

## TABLE OF CONTENTS

<i>Executive Summary</i> .....	5
<i>Background</i> .....	7
<i>Structure</i> .....	10
<b>Section 1 – Eliminating discrimination</b> .....	<b>11</b>
<i>Prevention and Compliance</i> .....	11
<i>Enforcement of substantive equality</i> .....	12
<i>Access to Justice</i> .....	12
<i>Context for Recommendations for Change</i> .....	13
Systemic discrimination.....	17
Disadvantage and Discrimination.....	18
Economic disadvantage resulting from systemic discrimination against indigenous Victorians .....	18
Social Disadvantage arising from systemic racial discrimination .....	19
Health and well-being disadvantage experienced by people in same sex relationships as a result of systemic discrimination.....	19
Social and Economic Exclusion of people with a disability as a result of systemic discrimination.....	20
Economic Disadvantage experienced by women as a result of systemic discrimination .....	20
Discrimination against Homeless People .....	22
The Equal Opportunity Act and the Charter of Human Rights and Responsibilities Act.....	22
<b>Section 2 - The case for reforming the law</b> .....	<b>25</b>
<i>Understanding the experience of discrimination</i> .....	25
The Commission’s own data.....	25
Racism and Employment.....	26
Access to Taxi Services.....	26
Access to Accommodation .....	27
Disability and Employment.....	29
Age and Employment.....	31
Systemic Discrimination against People in Same Sex Relationships.....	32
The Consequences of Discrimination and the Cost to the Community .....	32
Occupational segregation.....	33
Disparities in income .....	35
Skill Shortages .....	35
Education.....	36

Disability .....	36
Indigenous .....	36
Culturally and Linguistically Diverse.....	37
Sexual Orientation.....	37
Goods and services .....	38
Access to the Built Environment.....	38
Financial Services .....	38
Accommodation .....	39
Health Care Services .....	39
<i>Cost benefit analysis</i> .....	40
Community Strengthening .....	40
Prevention.....	41
<i>Initiatives that are already preventing or resolving discrimination.....</i>	42
<b>Section 3 - Preventing discrimination .....</b>	<b>43</b>
<i>Getting the objectives of the EOA right.....</i>	44
Recognising the link between the Charter and the EOA.....	46
Need for substantive equality .....	47
Connection between discrimination and disadvantage .....	48
Systemic discrimination.....	49
<i>A framework for compliance.....</i>	49
<i>A positive duty- shifting the onus .....</i>	51
<i>Education, advocacy and promoting compliance .....</i>	56
<i>Tools for compliance.....</i>	59
Codes of Practice .....	59
Guidelines .....	59
Action plans and compliance notices.....	61
Public Alerts and other public information.....	64
Procurement and granting policies.....	66
The Regulatory Environment.....	67
<i>Developing the Law .....</i>	68
Amicus Curiae .....	68
Intervener.....	70
Exemption applications .....	70
Initiating claims and prosecutions .....	71
<i>Research and inquiries.....</i>	72
Research.....	72

Investigations .....	73
Inquiries .....	73
<i>Legislative review</i> .....	75
<i>Substantive provisions of the Act</i> .....	76
Direct discrimination .....	76
Indirect discrimination .....	77
Intersectional discrimination.....	78
Attributes .....	79
Marital status .....	79
Parental or carer status .....	80
Physical features.....	81
Impairment .....	82
Assistance animals .....	83
Irrelevant criminal record.....	84
Homelessness .....	85
Areas of discrimination.....	86
Sexual harassment .....	86
Volunteers .....	86
Reasonable adjustment .....	87
Accommodation .....	87
Employment .....	88
Built environment.....	89
<b>Section 4 – Improving individual access to justice.....</b>	<b>91</b>
<i>The Commission’s role - a new model for handling complaints</i> .....	92
Dealing with identified risk of the model .....	95
Necessary legislative change .....	95
<i>Why there needs to be change</i> .....	96
Limitations of the current model for complaint handling by the Commission .....	96
Limitations of a model allowing only direct application to VCAT .....	96
Early informal ADR.....	97
Provision of ADR.....	97
Loss of direct access to information from complaints.....	98
<i>ADR in discrimination complaints</i> .....	98
Appropriate for many discrimination complaints.....	99
Appropriate for Complainants.....	100
Fairness .....	100
Commission as a point of first contact .....	101
Cost effective.....	101

<i>Complaint handling and systemic discrimination</i> .....	102
Private/public dichotomy .....	102
Identifying cases for intervention or amicus role.....	103
<i>Legal representation</i> .....	104
<i>VCAT and systemic discrimination</i> .....	106
<i>Complaint handling in a dual federal/state system</i> .....	108
Complaints.....	108
National harmonisation.....	109
Authorising and assisting .....	109
Vicarious liability .....	110
<i>Other issues</i> .....	110
Discrimination as part of other proceedings .....	110
Monitoring settlements and costs .....	111
Representative complaints .....	111
<i>Conflict of Interest</i> .....	112
Advocacy and Complaint Handling.....	112
Legal Representation .....	113
Complaint handling and regulation/enforcement.....	114
<b>Section 5 – the Commission’s structure and governance</b> .....	<b>115</b>
<b>Section 6 - Resources</b> .....	<b>119</b>

## Executive Summary

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC – in this document, the Commission) has developed this response to the Review of the *Equal Opportunity Act 1995*. In summary, the Commission’s view is as follows:

The focus of the legislation should be to achieve substantive rather than merely formal equality. It should provide a statutory basis for reasonable adjustment or accommodation of a particular attribute, in order to obtain equal outcomes.

This paper will outline the legislative changes that we believe are necessary to achieve substantive equality.

This may be summarised as follows:



In so doing, it is the Commission’s view that a modernised anti discrimination statute requires a range of provisions that will provide for:

- imposing a positive duty on organisations and agencies to be proactive in eliminating discrimination, shifting this burden away from individual complainants
- assistance with compliance with the legislation, including the prevention of discrimination;
- enforcement powers where necessary;
- ensuring the capacity for individuals or groups to have access to justice in line with the current government policies.<sup>1</sup>

The implications of the changes for the functions of the Victorian Equal Opportunity and Human Rights Commission are:

1. greater emphasis on functions that address prevention and compliance with the law;
2. additional functions that enable the Commission to enforce substantive equality;
3. reformed alternative dispute resolution processes that continue to enable individual access to justice at the same time as increased responsiveness.

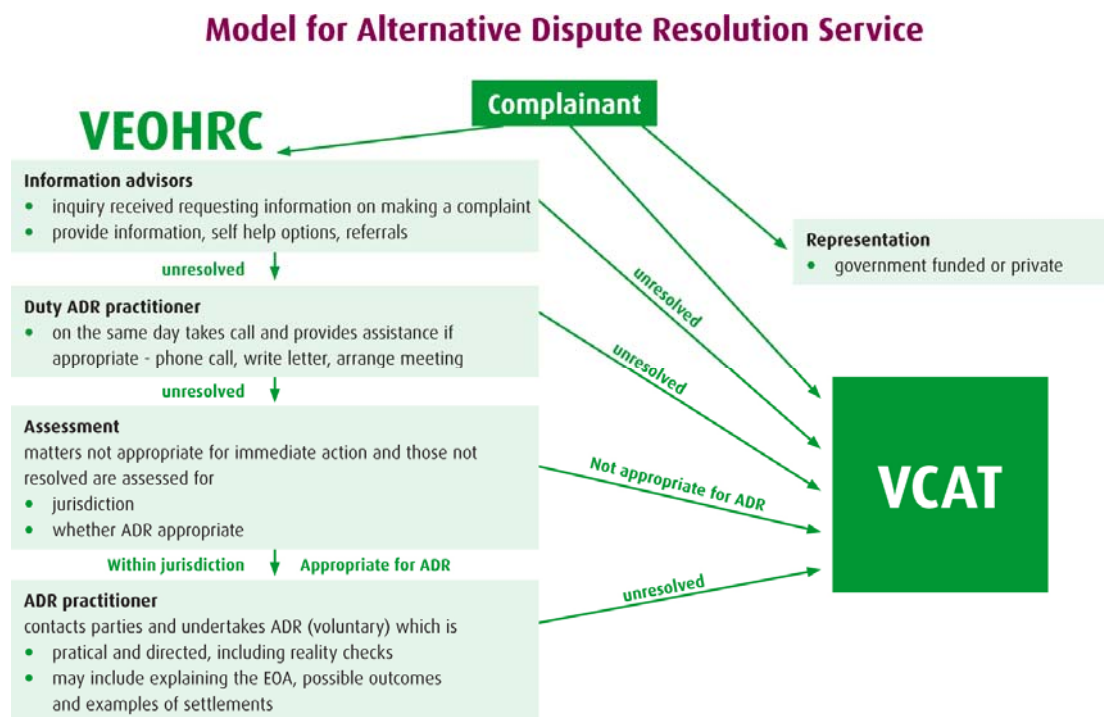
These may be summarised as follows:

### VEOHRC Role

<b>Education and promoting compliance</b>	<ul style="list-style-type: none"> <li>• Register of voluntary Action Plans</li> <li>• Education and training functions</li> <li>• Public alerts</li> <li>• Public information</li> <li>• Guidelines for compliance</li> <li>• Advocacy for substantive equality</li> </ul>
<b>Research into systemic issues</b>	<ul style="list-style-type: none"> <li>• Public report and report to relevant Ministers or organisational head</li> </ul>
<b>Own Motion inquiries into systemic discrimination</b>	<ul style="list-style-type: none"> <li>• Reports tabled in Parliament</li> <li>• Government response required</li> </ul>
<b>Monitor and enforcement compliance of positive duty</b>	<ul style="list-style-type: none"> <li>• Compliance assessment through information gathering</li> <li>• Compliance notices</li> <li>• Action plans</li> <li>• VCAT Orders</li> </ul>
<b>Individual Access to Justice</b>	<ul style="list-style-type: none"> <li>• Option for alternative dispute resolution at Commission for individual complainants or representative complaints</li> </ul>
<b>Developing Law</b>	<ul style="list-style-type: none"> <li>• Intervention function</li> <li>• Amicus Curiae</li> </ul>

<sup>1</sup> *New Directions for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement, May 2004; A Fairer Victoria: Progress and Next Steps, June 2006.*

The Commission's role in relation to individual access to justice is set out in the following summary diagram:



The Commission's view is that such amendments to the *Equal Opportunity Act 1995* (EOA) are consistent with the Government's policy directions in seeking to achieve proactive and creative forms of compliance with the Act<sup>2</sup>. This includes seeking to address disadvantage and recognising the link between disadvantage and discrimination<sup>3</sup>. Finally, any changes to the EOA must be consistent with the legal changes that arise from the passage of the Charter of Human Rights (the Charter).<sup>4</sup>

## Background

In May 2004, the Attorney General released the Justice Statement, which included two key goals in relation to discrimination and the realisation of a Charter of Human Rights. Legislation to implement the Charter was passed in 2006. In relation to

<sup>2</sup> New Directions for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement May 2004, p. 57.

