



Submission to the inquiry into injustice affecting First Nations people

**in the areas of housing, secondary
and tertiary education, and health**

February 2024



Acknowledgement

VEOHRC acknowledges the Wurundjeri people of the Kulin Nation as the Traditional Custodians of the lands on which we work. We also work remotely and serve communities on the lands of other Traditional Custodians. We pay our respects to their Elders past and present.

We also recognise the historic and ongoing harm caused by racism to First Nations people.

Cover artwork: Madison Connors, *Gorakor Wunbuni Yingurni (Walk Gently Today)* (2023)

8 February 2024

Attn: Hugh de Kretser
Chief Executive Officer
Yoorrook Justice Commission
54 Wellington Street
Collingwood VIC 3066

Dear Yoorrook Justice Commissioners

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) welcomes the Yoorrook Justice Commission's inquiry into injustice affecting First Nations people in the areas of housing, secondary and tertiary education, and health (Inquiry).

About VEOHRC

VEOHRC is an independent statutory body with responsibilities under the following laws:

- *Equal Opportunity Act 2010* (EO Act)
- *Charter of Human Rights and Responsibilities Act 2006* (the Charter)
- *Racial and Religious Tolerance Act 2001* (RRTA)
- *Change or Suppression (Conversion) Practices Prohibition Act 2021*.

Our role is to protect and promote human rights and eliminate discrimination, sexual harassment, vilification, victimisation, and conversion practices to the greatest extent possible. VEOHRC does this through a range of functions:

- **Resolving complaints** of discrimination, sexual harassment, racial and religious vilification, victimisation, and change or suppression practices by providing a free confidential dispute resolution service.
- **Research** to understand and find solutions to systemic causes of discrimination and human rights breaches.
- **Education and information** to help people understand and assert their rights, conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations and provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.

- **Advocacy** to raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views/behaviours.
- **Monitoring** the operation of the Charter to track Victoria's progress in protecting fundamental rights.
- **Enforcement** including intervening in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination, sexual harassment, victimisation and conversion practices.

Overview

This submission responds to the issues papers released by the Yoorrook Justice Commission relating to this Inquiry and focuses on discrimination and other impediments that deny First Nations people opportunities in education and access to housing and healthcare in Victoria.

In the first half of this submission, VEOHRC outlines the legislative framework protecting against racism, or race discrimination and racial vilification, under the EO Act and RRTA. This submission makes the case for bolstering protections under discrimination law to improve compliance, and in so doing, work towards eliminating discrimination against First Nations people in Victoria. The second part of this submission outlines Aboriginal and Torres Strait Islander human rights under the Charter in the areas of health, education and housing, and makes recommendations for strengthening this framework to comply with international treaty obligations on the rights of Indigenous peoples and on universal economic, social and political rights.

VEOHRC acknowledges and supports Aboriginal community-controlled organisations (ACCOs) in their leadership and advocacy on the issues relevant to this Inquiry. In particular, VEOHRC acknowledges the work of the Victorian Aboriginal Legal Service, Aboriginal Housing Victoria and the Victorian Aboriginal Community Controlled Health Organisation, who all play critical roles representing and supporting First Nations people in the housing, education and health systems.

Recommendations summary

Recommendation 1	The <i>Equal Opportunity Act 2010</i> should be amended to increase enforcement powers.
Recommendation 2	Funding should be made available to develop and deliver sustained education addressing racism against First Nations people for duty holders and the community.
Recommendation 3	Rights to an adequate standard of living, education and health should be added to the Charter.
Recommendation 4	Self-determination should be recognised in the Charter and First Nations people should be consulted with to determine the application and operation of the right.
Recommendation 5	An independent cause of action should be made available under the Charter.
Recommendation 6	An equal-access costs approach should be adopted for Charter claims.
Recommendation 7	Compensatory remedies should be made available for breaches of the Charter.
Recommendation 8	Alternative dispute resolution should be added as an option under the Charter.

These changes, in combination with the reforms to the EO Act recommended in the first half of this submission, would play a pivotal role in addressing inequality and upholding the human rights of First Nations people in Victoria.

Thank you for the opportunity to make a submission to the Yoorrook Justice Commission on these important issues.

Yours sincerely



Ro Allen

Victorian Equal Opportunity and Human Right Commissioner



Discrimination, sexual harassment and victimisation

This section discusses the EO Act which protects First Nations people from discrimination on the basis of race and other attributes, as well as providing protection against sexual harassment and victimisation; and the RRTA, which protects First Nations people from racial and religious vilification.

Victorian protections against race discrimination

Aboriginal and Torres Strait Islander people experience some of the highest levels of prejudice and discrimination in Australia. The Diversity Council of Australia's Inclusion@Work Index 2021–2022 found that First Nations workers experienced the highest levels of exclusion, with 1 in 2 workers reporting having experienced some form of discrimination and/or harassment in the past year,¹ making them twice as likely as non-First Nations workers to have experienced discrimination or harassment.²

In Victoria, the EO Act protects people from discrimination (including race discrimination), sexual harassment and victimisation in certain areas of public life. These areas of 'public life' include education, healthcare (the provision of goods and services), housing (provision of accommodation) and employment, among others.³ Duty holders under the EO Act, including employers, schools, universities, healthcare providers and accommodation providers, have a legal responsibility to take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation as far as possible – known as the 'positive duty'.⁴ The positive duty means that duty holders legally need to be taking steps to address drivers of discrimination, sexual harassment and victimisation. However, as discussed below, there are some issues relating to the enforcement of the positive duty.

VEOHRC released a *First Nations data report* in 2023. This data report presents data gathered from VEOHRC's enquiries and complaints services about the experiences of First Nations people between 2017–18 and 2022–2023. The report outlines that since 2017–18, 157 First Nations people made complaints about discrimination, sexual harassment and victimisation to VEOHRC. The most common issues raised by First Nations people in their complaints were disability discrimination (35%) and race discrimination (21%). This broadly reflects the overall number of

¹ Note that this is Australia-wide, Inclusion@Work Index 2021–2022, <https://www.dca.org.au/inclusion-work-index-2021-2022>.

