



17 March 2023

Attn: Hugh de Kretser  
Chief Executive Officer  
Yoorrook Justice Commission  
54 Wellington Street  
Collingwood VIC 3066

By email: [REDACTED]

Dear Yoorrook Justice Commission Commissioners

**Submission to the Yoorrook Justice Commission – protections against race discrimination by police, correctional and child protection authorities under the *Equal Opportunity Act 2010***

Thank you for requesting that the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) provide a submission to the Yoorrook Justice Commission on the protections against race discrimination by police, correctional and child protection authorities under the *Equal Opportunity Act 2010 (Vic)* (**EOA**). VEOHRC is an independent statutory authority with functions under the EOA.

**Acknowledgement**

VEOHRC acknowledges the Wurundjeri people of the Kulin Nation as the Traditional Custodians of the lands on which we work. We also work remotely and serve communities on the lands of other Traditional Custodians. We pay our respects to their Elders past and present.

We also recognise the harm caused by race discrimination to First Peoples.

**Overview**

VEOHRC's submission consists of two parts. Firstly, the submission provides an overview of the current situation in Victoria with respect to protections against race discrimination by public authorities, under the EOA. The submission then provides a summary of existing protections against race discrimination by public authorities across other Australian jurisdictions. The submission concludes that should Victoria seek to strengthen protections against race discrimination by public authorities under the EOA, there are appropriate models for reform we may look to within Australia.



Appended to the submission are two tables. The first outlines other anti-discrimination legislation across Australia that offer possible reform models. The second table outlines jurisdictions that, like Victoria, only offer protections against race discrimination by public authorities where the conduct is a 'service.'

For the purposes of this submission, a reference to 'public authorities' refers specifically to police, correctional and child protection authorities across Victoria and all other Australian jurisdictions, unless otherwise stated.

### **Victorian protections against race discrimination by public authorities**

The EOA provides protections from discrimination, including race discrimination, in areas of public life in Victoria. These areas of 'public life' are set out in Part 4 of the EOA and include areas such as employment, education, and the provision of services.<sup>1</sup> However, these areas of 'public life' do not specifically extend to interactions with or conduct connected to the functions of public authorities such as Victoria Police, Corrections Victoria and Child Protection.

Currently, race discrimination engaged in by these public authorities can be captured by the EOA if the relevant circumstances fit within the definition of a 'service.'

*A 'service' is broadly defined as 'any act of helpful activity'*

Section 4 of the EOA sets out a non-exhaustive list of categories that constitute a 'service.' This expressly includes services provided by public authorities, which would include Victoria Police, Corrections and Child Protection. However, the definition of a 'service' is not specifically set out in the legislation, only categories of conduct that could constitute a 'service' are included. Case law suggests that a 'service' can be broadly defined as 'any act of helpful activity'.<sup>2</sup>

As such, only actions of public authorities that can be described as a 'service' – i.e., an act of helpful activity – are likely to fall within the scope of the EOA.

*Victorian cases have examined the conduct of Victoria Police and Corrections, but have not made findings with respect to conduct of Child Protection*

#### Victoria Police

Case law in Victoria and other jurisdictions in Australia regarding the ways in which police conduct can be captured as services has established that, while some police conduct may be captured, much conduct of police will fall outside the scope of anti-discrimination protections.

<sup>1</sup> *Equal Opportunity Act 2010* (Vic) pt 4 divs 1 & 3. Section 44 prohibits discrimination in the provision of 'services.

<sup>2</sup> *Bayside Health v Hilton* [2007] VCAT 1483, [17] citing *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1.



The Victorian case of *Djime* set out several principles outlining the type of conduct engaged in by Victoria Police that may and may not constitute a 'service'.<sup>3</sup> Some of these principles are drawn from other jurisdictions and are therefore persuasive, rather than binding, within Victoria.