<sup>3</sup> *A Fairer Victoria: Progress and Next Steps*, June 2006.

<sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006*.

systemic discrimination, the Attorney-General's Justice Statement identified the following:

- Moving the focus of the *Equal Opportunity Act* 1995 away from responding to complaints towards proactive and creative forms of compliance.
- Identifying new tools for improving compliance such as industry-based codes of practice, accreditation and model-employer schemes.
- Encouraging employers to audit and monitor their workforces to identify where barriers to employment, goods and services occur.
- Vetting all new legislation to ensure that unintended discrimination does not occur.<sup>5</sup>

In 2005, the Attorney General invited the Equal Opportunity Commission of Victoria (now the Victorian Equal Opportunity and Human Rights Commission) to provide him with the Commission's view of what amendments were required to the EOA to better address systemic discrimination. The Commission provided its view<sup>6</sup>, which coincided with the community consultation in relation to the Charter.

It was not possible during 2006 to pursue both the review of the EOA and the implementation of the Charter process, although the review submission informed subsequent amendments to the Act which included:

- Representative complaints - Before the amendments only the person (with limited exceptions relating to children and people with disabilities) alleging discrimination or sexual harassment could make a complaint to the Commission. A representative can now make a complaint of discrimination or sexual harassment to the Commission on behalf of themselves and an individual or group. A complaint on behalf of more than one person must relate to the same set of circumstances or allegations. For example, a representative complaint may relate to poor access to buildings which affect many people with a disability. A representative body (an advocacy or support organisation for example) can now make a complaint of discrimination or sexual harassment to the Commission on behalf of an individual or group who wish to complain in relation to the same set of circumstances or allegations. These amendments bring the EOA into line with the

---

<sup>5</sup> *New Directions for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement* May 2004, p. 57.

<sup>6</sup> 'Recommendations from the Equal Opportunity Commission Victoria to the Attorney-General regarding reform and modernisation of the *Equal Opportunity Act* 1995 (Vic) to address systemic discrimination, November 2005.

*Racial and Religious Tolerance Act 2001* (RRTA) and provides a mechanism that can alleviate some of the stresses on individuals pursuing complaints based on the same set of circumstance or allegations.

- Delegation of complaint handling powers from the Commission - Before the amendments only Commission members could exercise many of the complaint handling functions and powers under the EOA. The Commission can now delegate these powers to Commission staff. This change has resulted in a more consistent, efficient and effective complaint handling process.
- Changes to and inclusion of additional attributes including changes to the definitions of Industrial Activity and employment related definitions have recognised recent case law and legislation in this area. The addition of Employment Activity as an attribute further expands the protection against discrimination of individuals under the EOA. Further amendments to the EOA are being considered by Parliament in relation to Family Responsibilities.

The Charter was enacted in July 2006 and the Commission assumed additional functions contained in the Charter relating to:

- Education about human rights and the Charter
- Reporting to the Attorney General annually about the Charter
- Assisting the Attorney General with the four year and eight year review of the Charter
- Intervention in a matter before a court or tribunal
- By request of the Attorney General or by invitation of a public authority, undertaking a review of human rights compliance.

In August 2007 the Attorney-General announced a review of the *Equal Opportunity Act 1995* (the Review), to be undertaken by Mr Julian Gardiner. The Attorney noted the Commission's previous recommendations for amendments to the EOA, which were provided to him in 2005, and advised that the Review would draw upon these recommendations. The Commission has advised the reviewer that the 2005 submission, while still a relevant document, does not reflect the Commission's current views, particularly in light of the additional functions that had been assumed under the Charter.

In November 2007, the *Equal Opportunity Review Discussion Paper* (DP) was released requesting written submissions by 14 January 2008. This document is the Commission's response to the DP and the Review more generally.

This response to the DP provides the Commission's view in the context of the statutory changes that have been made to our functions since 2005. It outlines how these changes position and inform the Commission's view about the future requirements of the EOA to address systemic discrimination.

## **Structure**

In section 1, the Commission outlines its view of how it can contribute to the elimination of discrimination and work to develop these functions consistently with its role as a human rights body.

Section 2 outlines its case for reforming the law, and provides further evidence of systemic discrimination.

Section 3 and 4 contain the substantive recommendations for change, giving the detail of both the enhanced preventive work which the Commission will undertake (section 3), and a model for handling individual disputes which is more efficient, effective and flexible (section 4).

Section 5 comments on how the Commission's structure and governance need to change to accommodate its new functions and to generally enhance its operations.

Section 6 address the issues of resources for the changes to the EOA.

The document follows the general structure of the DP for ease of reference. Questions posed in the DP are reproduced in the text in boxes and appear in Sections 2, 3, 4, 5 and 6. In each of these sections, the proposed changes are articulated first as a coherent model, and specific changes which address specific DP questions are then identified.

## **Section 1 – Eliminating discrimination**

The overriding objective of this review is to determine what legislative and structural framework will eliminate discrimination to the greatest possible extent.

The terms of reference identify two key approaches to achieving this objective:

- making prevention strategies more effective;
- improving fairness, effectiveness and efficiency in the mechanisms for resolving complaints of discrimination.

It is the view of the Commission that in order to achieve these goals, the focus of the legislation should be to achieve substantive equality.

A modernised anti discrimination statute requires a range of provisions that will address:

- imposing a positive duty on organisations and agencies to be proactive in eliminating discrimination, shifting this burden away from individual complainants
- assistance with compliance with the legislation, including the prevention of discrimination;
- enforcement powers where necessary;
- ensuring the capacity for individuals or groups to have access to justice in line with the current government policies.<sup>7</sup>

### ***Prevention and Compliance***

The Commission believes that the next generation of equal opportunity laws should have a substantive focus on framing the equality laws for achieving outcomes that make a difference and challenge society to accept responsibility for actively pursuing substantive equality.

In order to achieve this, it is our view that the EOA should provide mechanisms that:

---

<sup>7</sup> *New Directions for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement*, May 2004; *A Fairer Victoria: Progress and Next Steps*, June 2006.

1. show the community, employers and goods and services providers **what substantive equality looks like**, and how it has a positive outcome for all;
2. **assist with the frameworks and tools to address discrimination**, particularly systemic discrimination;
3. inform the community, employers and goods and services providers of their **obligations and responsibilities to deliver substantive equality**;
4. show these groups **how they can deliver substantive equality**.

### ***Enforcement of substantive equality***

The EOA should provide a regulatory framework that enables the enforcement of equal opportunity laws as a process of last resort. This includes both the resourcing and legal capacity to:

1. actively monitor progress and compliance;
2. use enforcement powers where reasonable steps are not being taken to comply with equal opportunity obligations.

### ***Access to Justice***

The Commission believes that notwithstanding the need to address systemic discrimination, there remains a need to address individual experiences of discrimination, and to utilise current reforms to allow representative matters to be heard. When individual rights are breached, an efficient and effective system of redress not only provides justice for that individual, but is an integral part of any prevention strategy. With the legislative and procedural changes proposed here, the Commission will re-model complaint handling to achieve better outcomes for both complainants and respondents and to better facilitate the Commission's wider prevention work.

It is the Commission's view that such access to early, informal and non-tribunal justice as a means of providing speedy resolution to discrimination and sexual harassment matters should continue. However, these processes should be modernised to provide:

- a choice between a formal tribunal process and Commission-based ADR processes;
- provision of advice and informal intervention to assist with early resolution of disputes;
- no investigation;
- no in principle determination of merit of the complaint;
- impartial treatment of parties in the dispute resolution processes;
- confidentiality of particulars of individual complaints.

### ***Context for Recommendations for Change***

A major impetus for this Review was the recognition that although there has been significant progress in reducing discrimination since 1977 when Victoria first passed the EOA, discrimination persists. The EOA has seen a number of amendments since 1977, the most significant being the 1995 reforms which changed the single Commissioner model to a Board with part time Commission Members and a full time Commission Member who is also the CEO and the Chief Conciliator.

Since that time, there have also been a number of changes to the regulatory environment, which deals in part, or whole with matters related to discrimination.

At a federal level, this has included the passage of the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Human Rights and Equal Opportunity Act 1986*, *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.

At a state level, a number of regulatory bodies or Commissions have been established in the past 30 years which complement and contribute to the work of the equal opportunity bodies over those years. These include:

- Ombudsman; established in 1973, under the *Ombudsman Act 1973*;
- Health Services Commissioner; established in 1998, when the *Health Services (Conciliation and Review) Act 1987* took effect;
- Victorian Multicultural Commission re-established in 2005, under the *Multicultural Victoria Act 2004*. Previously known as the Victorian Ethnic Affairs Commission since first established in 1983;
- Child Safety Commissioner; established in 2006, when the *Child Safety and Wellbeing Act 2005* took effect;

- Work Place Rights Advocate; established in 2006, when the *Workplace Rights Advocate Act 2005* took effect;
- Disability Services Commissioner; established in 2007, when the *Disability Act 2006* took effect;
- Changes to Worksafe and Occupational Health and Safety to include recognition of bullying *Occupational Health and Safety Act 2004* (incorporating recommendations from the Occupational Health and Safety Act Review, March 2004, known as 'the Maxwell Report').

In addition, there has been significant reform to the Tribunal systems and the resourcing of matters that go to the courts through the Victorian Civil and Administrative Tribunal (VCAT).

In the past decade, the Commission has progressively changed the focus and emphasis of its core activities, to reflect a gradual decline in the number of individual complaints<sup>8</sup> that it processes following the high level of activity with the 1995 amendments to the EOA, and the increasing emphasis on education and legal policy work to influence the impact of discrimination on the Victorian community.

