

A decorative graphic on the right side of the page consists of several large triangles pointing towards a central point. The triangles are colored in shades of blue, orange, and red. The top triangle is a medium blue, the one below it is a bright cyan, the one to the right of the cyan is an orange, the one below the orange is a red, the one to the left of the red is a light blue, and the bottom triangle is a dark blue.

Confirmation of Aboriginality

**Nuther-mooyoop to the Yoorrook
Justice Commission**

Aboriginal Justice Caucus

We acknowledge the Traditional Custodians of the lands and waterways upon which our lives depend. We pay our respects to our Ancestors and Elders – past, present and emerging. We extend that respect to all Aboriginal and Torres Strait Islander peoples. We acknowledge the leadership of Aboriginal Communities across Victoria in pursuing true justice for our people.

Advice to readers

Aboriginal and Torres Strait Islander peoples living in Victoria and involved in the justice sector have diverse cultures. Throughout this document ‘Aboriginal’ refers to Aboriginal and/or Torres Strait Islander People, communities and organisations. The Aboriginal Justice Caucus acknowledge that there are many Aboriginal people in Victoria who have Torres Strait Islander heritage, and many Torres Strait Islander people who now call Victoria home.

The terms ‘Koori’, ‘Koorie’ and ‘Indigenous’ are retained in the names of programs, initiatives, direct quotations, publication titles and in reference to published data.

The word family has many different meanings. Use of the words ‘family’ and ‘families’ is all encompassing and acknowledges the variety of relationships and structures that can make up a family unit, including family-like or care relationships and extended kinship structures.

To Aboriginal and Torres Strait Islander readers, we advise that this document includes the names and images of people who have died.

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Acronyms and Abbreviations

ACCO	Aboriginal Community Controlled Organisation
AJF	Aboriginal Justice Forum
AHV	Aboriginal Housing Victoria
AJA	Aboriginal Justice Agreement
AJA1	Victorian Aboriginal Justice Agreement
AJA2	Victorian Aboriginal Justice Agreement: Phase 2
AJA3	Victorian Aboriginal Justice Agreement Phase 3
AJA4	<i>Burra Lotjpa Dunguludja</i> Victorian Aboriginal Justice Agreement Phase 4
AJC	Aboriginal Justice Caucus
CoA	Confirmation of Aboriginality
DET	Department of Education and Training (now known as Department of Education)
DHHS	Department of Health and Human Services (now known as Department of Families, Fairness and Housing)
DJCS	Department of Justice and Community Safety
Djirra	Djirra (formerly the Aboriginal Family Violence Prevention and Legal Service)
DPC	Department of Premier and Cabinet
IPV	Independent Prison Visitor
KYC	Koorie Youth Council
LAJAC	Local Aboriginal Justice Action Committee
LSIC Inquiry	Legal and Social Issues Committee Inquiry into Victoria's Criminal Justice System
RAJAC	Regional Aboriginal Justice Advisory Committee
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
VAAF	Victorian Aboriginal Affairs Framework 2018-2023
VACCA	Victorian Aboriginal Child Care Agency
VACCHO	Victorian Aboriginal Community Controlled Health Organisation
VACSAL	Victorian Aboriginal Community Services Association Limited
VAEAI	Victorian Aboriginal Education Association Incorporated
VALS	Victorian Aboriginal Legal Service
Yoorrook	Yoo-rrook Justice Commission

Aboriginal Justice Caucus

The Aboriginal Justice Caucus (**AJC**) is made up of all the Aboriginal signatories¹ to the Victorian Aboriginal Justice Agreement (**AJA**) and includes Chairpersons of each of the nine Regional Aboriginal Justice Advisory Committees (**RAJACs**), representatives from statewide Aboriginal justice programs, Aboriginal peak bodies and Aboriginal Community Controlled Organisations (**ACCOS**).

The AJC are a crucial conduit between Aboriginal Communities and the Victorian 'justice' system. We are privileged to work with and listen to our communities, colleagues and clients and seek to ensure their voices are heard by government, and those responsible for the day-to-day operation of police, corrections, courts and other 'justice' services.

The AJC has worked in partnership with Victorian governments for over 24 years. The AJC acknowledge the enormous contributions of Aboriginal leaders, Elders and knowledge holders who have gone before us, and fought tirelessly for our rights. Their efforts paved the way for us to continue the fight for justice for our people.

As the AJA has evolved, so too has the role of the AJC. We participate in a growing number of advisory and governance mechanisms to change laws, develop strategies, procure programs and services, inform responses to justice issues and reform the system. However, to move beyond reform and *transform* the system into one that can truly deliver justice for our mob requires true self-determination.

Aboriginal leadership has always been central to the AJA, and as partners to successive phases of the Agreement the AJC have been instrumental in the creation of numerous positions, programs, policies and plans² to enable greater access to supports that prevent our people coming into contact with the system, and to ensure that, for those caught up in the system, it is more responsive to their needs.

The AJA's wide-reaching impacts, along with its strong partnerships, are a great strength. However, in the pursuit of true self-determination, there are significant limitations to this partnership approach where ultimate authority remains with the State. True self-determination still necessitates new and greater responsibilities for the AJC, Aboriginal Communities and Organisations to determine, design and deliver services that reflect Aboriginal ways of knowing, being and doing.

We are ready to meet this challenge as we embark upon the next phase of the Aboriginal Justice Agreement.

¹ Signatories to *Burra Lotjpa Dunguludja*, the fourth phase of the Victorian Aboriginal Justice Agreement, are listed at the back of this submission.

² While not an exhaustive list, positions, programs, policies and plans established under the first three phases of the AJA are outlined in *Burra Lotjpa Dunguludja* – Victorian Aboriginal Justice Agreement Phase 4, p.12

Introduction

The Aboriginal Justice Caucus welcome the opportunity to provide this *nuther-mooyoop* in response to the Yoorrook Justice Commission's (**Yoorrook**) invitation for final submissions. We note that Yoorrook's Letters Patent require recommendations to be made for healing, system reform and practical changes to laws, policy and education, as well as to matters to be included in future treaties.

Through this submission, the AJC wish to reiterate our position on matters relating to Confirmation of Aboriginality (**CoA**) given its critical importance in the context of progressing Aboriginal self-determination, transferring power, control and decision-making to Aboriginal people, ensuring our rights are protected and that we can benefit from subsequent changes to laws and policies and the development of any treaties.

For over a decade the AJC have worked on understanding the procedures, challenges, and implications associated with CoA in Victoria. This submission aims to highlight some of our work to date and provide insights and recommendations to ensure a fair, respectful, and effective process that acknowledges the cultural and community-based aspects of Aboriginal identity, while addressing concerns related to fraudulent claims and their impacts on Aboriginal communities.

Confirmation of Aboriginality

Confirmation of Aboriginality (**CoA**) describes the process through which an individual of Aboriginal descent may obtain official recognition of their Aboriginal status. This recognition is often required to access various programs, services, and entitlements designed to support Aboriginal communities. Accurate confirmation is essential to uphold the integrity of these programs and services.

Current process

Documentation:

Applicants typically provide evidence of their Aboriginal heritage, such as genealogical records, community endorsements, or historical documents. The documentation should clearly establish a connection to Aboriginal ancestry.

Community verification:

Aboriginal community organisations play a crucial role in verifying an individual's claim to Aboriginality. This may involve letters of support or other forms of acknowledgment from recognised Aboriginal Elders or community leaders who vouch for the applicant's connection to the community.

Formal recognition:

Successful applicants receive a Confirmation of Aboriginality certificate, which can be used to access relevant services and opportunities.

Recommendations

As outlined in our nuther-mooyoop to the Yoorrook Justice Commission on Systemic Injustice in the Criminal Justice and Child Protection Systems, the AJC recommend that the Victorian Government:

Recommendation 1: Resource community organisations

Provide funding and other resources to support ACCOs and Traditional Owner Groups involved in processing CoA applications and issuing certificates.

Recommendation 2: Establish an Aboriginal community-led authority

Provide resourcing for an independent, Aboriginal community-led authority responsible for overseeing CoA processes, researching and processing Confirmation of Aboriginality applications, and maintaining relevant records.

Recommendation 3: Abolish the use of statutory declarations

Abolish the use of statutory declarations so that they are not sought or accepted in lieu of CoA certificates.

Recommendation 4: Strengthen government processes and ensure consistency

Ensure consistent processes are used across government departments and agencies to check Aboriginal identification. Strengthen processes where they currently only require self-identification ('box-ticking is not sufficient').

Recommendation 5: Prosecute fraudulent claims

Prosecute fraudulent statutory declarations of Aboriginality under the *Oaths and Affirmations Act 2018*.

**Our work on
Confirmation of
Aboriginality**



Background

The Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**)³ found that the high rate of Aboriginal deaths in custody was directly related to underlying factors of poor health and housing, low employment and education levels, dispossession and past government policies. The RCIADIC asserted that the fundamental causes for over-representation of Aboriginal people in custody were outside of the criminal justice system, concluding that ‘the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society—socially, economically and culturally’.⁴

Since the release of the RCIADIC National Report in 1991, successive governments have made some progress towards implementation of the 339 recommendations, however, there are still significant areas of concern for the AJC. The increasing disparity in outcomes for Aboriginal people across all socio-economic areas continues to drive Aboriginal over-representation in the criminal justice system.

The first Victorian Aboriginal Justice Agreement (**AJA**) was developed in partnership between the Victorian Government and the Aboriginal community with the aim of responding to the RCIADIC recommendations. A key action of the first AJA was the development of a whole of government framework to address the underlying socio-economic factors contributing to the over-incarceration of Aboriginal people. This led to the development of the Victorian Indigenous Affairs Framework and its subsequent iterations (now known as the Victorian Aboriginal Affairs Framework).

The partnership between the AJC and the Victorian Government resulted in the development and implementation of successive Aboriginal Justice Agreements (AJA2, AJA3 and AJA4). Through our work on these Agreements, and involvement in the structures that support them (Aboriginal Justice Forums, Regional Aboriginal Justice Advisory Committees, and Local Aboriginal Justice Action Committees) we continue to hear from Community about their concerns with CoA processes, or lack thereof, and are provided with examples of people making false claims in the justice sector and more broadly.

When false or fraudulent claims are made, scarce resources, roles and opportunities designed to support Aboriginal people, families and communities are diverted to benefit people who are not Aboriginal. As a result, our mob miss out on the services and supports they need, and efforts to address injustices and inequalities are undermined.

AJC involvement

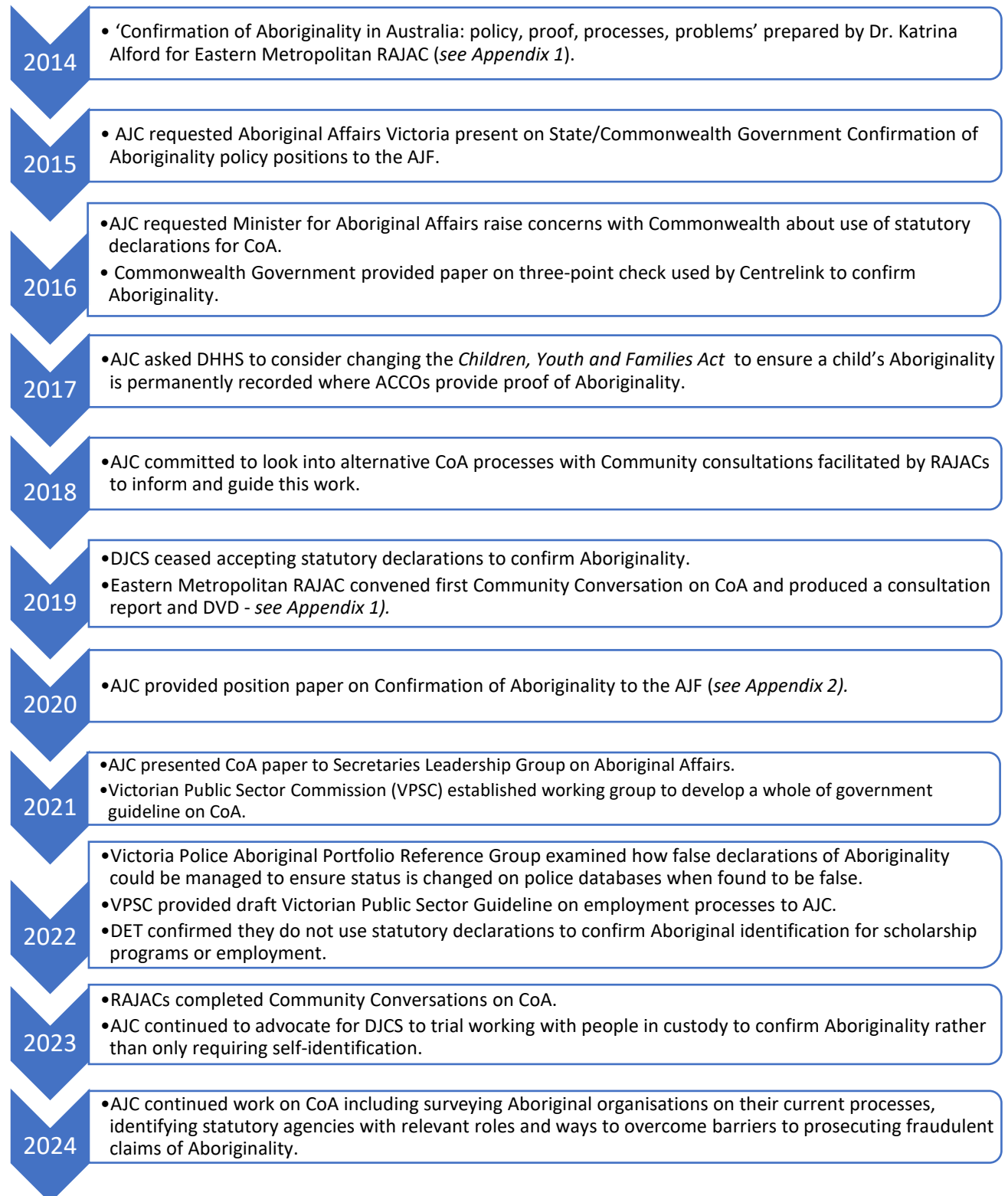
For the past decade, the AJC has been unpacking Community concerns around confirming Aboriginality, advocating for government funding to support Aboriginal Community-led processes and for consistent requirements across government in relation to CoA documentation.

Key aspects of this work, matters we’ve raised at various forums and resulting reports are outlined in the timeline over the next page. While we continue this work, one of the aims of this submission is to ensure Yoorrook have access to these documents given they outline a range of Community concerns and perspectives on CoA processes and examples of how these have changed over time.

³ Commonwealth, Royal Commission into Aboriginal Deaths in Custody: National Report (1991), Volumes 1–5. Australian Government Publishing Service, Canberra.

⁴ Ibid vol 1, [1.7.1]

Timeline



Community forums

The AJC wish to acknowledge Dr Lois Peeler AM, who as Chairperson of the Eastern Metropolitan RAJAC worked tirelessly to bring attention to a broad range of issues related to CoA and held the first community forums to explore these. The approach taken has informed the many community conversations that have been held since. We acknowledge the RAJAC Chairpersons who continue to champion this work, RAJAC staff, Community members and others who have given their time, knowledge and experience to enrich community forums and discussions on CoA. Thank you for your efforts and contributions to the ongoing improvement of CoA processes in Victoria.

Between 2019 and 2023 several community forums were held across all nine RAJAC regions. Participants were encouraged to raise any matters of concern, central to each forum was discussion of the:

- Commonwealth definition of Aboriginality
- Appropriateness of statutory declarations for confirming Aboriginality
- Processes for obtaining CoA certificates
- Role of Aboriginal Elders, organisations and community members in CoA processes

Summary of issues and recommendations

Each RAJAC produced a report detailing the discussions and feedback from the community forums held in their respective regions. While discussions were diverse and wide-ranging, some of the most common concerns and issues are summarised here.

Definition of Aboriginality:

There were mixed views on the usefulness of the Commonwealth three-part definition of Aboriginality (1978).:

'An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives.'

Some found this definition to be dated and considered it did not work for modern Aboriginal society. Others were concerned that debate around having a singular definition of Aboriginality was divisive, contributed to fracturing communities and lateral violence.

The third part of the definition requiring acceptance by the community was repeatedly criticised as being too imprecise. Participants pointed out that being accepted or known by the community is different to being recognised as an Aboriginal person by an Aboriginal community.

Use of Statutory Declarations:

The reliance on statutory declarations or other unverified self-identification methods as stand-alone evidence of Aboriginality was rejected by all regions.

It was acknowledged that statutory declarations could be useful in very limited circumstances, if used to complete eligibility criteria within time-constraints and accompanied by other legitimate means of verification.

The AJC recommend that the Victorian Government abolish the use of statutory declarations:

Abolish the use of statutory declarations so that they are not sought or accepted in lieu of CoA certificates.

Consistent processes:

Issuing CoAs

Standardised requirements for CoA applications were viewed by most participants as a necessary step towards improving the current system.

Some suggested that CoA applications should always require a written statement from an ACCO, verifying knowledge of the applicant and their Aboriginal identity. Others were concerned that family or political factions could complicate matters if this were introduced as a standard requirement.

Another suggestion was for applicants to write a statement of intent to accompany a CoA application setting out their reason/s for confirming their Aboriginal identity to mitigate against false applications made purely for financial gain.

There was strong community sentiment across regions that individuals be expected to 'do their homework' to be able to present evidence of their Aboriginal identity. Similarly, participants recognised that decision-makers need sufficient training and time to carefully consider the material before them before coming to a decision on any CoA application.

Many participants recognised that ACCOs entrusted with responsibility for issuing CoAs were not resourced or under-resourced given the time and effort required to administer, consider, and decide on CoA applications. (A list of Aboriginal organisations that issue CoAs is at Appendix 3).

Several questioned whether it was appropriate for a Traditional Owner to approve a CoA application where the applicant is from interstate and not known to that community.

There were significant concerns about an online service purporting to provide CoA certificates. The selling of CoAs was considered exploitative, offered no protection against false information, and resulted in certificates that were not issued by an appropriate cultural authority.

