Victorian Equal Opportunity & Human Rights Commission

To: Committee Secretary, Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

From: Ro Allen, Commissioner

Subject: Question on notice at our appearance before the Committee on Friday, 25 August 2023

Date: 14 September 2023

Requested by: Senator Stewart

Question from Senator Stewart, Hansard page 9

Ms Cooper: I'm very happy to speak to that. Of course the scope of that protection for cultural rights under our charter is an acknowledgement that First Nations people hold distinct cultural rights and mustn't be denied the right to enjoy their identity and culture, to maintain language, to maintain kinship ties and to maintain the distinctive relationship with the land and waters. We've seen the practical operation of that play out in many cases…..

I'm mindful of time, but, if you would like further examples of court proceedings, I can give you those specifically related to the cultural right. But, of course, I should make the point that our charter does protect First Nations people in relation to all of the rights, and it does, of course, have a role to play.

Senator STEWART: I'm happy for you to provide on notice any further examples you might have that go to your point.

Response to question

Please find below examples of court proceedings in Victoria that have addressed cultural rights under the Charter.

Cemino v Cannan [2018] VSC 535 (17 September 2018)

Case summary

A young First Nations man, Mr Cemino, made a request for his court matter to be transferred from the Echuca Magistrates' Court to the Koori Court in Shepparton. The Koori Court is a specialised court for First Nations people. It has been developed to provide a culturally appropriate and respectful justice system that reduces barriers for First Nations people to participate and engage in the legal process. For example, during a hearing in the Koori Court, Elders and a Koori Court Officer should be present, and a conversation takes place around the bar table.

His application to have his matter heard in the Koori Court was refused and he appealed this decision to the Victorian Supreme Court. Ultimately, it was confirmed that courts must consider the distinct cultural rights of First Nations people under the Charter when making decisions in relation to requests for matters to be heard in the Koori Court.

On the Charter ground, Justice Ginnane of the Supreme Court confirmed that the rights protected in s 8(3) (equality before the law) and 19(2)(a) (Aboriginal persons hold distinct cultural rights) were directly applicable to the Magistrates' Court by reason of s 6(2)(b) of the Charter, which provides that the Charter applies to courts and tribunals, to the extent they have certain functions. Accordingly, courts must consider the distinct cultural rights of Aboriginal people and their right to equality when making decisions in relation to an Aboriginal person's request to be heard in the Koori Court.

Justice Ginnane accepted the further evidence given by Mr Cemino on appeal that he feels better understood by the elders in the Koori Court, and that he can also better understand what is going on in Koori Court proceedings as opposed to mainstream Magistrates' Court proceedings.

Further, Justice Ginnane found that the Magistrates' Court should have taken into account the plaintiff's rights under s 8(3) and s 19(2)(a) when deciding whether to transfer the proceedings to the Koori Court by reason of s 32(1) of the Charter, which requires that all statutory provisions be interpreted in a way that is compatible with human rights so far as it is possible to do so consistently with their purpose. The Court held at [147] "the proper exercise of the discretion will affect whether an Aboriginal person has access to the Koori Court, which in turn enables an Aboriginal person to enjoy, in the sense of have the benefit of, their identity and culture when they are charged with criminal offences."

His Honour ordered that the Magistrates' decision be set aside, and that Mr Cemino be allowed to have a different Magistrate consider his transfer request.

Secretary to the Department of Human Services v Sanding [2011] VSC 42 (22 February 2011)

Case summary

This case involved four First Nations children who had spent many years living with their mother in the home of their maternal grandparents. The grandmother was the primary caregiver to the children. It was alleged that their mother was addicted to drugs and, in the past, her behaviour had made the household violent and unsafe for the children.

The then Department of Human Services (DHS) had been involved with the family for some time and eventually obtained a 'custody to Secretary' order from the Court that granted sole custody of children to the Secretary of the DHS. The Secretary decided to place the children in out-of-home care, in separate homes and with non-First Nations families.

After moving out of the grandmother's home, the mother applied to have the order revoked and the children placed in the care of their grandmother. The mother's application was successful. The Secretary applied for judicial review of that decision.

The substantive issues in the matter involved whether there was enough evidence before the Court for it to revoke the order. However, the Court also made findings relating to the Charter. It found that s 24 of the Charter - the right to a fair hearing - applied in child welfare proceedings.