² Inclusion@Work Index 2021–2022, <https://www.dca.org.au/inclusion-work-index-2021-2022>.

³ Equal Opportunity Act 2010 pt 4 divs 1 & 3.

⁴ Ibid, s 15.

complaints VEOHRC receives, as in 2021–22, the most common were disability and race.⁵ The most common areas of public life were in employment and the provision of goods and services.⁶ From 2019–20 to 2022–23, VEOHRC received 187 enquiries from First Nations people, raising 329 issues of discrimination. Of these, most issues were in the areas of retail (17%); health and medical providers (15%); and education (10%). Housing was also a key issue, with 6% of complaints from First Nations people relating to real estate services.

Victorian protections against racial vilification

The RRTA prohibits conduct that incites hatred, serious contempt for, revulsion or severe ridicule of a person or group of people because of their race or religion. Vilification complaints do not often relate to housing, education or health, given they are generally in the media or in public. There have been very few successful cases of vilification in the Victorian Civil and Administrative Tribunal (VCAT), and the Legal and Social Issues Committee in the Victorian Parliament recommended strengthening the RRTA to better protect people from vilification in 2021. Consistent with VEOHRC's overall complaints data, VEOHRC has received only a small number of racial vilification complaints from First Nations people – one or two complaints each year.

Barriers to reporting

In considering VEOHRC's complaints data, it is important to acknowledge the numerous barriers that Aboriginal and Torres Strait Islander people experience in reporting unlawful conduct, including (but not limited to):

- **Individual burden:** the fact that the onus is on individuals to make a complaint in order to address discrimination is a barrier to responding to instances of unlawful conduct.
- **Feeling hopeless or disempowered:** some may feel that reporting would not help, they may feel uncomfortable or embarrassed, or they may want to forget about the incident.⁷
- **Fear of victimisation:** people may fear backlash or unfair treatment because of their complaint and therefore do not report racist incidents.⁸

⁵ See Victorian Equal Opportunity and Human Rights Commission *Annual report 2021–22*, https://www.humanrights.vic.gov.au/static/442ca937630f7d8734091e1399b7686e/Resource_Annual_Report-2021-22.pdf, p 11–12.

⁶ Victorian Equal Opportunity and Human Rights Commission, *First Nations data report 2022–23*, <https://www.humanrights.vic.gov.au/resources/first-nations-data-report-2022-23/>, p 7.

⁷ https://humanrights.gov.au/sites/default/files/narf_scoping_report_2022_-_community_guide_0.pdf; Locked Out.

⁸ In Locked Out, some survey responders said that they were worried that making a complaint would affect their future chances of renting a property. This concern for 'blacklisting' was a greater issue for private renters in regional areas, where it is more difficult to remain anonymous. <https://thediomat.com/2022/03/why-australias-indigenous-people-fear-the-police/>; https://humanrights.gov.au/sites/default/files/narf_scoping_report_2022_-_community_guide_0.pdf.

- **Internalisation:** where individuals accept as true to varying degrees the negative beliefs, stereotypes, or prejudices, which can normalise racism.
- **Lack of awareness:** some people may not be aware of what constitutes discrimination or that many forms of racism are unlawful.
- **Lack of trust in agencies:** there may be a perception that the agencies responsible for receiving complaints will themselves be discriminatory towards First Nations people.⁹
- **Accessibility:** the process for reporting may be difficult to navigate.

While there are some barriers that are unique to, or exacerbated for, First Nations people, many are shared across the spectrum of attributes in the EO Act. These barriers make it very challenging to report racism, and as such, VEOHRC's complaint figures do not capture the scale of discrimination experienced within the community.

Discrimination in accommodation and housing

It is increasingly difficult to obtain housing as a First Nations person.¹⁰ First Nations people face many hurdles in accessing housing, including lack of affordable housing, lack of culturally safe services, onerous and complex administrative processes and racism.¹¹ Discrimination can occur when seeking, living in, or leaving a rental property.

In 2022, research conducted by Swinburne University of Technology (SUT) demonstrated that discrimination in the rental market disproportionately impacts First Nations people. Aboriginal and Torres Strait Islander people face prejudice, discrimination and structural disadvantage at every step of the rental process.¹² The support workers and professionals interviewed in this research identified discriminatory practices, which intersected with other barriers, such as discrimination on the basis of low income, having lived in social housing, being a single parent, or having pets.¹³ Further, shortages of social housing, coupled with high costs of home purchase, mean that privately rented dwellings provide a significant and necessary housing option for Aboriginal residents within Victoria, both in metropolitan and regional areas. This research highlights the intersectional discrimination that First Nations people experience in the private rental market.

⁹ https://humanrights.gov.au/sites/default/files/narf_scoping_report_2022_-_community_guide_0.pdf.

¹⁰ See Department of Families, Fairness and Housing, *Annual Report 2021–2022*, <https://www.dffh.vic.gov.au/sites/default/files/documents/202209/FINAL%20DFFH%20Annual%20Report%202021-22.pdf>.

¹¹ Victorian Auditor General's Office. (2014). *Accessibility of Mainstream Services for Aboriginal Victorians*. Victorian Government. No 325.

¹² titled 'Aboriginal Private Rental Access in Victoria: excluded from the start' <https://www.swinburne.edu.au/news/2022/10/think-private-renting-is-hard-first-nations-people-can-be-excluded-from-the-start/>

¹³ <https://theconversation.com/think-private-renting-is-hard-first-nations-people-can-be-excluded-from-the-start-192392>.

There is a concerning increase in accommodation discrimination more generally, which includes VEOHRC's First Nations complainants. In 2022–23, VEOHRC received 85 complaints about accommodation discrimination compared to the previous year, which was an increase of 130%. This trend demonstrates that housing, particularly private rentals, is a key area requiring discrimination education and prevention.

