



Advancing Aboriginal and Torres Strait
Islander Peoples' Rights using Victoria's
Human Rights Charter:

Your advocacy guide

Aim of this guide:

This guide aims to help Aboriginal and Torres Strait Islander Peoples in Victoria to protect their human rights under Victoria's Charter of Human Rights and Responsibilities.

Who is the guide for?

The guide is designed to help Aboriginal and Torres Strait Islander Peoples in Victoria and the organisations that work alongside them to advocate for their human rights. The guide is intended to help identify when the Charter might be used to protect Aboriginal and Torres Strait Islander Peoples' human rights and explain how to get further advice and assistance.

The guide is focused on particular human rights under the Charter that are relevant to Aboriginal and Torres Strait Islander Peoples. The Charter does not apply outside of Victoria.

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 waters.

Preamble to Victoria's Human Rights Charter

Aboriginal and Torres Strait Islander people should be aware that this document may contain images or names of people who have since passed away.



What are human rights?

Human rights are the basic freedoms that belong to every single one of us. They reflect values like equality, respect and dignity. They are the things we all need for our wellbeing and to live a dignified life.

Human rights help to keep our society fair, just and equal. They protect all of us.

Human rights have a long history going back centuries to documents like the Magna Carta, the American Bill of Rights and more recently the Universal Declaration of Human Rights.

Australia has agreed to comply with key international law treaties that protect human rights but these treaties aren't enforceable under Australian law. Australia has also supported the [UN Declaration on the Rights of Indigenous Peoples](#) which sets out specific human rights standards for Indigenous Peoples but the Declaration is not legally binding.

Unlike every other Western democracy, Australia has no national Human Rights Charter or Bill of Rights that comprehensively protects our human rights in Australian law. Instead, there is an incomplete patchwork of laws, like anti-discrimination laws, that protect some rights.

At the state level, Victoria has protected key human rights in law through the Charter of Human Rights and Responsibilities. The Australian Capital Territory is the only other state or territory with a Human Rights Charter.

Rights protected in Victoria's Human Rights Charter

Victoria's Human Rights Charter protects twenty fundamental human rights including:

- Cultural rights including Aboriginal peoples' cultural rights to enjoy identity and culture, maintain and use language, maintain kinship ties and maintain their distinctive spiritual, material and economic relationship with the land and water and other resources.
- The right to recognition, equality and non-discrimination.
- The right to be protected from cruel, inhuman or degrading treatment.
- The right not to have privacy, family or home arbitrarily interfered with.
- The right to protection of families.
- The right of every child to have protection as is in their best interests.
- The right to liberty and security.
- The right to humane treatment when deprived of liberty.

The right to self-determination is not currently protected in the Charter.



How does Victoria's Human Rights Charter protect rights?

The Charter is designed to protect and promote the human rights of Victorians when dealing with the Victorian Government. It also promotes transparency in the way the Victorian Government and Parliament deal with human rights.

The Charter requires Victorian public authorities, including government departments, public servants, local councils, Victoria Police and other agencies, to:

- *properly consider* human rights when making laws, developing policies, delivering services and making decisions; and
- *act compatibly* with human rights.

The Charter requires that new laws must be *assessed in Parliament* against human rights standards. In some circumstances, the Victorian Parliament can expressly choose to override human rights.

In some circumstances, the Victorian Government can lawfully *limit or restrict human rights*. It can only do this if it has a good reason for restricting the right and it does it in a reasonable way that is justified in a free and democratic society.

If the Victorian Government doesn't properly consider or act compatibly with human rights, a person affected may be able to *take action in the courts*. You can't take direct legal action for a breach of the Charter but you can raise the Charter breach if you have another legal action available. In this way, the Charter can help to stop or change the way government acts, but you can't get compensation for a Charter breach. Courts also can't invalidate laws that breach human rights.

Courts are required to *interpret laws consistently with human rights*.

You can raise human rights issues directly with Victorian public authorities and you can also *complain to the Victorian Ombudsman* if a government agency breaches the Charter.

The Charter doesn't apply to the Federal Government or other state and territory governments.

The Charter applies to public authorities including some private companies and community organisations

The Charter applies to public authorities in Victoria. Public authorities include Victorian government agencies and officials such as government departments, public servants, local councils, Victoria Police and other government bodies like VicRoads and WorkSafe. Courts and tribunals have to comply with the Charter in some circumstances. The Charter also applies to some private and community bodies when they are doing certain things for the government. For example, a private prison company, a community housing provider and a private company delivering public transport may all be public authorities required to comply with the Charter. When in doubt, seek advice.