The AJC recommend that the Victorian Government resource community organisations:

Provide funding and other resources to support ACCOs and Traditional Owner Groups involved in processing CoA applications and issuing certificates.

Requirement to check CoA certificates

Public sector agencies need to ensure their processes for requiring and checking CoA documents are as rigorous as those used for other background checks (criminal record check, Working with Children Check etc.), and that there is consistency across government.

It was suggested that applications for Aboriginal positions should require a statement of one's Mob, cultural knowledge or experience, to determine candidate appropriateness. There was a widely held view that to take up a government position aimed at supporting Aboriginal community members, an appropriate candidate must be equipped to advocate for Community and understand Community life and culture.

Participants felt that a consistent approach to checking the CoA of people claiming Aboriginality is required across all domains where funds, specific programs, services or other benefits are targeted towards Aboriginal people. Examples raised included child protection, schools, adult education, university scholarships, businesses, Koori Courts, and programs in custody.

The AJC recommend that government processes be strengthened to ensure consistency:

Ensure consistent processes are used across government departments and agencies to check Aboriginal identification. Strengthen processes where they currently only require self-identification ('box-ticking is not sufficient').

Establish a central, Aboriginal-led authority:

There were strong and repeated calls for a centralised Aboriginal authority to help bring consistency and regulation to CoA processes. This ‘authority’ should be self-determined, independent, and adequately resourced. Participants suggested its functions could include:

- Processing applications and issuing CoA certificates, and/or regulating organisations issuing CoA certificates (accreditation; monitoring)
- Legal research and/or referrals
- Historical research and development of family trees/genograms
- Maintaining records/databases of historical information and CoA certificates
- Information-sharing
- Community education

Many regions felt these functions could fall within the remit of an Aboriginal Social Justice Commissioner; a role long advocated for by the AJC. Another suggestion was for a Council of Elders.

Participants also suggested that the capacity and resourcing of existing organisations could be increased to take on a greater role in the CoA process. The Koorie Heritage Trust, Link Up, Bringing Them Home, and Births, Deaths and Marriages were all discussed in this context.

Discussions on this matter also reflected the need to attend to issues around data sovereignty, cultural intellectual property, genealogy and oral knowledge of Traditional Owners.

The AJC recommend that the Victorian Government fund establishment of an Aboriginal community-led authority:

Provide resourcing for an independent, Aboriginal community-led authority responsible for overseeing CoA processes, researching and processing Confirmation of Aboriginality applications, and maintaining relevant records.

Appeals and penalties:

A common concern raised was the lack of recourse to challenge or dispute claims of Aboriginal identity alleged to be false, or take meaningful action when claims were proven to be false.

It was suggested that legal avenues be further explored given the potential for penalties to be imposed for false declarations. Participants recognised that the introduction of penalties would be more effective if accompanied by an education campaign, with clear messaging to deter individuals from falsely identifying themselves as Aboriginal.

The AJC recommend prosecuting fraudulent claims:

Prosecute fraudulent statutory declarations of Aboriginality under Oaths and Affirmations Act 2018.

Support for Stolen Generations and people disconnected from their families/communities:

It was widely acknowledged that substantial consideration and support is needed for Stolen Generations; those disconnected from their communities for various reasons – child protection involvement, institutionalisation, incarceration etc; people who have difficulty accessing their genealogical information and those just starting on their identification journey.

Forum participants recognised that the Stolen Generations Reparation Scheme may offer support in some cases, but descendants of Stolen Generations and other displaced persons may not be eligible and additional support required.

Need to act

The AJC advocate for more rapid action on CoA matters to respond to demographic pressures and policy changes. This will help to ensure Aboriginal rights are protected and that we can collectively reap the benefits of any subsequent treaty/ies.

Demographic changes:

The Aboriginal population in Victoria is among the fastest growing in Australia. There were 65,646 people who identified as Aboriginal and/or Torres Strait Islander counted in Victoria in 2021 – up from 47,788 in 2016. This represents an increase of 37.4 per cent, or 17,858 people.⁵ Over a third of that growth was due to people changing their identification (or that of their children) over time.

Demographic factors (births, deaths, migration, people returning from overseas) explained 6,735 of the additional Aboriginal people counted in Victoria in 2021. The remaining 11,123 person increase (62 per cent) was non-demographic and arose from changes in whether a person identified (or was identified⁶) as Aboriginal, and/or changes in Census coverage and response.⁷

While there are various legitimate reasons why someone's identification may change between census periods, if these changes are reflected in commensurate increases in the number of CoA applications there is significant additional burden on ACCOs and other organisations to process these.

Policy changes:

The Victorian Government has committed to advancing Aboriginal self-determination. To do this, government must ensure that its systems and funded services are culturally safe, relevant, accessible and responsive. Ensuring government processes for checking CoA documentation are robust and consistent is a necessary part of this work.

The need to further examine CoA matters was also a finding of the recent Parliamentary Inquiry into Victoria's Criminal Justice System:

'The Committee believes that how Aboriginality is established in justice contexts, merits investigation by the Victorian Government, in partnership with Aboriginal representative bodies, Aboriginal Community Controlled Organisations, Traditional Owners and the Aboriginal community more broadly.'

Legislative Council Legal and Social Issues Committee⁸

By refining and strengthening the CoA process, Victoria can strive towards a system that respects the diversity and dignity of Aboriginal peoples, and supports ongoing connections to Country culture and kin, while also safeguarding the limited resources that are intended to benefit our Aboriginal communities.

⁵ ABS, Analysis of change in counts of Aboriginal and Torres Strait Islander Australians in the 2021 Census, April 2023, [Understanding change in counts of Aboriginal and Torres Strait Islander Australians: Census, 2021 | Australian Bureau of Statistics](#)

⁶ There were an additional 3,109 Aboriginal children aged between 5-14 years counted in the 2021 Census in Victoria, *ibid.*

⁷ *ibid*

⁸ LSIC, Inquiry into Victoria's Criminal Justice System, Finding 13

Appendices



Appendix 1 - Community Forum Summary

**'Confirmation of Aboriginality in Australia: policy, proof, processes, problems'
prepared by Dr. Katrina Alford for Eastern Metropolitan RAJAC**



COMMUNITY FORUM

CONFIRMATION OF ABORIGINALITY

FORUM SUMMARY



KOORIStrong
KOORIProud
KOORIJustice
Victorian Aboriginal
Justice Agreement



Community Forum for a Discussion on CONFIRMATION OF ABORIGINALITY FORUM SUMMARY

“The Government have been telling us ‘this all needs to be sorted out by the community’, so let’s discuss the issues, and take the outcomes to the AJF”

Eastern Metropolitan Regional Aboriginal Justice Advisory Committee (RAJAC)

On Wednesday 3 July 2019, around 80 Aboriginal Community members, representing very diverse Tribe/Clan groups from across the Eastern Metropolitan RAJAC and other regions, gathered at the Karralyka Centre in Ringwood to contribute to discussions around formal ‘Aboriginality’ processes.

In attendance were community members spanning in age from youth to elderly with good balance in gender, with each contributing in some way. Some who were unable to attend on the day expressed their views in a video production or through formal written commentary.

Whilst the topic as discussed on the day, has been well covered throughout all Aboriginal and Torres Strait Islander Communities, the diverse Eastern Metro representatives in attendance gave testament to the importance of the subject across the region and elsewhere.



Leading the morning, following a Welcome to Country from respected Elder Aunty Zeta Thomson, Eastern Metropolitan RAJAC, Chair: Dr Lois Peeler (Aunty Lois) introduced forum facilitator Nathan Leitch and welcomed all, providing a background to the forum.

The matter of Confirmation of Aboriginality has been raised at numerous Aboriginal Justice Forums over the last 6 years. In 2014 the Eastern RAJAC commissioned a report ‘Confirmation of Aboriginality in Australia: policy, proof, processes, problems’. The Report by Dr Katrina Alford, provided an overview of issues in regard to the current processes of Confirmation of Aboriginality.

The link between poverty and the low socio-economic position of Aboriginal people is a major contributor to over-representation in the justice system. Human rights abuse of Aboriginal people since colonisation is well documented. Past government policies saw our people herded onto government-controlled reserves, children removed, young people pressed into ‘service’, ‘slave labour’ access to proper education denied and breakdown of families.

Breaking the cycle of poverty and addressing intergenerational trauma is key to Aboriginal community advancement. Concerns identified in the Aboriginal and Torres Strait Islander Communities must be addressed.

Concerns at the Confirmation of Aboriginality processes have been identified over a number of years and these concerns are growing. Successive government ministers have pushed the responsibility of Confirmation of Aboriginality back onto Community.

The Victorian Aboriginal Affairs Framework 2018-2023 (VAAF) is the Victorian Government’s overarching framework for working with Aboriginal Victorians, organisations and the wider community to drive action and improve outcomes. In its development, it was stated, “Governments alone cannot hold itself accountable for improving outcomes for Aboriginal Victorians. Government, Aboriginal organisations and government funded organisations must be held accountable to community, by community.”

In acknowledging Aboriginal Community concerns on the Issue of Confirmation of Aboriginality, the Koori Justice Caucus of the Department of Justice and Community Safety, determined that each RAJAC should conduct a community forum in their respective regions.

On 3 July, 2019, the Eastern RAJAC held a forum to canvass the views of Community on the following:

1. to seek a consistent approach to Confirmation of Aboriginality processes
2. to pursue an appropriate process for monitoring claims of Aboriginality through Statutory Declarations
3. in line with self-determination, advocate for a properly resourced body responsible for research and processing Confirmation of Aboriginality applications
4. to communicate the views of this forum to the Koori Justice Caucus and Aboriginal Justice Forum

These four points provided the focus for discussion throughout the forum. The forum provided a platform for participants to share stories, relate anecdotes and express their views. Many examples of problematic behavior, often leading to detrimental outcomes for Community, were shared at the forum across all sectors including, early childhood, primary, secondary and tertiary education, employment, housing and health. The method of analysis and reporting utilised in this outcomes summary, ensures the forum outcomes are strategically focused, whilst respectfully allowing individuals to share their stories. These stories and experiences have been placed at the center of the outcomes, noting that the experiences, views, beliefs and expertise of Aboriginal Community is the key driver behind the call for system reform.

No individuals have been identified in this document, including any who are directly quoted. An opportunity to provide written submissions following the forum was offered, and two participants took up this offer.



Key points

“We’ve had these concerns for years. We need to fix it. We need solutions now.”

Consistency – need for a consistent approach to Confirmation of Aboriginality processes for individuals

There must be consistent practice across the board, to allow for clear understanding (and adherence) of protocols and parameters involved in Aboriginality claims and confirmation. Creating tangible benefits such as Aboriginal-designated scholarships or jobs is important public policy. Ensuring these are awarded to valid claimants is critical.

In describing the current practices of Confirmation of Aboriginality, language such as “fraudulent”, “lies”, “theft” and “gammon” was consistently used by forum participants. Overwhelmingly, there is a sense of frustration that Aboriginal identity is seemingly so easy to fabricate without any accountability or reliable systems in place. There is a broad spectrum of individuals seeking confirmation of Aboriginality, including (but not limited to):

- ‘late identifying’ individuals who might not have been ‘Raised Black’
- Non-Indigenous parents seeking confirmation for Aboriginal children
- Individuals seeking ‘benefits’ or access to Aboriginal resources
- Individuals seeking to fast track careers through Designated or Identified roles.
- Academic advancement in Higher Education

Within these common examples, all come with significant complexities. While there are many who genuinely wish to reconnect with culture and community, there are some individuals with fraudulent claims and connections. The line between these differing intentions is one that the forum wishes to clearly draw.

At the centre of issues raised are concerns regarding the Commonwealth definition of Aboriginality (1978):

“An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives.”

There is a call for this definition to be updated, or expanded upon, to allow for increased context and specificity. In particular, self-identification and Community acceptance can be vastly different, requiring a case-by-case approach, therefore some form of verification should be imposed.

Community engagement and control

Community acceptance, it appears, is the simplest and most efficient form of identification, although not without its limitations. Elders and leaders agree that their expertise and knowledge can be utilised, as expressed by these participants:

“All the anthropological information is written by White people. We are the real anthropologists, though. We know that.”

“When you meet someone, you know if they’re genuine.”

Currently across Victoria, people can apply for Confirmation of Aboriginality in multiple ways. The most common, is by contacting a local Aboriginal organisation. Several forum participants raised concerns with some of these organisational processes, regarding self-identification and perceived improper sign-off processes as problematic. There was reference to at least one ACCO in Victoria that has a rigorous (yet fair) application process, generally based on the applicant’s responsibility to provide evidence for their claim. It was agreed by the forum that this level of “homework” should be commonplace.



Returning to Community issues

“If there’s a question mark over someone’s identity, from a community perspective, that’s just not on. That connection they’ve lost, they need to find that.”

“There’s just some logical starting points. They’ve got their own homework to do. If they’re getting supported through the process by a service, then that service needs to provide good guidance.”

Recognising sensitivities around displaced persons, removal of children / stolen generations, individuals seeking confirmation must:

- do their research on genealogy and demonstrate evidence of their attempts to connect prior to seeking Confirmation of Aboriginality;
- demonstrate involvement in the community;
- for late identifiers – state their intentions and reason/s for identifying.

Several Elders have suggested that an important requirement for seeking confirmation must be a statement regarding the applicant’s intentions and reasons for applying for a Confirmation of Aboriginality certificate. The forum agreed that the “why are you doing this?” and “what are you hoping to get out of this” questions would provide significant insights into the genuineness of the claim.

Consideration should be given to a checklist of actions undertaken, with clear responsibilities of the individual/s seeking confirmation. The services supporting them must take this seriously, as a matter of accountability.

Employment

The Forum identified cases of corporate connivance to meet Aboriginal employment targets, without actually employing more Aborigines.

“Stop giving Whitefellas Blackfella jobs! We need to stamp this stuff out.”

The terminology of ‘Designated’ and ‘Identified’ positions used in the public sector is confusing. There should be one position identifier i.e. either ‘Designated Position’ or ‘Identified Position’.

The purpose of such positions is to ensure a workforce delivering government programs and services to the Aboriginal community has a working knowledge of that community. Key selection criteria for Designated / Identified positions must include demonstrated knowledge of culture, Community, established networks and Aboriginal ways of Knowing, Doing and Being.

The delivery of government services to the Victorian Aboriginal Community is a function of government agencies working to meet community objectives. Selection panels should comprise suitably qualified Elders / Respected Persons to assess the candidate’s claims against key selection criteria.

Other sectors impacted

There have been concerns raised regarding employment / recruitment processes, especially those that are online, where individuals can choose to “tick-a-box”, fraudulently identifying themselves as Indigenous. This occurs in employment, scholarships, funding and grant applications and procurement. This type of fraud is deemed commonplace, and has at times reached significant levels, including instances of Indigenous home loans. It has been suggested that there has never been any level of scrutiny, let-alone prosecution, of these frauds.

Confirmation of Aboriginality extends to Study Assistance and Support. Scholarship applicants are generally linked into Indigenous Higher Education Centres (IHEC) or Indigenous Support Workers. IHEC are located in Australian Universities to provide support to Indigenous students, further Indigenous academic studies, create a network of Indigenous students and academics, and provide an Indigenous presence on university campuses. Tutorial assistance is available through the Indigenous Tutorial Assistance Scheme (ITAS) to eligible Indigenous students undertaking tertiary or VET studies.

The support of Aboriginal and Torres Strait Islander students in Higher Education is crucial, however there is no regulatory body to provide oversight of fraudulent claims. In cases of questionable/ known fraudulent claims, universities push the responsibility back on Community.

The diversion of funding from limited Indigenous funding sources through fraudulent claims is a matter of concern. In the absence of any regulatory process, there is growing concern that funds to improve the socio-economic position of Aboriginal and Torres Strait Islander people are increasingly being fraudulently diverted.

Contractors, corporations and government procurement

The Forum heard of cases where contracts are awarded for Aboriginal and Torres Strait Islander employment and training based on targets where the company tells their non-Aboriginal ethnic workers to claim Aboriginality.

At the Forum an Elder identified concerns relating to procurement quotas, whereby suppliers (often interstate) are “swooping in” and taking economic opportunities away from smaller community enterprises. The federal Government’s Indigenous Employment Strategy (IAS) has awarded multi-million dollar grants to regional, national and even global companies with questionable Aboriginal cultural credentials or connections to “deliver” services to Aboriginal communities.

It is not just individual Aboriginal people who lose out if Confirmation of Aboriginality processes are corrupted. Community economic and social losses mount as well when Aboriginal-targeted money and resources are diverted to predominantly non-Aboriginal outlets.

The Forum was focused mainly on individual Confirmation of Aboriginality (COA) processes but communities are aware of and the Forum noted concerns about broader levels of fraudulence and corruption of COA claims. These may occur within organisations and companies, and in government Indigenous procurement policies and processes. Reviewing COA processes should include these broader levels of operation.

Widespread anecdotal evidence

Several participants, including Elders, referenced one specific individual who is not Aboriginal, but who has been posing as such for many years, working as a cultural consultant. The impact of this fraud is significant and is causing emotional and financial problems.

An Elder reported witnessing widespread fraudulent identification in the justice system, especially where prisoners can elect to self-identify and receive perceived ‘special treatment’. This is causing deep concern and frustration.

One participant reported seeing extensive issues within universities and major institutions, where scholarships and other significant opportunities are being regularly offered to individuals who identify as Aboriginal, but who have little or no community connections or knowledge. There are concerns for the level of opportunities and allocated resources which are not being applied to more marginalised or in-need community.

One participant reported cases of children in out of home care being incorrectly/fraudulently identified, then leading them to potentially harmful and traumatic experiences of being ‘de-identified’ via DHHS Child Protection protocols.



Statutory Declarations

The Forum wants more appropriate processes for individual Confirmation of Aboriginality than relying on Statutory Declarations by claimants.

Aboriginality is NOT just a “ tick the box” process lacking any cultural authenticity or authority. The Forum is critical of the notion that anybody can declare their Aboriginality based on a Statutory Declaration. Legal witnesses and signatories – Justices of the Peace, chemists and police officers – generally lack the cultural and community knowledge and connections required to affirm an individual’s Aboriginality.

