



ABORIGINAL CULTURAL RIGHTS

What you need to know

Fact sheet for public authorities

The Victorian Charter of Human Rights and Responsibilities (the Charter) protects the distinct cultural rights of Aboriginal and Torres Strait Islander people in Victoria.

The Charter's preamble recognises 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 waters.

The term 'Aboriginal' is used in this fact sheet and in the Charter to refer to anyone belonging to Aboriginal or Torres Strait Islander peoples.

What does the Charter say?

Section 19(2) of the Charter states that Aboriginal people hold distinct cultural rights and must not be denied the right, with other members of their community to:

- enjoy their identity and culture
- maintain and use their language
- maintain their kinship ties, and
- 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.

What do public authorities have to do?

"Government needs to ensure this right is demonstrated as part of government business when engaging and working with Aboriginal people and communities."

– Community member

Public authorities have a legal obligation under section 38 of the Charter to:

- act compatibly with Aboriginal cultural rights
- properly consider Aboriginal cultural rights when making decisions.

This means that public authorities must properly consider Aboriginal cultural rights when they deliver services, engage with the public, make decisions, and develop new projects or policies.

Aboriginal cultural rights are relevant in many areas of public life including education, health, employment, criminal justice, youth justice, policing, child protection, land and resources.

When a public authority (for example, a public servant in a government department) is making a decision that could limit human rights, they must consider which rights affected by the decision are relevant, and how the decision will interfere with those rights. Giving proper consideration involves balancing competing rights and interests. A decision may ultimately limit human rights, but this is OK as long as it is reasonable and justified in accordance with section 7(2) of the Charter.

Who is a public authority in Victoria?

A 'public authority' under the Charter includes:

- Government departments and agencies
- Public servants and officials
- Local councils, councillors and council staff
- Statutory authorities, that is organisations established by law with public functions (such as VicRoads, Parks Victoria and WorkSafe)
- Victoria Police
- An entity whose functions are of a public nature, and is exercising those functions on behalf the state or a public authority. For example, organisations that are contracted by the public authorities to deliver public services, such as a community organisation contracted to deliver health services, a privately run prison, and authorised officers on public transport.

When can Aboriginal cultural rights be limited?

As with all rights protected in the Charter, Aboriginal cultural rights may be limited or balanced with other rights and interests as long as the limitation is lawful, reasonable and proportionate.

Example of limiting cultural rights

The government is reviewing its laws regarding catching abalone at sea and consults with Victorian Traditional Owners. Usually, the government's catch limit is 10 per person. The Traditional Owners state it is a cultural right that there is no limit on the catch, as long as the person catching adheres to Aboriginal law and custom.

After its review, the government decides to amend the law to stipulate that Aboriginal people may catch an unlimited amount of abalone if:

- the person is a registered member of a Traditional Owner corporation, and
- the catch is for personal use (including the person's kinship group).

However, the limit remains at 10 when fishing at designated marine sanctuaries, and non-traditional owners may not catch any.

These limits consider additional interests, such as limiting the ability to commercialise the catch, and protecting the abalone population of marine sanctuaries.

Identity and culture

"Everybody thinks we come under one Aboriginal banner. But we're not all just one Aboriginal people, we are Aboriginal peoples. We are not just one culture, we are many cultures."

– Community member

The terms 'culture' and 'identity' are not defined in the Charter and public authorities should engage with Aboriginal people when seeking guidance. Remember, there are diverse Aboriginal cultures and cultural practices in Victoria.

The United Nations Committee on Economic, Social and Cultural Rights says that "culture is a living process, historical, dynamic and evolving, with a past, present and a future".

"Aboriginal culture defines us as a people, it determines who we are. Government departments/agencies need to understand the intrinsic importance of what culture represents to Aboriginal people to better inform their policy program development and delivery."

– Community member

The Victorian Aboriginal Controlled Health Organisation says that:

- for a variety of reasons, not all Aboriginal people will identify when asked
- you may come across people who are members of the Stolen Generations who may not have a close connection to family and community but who may identify as being Aboriginal
- there will be times when an individual chooses not to self-identify. This is their individual right and their decision should be respected
- questioning a person's Aboriginality due to their skin colour is offensive
- many Aboriginal people have mixed ancestry, which does not make them less Aboriginal
- Aboriginality is to do with a person's upbringing and life experiences, rather than the way a person looks
- Aboriginal people identify with each other by asking, "Who's your mob/family?" or "Where you from?"



Identifying as Aboriginal

“There are still a lot of non-Aboriginal people in government services who look shocked when you identify. It’s like they freeze and become uncomfortable.”

– Community member

Some Victorian laws adopt a working definition of Aboriginality endorsed by the High Court of Australia in *Commonwealth v Tasmania* (1983) 158 CLR 1 (popularly known as the Tasmanian Dam Case), where ‘Aboriginal’ is defined as a person who:

1. is descended from an Aboriginal person
2. identifies as Aboriginal, and
3. is accepted by his/her Aboriginal community.