Nonetheless, the number of complaints that VEOHRC receives from First Nations people regarding housing is still relatively low, with only eight complaints being received between 2021 and 2023. This lower number is likely to be just the tip of the iceberg in terms of the actual number of experiences of discrimination. First Nations people are not necessarily aware of our services, or that they can make a complaint. Complaint numbers may also be low as it is notoriously difficult to prove discrimination in private rental applications, as reasons are not generally given for unsuccessful applications.

In 2022, VEOHRC partnered with Aboriginal Housing Victoria to develop education programs for Aboriginal Housing Victoria and workers at the Aboriginal Private Rental Assistance Program. These programs sought to build an understanding of the rights of First Nations renters, the obligations on rental providers and real estate agents, and avenues for making complaints of discrimination at VEOHRC. During the delivery of these programs, Aboriginal Housing Victoria workers and other participants reported experiences that reflected the research conducted by SUT in 2022, particularly in terms of the extent of race-based discrimination within the private rental market.

In 2012, VEOHRC released a report on discrimination in the rental market – *Locked out: discrimination in Victoria's private rental market report* (Locked Out). Locked Out found that discrimination was widespread and that a significant number of people who participated in the survey indicated they were denied rental properties due to their parental status, age, marital status, race and disability. The personal stories contained in Locked Out provide powerful insights that illustrated the discrimination faced by renters, including:

- 'The agent was not interested in my income or length of employment once she realised I was Aboriginal.'
- 'The landlord would not allow installation of ramps, handrails, etc. as needed, as they felt it would devalue their property.'
- 'The property manager demanded to know why two applicants of the same sex were applying for a one-bedroom property. When we made it clear that we were a couple, the property manager advised that they would prefer a single applicant but continued to receive applications from heterosexuals.'
- 'I think I'm knocked back because I'm a single mother. I get curious and go past there and I see there's a couple in there or a family. I'm going to end up homeless.'
- 'It affected everything I've tried to build my life up for. I can't get a job without a home.'

While this report was released 12 years ago, the issues remain. VEOHRC is concerned that due to factors such as the current housing affordability crisis and an increasing number of First Nations people relying on the private rental market, housing discrimination may have become significantly more prevalent.¹⁴

Discrimination in health services

Healthcare providers have a legal responsibility under the EO Act to ensure that everyone who uses their services is treated fairly and without discrimination.¹⁵ However, racism and discrimination continues to directly impact First People's experiences of healthcare,¹⁶ in relation to both access to healthcare and the quality of services and treatment provided.¹⁷ Discrimination is also experienced by First Nations people who are practitioners in healthcare settings, within the context of employment. Racism exacerbates psychological stress, which has carry-on impacts for mental and physical health outcomes.¹⁸ The gap in health outcomes between Aboriginal and non-Aboriginal people in Victoria remains unacceptably high, particularly regarding rates of cancer and hospitalisations for preventable causes.¹⁹

Evidence suggests that First Nations people experience behaviour that is informed by racial prejudice and unconscious bias in health settings, which also have a bearing on clinical decision-making and health outcomes.²⁰ Despite their prevalence, prejudice and unconscious bias are difficult to address using the EO Act. Although unconscious bias can amount to discrimination under the Act,²¹ it can be difficult for people experiencing discrimination to bring a claim, as behaviour driven by unconscious bias can be subtle, and therefore difficult to prove. This is also the case where discrimination is systemic, meaning the systems, structures, organisational behaviours are inherently discriminatory, as it can be challenging to pinpoint the unfavourable behaviour with sufficient evidence to bring a claim.

A study from 2014 which looked at racism in healthcare for Victorian Aboriginal communities found that nearly one-third of the survey sample of 755 reported experiencing racism within

¹⁴ Census data demonstrates an increased reliance on the private rental market in Victoria by First Peoples, see 2016, 2011, and 2006 Census years, which showed an increase from 27.9 per cent to 35.4 per cent of the population. Stone, W.M., Goodall, Z.A, Peters, A. and Veeroja, P. (2021) Aboriginal Private Rental Access in Victoria: 'Excluded from the Start', A Report Commissioned by the Consumer Policy Research Centre, Swinburne University of Technology, Melbourne.

¹⁵ VEOHRC is currently developing a Race Discrimination Guideline, which focuses on racial discrimination in employment. VEOHRC can provide the Yoorrook Justice Commission with a copy of the guideline once published.

¹⁶ Aboriginal people are 47% more likely to experience racism in a healthcare setting in Victoria than non-Aboriginal adults. See <https://www.firstpeoplesrelations.vic.gov.au/victorian-government-aboriginal-affairs-report-2021/health-and-wellbeing>.

¹⁷ [Racism-in-Australias-health-system-AIDA-policy-statement_v1.pdf](#)

¹⁸ [Ibid.](#)

¹⁹ <https://www.firstpeoplesrelations.vic.gov.au/victorian-government-aboriginal-affairs-report-2021/health-and-wellbeing>.

²⁰ Hall WJ, Chapman MV, Lee KM et al. Implicit racial/ethnic bias among health care professionals and its influence on health care outcomes: a systematic review. *Am. J. Public Health* 2015; 105: 60–76.

²¹ relying on *Austin Health v Tsikos* [2023] VSCA 82.

health settings.²² Of those experiences in health settings, most reported being a target of racist names, jokes or teasing, or hearing comments that used stereotypes of Aboriginal Australians.²³ This experience was reported by 52% of respondents who reported racism in this setting.

Although studies suggest that First Nations people continue to experience unfair treatment in health settings,²⁴ few complaints appear to be raised and few cases in Australian courts tackle this issue. Between 2021 and 2023, VEOHRC received 11 complaints on the basis of race/other affecting First Nations people in health or in employment within the healthcare system, which was 13% of total complaints from First Nations people over that same time period. In 2019–2020 15% of complaints from First Nations people were about health and medical providers. The number of actual experiences of discrimination are also likely to be much higher, given the barriers that individuals face in making complaints.

