



**Victorian Equal Opportunity  
& Human Rights Commission**

# **2019 report on the operation of the Charter of Human Rights and Responsibilities**

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& Human Rights Commission**

# **2019 report on the operation of the Charter of Human Rights and Responsibilities**

# Letter to the Attorney-General

November 2020

Dear Attorney-General

On behalf of the Victorian Equal Opportunity and Human Rights Commission, it is with pleasure that I present to you our thirteenth annual report on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) covering the 2019 calendar year.

In accordance with section 41(a)(i) of the Charter this report examines the operation of the Charter, including its interaction with other statutes and the common law.

I am pleased to report that during 2019 there were no declarations of inconsistent interpretation made by the Supreme Court of Victoria nor were there any override declarations passed by the Victorian Parliament. Accordingly, it has not been necessary for this report to examine matters under section 41(a)(ii) and (iii) of the Charter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kristen Hilton', with a long horizontal flourish extending to the right.

**Kristen Hilton**

**Victorian Equal Opportunity  
and Human Rights Commissioner**

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# Commissioner's message



In 2019, the Victorian Parliament made significant progress towards protecting the human rights of Victorians. Our state led the nation by being the first jurisdiction to commit to a treaty process with Aboriginal peoples through legislation. This process provides a practical means by which self-determination may be realised by Aboriginal Victorians. The Victorian Parliament also passed its landmark gender equality law. This legislation aims to promote and facilitate the achievement of gender equality and improvement in the status of women. Parliament also passed amendments to our birth certificate laws. These amendments recognise that every Victorian – including those who are trans and gender diverse – should have the right to express their true identity free from discrimination. During these reform processes the Victorian Parliament actively engaged with the Charter and considered human rights issues during parliamentary debates and through the lawmaking process.

Within courts and tribunals, the Charter guided outcomes for individuals and the equal operation of the justice system. Notably, it informed

the scope of Deputy State Coroner English's inquest into the death in police custody of Yorta Yorta woman Tanya Day – leading to the Coroner's examination of how systemic racism contributed to Tanya Day's death. This case highlights the need for all public authorities to address systems, structures and practices that result in racial discrimination against Aboriginal people. Tanya Day's death in custody also highlighted the discriminatory impacts of Victoria's public drunkenness laws, resulting in the Victorian Government announcing that it will decriminalise public drunkenness. I commend Ms Day's family on their tireless advocacy on behalf of their mother and grandmother. This courageous work will result in law reform which may change the course of people's lives for generations to come.

During 2019, the Commission continued to partner with public authorities to strengthen the human rights culture in Victorian public sector organisations. The Commission delivered tailored education services and online Charter education, and supported leaders to embed human rights within their organisations. We built on our Culture Indicators Framework, designed to track progress in the growth of a human rights culture and to give public authorities the tools they need to achieve such growth. The Victorian Public Sector Commission's 2019 People Matter Survey indicates that many public sector staff and organisations value human rights and understand how they apply to their work.

Although this report covers the 2019 calendar year, it is published during a time of significant human rights challenges as a result of the COVID-19 pandemic. In times of crisis, human rights are more important than ever. The Charter has continued to operate during this period, and we have seen evidence of how it has been considered and applied in a range of emergency measures. The careful consideration given to human rights in the statement of compatibility for the COVID-19 emergency measures is an example of the Charter in action. Many of the emergency measures imposed serious limitations on Victorians' freedom of movement, assembly and association. In our monitoring of these limitations we have advocated to ensure that the restrictions are justified, proportionate and only in place for as long as necessary. We have also advocated for transparency in decision-making. This has been an exercise in real time and with very real consequences for Victorians in trying to balance the right to life with other rights such as the right to movement, liberty and privacy. This is the value of our Charter. It is not just a compliance tool or a risk mitigation strategy. It is a legal and ethical frame which animates the rights and experiences of everyday Victorians – those who are caring for others, those who are unwell trying to access health care, those who have been detained, those trying to have meaningful contact with loved ones.

COVID-19 has highlighted the need to strengthen the Charter's ability to provide individual redress. It has also showed just how important the rights to education, health and housing are, and that these rights too should be included in our rights framework.

Through this time and into the recovery we will continue to work closely with the government, public authorities and the community to help them understand their human rights obligations and how competing rights may be balanced against each other and with the need to protect public safety. We will also continue to listen to the needs and experience of Victorians, provide them with an avenue of redress where we can and play our role in rebuilding a fairer and more equal Victoria.



**Kristen Hilton**

**Victorian Equal Opportunity  
and Human Rights Commissioner**





# Human rights in Victoria

## Charter rights

Human rights are a basic entitlement of every one of us, regardless of our background, culture, sex, age or what we believe. The Charter enshrines more than 20 civil, political and cultural rights into Victorian law.

<b>Section 8</b>	The right to recognition and equality before the law
<b>Section 9</b>	The right to life
<b>Section 10</b>	The right to protection from torture and cruel, inhuman or degrading treatment
<b>Section 11</b>	The right to freedom from forced work
<b>Section 12</b>	The right to freedom of movement
<b>Section 13</b>	The right to privacy and reputation
<b>Section 14</b>	The right to freedom of thought, conscience, religion and belief
<b>Section 15</b>	The right to freedom of expression
<b>Section 16</b>	The right to peaceful assembly and freedom of association
<b>Section 17</b>	The right to protection of families and children
<b>Section 18</b>	The right to take part in public life
<b>Section 19</b>	Cultural rights, including Aboriginal cultural rights
<b>Section 20</b>	Property rights
<b>Section 21</b>	The right to liberty and security of person
<b>Section 22</b>	The right to humane treatment when deprived of liberty
<b>Section 23</b>	Rights of children in the criminal process
<b>Section 24</b>	The right to a fair hearing
<b>Section 25</b>	Rights in criminal proceedings
<b>Section 26</b>	The right to not be tried or punished more than once
<b>Section 27</b>	The right to protection from retrospective criminal laws

## Charter responsibilities

The Charter places responsibilities on the three arms of government – Parliament, courts and tribunals and public authorities – to uphold human rights.

The Charter creates a ‘dialogue model’ of rights – a constructive and continuous conversation about human rights between these arms of government and within the Victorian community. The model is designed to ensure human rights are considered in the development of laws and policies, in the delivery of public services, and in government decision-making. It encourages each part of our democratic system to play a role in protecting and promoting human rights. While each arm of government is subject to checks and balances, ultimate sovereignty rests with Parliament.

	<p><b>Parliament</b></p> <p>The Victorian Parliament must assess any new laws to see whether they are consistent with human rights. Parliament must explain which human rights the law has an impact on, if any, and how the anticipated impact on human rights is reasonable and justified.</p>
	<p><b>Courts and tribunals</b></p> <p>Courts and tribunals must interpret Victorian laws to uphold human rights as far as possible with a law’s purpose.</p>
	<p><b>Public authorities</b></p> <p>Public sector workers, government departments, local government, ministers and police must take human rights into account in their day-to-day work. They must act compatibly with human rights and consider human rights before making decisions. If a public authority fails to do so, then a claim for a breach of the Charter may be able to be brought alongside another legal claim.</p>

# Human rights 2019

Since the Charter came into operation over a decade ago, human rights have increasingly played a part in shaping case outcomes and law and policy reform in Victoria.

