

# Springvale Monash Legal Service (VIC) Inc



## Submission

To

## the Victorian Attorney-General's Independent Review of the Equal Opportunity Act 1995 (Victoria)

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## **Introduction**

Springvale Monash Legal Service (“SMLS”) has operated within the City of Greater Dandenong since the early 1970’s. Since that time, SMLS has partnered with Monash University Law Faculty, to provide a clinical legal education program whereby law students assist clients under the supervision of qualified legal practitioners.

The Springvale / Dandenong community is extremely diverse, with a large proportion from diverse cultural and linguistic backgrounds and low socio-economic circumstances.

The philosophy of the legal service is to ensure members of the community receive information and assistance to manage their own legal needs but given the high proportion of clients have limited access to the legal system for a number of reasons, including language barriers, lack of formal education, lack of financial resources, many of the matters are taken on as cases to ensure the client receives as fair an outcome as possible. Despite this, there is still an ethos of assisting the community through legal education to be able to understand the law and legal processes to maximise the community’s ability to live lawful and meaningful lives, where they are able to contribute to their community.

SMLS will respond to the questions raised in the Discussion paper of November 2007 that are of direct relevance to the operations of this legal service.

### **Question 1.**

#### **Does the law need to be changed to improve equality of opportunity and the elimination of discrimination in Victoria?**

*‘None of us can know anything except by building upon, challenging, responding to what we already have known, what we can see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh.*

*The latter is the open mind we hope for from those who judge...<sup>1</sup>*

Law continually needs review to meet the changing needs of communities. Although the *Equal Opportunity Act*<sup>2</sup> (“EOA”) was revised in 2005 there have been no substantial changes since the Act came into force in 1977. The objects of the Act have remained a central force within our society strengthened by the recent enactment and introduction of the *Charter of Human Rights and Responsibilities* 2006 (Vic) (“The Charter”).

As a Community Legal Centre (“CLC”) dealing with disadvantaged members of the community, SMLS encounters issues of discrimination on a daily basis relating to both individuals and groups, however this is not accurately reflected in the complaint statistics of the Victorian Equal Opportunity and Human Rights Commission (“the Commission”), as many clients will not pursue a discrimination complaint.

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<sup>1</sup> Hilary Astor, ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16 *Social and Legal Studies* 221 at 231.

<sup>2</sup> *Equal Opportunity Act* 1995 (VIC)

In many cases other issues prevail and are prioritised by clients over the need to lodge a discrimination complaint; for example:

- obtaining legal entitlements within employment,
- the stigma attached to making complaints, such as the risk of losing a job or being ‘seen’ to complain,
- the more immediate need to find alternate accommodation,
- protecting themselves and their family members from violence by protective orders.

### **The Need for Review**

SMLS believes that the rate of discrimination within this community is still high. Given people are not acting on those negative experiences SMLS welcomes a review of the legislation and the protection it affords, and the processes that are used to provide those protections.

SMLS would like to raise concerns regarding the restricted nature of the review and believes it should encompass all aspects of the EOA, in particular the relationship between the EOA and the Charter should be explored.

SMLS concurs with many of the reasons given in the Western Suburbs Legal Service report (“**the WSLS report**”) on Racial and Religious Discrimination<sup>3</sup>

### **Disadvantage versus discrimination**

Disadvantage must be addressed along with discrimination, as underlying causes of disadvantage will continue to support discriminatory practices; i.e. an individual or group receiving less favourable treatment because of their status as being disadvantaged. Some examples of this include the increased difficulties encountered by homeless persons while trying to access information about services, or of a person on low income being able to access affordable accommodation of a sufficient and safe standard.

### **Recommendation**

It will be hard for disadvantage to be addressed more thoroughly within the Victorian community when the government has not been prepared to include social, economic and cultural rights within the Charter. Although revision of the Charter is not within the scope of this Review, SMLS recommends that social, economic and cultural rights need to be a legislative and resource-directed priority if the underlying causes of discrimination are to be properly addressed, as it is these areas where the bulk of disadvantage occurs.