In summary, the Tribunal in *Djime* noted that Victoria Police may be providing a service to individuals, in circumstances including when:

- the conduct is helpful or beneficial for the individual;<sup>4</sup>
- the conduct is associated with the prevention and detection of crime when intervening in situations where there is a disturbance of peace;<sup>5</sup>
- the conduct takes place in the context of an offence having been, or may be committed and the conduct is directed at individuals or the public at large who may suffer injury or harm;<sup>6</sup>
- responding to calls for assistance;<sup>7</sup>
- maintaining good order and preventing crime;<sup>8</sup> and
- acting to protect an alleged offender from injury, death, and property damage when that alleged offender has been arrested and is in police custody.<sup>9</sup>

Additionally, in the Federal Court case of *Bickle v State of Victoria*, when considering conduct of Victoria Police, the Court found that police provide a 'service' in the initial investigation of a call for assistance by providing a benefit to potential victims of crime through protecting them from harm.<sup>10</sup>

Conversely, the Tribunal in *Djime* suggested that Victoria Police may *not* be providing a service when:

- investigating an alleged offence;<sup>11</sup>
- questioning an alleged offender;<sup>12</sup>
- arresting an alleged offender;<sup>13</sup>
- dealing with a bail application;<sup>14</sup>
- deciding whether to lay or prosecute charges;<sup>15</sup>

<sup>3</sup> *Djime v Kearnes* (Human Rights) [2015] VCAT 941, [70]-[138] (*'Djime'*).

<sup>4</sup> *IW v City of Perth* [1997] HCA 30.

<sup>5</sup> *Richards v Commissioner of Police* [2010] WASAT 115 (*'Richards'*).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Commissioner of Police v Mohammed* [2009] NSWCA 432.

<sup>8</sup> *Richards* (n 5).

<sup>9</sup> *Commissioner of Police v Estate Edward John Russell* [2001] NSWSC 745 (*'Russell'*).

<sup>10</sup> *Bickle v State of Victoria (Victoria Police)* [2020] FCA 168 [18] citing *Commissioner of Police v Mohamed* [2009] NSWCA 432 [49].

<sup>11</sup> *Lambe v Anti-Discrimination Commission and Commissioner of Police* [2001] NTMC 54 (*'Lambe'*).

<sup>12</sup> *Mariani v NSW Police Force* [2013] NSWADT 35 [87] (*'Mariani'*); *Rasmussen v NSW Police Force* [2013] NSWADT 277 [39] (*'Rasmussen'*).

<sup>13</sup> *Kyriakidis v State of Victoria* [2014] VCAT 1039; *Robinson v Commissioner of Police, NSW Police Force* [2012] FCA 770 (*'Robinson'*).

<sup>14</sup> *Robinson* (n 13).

<sup>15</sup> *Mariani* (n 12) [87]; *Rasmussen* (n 12) [39]; *Lambe* (n 11).



- deciding how matters will proceed at court;<sup>16</sup> and
- serving summonses and executing search warrants.<sup>17</sup>

However, as not all these principles are binding in Victoria, they are not determinative when considering individual circumstances involving potential racially discriminatory conduct of Victoria Police. This contributes to the uncertainty around determining when conduct of Victoria Police may amount to a 'service' and may therefore be captured under the EOA.

VEOHRC has been unable to find a Victorian case that proceeded to judgement involving an Aboriginal person claiming race discrimination against Victoria Police. However, the New South Wales (**NSW**) case of *Russell* did involve a claim of race discrimination on behalf of an Aboriginal person against NSW Police members and provides a case study of the limitations and complexities of capturing police conduct only through the area of services.<sup>18</sup>

*In this case, NSW Police officers pursued and arrested Mr Russell following a collision between a police vehicle and his utility, before conveying him back to the police station and interviewing him. The NSW Administrative Decisions Tribunal found that during his arrest and pursuit Mr Russell was subject to racist and abusive language, was punched, dragged, trodden on and hit with a police baton and the window of his utility was damaged. The Tribunal initially found that race discrimination had occurred.<sup>19</sup>*