The Court also found that it was required to consider the children's rights under the Charter when it was considering their best interests under the *Children, Youth and Families Act 2005*

(Vic). These interests included the protection of the family as the fundamental group unit in society (s 17(1)), the right to such protection as was in their best interests and was needed by them as children (s 17(2)) and their cultural rights as First Nations children (s 19(1) and (2)).

The appeal from DHS was dismissed and the children remained with their grandmother.

DPP v SE [2017] VSC 13 (31 January 2017)

Case summary

In the case of DPP v SE, which involved a young First Nations person with an intellectual disability, the Supreme Court found that the courts were required to directly apply several Charter rights when hearing bail applications involving children.

This included the right to equality (s 8), the right of a child to protection in their best interests (s 17(2)), the rights of children within the criminal process (s 23), the right to humane treatment when deprived of liberty (s 22) and cultural rights (s 19).

In practice, this included taking into account the applicant's age, his identity as a First Nations person and his intellectual disability.

The Supreme Court directed that the young person was not to be handcuffed or detained with adult prisoners, they could sit with their lawyer and their support persons, the judge and lawyers would not wear robes and they would all speak in understandable language.

This case illustrated what it looks like to practically uphold and protect a young person's rights in court proceedings – including how a young First Nations person's rights can be upheld in court.

Coronial Inquest into the passing of Mathew Luttrell

Case summary

A recent inquest into the passing of proud Yorta Yorta man Mathew James Luttrell, considered the role of the Charter with respect to Mr Luttrell diagnosis, treatment, and care at the Mildura Public Hospital. Mr Luttrell took his own life after being discharged from the Mildura Base Hospital.

The coroner acknowledged that one of the consequences flowing from the right to life protected under the Charter is that the coroner must conduct an effective investigation into the man's death. The coroner also made findings around the failure to provide Mr Luttrell with cultural supports and culturally appropriate care.

Significantly, the coroner made recommendations around the Commission providing the hospital with Charter training to help staff meet their obligations under the Charter.

The existence of the Charter could not prevent Mathew's passing. But the lessons learnt from this tragic case reflect that the Charter has a very real, practical role that must be reflected in the decisions and actions of public authorities.

Victorian Equal Opportunity & Human Rights Commission

To: Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

From: Ro Allen, Commissioner

Subject: Question on notice at our appearance before the Committee on Friday, 25 August 2023

Date: 14 September 2023

Requested by: Senator Stewart

Question from Senator Stewart via committee secretariat

We've heard from a witness in Brisbane last week that Conciliation may not be appropriate for FN peoples and that this cohort is just not very likely to make use of this avenue – What's been VEOHRC's experience of this? What are the possible alternative mechanisms that may be more accessible to vulnerable cohorts?

Response to question

In Victoria, the Ombudsman is the body with the power to handle complaints of breaches of Charter rights (except in relation to Victoria Police which is handled by the Independent Broad-based Anti-corruption Commission). However, the Commission does handle complaints of discrimination under the *Equal Opportunity Act 2010* (Vic) and provides a conciliation service. Our experience here is that the Commission has historically received low numbers of complaints from First Nations people.

When developing our 2020-22 Aboriginal Cultural Engagement Strategy (ACES) we heard from First Nations people and organisations about how we can better meet their needs. As part of the ACES several changes were made to the way in which the Commission provides its dispute resolution service to improve accessibility and ensure the services are culturally responsive, including:

- all complaints received are fast tracked through the dispute resolution process and assisted by a staff member who has completed tailored cultural competency training
- a complainant can speak to a dedicated staff member to help avoid them telling their story more than once and have the option to speak with a First Nations staff member (if available)
- a clear warm referral process to other relevant agencies who may be able to assist the complainant
- partnership principles (self-determination, cultural rights, promoting First Nations voices and perspectives and accountability and transparency to the First Nations community) to guide our work with First Nations organisations and enhance community engagement.

We are also working with an Aboriginal-led creative agency on projects to strengthen our reach and build trust with First Nations people. Projects include:

- a public engagement campaign - to raise awareness of our tailored services. We commissioned the original artwork Gorakor Wunbuni Yingurni 'Walk gently today' (Dja Dja Wurrung), from Yorta Yorta, Dja Dja Wurrung and Gamilaroi artist Madison Connors, which will be the campaign's visual identity. The campaign message, 'What happened to you matters,' focuses on allyship and making a complaint with the support of someone you trust.
- a tailored community reporting tool - to enable First Nations people to report their experiences and opt in (or out) of any further follow up or contact from us. It will act as an easy and accessible gateway into the Commission's services and formal complaints process if that person wishes to do so.
- a community partnerships strategy - to strengthen our connections with First Nations stakeholders, build their knowledge of our services, and affirm our commitment to providing culturally safe referral pathways.