Discrimination in education

It is against the law for teachers or staff at a school, university or TAFE to bully or treat someone unfairly because of a protected attribute under the EO Act, such as race. Under the EO Act, education providers also have a positive duty to eliminate discrimination, sexual harassment and victimisation as far as possible. Between 2021 and 2023, VEOHRC received eight complaints from Aboriginal Victorians in education settings (schools or tertiary institutions) or in employment within educational settings (out of a total of 83 complaints, reflecting 9.6% of all complaints from First Nations people). However, there is likely to be a much higher incidence of race discrimination within schools and tertiary institutions. For instance, the Commission for Children and Young People's 2023 report *Let us learn* found that racism persists from early childhood settings onwards, and that there is a lack of cultural safety.²⁵

Commissioner for Aboriginal Children and Young People Meena Singh wrote:

'Sadly, devastatingly, Aboriginal children and young people told me about experiences of racism in school. Whether it be feeling unseen through culturally inappropriate practices, or feeling unsafe through racialised bullying, too many Aboriginal children and young people must deal with racism every day, whether they are living with their immediate family or in out-of-home care.'²⁶

²² Margaret A Kelaher, et al 'Experiencing racism in health care: the mental health impacts for Victorian Aboriginal communities', < <https://www.mja.com.au/journal/2014/201/1/experiencing-racism-health-care-mental-health-impacts-victorian-aboriginal>>.

²³ Ibid.

²⁴ See for instance the international research mentioned in this article 'Review article: Implicit bias towards Aboriginal and Torres Strait Islander patients within Australian emergency departments' 28 November 2020 < <https://doi.org/10.1111/1742-6723.13691>>.

²⁵ *Let us learn: Systemic inquiry into the educational experiences of children and young people in out-of-home care* report was tabled in the Victorian Parliament on 16 November 2023 <https://ccyp.vic.gov.au/assets/Publications-inquiries/let-us-learn/CCYP-Education-inquiry-report-FINAL.pdf>.

²⁶ <https://ccyp.vic.gov.au/assets/Publications-inquiries/let-us-learn/CCYP-Education-inquiry-report-FINAL.pdf>.

Unfortunately, there is limited research regarding First Nations people's experiences of discrimination and racism within school settings. This could be attributed to numerous barriers individuals face in making complaints. A 2017 survey from Australian National University's Centre for Social Research & Methods found that close to 20% of students from Aboriginal and Torres Strait Islander backgrounds reported experiences of racial discrimination from their teachers, nationwide,²⁷ and 60% of students witnessed other students' experiences of racial discrimination.²⁸ This suggests that this problem is far larger than the complaints data reveals, and that a strong systemic response is required to ensure that all students have access to an education they feel safe in.

Issues with the current framework

Enforcement of discrimination protections

In order to improve the effectiveness of discrimination law in Victoria, VEOHRC requires increased powers to enforce the EO Act.

In 2010, the EO Act was introduced with a number of critical reforms to enforce the Act and address systemic issues. However, some of these enforcement powers were removed before commencement, resulting in fewer enforcement options. While VEOHRC can investigate noncompliance with the positive duty, section 127 of the EO Act imposes a high threshold in determining which matters can be investigated. For example, an investigation into a matter can only occur when the matter cannot reasonably be expected to be resolved by dispute resolution or by making an application to the VCAT and where the matter relates to a class or group of persons. VEOHRC does not have the power to compel attendance, information or documents from a party unless it obtains an order from VCAT. Potential investigation outcomes are currently limited to:

- taking no further action
- entering into an agreement with the party about action required to comply with the EO Act
- referring the matter to VCAT
- making a report to the Attorney-General or Parliament.

With fewer enforcement powers for the regulator, the burden on individuals, including First Nations people, to bring complaints in response to unlawful conduct is greater. Reinstating greater enforcement powers in the EO Act, including the ability to undertake own-motion public inquiries, compelling attending information and documents, seeking enforceable undertakings and issuing compliance notices, would enable VEOHRC to facilitate and enforce compliance, and better address systemic issues. Further, the threshold for investigations under the Act

²⁷ ANU Centre for Social Research and Methods, 'SOAR - Speak out against racism', available here [SOAR - speak out against racism | ANU Centre for Social Research & Methods](#)

²⁸ [Ibid.](#)

should be lowered to make it easier for VEOHRC to investigate parties for EO Act noncompliance.

Recommendation 1: Amend the *Equal Opportunity Act 2010* to increase enforcement powers.

Amend the EO Act to reinstate VEOHRC's powers to:

1. undertake own-motion public inquiries
2. investigate any serious matter that indicates a possible contravention of the EO Act:
 - (a) without the need for a reasonable expectation that the matter cannot be resolved by dispute resolution or the VCAT
 - (b) with the introduction of a 'reasonable expectation' that the matter relates to a class or group of persons
3. compel attendance, information and documents for any purposes of an investigation or public inquiry without the need for an order from VCAT
4. seek enforceable undertakings and issue compliance notices as potential outcomes of an investigation or a public inquiry.

These reinstated and strengthened powers and functions under the EO Act should apply to the regulation of discrimination (including race discrimination), sexual harassment and victimisation, and would ensure that the burden of enforcement is shifted in part, from individual complainants to Victoria's human rights regulator.

Lack of understanding of the positive duty

As mentioned, duty holders have an obligation under the EO Act to take proactive steps to prevent discrimination, sexual harassment, and victimisation from occurring in the first place. However, there is a poor understanding of the positive duty to prevent discrimination and to identify risk areas for discrimination on the basis of race in education, housing and health. In addition to introducing enforcement powers to enable VEOHRC to engage with non-compliant duty holders, delivering education to service providers in these areas would also contribute to prevention efforts, which will lead to improved positive duty compliance. VEOHRC is currently developing a guideline for racism in the workplace and will recommend to government that this guideline is expanded to cover other areas of public life such as education, goods and services and accommodation. Organisations in health, education and housing need to turn their minds to practical and innovative ways of tackling racism towards First Nations people, rather than simply responding to it when it happens.

Recommendation 2: Funding should be made available to develop and deliver sustained education addressing racism against First Nations people for duty holders and the community.

This would provide duty holders with information about their obligations, as well as best practice approaches to preventing racism, before it happens. It would also empower community to know their rights and take action against discrimination.