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<sup>3</sup> Western Suburbs Legal Service, *Racial & Religious Discrimination, Vilification and Harassment Project* (2006).

## Question 2

### **What are the social and economic costs and benefits involved in reforming the EOA to eliminate discrimination to the greatest possible extent?**

*'[N]on-discrimination and equality can be considered as having the same meaning, semantically. However, the term discrimination is focussed on a specific form of action. Equality describes an ideal.'*<sup>4</sup>

Thus, the search for equality is a basic tenet of a mature human society. Through non-discrimination law, all Victorians can be protected, including those groups most vulnerable such as indigenous, homeless, the elderly, those with mental illness, and other minority groups, as well as those of different culture.

In a study on the health of Victorians, VicHealth reports that those discriminated against exhibit a greater incidence of mental health issues, particularly depression<sup>5</sup>. The VicHealth report quotes Mukami McCrum, Director, Central Scotland Race Equality Council: "There is a growing body of evidence that persistent low-level harassment affects the health and wellbeing of people subjected to it. It leaves physical and psychological scars which are passed on from person to person in the community and remembered by generations to come. Living in fear because one belongs to a race or a group of people who are subjected to violence and constant harassment is a major cause of [poor] mental health and low self-esteem."<sup>6</sup>

Treatment of such illnesses comes at a cost to the State, so reforming the EOA to further reduce discrimination as much as possible will in turn help reduce, both the cost and tradition of discrimination. Reforms will also help instil in Victorians trust in the justice system. "Most of us forget how personal a matter of trust is, and forget to make proper allowance for the different speeds at which different personality types are capable of moving towards trust."<sup>7</sup> Most Victorians have a basic trust in the justice system, but the WSLS report<sup>8</sup> exemplifies the lack of trust, in particular, minority groups have with the justice system.

In the WSLS report<sup>9</sup>, which focussed on discrimination on the basis of race and/or religion, respondents stated that their freedom of movement is restricted for fear of harassment<sup>10</sup>. Further, respondents noted that they had problems accessing the anti-discrimination devices available.

Problems with access are also illuminated for the elderly, who may prefer speaking with someone face to face, rather than using the internet or making a telephone enquiry. Further, a 1999

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<sup>4</sup> Dagmar Schiek, Lisa Waddington & Mark Bell, *Non-Discrimination Law*, (2007) Oxford: Oregon. p.26

<sup>5</sup> VicHealth, Report: *More than Tolerance: Embracing Diversity for Health – Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions.* (2007) Available at: <http://www.vichealth.vic.gov.au/discrimattitudes/>

<sup>6</sup> Ibid, p.34.

<sup>7</sup> Peter Clayton, *Body Language At Work*, (2003) Hamlyn: London. P32.

<sup>8</sup> Western Suburbs Legal Service, *Racial & Religious Discrimination, Vilification and Harassment Project* (2006).

<sup>9</sup> Ibid

<sup>10</sup> Ibid. p14-15.

English study suggests that those most vulnerable are the least likely to seek legal advice and assistance.<sup>11</sup>

However, it is not just minority groups which are discriminated against. Discrimination can occur in employment where ‘working families’ are trying to balance work and the family. The EOA needs to be modified to help address the work-family conflict, as it is the perfect tool to do so.<sup>12</sup>

Reforming the EOA as discussed below, can assist the Department of Justice (“DOJ”) in ensuring that ALL Victorians have access to the anti-discrimination toolkit that is available, however adequately funded research needs to be undertaken to ascertain the full extent of discrimination within the community and social and economic impacts of such discrimination.

### **Question 3**

***Are the current ways of preventing discrimination working well or could they be improved?***

The current EOA does not prevent discrimination in and of itself. It provides a mechanism for raising complaints, settling disputes and educating the public about the law and processes.

As discrimination occurs on individual and systemic levels, there needs to be laws and processes that can prevent and address breaches of these laws at all levels.