The Forum calls for a review of the Confirmation process relating to dependence on the use of Statutory Declarations. Although these are insufficient proof of Aboriginal identity, they could be retained as one part only of the Confirmation process, to provide sworn evidence for any legal action against fraudulent claims.

Note: The Oaths and Affirmations Act Victoria, 2018, Part 4 Statutory declarations - includes harsh financial penalties, or imprisonment for 5 years, or both, for persons making false or misleading statements in a statutory declaration.

“We’re talking about financial fraud. Major fraud. And I’ve never seen a prosecution for it. Not one.”



Regulatory Authority

In line with self-determination, advocate for a properly resourced body responsible for research and processing Confirmation of Aboriginality applications:

“If community know of people saying they are Aboriginal, and definitely are not Aboriginal, Community (we) have a right to notify an external governing body /committee or business, so they can revoke their Confirmation of Aboriginality.”

“In cases of interstate applicants claiming Aboriginality, they should go back to their home community to approve their case.”

“Cultural authority” is the key driver for all objectives, meaning; decision-making processes and endorsed definitions will only result from Community expert input and scrutiny.

“We need a body that stores data and family histories. The Government already have plenty of data too. We should focus on mapping the Families, Clans, and Nations. I mean, where’s our genealogy or historical society? White people have them all over the place!”

There is a need for an independent state-wide body (The Body), responsible for centrally monitoring and supporting confirmation of Aboriginality processes in Victoria and maintaining a central database. The Body would incorporate knowledge and expertise from across all Communities, and would determine processes that prioritise beneficial outcomes for Aboriginal people in Victoria. The Body must be adequately resourced, and although it must have some connection to Government, it must operate as an autonomous Aboriginal entity.

The Body requires intensive engagement and commitment from Ministers and other Government decision-makers. Although it has been reported by several forum participants that this topic has been left with community, it is the Government that needs to support and facilitate these changes.

Registrar of Confirmation of Aboriginality certificates issued by ACCOS

The Body must develop and publish a list of Victorian ACCOs that provide confirmation of Aboriginality services, and which of those are meeting the criteria set out by the Body. Accountability across these ACCOs is paramount. Within this, there must be a register of all certificates issued, maintained as a database.

Recommendations

The Forum seeks a culturally appropriate regulatory review of decision-making regarding the confirmation process. Local community organisations, Elders and respected community members should be actively engaged in it.

The Forum seeks the appointment of an independent state-wide authority, properly resourced and suitably culturally competent, to monitor and support Confirmation of Aboriginality processes, policies and reforms.

To communicate the views of this forum to the Koori Caucus and Aboriginal Justice Forum:

“Confirmation of Aboriginality equals connection to Country, Lands, and Ancestors. That’s where it starts.”

The Eastern Metro RAJAC Community Forum on Confirmation of Aboriginality (The Forum) recommends the facilitation of a public discussion campaign that reaches out to all Victorian Aboriginal communities to formally raise awareness of these issues, and to gather Community views in relation to put in place new processes to address problematic processes, and install new measures in the Confirmation of Aboriginality process in Victoria.

The campaign may include, but not be limited to:

- A published statement of forum outcomes.
- A “Purpose Statement” – clearly articulating key points and proposals.
- A petition from Community – attached to the Purpose Statement, seeking public endorsement for calls to action i.e. need for legislation changes, abolition or amendment of Statutory Declaration identification process, and ethical cultural standards in recruitment, training and employment procedures.
- Establishment of a working group – led by a majority of Elders and Respected Persons.
- Drafting of a “framework for Cultural Authority”, which identifies a Community-led and endorsed process and protocols for Identification and Confirmation applications across multiple contexts.
- A reference guide to be utilised by ACCOs offering Confirmation.
- An online register of ACCOs in Victoria that currently offer Confirmation, including individual details regarding compliance with the framework.



CONFIRMATION OF ABORIGINALITY IN AUSTRALIA

POLICY, PROOF, PROCESSES, PROBLEMS

Report for Eastern Metropolitan Regional Aboriginal Justice Advisory
Committees (RAJAC)

November 2014

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Summary

Section 1 Background and purpose of report

There are community doubts about whether all people currently accepted as Indigenous Australians are in fact Indigenous, or whether some are abusing the system of proof of Aboriginality to obtain targeted benefits and entitlements. Proof of Aboriginality generally relies on the three-part definition introduced by the Commonwealth in 1981:

“An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives”.

This report investigates the application of these three criteria - descent, self-identification and community recognition and acceptance – in the administration of claims for proof of Aboriginality for the purpose of claiming particular tangible benefits or entitlements.

Section 2 Barriers and benefits: applications for confirmation of Aboriginality

Definitions of Aboriginality have been manipulated by governments repeatedly since colonisation. It may seem unnecessary or unfair to need to prove Aboriginality but it is increasingly necessary because the current system of proof may be providing incentives to lodge false and fraudulent claims, which diverts and reduces the supply of needs-based targeted assistance to Indigenous Australians. The range of benefits is substantial and potentially life-improving for recipients. Barriers to self-identification as Indigenous continue, however, and many Aboriginal people still encounter major hurdles during the application process for confirmation of Aboriginality.

Section 3 Application of three-part definition: varied processes for determining proof of Aboriginality

Consistent application of a national standard for recognising Aboriginality is a desirable principle that is lacking in practice. Merely ‘ticking the box’ (self-identification as Indigenous) is inadequate. The current three-part identification process appears to be acceptable to Indigenous people and organisations, providing all three criteria are used. The variability and inconsistency of applied definitions to obtaining proof of Aboriginality indicate systemic shortcomings in current processes.

Section 4 Issues

4.1.1 Lack of evidence to support false and fraudulent claims: allegations may be widespread but lack substance and are not based on hard evidence. The Report acknowledges time and budget restrictions on a more exhaustive literature search. The timing of a number of people’s discovery of their Aboriginal identity is questionable: “that is, when the discovery of Aboriginality occurs almost simultaneously with the discovery that there is a benefit attached to it.”

4.1.2 Demographic factors may (partly) account for perceptions of widespread false /fraudulent applications for confirmation: including an increase in self-identification as Indigenous (“late identifiers”), increasing identification of children from mixed partnerships as Indigenous, and other population trends.

4.2 False/fraudulent applications for confirmation are inherent in the context of competition, supply constraints and Indigenous disadvantage: in a context where substantial benefits are few, false and fraudulent claimants increase demand for these relatively scarce resources. In a competitive capitalist economy, competition may not only be fierce but breed corruption and dishonesty in the race for comparative advantage. This may account for increasing community concerns about ‘cheating the system’.

4.3 False/fraudulent applications for confirmations result in corruption of Indigenous policies and programs: community concerns include the use/abuse of institutional power by “late identifiers,” “gammon blackfellas,” “five-minute blackfellas” and “wannabes.” They obtain public positions of power and influence, profess cultural knowledge but have no real experience or knowledge of communities, their culture and their needs. Policies and programs are corrupted as a result and resources diverted from ‘legitimate’ Indigenous people.

4.4 Penalties for false/fraudulent applications and authorisations of proof of Aboriginality: for applicants, the three-part proof could be strengthened by requiring a written statement regarding each criterion, AND a statutory declaration. This double requirement includes acceptance and acknowledgment by community, as well as personal criminal liability for false declarations. Penalties should also apply to administrators who provide confirmations in the absence of clearly defined processes and compliance with eligibility requirements. A formal declaration of no real or potential conflicts of interest among administrators is required in many Australian and international organisations and could also apply to administrators of proof of Aboriginality claims.

4.5 Administration of proof of Aboriginality: how, who, why
How the three-part definition is applied, who applies it, and why (purpose) are important issues.

4.5.1 Administration of proof of Aboriginality: how?

Options include the following:

- (i) Strengthen the definition.
- (ii) Tighten eligibility and/or process conditions.
- (iii) Develop a consistent application of generic principles and processes of proof that is clearly stated and uniformly applied. It may come at a price, however, in leading to a one-size fits all process.
- (iv) Situation-specific or generic certificates are an alternative to a generic/universal approach, based on a case by case application in accordance with specified clear guidelines and requirements. This could draw on local community cultural and genealogical knowledge but may be administratively complex and may also discriminate against people not known to the community.
- (v) Strengthen the community acceptance criterion by requiring applicants to demonstrate active involvement in their community. This may raise the bar too high, give power to those “inside the system” and exclude “traumatised identifiers” such as Stolen Generations people, community-disengaged people, people with disabilities and “new comers” to the community for whom establishing proof may be onerous. The issue of whether proof should require evidence of active community participation needs resolving.
- (vi) Proving descent criterion is a harsh, discriminatory and largely meaningless and outdated requirement given developments in genetic science. Cultural rather than biological descent-based identification is more appropriate.
- (vii) Developing special processes for Stolen Generations claimants is recommended.

4.5.2 Administration of proof of Aboriginality: who?

- (i) Indigenous control: Indigenous people have been marginalised/eliminated from the process of defining and proving Aboriginality. The current federal government is unlikely to authorise or renew funding of the National Congress of Australia’s First Peoples or a similar body to administer a system of proof claims. Indigenous leadership, organisational capacity and compliance with the principles of impartiality, transparency and consistency are all issues requiring resolution in reforming the current system of proof.
- (ii) Administration by State/Territory based Indigenous organisations: organisations such as Land Councils, Aboriginal health and legal services may be appropriate administrators but may be overburdened by an additional role for which they are not funded. Political/family factions that influence local, regional and national Indigenous organisations to varying degrees may adversely influence ostensibly impartial, independent processes of determining proof of Aboriginality.

- (iii) Administration by local/regional Indigenous organisations: local community-based organisations are well placed to administer proof processes given their extensive knowledge of family history and kinship structures, but may not know “late identifiers” and “new comers”. This option may also give rise to more conflicts of interest. A local committee of Elders with nominees from local organisations could assist the process.
- (iv) Indigenous control in developing a national standard: it is recommended that State, Territory and national Indigenous peak organisations convene community forums, to develop standardised procedures for processing claims for proof of Aboriginality. Provisional inclusions are identified, such as a double requirement for written statements regarding the three-part definition accompanied by a statutory declaration. Developing a national unified approach before negotiating with governments is highly desirable.
A big issue beyond the control of Indigenous leaders and organisations is engaging with government in the current political climate of denying legitimate Aboriginal representation, cost-cutting and mainstreaming of many Indigenous services and programs.
- (v) Training for administering proof claims: this should be introduced in view of evidence indicating inconsistent and variable processes, in circumstances wherever and whenever benefits and entitlements are involved.
- (vi) Who should bear the costs of administering confirmation of Aboriginality processes?: “user pays” is increasing the norm in policy and practice but may be a deterrent to applications for proof. The option of accessing government funding is increasingly constrained.

4.5.3 Administration of proof of Aboriginality: why?

Should “need” replace “Aboriginality” as the principal eligibility criterion for benefits and entitlements, notably for public-policy and public-money-receiving purposes? This is argued on the basis that ‘Aboriginality’ is really just a proxy for socio-economic need, and that this option overcomes definitional and implementation issues regarding proof of Aboriginality. This option contains high risks, including those of reducing government sensitivity to Indigenous needs, reducing services and increasing the assimilation/integration of Indigenous people into mainstream service areas. The option may as well deny the inherent right of Indigenous Australians to self-identify and self-determination.

Recommendations

It is not appropriate in this Report to prescribe options but rather to unpack the many and complex issues involved, and flag them. Options to consider may include

1. Cost-benefit analysis of false and fraudulent claims

In view of the apparent extent of community concerns, the relative scarcity of benefits and entitlements available to Indigenous people and the potential drain on these from false claimants, a cost-benefit analysis may be desirable, if difficult. This would estimate the extent of false and fraudulent claims for proof of Aboriginality and the costs of redressing this, comparing this with the net gains to Indigenous individuals and communities of having a clear, consistent and transparent process of confirmation of Aboriginality claims. As governments would also benefit from an improved process it is reasonable to request that government funding be made available for such an analysis.

2. Adding a means test to applications for certain purposes

This may be desirable for tangible financial benefits such as education scholarships and housing.

3. Adding declaration of Aboriginality in the national census

It may be desirable to also require applicants for particular benefits to advise whether they identified as Aboriginal or Torres Strait Islander in the census, or were identified by the head of their household as such. If they were not identified as such, their proof of Aboriginality may be further investigated.

Section 1

Background and purpose of report

“(A)n ever increasing level of Aboriginal community concern and foreboding regard(s) the manner in which the test of Aboriginality is applied...and the apparent surge in the number of individuals who, it would appear, are making false and fraudulent claims to Aboriginality” (Morgan 2011: 64).

“Despite popular opinion over the last several generations, no-one really in their right mind would declare Aboriginality unless it were true. The myth of the extra money and extra benefits is really a piece of crap. And the backlash far outweighs the benefits” (Sharon Livermore, Aboriginal poet, cited in Creative Spirits 2014).

“Services insist on confirming Aboriginality to avoid abuse. Like any system of services that aims to provide a benefit to a minority of society, Aboriginal services are subject to abuse by a small number of dishonest people”(Creative Spirits 2014).

The above statements illustrate a range of coexisting if conflicting views regarding whether all people currently accepted as Indigenous Australians are in fact Indigenous, or whether some are abusing the system of proof of Aboriginality to obtain targeted benefits and entitlements. These include designated Aboriginal employment positions, promotions, Abstudy and scholarships, housing and medical benefits.

Proof of Aboriginality usually but not always relies on the three-part definition introduced by the Commonwealth in 1981:

“An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives”.

These three criteria - descent, self-identification and community recognition and acceptance - are used in State and federal legislation, the public service, by courts including the High Court and by Aboriginal and mainstream organisations for a range of administrative purposes, and in particular for determining eligibility for certain benefits and services.



Community concerns about “false and fraudulent” claims for proof of Aboriginality are expressed in a report by Professor Bob Morgan for the New South Wales Aboriginal Education Consultative Group (2011). These concerns are echoed by anecdotal reports, including by Regional Aboriginal Justice Advisory Committees (RAJAC) in Victoria (see also Kelly & Barac 2011a & b, 2010). While the Morgan report concludes that a review of the current three-part definition is needed, the report’s dominant theme is problematic application of the definition of Aboriginality more than the definition itself (Morgan 2011: 65).

The “false and fraudulent claim hypothesis” is serious. There does not appear to be widespread Indigenous community discussion about it, and it is a “taboo subject” in some quarters (Kelly & Barac 2011a: 6). Substantial evidence-based research is needed to prove or disprove largely anecdotal widespread community concerns (Morgan 2011; Kelly & Barac 2011a, b & 2010).

There are two main purposes or intents in applying for proof of Aboriginality - affirmation of heritage and ancestry, and confirmation of Aboriginality for a perceived benefit. This Report investigates:

- i) Issues regarding application of proof of Aboriginality processes rather than the definition per se;
- ii) Confirmation of Aboriginality as opposed to affirmation of Aboriginal identity;
- iii) Application for confirmation for the specific purpose of claiming particular tangible benefits or entitlements (while recognising that claiming Aboriginality to affirm heritage and ancestry may generate longer term community benefits such as native title).

Section 2

Barriers and benefits: applications for confirmation of Aboriginality

Aboriginality and identity

“Control of Aboriginal people through definitions of Aboriginality, and through associated policies, historically amounted to a denial of the citizenship or equality rights of Indigenous people in Australia....

The past in the present...a significant challenge for young Indigenous people in coming to terms with their identity is the continuing impact of the historical treatment of Indigenous peoples in Australia. Young Indigenous people continue to pay the price of systemic racism and poverty and to suffer the effects of colonialism”

(Aboriginal and Torres Strait Islander Social Justice Commissioner 2012).

Historically, the definition of Aboriginality has been used and abused in Australia in 67 different classifications and definitions since European settlement to determine who is an Aboriginal person (McCorquodale cited in ALRC 2003, Ch. 36). The primary purpose of the contemporary definition of Aboriginality is administrative, that is, to determine eligibility for various entitlements and programs. This may seem relatively painless and straightforward to non-Indigenous Australians but not to many Indigenous people who require proof of their Aboriginality.



Why do we need to prove our Aboriginality?

There are some objections to the need to prove Aboriginality, whatever the purpose (Morgan 2011). Some proof of Aboriginality is desirable, however, when the purpose and intent is to obtain a benefit or entitlement that is not available universally, and not available to non-Indigenous people. Proof is also required for clients of Indigenous organisations as a condition of receiving government funding. (No proof would be required if 'need' was to replace 'Aboriginality' as the main criterion of eligibility to a benefit or entitlement. See Section 4.5.3).

The need to establish clear and consistent requirements for confirmation of Aboriginality is pressing for at least three reasons:

- (i) On a population basis, Aboriginal people are highly disadvantaged and the need for targeted assistance on a needs basis is substantial. False and fraudulent claims diminish the supply of needs-based assistance and redirect scarce resources to non-Indigenous people who know and use the system for their personal benefit.
- (ii) The current system provides positive incentives to cheat the system (e.g. education institutions get more weighted funding for Indigenous students) and negative or perverse incentives (e.g. Centrelink can limit government expenditure by reducing the number of Indigenous-identified clients and relatively expensive Indigenous-targeted job assistance services).
- (iii) Applications for various benefits and entitlements are increasingly online (Morgan 2011: 27). Administrators are unlikely to know or meet applicants to verify claims. 'Identity theft' and online creations of false identity are increasingly common.

Benefits of confirmation of Aboriginality

For applicants, there are a range of potential distinct benefits accompanying confirmation of Aboriginality. It is not known whether these outweigh the costs involved in confirming Aboriginality (see Summary and Recommendation). The benefits include a range of legislative financial benefits including Commonwealth pensions, scholarships and other financial assistance to students, specified government funded jobs, priority in appointments, promotion and job transfers, housing and medical benefits. Positions of power and influence may be obtained by people with confirmation of Aboriginality (Morgan 2011: 27-28; Kelly & Barac 2011a, b, 2010; ALRC 2003: Ch. 36). The most significant community benefit may be the opportunity to claim native title.

For administrators processing and accepting confirmation of Aboriginality claims in institutions such as schools and universities, benefits include additional funding and resources that are attached to enrolments by Indigenous people (Kelly & Barac 2011a & b).