*The decision was subsequently appealed to the Appeals Panel of the Tribunal, which then referred several questions of law to the Supreme Court of NSW. This included a question on whether the individual police officers were providing a service to Mr Russell during his apprehension and arrest.<sup>20</sup> Ultimately, the Supreme Court found that the apprehension and arrest of an alleged offender was not a 'service' provided by NSW Police to Mr Russell – but it was a service provided to the community at large. A further appeal to the NSW Court of Appeal did not challenge this finding.<sup>21</sup>*

### Corrections Victoria

Case law suggests that Corrections Victoria may be providing a 'service' when providing opportunities for volunteer work to people in custody, access to medical treatment, access to telephones, and in relation to lost property.<sup>22</sup> It has also been found that the sending and receiving of mail is a 'service' provided by Corrections Victoria to people in custody.<sup>23</sup>

<sup>16</sup> *Lambe* (n 11).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Russell v Commissioner of Police, New South Wales Police Service & Ors* [2001] NSWADT 32.

<sup>19</sup> *Commissioner of Police v Estate of Russell and Others* [2002] NSWCA 272 [5-7]. ('*Russell No 3*').

<sup>20</sup> *Russell* (n 9) [11].

<sup>21</sup> *Russell No 3* (n 19).

<sup>22</sup> *Charles v State of Victoria* [2015] VCAT 375, [60] ('*Charles*').

<sup>23</sup> *Garden v Victorian Institute of Forensic Mental Health* [2008] VCAT 582.



The leading Victorian case on 'services' provided by Corrections Victoria is the 2012 VCAT case of *Charles v State of Victoria*.<sup>24</sup> In applying the reasoning of another Victorian case of *Egan*, the Tribunal in *Charles* noted that a critical factor for determining whether conduct was considered a 'service' was whether the person in custody was provided a benefit, or whether the act was part of the security and order of the prison or an inherent part of incarceration.<sup>25</sup>

In *Charles*, the Tribunal also set out several activities considered not to be 'services' provided by Corrections including:

- decisions made in relation to disciplinary and security issues;
- negative treatment of a person in custody after a positive urine screen drug test;
- a change to a personal security rating;
- decisions regarding a person in custody's location within prison;
- conduct of prison officers towards people in custody;
- the conduct of people in custody towards each other; and
- the provision of standard food to people in custody (although there is an arguable exception where special food is provided to an individual person in custody based on medical advice).<sup>26</sup>

Notably, NSW case law has taken a different direction with respect to the classification of people in custody – and found that this is a 'service' provided to people in custody. In the matters of *Contreras-Ortiz*<sup>27</sup> and *Whiteoak*<sup>28</sup> the NSW Civil and Administrative Decisions Tribunal found the classification of people in custody is a service because it can be characterised as helpful and beneficial to inmates.

#### Child Protection

At the time of writing, the Commission is not aware of any cases brought under the EOA that consider whether, and in what circumstances, Child Protection may be providing a 'service'. This may be due to the challenge in characterising Child Protection's actions towards parents and guardians as providing a service to them.

Overall, case law certainly provides some precedence and guidance when considering racially discriminatory conduct of public authorities within Victoria. However, case law is still evolving and, as discussed above in relation to classification of people in custody, there are some inconsistent approaches across jurisdictions. In Victoria, individual circumstances will still need to be considered against and fit within the definition of a 'service.' This highlights a problematic gap and potential area for reform within Victoria.

<sup>24</sup> *Charles* (n 22) [60].

<sup>25</sup> *Ibid*, [60] citing *Egan v State of Victoria* [2011] VCAT 1364.

<sup>26</sup> *Charles* (n 22) [55-60].

<sup>27</sup> *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308.

<sup>28</sup> *Whiteoak v State of NSW* [2014] NSWCATAD 45.



## Protections against race discrimination by public authorities across Australia

*Approaches to protections against race discrimination with respect to conduct of public authorities differs between Australian jurisdictions*

All Australian jurisdictions prohibit discrimination, including race discrimination, in the provision of services within their anti-discrimination legislation. However, Victoria is one of five Australian jurisdictions (Victoria, Australian Capital Territory, New South Wales, South Australia and Western Australia) that *only* offers protections against race discrimination by public authorities, such as police, correctional and child protection authorities, when the relevant circumstances amount to the provision of a 'service.'<sup>29</sup> As outlined above in the Victorian context, it can often be challenging to characterise interactions with public authorities as a 'service,' meaning that many actions of police, correctional and child protection public authorities are not covered by anti-discrimination legislation in these jurisdictions.