Protecting human rights using the Charter: Examples from Australia and overseas

This guide provides examples of different ways the Charter, and similar human rights laws overseas, have been used to protect the rights of Indigenous Peoples. These examples are intended to assist you to identify ways the Charter might help to protect the rights of Aboriginal and Torres Strait Islander Peoples in Victoria.

1. Child protection

Aboriginal and Torres Strait Islander children are over-represented in child protection and out-of-home care compared to non-Indigenous children. Past government policies such as forced removals (Stolen Generation), the effects of disadvantage and intergenerational trauma contribute to this.

Many Aboriginal children who are removed from their homes suffer harm in the child protection system. The Victorian Department of Health and Human Services (DHHS) must act compatibly with and properly consider human rights under the Charter, including Aboriginal cultural rights and the right of every child to protection that is in their best interests. The Charter can be used in child protection cases to ensure that each DHHS decision made in relation to an Aboriginal child is in their best interests and properly considers their cultural rights and rights to maintain kinship ties.

EXAMPLE:

Getting Aboriginal kids in care into Aboriginal homes: [Department of Human Services v Sanding \(Victorian Supreme Court, 2011\)](#)

Four Aboriginal siblings were placed in protective care because of concerns for their safety. At first, the children were placed in a non-Aboriginal home and separated from one another. Their mother then successfully applied to have the siblings reunited and returned to the care of their maternal grandmother. The court considered (among other things) how this decision would impact on the human rights of the children, and, in particular, their cultural and spiritual identity and connection with their Aboriginal family and the wider community. The court decided to uphold the decision to return the children to their grandmother.

EXAMPLE:

Meaningful access to culture in out-of-home care: [Commission for Children and Young People "Always was, Always will be Koori children" 2016 report](#)

In this report, the Commission relied on the cultural rights obligations in the Charter to support its recommendations for government and community service organisations to better identify and record Indigenous status in the child protection system and to make sure that Aboriginal and Torres Strait Islander children in out-of-home care have meaningful access to their culture.

2. Criminal justice

Aboriginal and Torres Strait Islander Peoples are statistically more likely than non-Indigenous Australians to be involved in the criminal justice system, as both offenders and victims.

Human rights issues are relevant at all stages of criminal justice processes – from contact with police, court processes, conditions in detention and more. The Charter requires police, courts, youth justice services and prisons to comply with human rights. However, the Youth and Adult Parole Boards have been exempted from complying with the Charter.

EXAMPLE:

Getting Aboriginal kids out of adult prison

After riot damage to a youth justice centre, the Victorian Government set up a new youth justice centre in a unit in the maximum security adult Barwon Prison and started transferring children as young as 15 there. The conditions in the unit were very harsh, including the use of extended solitary confinement, regular handcuffing and the denial of proper education.

The Victorian Aboriginal Legal Service (VALS) took legal action using the Charter and other laws to get all the Aboriginal children back into normal age-appropriate youth justice centres. VALS argued that locking up children at Barwon Prison breached their human rights, including their rights to humane treatment, protection of children and Aboriginal cultural rights. The Victorian Government settled the legal action by agreeing to remove all Aboriginal children from Barwon Prison and to not transfer any Aboriginal children other than in very limited circumstances. The Charter was later used to bring successful legal action to remove all the non-Aboriginal children from Barwon Prison, see: [Certain Children v Minister for Families and Children \(Victorian Supreme Court, 2017\)](#).



EXAMPLE:
Proper conditions for kids in jail:
Brough v Australia (UN Human Rights Committee)

Corey Brough was a 16 year old Aboriginal boy with a mild intellectual disability who was sent to a segregated area of an adult prison in NSW. He was locked in an isolated cell for long periods, placed under constant camera surveillance and forcibly stripped to his underwear. The United Nations Human Rights Committee found that this treatment breached his human rights under international law including his right to humane treatment in custody and his right to adequate protection of children. The Committee emphasised Corey's particular vulnerabilities as an Aboriginal boy with a disability. While this case was brought under international law protections because NSW does not have a Human Rights Charter, similar arguments could be brought under Victoria's Human Rights Charter if treatment like this happened in Victoria.

EXAMPLE:
Maintaining kinship ties for Aboriginal prisoners: Victorian Equal Opportunity and Human Rights Commission Charter Report 2015

The Charter has been used a number of times by Aboriginal prisoners to facilitate access to their family on the basis that their Aboriginal cultural rights include the right to maintain their kinship ties. One example involved an Aboriginal mother in prison trying to see her children, which was extremely difficult due to her incarceration 750km away from them. The Aboriginal Family Violence Prevention and Legal Service Victoria raised arguments about the woman's Aboriginal cultural rights and the right to protection of families under the Charter. A judge directed the Department of Health and Human Services, which had child protection orders over the children, to make all necessary arrangements for the children to visit their mother.