Case study:

the higher education sector in Australia Financial and other benefits in the higher education sector are significant. For example, Commonwealth Indigenous university scholarship provide benefits of over \$13,000 a year as well as access scholarships of a once only payment of nearly \$5,000 to assist Indigenous students to undertake a tertiary preparation program or an undergraduate program. It is claimed that the higher education sector in general makes it easy for students to identify as Indigenous, that the usual academic criteria are waived in the process, and that Indigenous students also benefit from individual tutoring, IT and office access and student housing (Kelly & Barac 2011a, b, 2010). Substantial labour market and financial benefits flow to Indigenous university graduates (Li 2014).

Barriers to applying for confirmation of Aboriginality

Barriers to self-identification have been documented. Moreover, many Aboriginal people still encounter major hurdles during the application process for confirmation of Aboriginality (Creative Spirits 2014; Creative Spirits native title 2014). The process is acknowledged as particularly fraught for the Stolen Generations (Morgan 2011), but may be so for Indigenous people more generally because of the enduring impact of historical legacies including dispossession, destruction of kinship and family networks and continuing racism. Common forms of identity are harder for Indigenous people to access. For example, Indigenous Victorians face difficulties registering births and obtaining a birth certificate (VEOHRC 2012: 3). Birth certificates are also apparently not commonly kept by Indigenous families (Alford 2014a). All these factors complicate the process of obtaining confirmation of Aboriginality.



Section 3

Application of three-part definition: varied processes for determining proof of Aboriginality

Application of three-part definition

Consistent application of a national standard for recognising Aboriginality is a desirable principle that is lacking in practice. There appears to be community unanimity that merely ‘ticking the box’ (self-identification as Indigenous) is inadequate proof of Aboriginality. This ignores two of the three accepted criteria for determining Aboriginality. ‘Ticking the box’ is too simple, too formulaic and too easy to subvert by false claimants (Morgan 2011). It is also open to abuse by organisations with a vested interest in increasing the number of Indigenous clients. Education funding, for example, is weighted for Indigenous students hence administrators have a vested interest in ‘ticking the box’ (Kelly & Barac 2011a & b, 2010).

There may also be negative or perverse incentives to reduce the number of Indigenous clients. For example, Centrelink managers have an incentive to reduce the number of Indigenous-identified clients or reduce their access to more expensive services including intensive job search assistance.

The current three-part identification process appears to be acceptable to many Indigenous organisations, providing all three criteria are used. The issue is that for some purposes only one or two of the three criteria are applied and organisations are providing certificates without adhering to a clearly defined and identified process.

The variability and inconsistency of applied definitions to obtaining proof of Aboriginality indicate at least seven systemic shortcomings in current processes:

- (i) Not all three parts of the current definition are applied equally.
- (ii) Even if they are, applicants usually have only to ‘tick the boxes’ rather than demonstrate their Aboriginality in a written, documented form.
- (iii) Organisations do not recognise each other’s paperwork.
- (iv) There appears to be a lack of consistency between agencies.
- (v) There is no governing body regarding determining proof of Aboriginality. It is left up to individual organisations to interpret bureaucratic rules.
- (vi) No national register or directory of Aboriginal people exists (Creative Spirits 2014).
- (vii) Many Indigenous people lack universal forms of proof of identity such as birth certificates (see Section 2).

Confirmation of Aboriginality processes vary, even within government departments. In some departments such as the federal Department of Human Services and its agency Medicare, answering the Indigenous identification question is voluntary. Other agencies such as Centrelink have special forms for verification of Aboriginality. Many organisations rely on the three-part definition of Aboriginality but commonly require ‘tick the three boxes’ only. In other cases, confirmation is required from any Aboriginal or Torres Strait Islander organisation within the definition of subsection 4 (1) of the Aboriginal and Torres Strait Islander Commission Act 1989 (<http://www.comlaw.gov.au/Details/C2004A03898>). Several organisations also require a statutory declaration from applicants regarding proof of Aboriginality. Penalties for making false and misleading statements are indicated on statutory declaration forms. See Attachment 1.



Case studies of processes for determining proof of Aboriginality

Department of Human Services including Medicare:

Mainly tick the box The Medicare application form includes volunteer ‘tick the box’ for self-identification only, with no requirement for additional documentation. Proof of identity is only required from a referee if standard proof requirement documents are unavailable e.g. birth certificate, legal document, passport, driver’s licence. A list of acceptable referees is listed on the form and includes a community Elder, medical or welfare manger, or long-term Commonwealth employee with five or more years continuous service. <http://www.humanservices.gov.au/spw/customer/forms/resources/0905-1208en.pdf>

Centrelink:

May be an additional form to complete For Indigenous-identified applicants for benefits, proof of Aboriginality may be required by completing the form Proof of Identification – Verification. For Aboriginal and Torres Strait Islander people Form SS231. This must be signed by one authorised referee from a select range of organisations including Chair, CEO or Secretary of an incorporated Indigenous organisation, School Principal or Counsellor, Aboriginal Medical service health professional or manager, remote jobs and community programs service provider, or Commonwealth Department of Human services employee of more than five years. An applicant’s referee is required to confirm identification from one of seven different sources including personal knowledge or organisation records.

Higher education (university) sector in Australia

Common university practice makes it easy to identify as Indigenous and/or of Indigenous descent. Only one university in Australia allegedly requires confirmation of Aboriginality from an Indigenous organisation based on the three-part definition. Usual academic standards are claimed not to apply to Indigenous people’s applications for entry (Kelly & Barac 2011a: 3-6).

Victorian Department of Education Wannik scholarships: Three-part definition without a statutory declaration

Application forms include ticking the three-part definition boxes, a school and a community reference, declarations by the applicant, parent/care giver and the Principal’s certification. No statutory declaration is required. <http://www.education.vic.gov.au/about/programs/aboriginal/pages/wannikscholarships.aspx>

Three-part definition AND a statutory declaration

This is a common requirement by a range of government and non-government organisations and Indigenous organisations including the Victorian Aboriginal Legal Service and Indigenous Business Australia. Example Victorian Aboriginal Legal Service <http://vals.org.au/> The first time someone uses VALS they must provide proof of their Aboriginality using the Confirmation of Aboriginality Form. This is based on the three-part definition of Aboriginality. The form must be signed by: The Chairperson of a recognised Aboriginal Organisation, or a designated Aboriginal Officer from a Government Department, or any Aboriginal employee of VALS, or a statutory declaration signed by client.



Section 4

Issues

4.1 No issue

4.1.1 Lack of evidence to support false and fraudulent claims

This report is open-minded about fraud allegations but has not, to date, found quantitative evidence corroborating the ‘false and fraudulent’ claims case. Indeed there are many more reports about the opposite case, that relating to hurdles to confirmation and proof. This Report acknowledges time and budget restrictions on a more exhaustive literature search.

A study of Indigenous students in the higher (university) education sector expresses concerns about many Indigenous “late identifiers” entering universities. The study is unable to provide hard evidence but questions the timing of a number of students’ discovery of their Aboriginal identity: “that is, when the discovery of Aboriginality occurs almost simultaneously with the discovery that there is a benefit attached to it” (Kelly & Barac: 14).

If this is the case, a disproportionate increase in the proportion of Indigenous students in universities over time would be expected. This has not happened. The proportion has remained unchanged over the past decade (Ibid: 7).

4.1.2 Demographic factors may (partly) account for perceptions of widespread false/fraudulent applications for confirmation

There are alternative explanations of widespread community concerns about false/fraudulent claims that may not have been considered, namely the relevance of demographic rather than personal factors (false statements - dishonesty).

Increasing Indigenous population: since the Indigenous identification question was first asked in the 1981 national census, proportionately more individuals and families are identifying as Indigenous. Indigenous population increases have been much greater than those for the non-Indigenous population or expected from natural increases (births minus deaths). The ABS (Australian Bureau of Statistics) identifies two main reasons: an increased tendency to self-identification, and proportionately more children of mixed partnerships identified as Indigenous (Gardiner-Garden 2003: 11). These people are described in the literature as “late identifiers.”

Distribution of Indigenous population: population increases are significantly lower in remote and very remote areas compared with metropolitan, inner and outer regional area (ABS 2014). This may be partly due to greater increases in self-identification in more urbanised areas, different birth and death rates and population movements away from remote and very remote Australia.

The combined influence of increasing “late identifiers” and population trends may partly or wholly explain the perceived increase in false/fraudulent claims of Aboriginality. That is, more people are either unknown to local communities, or not known or recognised as Indigenous.

4.2 False/fraudulent applications for confirmation are inherent in the context of competition, supply constraints and Indigenous disadvantage

Many types of Indigenous-targeted benefits such as education scholarships, job placements and promotions are limited and the benefits substantial, particularly for economically disadvantaged people. Applicants have to compete against other applicants in what is effectively a market for scarce resources. Additional false and fraudulent claimants increase demand for these relatively scarce resources. In a competitive capitalist economy, competition may not only be fierce but breed corruption and dishonesty in the race for comparative advantage.

In the current political-economic climate of cost-cutting and mainstreaming Indigenous services (Alford 2014b), increasing competition for a limited or shrinking supply of benefits and entitlements may partly explain the perceived increase in dishonest applications for proof of Aboriginality (i.e. increasing perceptions of cheating).

4.3 False/fraudulent applications for confirmations result in corruption of Indigenous policies and programs

Community concerns include the use/abuse of institutional power by “late identifiers,” who are also described in the literature as “gammon blackfellas,” “five-minute blackfellas” and “wannabes.” They fraudulently obtain confirmations of Aboriginality to climb up the ladder of power and privilege in Indigenous-identified public service positions of policy advice, leadership and program management. They profess cultural knowledge but have no real experience or knowledge of communities, their culture and their needs. Policies and programs are corrupted as a result (Morgan 2011: 29; Kelly & Barac 2011a).

It is alleged that Australian universities waive the usual academic criteria for entry for Indigenous students, a proportion of whom are of questionable Aboriginality and/or are “late identifiers”. This corrupts targeted Indigenous higher education policy and diverts benefits away from ‘legitimate’ Indigenous students (Kelly & Barac 2011a3).

4.4 Penalties for false/fraudulent applications and authorisations of proof of Aboriginality

For applicants, the three-part proof could be strengthened by requiring a written statement regarding each criterion, AND a statutory declaration. Standardised warnings of potential penalties for making false claims are on all forms where a statement of Aboriginality is required, according to Morgan (2011: 32: the author has seen forms without this warning). Penalties for false or misleading statements, information, documents or declarations include fines and imprisonment according to criminal law codes and four years imprisonment under the Statutory Declarations Act 1959. See Attachment 1 Commonwealth of Australia Statutory Declaration form.

This double requirement should reduce opportunities to make false and fraudulent claims. This is an option favoured by several organisations contacted for this report. It includes acceptance and acknowledgment by community, as well as personal criminal liability for false declarations (i.e. it puts the onus back on the individual).

Standardised warning should perhaps also apply to administrators who provide confirmations in the absence of clearly defined processes and compliance with eligibility requirements. Existing processes do not exclude the possibility of there being many real or potential conflicts of interest, including in the not-for-profit sector by individuals and organisations, for example, among Board members, School Principals and university administrators. This could be rectified by requiring a formal declaration of no real or potential conflicts of interest among administrators. This requirement is common in many Australian and international organisations including the World Health Organization, government departments, universities and in the not-for-profit sector (see ourcommunity.com.au website for examples of potential conflicts of interest in the not-for-profit sector).

4.5 Administration of proof of Aboriginality: how, who, why

How the three-part definition is applied, who applies it, and why (purpose) are all considered to be important issues (Morgan 2011:64).

4.5.1 Administration of proof of Aboriginality: how?

(i) Strengthen definition

The Australian Law Reform Commission (hereafter the ALRC) believes that detailed and/or more stringent definitions of Aboriginality for Commonwealth and State legislative purposes are not necessary (ALRC 1986; Morgan 2011: 52). AIATSIS (the Australian Institute of Aboriginal and Torres Strait Islander Studies) believes the existing three-part definition should be retained, although strengthened to allow it to become a legal standard (Morgan 2011), a view that is shared by Kelly and Barac in relation to Indigenous-specific services and programs (2011a: 8-9).

Dr William Jonas, the former Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission, noted (in 2002) that Indigenous peoples have resisted attempts internationally to prescribe an exhaustive definition of ‘Indigenous’. The United Nations Working Group on the Rights of Indigenous Populations has considered the definition of Indigenous peoples, communities and nations but has never adopted a formal definition (cited in ALRC 2003: Ch. 36.29-36):

“In no countries is identification of indigeneity a cut-and-dried process resulting in all all-pervasive all-purpose-serving identity” (Gardiner-Garden 2003: 16).

(ii) Tighten eligibility and/or process conditions

The proof of Aboriginality bar is too low, according to some Indigenous people (Morgan 2011: 23; Kelly & Barac 2011a & b). Raising the bar by tightening eligibility and/or process conditions may reduce fraud/false declarations. It may also reduce the number of questionable “late identifiers,” whose discovery of their Aboriginality happens to coincide with their applications for benefits and entitlements (Kelly & Barac 2011a: 8-13).

The costs may include deterring applications altogether. This may discriminate against community-disengaged people and “late identifiers”. It may also discriminate against “traumatised identifiers,” that is, Stolen Generations and other Indigenous people whose Aboriginal identity and kinship/ancestry links have been destroyed by colonial and post-colonial processes. As one community member noted:

“if this is pushed too far, it will inhibit people from identifying. It will make it harder for people to identify and increasingly marginalise them”(cited in Morgan 2011: 16)





(iii) Consistent application of generic principles and processes of proof

Overarching generic principles of assessing applications for proof should be developed, clearly stated and uniformly applied. The principle of consistency is admirable. It may resolve community concerns about “shopping around for a Certificate” (Morgan 2011: 25). It may come at a price, however, in leading to a one-size fits all process. Additionally, it may not be possible to administer flexibly and fairly, without overburdening already administratively strained Indigenous organisations (Alford 2014b) and/or kinship-severed individuals and families.

(iv) Situation-specific or generic certificates

An alternative to a generic/universal approach is a case by case application in accordance with specified clear guidelines and requirements. The ALRC supports a more flexible approach (ALRC 1986; Morgan 2011: 52). The benefits are that it is situation-specific and draws on local community cultural and genealogical knowledge. Costs may include administrative complexity, and discrimination against people not known to the community.

(v) Strengthen community acceptance criterion

The issue of whether proof should require evidence of active community participation needs resolving.

Which criterion is more important is an issue in applying the definition (Gardiner-Garden 2003: 6). There is a distinction between community recognition and acceptance. Some suggest the need to strengthen the community acceptance criterion by

“a clear demonstration of the requirement of belonging to a community...involvement in the Aboriginal community and community based organisations over several years...if you don’t have...a real community connection you should not be able to access Aboriginal services or programs” (community members cited in Morgan 2011: 18, 32, 34, 36).

This issue has given rise to talk of “late identifiers,” “gammon blackfellas” and “five-minute blackfellas” (Morgan 2011, 22, 27). In universities there is an alleged increasing dichotomy between “late identifiers” who cannot prove their community connectedness or acceptance, and “community Indigenous students” who can (Kelly and Barac 2011a, b, 2010). The advantage of local community control of the process is that local Indigenous organisations are better placed than national or government agencies to identify and define their community and its members (Peters-Little 2000). Disadvantages may outweigh advantages, however.

Strengthening the application of the community acceptance criterion by effectively redefining it as active involvement may raise the bar too high. It may exclude “traumatised identifiers” including Stolen Generations-type claimants, apathetic and/or community disengaged people, people with disabilities, and “new comers” to the community for whom establishing proof may be onerous. Requiring active involvement may also give power to those “inside the system”. Acceptance and recognition by one Aboriginal community may not be transferable to another Aboriginal community (Morgan 2011: 39, 46).

(vi) Proving descent criterion

Certificates of Aboriginality are allegedly given even though claimants are unable to provide evidence of descent (anecdotal report from an Indigenous Elder and leader).

Knowing one’s roots and ancestral background is a desirable form of proof (Morgan 2011: 34), however many Indigenous Australians may be ignorant and others know but are unable to provide genealogical proof. This may be particularly difficult for Stolen Generations people and also for Indigenous people more generally, in view of their cumulative historical legacy of dispossession, forced migration, destruction of kinship networks and estrangement from family.

Developments in genetic science also make race-based definitions of Aboriginality outdated and meaningless. ‘Race’ and ‘ethnicity’ are social, cultural and political constructs that cannot be tested objectively (Creative Spirits 2014; Grieves 2014). As well, the descent part of the definition is discriminatory and does not apply to any other Australian ethnic group, including Torres Strait Islanders. It is also expensive to administer (De Plevitz & Croft 2003). Cultural rather than biological descent-based identification according to Indigenous peoples’ own custom and laws is a more appropriate standard or criterion (Ibid; Grieves 2014.)

(vii) Special process required to develop protocols for Stolen Generations

A special/ised process is recommended for the Stolen Generations and their descendents, in view of their frequent loss of Aboriginal identity, relatively disadvantaged and ambiguous positioning in application of the definition and lack of documentation. The politics of not identifying as Indigenous due to fear is acknowledged (Morgan 2013: 23).



4.5.2 Administration of proof of Aboriginality: who?

(i) Indigenous control

Indigenous-authored literature emphasises that Indigenous people have been marginalised/eliminated from the process of defining and proving Aboriginality. Parliaments and Courts have never been representative of Indigenous Australians who have not been consulted in determining principles and processes for confirming Aboriginality. Looking to the future in 1998, Justice Merkel of the Federal Court of Australia noted:

“It is to be hoped that one day...determination (of Aboriginality) might be made by independently constituted bodies or tribunals which are representative of Aboriginal people” (cited in Gardiner-Garden 2003: 16-17).

This should be the case but the current federal government is unlikely to authorise or renew funding of the National Congress of Australia’s First Peoples or a similar body for this purpose. Issues that need to be resolved include identifying leadership, the appropriate organisation/s to determine principles and processes for confirming Aboriginality, their capacity, and compliance with the principles of impartiality, transparency and consistency.