This report will focus on the following key human rights issues of 2019:

- Systemic racism and Aboriginal deaths in custody
- Gender equality and diversity
- Treaty and self-determination
- Racial and religious tolerance.

The Charter played a central role in shaping developments across most of these issues, and a more indirect role in others.

Progress made in these areas will improve the realisation of human rights in Victoria. Some changes are structural, improving systems to provide justice, equality and accountability, while others create immediate positive change in many people's everyday lives. In some areas, the Charter has assisted progress towards future reform.



# Aboriginal incarceration and deaths in custody

## Coronial inquest considers systemic racism

In August 2019, a Coronial inquest was held into the death in police custody of Yorta Yorta woman Tanya Day. Tanya had died in December 2017, after falling asleep on a V/Line train on her way home to Melbourne. A V/Line officer called the police who woke her up, removed her from the train, and arrested her for public drunkenness. She was taken into police custody where she hit her head multiple times in a holding cell resulting in a brain haemorrhage. Tanya was eventually transferred to hospital and underwent surgery but tragically did not regain consciousness.

The inquest was groundbreaking insofar as Deputy State Coroner English included in the scope of her investigation the extent to which systemic racism played a part in Tanya's death. Her decision to do so was informed by interpreting her statutory functions consistently with Charter rights. This is the first time the Coroners Court of Victoria has ruled that all the evidence before it would be scrutinised through the lens of systemic racism and, if necessary, it would make broader recommendations about how to address it.

The coronial inquest ran over two weeks during August 2019. In April 2020, Deputy State Coroner English made landmark findings that the V/Line officer's treatment of Tanya was influenced by her Aboriginality and affected by unconscious bias. See a full discussion of the case on page 26.

**“This is a historic day for Aboriginal people and a bittersweet day for our family. Hundreds of Aboriginal people have died in police custody yet no police officer has been held criminally responsible. This is a stain on our country. Our families and communities are being decimated by the racism that infects police.**

**We are pleased that Deputy State Coroner English found that the V/Line officer acted in a racist way. But we are disappointed that Deputy State Coroner English stopped short of finding that Victoria Police were influenced by systemic racism. We know that our Mum would have been treated differently and would still be alive today if she was a non-Indigenous woman.”**

Statement of the family of Tanya Day following Deputy State Coroner English’s ruling in the inquest into their mother’s death.

## Commitment to decriminalise public drunkenness

Aboriginal and Torres Strait Islander people are over nine times more likely to serve a sentence for public order offences such as public drunkenness in Victoria.<sup>1</sup> Before the inquest into Tanya Day's death began, Deputy State Coroner English said she would recommend that the offence of public drunkenness be abolished. In August 2019, just days before the start of the inquest, the Victorian Government announced a plan to abolish this offence and replace it with a health-based approach that will promote therapeutic and culturally-safe pathways to assist alcohol-affected people in public places. In 2020, following the death of George Floyd in the United States of America, Black Lives Matter protests were held in Victoria highlighting the longstanding and ongoing issue of Aboriginal deaths in custody.

An Expert Reference Group (ERG) was established to provide advice to government about the decriminalisation and the development of an alternative, health-based response. In August 2020, the ERG delivered its report *Seeing the Clear Light of Day* to the government. In developing its advice and recommendations, the group worked closely with Aboriginal stakeholders, police, alcohol and drug experts as well as other key stakeholders.

The government is considering the ERG's report, as it works towards introducing legislation to Parliament in 2020 to decriminalise public drunkenness and support a public health response.

We welcome the Victorian Government's commitment to introduce legislation in 2020 to remove the offence of public drunkenness from the *Summary Offences Act 1966*. In August 2020, the Attorney-General reaffirmed the government's commitment to decriminalising public drunkenness. "We are working to establish a health-led model and introduce legislation to Parliament as soon as possible," she said. "But we need to take the time to get it right and make sure that we have worked with community to achieve a model that works and is culturally safe."<sup>2</sup>

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1 Derkley K. 'Public drunkenness law should be abolished' (Media Release, Law Institute of Victoria, 12 April 2019) <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/April-2019/Public-drunkenness-law-should-be-abolished>>.

2 Steven Schubert, 'Tanya Day's family 'devastated and angry' no police officers will be charged over the Indigenous woman's death', ABC News, (Online, 27 August 2020) <<https://www.abc.net.au/news/2020-08-27/victoria-police-officers-not-charged-over-tanya-day-death/12600798>>.

## Raising the age of criminal responsibility

In every state and territory in Australia, children as young as 10 can receive criminal punishment, including imprisonment. In February 2019, the Council of Attorneys-General (CAG) working group was established to review the age of criminal responsibility in Australia.

Raising the age of criminal responsibility is a vital step in reducing the over-representation of Aboriginal children in the justice system and supporting the wellbeing of young people across Victoria. In Victoria, Aboriginal children are 10 times more likely to be imprisoned than non-Aboriginal children.<sup>3</sup> Australia-wide, this likelihood is far higher – on an average night in the June quarter 2019, young Aboriginal and Torres Strait Islander people aged 10–17 were 21 times as likely as young non-Aboriginal and Torres Strait Islander people to be in detention.<sup>4</sup> Aboriginal and Torres Strait Islander children are more likely to be involved with the youth justice system due to differential treatment and the criminalisation of disadvantage and trauma.

Raising the age is also consistent with international human rights law and Charter rights. The United Nations Committee on the Rights of the Child has consistently stated that countries should work towards 14 being the minimum age of criminal responsibility. This protects young peoples' right to equality, their right to protection as children and their cultural rights under the Charter.

Doctors, lawyers, health and human rights experts have joined the call for Australia to raise the age of criminal responsibility in the #RaiseTheAge campaign.

In July 2020, CAG announced that further work was required to design an appropriate service model for responding to children under 14 in place of the criminal justice system. CAG agreed that the working group would report back on the progress of this work in 2021.

We encourage national reform on this issue and note that Victoria's Youth Justice Strategy 2020-2030 commits to implementing the recommendations from the CAG process. Victoria is well placed to lead efforts to and establish proof that children under 14 do not need to be locked up. Aboriginal children get the best outcomes when the justice system can support connections to culture, family and country, rather than relying on criminal penalties such as imprisonment. We encourage the strengthening of existing diversionary programs that address the underlying risk factors and prevent re-offending.

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3 Australian Institute of Health and Welfare, 'Youth detention population in Australia 2019', (Bulletin No 148, 28 February 2020) 17. <<https://www.aihw.gov.au/getmedia/c3ba6d29-7488-4050-adae-12d96588bc37/aihw-juv-131.pdf.aspx?inline=true>>.

4 *ibid.*

# Gender equality and diversity

## Gender Equality Bill

In November 2019, Victoria took a significant step towards improving workplace gender equality and the status of women across the Victorian public sector, universities and local councils with the introduction of the Gender Equality Bill into Parliament.

The *Gender Equality Act 2020*, passed in February 2020, requires public sector organisations to take positive steps to ensure gender equality by creating action plans and reporting publicly on a range of key indicators including equal pay, rates of sexual harassment, and their recruitment and promotion practices.

Improving gender equality is a critical part of primary prevention of family violence. This is a fundamentally rights-promoting piece of legislation, improving women's right to equality and the protection of children and families.<sup>5</sup> The Gender Equality Act is discussed in detail on page 35.