### **The Current Complaint Handling Process**

The WSLs report states that participants are frequently unhappy with the process of making a discrimination complaint. Participants generally state that they have trouble firstly accessing the system as they are either unsure or unaware of the difference in resolving their matter through either State or Federal bodies, and do not have the funds for private legal advice anyway.<sup>13</sup>

### **Suggestions for the complaint handling process: Improving Legal and Strategic Advice**

*‘When you have knowledge of legal systems and processes you feel empowered. You have the ability to respond and defend yourself, whereas a lot of people I’m sure don’t do anything.’<sup>14</sup>*

Felstiner, Abel and Sarat<sup>15</sup> have done significant work in understanding complaint processes and explaining the reasons for attrition rates within the various stages of this process. Initially, a potential complainant has merely a ‘perceived injurious experience’ and must then become aware

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<sup>11</sup> Hazel Genn, *Paths to Justice: What people do and think about going to law*, (1999) Oxford: England.

<sup>12</sup> Belinda Smith, ‘Not The Baby And The Bathwater: Regulatory Reform For Equality Laws To Address Work-Family Conflict’, (2006) 28 *Sydney Law Review* 730.

<sup>13</sup> Western Suburbs Legal Service, *Racial & Religious Discrimination, Vilification and Harassment Project* (2006).

<sup>14</sup> Ibid P.44. (Interviewee E.)

<sup>15</sup> Felstiner, Abel and Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...’ (1980-1) 15 *Law and Society Review*

of any avenues available to resolve it, in order to feel motivated to convert their experience to a complaint.

Felstiner, Abel and Sarat believe that this stage of a dispute is critical, not only because of the high attrition rate, but that passing through this stage is largely dependent on a complex number of factors. 'Transformations reflect social structural variables, as well as personality traits. People do – or do not – perceive an experience as an injury, blame someone else, claim redress, or get their claims accepted because of their *social position* as well as their individual characteristics.'<sup>16</sup>

1. The Commission should be able to determine over the phone which is the appropriate forum (state or federal) to lodge a particular matter.

There is great confusion in the community and sometimes within CLCs as to the best place to lodge a complaint. The distinction between Federal and State anti-discrimination law is especially difficult to draw for a layperson. The community look to the expertise of the Commission to clarify these questions; however the anecdotal evidence drawn from CLC cases suggests that this kind of help is not currently provided and that potential complainants are expected to somehow make this determination on their own. The danger of this is that a complaint process, once initiated in one jurisdiction cannot be initiated in another, and further, that there are time limitations in the ability to access complaints procedures.

The Commission is in a position where it can quickly identify which areas have overlapping or exclusive jurisdiction, what the lead time is on processing a complaint in each jurisdiction and how this might affect access to, and the most effective resolution of, a complaint.

2. The Commission should be giving sufficient legal advice so that a complainant is able to maximise their ability to establish the elements of a complaint to the satisfaction of the EOA.

This is particularly of issue because the EOA does not specify a burden of proof with regards to complaints. There is thus an implication that those initiating complaints must both have sufficient understanding of, and provide enough evidence of, these elements in order to initiate a complaint. SMLS believes therefore that the Commission should be providing such legal assistance and strategic advice as is needed to help a potential complainant understand and establish the presence of the elements required to make a complaint.

If the Commission receives a call which they feel requires legal support in the preparation of the complaint beyond that which they can provide, they should be equipped to refer cases, with reference to what area of the EOA they fall under, to appropriate community legal services and other broadly accessible systems. These services may be able to provide them with targeted advice in a particular area. For instance, if a potential complainant feels discriminated against in the area of disability and the Commission is unable to assist them further regarding the elements of their complaint then that person may be referred to the Disability Discrimination Legal

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<sup>16</sup> Ibid 631-55 at 636

Service for specialist advice. SMLS notes an 1999 UK study which found that that, 'if legal advice is obtained or agencies or other advisers provide positive assistance, the likelihood that a resolution will be achieved is increased.'<sup>17</sup> In order to do this, CLCS and other specialist bodies would need to be adequately funded.