**Table 1: Individual Complaint Trends**

	Individual Complaint Issues	Complaint Files Lodged
<b>2000/2001</b>	3433	1036
<b>2001/2002</b>	3493	986
<b>2002/2003</b>	3445	1228
<b>2003/2004</b>	3186	1165
<b>2004/2005</b>	2876	1161
<b>2005/2006</b>	2169	911
<b>2006/2007</b>	1765	791

While individual complaints are dropping, and this may reflect a reduction in overt and blatant discrimination, indicators of continuing disadvantage for many groups point to the continuing presence of underlying, systemic discrimination. Increasingly,

---

<sup>8</sup> See Table 1

this link has been recognised in government policies such as A Fairer Victoria<sup>9</sup> and the Attorney General's Justice Statement.<sup>10</sup> Until now, the Commission has sought to address these issues in a number of ways. This has included through its research function under section 162 of the Act, with research reports including:

- Same Sex Relationships and the Law (1998);
- A Fair Go for Job Seekers: Best Practice guidelines for the recruitment Industry (2005) ;
- Women in Prison and Discrimination and the Law (2006);<sup>11</sup>
- Time to respond. Realising Equality for people with a disability utilising taxi services (2007).

Its education functions under section 162 have included:

- The provision of free workshops targeting community based organisations on the operation of the EOA and in later years the RRTA;
- The provision of advice on its enquiry line, which not only assists with the lodgement of complaints, but also provides general information and advice on equal opportunity and referral advice;
- Fee for service training targeting private and public sector employers on EOA;
- Development of guidelines such as Guidelines for Employers,<sup>12</sup> Access All Areas<sup>13</sup> that provide advice about what compliance with the EOA looks like,
- Forums and conferences that promote dialogue about human rights and equal opportunity such as the annual Human Rights Orations held in December of each year, the Human Rights Conference held in February 2007, the Work Life Balance Forum held in 2006;
- Partnership projects with other government departments, such as Industrial Relations Victoria<sup>14</sup> and the Department of Victorian Communities (now Department of Planning and Community Development),<sup>15</sup> Victoria Police and

---

<sup>9</sup> *A Fairer Victoria: Progress and Next Steps*, June 2006

<sup>10</sup> *New Directions for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement* May 2004

<sup>11</sup> This report resulted from a request from the Federation of Community Legal Centres and the Victorian Council of Social Services, seeking the Commission to seek approval from the Attorney General to investigate systemic discrimination in the Women's Prison.

<sup>12</sup> <<http://www.humanrightscommission.vic.gov.au/publications/employer%20guidelines/>> 20k

<sup>13</sup> <<http://www.humanrightscommission.vic.gov.au/publications/access%20all%20areas/>> 21k

<sup>14</sup> <<http://www.humanrightscommission.vic.gov.au/publications/discrimination%20still%20against%20the%20law/>> 2006

<sup>15</sup> Just Like You Campaign, 2006, available at:

<<http://www.humanrightscommission.vic.gov.au/.../about%20the%20just%20like%20you%20campaign.asp>>

private sector employer agencies to demonstrate compliance with equal opportunity laws.

Whilst these have addressed systemic issues, the current statutory framework imposes significant limitations on the Commission's ability and authority to address systemic issues and to require changes. If we take the example of the most recent research on the taxi industry, expanded powers proposed for the Commission in this paper would have delivered a significantly better outcome. The particular challenges facing people with a disability accessing taxi services could have been addressed through an own motion inquiry function, which would have resulted in a report before the Parliament and greater public as well as industry exposure.

Alternatively, the development of guidelines (that can be taken into account in matters before VCAT), could assist in the identification of reasonable adjustments in the provision of taxi services to people with a disability. As it stands at the moment, the research function allows the publication of a report which can be distributed to the public, and we await a response from the relevant Minister.

The advent of other bodies with broader human rights, regulatory and complaint handling functions, and the need to address embedded or institutionalised discrimination has identified the need to seek different statutory powers to provide greater standing beyond the research and education capacity that currently exists under the 1995 Act.

In addition, the policy context in which the EOA is administered requires a greater recognition on the link between disadvantage and discrimination.<sup>16</sup>

Finally, there is a need to bring the EOA into line with the requirements of the Charter.

In response to the questions posed in the DP, the Commission has outlined its view of what statutory changes are required to achieve this end, and what role it can play in conjunction with other regulatory bodies, to reduce discrimination and achieve greater human rights outcomes.

---

<sup>16</sup> A Fairer Victoria: Progress and Next Steps, June 2006.

Our response is based on our experience which leads us to identify the following as indicators for change:

1. The existence of systemic discrimination which occurs:

(As defined in the Attorney-General's Justice Statement) ... when processes and practices become entrenched in organisations and are viewed as neutral and acceptable, but in fact result in discrimination against various groups who are often disadvantaged in other areas of their lives.<sup>17</sup>

2. The changed legal context created by the Charter of Human Rights and Responsibilities which provides a clearer requirement for the Commission to seek to achieve substantive rather than mere formal equality.
3. The link between disadvantage and discrimination which often leads to systemic and institutional discrimination.

### **Systemic discrimination**

The meaning of 'systemic' discrimination is interchanged with the terms 'institutional' or 'organisational' discrimination. It is different from the most familiar forms of discrimination which involve people being treated less favourably because of perceptions of what they are 'like' or their capability based on their age, disability or impairments, gender identity, industrial activity, lawful sexual activity, physical features, political belief or activity, race, religious beliefs or activity, sex, sexual orientation, personal associations, breastfeeding, pregnancy, parenting or carer responsibilities or marital status.

Discrimination may be direct or indirect. Indirect discrimination is a requirement, policy or practice that inadvertently discriminates against a group (for example, banning head gear or coverings). On the surface, the situation or processes may appear reasonable (partly because it's seen as 'normal'). It is important to note that systemic discrimination is not just the sum total of direct and indirect discriminatory practices – it goes beyond this to attitudes and cultures.

Indirect discrimination, and the remedies for it, is still dependent on individuals taking action – seeking help or lodging a complaint. The EOA that protects people from indirect discrimination has still been unable to address systemic discrimination – the

---

<sup>17</sup> *New Directions for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement*, May 2004, p.57

gender pay gaps are not decreasing; the continuing disadvantage of indigenous people; people with disabilities continue to be unable to participate fully in social and economic life, to name a few examples.

Discriminatory outcomes are not necessarily apparent until a pattern is formed – that is, after the fact and after individuals have been discriminated against. And even then, the pattern can be viewed as the ‘natural’ outcome of ‘the way it’s always been done’ – and therefore beyond examination or question. Herein lays one of the key difficulties in dealing with this form of discrimination at an early or ‘preventative’ level – and the ‘punishment’ is equally difficult. How can a ‘system’ be penalised – especially if it is a system used across an industry or service? This must be addressed by requiring the system to achieve certain outcomes in relation to achieving equality, and to allow scrutiny and analysis of how this is done.

Preventative measures also bear analysis – that is, what can be done to prevent systemic discrimination in the first place?

In the exploration of systemic discrimination it is critical to remember that no matter how systemic an issue is its impact is experienced by individuals who are entitled to seek effective redress.

## **Disadvantage and Discrimination**

Discrimination also links with disadvantage. Examples of this are described in more detail in section 2 of this Report, but can be seen in the following examples.

### **Economic disadvantage resulting from systemic discrimination against indigenous Victorians**

- The rate of full time employment in 2001 for Indigenous people was much lower than that for non-indigenous people in all age groups and geographic regions. Nationally, 41.5% of Indigenous people were in full time work compared with 60.2% of non-Indigenous people.<sup>18</sup>
- In 2004-05, after adjusting for age differences:
  - the labour force participation rate for Indigenous people (58.5 per cent) was about three quarters of that for non-Indigenous people (78.1 per cent)

---

<sup>18</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2001*, ABS cat no. 4713.0

- the unemployment rate for Indigenous people (13 per cent) was about 3 times the rate for non-Indigenous people (4 per cent).<sup>19</sup>
- Indigenous people are less likely to complete year 7 education (66% compared with 86.9% of all students).<sup>20</sup>
- Teenage pregnancy among indigenous teenagers is 66.9 per 1000 births compared to 8.4 per 1000 for non-indigenous teenagers.<sup>21</sup>

#### **Social Disadvantage arising from systemic racial discrimination**

- More than 25% of respondents to a survey conducted as part of HREOC's Isma Inquiry into the experiences of Arabic and Muslim Australians indicated that they have experienced some form of racism, abuse or violence at work or at school.<sup>22</sup>
- A sizeable proportion of people surveyed who were born in countries where English is not the main language spoken reported experiencing discrimination due to their ethnic origin at some time.
  - Nearly two in five had experienced discrimination in the workplace (three times as likely as those born in Australia)
  - 30 per cent had experienced discrimination in education (twice as likely as those born in Australia)
  - 18 per cent reported having experienced discrimination in housing (four times as likely as those born in Australia)
  - 19 per cent reported having experienced discrimination in policing<sup>23</sup>

#### **Health and well-being disadvantage experienced by people in same sex relationships as a result of systemic discrimination**

- Members of the gay, lesbian, bi-sexual and transgender and intersex communities reported they had experienced abuse at school.<sup>24</sup>
  - 38% of participants reported unfair treatment on the basis of their sexuality;

---

<sup>19</sup> SCRGSP (Steering Committee for the Review of Government Service Provision) 2007, *Overcoming Indigenous Disadvantage: Key Indicators 2007*, Productivity Commission

<sup>20</sup> Ministerial Advisory Committee for Victorian Communities. *Social Inclusion: The next step for a fairer Victoria*, May 2007, p.8

<sup>21</sup> *ibid*

<sup>22</sup> Poynting, S. and Noble, G., 'Living with Racism: The experience and reporting by Arab and Muslim Australians of discrimination, abuse and violence since 11 September 2001', *Report to The Human Rights and Equal Opportunity Commission*, 2004, Sydney: HREOC

<sup>23</sup> Victorian Health Promotion Foundation, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report*, 2007, p.32

<sup>24</sup> Hillier, L., Turner, A., and Mitchell, A., *Writing Themselves in Again: 6 years on, Australian Research Centre in Sex, Health & Society*, 2005, ARCSHS, p.35

- 44% reported verbal abuse and 16% reported physical abuse because of their sexuality, figures that are largely unchanged since the 1998 report;
- School was the most dangerous place for young people to be with 74% of young people who were abused experiencing this abuse at school (80% young men, 48% young women).