(ii) Administration by State/Territory based Indigenous organisations

The three most likely organisations are regional Land Councils, Aboriginal Legal Services (ALS) and Aboriginal Health Services (AHS). Benefits include acknowledging Indigenous sovereignty, State/Territory based links with local organisations and knowledge of the confirmation of Aboriginality process.

Disadvantages include the lack of Land Councils, ALS and AHS in many local areas hence lack of local genealogical and cultural knowledge, and the administrative burden imposed on these organisations by another demanding role for which they may not be funded or trained to administer (for administrative overload on Aboriginal Health Services see Alford 2014b).

A further detrimental factor is the influence of political/family factions that influence local, regional and national Indigenous organisations to varying degrees, and may adversely influence ostensibly impartial, independent processes of determining proof of Aboriginality. This is well known if less well documented by Indigenous peoples. “Government Aboriginal gatekeepers” and “personal preference” distorting policy decision-making are discussed by Morgan (2011: 35).

(iii) Administration by local/regional Indigenous organisations

Benefits and costs include those for State-based Indigenous organisations described above.

Local community-based organisations are well placed to administer proof processes given their extensive knowledge of family history and kinship structures. Giving them authority is an expression of sovereignty (Morgan 2011: 35). However, localising processes may be contentious. Local organisations may not know all community members, particularly new entrants, community-inactive people and Indigenous people who access mainstream rather than Indigenous specific services, notably health services (Alford 2014b), hence are unrecorded in Indigenous administrative data bases. There may also be more conflicts of interest in local communities, where employees or kin of the organisation apply for confirmation from the same organisation.

To address this, Morgan suggests the establishment of local committees of Elders with nominees from local organisations, whose sole responsibility is to assess applications for proof of Aboriginality (2011: 36).

(iv) Indigenous control in developing a national standard

It is recommended that State, Territory and national Indigenous peak organisations convene community forums, to develop standardised procedures for processing claims for proof of Aboriginality (“a unified set of standards, policies, procedures and practices”, Morgan 2011: 15) . Provisionally, these should include:

- Eliminating tick the box format, replacing this with the requirement for a written statement in support of the three criteria.
- Consideration of requirement to verify claims with additional documentation.
- A Statutory Declaration to support the claim may also be required.
- Claim forms should include warning of legal action against fraudulent claimants and administrators of such claims, with liability for prosecution and penalties.
- Development of a national unified approach via the National Congress of Australia’s First Peoples, to negotiate with all Australian governments through the Council of Australian Governments (COAG), the peak intergovernmental forum in Australia (Morgan 2011: 14-15).
- Development of training modules on Aboriginality and identity. See Section 4.5.2 (v).

A big issue beyond the control of Indigenous leaders and organisations is engaging with government in the current political climate of denying legitimate Aboriginal representation, cost-cutting and mainstreaming of many Indigenous services and programs.

(v) Training to administer system required

The requirement for training to administer applications for confirmation of Aboriginality where benefits and entitlements are involved is evident in view of evidence indicating inconsistent and variable processes. There is also inadequate consideration of the purpose and intent of applications, and specifically relating to obtaining tangible benefits (for example a job, a scholarship, a pension). Questions include whether, for example, it is appropriate for School Principals to be involved in enrolment applications requiring proof of Aboriginality (conflict of/vested interests). Should Indigenous individuals known to applicants be in a position to determine proof where there is a clear pecuniary benefit to the applicant? At a local and regional level this will often be the case.

Training for selection panels involved in processing claims for proof of Aboriginality is recommended, to ensure that the three-part definition is effectively demonstrated by applicants (Morgan 2011: 35). This assumes that confirmation criteria are clear, consistently and uniformly applied.

(vi) Who should bear the costs of administering confirmation of Aboriginality processes

In most social security areas, the onus is on individual claimants to verify/corroborate their identity and bear associated costs. The issue is whether this should also apply to Indigenous claimants for proof of Aboriginal identify and if so, whether organisations administering the process should charge a ‘user pays’ fee, or apply for funding to administer the process. ‘User pays’ is now common policy in many government and non-government organisations but this may act as a financial disincentive to identify for many Indigenous people. Applications for administration funding are problematic these days given the trend towards individual user pays in many areas of government policy, as well as increasing restrictions on government funding for administrative as opposed to ‘front line’ service provision.

4.5.3 Administration of proof of Aboriginality: why?

Should “need” replace “Aboriginality” as principal eligibility criterion for benefits and entitlements?

One recommendation (by a senior Commonwealth public servant in 2003) relates to the purpose and intent of confirming proof of Aboriginality, that is, why? Gardiner-Garden (1) suggests that for public-policy and public-money-receiving purposes, the focus of eligibility should change from problematic definitions and applications for proof of ‘Aboriginality’ to particular ‘needs’:

“The fundamental problem is that the term ‘Aboriginal’ is... being used as a proxy for something else, a poor proxy for ‘people with the needs which a piece of legislation is trying to address’. Alterations to definitions or to arbitration mechanisms will not alleviate difficulties arising from a problem of this nature” (Gardiner-Garden 2003: 17).

Advantages of this option include overcoming definitional and implementation issues applying proof criteria. The need for confirmation of Aboriginality in obtaining a range of service benefits would no longer exist. The focus would be on recipients’ particular needs, situation and/or purpose, rather than on their Aboriginality.

1 Dr Gardiner-Garden is from the Social Policy group in the Department of the Parliamentary Library. His paper is not an official document and it represents his personal views and not those of the Parliamentary Library or professional legal opinion (Gardiner-Garden 2003).

Apparent declining gaps in Indigenous compared with non-Indigenous socio-economic status in urban areas are an additional reason for replacing ‘Aboriginality’ with ‘needs’ in public policy, according to Gardiner-Garden (2003: 11-13, 17-20). He also alleges (inaccurately, we believe) that this option “appears” to have been accepted by the ATSIC Board and Lowitja O’Donoghue (Ibid: 19). The option was raised in Canada (in 1969) and met strong Indigenous opposition. The option is nevertheless recommended, on the proviso that mainstream agencies are sensitive and responsive to Indigenous needs (Ibid: 18-20; Morgan 2011: 47-48).

Objections to this option include rejection of the view that just because definitional and conformation issues are hard and “broader than just a Tasmanian problem”, they should be avoided and ‘Aboriginality’ replaced with some other criterion/criteria. Other disadvantages include the likelihood that such a policy shift would reduce rather than increase government sensitivity to Indigenous-specific need and issues, lead to reductions in Indigenous-specific services and benefits, and put pressure on Indigenous people to assimilate/integrate into mainstream service areas.

The option may as well deny the inherent right of Indigenous Australians to self-identify and self-determination (Ibid: 17-18).



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CONFIRMATION OF ABORIGINALITY IN AUSTRALIA

ATTACHMENTS

Amendment/Addendum 2019

Legislative changes in Victoria and the Commonwealth in 2018 include Commonwealth amended Statutory Declaration forms, as of September 2018 for the Commonwealth. These are available at:

www.ag.gov.au/Publications/Statutory-declarations/Documents/commonwealth-statutory-declaration-form.pdf

Commonwealth statutory declaration form [PDF 81KB]


www.ag.gov.au/Publications/Statutory-declarations/Documents/commonwealth-statutory-declaration-form.docx

Commonwealth statutory declaration form [DOCX 27KB]

For Victoria, as of 1 March 2019: available at Victorian Department of Justice site:

www.justice.vic.gov.au/statdecs

Statutory declarations, including how to make a statutory declaration in Victoria and list of authorised witnesses.



**Koori Strong
Koori Proud
Koori Justice**
Victorian Aboriginal
Justice Agreement

RAJAC - Eastern Metropolitan
Executive Office: Samuel Nolan
703 Station Street, Box Hill VIC 3218
Phone: 03 8803 8422
Mobile: 0447 462 819
samuel.nolan@justice.vic.gov.au
www.aboriginaljustice.vic.gov.au

Confirmation of Aboriginality Forum
Wednesday, 3 July, 2019, Karralyka Centre, Ringwood

AGENDA

1.	Forum Open	9.00am
	Welcome to Country	
2.	Introduction and Apologies	
3.	Purpose of Forum / Forum Objective:	9.10am RAJAC Chair:
	<ul style="list-style-type: none"> - to seek a consistent approach to Confirmation of Aboriginality processes - to pursue an appropriate process for monitoring claims of Aboriginality through Statutory Declarations. - In line with self-determination, advocate for a properly resourced body responsible for research and processing Confirmation of Aboriginality applications. - to communicate the views of this forum to the Koori Caucus and Aboriginal Justice Forum 	
4.	Introduction of Facilitator – Nathan Leitch	30 minutes
	<ul style="list-style-type: none"> • Meeting protocols • Commonwealth definition • Statutory Declarations 	
5.	Video Presentation	10 minutes
6.	Open discussion	60 minutes
7.	Break	15 minutes
8.	Open discussion	60 minutes
9.	Lunch & summary of forum outcome to convey to government	20 minutes
10.	Close	1.00pm

'Dancing in the Moonlight' by Jenaiha Peckham of Wiraduri descent. A strong advocate on the rights of women, Jenaiha said "My painting tells the story of woman dancing, celebrating life and culture." This sentiment resonates with the RAJAC focus on assisting Koori women in the Justice System to maintain and celebrate life and culture.



COMMUNITY FORUM

Please join us for A Discussion on

CONFIRMATION OF ABORIGINALITY

Wednesday 3 July 2019 from 9:00am – 1.00pm
Karralkya Centre, Mines Road Ringwood East 3135
RSVP: Sam Nolan 0447462 819 Email: samuel.nolan@justice.vic.gov.au

Have Your Say

Services and programs specific to Aboriginal and Torres Strait Islander people, are intended to address the social, health and educational issues that our First Nations Peoples face.

The accepted three part Commonwealth definition states:

"An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives".

The Eastern Regional Aboriginal Justice Advisory Committee (RAJAC) wants to hear from you on this important issue – let's work together to ensure our people are not further disadvantaged.




SCHOOL SCHOLARSHIPS
HIGHER EDUCATION
TRAINING
HOUSING

SOCIAL SUPPORT
HEALTH
EMPLOYMENT
BUSINESS DEVELOPMENT

HOME OWNERSHIP

Attachment 1

Commonwealth of Australia
STATUTORY DECLARATION
Statutory Declarations Act 1959

Insert the name, address and occupation of person making the declaration I,¹
Set out matter declared to in numbered paragraphs make the following declaration under the *Statutory Declarations Act 1959*:

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.

Signature of person making the declaration ³
Place Declared at ⁴ Day on ⁵ Month and year of ⁶
Before me,

Signature of person before whom the declaration is made (see over) ⁷

Full name, qualification and address of person before whom the declaration is made (in printed letters) ⁸

Note 1 A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years — see section 11 of the *Statutory Declarations Act 1959*.
Note 2 Chapter 2 of the *Criminal Code* applies to all offences against the *Statutory Declarations Act 1959* — see section 5A of the *Statutory Declarations Act 1959*.

A statutory declaration under the *Statutory Declarations Act 1959* may be made before—
(1) a person who is currently licensed or registered under a law to practise in one of the following occupations:
Chiropractor Dentist Legal practitioner
Medical practitioner Nurse Optometrist
Patent attorney Pharmacist Physiotherapist
Psychologist Trade marks attorney Veterinary surgeon
(2) a person who is enrolled on the roll of the Supreme Court of a State or Territory, or the High Court of Australia, as a legal practitioner (however described); or
(3) a person who is in the following list:
Agent of the Australian Postal Corporation who is in charge of an office supplying postal services to the public
Australian Consular Officer or Australian Diplomatic Officer (within the meaning of the *Consular Fees Act 1955*)
Bailiff
Bank officer with 5 or more continuous years of service
Building society officer with 5 or more years of continuous service
Chief executive officer of a Commonwealth court
Clerk of a court
Commissioner for Affidavits
Commissioner for Declarations
Credit union officer with 5 or more years of continuous service
Employee of the Australian Trade Commission who is:
(a) in a country or place outside Australia; and
(b) authorised under paragraph 3 (d) of the *Consular Fees Act 1955*; and
(c) exercising his or her function in that place
Employee of the Commonwealth who is:
(a) in a country or place outside Australia; and
(b) authorised under paragraph 3 (c) of the *Consular Fees Act 1955*; and
(c) exercising his or her function in that place
Fellow of the National Tax Accountants' Association
Finance company officer with 5 or more years of continuous service
Holder of a statutory office not specified in another item in this list
Judge of a court
Justice of the Peace
Magistrate
Marriage celebrant registered under Subdivision C of Division 1 of Part IV of the *Marriage Act 1961*
Master of a court
Member of Chartered Secretaries Australia
Member of Engineers Australia, other than at the grade of student
Member of the Association of Taxation and Management Accountants
Member of the Australasian Institute of Mining and Metallurgy
Member of the Australian Defence Force who is:
(a) an officer; or
(b) a non-commissioned officer within the meaning of the *Defence Force Discipline Act 1982* with 5 or more years of continuous service; or
(c) a warrant officer within the meaning of that Act
Member of the Institute of Chartered Accountants in Australia, the Australian Society of Certified Practising Accountants or the National Institute of Accountants
Member of:
(a) the Parliament of the Commonwealth; or
(b) the Parliament of a State; or
(c) a Territory legislature; or
(d) a local government authority of a State or Territory
Minister of religion registered under Subdivision A of Division 1 of Part IV of the *Marriage Act 1961*
Notary public
Permanent employee of the Australian Postal Corporation with 5 or more years of continuous service who is employed in an office supplying postal services to the public
Permanent employee of:
(a) the Commonwealth or a Commonwealth authority; or
(b) a State or Territory or a State or Territory authority; or
(c) a local government authority;
with 5 or more years of continuous service who is not specified in another item in this list
Person before whom a statutory declaration may be made under the law of the State or Territory in which the declaration is made
Police officer
Registrar, or Deputy Registrar, of a court
Senior Executive Service employee of:
(a) the Commonwealth or a Commonwealth authority; or (b) a State or Territory or a State or Territory authority
Sheriff/Sheriff's officer
Teacher employed on a full-time basis at a school or tertiary education institution

Example of Centrelink Confirmation of Identity
For Aboriginal and Torres Strait Islander peoples

Instructions



centrelink

Confirmation of Identity – Verification
For Aboriginal and Torres Strait Islander peoples

When to use this form

Use this form to provide confirmation of your identity if you are an Aboriginal or Torres Strait Islander Australian who has insufficient identity documents available.



Online services



You can upload this form, with any supporting documents, online.

For more information about how to access an online account or how to lodge documents online, go to humanservices.gov.au/submitdocumentsonline

For more information



Go to humanservices.gov.au or visit one of our service centres.

Call us on **1800 136 380**.

If you have a hearing or speech impairment, you can contact the TTY service Freecall™ **1800 810 586**. A TTY phone is required to use this service.

Returning your form

Check that all required questions are answered and that the form is signed and dated.

Return this form and any supporting documents to us **within 14 days** so we can process your application or claim. If you cannot do this **within 14 days**, you must contact us at the earliest possible date to make an arrangement.

Return this form and any supporting documents:

- **online** using your Centrelink online account. For more information, go to humanservices.gov.au/submitdocumentsonline
- **by fax** to **1300 786 102**
- **in person** at one of our service centres, Centrelink agent or with a remote services officer if you are not able to use your Centrelink online account.

Important Note: If you are making a claim, you must return this form and **all** supporting documents at the same time you lodge your claim form. If you do not return all documents, your claim may not be accepted. The only exception will be if you are waiting for medical evidence or other documents from a third party.

RA010.1907

Notes—1 of 2

Information for
claimant

People who are partnered must each provide separate identity documents when claiming:

- Parenting Payment Partnered
- Low Income Health Care Card
- Commonwealth Seniors Health Care Card, **or**
- Exceptional Circumstances Relief Payment.

Complete questions 1 to 8 before giving this form to an Authorised Referee. Where possible, sign this form at question 8 in the presence of an Authorised Referee.

Your Authorised Referee will complete questions 10 to 13 and return the form to you.

An Authorised Referee is a person who is either a:

- Chairperson, Secretary or CEO of an incorporated Indigenous organisation (including land councils, community councils or housing organisations)
- Community Development Programme provider
- School Principal
- School Counsellor
- Minister of Religion
- Treating Health Professional or Manager in Aboriginal Medical Services
- Australian Government Department of Human Services staff, **or**
- other Government employee of at least 5 years.

Information for
Authorised Referees

You must meet one of the categories listed above to be an Authorised Referee.

This form can only be used if the person named at question 1 or their partner is an Aboriginal or Torres Strait Islander Australian and is not able to provide standard identification documents.

The authority to request this information is contained in the *Social Security (Administration) Act 1999* or the *Student Assistance Act 1973* in accordance with policy guidelines issued by the Department of Jobs and Small Business.

RA010.1907

Notes—2 of 2



ABORIGINAL OR
TORRES STRAIT ISLANDER
DESCENT CONFIRMATION

GUIDELINES

Each Aboriginal person or Torres Strait Islander who applies for IBA assistance must complete a statutory declaration.

A statement in the statutory declaration that the person is an Aboriginal person or a Torres Strait Islander within the meaning of the *Aboriginal and Torres Strait Islander Act 2005* is understood to be a claim to the effect that the person:

- is of Aboriginal or Torres Strait Islander descent, or both
- identifies as an Aboriginal person or Torres Strait Islander, or both and
- is recognised as such by their community.