## Birth certificate reform

In August 2019, the Victorian Parliament passed reforms that greatly assist trans and gender diverse Victorians to live their true identity. On the back of strong advocacy from many people, including the trans and gender diverse community, the *Births, Deaths and Marriages Registration Act 1996* was reformed so that Victorians would no longer need to undergo sex affirmation surgery to change the record of their sex in their birth registration. Instead, they may change their record of sex by nominating a sex descriptor of their choice. For further detail see page 36.

## Victorian government pronoun policy

In 2019, the Victorian Government took an important step towards a culture of diversity and inclusion of people of all genders, sex and sexual orientation when it published LGBTIQ inclusive language guidance for the Victorian public sector. The guidance explains how to use language respectfully and inclusively when working with and referring to LGBTIQ people.

As a result, many organisations – including the Commission – introduced an opt-in scheme for staff to include pronouns in their email signatures. This practice creates a simple way for people to disclose their pronouns in their own terms, thereby reducing the risk that they are misgendered. It promotes the Charter rights to equality and privacy of non-binary, gender diverse and gender non-conforming staff.

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<sup>5</sup> Victoria, *Parliamentary Debates*, Legislative Council, 6 February 20, 250, (Jaclyn Symes).

**“The Victorian Government’s LGBTIQ Inclusive Language Guide is a hugely important step forward to make sure the public sector is inclusive of non-binary, gender diverse and gender non-conforming staff like myself. Knowing you have that document to point to which encourages respectful workplace behaviour makes it so much easier when trying to explain why using the right pronouns is essential to creating safe and supportive spaces for all of us.”**

Lee Carnie (they/them), Strategic Advocacy and Policy Manager, Civil Justice at Victoria Legal Aid.

## Treaty and self determination

In 2019 Victoria took an important step towards self-determination of Aboriginal peoples with the establishment of the First Peoples' Assembly of Victoria. The Assembly will work with the Victorian Government to create the rules and processes by which a Treaty or Treaties can be agreed in Victoria. This includes a self-determination fund that will help Aboriginal groups negotiate on an equal footing with the government; a Treaty Authority to oversee Treaty negotiations; and an Elders Voice to provide cultural guidance to the Assembly.

This work follows on from the 2017 Uluru Statement from the Heart, that called for a 'First Nations Voice' as a representative body in the Constitution and a 'Makarrata Commission' to supervise an agreement making process and to facilitate truth-telling.

A Treaty is one expression of self-determination for Aboriginal people. The Commission has long advocated for a legislated right to self-determination in the Victorian Charter,<sup>6</sup> and in 2019 we recommended that a right to self-determination also be included in a national Human Rights Act.<sup>7</sup>

### Aboriginal Justice Agreement

During 2019, the Aboriginal community and Victorian Government continued their partnership under Phase 4 of the Aboriginal Justice Agreement to improve Aboriginal justice outcomes, family and community safety, and reduce over-representation in the Victorian criminal justice system.

In 2019, as part of its Charter Education Program, the Commission provided education on how Charter rights apply to Aboriginal people to more than one thousand participants working in the Victorian justice sector.

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6 Victorian Equal Opportunity and Human Rights Commission, Submission No 278 to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (1 July 2011) 88.

7 Victorian Equal Opportunity and Human Rights Commission, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian conversation on human rights* (November 2019) 20–2.



## Racial and religious tolerance

### Victoria's first successful prosecution of serious vilification upheld

Mr Cottrell was successfully prosecuted under the *Racial and Religious Tolerance Act 2001* (Vic) for participating in making a video of a mock beheading, which was used to promote a protest against building a Mosque in Bendigo.<sup>8</sup> On appeal the County Court held that the prohibition on hateful conduct in the Act does not unreasonably limit the Charter right to freedom of thought, conscience, religion and belief, freedom of expression and to take part in public life. Any restrictions there may be are at the very margins and are reasonable and justified in law. See full detail on page 28.

For the most part, Victorians respect and celebrate our diverse and vibrant society. However, in 2019, the deadly racist attack at mosques in Christchurch and subsequent hateful comments, and the spread of right-wing extremism online refocused attention on the prevalence, nature and impact of hate within our own community.

In order to better protect Victorians from hate speech and hate conduct, the Commission has advocated for stronger anti-vilification laws, including reform of the *Racial and Religious Tolerance Act 2001* (Vic) (the RRTA). Racist words and actions can affect people's fundamental rights including their right to equality, to privacy, to freedom of expression and to cultural rights.

To date, there have only been two successful claims of vilification before the Victorian Civil and Administrative Tribunal and, in 2019, we saw the first successful prosecution of serious vilification upheld by the County Court. The need for stronger anti-vilification protections was an issue explored by Parliament in 2019, firstly, with Fiona Patten's introduction of the Racial and Religious Tolerance Amendment Bill into Parliament in August 2019 and, secondly, with the Legal and Social Issues Committee's Inquiry into Anti-Vilification Protections in Victoria, which is due to report by 1 March 2021. In making recommendations, and in any subsequent law reform, the Committee and the Victorian Parliament will need to consider Charter rights including the right to recognition and equality before the law, to privacy, to freedom of expression and to cultural rights.

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8 *Cottrell v Ross* [2019] VCC 2142.

**“I work as a nurse and many times I’ve been called names by patients like ‘n\*\*\*a’, ‘black bitch’ and ‘monkey’. It’s almost normal and accepted that patients do this.”**

**“I was a refugee and I was told to go home to my country and get shot.”**

**“The news of the attack left us distraught, an undeniable sense of vulnerability. Would we ever be safe from Islamophobia?”**

Statements made during the Commission’s Roundtable on Freedom of Religion, October 2019.

# Human rights in courts and tribunals

In 2019 the Charter was raised or considered in more than 60 cases in the High Court of Australia and in Victorian courts and tribunals (see Appendix A). The Charter was also referred to in decisions of the Victorian Mental Health Tribunal,<sup>9</sup> the Victorian Information Commissioner,<sup>10</sup> and courts and tribunals in other jurisdictions.<sup>11</sup>

Litigation provides an important platform for individuals and groups to assert their human rights, obtain remedies and achieve more rights-compliant outcomes. These cases demonstrate that the Charter continues to be influential across an increasingly broad range of issues.

During 2019 there were some clear themes to human rights litigation:

- Systemic racism in policing and other public authorities.
- Limiting speech that is harmful to particular groups, whether it's religious vilification or harassment of women attending abortion clinics.
- Prisoners' access to discretionary outcomes such as parole and emergency management days.

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9 *NMC* [2019] VMHT 24; *UTT* [2019] VMHT 20; *EBJ* [2019] VMHT 12; *HUV* [2019] VMHT 2; *HXN* [2019] VMHT 28.

10 *'AO7' and State Revenue Office* [2019] VICmr 133; *'AK54' and Monash University* [2019] VICmr 94; *'AK3' and Monash University* [2019] VICmr 93.

11 *South Australian State School Leaders Association Inc v Australian Education Union (SA Branch) & Independent Education Union (SA)* [2019] SAET 182; *Nieuenhuizen v Catholic Church Endowment Society Inc* [2019] SAET 179; *Stenner v Crime and Corruption Commission* [2019] QSC 202; *GS v MS* [2009] WASC 255; *Laki (Migration)* [2019] AATA 1718.