### **Social and Economic Exclusion of people with a disability as a result of systemic discrimination**

- ABS data shows that 31.1% of people with disabilities reported difficulties using public transport.<sup>25</sup>
- People with disabilities are far less likely than people without a disability to complete year 12, go to university or find work. It is impossible for people with disabilities to fully participate in society unless they can fully access the built environment and public transport.<sup>26</sup>
- A review of the *Disability Discrimination Act 1992* (Cth) found that people with a disability are more likely to be unemployed than those without a disability; people with a disability are less likely to be employed full time, and they experience longer periods of unemployment.<sup>27</sup> Further, HREOC reports that people with an intellectual disability are employed in conditions well below safety net wages and conditions enjoyed by employees without disability.<sup>28</sup>

### **Economic Disadvantage experienced by women as a result of systemic discrimination**

- Women with dependent children are much less likely to be employed than men with dependent children, and women continue to experience a gender pay gap of up to 18.4% (a slightly better result than ABS found – see below) and that individual enterprise bargaining exacerbates the gap – with women tending to end up with lower negotiated wages than men.<sup>29</sup>
- National statistics from ABS show that average weekly earnings, based on full time ordinary earnings (base salaries not including benefits) show a gender pay

---

<sup>25</sup> Productivity Commission Inquiry report, *Review of the Disability Discrimination Act 1992*, report no. 30, 30 April 2004

<sup>26</sup> Ministerial Advisory Committee for Victorian Communities, *Social Inclusion: The next steps to a fairer Victoria*, May 2007, p.7

<sup>27</sup> Productivity Commission Inquiry report, *Review of the Disability Discrimination Act 1992*, report no. 30, 30 April 2004, p.37

<sup>28</sup> HREOC Summit Paper by National Council on Intellectual Disability, *The Disability Discrimination Act as a Tool for Change*, December 2001. Available at:

<[www.hreoc.gov.au/disability\\_rights/consult/summit01/ncid.doc](http://www.hreoc.gov.au/disability_rights/consult/summit01/ncid.doc)>, p.1

<sup>29</sup> Pay Equity Working Party to the Minister for Industrial Relations, *Advancing pay equity – their future depends on it*, February 2005, p.3

- gap of 19.4% for Australia and 19.04% for Victoria. The gaps widens when taking into account 'extras' such as overtime, leave loadings, severance and termination pay – to 23.98% nationally and 23.04% for Victoria<sup>30</sup> – despite the following:
- Evidence indicates that the ability (or employee willingness) to work extra hours is 39% - equal for both genders<sup>31</sup>, and
  - Women are less likely to be paid for the overtime they work.<sup>32</sup>
- A Victorian survey<sup>33</sup> published last year reported that
    - Workplaces with a high proportion of male employees had a more diverse mix of pay-setting methods (for example, awards, collective agreements or individual agreements)
    - Predominantly female workplaces tended to be more reliant on award minimum standards than collective agreements.
    - Predominantly male workplaces had more staff receiving over-award payments and coverage by collective agreements, and less staff with individual agreements and awards
    - Workplaces with a large proportion of male employees were more likely to pay higher wages than those workplaces with a large proportion of female employees
  - While the statistics on the gender pay gap are shameful, they are not as great as that of many other OECD countries – an advantage Australian women were afforded by virtue of legislated protection arising from the 1972 Equal Pay Case and the implementation of centralised industrial awards. The little advantage there was ebbs away with the movement away from centralised wage determination currently.<sup>34</sup>
  - Women made up 66% of all underemployed part time workers in September 2005. The major hindrance to participation is access to affordable childcare. In 2005, 41.8% of Victorian parents who required childcare could not access any services to meet their needs. This has particular impact on single parent families and their participation in the workforce.<sup>35</sup>

---

<sup>30</sup> Australian Bureau of Statistics, *Average Weekly Earnings Report*, Cat 6302.0, May 2007

<sup>31</sup> Australian Bureau of Statistics, *Working Arrangements*, Cat 6342.0, 2000, p.20

<sup>32</sup> Australian Bureau of Statistics, *Working Arrangements*, Cat 6342.0, 2000, p.4

<sup>33</sup> *Snapshot report: Women in the Victorian workplace, findings from the Victorian workplace industrial relations survey*, 2006, p.4

<sup>34</sup> Victorian Pay Equity Working Party, *Advancing pay equity – their future depends on it*, February 2005,

p.3  
<sup>35</sup> *ibid*

### **Discrimination against Homeless People**

- Almost all (90%) of Victoria's 88,000 homeless people who are eligible to vote are not registered to exercise one of their fundamental human rights – their participation in our democracy, through which we are all acknowledged as citizens with a stake in our community.<sup>36</sup>

None of the people who make up any of the figures quoted above conspired to be there along with the others. And yet there they sit, joined by an 'attribute' that has, at some point, singled them and all like them out for special exclusion.

### **The Equal Opportunity Act and the Charter of Human Rights and Responsibilities Act**

The passage of the Charter is a critical influence on any future amendment of the EOA. It also has a bearing on the future functions of the Commission to ensure integration and consistency of its functions.

The Charter specifically recognises equality before the law in section 8:

Every person has the right to recognition as a person before the law;

Every person has the right to enjoy his or her human right without discrimination;

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination;

Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

The Charter confirms the right to equal opportunity as part of the broader framework of human rights in Victoria, and provides a significant opportunity to enhance the operation of the EOA, particularly within the public sector. *Substantive equality is the aim rather than mere formal equality*

At a policy level this means that in identifying, understanding and responding to issues, the overall mandate of the Commission is no longer limited to those matters that can be characterised as less favourable treatment on the basis of specific attributes. Instead, the more holistic human rights lens can be applied to both

---

<sup>36</sup> Department Victorian Communities, *Social inclusion, the next step for a fairer Victoria*, May 2007, p.7

understand problems and negotiate their solution. The Commission has already flagged matters where this is critical – for example women in prison.<sup>37</sup>

On a practical level the Charter contains a number of provisions which provide tools and powers for compliance which have been identified as lacking in the EOA, including:

- the notion of positive duties – the manner in which section 38 of the Charter is drafted requires pro-active consideration of human rights obligations (including the principle of non-discrimination). There is a debate as to whether positive duties fundamentally alter the scope of the underlying legal obligation, but at the very least they are a powerful educative tool;
- intervention / amicus – the broad intervention function vested in the Commission under the Charter is in contrast to the lack of such a function in the EOA. The intervention power may provide a means for the integration of the EOA into a human rights framework – for example a number of exceptions in the EOA may not be Charter-compatible and there may be an opportunity to reinterpret and read-down these provisions in accordance with section 32 of the Charter;
- reporting – for many years the Commission has argued for a power that enables it to report to Parliament on matters of significance. The reporting function under the Charter, while somewhat limited, is movement in the right direction – at the very least it familiarises Parliament with Commission reports and human rights analysis, and develops the Commission's capacity to deliver such reports.

At the same time the Charter might also be viewed as providing a very clear litmus test or indicator of what level or type of reform to the EOA may be palatable to government and to a lesser extent the community. The process that led to the passing of the Charter clearly demonstrated that reforms that are viewed as inherently litigious are unlikely to be acceptable.

The possible introduction into the EOA of some of the measures contained in the Charter, must however address the greater level of intersection between the EOA and the private sector, and the prevailing orthodoxy of reducing regulatory burden.

---

<sup>37</sup> Women Prisoners In Victoria , A report on the considerations and conclusions of the Equal Opportunity Commission of Victoria in determining whether to seek the Attorney-General's consent to conduct a formal investigation into systemic discrimination against women in Victorian prisons, December 2005.

This requires careful consideration of what value the whole community, including the private sector, places on a 'fair go for all' and in realising it.

The enactment of the Charter has changed the landscape for equal opportunity, giving it a higher profile and locating it within a broader rights agenda. The momentum, created by the Charter's introduction, towards the implementation of the Justice Statement's priority to protect human rights and address disadvantage, can be maintained by improving and strengthening the EOA. The central responsibility of the Commission for both the Charter and the EOA means they can be implemented in a complementary way, by an agency which has the existing expertise to continue to drive a rights agenda for all Victorians.

## Section 2 - The case for reforming the law

The DP asks the following initial questions:

### Key questions

- 1 Does the law need to be changed to improve equality of opportunity and the elimination of discrimination in Victoria?
- 2 What are the social and economic costs and benefits involved in reforming the EOA to eliminate discrimination to the greatest possible extent?

The Commission provides its detailed proposals for changes to the law in the following two sections of the paper. In this section, the focus is on the social and economic costs of discrimination and provides further evidence of the link between disadvantage and discrimination. There is insufficient research that directly links the cost of such discrimination to the costs to society as a whole. However, the consequences are evident in the outlines provided.

### *Understanding the experience of discrimination*

The DP asks:

- 2.1.1 What evidence is there of the grounds and areas in which discrimination (whether individual or systemic) is still occurring (particularly those that are not being reflected in complaints statistics)?
- 2.1.2 What is the impact of discrimination?
- 2.1.3 What are the consequences of not addressing this discrimination?

### **The Commission's own data**

Research conducted by the Commission under section 162 of the EOA has identified areas where systemic discrimination continues. This is by no means a conclusive list, but provides an opportunity to see what the consequences of such discriminatory practices and activities are, not just to the individuals concerned, but also to the community more generally.

## **Racism and Employment**

The Commission is currently undertaking research to explore the implications of discrimination in employment on the basis of race. This research is in progress, but early findings from consultations held in 2007 show that a variety of discriminatory practices continue to affect the chances of culturally and linguistically diverse people securing employment within Victoria. This research, which is supported by the Victorian Multicultural Commission, documents the case studies of new arrivals and other immigrants who have been in Victoria for some time, and who, notwithstanding experience or qualification, have continuously failed to gain employment. The economic, social and health consequences of this were highlighted graphically at the end of 2007, when we saw the response of the African community in various parts of Melbourne to suggestions that they had failed to integrate into community life in Australia.<sup>38</sup> Despite the efforts of many members who shared their story with the press at that time, some structural barriers remain to prevent their full participation in society, with adverse consequences to both them and the community more generally.

### **Summary of response**

**The evidence of broad systemic discrimination on the basis of race in employment is not reflected in individual complaints that are lodged with the Commission. Research such as this is important to identify the issues, but a positive duty, with related compliance tools, will provide a more direct and effective means of addressing the economic and social exclusion of this group of people from the workforce.**

## **Access to Taxi Services**

As previously mentioned, the recently released report by the Commission on the use of taxi services by people with a disability,<sup>39</sup> identifies aspects of the provision of taxi services that discriminate against people with a disability, and the need for reasonable adjustments to be made.

