples is an area of responsibility which may be appropriately taken up by a First Peoples representative body granted decision-making authority in the context of a State-wide Treaty.

179. Apart from UNDRIP, other international instruments (referred to at pp 1-2 of the Commission's Letters Patent) address both the State's obligations to victims of serious human rights violations and the rights of First Peoples under international

human rights law. Indeed, the denial in Australia of First Peoples' autonomy and self-determination has enabled other internationally-recognised violations to take place, including racial discrimination, genocide, torture, cruel, inhuman and degrading treatment. Under international law, victims of these and similar crimes are entitled to reparation, the right to recognition of what happened, accountability for those responsible, and to be assured of action to prevent further violations in the future.

Signed by Marcus Stewart

on 29.04.2022

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Signature