EXAMPLE:
Cultural rights in bail decisions:
Director of Public Prosecutions v SE (Victorian Supreme Court, 2017)

SE was a 17 year old Aboriginal person with an intellectual disability who applied for bail after being arrested. The court relied on the Charter to conduct the bail hearing in a way that was appropriate for a child with an intellectual disability. Victorian bail laws specifically require that Aboriginal cultural issues be taken into account in relation to bail applications. The court considered this obligation together with the cultural rights of Aboriginal people under the Charter. One of the reasons the Court granted bail was on the basis that it would facilitate contact with SE's Aboriginal family which would have a positive influence on rehabilitation.



3. Equality

Many Aboriginal and Torres Strait Islander Peoples continue to face significant disadvantage. Racism and discrimination remain widespread in the Australian community. The Charter bolsters anti-discrimination laws by requiring Victorian government agencies to comply with the right to equality. The Charter also allows positive discrimination measures taken for the purpose of assisting or advancing Aboriginal and Torres Strait Islander Peoples disadvantaged because of discrimination.

EXAMPLE:
Aboriginal and Torres Strait Islander only jobs

A number of organisations and government agencies have applied for exemptions under anti-discrimination laws to enable them to advertise for and employ only Aboriginal and Torres Strait Islander people in particular positions. In each case, the relevant tribunal has decided to grant the exemption or said that the exemption was unnecessary, recognising the legitimacy of measures taken to advance Aboriginal and Torres Strait Islander people who have been disadvantaged because of discrimination. Relevant cases are [Cummeragunja Housing](#), [Parks Victoria](#), [Ian Potter Museum of Art](#), [Stawell Regional Health](#) and [Department of Human Services](#).

EXAMPLE:
Redress for racial discrimination by police: [Wotton v Queensland](#) (Federal Court, 2016)

Following the death in custody of an Aboriginal man, Mulrunji, Queensland Police racially discriminated against the Aboriginal and Torres Strait Islander community of Palm Island. The police failed to independently and impartially investigate the death, failed to communicate with the community and then declared an emergency situation, which facilitated an excessive and disproportionate policing response undertaken as a show of force against the community.

Three members of the community successfully brought legal action under Federal race discrimination laws. The court ruled that a number of the community's human rights had been violated, including the right to equality before the law and the right not to be subjected to unlawful interference with privacy, family or home. The court made a number of orders including an order for compensation.

This case was brought under Federal race discrimination laws. Similar arguments could be brought in Victoria if treatment like this happened in Victoria. The Charter could be used to strengthen a legal case brought under anti-discrimination laws.

EXAMPLE:
Ensuring proper child and family services: [First Nations Child and Family Caring Society v Canada](#) (Canadian Human Rights Tribunal, 2016)

A Canadian tribunal ruled that the Canadian Government racially discriminated against First Nations children and their families living on-reserve by failing to provide them the same level of welfare services that exist elsewhere, contrary to Canada's Human Rights Act.

The Tribunal found that First Nations children on-reserve must be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve. Further, these services must be sufficiently funded to meet the real needs of First Nations children and families, in order to not perpetuate historical disadvantage and trauma suffered by Aboriginal people.

This case was brought under Canadian anti-discrimination laws. Similar arguments could be brought in Victoria if treatment like this happened in Victoria. The Charter could be used to strengthen a legal case brought under anti-discrimination laws.

4. Protecting cultural rights connected to land and water

Connection to and relationship with land is core to Aboriginal and Torres Strait Islander Peoples' culture, spirituality and wellbeing. Certain areas of land are particularly significant for cultural reasons.

Some legislation protects particular aspects of the distinct cultural rights of Aboriginal and Torres Strait Islander Peoples in relation to land and water; see for example Victoria's Traditional Owner Settlement Act or the Federal Basin Plan which regulates water management in the Murray-Darling Basin.

The Charter requires Victorian government agencies to properly consider and act compatibly with Aboriginal and Torres Strait Islander Peoples' right to maintain their distinctive relationship with the land, waters and other resources. While no Victorian court cases to date have considered or applied this right, examples from overseas show how it might be used in the future.



EXAMPLE:
Requiring government to consider cultural rights: Lansman v Finland (UN Human Rights Committee, 1994)

The Moutkatunturi Herdsmen's Committee are members of the Sami peoples in Finland who have a traditional cultural practice of reindeer herding. They twice complained to the UN Human Rights Committee that the Finnish Government had violated their cultural rights under international human rights law by authorising logging, construction and mining works which adversely affected this cultural practice.