The Charter does not define Aboriginal identity. Ultimately, Aboriginal people have the right to determine their own identity or membership (article 33(1) of the United Nations *Declaration on the Rights of Indigenous Peoples*).

People have the right to identify as Aboriginal when accessing services and their identity should not be challenged.

Language

There are more than 38 Aboriginal languages spoken in Victoria today. Many Victorian communities are reviving their languages in creative ways, including workshops, language camps, music and digital resources. For more information, visit the Victorian Aboriginal Corporation for Languages website: vaclang.org.au.

The Victorian Aboriginal Corporation for Languages says that:

Language is important to Aboriginal people because it is a way for them to express their identity and be proud of where they come from and who they are. If a person knows a word in their language, he/she is maintaining a link that has lasted thousands of years, keeping words alive that have been used by their ancestors – language is an ancestral right and it distinguishes something special about Aboriginal people from non-Aboriginal people.

Language is a part of culture, and knowledge about culture is a means of empowering people. Language contributes to the wellbeing of Aboriginal communities, strengthens ties between elders and young people and improves education in general for Indigenous people of all ages.

Cultural rights in practice

Tahlia is an Aboriginal student who wishes to enrol in the VCE subject Indigenous Languages of Victoria. However, Tahlia’s school does not offer the subject. Tahlia raises her cultural rights under the Charter with her school, which considers different options to enable Tahlia to complete the subject.

Kinship ties

Section 19(2)(c) of the Charter recognises the importance of family and kinship in Aboriginal communities. The concept of kinship within Aboriginal cultures is unique. It can extend broadly into the community and beyond a person’s immediate family and blood relations.

Cultural rights in practice

Sandra is incarcerated in a prison that is situated more than 500 kilometres away from her home and family. This makes access to her children extremely difficult. When Sandra’s advocate raises her right to maintain her kinship ties under the Charter, the prison helps arrange visits with her children.

Relationship with land, waters and other resources

Public authorities must consider Aboriginal cultural rights when they make decisions or undertake activities that may have an impact on Aboriginal people’s distinctive spiritual, material and economic relationship with land, water and other resources.

Cultural rights in practice

Pat is an Aboriginal elder widely respected for her knowledge and skills in bark painting. Pat collects bark from the trees lining a highway and has been cautioned by police on several occasions and told she must stop immediately or face penalties. Pat raises her cultural rights with her local council, which considers practical ways to enable Aboriginal people to collect natural resources to participate in traditional cultural practices. The council promotes the celebration of traditional cultural practices by including an article on Pat in its local newsletter.



Consultation – the ‘nothing about us, without us’ principle

Consultation with relevant Aboriginal groups and organisations is critical at the start and during the development of projects, policies and programs that may impact on Aboriginal cultural rights.

As a starting point public authorities might consult:

- staff in identified Aboriginal roles
- relevant Traditional Owner Corporations
- Local Aboriginal Networks (LANs)
- relevant Aboriginal Community Controlled Organisations.

Consultation should be meaningful and public authorities should take heed of what Aboriginal people have to say. Involving Traditional Owners prior to, during, and after developing policies and projects promotes meaningful engagement, mutually beneficial outcomes and the development of strong relationships.

Valuing Aboriginal people’s input, involving them in decisions, and making decisions in line with their viewpoints follows the international law principle of self-determination for Indigenous peoples.

Further, international law specifies that states obtain the free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.

Aboriginal people may also argue that it is their cultural right to take part in decisions that affect them.