### **Unsatisfactory complaint handling experiences: the potential for double discrimination**

The table on page 9 of the Equal Opportunity Review discussion paper ("**Discussion Paper**")<sup>18</sup> reflects that more enquiries are being made than actual complaints submitted to the Commission. In their study, WSLs found that interviewees were 'generally unhappy with and did not have confidence in the complaints process. In some cases, interviewees felt further discriminated against during the process, discouraging them from making further complaints and or recommending the process to others.'<sup>19</sup>

These factors show that many are experiencing secondary discrimination at the process and complaint handling level and thus, further assistance is needed in accessing the tools of the EOA.

### **Community Education**

The Commission offers education to groups, businesses etc to understand their responsibilities to comply with the EOA but it is insufficient. As a result CLCs pick up complaints from individuals and groups about the treatment they have received which is not in compliance with principles of equal opportunity and it is only when a complaint is made and heard that processes and practices can change.

For example the changes that have occurred in the way the police deal with and respond to complaints about family violence is a good example of how a change in process and codes of practice can bring about significant change for victims of family violence even without legislative change. In this case, a change in police protocols and education of police members has seen improvements in the way police treat women who are victims of family violence. There had been a long history of failure on the part of police to respond to complaints of violence and as women are overwhelmingly the victims of family violence this was a clear example of discrimination against a group (women) because of their gender.

### **Recommendation**

Greater scrutiny of statutory bodies, corporations, non-government agencies in relation to their policies and practices to provide equality of opportunity for all of their workers and clients would work towards preventing discrimination occurring within those environments.

The Commission currently has powers under the Charter to ensure activities of public authorities comply with that legislation. SMLS believes that the Commission should be able to use similar

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<sup>17</sup> Hazel Genn, *Paths to Justice: What people do and think about going to law*, (1999) Oxford: England.

<sup>18</sup> November 2007

<sup>19</sup> Western Suburbs Legal Service, *Racial & Religious Discrimination, Vilification and Harassment Project* (2006). P43.

powers to ensure compliance of public authorities with the EOA. As these are relatively new powers, SMLS is not in a position to say they will be appropriate for this additional function.

The current Western Australian Equal Opportunity Act structure empowers a separate body, 'The Office of the Director of Equal Opportunity in Public Employment' to advise and help Western Australian public authorities to meet their obligations under their Act<sup>20</sup>.

Introducing a comparable body in Victoria through the EOA would ensure standards of equal opportunity would extend to public authorities as well as maintain compatibility with Human Rights standards set by the Charter.

### **Empowering the Commission to make binding codes and guidelines**

SMLS believes that binding codes of conduct would provide the impetus for a much more effective implementation and compliance throughout society of the anti-discrimination standards set by the EOA. Specifically empowering the Commission to issue codes would fall within the primary objectives of the Act to eliminate discrimination and sexual harassment, 'promote recognition and acceptance' of a 'right to equality of opportunity' and would strengthen the grounds 'to provide redress for people that have been discriminated against or sexually harassed'<sup>21</sup>.

#### **1. Setting standards for employers and the community**

The establishment of codes would encourage employers to implement more uniform standards and protocols of equal opportunity and discrimination prevention within their workplaces, and would increase their confidence that they were complying with a standard of practice while reducing the number and exposure to complaints.

It should be noted that although the Commission currently has several fact sheets and guidelines for employers available through their website, the current format's tendency to describe what 'may' lead to discrimination complaints is not one which encourages compliance, nor certainty. Although conscientious employers may seek out such fact sheets and bear them in mind when establishing policies, SMLS is concerned with the lack of concreteness and accessibility involved in the implementation of the law, particularly in areas where unconscientious employers exploit vulnerable sections of the community. It is frequently our experience that the vulnerable clients find it difficult to make individual complaints. Thus it would be particularly important and beneficial to set recognisable standards that would imply redress.

In 2004, a code making provision was introduced into the NSW Act under s120A<sup>22</sup>. Although codes under the NSW Act are not of themselves legally binding under subsection (4) they enable evidence of compliance with, or contravention of, a code to be considered by the Commission and Tribunal in the assessment of complaints.