# Systemic racism, racial profiling, Aboriginal deaths in custody

## Gebrehiwot v State of Victoria (who sues by his Litigation Guardian Tamar Hopkins) (Ruling No 2)<sup>12</sup>

Mr Gebrehiwot is of Ethiopian descent and has a diagnosed intellectual disability. During questioning and arrest by police while they were looking for two men described as 'African males', Mr Gebrehiwot claims he was thrown to the ground, causing injury which later resulted in his finger being amputated. In the County Court Mr Gebrehiwot argued that his arrest was racially motivated. He raised allegations of a breach of his rights to equality before the law, freedom of movement, liberty, and protection from cruel, inhuman or degrading treatment under the Charter and sought exemplary damages. In an interlocutory hearing the court considered whether the Charter can be taken into account when calculating damages under a non-Charter claim. The court held that the Charter is not relevant to the jury's assessment of damages in this case, as indicated by the plain meaning of s 39, the clear intent of Parliament and the court's approach to the remedies available under the Charter. The matter will proceed to a hearing before a jury and the declaratory relief sought under the Charter will be considered by the court in the judgment.



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12 [2019] VCC 1229.

### What is systemic racism?

'Systemic racism' (also referred to as 'institutional racism') is a term used to describe how laws, policies and practices across agencies work together to produce a discriminatory outcome for racial or cultural groups. It occurs where laws and policies "impact so disproportionately on one sector of our community" that they are "manifestly unfair".<sup>13</sup>

Systemic racism is not about people or organisations expressing obviously racist views, or explicitly discriminating against members of a particular race. Indeed, systemic racism can be perpetuated by people who have no racist intent at all and who believe they are simply "doing their job".<sup>14</sup> Nearly thirty nine years ago the Royal Commission into Aboriginal Deaths in Custody acknowledged that systemic racism operates through key institutions including the public service, the legal and medical systems and the education system.<sup>15</sup>

For example, an effect of systemic racism is that an Aboriginal person is almost 10 times more likely to be arrested for public drunkenness in Victoria than a non-Aboriginal person. Systemic racism can also be responsible for a whole series of decisions that are not necessarily malicious but that ultimately lead to a tragic outcome – for example an Aboriginal person dying in custody in circumstances in which a white person would still be alive.

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13 Thalia Anthony, *Report on systemic racism in relation to the death of Tanya Louise Day for the Coronial Court of Victoria*, Case No. 006424/17 (Report, 26 March 2019) [16]-[20]. Quoting Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016 [87].

14 William Macpherson, *Report of the Stephen Lawrence Inquiry* (Cm 4262-1, 1999) (Lawrence Inquiry) 6.34.

15 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) vol 2, 12.1.12.

## CASE STUDY

# Coronial inquest into the death of Tanya Day

The 2019 coronial inquest into the death of Yorta Yorta woman Tanya Day broke new ground: it was the first inquest to consider whether systemic racism contributed to the cause and circumstances of a death. In her ruling, Deputy State Coroner English considered Tanya Day's rights to life and equality under the Charter. She found that in order to conduct a comprehensive and effective investigation, she would assess the evidence through the lens of systemic racism.

This inquest demonstrates how Charter rights inform the content of a coronial process, including a Coroner's decision on the scope of an inquest. It also highlights the urgent need for all public authorities – including police, transport providers and hospitals – to provide culturally safe and trauma-informed care for Aboriginal people.

On 5 December 2017, Aboriginal woman Tanya Day was removed from a V/Line train and arrested for public drunkenness. Tanya was taken into police custody, where she hit her head multiple times in the holding cell. The most significant fall resulted in a brain haemorrhage. Tanya was eventually transferred to hospital and underwent surgery but did not regain consciousness. She died in hospital on 22 December 2017.

### Systemic racism included in scope of inquest

Before the inquest, Tanya's family requested that the Coroner consider whether systemic racism contributed to her death. The Commission intervened, also submitting that the Charter required the Coroner to investigate whether systemic racism

was a cause or circumstance of Tanya's death. The Commission argued that the Coroners Court is bound by the Charter to act compatibly with human rights and to consider human rights when making decisions. In order to give effect to the right to life, the coronial process must ensure a comprehensive and effective investigation into Tanya's death. This includes scrutinising not only the immediate causes of Tanya's death, but also the broader systemic causes at play.

On 25 July 2019, in a landmark decision, Deputy State Coroner English accepted the submissions from Tanya's family and the Commission, ruling that for the first time a Coroner would consider whether systemic racism played a part in a death in custody.

### Deputy State Coroner English's landmark findings

The coronial inquest ran over two weeks during August 2019. The Commission made submissions on the human rights relevant to Tanya's treatment, including her right to freedom of movement, her right to liberty, and her right to humane treatment when deprived of liberty.

On Thursday 9 April 2020, Deputy State Coroner English made landmark findings, including that:

- The V/Line officer's treatment of Tanya was influenced by her Aboriginality and affected by unconscious bias. The V/Line officer considered Tanya to be "unruly" despite her being asleep and it took him less than a minute to call for police. Deputy State Coroner English confirmed that Tanya's right to freedom of movement, protected under the Charter, was engaged by the V/Line officer's decision to call for police.

- The police did not adequately check on Tanya in her cell, as required by their own guidelines and standard operating procedures. The police also did not treat Tanya humanely or with dignity in the cell, as required by the Charter.

Deputy State Coroner English detailed a “culture of complacency regarding intoxicated detainees” within Victoria Police. She concluded that the police officers “thought at all times they were looking at Ms Day as a conscious, breathing drunk doing what all drunks do. This illustrates the power of stereotype and its resistance to correction”.

The Coroner referred Ms Day’s death to the Director of Public Prosecutions for criminal investigation. No police officer has ever been held criminally responsible for the death of an Aboriginal person in custody. In August 2020 the Director of Public Prosecutions announced it would not prosecute the officers.<sup>16</sup>

Deputy State Coroner English noted that many of the recommendations from the Royal Commission into Aboriginal Deaths in Custody were relevant to this inquest.

## Recommendations

To the Attorney-General:

- That the offence of public drunkenness be decriminalised and that section 13 of the *Summary Offences Act 1996* be repealed.
- That the Coroners Act be amended so the Coroner in charge of the coronial investigation may give a police officer direction about an investigation.

To Victoria Police:

- Include a falls risk assessment as part of the detainee risk assessment in custody for anyone who appears to be affected by alcohol, drugs or illness.
- Review training about the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- Implement training on mandatory requirements for the safe management of people in custody, and the medical risks of people affected by alcohol.
- Request the Commission to conduct a human rights review of its training materials.

To V/Line:

- Include Aboriginal community input into training about how to remove unconscious bias in decision-making.
- Request the Commission to conduct a human rights review of its training materials.

To the Department of Justice and Community Safety:

- Review the effectiveness of the volunteer-based Aboriginal Community Justice Panel in providing protection for Aboriginal people in custody.

In addition, the inquest was instrumental in the Victorian Government’s commitment to abolish the offence of public drunkenness and to replace it with a health-based approach that will promote therapeutic and culturally-safe pathways to assist alcohol-affected people in public places. The Commission welcomes this commitment.

**These are incredibly important findings that go some way to providing justice for Tanya Day’s family.**

<sup>16</sup> Steven Schubert, (n 2).