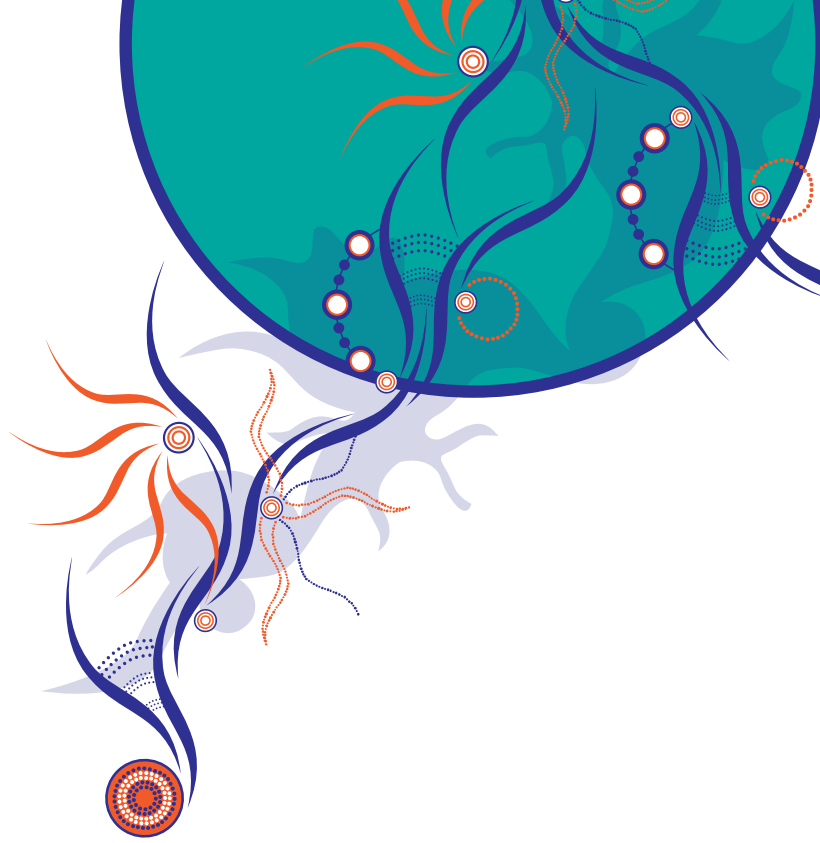
See *Fact sheet: Cultural rights in international law* on the Aboriginal Cultural Rights webpage for more information on how international law is relevant in Australia and Victoria.

Guide to best practice

“[A] cultural overlay needs to be in place as the basis and starting point for how to effectively engage otherwise services will not hit their mark”

– Community member

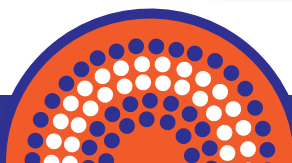
Protecting and promoting Aboriginal cultural rights can improve service delivery and employment practices. It can also help to build strong relationships with Aboriginal communities and to celebrate the many unique Aboriginal cultures in Victoria.



What can you do?

Aboriginal community members in Victoria told the Commission that there are many ways public authorities can better protect and promote their cultural rights. These include:

- providing compulsory cultural awareness training for staff
- embedding Aboriginal cultural rights in frameworks, policies and practices
- promoting Aboriginal cultural rights in publications and other communications
- employing Aboriginal people to design, work in and promote services
- properly considering Aboriginal cultural rights when making decisions
- providing more education in schools about Aboriginal history, culture and languages
- actively engaging and consulting with Traditional Owners and Aboriginal communities
- displaying posters on Aboriginal cultural rights in the workplace
- developing a Koori Inclusion Action Plan
- including Aboriginal-themed images on mainstream websites and publications
- including compliance with Aboriginal cultural rights as a minimum service standard
- holding a Welcome to Country ceremony at events and launches
- flying the Aboriginal flag.



Case study: Yarra Ranges Shire Council

The Yarra Ranges Shire Council has implemented several initiatives that are great examples of a public authority taking steps to protect section 19(2) rights.

Indigenous Advisory Committee

In 2005 Council established the Indigenous Advisory Committee (IAC) to guide the reconciliation process. The IAC also ensures appropriate compliance with section 19(2) of the Charter and is made up of a range of Indigenous people from government, academia and community. The IAC is designed to operate as an advocate on agreed issues and provide an effective mechanism for consultation between members of the Indigenous community and Council across a broad range of social, health and wellbeing issues.

The IAC facilitates ongoing engagement with Council to ensure delivery of culturally appropriate services that are informed by Indigenous history,

culture and community needs. The IAC and Council also recognise that strategies to create and strengthen social and economic participation need to be underpinned by a strong cultural framework and led by the Indigenous community.

The Return of the Firestick

This project aims to re-establish Indigenous fire-stick land management knowledge and practices within the Victorian Aboriginal population. In re-building this knowledge the project proposes to apply it as a highly efficient fuel reduction practice to reduce extreme threat of bushfire within the Yarra Ranges region.

Reviving traditional land management practices allows the Aboriginal community to actively participate in cultural practices that benefit the wider Yarra Ranges community. It also assists in protecting the right of traditional owners to maintain their distinctive relationship with the land under section 19(2)(d) of the Charter.

Remember

- Section 19(2) of the Charter protects the distinct rights of Aboriginal people in Victoria.
- Public authorities have a legal obligation to act compatibly with Aboriginal cultural rights and to properly consider Aboriginal cultural rights when making decisions.
- Consultation with Traditional Owners and Aboriginal communities is essential when a decision or action may impact Aboriginal cultural rights.

More about Aboriginal Cultural Rights

You can download more resources from humanrightscommission.vic.gov.au/acr



**Victorian Equal Opportunity
& Human Rights Commission**

Need more information?

Contact the Commission:

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Accessible formats

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We welcome your feedback!

Were these resources useful? Easy to use? Would you like to see something else included? Please email us at communications@veohrc.vic.gov.au.

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