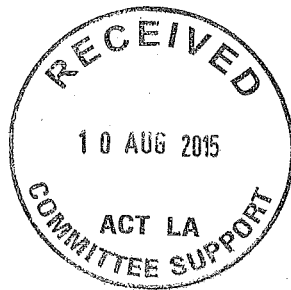





Victorian Equal Opportunity  
& Human Rights Commission

# Submission to the Inquiry into the *Human Rights Amendment Bill* *2015 (ACT)*

7 August 2015



	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	2.
DATE AUTH'D FOR PUBLICATION	24.08.15 BA

## Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the inquiry of the ACT Standing Committee on Justice & Community Safety ('Standing Committee') into proposed amendments to the *Human Rights Act 2004* contained in the *Human Rights Amendment Bill 2015*.

The Commission is an independent statutory body with functions under the *Equal Opportunity Act 2010* (the EOA 2010), the *Racial and Religious Tolerance Act 2001* (the RRTA 2001) and the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The Charter is an Act of Parliament setting out the human rights of people in Victoria, aiming to promote a culture where everyone's rights are protected and considered in service delivery, policy, public decision making and legislation.

The Victorian Charter was introduced into Parliament in 2006 and contains 20 human rights, including Aboriginal cultural rights. The Charter protects human rights in Victoria in three main ways:

1. Public authorities must act in ways that are compatible with human rights
2. Human rights must be taken into account when developing new laws
3. Laws must be interpreted and applied compatibly with human rights

The Commission has a role to report to the Victorian Attorney-General on the operation of the Charter and to conduct Charter interventions in proceedings before courts or tribunals. In addition, the functions of the Commission include performing compliance reviews at the request of a public authority and education about human rights and the Charter.

## Submission Overview

This Submission addresses the proposed amendments to the *Human Rights Act 2004* (HRA) contained in the *Human Rights Amendment Bill 2015*. The inquiry's terms of reference are the text of the amendment Bill.

The Commission's submission will address the proposed amendments providing for:

- explicit recognition of Aboriginal and Torres Strait Islander cultural rights
- a Note that children have all rights in the HRA
- application of the right to education to public authorities

The Commission is pleased to be invited to make a submission, as we have experience to share that is relevant to the proposals set out in the amendment Bill.

### **1. Explicit recognition of Aboriginal and Torres Strait Islander cultural rights**

The Commission supports the explicit protection of Aboriginal and Torres Strait Islander cultural rights under the proposed section 27(2)(a) of the HRA.

In Victoria, the Charter recognises the Victorian Aboriginal community in two ways:

1. The Preamble acknowledges as one of its guiding principles that:

Human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and water.

2. Aboriginal cultural rights are explicitly protected under section 19(2) of the Charter which states that:

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –

- a) to enjoy their identity and culture;
- b) to maintain and use their language;
- c) to maintain their kinship ties; and
- d) to 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.

The value and significance of Aboriginal cultural rights is well documented.<sup>1</sup> The Expert Mechanism on the Rights of Indigenous Peoples highlighted in its *Study on the role of languages and cultures in the promotion and protection of the rights and identity of Indigenous peoples* that 'languages and cultures will only flourish in environments when they are more broadly respected in their own right and for their contribution to an understanding of humanity'.<sup>2</sup> Therefore, the Commission considers that it is important to protect Aboriginal and Torres Strait Islander peoples' culture under domestic law.

### **Aboriginal cultural rights in practice**

The following examples demonstrate some of the ways that Aboriginal cultural rights have been used in a practical way to achieve positive outcomes for the Victorian Aboriginal community and the Victorian Government.

#### *1: Establishment of Wulgunggo Ngalu Learning Place*

Aboriginal cultural rights were a key consideration in the establishment of Wulgunggo Ngalu Learning Place, a residential diversion program for Koori males operated by Corrections Victoria. The program recognises the importance of culture in the rehabilitation of Koori men interacting with the justice system.

#### *2: Development of the Traditional Owner Settlement Act 2010 (Vic)*

Section 19(2) of the Charter was a key consideration in developing the *Traditional Owner Settlement Act 2010 (Vic)* (TOS Act). The TOS Act provides for an out-of-court settlement of native title in Victoria.