# Balancing the right to freedom of expression with other rights

## Cottrell v Ross<sup>17</sup>

Mr Cottrell was a member of the United Patriots Front (UPF), a far-right anti-Islam group. He participated in a short video of a mock beheading of a mannequin in front of City of Greater Bendigo offices. The video was uploaded to the UPF Facebook page and used to promote a rally to be held a week later against a Council proposal for a Mosque to be built in Bendigo.

In September 2017, the Magistrates Court of Victoria convicted Mr Cottrell of serious religious vilification under s 25(2) of the Racial and Religious Tolerance Act, fining him \$2,000. He was convicted for knowingly engaging in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of Muslim people on the ground of their religious belief or activity. Mr Cottrell appealed the decision to the County Court.

Mr Cottrell argued unsuccessfully that:

- it had not been proved, beyond reasonable doubt, that he had the necessary ‘intention’ required for the offence of serious religious vilification
- his conduct was akin to a mere insult and fell into the category of political discourse. He argued that s 25(2) should be read down or narrowed to exclude political discourse, having regard to the Charter rights of freedom of expression, freedom of thought, conscience, religion and belief and taking part in public life
- the offence of serious religious vilification is unconstitutional because it infringes the implied freedom of political communication.

In December 2019, His Honour Chief Judge Kidd upheld the conviction, that the prohibition on hateful conduct in s 25(2) of the Act does not unreasonably limit the Charter right to freedom of thought, conscience, religion and belief, freedom of expression and to take part in public life. Any restrictions there may be are at the very margins and are reasonable and justified in law.

His Honour also found that:

- Mr Cottrell’s video was purposeful and calculated, intended to incite visceral, impactful and lasting emotions and ‘whip up extreme negative feelings’ including ‘fear, loathing, disgust and alarm’ towards Muslim people<sup>18</sup>
- the prohibition on hateful conduct in the Act also does not burden the implied constitutional right of political communication. Even if it did, it is reasonably appropriate and adapted to a legitimate purpose.

This case illustrates how a court can balance rights, particularly where the exercise of one right will seriously limit the rights of others. It sends a message that there is no place in Victoria for hateful conduct that incites ridicule and contempt for members of our community because of how they look, where they are from or what they believe. It is a reminder about the important role anti-vilification laws play in ensuring the vitality and diversity of the community.

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<sup>17</sup> [2019] VCC 2142.

<sup>18</sup> *Cottrell v Ross* [2019] VCC 2142, [327].

“In my view, racial and religious vilification speech – especially of an extreme kind – is antithetical to the fundamental principles of equality, democratic pluralism and respect for individual dignity which lie at the heart of the protection of human rights. [Protective] legislation positively promotes people of different religions to participate in public life and discourse, free from vilification.”

His Honour Chief Justice Kidd, *Cottrell v Ross*.<sup>19</sup>

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19 [2019] VCC 2142, [98].



## **Clubb v Edwards & Anor<sup>20</sup>**

In April 2019, the High Court upheld Victorian and Tasmanian laws that created 'safe access zones' around abortion clinics. Safe access zones now operate in all Australian jurisdictions, except South Australia and Western Australia.

Safe access zones prevent anti-abortionists from targeting patients, staff and others within 150 metres of abortion clinics. They protect the privacy, safety and dignity of women accessing health care.

The Statement of Compatibility for the Victorian bill – the Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015 – indicated that the restrictions on freedom of expression were necessary to respect the welfare, rights and reputation of people accessing the services and staff. The aim of the restrictions promoted people's privacy, protecting them from intimidation or being recorded with the explicit or implicit threat of public exposure.

In 2019, the High Court considered whether safe access zone laws were invalid as an impermissible burden on the implied freedom of political communication in the Australian Constitution. The constitutional test is different to the limitations test under section 7 of the Charter, however both tests consider necessity and proportionality of limitations of rights and freedoms. In this case, the High Court determined that safe access zones do not impermissibly burden the implied freedom. This decision affirms the validity of the law and women's right to medical privacy and dignity.

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20 [2019] HCA 11.

# The scope of the right to humane treatment when deprived of liberty

## Minogue v Victoria<sup>21</sup>

In 2016, Dr Craig Minogue, a maximum-security prisoner at Barwon Prison, completed a 28-year non-parole term of imprisonment for the Russell Street bombing that killed a police officer and injured 22 others.

The Charter provides that Parliament may, in exceptional circumstances, declare that a law or part of a law has effect despite being incompatible with human rights.<sup>22</sup> This is known as an ‘override declaration’. In 2018, Parliament enacted an override declaration regarding the Corrections Amendment (Parole) Bill 2018, which effectively prevented the Adult Parole Board from granting parole to prisoners convicted of killing a police officer unless it is satisfied that the prisoner is in imminent danger of dying or is seriously incapacitated. The Statement of Compatibility concluded the Bill was incompatible with the Charter as it unjustifiably limited the right to protection from torture and cruel, inhuman or degrading treatment and the right to humane treatment when deprived of liberty. However, the Bill had been enacted in order to “provide legal certainty and to avoid a court giving the Bill an interpretation based on Charter rights which do not achieve the government’s intention”.<sup>23</sup>

Dr Minogue challenged the constitutional validity of this regime in the High Court, claiming it has the practical effect of subjecting him to a life without a meaningful prospect of parole and amounts to cruel, inhuman punishment. The High Court found that the section does no more than alter conditions to be met before he can be released on parole. Dr Minogue continues to be deprived of his liberty by force of the life sentence imposed by the Supreme Court. The High Court found that legislative removal of a meaningful prospect of release on parole does not render the life sentence more restrictive of his liberty or otherwise impose greater punishment for the offence for which he was convicted.<sup>24</sup>

The implication of this decision is that prisoners convicted of murdering a police officer are unable to rely on Charter rights in relation to parole decisions and are likely to be released from prison only in very restricted circumstances.

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21 [2019] HCA 31.

22 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 31(1).

23 Victoria, Parliamentary Debates, Legislative Assembly, 25 July 2018, 2238 (Lisa Neville).

24 [2019] HCA 31 [9] [30] [32] <<http://eresources.hcourt.gov.au/downloadPdf/2019/HCA/31>>.

## **Kheir v Robertson & Ors<sup>25</sup>**

Mr Kheir was serving a nine year sentence and imprisoned at Metropolitan Remand Centre when a riot occurred. He was transferred to Barwon prison and confined to his cell for long periods each day for 21 months before transfer to a mainstream unit at Port Philip Prison. Charges of riot against him were dropped.

Mr Kheir applied to the Secretary for emergency management days (EMDs) to reduce his non-parole period on account of good behaviour while suffering disruption or deprivation. The Commissioner for Corrections rejected his application. Mr Kheir successfully sought judicial review. The decision was remitted back to a delegate of the Secretary. There was a long delay in the re-making of the decision. Mr Kheir brought a judicial review claim against the delegate, who refused to reduce the sentence.

The Supreme Court was not satisfied the delay unreasonably breached Mr Kheir's Charter rights to liberty and security of person and to humane treatment when deprived of liberty. The Court found that the refusal to grant EMDs also did not unreasonably deprive him of his right to liberty. There is no entitlement to EMDs, the Secretary simply has a discretion to reduce a sentence or non-parole period.

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25 [2019] VSC 422.