Currently Queensland and Tasmania offer clearer protections against race discrimination by public authorities, and similar provisions will commence in the Northern Territory shortly. These protections operate against race discrimination by public authorities through a specifically protected area of public life – the administration of State or Territory laws and programs.<sup>30</sup> The conduct of public authorities like police, correctional and child protection authorities that exercise their powers under State or Territory laws fits within this protected area of public life.<sup>31</sup> This means that when these public authorities have engaged in conduct amounting to race discrimination, when administering State or Territory laws or programs, there is a clear cause of action under the relevant anti-discrimination legislation.

Having a specifically protected area of public life means that the relevant conduct does not need to be tied to the provision of a 'service' but must simply fall within the area of administering State or Territory laws or programs.

Queensland was the first to introduce this protected area of public life into anti-discrimination protections, with the relevant provision included in its *Anti-Discrimination Act 1991* when it was first passed.<sup>32</sup>

<sup>29</sup> *Equal Opportunity Act 2010* (Vic) ss 4,44; *Discrimination Act 1991* (ACT) s 20; Dictionary; *Anti-Discrimination Act 1977* (NSW) ss 4, 19; *Equal Opportunity Act 1984* (SA) ss 5, 39; *Equal Opportunity Act 1984* (WA) ss 4, 46.

<sup>30</sup> *Anti-Discrimination Act 1991* (Qld) s 101; *Anti-Discrimination Act 1998* (Tas) s 22(1)(f); *Anti-Discrimination Amendment Bill 2022* (NT) s 22; Section 22 of the *Anti-Discrimination Amendment Bill 2022* (NT) will insert a new section 49A into the *Anti-Discrimination Act 1992* (NT).

<sup>31</sup> *Given v State of Queensland (Queensland Police Service)* [2019] QCAT 16. In this case, the Tribunal noted that the conduct of Queensland Police was being exercised under the relevant police legislation and so section 101 of the *Anti-Discrimination Act 1991* (Qld) was the relevant section for the Tribunal to consider.

<sup>32</sup> *Anti-Discrimination Act 1991* (Qld) s 101 <<https://www.legislation.qld.gov.au/view/pdf/asmade/act-1991-085>>.



Tasmania then included this protected area of public life in its *Anti-Discrimination Act 1998* when it was first passed.<sup>33</sup> Initially, this protection extended to only certain attributes but has since been expanded to include all protected attributes under Tasmania's anti-discrimination legislation.<sup>34</sup>

The Northern Territory recently passed a Bill to amend its *Anti-Discrimination Act 1992*, inserting a new provision prohibiting discrimination in the 'administration of laws and government programs'. At the time of writing, this new provision is yet to commence but will come into effect prior to or on 1 October 2024.<sup>35</sup> The Second Reading Speech for the Bill suggests there is a clear intention that this new provision will apply to the functions of public authorities such as police, corrections, and child protection authorities, with the Minister noting:

*'... the bill inserts a new section 49A to prohibit discrimination in the administration of laws and government programs ... This will include the functions of police and other people undertaking government functions such as correctional services officers and child protection workers.'*<sup>36</sup>

There do appear to be some potential differences in the scope of the protection between Queensland, Tasmania, and the Northern Territory. In Queensland and the Northern Territory, the protected area of public life encompasses both people who perform functions or exercise powers under laws or programs of the State or Territory, as well as people with responsibility for the administration of these laws or programs.<sup>37</sup>

Tasmania's protected area of public life encompasses any person engaged in or undertaking an activity in connection with the administration of any law of the State or any State program.<sup>38</sup> The provision does not explicitly mention the extent to which persons performing functions or exercising powers under any law of the State or any State program may be covered.<sup>39</sup> It may be that, in practice, the Tasmanian provision offers as broad a protection as Queensland and Northern Territory – however, this submission does not consider this difference in detail.