While the Commission has received few complaints regarding Wheelchair Accessible Taxi (WAT) provision, feedback from the Commission's Disability Reference Group, the Commission's Taxi Working Group and other community consultation as part of

---

<sup>38</sup> The Age 'Has our way of life come to this?' , Editorial, October 4<sup>th</sup> 2007, p. 14.

<sup>39</sup> VEOHRC, *Time To Respond - Realising Equality for people with a disability utilising taxi services*, November 2007.

this research reveals that time delays in the dispatch of WATs remains a significant problem for people with a variety of disabilities.

The survey conducted in the research revealed WAT time delays as a problem - 47% of people interviewed cited taxi (general) time delays as a cause of difficulty when using taxi services.<sup>40</sup>

The Victorian Taxi Directorate claims to have received very few complaints regarding time delays in WAT provision. The recent Commission report highlights a variety of concerns regarding identifying the locus of responsibility when it comes to lodging such a complaint. According to the Commission's report this is due to the complexity of the taxi industry and identifying an appropriate respondent to the complaint.

The report shows that inaccessible taxi services affect people's abilities to access health care services, and participate in employment, civic and social life. This has a direct consequence on the individual being discriminated against, but also limits their contribution to the community overall. This will be exacerbated as the population ages, unless taxi services provide people with an option to participate fully in public life.

#### **Summary of response**

**There are very few individual complaints that the Commission receives in relation to access to taxi services, yet this survey indicates that a high proportion of wheel chair users who access taxi services are treated less favourably than other taxi users. An own motion inquiry power would enable the Commission to undertake a report to be considered directly by the Parliament and receive much greater public profile in relation to the issues faced by people with a disability. This leads to a greater impetus to achieve change.**

#### **Access to Accommodation**

The need for a guide for property managers arose from consultation with people with disabilities who reported difficulty in accessing the private rental market. *Access All Areas: A guide for property managers to working with disability support networks* (2007) is a guide that has been developed with the support of the Real Estate Institute of Victoria, aimed at educating property managers. The findings of the

---

<sup>40</sup> Ibid, p.9

Commission's consultative processes show that discrimination in private rental accommodation persists and that people with a disability experience disproportionate difficulty when seeking and maintaining private rental accommodation.

Discrimination more generally in the private rental market is also addressed below, and the Commission's own complaints data indicates that this is not an issue that can be readily addressed through individual complaint handling.

The table below shows the complaints received about accommodation and discrimination ranked in number of complaints in the area of accommodation. However, the research about discrimination suggests that it is much more prevalent than the complaints data indicates.

**Table 2: 2006/2007 Complaints relating to Accommodation**

AREA	ATTRIBUTE	TOTAL EVENTS	%
Accommodation	Race	8	28%
	Impairment	6	21%
	Personal Association	4	14%
	Sexual harassment	3	10%
	Religious Belief or Activity	2	7%
	Age	1	3%
	Carer Status	1	3%
	Marital Status	1	3%
	Political Belief or Activity	1	3%
	Sexual Orientation	1	3%
	Victimisation	1	3%
<b>TOTAL</b>		<b>29</b>	

The Consumer Affairs Victoria report *Indigenous people and private rental housing: a review of the Australian literature with special reference to Victoria (CAV, 2007)* substantiates the persistence of racial discrimination and, further, attributes high

levels of Indigenous homelessness and unemployment to discrimination in accommodation. It states:

Despite the existence of anti-discrimination laws, complaint mechanisms and the various real estate institute's codes of conduct, discrimination in the housing market is generally believed to be common.

It also notes that Stanley found that there is considerable evidence of direct discrimination against Indigenous people in the process of accessing private rentals and that such discrimination occurs across income levels.

**Summary of response**

**Where people face discrimination in accessing accommodation, a speedy resolution is required. An alternative dispute resolution service which aims to achieve this will go some way to addressing individual experiences of discrimination.**

**However the systemic nature of accommodation discrimination indicates that other regulatory tools are needed to address this issue. The positive duty to meet substantive equality requirements which is supported by guidelines to demonstrate compliance, and accompanied by regulatory tools such as compliance notices and action plans are avenues to achieve substantive equality.**

**Disability and Employment**

The Commission's guidelines on *Disclosure of Disability in Employment (2007)* arose from the identified need to provide advice to employers and employees in relation to disclosing a disability when seeking employment. The Commission's statistics in relation to complaints in employment indicate that most people seek assistance from the Commission in response to return to work issues and this suggests that many people who are unsuccessful in recruitment processes do not go on to lodge a formal complaint. These guidelines address one small area of activity, but the complaints data from the Commission highlight broader areas of concern.

The table below shows percentage figures for events for complaints based on impairment in the area of employment for 2006/2007.<sup>41</sup> There were 325 complaints based on impairment in the area of employment in 2006/2007. There were 469 events recorded in relation to these complaints.

---

<sup>41</sup> Please note there can be more than one event per complaint.

**Table 3 2006/2007 Complaints of impairment discrimination in the area of employment.**

AREA	EVENT	TOTAL EVENTS	%
Employment	Dismissed	153	33%
	Less favourable conditions/benefits	126	27%
	Harassment	59	13%
	Humiliation/Denigration	56	12%
	Return to work denied/conditions	24	5%
	Not Employed	23	5%
	Resignation	13	3%
	Other - please specify in summary	10	2%
	Access denied	4	1%
	Refusal	1	0%
TOTAL		469	

Recruitment (not employed) accounts for 5% of the events recorded in relation to complaints, whereas most of the other events are connected to retention.

The “not employed” percentage of events has remained between 1 and 5 % of all events in this attribute area over the last 5 years.

These data indicate the challenges for people with a disability within employment but also demonstrate the disconnects between complaints that are lodged and the experience of people with a disability, where they may not have attained a job on the basis of their disability, but do not go on to complain.

**Summary of response**

**In some cases, such as ‘not-visible’ disabilities like mental illness, there is a need for information and guidelines about how to achieve substantive equality. In some areas of disability, there remains community views or attitudes that are misrepresenting the true ability and capacity of people with a disability, and thus this is reflected in the**

perceptions of how they may contribute, to a work place, to a community organisation or some other area of public life.

The ability to undertake information campaigns and to also develop guidelines that indicate how disability may be reasonably accommodated is important to develop a broader understanding and to avoid discriminatory practices. Compliance tools beyond individual remedies are then necessary to ensure that there is not only the capacity for individual redress, but that the approach taken by employers is changed.

### Age and Employment

The area of recruitment for older people is in stark contrast to that facing people with a disability. The Commission's statistics in this area show that the largest area of complaint about discrimination on the basis of age arose in the area of recruitment.

**Table 4: 2006/2007 Complaints related to Older People and Employment**

AREA	EVENT	TOTAL EVENTS	%
Employment	Not Employed	21	24%
	Less favourable conditions/benefits	18	21%
	Dismissed	17	20%
	Harassment	11	13%
	Humiliation/Denigration	7	8%
	Resignation	6	7%
	Other - please specify in summary	4	5%
	Return to work denied/conditions	3	3%
Total		87	

In 2003, the Commission, in conjunction with VicHealth and the Office of Senior Victorians, produced an employers kit addressing the recruitment and retention of workers 45 years and older.<sup>42</sup> The kit provided information about the contribution of older workers to the workforce, and guidelines for employers relating to the employment of older workers.

<sup>42</sup> Equal Opportunity Commission of Victoria, 'Experience at work. Building your 45 plus workforce. Employers kit.', 2003.

### **Summary of response**

**The production of such guidelines will have more authority and influence on both the public and private sector, if they have some standing in a court or tribunal where a discrimination matter arises. They will also have more standing if they operate within the context of a positive duty on both the public and the private sector, and are linked with demonstrating what compliance looks like in relation to this positive duty.**

**Such guidelines are a good example of the importance of involvement of private sector employers in their development and production.**

### **Systemic Discrimination against People in Same Sex Relationships**

In 1998, the Commission finalised its report on *Same Sex Relationships and the Law*. This report outlined a range of areas where systemic discrimination continues to affect same sex couples and advocates for legal reform to eliminate discrimination. A significant law reform process has followed this report. However, discrimination continues to occur as is outlined below.

### **The Consequences of Discrimination and the Cost to the Community**

There are varying impacts of discrimination, depending on the complexity and frequency of its incidence. For example, once-off discrimination might have an immediate effect but if resolved the impact can be minimised. Persistent discrimination, on the other hand, can result in entrenched inequality. This has been shown to be the case through international and local research.

Referring to the impact of race discrimination, Blank *et al* found:<sup>43</sup>

Discrimination may well have cumulative effects, and it is therefore better viewed as a dynamic process that functions throughout the stages within a domain, across domains, across individual lifetimes, and even across generations. For example, discrimination involving teachers' expectations during schooling may affect students' later educational experiences or job opportunities; likewise, discrimination against prior generations may diminish opportunities for present generations even in the absence of current discriminatory practices.

It is particularly debilitating when it becomes intergenerational affecting communities through time. According to Blank *et al*,<sup>44</sup>

---

<sup>43</sup> Blank, R., Dabady, M. and Citro, C.F. *Measuring Racial Discrimination*, 2004. Available at: <[http://www.nap.edu/catalog.php?record\\_id=10887](http://www.nap.edu/catalog.php?record_id=10887)> (accessed January 2008)

Discrimination in one generation that negatively affects health, economic opportunity, or wealth accumulation for a particular group may diminish opportunities for later generations.

The link to disadvantage is evident when this occurs.

The impact and experience of discrimination varies according to the attribute or area. Responses to discrimination have focussed on reform in certain areas, such as education, employment or goods and services provision. However, the Productivity Commission, in its 2007 report, emphasised that certain communities are more likely experience discrimination in multiple areas, and in relation to the different attributes, which seriously compounds the effect.<sup>45</sup>

For example, the experience of Indigenous Victorians throughout the history of European settlement has led to various outcomes including poorer health outcomes, lower education attainment and higher rates of unemployment.<sup>46</sup> The effects of such multivariate discrimination are documented in the Royal Commission into Aboriginal Deaths in Custody Report,<sup>47</sup> and the subsequent reviews of actions arising from these reports.<sup>48</sup>

### **Occupational segregation**

The causal relationship between discrimination and Indigenous employment and occupational segregation has been shown in research looking at Indigenous communities in Australia. Hunter found:<sup>49</sup>

It is probable that poor educational outcomes and discrimination are the main wedges preventing the convergence of Indigenous and non-Indigenous employment rates.