# Human rights in lawmaking

In Victoria, the Charter requires human rights are considered at every stage of the lawmaking process. All Bills introduced into Parliament must be accompanied by a statement of compatibility, which provides an overview of any human rights impacted by the Bill and why any proposed limitations are reasonable and justified. Parliament's Scrutiny of Acts and regulations Committee (SARC) assists with this process by preparing a report on tabled bills, highlighting whether SARC considers it to be compatible with human rights. Members of Parliament are able to consider these statements and reports and raise any concerns during parliamentary debate.

In 2019 the Victorian Parliament made significant progress towards protecting the human rights of Victorians, notably in the areas of gender equality and diversity, but also in relation to assisted reproductive treatment, and towards reform of racial and religious tolerance laws. These are examples of Parliament actively engaging with the Charter and contemplating human rights issues during parliamentary debates and in the lawmaking process.

## Legislative activity

67	Bills introduced into Parliament
76	SARC reports produced (including reports in relation to Bills introduced in 2018)
27	Questions about rights referred to a member or Minister by SARC
26	Responses received by SARC from a member or Minister
15	Public submissions made to SARC
0	Questions about rights referred to Parliament by SARC
0	Statements of partial incompatibility
0	Override declarations
1	House amendment to the Transport Legislation Amendment Bill 2019 resulting from SARC's commentary on the human rights raised.

## Introduction of historic gender equality legislation

In November 2019 the Victorian Government introduced the Gender Equality Bill into Parliament, aiming to deliver better opportunities for women in the public sector and fairer, more equitable workplaces. It was enacted into Victorian law in February 2020.

The legislation requires around 300 public sector organisations (including universities and local councils) to report publicly on a range of key gender equality indicators including equal pay, rates of sexual harassment, and recruitment and promotion practices. To guide their approach, public sector agencies will need to prepare a gender equality action plan and undertake periodic gender impact assessments. The Act also establishes the Public Sector Gender Equality Commissioner, who has the role of promoting the objectives of the Act, collaborating with organisations to improve gender equality, and use of compliance and enforcement measures where necessary to ensure that public sector entities comply with their obligations under the Act.

The Act has been designed to "redress disadvantage, address stigma, stereotyping, prejudice and violence and accommodate persons of different genders by way of structural change".<sup>26</sup> Recognised in the objectives of the Act is the reality that gender inequality may be compounded by other forms of disadvantage or discrimination on the basis of Aboriginality, age, disability, ethnicity, gender identity, race, religion, sexual orientation and other attributes.<sup>27</sup>

The statement of compatibility sets out how this piece of legislation protects and promotes women's Charter rights to recognition and equality before the law and to take part in public life, and that by promoting gender equality it supports the primary prevention of family violence and the protection of families and children.<sup>28</sup>

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26 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4579-4580, (Gabrielle Williams, Minister for Prevention of Family Violence, Minister for Women, Minister for Youth).

27 *Gender Equality Act 2020* (Vic), s 4.

28 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4580, (Gabrielle Williams).

## Inclusive birth certificate reforms

In 2019 – following almost a decade of advocacy from the trans and gender diverse community – the Victorian Parliament passed amendments to the *Births, Deaths and Marriages Registration Act 1996*, which will greatly assist trans and gender diverse Victorians to live their true identity.

Following the reforms, Victorians will no longer need to undergo sex affirmation surgery to apply to change the record of sex in their birth registration. When changing the record of sex, a person will be able to nominate a sex descriptor of their choice –including male, female, or any other sex descriptor.

**"Trans rights are human rights and we welcome the passing of this bill. It is important that we can all have documents which reflect who we are and enable us to get on with our lives with pride rather than hiding in the closet."**

Transgender Victoria spokeswoman Brenda Appleton.

The development of this Bill is an example of Parliament actively engaging with the Charter and contemplating human rights in the lawmaking process. Charter rights were raised both in support for, and opposition to, the Bill during Parliamentary debate. Those in support of the Bill argued that the reforms promote the human rights of trans and gender diverse Victorians, including the right to equality, the protection of families and children and the right to privacy, for example by not inappropriately medicalising a person's sex or gender identity.<sup>29</sup> Those in opposition argued that the Bill risks infringing the rights of women, for example by increasing the risk of women being harassed in women-only spaces.<sup>30</sup>

The Bill passed both Houses of Parliament in August 2019. Following the reforms, between 1 May and 19 October 2020 there were 305 applications received and 262 completed. This is a marked increase from the 56 applications completed in 2019 under the previous legislation.

The process of implementation also promoted the rights of the people affected by the laws. The Registry of Births, Deaths and Marriages Victoria implemented the reforms through an advisory group that included trans and gender diverse representatives and advocates. Improvements delivered through this inclusive approach made a significant difference to people affected by the legislation. For example, for a child to change their birth certificate, the law originally required a statement of support from a doctor or registered psychologist, but allowed for other people to be prescribed. Trans young people and their families provided feedback that this requirement risked medicalising an administrative process,

29 Victoria, Parliamentary Debates, Legislative Assembly, 15 August 2019, 2725, 2729, 2736, 2738, 2742 (Steve Dimopoulos, Pauline Richards, Dustin Halse, Danielle Green, Juliana Addison).

30 Victoria, Parliamentary Debates, Legislative Assembly, 15 August 2019, 2723-4, 2732-3 (Bridget Vallence, Cindy McLeish).

and advocated for a supporting statement to alternatively be made by an adult they felt comfortable with. As a result of this feedback, the categories of authorised people who could provide a supporting statement for a child wishing to update their birth certificate were broadened to include an adult (other than [the parents/guardian) who has known the child for at least 12 months.







## Key bills

Bill	Summary	
Assisted Reproductive Treatment Amendment (Consent) Bill 2019	The Bill amends the Act to provide that a married woman is not required to obtain the consent of her spouse to access a treatment procedure using donor sperm in circumstances where the woman is separated from her spouse.	
Births, Deaths and Marriages Registration Amendment Bill 2019	The Bill removes the requirement that an applicant has undergone sex affirmation surgery before being able to apply to alter the sex recorded in their Victorian birth registration.  This Bill also provides for the issuing of a document acknowledging the name and sex of an applicant whose birth is registered in a place outside Victoria.	
Children Legislation Amendment Bill 2019	This omnibus Bill makes a range of amendments including requiring persons in religious ministry to be mandatory reporters and no longer exempting information that would otherwise be privileged under the religious confessions privilege in the <i>Evidence Act 2008</i> .	
Crimes Amendment (Abolition of Blasphemy) Bill 2019	This Bill abolishes the common law offences of blasphemy and blasphemous libel to the extent that they form part of the common law of Victoria.	
Disability (National Disability Insurance Scheme Transition) Amendment Bill 2019	The Bill makes amendments required for Victoria to transition to the NDIS. Reflects changes brought by the commencement of the full NDIS.	
Gender Equality Bill 2019	The Bill requires the public sector, councils and universities to take positive action towards achieving workplace gender equity, to promote gender equality in their policies, programs and agencies and establishes the Public Sector Gender Equality Commissioner.	
Justice Legislation Amendment (Criminal Appeals) Bill 2019	The Bill improves and modernises Victoria's appeal system. Amends the <i>Children, Youth and Families Act 2005</i> to establish de novo appeals against final orders made by the Family Division of the Children's Court.  The Bill also amends the <i>Criminal Procedure Act 2009</i> to provide a second or subsequent right of appeal against conviction in certain circumstances.	
Justice Legislation Amendment (Police and Other Matters) Bill 2019	The Bill creates new offences of recklessly discharging a firearm and intimidation of law enforcement officers and family members (15 years and 10 years maximum penalty respectively).  It introduces a new scheme for Victoria Police for the taking of DNA profile samples from persons suspected of committing or found to have committed a serious offence.  It provides immunity against medical practitioners, nurses, midwives, dentist and other authorised persons or anyone assisting such persons in relation to the taking of a DNA profile sample.	