Case law from Queensland bolsters the position that having a specifically protected area of public life will more clearly capture conduct of public authorities. For example, in the case of *Cook v State of Queensland*,<sup>40</sup> the Queensland Civil and Administrative Tribunal noted that the 'proper approach' in other jurisdictions is that the investigation of offences by police does not constitute the provision of services. This is in circumstances where the definition of 'services' includes 'the provision of services by government departments or public authorities.'<sup>41</sup>

<sup>33</sup> Tasmania, *Parliamentary Debates*, Legislative Assembly, 3 December 1998, 51-52. Note that VEOHRC has not been able to locate the original *Anti-Discrimination Act 1998* (Tas) as passed.

<sup>34</sup> *Ibid*; see current provision in *Anti-Discrimination Act 1998* (Tas) s 22(1)(f) which is not restricted to certain attributes.

<sup>35</sup> *Anti-Discrimination Amendment Bill 2022* (NT) s 22. This section will insert a new section 49A into the *Anti-Discrimination Act 1992* (NT).

<sup>36</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 13 October 2022, 13.

<sup>37</sup> *Anti-Discrimination Act 1991* (Qld) s 101; *Anti-Discrimination Amendment Bill 2022* (NT) s 22.

<sup>38</sup> *Anti-Discrimination Act 1998* (Tas) s 22(1)(f).

<sup>39</sup> *Ibid*.

<sup>40</sup> *Cook v State of Queensland* (Queensland Police Service) & Anor [2018] QCAT 216. ('Cook').

<sup>41</sup> *Ibid* [33].



The Tribunal found that the correct provision to consider was section 101 of Queensland's legislation relating to the administration of State laws and programs.<sup>42</sup>

*The Commonwealth also has a broad level of protection against race discrimination by public authorities*

At the Commonwealth level, the *Racial Discrimination Act 1975* prohibits race discrimination in a broad range of areas of public life including the political, economic, social and cultural fields of public life.<sup>43</sup> Case law suggests that this broad protection would extend to the conduct of public authorities, such as police.<sup>44</sup>

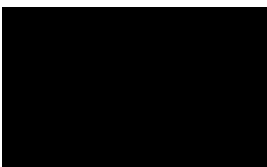
The *Disability Discrimination Act 1992*, *Age Discrimination Act 2004* and *Sex Discrimination Act 1984* are not drafted quite as broadly as the *Racial Discrimination Act* with respect to protected areas of public life. However, they do include the 'administration of Commonwealth laws and programs' as a protected area of public life.

## Conclusion

The services approach under the EOA to coverage of public authorities such as police, corrections and child protection in Victoria has resulted in gaps in protection from race discrimination and gives rise to uncertainty. Should Victoria seek to strengthen protections against race discrimination by public authorities under the EOA, it may look to existing models in other Australian jurisdictions that have a specifically protected area of public life.

Thank you again for the opportunity to make a submission to the Yoorrook Justice Commission on this important justice issue.

Yours sincerely



**Ro Allen**  
Victorian Equal Opportunity and Human Rights Commissioner

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<sup>42</sup> *Cook* (n 40).

<sup>43</sup> *Racial Discrimination Act 1975* (Cth) s 9.

<sup>44</sup> *Wotton v State of Queensland (No 5)* [2016] FCA 1457.





## Appendix 1: Table of Australian jurisdictions with a protected area of public life specific to conduct of public authorities