According to Hunter,<sup>50</sup> Indigenous people tend not to be employed in the private sector and other potentially high-income earning areas, which can result in income

---

<sup>44</sup> Ibid, p.224

<sup>45</sup> Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2007*. 2007. Available at: <<http://www.pc.gov.au>>

<sup>46</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2001*, ABS cat no. 4713.0

SCRGSP (Steering Committee for the Review of Government Service Provision) 2007, *Overcoming Indigenous Disadvantage: Key Indicators 2007*, Productivity Commission

<sup>47</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report by Commissioner Elliot Johnston QC*, 1991, Canberra, Australian Government Publishing Service

<sup>48</sup> 'Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody. Review Report' October 2005.

<sup>49</sup> Hunter, B.H. *Indigenous Australians in the Contemporary Labour Market*, 2002, Available at: <<http://www.ausstats.abs.gov.au>> (accessed January 2008)

<sup>50</sup> Ibid

disparities between Indigenous and non-Indigenous peoples. Such occupational segregation also limits career progression and satisfaction.

Gender related occupational segregation is found to have a variety of impacts in Australia including labour shortage, pay differentials, women's right to independence with wider economic implications. Ford found,<sup>51</sup>

Systemic disadvantage experienced by women within the labour market is linked to a workplace historically structured on the needs and attributes of male workers – the 'traditional breadwinner' model.

Recent research conducted in the United Kingdom reveals similar impacts due to gender related occupational segregation.<sup>52</sup> The research identifies the need for reform to bring economic and social benefits to the Community. The report on *General Formal Investigation into Occupational Segregation and Apprenticeships*, found:

It is in our individual, business, and wider economic and social interests to do things differently so that we support rather than undermine wider choice, opportunity and social mobility.

These concerns are reiterated in the UK Women and Work Commission's February 2006 report *Shaping a Fairer Future*.<sup>53</sup> The Commission was set up by the British Government in 2004 to consider ways to close the gender pay and opportunities gap within a generation. Occupational segregation, alongside the impact of family responsibilities and unequal pay, were the three core issues identified as barriers to women's full participation in the workforce. The UK Commission specifically noted the importance of removing barriers to women in occupations traditionally undertaken by men ([www.womenandequalityunit.org.uk](http://www.womenandequalityunit.org.uk)).

---

<sup>51</sup> Ford, C. 'The Resilience of Gender as a Determinant in Career Planning', *The Australian TAFE Teacher* 40,3, Spring 2006, pp.12-14

<sup>52</sup> Equal Opportunities Commission, *General Formal Investigation into Occupational Segregation and Apprenticeships*, 2004, Available at: [http://www.employersforapprentices.gov.uk/docs/meetings/Meeting\\_11\\_233.doc](http://www.employersforapprentices.gov.uk/docs/meetings/Meeting_11_233.doc) (accessed January 2008); Equal Opportunities Commission, *Free to Choose – tackling gender barriers to better jobs*, 2005, Available at: <http://www.eoc.org.uk> (accessed January 2008)

<sup>53</sup> UK Women and Work Commission, *Shaping a Fairer Future*, 2006, Available at: <http://www.womenandequalityunit.org.uk> (accessed January 2008)

## Disparities in income

The Federal Human Rights and Equal Opportunity Commission (HREOC) showed that people with disability are subject to systemic discrimination in employment.<sup>54</sup>

Results from the National Enquiry into Employment and Disability reveal,

People with disability represent a significant proportion of Australia's working age population (16.6%), yet they participate in the workforce at lower rates, they are less likely to be employed when they do attempt to participate, and they will earn less if they do get a job. This has been the case for a long time and the problem is not just ongoing, it seems to be getting worse.

Caputo reports young people who experienced recruitment related discrimination such as race, nationality, sex, or age in the US were found to invest more in job training programs and additional schooling than those reporting no such discrimination.<sup>55</sup> Caputo advocates for race and sex related affirmative action policies and programs.

In a recent survey of 5476 gay and lesbian, bisexual, transsexual and intersex participants indicate that discrimination in employment remains a key issue for this community. According to Pitts *et al*,<sup>56</sup>

10.3% of participants reported having been refused employment or promotion as a result of their sexuality.

This exclusion has economic as well as social and health costs.

## Skill Shortages

At a time of labour market shortages, the economic costs of excluding groups from the workforce has become more apparent. Victorian trends show an ageing population and potential future skill shortages. Buttigieg and Gahan assert that discrimination will worsen this situation and result in a range of economic and employment related crisis in Victoria.<sup>57</sup>

---

<sup>54</sup> Human Rights and Equal Opportunity Commission, *WORKability II: Solutions. People with Disability in the Open Workplace*, 2005, Available at: <<http://www.hreoc.gov.au>> (accessed January 2008)

<sup>55</sup> Caputo, R. 'Discrimination and human capital: a challenge to economic theory and social justice', *Journal of Sociology and Social Welfare* June 2002,

<sup>56</sup> Pitts, M., Smith, A., Mitchell, A. and Patel, S. *Private Lives: A report on the health and wellbeing of GLBTI Australians*, 2006, La Trobe University, Melbourne

<sup>57</sup> Buttigieg, D. M. and Gahan, P. 'Wages, career progression, training and work family policies: an integrated approach to explaining gender discrimination', in Doug Davies, Greg Fisher and Raechel Hughes (eds), *Proceedings of the 19th ANZAM Conference*, 2005, Australian and New Zealand Academy of Management, New South Wales

Skills shortages in New Zealand are prompting employers to buck the trend and employ female apprentices. According to the *Give Girls a Go! Female Modern Apprentices in New Zealand* report prepared by the Human Rights Commission,<sup>58</sup>

There are both social justice and business case reasons for promoting the greater inclusion of women in the MA (Modern Apprenticeship) program. The social justice argument respects the freedom of human beings to develop their capabilities and to choose and pursue their professional and personal aspirations to their best ability... The business case relates to the waste of human talent and resources which has negative effects on productivity, competitiveness and the economy in general.

## **Education**

The area of education is strongly linked to life prospects and economic wellbeing. Various areas of systemic discrimination illustrate the consequences for people who experience discrimination in the area of education.

## **Disability**

In its 2001 report, HREOC found that discrimination of children and adults with intellectual disability in education is systemic.<sup>59</sup> Disability discrimination in education has to date been the source of substantial separation of children with intellectual disability from their peers. International and national research into education indicates that the inclusion of students with disability is the most powerful method to combating discrimination.

## **Indigenous**

Low Indigenous participation rates in schools are a matter of concern. In 2001, 56% of Year 11 Indigenous students remained in schools compared to 87% of non-Indigenous students. In 2004, 61.4% of Year 11 Indigenous students remained in schools compared to 89.5% of non-indigenous. In 2004 39.5% of Year 12 Indigenous students remained in schools compared to 76.8% of non-Indigenous students.<sup>60</sup>

A summary report of consultations conducted by HREOC states,<sup>61</sup>

---

<sup>58</sup> Human Rights Commission, *Give Girls a Go! Female Modern Apprentices in New Zealand*, 2006, Available at: <<http://www.neon.org.nz/documents/Give%20Girls%20a%20Go%20Report.pdf>> (accessed November 2007)

<sup>59</sup> Human Rights and Equal Opportunity Commission, 2001, Available at: <<http://www.hreoc.gov.au>> (accessed August 2007)

<sup>60</sup> Australian Bureau of Statistice, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, 2005, Available at: <<http://www.abs.gov.au>> (accessed November 2007)

<sup>61</sup> Human Rights and Equal Opportunity Commission, 2001, Available at: <<http://www.hreoc.gov.au>> (accessed August 2007)

The continued low levels of educational and occupational outcomes achieved by Indigenous Australians were identified by many participants as being the result of structural discrimination in the education sector. This was seen as the perpetuation of systemic racism and the unwillingness of education authorities and governments to incorporate diverse cultural models of learning and teaching into the curricula.

According to the 2006 Social Justice Report prepared by the Aboriginal & Torres Strait Islander Social Justice Commissioner, Tom Calma:<sup>62</sup>

Non-attendance at school and low retention is a matter of human rights compliance and breaches the rights of the child. It necessitates action by governments to ensure that the right to education is available to all 'with a view to achieving this right progressively and on the basis of equal opportunity.'

### **Culturally and Linguistically Diverse**

According to Olliff<sup>63</sup> young people from refugee and newly arrived backgrounds experience a far greater risk of leaving the educational system earlier than is common for other young Victorians. This is due to a number of factors that inhibit their access to education:

- Language barriers: many young people find it difficult to cope with language acquisition, a situation that is compounded by current curriculum requirements. There are also significant implications for students who may also be illiterate in their first language;
- Lack of knowledge: many newly arrived young people and their families lack a working understanding of the Australian education system, the various curriculum and available pathways;
- Study Space: many newly arrived young people lack a quiet space to study at home;
- Disrupted schooling: many newly arrived young people have experienced disrupted schooling for varying lengths of time. In some cases, young people may have received no previous schooling at all, either in their country of birth or in the transitional country they lived in prior to settlement in Australia.

### **Sexual Orientation**

1749 same sex attracted young people were surveyed in 2004, 38% of whom reported unfair treatment on the basis of their sexuality. School was reported to be the most dangerous place for such people, 74% of participants reporting that they had experienced abuse at school. The report suggests that the "only way to bring

---

<sup>62</sup> Human Rights and Equal Opportunity Commission, *Social Justice Report*, 2006

<sup>63</sup> Olliff, L. *Pathways and Pitfalls: refugee young people in and around the education system in Greater Dandenong*, 2004, Victoria, CMYI-SELLEN

change in enough schools to make a real difference is through planned systemic change.”<sup>64</sup>

## **Goods and services**

### **Access to the Built Environment**

Limitations to access to the built environment affects a large number of people within Victoria. Past and current design often leads to systemic discrimination by preventing access to goods and services and to major areas of social activity such as travel, work and full participation in civil, social and cultural life. In the Productivity Commission’s 2002 review of the DDA<sup>65</sup> a substantial number of study participants felt that while the DDA had led to greater awareness of disability issues it had not yet had much noticeable impact on the built environment. There is a strong feeling that the legislation is not strong enough, that there are too many loopholes and the term “reasonable adjustment” is too open to interpretation. Some mentioned being unclear about how the legislation was going to be enforced and others that the legislation would only be properly tested and established via test cases going to court which could take some time.