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<sup>20</sup> *Equal Opportunity Act 1984* (WA) Part IX

<sup>21</sup> *Equal Opportunity Act 1985* (VIC) s.3

<sup>22</sup> *Anti-Discrimination Act 1977* (NSW)

## 2. A response to systemic discrimination and recurring complaints

The making of codes would provide the Commission with a more proactive rather than responsive approach to common complaints. It would empower the Commission with a constructive and progressive way to utilise data already gathered indicating recurring and systemic complaints in a fashion that actively promotes equal opportunity and directly addresses common forms of discrimination. It would additionally provide a logical corollary to the educative and informative role of the Commission<sup>23</sup>.

## 3. Inter-Jurisdictional Comparisons

The appropriateness and use of vesting the power to make codes and guidelines with the Commissions is demonstrated in its appearance in other jurisdictions, such as in NSW (aforementioned), can be found in the UK where the power to make codes is vested in the Equal Opportunity and Human Rights Commission<sup>24</sup>, and in New Zealand where the power is vested in the Human Rights Commission<sup>25</sup>.

### **Recommendation**

SMLS believes that a binding code-making provision in the EOA would be an appropriate extension of the Commissions powers, utilising their knowledge of problem areas in the community, and providing the impetus for the promotion of standards in particular and targeted areas which would be a much more publically accessible and relevant to the community.

### **Question 4**

*What role should the Commission have in preventing discrimination, including additional powers or functions (if any)?*

### **Improvements to Data Collection and Publication**

The Commission have recently increased their powers in order to educate the community and monitor the introduction of the Charter. Similar powers could be used to monitor the effectiveness of non discrimination practices within the community by ensuring policies and practices of all public authorities as well as corporations are not breaching the objects of the EOA. Bodies who do not comply could be made known publicly through outcomes in the Commission's Annual Report similar to those produced by the Commonwealth Telecommunications Industry Ombudsman<sup>26</sup>.

The information collected in this way could be used to uncover discriminatory behaviours that may exist in certain areas of the community or if there is a particular form of discrimination occurring more frequently at particular times.

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<sup>23</sup> Ibid s.161

<sup>24</sup> *Equality Act* 2006 (UK), s.14

<sup>25</sup> *Human Rights Act* 1993 (NZ), s.5(d)

<sup>26</sup> <[http://www.tio.com.au/publications/annual\\_reports/default.htm](http://www.tio.com.au/publications/annual_reports/default.htm)> at 14 January 2008

Information collected from inquiries made to the Commission could be used in the same way. CLCs use their casework statistics to assist with prioritising community development and legal education activities within the community. Such data collection could elicit patterns of behaviour within certain industries or public authorities and assist the Commission to impose sanctions as well as making the practice known publicly as a way of eliminating that practice in the future.

In addition, service providers should be able to notify the Commission if they are seeing trends occurring within their community. This could occur even within the current legislation, for example in employment, accommodation etc. In this way, the Commission would be performing a watchdog brief, where information about all types of discrimination would be collected and used as a way of assessing educative needs of service providers, but also as a way of determining if there have been improvements over time.

There is currently no mechanism for service providers to be able to report on these occurrences as they are restricted to either assisting clients to make an individual complaint or since 2006, bring a representative action provided the people concerned are prepared to sign their names to that action.

A service provider may only receive one formal complaint about a practice within their community but is often aware of this occurring much more frequently. If this information could be made known to a decision maker when trying to resolve the dispute, a more suitable penalty could be imposed on the offender.

## **Exemptions**

Failure of a complaint is not necessarily the result of the complexity of the current law, but often occurs because of the existence of the range of exemptions in the EOA. SMLS acknowledges that an analysis of exemptions under the EOA does not form part of this review but it is essential that the role of exemptions are considered within the overall review of the law.

### **Example: Exemption regarding small businesses:**

Under section 21 of the EOA, a small business employer (less than 5 employees) is allowed to discriminate on the basis of sexuality. The person being discriminated cannot use the Federal system either because sexuality discrimination is not a ground of discrimination under Federal law.

Such an exception accounts for 5.4% of complaints lodged at the Commission and should be removed as there is no reason why discrimination along grounds of sexuality should be permissible in small business or at all.