	<b>Consideration of human rights by SARC and within Parliament</b>
	<p>SARC (Alert Digest No 8 of 2019, p 1) requested clarification regarding the compatibility of clauses with the Charter right to equality.</p> <p>Response received (Alert Digest No 9 of 2019, p 20)</p> <p>The Hon. Jaala Pulford MP (Statement of Compatibility) noted the Bill promotes the Charter rights to recognition and equality before the law, privacy, and the protection of families and children.</p>
	<p>SARC (Alert Digest No 9 of 2019, p 1) requested clarification regarding the application of the right to equality and the right to freedom of expression.</p> <p>Response received (Alert Digest No 11 of 2019, p 18)</p>
	<p>SARC (Alert Digest No 10 of 2019, p 1) requested clarification regarding the application of the right to freedom of religion.</p> <p>Response received (Alert Digest No 11 of 2019, p 22)</p>
	<p>SARC (Alert Digest No 1 of 2020, p 1) considered the Bill compatible with the rights set out in the Charter.</p> <p>The Hon. Fiona Patten MP (Statement of Compatibility) noted the Bill engages and promotes the right to equality before the law and to freedom of expression. Ms Patten also noted the Bill implements recommendations of the United Nations Human Rights Committee.</p>
	<p>SARC (Alert Digest No 8 of 2019, p 7) considered the Bill compatible with the rights set out in the Charter.</p>
	<p>SARC (Alert Digest No 1 of 2020, p 2) considered the Bill compatible with the rights set out in the Charter.</p>
	<p>SARC (Alert Digest No 13 of 2019, p 8) considered the Bill compatible with the rights set out in the Charter.</p>
	<p>The Hon. Jaclyn Symes MP (Statement of Compatibility) noted that to the extent that the Charter right to privacy is engaged by the new DNA powers provided in the Bill, this is justified because any interference is not unlawful or arbitrary. A senior police officer must be satisfied of particular criteria before authorising the taking of a DNA profile sample from a suspect or an offender.</p> <p>SARC (Alert Digest No.2 of 2019, p 3) considered the Bill compatible with the rights set out in the Charter.</p>

Bill	Summary	
Justice Legislation Amendment (Serious Offenders and Other Matters) Bill 2019	The Bill strengthens the operation of the prisons, parole and post-sentence supervision scheme to further enhance community safety. Amends the <i>Corrections Act 1986</i> , the <i>Serious Offenders Act 2018</i> and the <i>Children, Youth and Families Act 2005</i> .	
Justice Legislation Miscellaneous Amendments Bill 2019	The Bill makes amendments to improve access to justice. For example, amends the <i>Supreme Court Act 1986</i> to make further provision about costs in group proceedings.	
Open Courts and Other Acts Amendment Bill 2019	<p>The Bill amends the <i>Open Courts Act 2013</i> in relation to the prohibition and restriction of the publication of information in court and tribunal proceedings. Imposes a requirement on courts and tribunals to give reasons for, and for the terms of a suppression order. A victim of a sexual or family violence offence in a proceeding in which a suppression order was made may apply to the court or tribunal to review the suppression order.</p> <p>The Bill also amends the <i>Children, Youth and Families Act 2005</i> to provide an exemption from the restriction against publication of a report of a specified proceeding in the Children's Court. It amends the <i>Judicial Proceedings Reports Act 1958</i> enabling a court to make an order lifting the prohibition on publishing a victim's identity if the victim consents and there are no other reasons for the information to be concealed.</p>	
Racial and Religious Tolerance Amendment Bill 2019	<p>The Bill amends the <i>Racial and Religious Tolerance Act 2001</i> to include protections from vilification based on gender, disability, sexual orientation, gender identity and sex characteristics.</p> <p>It amends aspects of the civil vilification prohibition and the criminal offence of serious racial vilification.</p> <p>It inserts new sections regarding the provision of information to the Commission for dispute resolution.</p>	
Police Legislation Amendment (Road Safety Camera Commissioner and Other Matters) Bill 2019	Among other things, the Bill expands the powers of protective service officers in executing a warrant to arrest.	
Spent Convictions Bill 2019	This Bill provides that convictions (other than a conviction for which a prison sentence of six months or more is imposed, a conviction of a body corporate or a conviction for a prescribed offence) are considered automatically spent after a specified waiting period if the convicted person is not convicted of a subsequent offence other than a minor offence.	

	<b>Consideration of human rights by SARC and within Parliament</b>
	<p>SARC (Alert Digest No 13 of 2019, p 10) requested further clarification regarding the application of the Charter right to privacy (information sharing).</p> <p>Response received (Alert Digest No 14 of 2019, p 19).</p>
	<p>SARC (Alert Digest No 1 of 2020, p 7) considered the Bill compatible with the rights set out in the Charter.</p>
	<p>The Hon. Jill Hennessy MP (Statement of Compatibility) noted that the Bill recognises a balance between the need for open justice as against the need to protect other legitimate interests of accused persons, victims and witnesses and the preservation of the proper administration of justice. Relevant Charter rights include the right to fair hearing, freedom of expression, privacy, protection of families and children, presumption of innocence, freedom from against arbitrary and unlawful detention, and the right of children in criminal proceedings.</p> <p>SARC (Alert Digest No. 3 of 2019, p 3) requested further clarification regarding the application of the right to freedom of expression.</p> <p>Response received (Alert Digest No. 4 of 2019, p 18).</p>
	<p>SARC (Alert Digest No 11 of 2019, p 14) requested further clarification regarding the application of the right to freedom of expression.</p> <p>Response received (Alert Digest No 12 of 2019, p 18).</p>
	<p>SARC (Alert Digest No 11 of 2019, p 10) requested further clarification regarding retrospective criminal laws.</p> <p>Response received (Alert Digest No 12 of 2019, p 16).</p>
	<p>The Hon. Fiona Patten MP (Statement of Compatibility) noted that the Bill engages and promotes the Charter right to equality before the law.</p> <p>SARC (Alert Digest No 2 of 2019, p 7) requested further clarification regarding the right to the presumption of innocence and freedom of expression.</p> <p>Response received (Alert Digest No. 3 of 2019, p 14).</p>

# A culture of human rights

The dialogue model of the Charter was designed to build a stronger culture of human rights in the Victorian Government over time.<sup>31</sup> It provides public authorities with a framework for properly considering and acting in accordance with human rights when making decisions and delivering services to the public.

The Commission's vision is for a positive human rights culture to be deeply embedded in government – where the rights of all Victorians are thoughtfully considered and prioritised in everyday business. A positive human rights culture is a pattern of shared attitudes, values and behaviours that influence the policy making, decisions and practices of government to uphold the human rights of all people. Importantly, such a culture will lead to fairer decisions and outcomes for all Victorians.