### **Financial Services**

Age discrimination in goods and services is widespread. Research from the United Kingdom suggests that financial services particularly are problematic for the aged, who experience direct and indirect discrimination.<sup>66</sup> Explicit age criteria is often used as a proxy for other items (such as health) to acquire personal and car insurance, and loans and mortgages can become difficult to obtain due to age limits regardless of ability to afford repayments. Further, negative attitudes toward the elderly and presumptions of capacity limit access to information and exacerbate low levels of financial literacy.<sup>67</sup>

---

<sup>64</sup> Hillier, L., Turner, A., and Mitchell, A., *Writing Themselves in Again: 6 years on, Australian Research Centre in Sex, Health & Society*, 2005, ARCSHS.

<sup>65</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992, 2004*, Available at: <<http://bilbo.indcom.gov.au>> (accessed January 2008)

<sup>66</sup> <<http://www.helptheaged.org.uk>>

<sup>67</sup> Ibid

## **Accommodation**

According to Long and Memmott,<sup>68</sup> Indigenous households find it far more difficult than non-Indigenous households to get access to private rental housing due to discriminatory policies. For example, the requirement of evidence of private rental history and the establishment of onerous requirements as a general policy for rental housing applicants (eg. based on income or employment), and then making exceptions which largely favour non-indigenous households.

According to Stagoll and Lynch “discrimination against people on the grounds of their social status as a homeless person, an unemployed person or a recipient of social security payments is widespread in Victoria in many areas of public life, particularly in relation to accommodation and the provision of goods and services.”<sup>69</sup> The Homeless Persons’ Legal Clinic claims that such discrimination “...has a deleterious impact on the individuals concerned and the community as a whole.”

Although there are no precise statistics regarding the extent of discrimination in rental accommodation, research and anecdotal evidence indicate that that prejudice and discrimination is endemic and excludes particular groups from the private market.<sup>70</sup>

## **Health Care Services**

In 2005, 652 members of the GLBT communities were surveyed in relation to same sex relationships and discrimination. Of note are comparative levels of discrimination in health care. The 1994 report identified that 17% of respondents had experienced discrimination.<sup>71</sup> This increased to 23% in 1999<sup>72</sup> and was 20.5 % in 2005.<sup>73</sup> These figures demonstrate that discrimination within health care has not changed significantly over the last 10 years.

---

<sup>68</sup> Long, S. and Memmott, P. *Indigenous People and Private Rental Housing: a review of the Australian literature with special reference to Victoria*, 2007, Australian Housing and Urban Institute.

<sup>69</sup> Stagoll, B. and Lynch, P. *Promoting Equality: Homeless Persons and Discrimination*, 2002, Homeless Persons’ Legal Clinic, p.36

<sup>70</sup> Slatter, M., Adkins, J. and Baulderstone, J. ‘A glimpse of the invisible: Sex discrimination in housing’, *Alternative Law Journal* 30/1, 2005, 15-18, 46

<sup>71</sup> VGLRL, GLAD Report, 1994.

<sup>72</sup> VGLRL, *Enough is Enough*, VGLRL Report, 1999,

<sup>73</sup> VGLRL, *Not Yet Equal: Report on the VGLRL Same Sex Relationships Survey 2005*.

### Summary of response

The extensive research and reporting of the experiences of systemic discrimination substantiate the need for a more active regulatory regime to be reflected in the *Equal Opportunity Act*, in order to achieve substantive equality. This research also clearly demonstrates the link between disadvantage and discrimination and the need to monitor the experiences of people in relation to areas of public life and discriminatory practices.

## **Cost benefit analysis**

The DP asks:

2.2.1 What factors should be taken into account when considering whether there is a case for reform of the laws to improve the complaints system and the system's capacity to address systemic discrimination?

2.2.2 How do the economic and social costs and benefits vary depending on the area of discrimination or the attribute?

As previously stated, it is very challenging to find economic or hard data arguments about the impact of discrimination and what the benefit to the community will be to have it addressed. As is evident from the material above, it is clear what the costs are to an individual and the consequential financial or economic burden that may be placed on the community as a result of lack of social or economic participation.

There is clearly a need for more work to be done in this area, similar to the research which is linking discrimination to poor health outcomes.<sup>74</sup>

## **Community Strengthening**

In a review of the DDA the Productivity Commission concluded that the Act provides a net benefit to community;<sup>75</sup>

Taking a broad view of all costs and benefits flowing from the Act, the Productivity Commission considers that the DDA is very likely to have produced a net community benefit in the period since its introduction. In the Commission's view, the restrictions on competition that arise from the operation of the current version of the Act are not sufficient to reverse this conclusion.

---

<sup>74</sup> VicHealth, *More than tolerance: Embracing diversity for health. A Summary Report*. 2007

<sup>75</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, p.152. Available at: <<http://bilbo.indcom.gov.au>> (accessed January 2008)

The community/welfare sector is facing an increasing demand to assist community members who continue to experience the impact of discrimination. For example, through community consultation conducted by Tenants Union Victoria regarding discrimination faced by single parents in private rental accommodation, it was made clear that the role of Community Workers has expanded recently to include assisting people into private rental accommodation. The reason for this is not only the affordability crisis affecting the whole of Australia, but the associated increase incidence of discrimination.

#### **Summary of response**

**There is emerging research which documents the cost to the community of discrimination as well as the cost to the individuals. However, further research is required, and this can be addressed within a reframed *Equal Opportunity Act* with systemic discrimination and substantive equality clearly articulated within its objectives. Such research is also consistent with the current government policy framework addressing fairness and social inclusion.**

#### **Prevention**

While there may be monetary and political costs associated with reforming the EOA to address systemic discrimination, evidence from other jurisdictions indicates such reform can result in long-term social and political change. Jomo illustrates the Malaysian example where the introduction of the countries New Economic Policy (NEP), involving affirmative action programs to address racial inequality "...have undoubtedly resulted in rapid economic growth and development since the 1970s."<sup>76</sup> Such programs focused on improving the provision of public health facilities and better access to education through affirmative action programs. While there were initial concerns about taking resources away from other development related opportunities, Jomo asserts that the NEP has had the effect of averting poverty and assuring stability in the region.

---

<sup>76</sup> Jomo, S. *The New Economic Policy and Interethnic Relations in Malaysia*, United Nations Research Institute for Social Development, 2004. Available at: <<http://www.unrisd.org/unrisd/website.document.nsf/0/A20E9AD6E5BA919780256B6D0057896B?OpenDocument>> (accessed January 2008)

***Initiatives that are already preventing or resolving discrimination***

2.3.1 Are there good practices in place (whether in the public or private sectors) that are preventing or resolving individual or systemic discrimination?

2.3.2 Are there good practices in relation to other issues (for example, occupational health and safety) that could be modified so they effectively prevent or resolve discrimination?

**Summary of response**

**These issues will be addressed in the following two chapters which look at how to better prevent discrimination and resolve complaints.**

## Section 3 - Preventing discrimination

This section deals with the statutory provisions in the EOA that are designed to prevent discrimination, apart from the complaint handling provisions, which are dealt with in the following section 'Improving individual access to justice'. The DP asked the following initial questions.

### Key Questions

- 3 Are the current ways of preventing discrimination working well or could they be improved?
- 4 What role should the Commission have in preventing discrimination, including additional powers or functions (if any)?
- 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?
- 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?

Prevention of discrimination relies upon a strong culture of fairness for and inclusion of all, regardless of personal attribute, in the social, cultural and economic life of our community. It is also about compliance, which is based on knowledge of the rules and the ability and motivation to comply.

The most significant aspect of the reforms proposed below will be the imposition of a positive duty, which the Commission believes should apply across all sectors - public, private and not for profit. This concept will not be entirely new for the public sector as the Charter has already led the way in this regard.<sup>77</sup> The public sector has a particularly important leadership role in eliminating discrimination. The UK Equalities Review Panel final report notes:

This report does not place all responsibility on government or public institutions – but it does show clearly that public institutions and public leaders carry a profound

---

<sup>77</sup> See Division 4 – Obligations on Public Authorities.

responsibility to create the conditions that will liberate the aspirations of those trapped by persistent disadvantage.<sup>78</sup>

The concept of a positive duty that imposes an obligation on both the public and private sectors is consistent with international trends that require greater public reporting and commitment to corporate social responsibility, and the growing engagement of public and private entities with the UN Global Compact. The Compact explicitly links corporate social responsibility with improved business performance.<sup>79</sup>

The responsibility for human rights does not rest with governments or nation states alone. Human rights issues are important both for individuals and the organisations that they create. As part of its commitment to the Global Compact, the business community has a responsibility to uphold human rights both in the workplace and more broadly within its sphere of influence. A growing moral imperative to behave responsibly is allied to the recognition that a good human rights record can support improved business performance.

In this way, the EOA becomes a statutory tool to not only promote greater EO compliance, but also start to deconstruct the historical division of EO and human rights across the public and private sector.

Legislative reform, identified below, will give the Commission the tools and authority it needs to expand the range and breadth of strategies available to allow it to more effectively work for the elimination of discrimination.

### ***Getting the objectives of the EOA right***

The objectives of the Act have remained unchanged since the current Act was introduced in 1995. With the subsequent recognition that systemic discrimination has not been, and in the view of the Commission cannot be, properly addressed by the current legislative regime, it is important as a first step to identify how the objectives of the Act can be amended to reflect this new understanding.

For the statutory framework to have the capacity to address systemic discrimination, it must be based on clear and progressive objectives that target both the causes and manifestations of discrimination and harassment. These objectives can then inform and support advocacy and research work and more sophisticated education and

---

<sup>78</sup> Equalities Review Panel, *Fairness and Freedom: the Final Report of the Equalities Review*, February 2007, London, p.4

<sup>79</sup> From principle one of the ten principles of the UN Global Compact, Available at <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>>

compliance strategies, as well as comprehensive and clear substantive prohibitions. The objectives will also provide the context for appropriate technical interpretation of the legislation. It is also essential that the objectives reflect an appreciation that discrimination and harassment are more than interpersonal disputes between two parties, but are rather the consequence of many societal factors operating at a systemic level.

Recently enacted objectives-equivalent sections in the legislation of the UK and Ontario, Canada have used the language of human rights.