The work undertaken under the ACES has seen an increase in enquiries and complaints received from First Nations people since 2020-21. Of the complaints received in 2022-23, most were in the areas of receipt of goods and services (43.6%) and in employment (28.2%). While complaints received have risen, we acknowledge that these numbers are just a fraction of the instances of discrimination experienced by First Nations peoples.

There are limited alternative mechanisms available for complainants, except to make an application to the Victorian Civil and Administrative Tribunal – Human Rights List.

Victorian Equal Opportunity & Human Rights Commission

To: Committee Secretary, Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

From: Ro Allen, Commissioner

Subject: Question on notice at our appearance before the Committee on Friday, 25 August 2023

Date: 14 September 2023

Requested by: Senator O'Sullivan

Question from Senator O'Sullivan, Hansard page 10

Senator O'SULLIVAN: I'll keep it short. It follows on from the deputy chair's question. In relation to the case study that you provided and the fact that you've said that parliament continued to scrutinise legislation, including COVID-19 measures. Given that parliament in Victoria didn't meet as often for obvious reasons, did the relevant committee continue to meet? In your view, was the scrutiny role diminished by parliament not meeting, or was it sufficiently covered by the committee's role?

Mx Allen: Thanks for the question. I'm not sure we can add much more than we've already added. Does the team want to add anything else? Certainly the pandemic legislation moving forward is going to definitely provide more scrutiny with another advisory committee to the minister.

Senator O'SULLIVAN: I'm not sure if that question was answered in your earlier statement. Because parliament wasn't meeting—it didn't sit as often—did the committee continue to meet?

Ms Matthews: Is the question: did the SARC, the Scrutiny of Acts and Regulations Committee continue to meet?

Senator O'SULLIVAN: Yes.

Ms Matthews: We'd have to take that on notice. We'd have to consult with parliament to identify how often, but presumably they meet in relation to all legislation, and there was no change in that.

Response to question

The Commission contacted the Scrutiny of Acts and Regulations Committee Secretariat on this matter and received the following response: "The Scrutiny of Acts and Regulations Committee (Committee) continued to meet regularly throughout 2020 and 2021. In accordance with the statutory requirements in the *Parliamentary Committees Act 2003* the Committee reported on all Bills introduced into the Parliament. All 'Alert Digests' were tabled in a timely manner in accordance with normal practice and are available on the Committee's website. The Committee also discharged its statutory responsibilities in relation to subordinate legislation in accordance with the requirements of the *Subordinate Legislation Act 1994*. The Committee met remotely by Teams."

Victorian Equal Opportunity & Human Rights Commission

To: Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

From: Ro Allen, Commissioner

Subject: Question on notice at our appearance before the Committee on Friday, 25 August 2023

Date: 14 September 2023

Requested by: Senator Thorpe

Question from Senator Thorpe via committee secretariat

If every single person experiencing human rights abuse in Victoria had the means to pursue a claim, do you have any indication on what these numbers would look like?

Response to question

Our submission notes that in Victoria the Ombudsman has the power to enquire into or investigate whether any administrative action is incompatible with a Charter right (including corrupt conduct referred from the Independent Broad-based Anti-corruption Commission) and is now able to undertake alternative dispute resolution in relation to most complaints (the Ombusdman has had a complaints function since 1 January 2007, the date on which the Charter commenced but the alternative dispute resolution has only been in place since 1 January 2020). In its most recently published annual report (2021-22) the Ombudsman stated it received 2937 human rights complaints, which is an increase of six per cent on the previous year. The Ombudsman's website states that the most common human rights complaints relate to humane treatment when in custody; protection of families and children; property rights; recognition and equality before the law and protection from cruel, inhuman or degrading treatment.

We recognise that the number of complaints made to the Ombudsman is low compared with the total number of Victorians. However it is very difficult to provide an accurate answer on how many claims would be made if all people in Victoria were aware of their right to make a claim and had the means to pursue them (and assuming this encompasses all the necessary means).

Our submission (pages 16-21) has recommendations on mechanisms which in our view will improve access to justice for people to pursue Charter claims including:

- alternative dispute resolution
- an independent cause of action
- representative complaints
- equal access to costs in human rights matters
- access to compensation where a court or tribunal determines that administrative action does not adequately address the harm the person has experienced.