At the time the proposed new law was introduced, the Victorian Government noted that it:

---

<sup>1</sup> See, for example, Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No.4 – Ensuring the ongoing survival of the oldest living culture in the world* (July 2013), <<https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/declaration-dialogue>>.

<sup>2</sup> Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and cultures in the promotion and protection of the rights and identity of indigenous peoples*, UN Doc A/HRC/EMRIP/2012/13 (2012), 21.

Was a significant milestone in the ongoing protection of Aboriginal cultural rights and an important step to ensuring the rights can be fully exercised. This bill recognises that Aboriginal people have lived for more than a thousand generations in this state and have maintained complex societies with many languages, kinship systems, laws, politics and spiritualities.

They enjoyed close spiritual connections with their country and developed sustainable economic practices for their lands, waters and natural resources. Through this bill, the state will make agreements which formally recognise particular traditional owner groups and their traditional and cultural association with an area of Victoria. In doing so, the Bill promotes Aboriginal cultural rights under the Charter.<sup>3</sup>

A positive outcome of this law was the settlement agreement for the Dja Dja Wurrung people. In this agreement the Victorian Government acknowledges the continuing rights of the Dja Dja Wurrung people, including to enjoy their culture and identity, to maintain their distinctive relationship and connection with their ancestral land and to access, use and protect it.

### *3: Consideration of Aboriginal cultural rights in exemption applications*

The Victorian Civil and Administrative Tribunal considered Aboriginal cultural rights when it granted Parks Victoria an exemption from the *Equal Opportunity Act 2010* to employ Indigenous persons to care for and protect Wurundjeri country.<sup>4</sup>

The applicant argued that this would 'provide opportunities for traditional owners and Indigenous communities to realise their rights and aspirations and to have real involvement and input in caring for country through active park management'.<sup>5</sup> The Tribunal found that the nature of the roles and the work were 'closely aligned' with the rights in section 19(2) of the Charter.<sup>6</sup>

### **Aboriginal cultural rights project**

This year, the Commission commenced a project on Aboriginal cultural rights in Victoria. The project aims to increase the awareness, understanding and use of Aboriginal cultural rights under section 19(2) of the Charter. To achieve this, the Commission will develop a range of resources about Aboriginal cultural rights:

- to assist public authorities to comply with their obligations under the Charter by acting compatibly with Aboriginal cultural rights; and
- to increase awareness, understanding and use of Aboriginal cultural rights under the Charter by Aboriginal peoples as a tool to engage with public authorities.

The Commission has commenced consultation with government departments and the Victorian Aboriginal community to inform the development of the resources. Both government and the community have embraced the project and the need to develop practical resources and case studies to bring about greater understanding, use and respect for Aboriginal cultural rights.

For further information on this project, please visit:

<sup>3</sup> Statement of Compatibility, *Traditional Owner Settlement Act 2010* (Vic).

<sup>4</sup> Parks Victoria (Anti-Discrimination Exemption) [2011] VCAT 2238.

<sup>5</sup> Para 24.

<sup>6</sup> Para 33 and 34.

<http://www.humanrightscommission.vic.gov.au/index.php/aboriginal-cultural-rights-in-victoria>

## 2. A Note that children have all rights in the HRA

The *Human Rights Amendment Bill 2015* seeks to amend the HRA by including a Note in section 11 that children have all rights in the HRA in addition to the specific right to protection of families and children.

The ACT presently recognises children's rights in provisions in the HRA including:

Section 11 – protection of family and children:<sup>7</sup>

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind

Section 20 – children in the criminal process:<sup>8</sup>

- (1) An accused child must be segregated from accused adults.
- (2) An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted.
- (3) A child must be brought to trial as quickly as possible.
- (4) A convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.