## **Systemic discrimination**

In many cases, individual discrimination will not stop until systemic issues are dealt with. Encouraging and supporting an individual or group to bring a complaint against the police for racial discrimination can be futile as disadvantaged groups often feel powerless and that no-one will believe them or worse still, by bringing a complaint they will bring attention to themselves and be the target of worse treatment.

Within the Sudanese community in this area, we have been told by clients that they would rather retreat from public view than bring attention to the treatment they often report to support workers. If the complaint is against a body that has authority such as the police then they are more likely to feel they cannot complain and if they did it wouldn't achieve anything as the 'authorities would collude'.

In another example, people with disability are often treated poorly in workplaces, given the most demeaning jobs, not receiving all due entitlements, lack of access to supports. Until workplaces are forced to treat all people equally and provide information and services for all workers even those who have special needs, then problems of disadvantage will continue throughout society.

### Question 5

*Would any potential conflict of interests arise if the Commission takes on additional powers or functions? If so, how could this conflict best be managed?*

Potential for conflict exists when any governmental body takes on a preventative and enforcement role alongside with individual complaints handling. If the community do not trust an organisation to deal with the handling of complaints, or feel that intervention measures in enforcing compliance are ineffective, it will be hard for them to have faith in that same body undertaking preventative work.

It is imperative that the different functions of the Commission are seen to operate independently to prevent even a perception of collusion.

### **Different functions and emphases call for different organisational structure**

In jurisdictions with greater powers or different emphases, Alternative Equal Opportunity models have developed and the Complaints handling process is often separated and left within the jurisdiction of courts and tribunals.

For example, in the UK, the Equality and Human Rights Commission has a strong preventive and advocacy/enforcement role. Discrimination complaints are made directly to appropriate tribunals and courts<sup>27</sup>.

In Ontario, from June 2008, the Discrimination Commission will no longer process complaints but will instead have a preventative and enforcement role<sup>28</sup>.

In New Zealand where the 'Human Rights Commission' (under the *Human Rights Act 1993* (NZ)) has additional functions such as preparing and publishing guidelines and voluntary codes,

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<sup>27</sup> <http://www.equalityhumanrights.com/en/aboutus/pages/aboutus.aspx>

<sup>28</sup> <http://www.ohrc.on.ca/en/commission/about>

appearing in or bringing proceedings<sup>29</sup>, acting as a court intervener or counsel in proceedings, the Commission is a separate and independent body from the ‘Office of Human Rights Proceedings’ which investigates disputes and complaints and provides representation for complainants where required in a Tribunal.

## Recommendation

SMLS supports a stronger focus by the Commission on preventative and enforcement and as these powers are increased, so does the imperative to separate the Commission from handling complaints, in terms of both practical resource management and conflict of interest. Complaints could then be made directly to the appropriate court or tribunal.

## Question 6

*Could technical aspects of the law (including protected attributes and the definitions of ‘direct’ and ‘indirect’ discrimination) be improved so that the law itself does not prevent the elimination of discrimination?*

### Changing the definition for indirect discrimination

The current test for indirect discrimination requires evidence that the complainant with a particular attribute:

- a) cannot comply with a requirement, condition or practice AND
- b) that there are proportionally more people who do not have the complainant’s attribute that **can** comply AND
- c) That the requirement condition or practice is not reasonable in all the circumstances.

#### 1. Problems with the proportionality test:

Although no burden of proof is specified in the EOA, it is the complainant who must show each of these things in order to establish a complaint of indirect discrimination under the EOA’s definition. Because the Commission has the power to screen complaints before they are investigated, it is of particular concern that a potentially meritorious complaint by an individual that does not readily show these three elements will be knocked back.

Requirements, conditions and practices such as those which may involve indirect discrimination are usually applied in an organisational context (e.g. rules or practices in a workplace) or an application/interview context (e.g. when somebody applies for a job or a rental property) where there is a significant informational, power and resource imbalance between those organisations which apply practices or uphold requirements, and the individuals to whom they apply.