The Charter of Human Rights and Responsibilities

This section discusses the Charter which provides protections for First Nations people by protecting and promoting various human rights. The Preamble to the Charter sets out foundational principles on which the Charter is based, including an acknowledgement of the special importance of human rights for First Nations people with diverse spiritual, social, cultural and economic relationships with their lands and waters.

The distinct cultural rights held by First Nations people are also recognised in section 19(2) of the Charter. Public authorities are required to act compatibly with human rights and to consider human rights in making decisions.²⁹ This includes government departments, agencies, local councils, statutory bodies, and organisations that deliver public services on behalf of the Victorian Government. The Charter also applies to all Victorian government schools, as well as tertiary education institutions, public hospitals and public housing providers where they are a public authority.³⁰ In Victoria, a person can only raise a Charter argument in court if they have standing to bring a separate proceeding against the public authority.

Existing Charter rights

Charter rights relevant to First Nations people in the areas of housing, education and healthcare are listed below.

Equality (section 8)

The Charter includes protection against discrimination through the right to equality (section 8), which provides that every person has the right to enjoy their human rights without discrimination and that every person has the right to equal and effective protection against discrimination. Discrimination is defined by reference to the EO Act. This means that a person cannot be treated unfavourably because of their personal characteristics protected by the law, including race (unless the right is limited in a lawful, reasonable and justifiable way having regard to the factors in section 7(2) of the Charter).

²⁹ Charter, s 38.

³⁰ In *Metro West v Sudi* (Residential Tenancies) [2009] VCAT 2025, VCAT found that Metro West Housing was exercising public functions on behalf of the State or a public authority under s 4(1)(c), and so despite being a private company, it was considered a public authority under the Charter.

Privacy (section 13)

The Charter's right to privacy under section 13 protects an individual's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Broadly speaking, the right protects against unjustified interference with an individual's private life. In a housing context, for instance, the right of an individual not to have their home interfered with unlawfully or arbitrarily is of particular importance in the provision of public housing. The Director of Housing is a public authority and therefore has obligations under the Charter to act compatibly with human rights and give proper consideration to human rights in making decisions. Evicting a person from public housing can be a severe infringement of their human rights and may be unlawful under the Charter unless the interference can be demonstrably justified.

Protection of families and children (section 17)

Section 17(1) of the Charter provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. Section 17(2) provides that every child has the right, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child. At international law, the concept of a child's best interests involves securing the holistic physical, psychological, moral and spiritual integrity of the child and promoting their human dignity,³¹ is also relevant to public healthcare, education and housing settings. For children who are homeless or who are living in insecure housing, the lack of a secure and permanent home can interrupt their schooling and negatively impact their health and wellbeing.

In the statement of compatibility to the Education and Training Reform Amendment (Land Powers) Bill 2023 (Vic), the Minister for Education acknowledged that the need to promote a child's development and education is in a child's best interests and that, by introducing principles around the importance of access to education during early childhood, the Bill promoted the right in section 17(2) of the Charter.

In the housing context, the right to the protection of families and children has been raised in cases concerning evictions from public housing,³² transfers of public housing tenants to safer housing³³ and the making of certain tenancy orders.³⁴

³¹ United Nations Committee on the Rights of the Child, *General Comment No. 14: The Right of a Child to have his or her Best Interests Taken as a Primary Consideration* (art.3, para.1), 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [5].

³² *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 [217], [221].

³³ Public Interest Advocacy Centre, *Human Rights Charter Review – respecting Victorians* (24 June 2011), p 13.

³⁴ *Giotopoulos v Director of Housing* [2011] VSC 20 [88]-[89].

Cultural rights (section 19)

Warning to Aboriginal and Torres Strait Islander readers: this foreword includes the name of a deceased First Nations person. Her name is used with the permission of her family.

Section 19(1) of the Charter provides that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language. Section 19(2) of the Charter states that Aboriginal people hold distinct cultural rights and must not be denied the right, with other members of their community, to:

- enjoy their identity and culture
- maintain and use their language
- maintain their kinship ties
- maintain their distinctive spiritual, material, and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Case study: Coronial inquest into the passing of Veronica Nelson

The coronial inquest into the passing of Veronica Nelson is a tragic example of the intersections between the criminal justice system and healthcare, and the impacts of systemic racism on First Nations people's access to healthcare.

VEOHRC intervened in the inquest to make submissions to the Coroner on matters relating to human rights under the Charter. VEOHRC argued that certain provisions of Victoria's *Bail Act 1977* were incompatible with Charter rights, including the right to equality, given their disproportionate impact on First Nations women. VEOHRC also submitted that stigma and systemic discrimination contributed to the poor treatment and inadequate healthcare Veronica received, and that the lack of culturally safe medical care for First Nations people in prison infringed rights to equality and cultural rights, as well as the right to humane treatment when deprived of liberty.

The Coroner considered the way in which potential human rights breaches may have contributed to Veronica's passing, and made multiple findings on the basis of human rights at the conclusion of the inquest. The Coroner noted that the right to life requires public authorities to take measures to prevent and protect individuals against the arbitrary deprivation of life, and necessarily includes the right to appropriate healthcare within a closed or custodial environment.³⁵ He noted that in international jurisprudence the right to life includes an obligation on the state to ensure that the health and

³⁵ Findings, *Inquest into the Passing of Veronica Nelson* (COR 2020 0021) (30 January 2023) <<https://coronerscourt.vic.gov.au/sites/default/files/2023-08/COR%202020%200021%20-%20Veronica%20Nelson%20Inquiry%20-%20Form%2037%20-%20Finding%20into%20Death%20with%20Inquest%20-%2030%20January%202023%20-%20Amended%2024%20August%202023.pdf>> p 262 [767].

wellbeing of people in detention are adequately secured by providing requisite medical assistance, prompt and accurate diagnosis and care and regular supervision.³⁶

In relation to healthcare, the Coroner found that:

- the healthcare guidelines applied to Veronica in prison denied prisoners a level of care equivalent to that available in the community and infringed their rights to life and to humane treatment when deprived of liberty in sections 9 and 22 of the Charter³⁷
- the medical treatment available to Veronica was inadequate and constituted cruel and inhuman treatment contrary to section 10 of the Charter³⁸
- the absence of bed-based care at the women's prison was discriminatory and infringed Veronica's rights to equality and life pursuant to sections 8 and 9 of the Charter³⁹

Veronica's care and treatment by both prison and medical staff was influenced by stigma, and that this causally contributed to her passing.⁴⁰

The need for Charter reform to promote the rights of First Nations people

The Charter rights outlined above only provide limited protections for First Nations people. For example, while rights to privacy, property and family may all be used to stop someone being evicted from their home, they do not place any positive obligation on government to provide safe, affordable, accessible housing.