<p><b>Introduced 1975: Racial Discrimination Act 1976 (Cth)</b></p> <ul style="list-style-type: none"> <li>Includes a provision prohibiting race discrimination that has the effect of impairing or nullifying the recognition, enjoyment, or exercise of identified human rights in a broad range of areas of public life – the political, economic, social, cultural or any other field of public life (s 9)</li> <li>Case law suggests that this provision would capture the actions of public authorities such as police (<i>Wotton v State of Queensland (No 5)</i> [2016] FCA 1457).</li> </ul>
<p><b>Introduced 1984: Sex Discrimination Act 1984 (Cth)</b></p> <ul style="list-style-type: none"> <li>Includes a provision prohibiting discrimination in the administration of Commonwealth laws and programs (s 26)</li> <li>Extends to any person performing any function or exercising any power under a Commonwealth law or for the purposes of a Commonwealth program</li> <li>Extends to any person with responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program</li> </ul>
<p><b>Introduced 1991: Anti-Discrimination Act 1991 (Qld)</b></p> <ul style="list-style-type: none"> <li>Includes a provision prohibiting discrimination in the administration of State laws and programs (s 101)</li> <li>Extends to persons performing functions or exercising powers under State law or for a State government program</li> <li>Extends to persons with responsibility for administering State laws or conduct of a State Government program</li> <li>Case of <i>Given v State of Queensland (Queensland Police Service)</i> [2019] QCAT 16 finds that where conduct of Queensland Police is clearly being exercised under the relevant police legislation, then the conduct will be covered by s 101.</li> <li>Case of <i>Cook v State of Queensland (Queensland Police Service) &amp; Anor</i> [2018] QCAT 216 noted that the investigation of offences by police does not constitute the provision of services in circumstances where the definition of 'services' includes "the provision of services by government departments or public authorities." It considered the discrimination complaint under s 101.</li> </ul>
<p><b>Introduced 1992: Disability Discrimination Act 1992 (Cth)</b></p> <ul style="list-style-type: none"> <li>Includes a provision prohibiting discrimination in the administration of Commonwealth laws and programs (s 29)</li> <li>Extends to any person performing any function or exercising any power under a Commonwealth law or for the purposes of a Commonwealth program</li> <li>Extends to any person with responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program</li> </ul>
<p><b>Introduced 1998: Anti-Discrimination Act 1998 (Tas)</b></p> <ul style="list-style-type: none"> <li>Includes a provision prohibiting discrimination in the area of the "administration of State laws and programs (s 22(1)(f))</li> </ul>
<p><b>Introduced 2004: Age Discrimination Act 2004 (Cth)</b></p>
<p><b>Introduced 2023: Anti-Discrimination Act 1992 (NT)</b></p> <ul style="list-style-type: none"> <li>Will include a provision prohibiting discrimination by a person who performs any function or exercises any power under a law of the Territory or for the purposes of a Territory Government program or has any other responsibility for the administration of a law of the Territory or the conduct of a Territory Government program (new s 49A).</li> </ul>

**Appendix 2: Table of Australian jurisdictions with protections only where conduct is a 'service'**
*Equal Opportunity Act 2010 (Vic)*

- Prohibits race discrimination in the provision of a 'service' (s 44)
- 'Services' includes services provided by public authorities (s 4)
- Case law suggests this captures some actions of police and correctional authorities. No known case law on child protection

*Discrimination Act 1991 (ACT)*

- Prohibits race discrimination in the provision of a 'service' (s 20)
- 'Services' includes services provided by a government, government authority, local government body or corporation in which a government has a controlling interest (Dictionary)
- Likely to capture some actions of police, correctional and child protection authorities

*Anti-Discrimination Act 1977 (NSW)*

- Prohibits race discrimination in the provision of a 'service' (s 19)
- 'Services' includes services provided by public authorities (s 4)
- Case law suggests this captures some actions of police and correctional authorities (case of *Commissioner of Police v Estate Edward John Russell* [2001] NSWSC 745; *Whiteoak v State of New South Wales* [2014] NSWCATAD 45)

*Equal Opportunity Act 1984 (SA)*

- Prohibits race discrimination in the provision of a 'service' (s 39)
- 'Services' include services provided by a Government department, instrumentality or agency or a council (s 5)
- Likely to capture some actions of police, correctional and child protection authorities

*Equal Opportunity Act 1984 (WA)*

- Prohibits race discrimination in the provision of a 'service' (s 46)
- 'Services' include services of the kind provided by a government "...a government or public authority or a local government body" (s 4)
- Likely to capture some actions of police, correctional and child protection authorities