Any information provided by an applicant in relation to their claim to be an Aboriginal person or a Torres Strait Islander may be subject to verification by IBA. In doing so IBA may require the applicant to provide additional evidence to support their claim to be an Aboriginal person or Torres Strait Islander. **The making of false or misleading statements in applications and statutory declarations is punishable under section 136 of the *Criminal Code Act 1995* (Cth) and section 11 of the *Statutory Declarations Act 1959* (Cth).**

QUALIFICATIONS

Tick the box to indicate the qualification of the witness to this statutory declaration.
A statutory declaration under the *Statutory Declarations Act 1959* may be made before:

1. a person who is currently licensed or registered under a law to practise in one of the following occupations:

1.1 ☐ Architect

1.2 ☐ Chiropractor

1.3 ☐ Dentist

1.4 ☐ Financial advisor/planner

1.5 ☐ Legal practitioner

1.6 ☐ Medical practitioner

1.7 ☐ Midwife

1.8 ☐ Migration agent registered under Division 3 of Part 3 of the *Migration Act 1958*

1.9 ☐ Nurse

1.10 ☐ Occupational therapist

1.11 ☐ Optometrist

1.12 ☐ Patent attorney

1.13 ☐ Pharmacist

1.14 ☐ Physiotherapist

1.15 ☐ Psychologist

1.16 ☐ Trade marks attorney

1.17 ☐ Veterinary surgeon
2. a person who is enrolled on the roll of the Supreme Court of a State or Territory, or the High Court of Australia, as a legal practitioner (however described) or
3. a person who is in the following list:

3.1 ☐ Agent of the Australian Postal Corporation who is in charge of an office supplying postal services to the public

3.2 ☐ Australian Consular Officer or Australian Diplomatic Officer (within the meaning of the *Consular Fees Act 1955*)

3.3 ☐ Bailiff

3.4 ☐ Bank officer with 5 or more years of continuous service

3.5 ☐ Building society officer with 5 or more years of continuous service
- 3.6 ☐ Credit union officer with 5 or more years of continuous service

3.7 ☐ Chief executive officer of a Commonwealth court

3.8 ☐ Clerk of a court

3.9 ☐ Commissioner for Affidavits

3.10 ☐ Commissioner for Declarations

3.11 ☐ Employee of the Australian Trade Commission who is:

a) in a country or place outside Australia, and

b) authorised under paragraph 3(d) of the *Consular Fees Act 1955*, and

c) exercising his or her function in that place

3.12 ☐ Employee of the Commonwealth who is:

a) in a country or place outside Australia, and

b) authorised under paragraph 3(c) of the *Consular Fees Act 1955*, and

c) exercising his or her function in that place

3.13 ☐ Fellow of the National Tax Accountants' Association

3.14 ☐ Finance company officer with 5 or more years of continuous service

3.15 ☐ Holder of a statutory office not specified in this list

3.16 ☐ Judge of a court

3.17 ☐ Justice of the Peace

3.18 ☐ Magistrate

3.19 ☐ Marriage celebrant registered under Subdivision C of Division 1 of Part IV of the *Marriage Act 1961*

3.20 ☐ Master of a court
- 3.21 ☐ Member of the Governance Institute of Australia Ltd

3.22 ☐ Engineer who is:

a) a member of Engineers Australia, other than at the grade of student, or

b) a Registered Professional Engineer of Professionals Australia; or

c) registered as an engineer under a law of the Commonwealth, a State or Territory, or

d) registered on the National Engineering Register by Engineers Australia

3.23 ☐ Member of the Association of Taxation and Management Accountants

3.24 ☐ Member of the Australasian Institute of Mining and Metallurgy

3.25 ☐ Employee of the Australian Defence Force who is:

a) an officer, or

b) a non-commissioned officer within the meaning of the *Defence Force Discipline Act 1982* with 5 or more continuous years of service, or

c) a warrant officer within the meaning of that Act

3.26 ☐ Member of the Institute of Chartered Accountants in Australia and New Zealand, CPA Australia or the Institute of Public Accountants

3.27 ☐ Member of:

a) the Parliament of the Commonwealth, or

b) the Parliament of a State, or

c) a Territory legislature, or

d) a local government authority of a State or Territory
- 3.28 ☐ Minister of religion registered under Subdivision A of Division 1 of Part IV of the *Marriage Act 1961*

3.29 ☐ Notary public

3.30 ☐ Agent of the Australian Postal Corporation who is in charge of an office supplying postal services to the public

3.31 ☐ Permanent employee of:

a) the Commonwealth or Commonwealth authority, or

b) a State or Territory or a State or Territory authority, or

c) a local government authority,

with 5 or more years of continuous service who is not specified in another item in this list

3.32 ☐ Person before whom a statutory declaration may be made under the law of the State or Territory in which the declaration is made

3.33 ☐ Police officer

3.34 ☐ Registrar, or Deputy Registrar, of a court

3.35 ☐ Senior executive employee of a Commonwealth authority

3.36 ☐ Senior executive employee of a State or Territory

3.37 ☐ SES employee of the Commonwealth

3.38 ☐ Sheriff

3.39 ☐ Sheriff's officer

3.40 ☐ Teacher employed on a permanent full-time or part-time basis at a school or tertiary education institution.

014-10-2018



STATUTORY DECLARATION

Please use BLOCK CAPITAL LETTERS to fill in this form.

I,

Title

First name

Middle name/s

Family name

Date of birth (DD/MM/YYYY)

Place of birth

Other names (for example, maiden, community or traditional name)

also known as

Current address

of

Occupation

and

make the following declaration under the *Statutory Declarations Act 1959*.

1. I am of Aboriginal or Torres Strait Islander descent, or both, **and**
2. I identify as an Aboriginal person or Torres Strait Islander, or both, **and**

3. I am accepted as such by the

Name of community (includes traditional area, region, nation or language group)

in which I

or my family

currently live or formerly lived.

Your signature **must** be witnessed by a qualified witness. A full list of qualifications is contained on page 1 of this form.
You **must** indicate how your witness is qualified by ticking the appropriate box on page 1.

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.

Signature of applicant

Optional: email and/or phone number of person making the declaration

Place

Day

Month

Year

Declared at

on

of

20

Signature of qualified witness

Full name of witness

Address of witness

Optional: email and/or phone number of witness

Note 1: A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for four years – see section 11 of the *Statutory Declarations Act 1959*.
Note 2: Chapter 2 of the Criminal Code applies to all offences against the *Statutory Declarations Act 1959* – see section 5A of the *Statutory Declarations Act 1959*.

PRIVACY STATEMENT

Personal information provided by a person to IBA in the Aboriginal or Torres Strait Islander Descent Confirmation will be used by IBA to assess the person's eligibility for IBA assistance. The information will be maintained in a secure location as required under the *Privacy Act 1988*. IBA respects the privacy of all customers and is committed to maintaining your privacy. More information on how IBA handles your personal information is in our Privacy Policy, available at iba.gov.au.

Frequently Asked Questions

Oaths, Affirmations, Affidavits, Statutory Declarations and Certifications

GENERAL

1. What does the Oaths and Affirmations Act 2018 do?

The *Oaths and Affirmations Act 2018* and related regulations bring together, clarify and update laws about oaths, affirmations, affidavits and statutory declarations that were previously found in the *Evidence (Miscellaneous Provisions) Act 1958*.

This legislation also provides a clear statutory process for certifying that a document is a true copy of an original document. Organisations are not required to follow the certification processes but they can choose to use them.

OATHS AND AFFIRMATIONS

2. What is the difference between an oath and an affirmation?

An oath is a solemn promise to tell the truth, which is made before a deity. An oath is generally sworn when a person has a belief in a god or has some form of religious or spiritual beliefs, although a person may swear an oath even if their religious or spiritual beliefs do not include a belief in the existence of a god.

An affirmation is a solemn promise to tell the truth. An affirmation is usually used by people who do not have any spiritual or religious beliefs or any belief in the existence of a god. The legislation makes it clear that people who do believe in a god or have spiritual or religious beliefs can make an affirmation.

The legal effect of swearing an oath or making an affirmation is the same. In each case a person is solemnly committing themselves to telling the truth.

A person swears an oath or makes an affirmation either immediately before giving oral evidence in a court or a tribunal and/or when making an affidavit that will be given to the court as written evidence. Sometimes oaths and affirmations are made when a person is appointed to a special position, such as a judge or Member of Parliament.

3. What happens if a person lies under oath or affirmation?

An original document is any document that an authorised certifier, using their best judgement, determines to be original. If a person lies under an oath or an affirmation they can be charged with the offence of perjury. This offence has a maximum penalty of 15 years imprisonment.

Frequently Asked Questions

4. Who can swear an oath or make an affirmation?

Any person may swear an oath or make an affirmation, as long as that person is able to understand the nature of an oath or affirmation.

5. Who can administer an oath or an affirmation in a court or tribunal?

A court, tribunal, judicial officer or a person acting judicially, as well as a person who is performing duties in relation to a court or tribunal and any prescribed person or person who is a member of a prescribed class of persons and various others specified, may administer an oath or affirmation for court or tribunal purposes.

6. What must a person say when making an oath or an affirmation?

The words of an oath or affirmation will depend on the reason it is being made.

Generally, an oath may be taken using the following, or similar words:

"I, [*name of person making oath*], swear (or promise) by Almighty God (or the person may name a god recognised by the person's religion) that the contents of this affidavit are true and correct."

An affirmation may be made using the following, or similar words:

"I, [*name of person making oath*], solemnly and sincerely declare and affirm that the contents of this affidavit are true and correct."

7. Can children use simpler language when making an oath or affirmation, either in court or for the purposes of making an affidavit?

Yes, they may use similar, simpler words including: "I promise to tell the truth".

8. Must a person use a religious text or have a belief in a god when swearing an oath?

A person may hold or use a religious text when swearing an oath, but is not required to do so. While often a person who swears an oath will have a belief in a god, a person may swear an oath even if the person's religious or spiritual beliefs do not include a belief in the existence of a god.

The form of oath made by a person does not need to include a reference to a god, and may instead refer to the basis of the person's beliefs.

An oath is effective even if the person who takes it does not have a religious belief or a religious belief of a particular kind.

The substance of these provisions is not new and was previously contained in the *Evidence (Miscellaneous Provisions) Act 1958*. The provisions in the new *Oaths and Affirmations Act 2018* ensure the law is consistent for all oaths and affirmations, whether made in courts, tribunals or elsewhere.

9. Can a person with a disability that prevents them from complying with the usual requirements of swearing an oath or making an affirmation still make an oath or affirmation?

If a person swearing an oath or making an affirmation has a disability that prevents them from complying with the process of swearing an oath or making an affirmation then the person who administers an oath or affirmation may make reasonable modifications to the process.

For example, a hearing-impaired person may read and sign an oath or affirmation instead of saying it aloud. A person who is unable to speak may be able to listen to an oath or affirmation being read and nod agreement.

If a person is illiterate, blind or cognitively impaired and seeks to take an oath or make an affirmation for the purposes of an affidavit, then the person administering the affidavit must read it to the person making it.

However, the person must be able to understand that they are making a legal promise to tell the truth, and that being untruthful under oath or affirmation is an offence. If a person seeking to swear an oath or make an affirmation is unable to understand the nature of an oath or affirmation, then that person will not be able to do so.

10. Who can administer an oath or an affirmation for other purposes?

Any person can be authorised by or under an Act to administer an oath or affirmation for specified purposes.

11. Must all oaths and affirmations comply with the Oaths and Affirmations Act 2018?

No. Part 2 of the Act provides a process for making oaths and affirmations where other laws are silent or have 'gaps' in the process. For example, if legislation requires an oath or affirmation but does not set out a form or process, the form and process in the Act can be used.

AFFIDAVITS

12. What is an affidavit?

An affidavit is a written statement that has been confirmed to be true by the person making it (deponent). The deponent confirms its truth by swearing an oath or making an affirmation before a person authorised by law to take an affidavit. Taking an affidavit is also called 'witnessing' or 'administering' an affidavit. There is a prescribed affidavit form which can be used for the written part of an affidavit. The written form is not mandatory. The words for the oath or affirmation are on the Example Affidavit on the Department of Justice and Community Safety website. These words are mandatory.

An affidavit is a form of sworn evidence and can be used in court proceedings and for other purposes authorised by law. An affidavit can serve to either collect a handful of exhibits together for ease of handling or reference, or to set out a person's own account of relevant events in numbered paragraphs.

13. Who can make an affidavit?

Any person, whether an adult or a child, may make an affidavit, as long as at the time of making the affidavit that person has the capacity to understand the nature of an oath or affirmation. That is, they must be able to understand that they are making a legal promise to tell the truth, and that being untruthful in an affidavit is an offence.

14. Who can administer an affidavit?

The *Oaths and Affirmations Act 2018* (The Act) lists some of the people who can administer an affidavit. It also allows other legislation and regulations to give people the authority to administer affidavits. The list of people in the Act who can administer an affidavit is broadly the same as those previously authorised under the *Evidence (Miscellaneous Provisions) Act 1958* but with some anomalies removed.

Some examples of people who can administer affidavits under the Act include judicial officers, honorary justices, public notaries, court registrars, Victorian Civil and Administrative Tribunal members and registrars, members and former members of both Houses of Parliament, Australian legal practitioners, police officers of or above the rank of sergeant or for the time being in charge of a police station, and public servants with a classification prescribed in regulations. The full list of prescribed affidavit takers can be found on the Department of Justice and Community Safety website at www.justice.vic.gov.au.

15. What is the penalty for making a false statement in an affidavit?

If a person lies in an affidavit they can be charged with perjury. This offence has a maximum penalty of 15 years imprisonment.

16. Who can administer an affidavit out of Victoria for use within Victoria?

In addition to those listed in the attached list of authorised affidavit takers, an Australian Consular officer, certain local employees of the Commonwealth in overseas locations, and employees of the Australian Trade and Investment Commission are authorised to take an affidavit in any place out of Victoria for use within Victoria, as well as any person having authority to administer an oath or affirmation in a place outside of Victoria.

If an affidavit can or must be taken by a Justice of the Peace or a bail justice, then it can be taken by a Justice of the Peace or bail justice outside of Victoria, for use in Victoria.

17. Is there a particular form that must be used for an affidavit?

Under existing law, each court or tribunal specifies the requirements for affidavits used in that court or tribunal. Regulations made under the *Oaths and Affirmations Act 2018* specify the basic contents and requirements for all affidavits, although it is not mandatory to adopt the prescribed form. Courts and tribunals may also customise the content of particular affidavits to suit their requirements in court rules.

The Regulations set out the words a person must say when swearing the oath or making the affirmation that forms part of their affidavit. These words are contained in the template affidavit form, which can be found at www.justice.vic.gov.au.

If another Act or Court rule is inconsistent with the requirements of the Act and specifically requires a different form for specific purposes, then that different form should be used. Otherwise the form prescribed by the Act is appropriate.

18. What is an example of ‘inadvertent non-compliance that does not materially affect the nature of an affidavit’?

If a person makes a small, insignificant mistake that does not strictly comply with a requirement then the affidavit may still be valid. However, it is not possible to provide a list of examples that may or may not fall within this category. This will depend on each case, and may ultimately depend on a court ruling. Not making the oral oath or affirmation is not inadvertent non-compliance, and will invalidate an affidavit.

19. Can a person who administers an oath or affirmation for an affidavit charge a fee for doing so?

A person may not charge for administering an oath or affirmation to a person making an affidavit or signing an affidavit. Doing so is an offence punishable by 10 penalty units. However a person may charge for preparing or drafting the contents of the affidavit. This is not new and was the previous law under the *Evidence (Miscellaneous Provisions) Act 1958*.

The only exception is for public notaries, who are permitted to charge a fee for their services when taking affidavits intended solely for use outside of Australia.

Questions for authorised affidavit takers

20. If I am authorised because I am a member of a particular profession (e.g. police officer), am I authorised only to take affidavits related to my work, or is my authorisation broader than that (e.g. privately executed documents)?

If you are authorised because you are a member of a particular profession then you are authorised to take affidavits both related and unrelated to your profession.

The only exception is persons employed in a court or tribunal with a classification level of 2 or 3, such as Victorian Civil and Administrative Tribunal counter staff, who are only permitted to take affidavits in the course of their duties.

21. How can I determine if somebody would benefit from reasonable modifications in making their affidavit?

If a person is able to understand that they are making a legal promise to tell the truth, and that being untruthful in an affidavit is an offence, they can make an affidavit.

If a person also has a disability that makes it difficult or impossible to comply with the legal requirements for making an affidavit, you may need to modify the process so that a deponent can complete their affidavit. Making reasonable modifications to the affidavit process does not require a medical assessment. You should use your own good judgement about what is necessary to ensure a person's disability does not prevent them making an affidavit.

22. How should I ask the person making their affidavit to swear the oath or affirm? (E.g. can I say ‘Repeat after me’, or can the deponent read from a printed card, or can they answer ‘Yes’ to questions such as, ‘Are the statements made in this affidavit true and correct?’)

A person making an oath or affirmation for an affidavit must say the prescribed words aloud. They may repeat the words after the authorised affidavit taker has spoken them, or read them from a card. It is not sufficient (unless reasonable modifications must be made because of a disability) to simply answer yes to questions such as ‘Are the statements made in this affidavit true and correct?’.

23. When saying the capacity in which I am authorised, how specific should I be? For example, should I state that I am a lawyer or legal practitioner or legal practitioner within the meaning of the Legal Profession Uniform Law (Vic)?

You should use the wording referred to in the attached list of authorised affidavit takers. So, for example, an **Australian legal practitioner** is authorised to take an affidavit. If the affidavit is taken by such a person then that term should be used. Terms like lawyer or legal practitioner might be considered to include a person who practices law in another country. That person usually would not be authorised to take an affidavit in Victoria.

Questions for people making affidavits

24. Can I be assisted by an interpreter?

Yes, a person may be assisted by an interpreter when making an affidavit. It should be noted that affidavits are usually prepared on the basis that they might be used in a court or a tribunal. If the affidavit is made in a language other than English, it is unlikely that the court or tribunal would accept it, unless it was accompanied by an affidavit from a qualified interpreter who:

swore an oath or made an affirmation that they had accurately translated the prescribed words from English into the deponent's language and translated what the deponent said in their language into English, and

- provided a written translation in English of the deponent's affidavit.

STATUTORY DECLARATIONS

25. Is there a particular form that must be used for a statutory declaration?

Yes, under the *Oaths and Affirmations Act*, a written statutory declaration must be in the form prescribed by regulations. The template statutory declaration form can be found at www.justice.vic.gov.au. There was no prescribed form for a statutory declaration under the previous law.

26. What if a person uses the wrong form or the form is out of date?

The new provisions under the *Oaths and Affirmations Act 2018* and related regulations commence on 1 March 2019. The Oaths and Affirmations (Affidavits, Statutory Declarations and Certification) Regulations 2019 prescribes the information which must be on a statutory declaration form.