There are also several rights, which are fundamental to people's everyday lives, that are not currently protected by the Charter. These include rights to health, housing and education, all areas of urgency for First Nations people. The Charter also does not sufficiently recognise the rights of First Nations people through a statutory right to self-determination. VEOHRC considers that First Nations people should be consulted regarding including the right to self-determination in the Charter, which would further support Victoria's First Nations communities to meet their social, cultural, health and economic needs and participate in the decisions that affect them.

³⁶ p 30.

³⁷ Ibid [416].

³⁸ Ibid [18].

³⁹ Ibid [653]-[654].

⁴⁰ Ibid [676].

Economic, social and cultural rights

VEOHRC considers that the Charter should be as comprehensive as possible and reflect the seven-core international human rights treaties to which Australia is a party. It should also reflect the interests and wishes of the Australian community by protecting rights that the community recognises as fundamental.

Under international doctrine, all human rights are 'universal, indivisible, interdependent and interrelated'.⁴¹ However, the Charter only protects civil and political rights, excluding economic, social and cultural rights (or ESC rights), including the rights to health, education and an adequate standard of living. This undermines universality, indivisibility and interrelatedness of human rights, and as such ESC rights should also be included in the Charter.

Right to health

The right to health is contained in article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), which protects the right of all people to the enjoyment of the highest attainable standard of physical and mental health. According to the UN Committee on Economic, Social and Cultural Rights, the right to health is not a right to be healthy, but rather a right that contains both freedoms and entitlements relating to health.⁴² These freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. The entitlements include the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health.

The right to health is enshrined in Queensland's *Human Rights Act 2019*. Section 37(1) of that Act provides that every person has the right to access health services without discrimination and section 37(2) provides that a person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person. This provision applies to developing laws, policies or decisions that relate to health services for particular demographics, including First Nations people, people with disability, women and children. In applying the right in Queensland, it necessary to consider whether health services are within safe physical reach for all sections of the population, especially First Nations people and people with disability. Queensland health officials must consider the right to health in their decisions around rolling out services and turn their mind to the impact on marginalised groups.

While the Queensland approach focuses on discrimination and equality aspects of the right to health, a right to health within the Victorian Charter could adopt a more fulsome approach to the right protecting the full content of the right. The UN Committee on Economic, Social and Cultural Rights recommend decision makers take positive steps to uphold the right to health, such as by

⁴¹ Vienna Declaration and Programme of Action, pt. I, para. 5, UN Doc. A/CONF.157/23 (1993), 32 ILM 1661 (1993) (adopted at the 1993 World Conference on Human Rights).

⁴² <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>, p 3.

working to provide the preconditions to a healthy life (i.e. food and nutrition, housing, access to safe and potable water and adequate sanitation).

The right to health provides a framework for healthcare from a human-needs perspective. While some aspects of this right are already mirrored in the Charter (for example, the right in section 10(c) to not be subjected to medical or scientific experimentation or treatment without full, free and informed consent), incorporating a specific right to health would provide important legal safeguards for the rights of First Nations people with health conditions and disability. In addition, a right to health in the Charter would inform the development of legislation and policy including by imposing additional scrutiny on new legislation that may impede the rights of First Nations people with mental health conditions, strengthening protections against discrimination within health service provision and contributing to greater fairness and adherence to human rights in decision-making about compulsory treatment and conditions within public healthcare facilities.

The right to an adequate standard of living

Everyone should have the right to safe and secure housing. Housing is essential to human dignity and wellbeing and is a crucial factor in addressing social and economic disadvantage. The ICESCR provides a right to an adequate standard of living, which includes the provision of housing. However, this right is not included in the Charter.

Introducing this right into the Charter would require public authorities to consider the provision of adequate housing in the creation and implementation of laws, regulations and policies, including decisions about the availability and location of public housing, as well as decisions about eviction and affordability. This right is not absolute, and limitations would need to be determined by law, as is the case for all rights. Some elements of this right would need immediate protection and other elements would need to be implemented over time, in line with the obligation of progressive realisation.⁴³

When included with other Charter rights, including the right to self-determination (discussed below), a right to an adequate standard of living would assist First Nations people in several ways, including:

- enhancing the access to housing for First Nations people
- empowering First Nations people to participate in the design, delivery and governance of housing services and programs that are culturally safe and appropriate
- addressing the historical and ongoing impacts of colonisation, dispossession and discrimination on the housing outcomes of First Nations people.

⁴³ Progressive realisation is reflected in article 2(1) and takes into account the fact that full realisation of all economic, social and cultural rights will take time, and allows for a level of flexibility.

VEOHRC has long called for this reform to the Charter, including advocating for the introduction of the right to housing in 2011.⁴⁴ The right to housing was also recommended by the Legal and Social Issues Committee's inquiry into homelessness in Victoria.⁴⁵ The formulation of this right to an adequate standard of living aligns with article 11 of the ICESCR.

The right to education

Everyone has the right to education. The right to education is reflected in Article 26 of the Universal Declaration of Human Rights, as well as the International Covenant on the Elimination of All Forms of Racial Discrimination and ICESCR. VEOHRC considers that the right to education should be included in Victoria's Charter.