**“Human rights matter because people matter. Because the ability to have a life in which you feel respected – where your dignity is maintained, where you can participate freely and equitably in society and the community, in the workplace, in your school – that matters.”**

Kristen Hilton, Victorian Equal Opportunity and Human Rights Commissioner

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31 Victorian Human Rights Consultation Committee, *'Rights, Responsibilities and Respect'* (Report, 30 November 2005) ii–iii.



KARIV.

## Charter education and public authorities

Victoria's public authorities are continually deepening their understanding of Charter responsibilities and developing the skills to apply the Charter in practice. From 2017 to 2019, the Commission partnered with the Department of Justice and Community Safety to build a human rights culture within the Victorian Public Sector with the support of the Victorian Secretaries Board. The program supported public authorities to make human rights part of the everyday business of government. Throughout 2019, the Commission continued to provide its suite of Charter e-learning modules to more than 800 public sector staff. Public authorities also engaged in face-to-face Charter education through the Commission's Charter Education Program.

During 2019, the Commission partnered with a range of government departments, statutory authorities, courts and tribunals to strengthen understanding of human rights and foster skills to apply the Charter in practice. The Commission delivered more than 160 face-to-face education sessions tailored to the work of teams. The sessions used realistic workplace scenarios to practice applying the Charter. More than 2,700 public sector staff took part in the Charter Education Program throughout the year.

At the leadership level, executive sponsors continued their work under the Charter Leaders Group during 2019. Appointed by the Victorian Secretaries Board in 2018, the group is comprised of senior executives from each department, Victoria Police and Victorian Public Sector Commission to promote human rights and embed a human rights culture within the Victorian Public Sector. The purpose of the Charter Leaders Group is to give practical effect to the Charter by testing, demonstrating and modelling how leadership can embed human rights practice in organisational core documents, systems and operational capacity. In 2019, the Charter Leaders Group shared experiences with the Charter, considered initiatives to embed human rights practice and identified actions under the Human Rights Culture Indicator Framework to strengthen their obligations.

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Throughout 2019

**866**

public sector staff completed one of the Commission's suite of e-learning modules relating to the Charter.

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Of users surveyed, more than

**90%**

found the Charter modules assisted with their understanding of the rights protected and their duties under the Charter.

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Of those surveyed

**88%**

felt the modules helped them understand how and when rights can be limited.

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The Commission delivered more than

**160**

face-to-face education sessions tailored to the work of teams.

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More than

**2,700**

public sector staff took part in the Charter Education Program throughout the year.





## CASE STUDY

### **Aboriginal rights**

As part of its Managing Country Together Framework, Parks Victoria engaged the Commission to deliver tailored education sessions on Aboriginal cultural rights for its leadership, including Executive and Board, as part of a broader cultural awareness program. The Framework outlines a principles-based approach to strengthening the partnership between Parks Victoria and Traditional Owners in the management and protection of the its estate. The Commission's session was designed to build understanding of the rights of Aboriginal people under the Charter, and how these rights are understood with regard to the United Nations *Declaration on the Rights of Indigenous People*. The program emphasised the importance of Aboriginal cultural rights underpinning the implementation of the Framework.

The Commission's presentation brought a strategic perspective to the discussion that was highly valued by participants. It provided a clear picture of Victoria's policy and legislative basis and helped to reinforce the critical need to approach partnerships between government and Traditional Owners through a lens of human and cultural rights. The education materials developed and presented by the Commission will be integrated into the rollout of a broader cultural awareness program, to be delivered to all Parks Victoria staff.

# Tracking a human rights culture

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**2016**

The Commission surveyed more than 100 departments, agencies and local councils to understand what activities were undertaken to strengthen the Victorian Government's human rights culture. The results indicated that public authorities were taking steps to improve their human rights culture, but that they could be doing more. This was evidenced by the fact only about half (54 per cent) of public authorities surveyed reported changing their approach in 2016 to human rights compliance or making efforts to improve their human rights culture as a result of the independent review.

**2017**

The Commission profiled the progress made by five public authorities who participated in the Charter Education Project, celebrating the work of these organisations to grow their human rights culture.

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**2018**

The Commission developed a practical framework for identifying actions, indicators and measures to track improvements in the human rights culture within public authorities. This framework allows the Commission to transparently monitor the growth of a human rights culture within organisations. It also provides a roadmap for public authorities to embed human rights into their everyday policies and practices. Thirty-five public authorities participated in a pilot survey responding to questions against the framework. This indicated that many public sector staff know about and value human rights, and that the public sector is engaging community organisations in decisions that impact their rights. Potential areas for improvement included opportunities for leaders to model and promote human rights, and to use complaints data to identify improvements to human rights protection.

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**2019**

The Commission continued to build on the framework to provide public authorities with tools to make human rights a strong part of their culture. Following the pilot survey, the Commission reviewed the framework and sought feedback from the public authorities who participated in the pilot. The Commission has begun preparations for the next human rights culture survey of public authorities, which will focus on the 2021 calendar year, with the results to be released in early 2022.

**2020**

## 2019 People Matter Survey

The annual Victorian Public Sector Commission (VPSC) People Matter Survey provides valuable data for assessing the state of human rights knowledge, awareness and culture within the Victorian public sector. In May and June 2019, 89,455 employees in 181 public sector organisations took part in the survey, giving an overall survey response rate of 46 per cent.

In 2019 the VPSC asked public sector employees whether they agree, on a scale from strongly agree to strongly disagree, with four key statements about human rights culture. The results were positive, indicating that many public sector staff and organisations value human rights and understand how they apply to their work. In all but one measure there has been a steady increase in people's and organisations' engagement with and awareness of human rights.



The People Matter Survey results can provide public authorities with an insight into their progress in growing a human rights culture. As part of our work with public authorities under the Charter Education Program, several public authorities have used their organisation's results as a catalyst for taking action to improve their human rights culture.

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32 Victorian Public Sector Commission, *The State of the Public Sector in Victoria 2018–2019*, 145 <<https://vpvc.vic.gov.au/wp-content/uploads/2020/04/Report-State-of-the-Public-Sector-in-Victoria-2018-to-2019.pdf>>.

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During 2019 almost

**90,000**

public sector staff (46%) undertook the People Matter Survey.

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**“My workgroup values human rights”**

**85%**

of participants agreed or strongly agreed, a steady increase from 80% in 2017.

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**“My organisation encourages employees to act in ways that are consistent with human rights”**

**80%**

of participants agreed or strongly agreed, down from 87% in 2018 but level with 80% in 2017.

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**“I understand how the Charter of Human Rights and Responsibilities applies to my work”**

**75%**

of participants agreed, which is similar to the result in 2018 (76%) but a significant increase from 61% in 2017.

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**“My organisation respects the human rights of employees”**

**77%**

of participants agreed or strongly agreed. This is a positive result, noting that this question has been added recently so no comparisons are available.<sup>31</sup>

# Appendix

## Cases raising or considering the Charter

- ANZ Banking Group Ltd v Williamson* [2019] VSC 692
- Austin v Dwyer & Anor* [2019] VSC 837 (20 December 2019)
- AXP v Secretary to the Department of Justice and Community Safety (Review and Regulation)* [2019] VCAT 710
- Barnes v Boroondara City Council (Human Rights)* [2019] VCAT 116
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