In case an old form of statutory declaration is accidentally used, the Oaths and Affirmations Transitional Regulations 2019 provide a transitional period from 1 March 2019 to 31 December 2019. During this time, statutory declarations made in accordance with the repealed process under the *Evidence (Miscellaneous Provisions) Act 1958* will still be valid, regardless of whether the witness who took the statutory declaration only became authorised under the new Act.

27. What is a statutory declaration? How is it different to an affidavit?

A statutory declaration is a legally recognised written statement that the person making the statutory declaration (the declarant) promises is truthful. It is witnessed by a person who is authorised by legislation to witness statutory declarations. It includes an acknowledgement that the declarant knows that it is an offence to make a statement they know to be untrue.

Unlike an affidavit, a statutory declaration is not made on oath or by affirmation. But it is still a criminal offence to make a false statutory declaration. The penalty for making a false statutory declaration may be a fine or imprisonment. So a person must treat the making of a statutory declaration seriously.

A statutory declaration can be used where sworn evidence provided in the form of an affidavit is not required but a legally recognised statement is, such as when a person makes an application for a mortgage with a bank.

28. What is the penalty for making a false statutory declaration?

A person who makes a statement in a statutory declaration that the person knows to be untrue commits an offence that is punishable by a fine of up to 600 penalty units or up to imprisonment for 5 years or both.

29. Who can make a statutory declaration?

Any person, whether an adult or a child, may make a statutory declaration.

30. Who can witness a statutory declaration under the Oaths and Affirmations Act 2018?

There is a wide variety of people who are able to witness a statutory declaration under the Act. A full list of authorised statutory declaration witnesses can be found at www.justice.vic.gov.au. They include:

- Those who can administer an affidavit, including judicial officers, such as judges and magistrates, honorary justices, public notaries, court registrars, Victorian Civil and Administrative Tribunal members, members and former members of both Houses of Parliament, Australian legal practitioners and others;
- A person authorised to take a Commonwealth statutory declaration, such as a chiropractor, nurse, optometrist, physiotherapist, certain Australia Post officers and numerous others; and
- Those who are prescribed in regulations made under the Act, such as a school principal, a protective services officer, a public servant with a certain classification and various others; and
- Anyone specifically authorised under a specific Act.

31. What is an example of 'inadvertent non-compliance that does not materially affect the nature of a statutory declaration'?

If a person makes a small, insignificant mistake that does not strictly comply with a requirement then the statutory declaration may still be valid. However, it is not possible to provide a list of examples that may or may not fall within this category. This will depend on each case, and may ultimately depend on a court ruling.

32. Will it be easier to find witnesses for a statutory declaration under the new legislation?

Yes, the new legislation expands the list of people able to witness Victorian statutory declarations. From 1 March 2019 a person who is authorised to witness a Commonwealth statutory declaration is also authorised to witness a Victorian statutory declaration. This greatly increases the number of people who are authorised to witness Victorian statutory declarations.

Regulations made under the *Oaths and Affirmations Act 2018* authorise some other people who were not previously authorised to witness statutory declarations, such as police reservists, protective services officers, and licensed conveyancers, thereby adding to the list of available witnesses.

33. Why do statutory declarations need to be witnessed?

Statutory declarations have a wide variety of uses. They are often used to obtain a right or benefit and therefore must contain truthful information. For example, a person may make a statutory declaration in support of taking carer's leave, or when a person makes an application for a mortgage with a bank.

The organisation receiving the statutory declaration must rely on the declaration being true and correct. The requirement of having a statutory declaration witnessed adds formality and accountability to the process so that the receiving organisation can be confident that it can act on the information and material provided.

34. Can a person with a disability that would prevent them from making a statutory declaration in the usual way still make a statutory declaration?

Another person may assist a person to make a statutory declaration, and, if that occurs, the person assisting must, on the face of the document, write their name and address and explain the nature of the assistance provided, for example, assistance with writing or reading.

The *Oaths and Affirmations Act 2018* also provides that a person who is illiterate, blind or cognitively impaired may make a statutory declaration, but only if the person witnessing the statutory declaration reads it to the person making it.

The Act also allows a statutory declaration witness to modify the usual process to take into account a person's disability. For example a person who is unable to speak may be able to read the oral declaration and nod assent.

35. Must a statutory declaration be in writing?

Yes, a statutory declaration must be made in writing, and in the form prescribed by the regulations.

However, when a person makes a statutory declaration the law will now require that they must say certain words to confirm the truth of the statement. These words or declaration can be found in the regulations or in the instructions on the statutory declaration form on the Department's website.

Before 1 March 2019 different witnesses had different practices. Some witnesses required a person making a statutory declaration to make a declaration aloud but others only required the statutory declaration to be signed. From 1 March 2019 the law is clear and a person making the statutory declaration will have to make a short

declaration confirming the statement is true and correct in front of the witness **and** also sign the statutory declaration.

36. Can a person charge for witnessing a statutory declaration?

The *Oaths and Affirmations Act 2018* does not prohibit an authorised witness from charging to witness/take a statutory declaration but usually this is regarded as a public service and most witnesses do not charge a fee. It is not expected that the Act will change this custom.

However, Honorary Justices are prohibited under the *Honorary Justices Act 2014* from charging for any service they perform, including witnessing a statutory declaration.

Questions for authorised statutory declaration witnesses

37. If I am authorised because I am a member of a particular profession (e.g. engineer), am I authorised only to witness statutory declarations related to my work, or is my authorisation broader than that (e.g. privately executed documents)?

If you are authorised because you are a member of a particular profession then you are authorised to witness statutory declarations that are both related and unrelated to your profession.

38. If I am authorised in my profession but am employed in a “temporary” or “casual” capacity, am I still considered an authorised person?

You should consult the attached list. Some people who are employed in a particular profession on a temporary or casual basis may be authorised, but others may not be unless they are employed on a full time basis. Generally speaking, unless otherwise specified, witnesses authorised in their profession but employed in a “temporary” or “casual” capacity will be permitted to witness statutory declarations for the duration of their time in the authorised role.

39. How can I determine if somebody would benefit from reasonable modifications in making their statutory declaration?

You will need to exercise your ordinary judgment. You are not expected to be a psychologist, psychiatrist or a medical professional so you are not required to undertake a complex assessment.

40. How should I solicit the oral portion of the statutory declaration when taking a statutory declaration? (E.g. do I say ‘Repeat after me’, or can the deponent read off a printed card, or can they answer ‘Yes’ to questions such as, ‘Are the statements made in this declaration true and correct?’)

A person making a statutory declaration must say the prescribed words aloud. They may repeat the words after the authorised statutory declaration witness or read them from a card. It is not sufficient to simply answer yes to questions such as ‘Are the statements made in this statutory declaration true and correct?’

41. When saying the capacity in which I am authorised, how specific should I be? For example, should I state that I am a lawyer or legal practitioner or legal practitioner within the meaning of the Legal Profession Uniform Law (Vic)?

You should use the wording referred to in the attached list of authorised statutory declaration witnesses. So, for example an **Australian legal practitioner** is authorised to witness a statutory declaration. If the statutory declaration is taken by such a person then that term should be used. Terms like lawyer or legal practitioner might be considered to include a person who practices law in another country. That person would usually not be authorised to witness a statutory declaration in Victoria.

Questions for people making statutory declarations

42. Can I be assisted by an interpreter when making a statutory declaration?

Yes, a person may be assisted by an interpreter when making a statutory declaration. In this situation the interpreter must clearly write or stamp on the front page of the statutory declaration their name and address, and that they provided translation or interpreting assistance.

CERTIFICATION OF COPY DOCUMENTS

43. Why are certified copy documents needed?

It is sometimes necessary to prove something with a document but it is not possible to give the original document, e.g. a certified copy of a driver's licence in a passport application, or a certified copy of an academic transcript when applying for a new course of study. A process is required to ensure that the copy document is an accurate copy of the original document and therefore can be relied upon.

44. How does the certification process under the Oaths and Affirmations Act 2018 work?

Before certifying a copy of an original document, an authorised certifier must inspect the original document to ensure that it is an original document and inspect the copy to ensure it is identical to the original document.

Identical does not mean that the copy must be of the same size or colour as the original, provided the use of a different size or colour does not result in the loss of any material information.

The authorised certifier then writes or stamps the copy document with words prescribed by the legislation that confirm that the copy is a true copy of an original document, signs and dates the copy, and writes or stamps the copy with their name, qualification and address.

45. Who can certify copy documents under the Oaths and Affirmations Act 2018?

- An authorised affidavit taker
- A person authorised to witness a statutory declaration
- A person authorised by or under another Act
- A person prescribed in regulations made under the *Oaths and Affirmations Act 2018*.

46. Must a person use the process set out in the Oaths and Affirmations Act 2018 to certify a document as a genuine copy of an original?

No, the certification process in the Act may be used to certify a document as a genuine copy of an original, but the process is not mandatory. Some industries or organisations already have robust processes in place to ensure the integrity of copy documents. For example, under laws for the transfer of property, certain documents like a driver's licence or passport must be produced to authorised agencies, such as Australia Post, so that the identity of those doing the land transfer can be verified. Copies of the original documents are made and stored to verify identity. These processes are not affected by the new Act.

Certification procedures that already exist in other Acts will not be displaced by the Act's certification processes either. For example, the *County Court Act 1958* contains a process for the Registrar or Deputy Registrar to certify true copies of entries in the register books of the court which will continue to apply. If the certification system in the *Oaths and Affirmations Act 2018* is to be used, it must be specifically adopted in legislation, regulations or policy documents and only then will it apply.

47. What documents can be certified as copies of originals?

A copy of an original document may be certified as a true copy.

An authorised certifier may not be able to tell, with absolute certainty, whether a document is truly an "original document". So the *Oaths and Affirmations Act 2018* provides that the authorised certifier must simply use their best judgement and decide if it is an original document.

Also sometimes a register is kept of public information. An authorised copy of an entry on a register of public documents or an extract certified as a true extract from the register is regarded as "an original document" because the official holder of the register has issued or certified the document. Even where the holder of the register issues

multiple authorised copies or multiple extracts of a document, each of those documents would be considered an "original document" under the Act.

For example, a birth certificate which has been issued to an individual by the Registrar of Births Deaths and Marriages will be regarded as the "original document", even though it is a copy of particulars recorded on the Register. Certified copies could be made of the birth certificate using the process in the *Oaths and Affirmations Act 2018*.

48. Can a person certify a copy of a certified copy of a document?

Yes, a person may certify a copy of a certified copy of a document. In such a case the authorised certifier must inspect the certified copy of the original document to ensure it appears to be authentic and inspect the copy of the certified copy to ensure it is identical to the certified copy.

49. Can a document in a language other than English be certified?

Yes, a document in a language other than English can be certified, if the authorised certifier is of the opinion that the copy and the original document are identical.

50. Will the certification scheme in the Oaths and Affirmations Act 2018 affect certification arrangements that are already in place for other schemes?

Not necessarily. Other schemes may provide for other certification arrangements and may maintain their current system, make changes or expressly adopt the certification scheme in the Act.

The scheme provided for by the Act does, however, create a clear and robust system of certification of documents that are copies of originals with authorised certifiers.

Questions for authorised certified copy witnesses

51. Should an authorised certifier use their personal or professional address when certifying documents?

Either address is permitted under the *Oaths and Affirmation Act 2018*, however authorised certifiers are advised to use their professional address unless there is a compelling reason not to do so.

Instructions for completing a statutory declaration

Please complete the following form using the notes in the left-hand margin for guidance. More guidance on making statutory declarations can be found at www.justice.vic.gov.au.

When making the statutory declaration the declarant must say aloud:

I, [full name of person making declaration] of [address], declare that the contents of this statutory declaration are true and correct.

Statutory Declaration

Insert the name, address and occupation (or alternatively, unemployed or retired or child) of person making the statutory declaration.

I,

make the following statutory declaration under the **Oaths and Affirmations Act 2018**:

1.

Set out matter declared to in numbered paragraphs. Add numbers as necessary.

I declare that the contents of this statutory declaration are true and correct and I make it knowing that making a statutory declaration that I know to be untrue is an offence.

Signature of person making the declaration

Declared at

*in the state of Victoria

Place (City, town or suburb)

Date

on

Signature of authorised statutory declaration witness

I am an authorised statutory declaration witness and I sign this document in the presence of the person making the declaration:

Date

on

Name, capacity in which authorised person has authority to witness statutory declaration, and address (writing, typing or stamp)

A person authorised under section 30(2) of the **Oaths and Affirmations Act 2018** to witness the signing of a statutory declaration.

The witness must only sign this section if the person making the statutory declaration is illiterate, blind or cognitively impaired and the statutory declaration is read to them.

I certify that I read this statutory declaration to [name of the person making the statutory declaration] at the time the statutory declaration was made.

This section must be signed by any person who has assisted the person making the statutory declaration, for example by translating the document or reading it aloud. If no assistance was required, this section does not need to be completed.

I certify that I have assisted [name of the declarant] by [insert assistance provided, for example translating the document].

Signed:

On:

Date

Name and address of person providing assistance

Name and address of person providing assistance:





KOORI Strong
KOORI Proud
KOORI Justice
Victorian Aboriginal
Justice Agreement

**Appendix 2 – Confirmation of Aboriginality – Paper prepared by the Aboriginal Justice
Caucus – June 2020**



CONFIRMATION OF ABORIGINALITY



Paper prepared by the Aboriginal Justice Caucus
JUNE 2020

ABORIGINAL JUSTICE CAUCUS

Confirmation of Aboriginality

June 2020

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Note on terminology:

The word Aboriginal is the preferred terminology used in Victoria and used throughout this paper; it includes reference to Torres Strait Islander people. We recognise the right of various language groups to identify specific language nations and groups however for the purpose of this paper the word Aboriginal is used. The word 'Indigenous' is a generic term used in describing both Aboriginal and Torres Strait Islander peoples and is broadly used in Australian governments in referencing both Aboriginal and Torres Strait Islander peoples. The use of the word Indigenous in this paper reflects a national policy or view.

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Background

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC)¹ found that “the high rates of Aboriginal deaths in custody was directly related to the underlying factors of poor health and housing, low employment and education levels, dysfunctional families and communities, dispossession and past government policies...it concluded that the most significant contributing factor bringing Aboriginal people into conflict with the criminal justice system was their disadvantaged and unequal position in the wider society”.

Since the release of the RCIADIC Report in 1991, successive Victorian governments have made some progress towards implementation of the 339 recommendations, however, there are still areas of concern for the Aboriginal Justice Caucus (AJC). The increasing disparity in outcomes for Aboriginal people across all socio-economic areas continues to drive over-representation in the criminal justice system.

In Victoria, the partnership between the Victorian Government and the Victorian Aboriginal community has resulted in the development and implementation of the Victorian Aboriginal Justice Agreement (AJA1, AJA2, AJA3 and AJA4). The AJA was first launched in 2000 and is the Victorian Government’s response to the RCIADIC recommendations.

The AJC acknowledges the Victorian Government’s commitment to Aboriginal self-determination and its responsibility to reform its systems, structures and service delivery to better reflect the aspirations of Victorian Aboriginal communities.

Issues

The RCIADIC report articulated implicitly, the level of inequality and disadvantage experienced by Aboriginal people. In order to deliver equitable outcomes for families and communities, a sustained effort with dedicated resources is required. When the limited resources are diverted to benefit non-Aboriginal people, this contributes to entrenched poverty in the Aboriginal community which in turn contributes to the over-representation of Aboriginal people in the justice system.

Whilst resources have been dedicated to address this over-representation across all of the socio-economic areas, there is increasing anecdotal evidence to support that those resources are being accessed by non-Aboriginal people claiming to be Aboriginal, particularly within the justice system.

Data provided by Corrections Victoria on prisoner profiles in Victoria indicate that *“the number of Aboriginal and Torres Strait Islander (Aboriginal) prisoners has more than tripled, now representing ten per cent of the prisoner population compared with six per cent in 2009. In 2019, over one in ten women in prison (14 per cent) were Aboriginal”*.²

Similar statistics can also be seen for those on Community Corrections orders - *“the number of Aboriginal offenders in CCS has almost doubled and has increased from six to seven per cent of the total CCS population”*.

The targeting of these resources for our Aboriginal men, women and youth is even more critical now than ever.

Confirmation of Aboriginality can be a sensitive issue for several reasons. There are diverse views in relation to the confirmation of Aboriginality process. The Australian Institute of Aboriginal

¹ Johnston, E (1991) Royal Commission into Aboriginal Deaths in Custody: National Report, Volumes 1–5. Australian Government Publishing Service, Canberra.

² Corrections Victoria Prisoner Profile (2019) Annual Prisoner Statistics.

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and Torres Strait Islander Studies states; “Your Aboriginal or Torres Strait Islander heritage is something that is personal to you. You do not need a letter of confirmation to identify as an Indigenous person”.

Other views include reference to late identifiers whose family, or they personally, did not previously identify as Aboriginal, have not had the lived experience or been part of the ‘journey’.

Others view that ‘I feel Aboriginal, therefore I am Aboriginal’ and do not require a formal process of confirmation. Still others are of the view that ‘my partner is Aboriginal, therefore I am’.

Currently across Victoria, people can apply for Confirmation of Aboriginality in many ways. The most common is by contacting a local Aboriginal organisation. It was noted, however, that even this method can vary depending on the requirements of the organisation and the person responsible for signing applications.

A Brisbane based company, the Institute of Indigenous Australia, provides on-line Confirmation of Aboriginality Descent Forms for \$99 to applicants anywhere in Australia. The AJC reject this approach as a means of Confirmation of Aboriginality.

At the Aboriginal Justice Forum (AJF) held in Wodonga in 2014 Dr Lois Peeler (Chairperson, Eastern Metropolitan Regional Aboriginal Justice Committee placed Confirmation of Aboriginality on the agenda and a report prepared for the Eastern Metropolitan RAJAC by Dr Katrina Alford, “**Confirmation of Aboriginality in Australia: Policy, proof, processes, problems**”³.