It is oftentimes difficult or impossible for an individual complainant to prove the proportionality requirement, as they must ideally demonstrate there are other people in the exact same position **but for** the complainant’s attribute.

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<sup>29</sup> s.6, 93B, 92E, 92H, and 97

On the other hand the organisation which is applying the requirements to a number of people may be much better equipped to provide information on access or compliance statistics by a group. In circumstances where an organisation is also unable to provide this information then an individual complainant certainly will not be able to.

Furthermore although comparisons can be useful, indirect discrimination that flows from a general requirement, condition or practice can be demonstrated purely by a positive disadvantage based on a person's attribute without needing to show comparatively that other people are better off. A physically disabled person who cannot access a building that has no ramps does not need to show that other people who are not disabled can access the building in order to demonstrate that she has been disadvantaged by a building practice which has provided only stairs but not ramp access.

## 2. Problems with the reasonableness test:

An aggrieved complainant will undoubtedly be able to show from a subjective standpoint that a requirement condition or practice which disadvantages them is unreasonable. However it is usually difficult for such an individual to prove or have the resources to show that a systemic practice, in all the surrounding circumstances, is unreasonable.

Conversely, an organisation that has set a general requirement, practice or condition that leads to an indirect discrimination is most likely and better placed to be able to justify its existence along reasonable grounds from a systematic standpoint (if there indeed are reasonable grounds).

### **Other anti-discrimination legislation: Tests for indirect discrimination**

The recent Commonwealth *Age Discrimination Act 2004*<sup>30</sup> and the 1995 amendments to the Commonwealth *Sexual Discrimination Act 1984*<sup>31</sup> **do not** contain a proportionality test, but **do** contain a reasonableness requirement with the burden on the respondent, not the complainant.

The Queensland *Anti-Discrimination Act 1991* includes a very similar definition of indirect discrimination to the current Victorian Act, including both proportionality and reasonableness tests. The burden of proof generally rests on the complainant **except** in the case of indirect discrimination, where it shifts to the respondent<sup>32</sup>.

In the Tasmanian *Anti-Discrimination Act 1998* the burden of proof stays with the complainant, but indirect discrimination does not include the high burden of the proportionality test<sup>33</sup>.

The Western Australian *Equal Opportunity Act 1984* has recently undergone review. The May 2007 report released by the Equal Opportunity Commission recommends reforming the act to exclude the proportionality test, and to shift the burden of proof for the reasonableness test from the complainant to the respondent<sup>34</sup>.

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<sup>30</sup> s.15(1) and 15(2)

<sup>31</sup> s.7B and s.7C

<sup>32</sup> s.11, 204, 205

<sup>33</sup> s.15

<sup>34</sup> Equal Opportunity Commission (WA), *Review of Equal Opportunity Act 1984: Report* (May 2007) <<http://www.equalopportunity.wa.gov.au/pdf/revieweoact.pdf>> at 12 January 2007, p.32

## **Recommendation**

SMLS believes that given the high burden on individual complainants under the current definition and in light of the changes in the definition of indirect discrimination in equivalent legislation in other states and federal jurisdictions, that the proportionality test be dropped and the burden for the test of reasonableness should shift to the respondent.

If the proportionality test instead remains, then the burden of proof for indirect discrimination as a whole should rest with the respondent.

Alternatively, if both tests remain part of the definition of indirect discrimination then the complaints process should not require a complainant establish a *prima facie* case of indirect discrimination at the application stage, but allow for evidence to be investigated by the Commission at the investigation stage, so as to decrease access issues to individual complainants and allow the investigatory powers of the commission to shoulder the evidentiary burden. This is the current situation in NSW, clarified by s.89(2) of the *Anti-Discrimination Act 1997*.