The Charter currently protects the right to freedom of expression (section 15), which includes the freedom to seek, receive and impart information and ideas of all kinds. However, this right places limited positive obligations on education providers. Furthermore, the *Education and Training Reform Act 2006* (Vic) aspires to give free education for students under the age of 20, 'irrespective of the education and training institution they attend, where they live or their social and economic status'. However, this section is framed as a principle that does not give rise to, and cannot be taken into account, in any civil cause of action.

A right to education in the Charter would fill these gaps, requiring Parliament to consider the right when developing legislation and regulations and requiring public authorities to act compatibly with the right when implementing decisions, laws, regulations and policies relating to education, recognising the importance of education for human dignity, development and participation.

A right to education in the Charter could assist First Nations people by helping to ensure education is high quality, accessible and delivered in a culturally appropriate manner. This is especially important for those who face barriers due to poverty, remoteness, disability or other indicators of disadvantage. Available data shows that First Nations students are over-represented in expulsions, have almost twice the non-attendance rate and have lower attendance rates (although this rate is improving).⁴⁶

⁴⁴ https://www.humanrights.vic.gov.au/static/16c54603134736c7df204bc45da060f7/Submission-Scrutiny_of_Acts_and_Regulations_Committee-Four_year_review-Charter_review_submission-Jul_2011.pdf

⁴⁵ See recommendation 34 on page 200.

<https://www.parliament.vic.gov.au/4b00a5/contentassets/0c6d61c7d86d4971bf50c2573cb534b2/inquiry-into-homelessness-in-victoria---final-report.pdf>

⁴⁶ [Statistics on Victorian schools and teaching | vic.gov.au \(www.vic.gov.au\)](#); [Victoria: Aboriginal and Torres Strait Islander population summary | Australian Bureau of Statistics \(abs.gov.au\)](#). Also see www.education.vic.gov.au/Documents/about/programs/aboriginal/Current_Data-Participation_and_Inclusion.docx.

A Charter right to education would ensure that public authorities, including public schools, would be required to consider students' rights when making decisions that impact on these figures.

The right would require that functioning educational institutions and programs are available in sufficient quantity and provided in an accessible and safe environment.⁴⁷ Consistent with the right, education must be within safe physical reach, either by attendance at some reasonably convenient geographic location or via access to a 'distance learning' program. All institutions and programs are likely to require appropriate physical facilities, trained teachers receiving domestically competitive salaries, teaching materials, libraries and computer facilities. This right could be used by First Nations people, for instance, in asserting the right to for accessible education, which includes a culturally safe environment for First Nations students.

Enforcement of ESC rights

VEOHRC understands that governments in some countries have been reluctant to implement ESC rights due to uncertainty around whether a finding of noncompliance could be made for rights that require progressive realisation (such as the right to an adequate standard of living).

However, in VEOHRC's view, the justiciability (whether they are capable of being settled by a court) of ESC rights is not an impediment to enacting these rights in the Charter. This is because the ICESCR allows signatories to realise aspects of these rights progressively,⁴⁸ recognising that fully achieving economic, social and cultural rights will take time and will be dependent on available resources. In incorporating these rights into the Charter, public authorities would be required to progress expeditiously and effectively toward achieving goals and ensuring core obligations without discrimination, including through the adoption of laws, strategies and action plans. Unjustified regression, failure to allocate resources to meet core obligations and discrimination may lead to a breach of duties. Courts could adjudicate compliance with ESC rights by reference to the steps taken towards progressive realisation, and breaches of obligations capable of immediate application.

VEOHRC considers that direct incorporation of ESC rights into the Charter should occur alongside the development of procedures which enable remedies to be effective (see the discussion of remedies below). This would allow these rights to be justiciable, based on the question of whether parties have taken the procedural steps set out in the procedures, which give effect to these rights.

⁴⁷ See General Comment No. 13: The right to education (article 13) (1999), (Adopted by the Committee on Economic, Social and Cultural Rights at the Twenty-first Session, E/C.12/1999/10, 8 December 1999).

⁴⁸ According to the ICESCR, state parties to treaties have a core obligation to give effect to the rights recognised therein, 'by all appropriate means'. Article 2 of ICESCR requires signatories to 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

Incorporating the ICESCR provisions into domestic law is also legally required by Australia's international treaty obligations.

Recommendation 3: Rights to an adequate standard of living, education and health should be added to the Charter.

Right to self-determination

Self-determination is considered to be the most fundamental of all human rights and is widely acknowledged to be a principle of customary international law.⁴⁹ The right to self-determination is contained in several international instruments, including Article 1 of the International Covenant on Civil and Political Rights (ICCPR), Article 1 of the ICESCR and Article 3 of the Declaration on the Rights of Indigenous Peoples (UNDRIP). The United Nations Human Rights Committee described the right to self-determination as 'the essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.'⁵⁰ It was for this reason that it was placed as the first article of the ICCPR.

The Charter does not currently recognise the right to self-determination. The independent 8-year review of the Charter recommended that a right to self-determination be recognised in Victorian human rights law.⁵¹ Including the right in the Charter could lead to stronger legal recognition of the rights of First Nations Victorians in a way that is consistent with international law. It would mean that public sector staff and members of the Victorian Parliament would need to consider self-determination as they make policies and enact laws.

The Victorian Government has committed to the principles of self-determination set out in the Victorian Aboriginal Affairs Framework 2018–2023. However, the government has not yet reached an agreement with First Nations communities in Victoria on a shared definition of the right to self-determination. Government should work with First Nations community leaders and the First Nations people's Assembly to develop a shared understanding of the right to self-determination. Once established, options can be explored on how to include the legislative right to self-determination in the Charter, or potentially into legislation stemming from Treaty negotiations.

⁴⁹ <https://www.austlii.edu.au/au/journals/JIndigP/2012/7.pdf>.

⁵⁰ Human Rights Committee, CCPR General Comment 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples, 21st sess, UN Doc HRI/GEN/1/Rev.1 at 12 (13 March 1994), para 1.

⁵¹ <https://vpls.sdp.sirsidynix.net.au/client/search/asset/1295292/0>.