The report outlined the issues and impact of those falsely claiming Aboriginality to access benefits meant to support highly disadvantaged Aboriginal people. The report identified:

- Proof of Aboriginality generally relies on a three part definition introduced by the Commonwealth in 1981 “*An Aboriginal or Torres Strait Islander is a person of Aboriginal descent, who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives*”
- There are community doubts about whether all people currently accepted as Aboriginal are in fact Aboriginal, or whether some are abusing the system of proof of Aboriginality to obtain targeted benefits and entitlements
- Consistent application of a national standard for recognising Aboriginality is a desirable principle that is lacking in practice. Merely “ticking the box” is not acceptable.

Since that meeting the AJC has consistently advocated that the use of Statutory Declarations as a form of confirming Aboriginal identity cease. Despite the advocacy by the AJC it is disappointing to note that legislative changes were made to Statutory Declarations during 2018.

The AJC believe that this was a missed opportunity by government to incorporate amendments as identified by the AJC in many discussions regarding the use of Statutory Declarations at every AJF since 2014.

Similar concerns have also been echoed at other Victorian forums including the Aboriginal Children’s Forum and include:

- The legal and legislative status of Confirmation of Aboriginality
- The lack of recourse to challenge false claims or to reverse the claims
- Reports that some Government services have wrongly accepted client’s claims of

³ Alford, Katrina (November 2014): Confirmation of Aboriginality in Australia: Policy proof, processes, problems. Report for the Eastern Metropolitan Regional Aboriginal Justice Advisory Committee.

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Aboriginality when making referrals to the Aboriginal Community Controlled (ACCO) sector

- Anecdotal reports of false claims to access scholarships or identified jobs
- Reports that universities disagree and are divided as to how to recognise Aboriginality
- Lack of overarching Victorian Government policy regarding Confirmation of Aboriginality
- Implications for child protection regarding self-identification of Aboriginality, including legal obligations to provide cultural plans for Aboriginal children in out-of-home care
- The imperative to ensure that no additional barriers are created for children in out-of-home care to identify and connect to culture.

Victoria is not unique on the issue of Confirmation of Aboriginality. Other states have also taken up the issue and, in New South Wales in 2016, the Metropolitan Aboriginal Land Council held a Community Forum (3 June 2016) to discuss the need for action. The focus of discussion centred on the legal definition of Aboriginality, ethnic fraud, self-identification being accepted for quality assurance of identified Aboriginal government funding and the lack of an Australia wide standard procedure for Confirmation of Aboriginality.

As a result of this meeting, several recommendations were put forward for action which included:

- the need for Aboriginal people and communities to determine who is Aboriginal not Government
- the need for a national standard procedure for Confirmation of Aboriginality
- the establishment of an Aboriginal Register managed by Aboriginal people to address the fraudulent claim of Aboriginality.

Victorian Government Response

In 2015 the Victorian Government (Department of Premier and Cabinet, Office of Aboriginal Affairs) provided a response to the AJC's request for information on policies and processes implemented across government for confirmation of Aboriginality.

DPC reported that there was no over-arching Victorian Government policy regarding Confirmation of Aboriginality and that in many cases, self-identification was the accepted practice. DPC provided examples of the processes used by some departments including:

- Provision of confirmation of Aboriginality certificate (which includes the common seal of the organisation issuing the documentation)
- Referees from Aboriginal people/organisations
- Statutory declaration of Aboriginality that confirms an individual:
 - Is of Aboriginal and/or Torres Strait Islander descent
 - Identifies as an Aboriginal and/or Torres Strait Islander person; and
 - Is accepted by the Aboriginal community as Aboriginal and/or Torres Strait Islander.
- Selection criteria that requires individuals to outline their knowledge/understanding of the Aboriginal community and relevant issues, ability to communicate sensitively and effectively with the Aboriginal community and involvement in/experience with working with the Aboriginal community.

DPC had been asked to take up this matter as a statewide policy issue, however, given the sensitivities involved with Confirmation of Aboriginality, and in line with the Victorian Government's commitment to self-determination, advised "that any future action should be guided by the Aboriginal community".

At the AJF49 in Swan Hill in 2017, DPC informed members that as part of the work of Barring

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Djinang, the Victorian Public Sector Commission (VPSC) would be working to improve attraction and recruitment of Aboriginal employees and that part of this work with departments and agencies would also include:

- Establishing a sector-wide approach in Victoria, including exploring the applicability of compulsory Confirmation of Aboriginality guidelines for Victorian Public Sector Entities
- Examining the use of Statutory Declarations as proof of confirmation of Aboriginality by all Victorian Public Sector Entities.

The VPSC was also to undertake a scoping exercise to look at jurisdictional approaches to Confirmation of Aboriginality as it relates to public sector employment and seek advice from the community on potential approaches to Confirmation of Aboriginality.

To date the AJC has not received any information/advice in respect of this work. It is noted however, that the primary focus of this work by would relate only to employment, rather than the wider considerations of education, housing and access to community services directed specifically for the Aboriginal community.

The AJC is of the view that, whilst there would be some beneficial aspects in relation to employment opportunity, it does not encompass the issues raised by the AJC.

Where are we now?

At the AJF53 in Morwell in March 2019, the Secretary, DJCS gave a commitment that the use of Statutory Declarations as a form of confirming Aboriginality would cease for the next 12 months and that DJCS would report to the Secretaries Leadership Group on Aboriginal Affairs detailing the impact of removing statutory declarations.

Commitment was also given by the Koori Justice Unit (DJCS) to support respective RAJAC's to conduct community conversations. A consolidated report is to be provided to the AJF.

Confirmation of Aboriginality – Community Conversations

“We’ve had these concerns for years. We need to fix it. We need solutions now” – Community member

The first of the community conversations commenced in the Eastern Metropolitan RAJAC region in July 2019.

Attendees at this community conversation consisted of Elders and Respected persons, Aboriginal people representing their respective organisations and all other Aboriginal community members interested and/or had concerns about the current processes for Confirmation of Aboriginality. Participants recognised the sensitivities of this topic, however, welcomed the opportunity to provide their views.

There have been several other regions who have held their community conversations across the State, however, there are still some regions where the impact of the COVID-19 pandemic has made face-to-face conversations impossible.

There is overwhelming support from the community to address the issues that have already been highlighted in the community conversations that have been held.

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“Those signatories, the police and chemists and all that, they’re only signing to say that your signature is really yours. They’re not confirming your Aboriginality so anybody at all can walk in with a piece of paper that says from any old tribe and BAM! Confirmed. And that’s fraud” – Community member

Summary of feedback

Community members acknowledged that there are many ways Aboriginal people identify and there are many combinations of factors that contribute to each individual, family, community and region. There was wide recognition of sensitivities and barriers that exist for displaced persons, removal of children and stolen generation individuals.

There was broad agreement that individuals experiencing these barriers must be supported by appropriate agencies and organisations to assist them to gather details and to complete their stories and genealogical connections.

In this context, asking questions to provide insight into the validity of a claim is generally considered appropriate along with encouragement to the individual seeking confirmation for them to do the research and gather information.

Community members also cited instances where non-Aboriginal people had been issued with a Confirmation of Aboriginality certificate based on being married to an Aboriginal person.

*“Being ‘on the journey’ does not equate to Aboriginality”
Community member*

Some community members expressed their deep dissatisfaction where non-Aboriginal government appointed administrators were signing Confirmation of Aboriginality applications. This practice was also seen in the education sector, where Principals of schools provide Confirmation of Aboriginality for students.

The use of Statutory Declarations is not an acceptable form of confirming Aboriginal identity. These declarations require the signature of a Justice of the Peace, Bank Manager, Court Registrar, Dentist, Chemist, School Principal, School Counsellor, Minister of Religion, Treating Health Professional, Australian Government Department of Human Services staff, or other Government employee of at least 5 years and others.⁴

These individuals lack the genealogical, cultural and community knowledge, and cultural authority required to affirm an individual’s Aboriginality and do not have the essential agency or right to perform this type of endorsement.

It was noted across all Community forums that there has been no prosecution or conviction for breaches of the Oaths and Affirmations Act in Victoria for those claiming Aboriginality.

A summary of key points raised at the regional community forums demonstrates a consistent

⁴ Oaths and Affirmations Act 2018, No. 6 of 2018, Part 4 Section 30(2).

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theme:

- Establishment of a consistent approach to Confirmation of Aboriginality
- The abolition of the use of Statutory Declarations as a way of confirming Aboriginality
- The prosecution of those falsely claiming Aboriginality (under the Oaths and Affirmations Act 2018)⁵
- The need for the application of a rigorous eligibility process when seeking Aboriginal funds
- Consideration for the Stolen Generations
- Problems with the Commonwealth definition of Aboriginality
- The establishment of a resourced Aboriginal community-controlled independent regulatory authority tasked with the responsibility for researching and processing Confirmation of Aboriginality applications. This authority would then act as an archive for Confirmation of Aboriginal certificates.

Community members endorsed the view of community acceptance that requires “a clear demonstration of belonging to a community, involvement in the Aboriginal community and community-based organisations - *If you don't have a real community connection, you should not be able to access Aboriginal services or programs*”.

Community members believe that the establishment and implementation of a rigorous process and clear messaging that those making a false claim **will** be prosecuted and will act as a deterrent in the future.

“We’re talking about financial fraud. Major fraud. And I’ve never seen a prosecution for it.”
Community member

Employment

Some forum participants expressed their perception that employers who have a percentage of Aboriginal employment target written into their contract with commonwealth and/or state government departments do not apply rigour to identification because they are driven by financial incentives to meet the required targets.

Participants were adamant that a stricter process was required in light of the potential for culturally unauthorised persons to hold decision-making roles in community-controlled organisations, or senior officials in designated positions in government.

The forum called for the cessation of the on-line employment processes, where individuals can choose to ‘tick-a-box’ to identify as being of Aboriginal and/or Torres Strait Islander descent, particularly in the Victorian Public Sector (VPS).

The recruitment to Identified and Designated positions within the VPS was a key concern. The selection criteria/job requirements for these positions are designed to attract applicants with the appropriate skills, attributes and experience that enable them to work effectively and sensitively

⁵ Oaths and Affirmations Act 2018, No. 6 of 2018, Part 4 – Statutory Declarations. Section 36 *Offence to make false statutory declaration*. A person must not make a statement in a statutory declaration that the person knows to be untrue. Penalty: 600 penalty units or imprisonment for 5 years or both.

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on Aboriginal issues and/or with Aboriginal Australians. This requires:

- an understanding of the issues affecting Aboriginal and/or Torres Strait Islander people, and
- an ability to communicate sensitively and effectively with Aboriginal and/or Torres Strait Islander people.

It is not clear how any person who does not wish to identify meets the criteria for an Identified or Designated position or is able to successfully function in the role. This is unacceptable to the AJC.

The AJC have worked closely with DJCS on the development of many strategies and initiatives over the last 20 years including the *Koori Employment and Career Strategy 2017 – 2020*. The Strategy acknowledges that:

*"Employing a workforce that is representative of the community helps us to develop trust and stronger engagement, which ultimately helps us meet the needs of those communities. The unique skills, knowledge and experience of Koori people add significant value in the department's program design and delivery, and is pivotal to the success of our work towards achieving positive Koori outcomes"*⁶.

Under this Strategy, Aboriginal employees have access to a range of programs and initiatives including an Aboriginal Mentoring Program and Aboriginal Employee Staff Network.

The option for DJCS employees to self-identify for statistical purposes only is rejected and should cease immediately.

Education

The support of Aboriginal and Torres Strait Islander students in Higher Education is crucial, however some universities do not require Confirmation of Aboriginality and there is no regulatory body to provide oversight of fraudulent claims.

Confirmation of Aboriginality extends to Study Assistance and Support. Scholarship applicants are generally linked to Indigenous Higher Education Centres (IHEC) or Indigenous Support Workers. IHEC are located in Australian Universities to provide support to Indigenous students, further Indigenous academic studies, create a network of Indigenous students and academics and provide an Indigenous presence on university campuses.

The Commonwealth Tutorial Assistance Program is available through the Indigenous Tutorial Assistance Scheme (ITAS) to eligible Indigenous students undertaking tertiary or VET studies. Where a scholarship recipient is undertaking study at TAFE students and where available, will be linked to Indigenous Support Workers (ISW).⁷ ISW's provide support and advice to Indigenous students while studying.

The AJC is concerned that these practices also occur within DJCS in relation to applicants for the Aboriginal Graduate Scheme, Aboriginal Tertiary Scholarship Program, Youth Employment Scheme Traineeships and the Aboriginal Undergraduate Cadetship Program.

Within Corrections Victoria, Youth Justice and Victoria Police programs and services aimed at improving educational outcomes for our men, women and youth are wrongfully being accessed

⁶ Koori Employment and Career Strategy (2017): The State of Victoria Department of Justice and Regulation. Published by People and Culture, Department of Justice and Regulation, Melbourne, Victoria, Australia

⁷ The use of the word "Indigenous" is the terminology used by the Commonwealth.

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by individuals who are claiming to be Aboriginal.

Conclusion and Recommendations

The AJC recognise that the issue of Confirmation of Aboriginality is deep and complex. There are many different perspectives and considerations, particularly for those members from the Stolen Generations, our young Aboriginal children in out-of-home care, for our men and women who are in prison and our at-risk youth.

The community conversations that have taken place to date have clearly identified that there is broader community concern regarding the processes currently in place for confirming Aboriginality. Community participants strongly voiced their concerns and approached the conversations with a positive attitude that something good could come out of their contribution.

DJCS has carriage of legislation that affects the lives of Aboriginal people and communities and has a greater responsibility to address the underlying causes of the high levels of Aboriginal people in custody and the justice system.

It is envisaged that, with strong leadership by DJCS, our other government partners of the Aboriginal Justice Forum will also take note of these recommendations and take action to address the ongoing concerns of the Aboriginal community and take steps to address the issues identified.

In the pursuit of self-determination, and to honour the lengthy discussions on this topic at AJF's since 2014, the Aboriginal Justice Caucus make the following recommendations to the Department of Justice and Community Safety.

Aboriginal Justice Caucus – Recommendations to the Department of Justice and Community Safety:

1. That an independent, well-resourced Aboriginal-led authority be established tasked with the responsibility of researching and processing Confirmation of Aboriginality applications. This authority will then become the repository of all approved Confirmation of Aboriginality applications.
2. This independent authority will assist and refer individuals to existing organisations for members of the Stolen Generations to research their family connections.
3. That applications for Confirmation of Aboriginality should also include the requirement for the applicant to provide a written statement from an Aboriginal Community Controlled Organisation verifying their knowledge of the applicant and their Aboriginal identity.
4. That the use of Statutory Declarations as a form of confirming Aboriginal identity is abolished immediately.
5. That fraudulent claims of Aboriginality be prosecuted under the Oaths and Affirmations Act 2018, No. 6 of 2018, Part 4 – Statutory Declarations Sect 36.

Appendix 3 – Aboriginal organisations and services that sign off on CoA applications

Region / Name:

Do they sign off on CoA?

HUME ACCOs / Services:

Rumbalara Aboriginal Co-operative	YES
Mungabareena Aboriginal Co-operative	YES

LODDON MALLEE ACCOs / Services:

Bendigo and District Aboriginal Cooperative (BDAC)	YES
Murray Valley Aboriginal Co-Operative	YES
Mallee District Aboriginal Service - Swan Hill	YES
Njernda Aboriginal Corporation	YES

GRAMPIANS ACCOs / Services:

Goolum Goolum Aboriginal Co-Operative - Horsham	YES
Ballarat and District Aboriginal Cooperative (BADAC)	YES

WESTERN METROPOLITAN ACCOs / Services:

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BARWON SOUTH-WEST ACCOs / Services:

Gunditjmara Aboriginal Cooperative Ltd	YES
Gunditj Mirring Traditional Owners Aboriginal Corporation	YES

GIPPSLAND ACCOs / Services:

Gippsland and East Gippsland Aboriginal Co-Operative (GEGAC)	YES
Ramahyuck District Aboriginal Corporation	YES
Moogji Aboriginal Council East Gippsland Inc.	YES
Gunaikurnai Land and Waters Aboriginal Corporation	YES

NORTHERN METROPOLITAN ACCOs / Services:

Victorian Aboriginal Child Care Agency (VACCA)	YES
Link up Victoria (VACCA)	YES
Aboriginal Advancement League (AAL)	YES
Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation - Abbotsford	YES

EASTERN METROPOLITAN ACCOs / Services:

Oonah Belonging Place	YES
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SOUTHERN METROPOLITAN ACCOs / Services:

Dandenong and District Aboriginal Co-Operative Ltd	YES
Bunurong Health Service	YES
Willum Warrain Aboriginal Association Inc.	YES

Note: There were a small number of organisations that did not respond to the AJC survey. They have been omitted from this list.

Appendix 4 – Aboriginal Justice Caucus – Signatories to *Burra Lotjpa Dunguludja*

Organisation	Signatory to AJA4
Aboriginal Community Justice Panel	Chairperson
Aboriginal Housing Victoria	Chief Executive Officer
Dhelk Dja Indigenous Family Violence Partnership Forum	Koori Caucus representative
Djirra	Chief Executive Officer
Independent Prison Visitor Scheme	Koori Independent Prison Visitor
Koorie Youth Council	Executive Officer
Barwon South West Regional Aboriginal Justice Advisory Committee	Chairperson
Eastern Metropolitan Regional Aboriginal Justice Advisory Committee	Chairperson
Gippsland Regional Aboriginal Justice Advisory Committee	Chairperson
Grampians Regional Aboriginal Justice Advisory Committee	Chairperson
Hume Regional Aboriginal Justice Advisory Committee	Chairperson
Loddon Mallee Regional Aboriginal Justice Advisory Committee	Chairperson
Northern Metropolitan Regional Aboriginal Justice Advisory Committee	Chairperson
Southern Metropolitan Regional Aboriginal Justice Advisory Committee	Chairperson
Western Metropolitan Regional Aboriginal Justice Advisory Committee	Chairperson
Victorian Aboriginal Child Care Agency	Chief Executive Officer
Victorian Aboriginal Community Controlled Health Organisation	Chief Executive Officer
Victorian Aboriginal Education Association Incorporated	President
Victorian Aboriginal Justice Advisory Committee	Chairperson
Victorian Aboriginal Legal Service	Chief Executive Officer