## **Extending the Definition of Employment: Volunteers**

The WA Report recommends that the definition of employment should be amended to recognise unpaid or volunteer work, as per that of Queensland, South Australia and the ACT. It is apparent to the Commission that the arrangement under which these people work for others is, in all important respects, the same as any employment relationship.<sup>35</sup>

The WA Commission believes that the definition should be expanded to include unpaid and voluntary workers and further, people doing work under an education, vocational, or training arrangement, as they receive many complaints of discrimination and harassment from high school workers.<sup>36</sup>

## **Recommendation**

SMLS believes that the EOA needs to be expanded in order to cover these volunteer workers as well. Especially since volunteers are giving up their own time, without remuneration, in furtherance of the broader cause, even to the point of assisting paid workers.

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<sup>35</sup> Ibid, p.36

<sup>36</sup> Ibid, p.36

## Question 7

***Once a complaint of discrimination has been made could it be handled more efficiently and effectively?***

### **Benefits to Alternative Dispute Resolution methods**

There are many benefits of Alternative Dispute Resolution (“ADR”) methods in the context of a discrimination dispute. However, at the same time, there are many potentially harmful elements in to applying ADR universally.

The main benefit of ADR is that it focuses on increased participation by the parties, which offer increased feelings of commitment to the solution and enhance satisfaction on the actual process.<sup>37</sup>

However, ADR proponent Tom Tyler believes that ADR can be problematic because of the emphasis on ‘compromise.’ This may be particularly damaging in the context of a discrimination dispute: ‘A party with a legitimate claim may not feel that they should be encouraged or required to compromise. Instead, they may feel that the court system should enforce their claim by making an all or nothing judgement favouring them. ADR programs may lessen the opportunities for pressing claims by encouraging parties to reach a settlement.’<sup>38</sup>

Furthermore, ADR programs may also be harmful to disputants if they lack power or the opposing party is powerful. Tyler believes that the issue is ‘whether or not the position of disadvantaged parties is worsened when the ‘safeguards’ associated with adjudication are removed or weakened.’

Lastly, ADR can lead to the privatisation of a dispute. Some respondents in the WSLS report noted that they did not want their claim to be remedied by money, but rather preferred a public apology:

*‘Here are your options on what you could ask: would you like a public apology?’ Just your options on what you could do. Basically I didn’t know, you know, I didn’t want to be like other people and say get them for their money. This is just like a cop out, if they just paid us off. Like people around the world will not know what the pub is like.’<sup>39</sup>*

The benefit of ADR methods in the context of a discrimination dispute appears to be that it focuses on all the parties actually having a say, stating their case, and why they felt discriminated, for instance. Conversely, ADR in this context must be carefully managed to ensure some sort of equality between the parties. This can be particularly difficult where lawyers are present and/or the discrimination claim is by a minority group.

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<sup>37</sup> Tom Tyler, ‘The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities’ (1988-89) 66 *Denver University Law Review*, 419 -436

<sup>38</sup> Ibid p. 431.

<sup>39</sup> Western Suburbs Legal Service, *Racial & Religious Discrimination, Vilification and Harassment Project* (2006). P.43. (Interviewee G)

## **Recommendations**

SMLS believes that conciliation is one useful tool in helping to resolve complaints, however with regard to the points made above, should not be the only method of complaint resolution where circumstances render it inappropriate or inefficient.

The removal of the confidentiality provisions of agreements would ensure ‘public apologies’ can be used as an effective remedy and help redress the imbalance.

SMLS concurs with the Federation of Community Legal Centres Victoria submission (“**Federation Submission**”) for this review, regarding the expansion of VCAT powers in dealing with complaints<sup>40</sup>.

## **Current Remedies**

There is also an issue around remedies available under the EOA. CLCs are often told by clients who report incidences of discrimination that they simply want the behaviour to cease and to ensure that others are not subjected to the same behaviour. The need to obtain a monetary recompense often does not arise.

## **Recommendation**

SMLS believes that the issue of remedies needs to be considered particularly in light of using the remedy as a deterrent from similar behaviour continuing. We agree with the Federation Submission that ‘[r]emedies must be adequate, including compensation and reinstatement if appropriate, flexible enough to be tailored to the specific context, and enforceable in relation to all forms of discrimination.’<sup>41</sup>

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<sup>40</sup> P.9

<sup>41</sup> Ibid