The existing provisions in the HRA are similar in nature to the provisions contained in the Victorian Charter. These sections protect children's rights in the family unit and children, based on their status as a child. They also recognise that children are particularly vulnerable in the criminal process and require special protection in the justice system.<sup>9</sup>

In Victoria, our protection of children provision extends to each child having the right without discrimination to 'such protection **as is in his or her best interests** and is needed by him or her by reason of being a child.' This is broader than the current ACT provision, and operates as a stand-alone provision. It gives effect to the *Convention on the Rights of the Child 1989* ('CRC'), for example, article 3, which sets out that, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>10</sup>

This can prompt decision makers to refer to relevant articles in the CRC, for example, when ascertaining the scope of the right to protection of a child's best interests. In the matter of *Secretary to the Department of Human Services v Sanding*, the Victorian Supreme Court noted a number of factors which must be taken into account when identifying the best interests of the child, including the principle of ensuring that the voice of the child is heard in all matters affecting the child, as provided in article 12 of the CRC. The Court found that the magistrate had properly taken these matters into account.<sup>11</sup>

The Victorian Supreme Court contemplated the scope of the right to protection of children's best interests in an application by two children for an order to quash a decision of the Children's Court that children lacked maturity to provide instructions to

<sup>7</sup> *Human Rights Act 2004* (ACT) Section 11(1)&(2)

<sup>8</sup> *Human Rights Act 2004* (ACT) Section 20(1)-(4)

<sup>9</sup> *Charter of Human Rights and Responsibilities Act 2006*, section 17: Protection of families and children, section 23: Children in the criminal process.

<sup>10</sup> *Convention on the Rights of the Child 1989*: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>11</sup> [2011] VSC 42, paras 29, 30, 252

legal representatives. The Children's Court decision had denied them leave to be represented on a direct instructions basis. In the matter of *A & B v Children's Court of Victoria & Ors* [2012]<sup>12</sup>, the Court observed that article 12 of the CRC provides that a child has a right to have an opinion, to have that opinion listened to and taken seriously. The Court held that assessing whether a child is mature enough to give instructions requires considerations of more than just a child's age and must also assess the child's development and capacity to give instructions. The Court endorsed *Sanding*, finding that the best interests principle recognises children as autonomous rights-bearers whose views are entitled to be given proper consideration.

The Bill seeks to amend the HRA to include a Note in section 11 that children have all rights in the HRA in addition to the right to protection. This would be a positive clarification to promote recognition of children's civil and political rights. The Commission would also recommend a further amendment to section 11(2) of the HRA to include protection in a child's 'best interests' and as needed by him or her by reason of being a child. Explicit recognition of this kind would better align the HRA with the protection afforded specifically to children in the CRC.

### **3. Application of the right to education to public authorities**

The *Human Rights Amendment Bill 2015* proposes to extend the application of part 5A of the HRA to the right to education, imposing an obligation on public authorities to comply with the right to education in section 27A. The requirement of public authorities to act compatibly with human rights and to give proper consideration to human rights in section 40B(3) has previously not applied to the right to education, as this has been an 'interpretational right' that has not imposed a duty.

Victoria does not have an equivalent Charter provision, however, in principle the Commission would support broadening the scope of the obligation on public authorities to comply with the right to education.

In practice, this would mean that public authorities must consider how their decisions, actions, policies and procedures impact on the right to education in the same way as the civil and political rights contained in the HRA, and there would be the same legal consequences for a breach. The United Nations High Commissioner for Human Rights has noted that the right to education is fundamental to exercising other human rights. For example, individuals who are not literate may struggle to take part in political activity, vote or enjoy freedom of expression.<sup>13</sup> The Commission supports reforms to the HRA that would strengthen protection of rights, including important rights contained in the *International Covenant on Economic Social and Cultural Rights 1966* such as the right to education.

### **4. Conclusion**

The Commission supports the reforms set out in the *Human Rights Amendment Bill 2015 (ACT)*. These proposals would strengthen human rights protections enjoyed by people in the Australian Capital Territory.

---

<sup>12</sup> [2012] VSC 589, paras 91, 93, 100, 101

<sup>13</sup> Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on economic, social and cultural rights*: fact sheet no. 33, Geneva, Switzerland, 2008, p10.



Victorian Equal Opportunity  
& Human Rights Commission

*Contact us*

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	<a href="mailto:information@veohrc.vic.gov.au">information@veohrc.vic.gov.au</a>
Website	<a href="http://humanrightscommission.vic.gov.au">humanrightscommission.vic.gov.au</a>
Follow us on Twitter	@VEOHRC
Find us at	<a href="http://www.facebook.com/VEOHRC">www.facebook.com/VEOHRC</a>