The Human Rights Committee explained that cultural rights under international law apply even where traditional practices have evolved through the use of technology and the passage of time. It also acknowledged that commercial activities could erode cultural rights and accordingly the interests of Indigenous people must be considered before granting authorisation. In this particular case there was no violation of cultural rights because the government had considered the interests of, and consulted with, the Sami peoples, and the reindeer-herding did not appear to have been adversely affected by the commercial activities.

While this case was brought under international law, it highlights the kinds of issues that Victorian government agencies may need to consider in relation to Aboriginal cultural rights over land, water and resources.

EXAMPLE:
Informed consent required before substantially interfering with cultural rights: Poma v Peru (UN Human Rights Committee, 2009)

Ms Poma Poma was a member of the Aymara people in Peru. As a result of water-diversion and water drilling projects by the Peruvian Government, her community's traditional grazing lands for llamas and alpacas were badly degraded, ruining their way of life and economy.

The Human Rights Committee found that the activities carried out by the government breached cultural rights under international law. It found that where government action will substantially compromise or interfere with culturally significant economic activities of an indigenous community, there must be free, prior and informed consent from the members of the community – mere consultation is not enough. The Committee stated that Peru must provide an effective remedy and reparations.

Related issues arose in a 2007 case decided in the Inter-American Court of Human Rights, Saramaka People v Suriname. The Court found that Suriname violated the Saramaka people's property and other rights by granting mining and logging concessions on their traditional lands without effectively consulting with them and ensuring other safeguards.

Again, while these cases were brought under international law, they highlight the kinds of issues that Victorian government agencies may need to consider in relation to Aboriginal cultural rights over land, water and resources.



Taking action

Individuals, lawyers, advocates and organisations can use the Charter in a range of ways to advance Aboriginal and Torres Strait Islander Peoples' rights.

You can engage with the Victorian Government, the Parliament and law reform bodies when laws and policies are being developed to push for better laws and policies that comply with human rights.

For example, the Victorian Aboriginal Heritage Council has recognised that the Charter helps to promote a greater understanding of Victorian Aboriginal cultural heritage and has engaged with a range of government bodies to promote cultural rights in line with the Charter.

You can also use the Charter in individual cases to advocate with government agencies to stop action that would breach human rights.

For example, the Victorian Aboriginal Legal Service used the Charter to help stop the eviction of an Aboriginal woman and her family members from transitional housing, arguing that the housing organisation hadn't properly engaged with her cultural and family rights.

In some circumstances, the Charter can be used in legal action to stop or change government action that breaches human rights.

Below is a flowchart with some suggested steps for taking action using the Charter and some information on where to get legal help.

Flowchart for taking human rights action

STEP 1
Identify the policy, act or decision

Identify what is being done that you want stopped or changed.

Identify who is being affected.

Identify who made the policy, act or decision – is it a Victorian public authority?

The Charter applies to Victorian public authorities which include government bodies, public servants, local councils and some private companies and community organisations that perform functions for government.

STEP 2
Identify the restriction on human rights

Identify the human rights that are being restricted by the policy, act or decision.

Is the restriction for a good reason?

If so, is it being done in the least restrictive way?

The Victorian Government can restrict human rights but only for a good reason and then only if done in the least restrictive way.

STEP 3
Raise the issue with the Victorian public authority

Gather the information you need to raise the issue.

Identify the change you want to achieve.

Raise the issue with the public authority.

It's normally best to first raise the issue directly with the relevant public authority in a constructive way that seeks to resolve the issue.

Consider expert legal advice

STEP 4
Take further action

Consider contacting any relevant regulatory body

Consider escalating the complaint in the public authority

Consider a complaint to the Victorian Ombudsman



Getting help

There are a number of ways to get legal help about human rights issues and advice about options.

Victoria Legal Aid has a free legal helpline. Call 1300 792 387. www.legalaid.vic.gov.au

The Victorian Aboriginal Legal Service may be able to help with some human rights issues. Call 1800 064 865. www.vals.org.au

The Aboriginal Family Violence Prevention & Legal Service may be able to help with family violence, family law, victims of crime and child protection issues. Call 1800 105 303. www.fvpls.org

The Human Rights Law Centre may be able to provide advice to lawyers and advocates on helping their clients with human rights issues. Call 8636 4450. www.hrlc.org.au

You can make human rights complaints to the Victorian Ombudsman. Call 1800 806 314 or go to www.ombudsman.vic.gov.au

The Victorian Equal Opportunity and Human Rights Commission has information on the Charter and can receive complaints about discrimination, harassment, vilification and victimisation. Call 1300 292 153 or go to www.humanrightscommission.vic.gov.au

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This guide is not legal advice

This guide provides general information only and is not legal advice. When in doubt, seek legal advice about your specific situation.

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Photographs: Gary Radler