What is self-determination under UNDRIP?

UNDRIP outlines that the right to self-determination has two core components – firstly, the increased freedom to participate in decision-making, and secondly, the right to be free from discrimination. UNDRIP provides a universal framework for realising self-determination of First Nations people, under which States are entrusted for the realisation of self-determination through action and inaction. This framework includes:

- the right to life and liberty
- right to preserve distinct identity based on culture, religion, language and spiritual belief
- educational rights
- self-governance and participatory rights
- land resources and management.

UNDRIP specifies minimum standards for the survival, dignity and wellbeing of Indigenous peoples of the world. These standards are considered necessary for the realisation and protection of self-determination.

Considering these UNDRIP principles, Victoria could recognise self-determination in the Charter, alongside cultural rights.

If included in the Charter, the right to self-determination would guide government to:

- promote First Nations participation in decision-making
- establish representative bodies for First Nations people
- respect Aboriginal cultural diversity
- provide for autonomy and self-government
- address historical injustices
- promote economic development.

The specific measures taken to uphold the right to self-determination should be based on close consultation with First Nations people in Victoria.

Recommendation 4: Self-determination should be recognised in the Charter and First Nations people should be consulted with to determine the application and operation of the right.

Other reforms to the Charter

Independent cause of action

In order to establish a fair, just and accountable human rights system, a person who claims their rights have been violated should have the right to be heard and have their matter determined by an appropriate independent body. The ability to bring a direct cause of action for a breach of the Charter would provide a clear, important avenue by which people can seek relief or remedy in respect of a public authority's decision that infringes human rights or fails to give proper consideration to human rights. It would also ensure that individuals would have access to the breadth of remedies available in proceedings without needing to bring an additional ground of unlawfulness separate to the Charter breach.

In Victoria, the Charter does not allow a person to bring an independent action against a public authority for a breach of the Charter. Instead, a person can only raise the Charter if they have standing to bring a separate proceeding against the public authority. This significantly increases the complexity of bringing a claim under the Charter and reduces the ability for individuals to obtain effective relief. Queensland's Human Rights Act has a similar 'piggybacking' requirement, although it does allow for complaints to the Queensland Human Rights Commission. By contrast, human rights legislation in the ACT allows a person to bring a claim for a breach of a human right without the need to attach it to another claim. Under this model, a person whose human rights have been breached could either bring a proceeding using the direct cause of action or rely on their rights in other legal proceedings.

Recommendation 5: An independent cause of action should be available under the Charter.

Costs

In addition to enabling Charter claims as an independent cause of action, VEOHRC considers that these claims should be subject to an equal access costs approach. A risk of an adverse costs order can be a deterrent to claimants pursuing action, particularly when defendants are often well resourced and have access to much of the relevant information for a claim. Equal access cost approaches aim to level the playing field so that claimants do not risk going into debt when claiming their rights.

Under an equal access costs approach, individuals who have experienced breaches of human rights recover their legal costs if successful, and if unsuccessful, are not required to pay the other party's costs. This addresses the risk of claimants being left with large cost orders against them. Where a case has merit, people should be able to litigate their claim, which builds greater accountability for human rights breaches. An equal access costs approach can be safeguarded through exceptions, such as when a claim has been brought vexatiously.

Recommendation 6: An equal access costs approach should be adopted for Charter claims.

Remedies

The availability of a range of remedies, including compensation, is important in ensuring the Charter is adaptable to the circumstances of a particular breach. However, as it currently stands, a Charter breach cannot be used to award compensation to an individual, even if that person has an existing entitlement to compensation for a non-Charter breach. This sends mixed messages about the importance of human rights, which undermines the effectiveness of the Charter.⁵² Although non-monetary orders may provide an effective remedy for a breach of human rights obligations by a public authority in many cases, this will not always be the case. For example, an award of compensation may be the only effective remedy for a past breach of human rights.

The UK and New Zealand have broad, flexible remedies available for breaches of human rights, which could be considered in amending the Charter. In New Zealand, the *Bill of Rights Act 1990* does not set out available remedies for human rights breaches. However, New Zealand courts have found damages to be available for human rights infringements.⁵³ Former Chief Justice Dame Sian Elias has observed that the number of cases where damages have been sought against the State since 1994 is small ‘suggesting that early predictions of a flood of claims to vex the administration of justice are well astray, as such predictions usually are.’⁵⁴ Under the UK’s *Human Rights Act 1998*, there are limitations whereby compensation can only be awarded where the court is satisfied that compensation is ‘necessary to afford just satisfaction to the person in whose favour it is made’.⁵⁵

Recommendation 7: Compensatory remedies should be available for breaches of the Charter.

Alternative dispute resolution

Currently there is no single body that can receive complaints about allegations of a human rights breach against all Victorian public authorities as defined in the Charter. Instead, there is a ‘patchwork’ of options for dealing with alleged human rights breaches. Incorporating a dispute resolution framework into the Charter, like VEOHRC’s dispute resolution function under the EO Act, would strengthen accountability and enable people to directly bring complaints about breaches of their human rights and have them resolved through a fair, timely and accessible process.

⁵² 2015 Review of the Victorian Charter, Michael Brett Young

⁵³ *Simpson v Attorney General (Baigent's case)* (1994) 3 NZLR 667

⁵⁴ *Attorney General v Chapman* (2011) NZSC 110, 5.

⁵⁵ *Human Rights Act 1998* (UK), s 8(3).

In late 2023, the ACT legislated to provide their *Human Rights Commission Act 2005* (ACT) with a dispute resolution function, so that individuals can bring a complaint if they believe a public authority has breached their human rights.⁵⁶ People in the ACT will be able to make complaints to the ACT Human Rights Commission after first lodging a complaint with the relevant authority, so that public authorities first have the chance of resolving issues themselves without conciliation. This dispute resolution function will come into effect in six months and could be considered in Victoria.

Recommendation 8: That Alternative dispute resolution should be added as an option under the Charter.

⁵⁶ Human Rights (Complaints) Legislation Amendment Bill 2023