The UK has two pieces of legislation, the *Equality Act 2006* and the *Human Rights Act 1998*, making it most similar to the Victorian situation. The *Equality Act* contains a general duty as follows:

### 3. General duty

The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which —

- (a) people's ability to achieve their potential is not limited by prejudice or discrimination,
- (b) there is respect for and protection of each individual's human rights,
- (c) there is respect for the dignity and worth of each individual,
- (d) each individual has an equal opportunity to participate in society, and
- (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

Compared to the current objectives in the EOA, this general duty is broader, reflecting current thinking on the interrelationship between equal opportunity and human rights generally. Its wording is however rather conservative in relation to the duty expressed, requiring only that its functions be exercised to encourage and support the development of a society in which the listed attributes apply.<sup>80</sup> The current EOA language of promotion and elimination is a stronger statement of intention.

The Ontario *Human Rights Code 1990* preamble states:

---

<sup>80</sup> It may however be a more realistic view of what a commission can achieve.

## Preamble

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

As appropriate for a single human rights document it starts with a general human rights statement and then focuses on equal opportunity.<sup>81</sup>

Both use the wording of the dignity of the person, notions of respect for individual worth, and participation in, and contribution to, community and society.

## Recognising the link between the Charter and the EOA

The DP asks:

3.4.2.1 Should the objectives be amended to recognise the links between the Charter of Human Rights and Responsibilities and the EOA (for example, the right to effective protection against discrimination)?

In relation to the Charter the Commission believes that the objectives of the EOA should expressly recognise the connection between the Charter and the EOA. The Charter is explicit in its recognition of equality, stating that every person has the right to enjoy her or his human rights without discrimination and to effective protection against discrimination.<sup>82</sup> The preamble of the Charter identifies foundation principles, the first two of which are:

human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;

human rights belong to all people without discrimination and the diversity of the people of Victoria enhances our community.....

---

<sup>81</sup> Note however that because of the existence of federal human rights legislation, the code actually deals exclusively with equal opportunity and discrimination.

<sup>82</sup> *Charter of Human Rights and Responsibilities Act 2006*, s 8

The Commission argued earlier in the report that equal opportunity is a fundamental human right and that recognition of this connection will enhance the operation and effectiveness of both Acts. It is appropriate then for the EOA to make this connection explicit.

The Commission has previously argued in its 2005 submission, which was prepared before the introduction of the Charter, that explicit reference should also be made in the EOA objectives to the international legal framework that defines and supports human rights and equal opportunity, namely the Universal Declaration of Human Rights. This connection is now made in the Charter by virtue of section 32.<sup>83</sup>

**Summary of response: that the objectives statement in the EOA recognise the connection between the *Equal Opportunity Act 1995* and the *Charter of Human Rights and Responsibilities*.**

### **Need for substantive equality**

The DP asks:

3.4.2.3 Should the objectives include recognition of the need for substantive equality rather than formal equality? This would involve acknowledging that in order to promote genuine equality it is often necessary to consider how a person's individual needs or characteristics may require them to be treated differently, so that they can achieve equality.

3.4.2.4 Should the objectives of the EOA recognise that in some circumstances, equal treatment could reinforce disadvantage and inequality? An individual or group that has been subjected to ongoing discrimination and entrenched disadvantage may find it more difficult to comply with an apparently neutral requirement, policy or practice.

The Commission strongly supports the recognition of the need for substantive rather than mere formal equality. The EOA should provide a statutory basis for the need for reasonable adjustment or accommodation of a particular attribute, in order to obtain

---

<sup>83</sup> s32(2) International law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

equal outcomes.<sup>84</sup> The provisions in the EOA which allow for exemptions are an existing tool for allowing positive measures to bring about equality.<sup>85</sup>

The Commission believes that the concept of substantive equality should be specifically recognised in the EOA objectives.

**Summary of response: that the objectives statement in the EOA recognise the need for substantive equality and for reasonable adjustments to be made to achieve this.**

### **Connection between discrimination and disadvantage**

The DP asks:

3.4.2.2 Should the objectives recognise the link between discrimination and disadvantage?

The connection between discrimination and disadvantage is a very important driver for a continuing and expanded campaign to eliminate discrimination. The UK Equalities Review found that:<sup>86</sup>

..in the area of the most persistent inequalities, it has become clear to us that one of the major reasons that some disadvantages are intractable, lies in the fact that the very desire to take responsibility for bettering one's own life chances can be crushed by the reality of prejudice and bias.

While closely related to the recognition of substantive justice as an objective, the Commission believes this connection should still be specifically identified, as it provides a clear and practical statement of how destructive discrimination is. This can be seen in particular in relation to the use of irrelevant criminal records to deny employment opportunities, and the discrimination faced by people who are homeless or unemployed. In addition, the Commission believes that the importance of fostering community capacity to attain equality of opportunity should be included in the objectives.

---

<sup>84</sup> This issues is raised in more detail in the discussion of reasonable adjustment later in the report.

<sup>85</sup> For example, exemptions granted to some organisations providing services to female sexual assault victims, to employ only female staff in counselling roles.

<sup>86</sup> Equalities Review Panel, *Fairness and Freedom: the Final Report of the Equalities Review*, February 2007, London, p 3

**Summary of response: that the objectives statement in the EOA recognise the connection between discrimination and disadvantage, and the importance of fostering community capacity**

## **Systemic discrimination**

The DP asks:

3.4.5.1 Should the concept of systemic discrimination be expressly recognised in the EOA?

As outlined in an earlier section of the paper, systemic discrimination is not a third type of discrimination sitting alongside direct and indirect discrimination. It is entrenched structural, sometimes institutional, patterns of behaviour which may become manifest as either direct or indirect discrimination. As such it is already prohibited by the EOA. The difficulty lies with identifying and addressing this type of discrimination solely through a complaints based process.

The Commission believes that there would be benefit in explicitly recognising in the objectives, the systemic causes of discrimination and the consequent need for the promotion of attitudinal, structural and institutional change.

**Summary of response: that the objectives statement in the EOA recognise the systemic causes of discrimination and the need for the promotion of attitudinal, structural and institutional change.**

## ***A framework for compliance***

In its 2005 submission to the Attorney-General the Commission identified the concept of compliance oriented regulation as providing a sound framework for the development of a modernised EOA - one that was capable of both responding to systemic discrimination and positioning the EOA at an appropriate point on the regulation spectrum. The detail of the theoretical underpinning of this approach will not be reproduced here.<sup>87</sup> Briefly, compliance oriented regulation is based on seven principles:

- problem identification and analysis;

---

<sup>87</sup> See pages 40-46 of the 2005 submission for more details.

- harnessing private capacity to secure compliance;
- using processes and outcome based regulation to maximise voluntary compliance;
- rewards and incentives for high / voluntary compliance;
- informed monitoring of non-compliance;
- dialogue and resolution where voluntary compliance fails; and
- enforcement where required.

The model envisages a mix of regulatory strategies which can deal with a multiplicity of regulatory situations, with flexibility and in a responsive way.

Utilising these principles of compliance oriented regulation, the system can be conceived as operating in the following manner:

### **1. Problem identification and analysis**

- Active engagement with all sectors of the community through consultation and co-operation as well as education
- Research – already undertaken by others or undertaken by the Commission in collaboration with others
- Monitoring of issues identified through individual requests for advice and complaints.
- Own initiative inquiries about systemic issues

### **2. Harnessing private capacity to secure compliance.**

- Clarifying the law and what it requires through a range of general and industry-based guidelines and a positive duty.
- Empowering individuals and groups with rights based education
- Accreditation or advantage schemes
- Procurement policies

### **3. Using processes and outcome based regulation to maximise voluntary compliance.**

- Providing direction to stakeholders through a range of general and industry-based guidelines and a positive duty.
- Appearing as amicus curiae or intervenor to advocate for a consistent and outcome-focussed interpretation and application of the EOA and RRTA.

#### **4. Rewards and incentives for high / voluntary compliance.**

- Linking guidelines with the liability provisions of the EOA and RRTA so as to provide an incentive for adherence.
- Recognising guidelines as relevant to the consideration and determination of complaints by VCAT in order to encourage adherence.

#### **5. Informed monitoring of non-compliance.**

- Active engagement with the community using existing research and education functions as well as a new inquiry function
- Targeted assessment of agency compliance with a positive duty
- Monitoring of issues identified through individual complaints.
- Own initiative inquiries about systemic issues
- Assessment of action plans voluntarily referred to the Commission

#### **6. Dialogue and resolution where voluntary compliance fails**

- Conciliation of individual complaints
- Negotiation of compliance strategies where agencies assessed as non-compliant
- Own initiative inquiries about systemic issues

#### **7. Enforcement where required**

- Compliance notices from the Commission which can become compliance orders from VCAT if referred to VCAT by the Commission
- Determination of individual complaints by VCAT
- Appearing as amicus curiae and as an intervener to advocate for a consistent and outcome-focussed interpretation and application of the EOA and RRTA

The practical measures needed to allow this framework to be applied are described below.

### ***A positive duty- shifting the onus***

The Commission believes that a major shift in attitude can only be brought about by a recasting of the debate as a responsibility on everyone to actively eliminate discrimination, rather than as currently - merely a passive obligation not to discriminate. Currently the system relies on an individual who has been

discriminated against to activate compliance by lodging a complaint. To achieve this shift, the Commission believes that the EOA must contain a positive duty which is clear and enforceable.

At present the EOA is expressed largely in the negative. While the framing of the EOA's liability provisions does mean that in order to comply with their obligations under the Act employers, service providers, educational authorities, clubs etc, all need to take proactive steps to avoid discrimination and harassment, the Commission believes this still falls short of what an express positive duty could deliver.

Academic Susan Fredman emphasises the importance of positive duties in addressing systemic discrimination.<sup>88</sup>

At the root of the positive duty ... is a recognition that societal discrimination extends well beyond individual acts of racist prejudice. Equality can only be meaningfully advanced if practices and structures are altered proactively by those in a position to bring about real change, regardless of fault or original responsibility. Positive duties are therefore proactive rather than reactive, aiming to introduce equality measures rather than to respond to complaints by individual victims.

Fredman goes on to identify the important implications of such a duty. The duty falls not on the individual to show specific acts of prejudice. Showing a pattern of under-representation or other evidence of structural discrimination is sufficient, and the one bearing the duty to respond is the organisation – the body most able to bring about a change. The duty also requires not compensation for an individual, but structural change which will benefit a much larger group of people.

Federally the, *Equal Opportunity for Women in the Workplace Act 1999*, although not expressly imposing a positive duty, incorporates such a duty with its requirement for the development of workplace programs. The programs require that action be taken to eliminate all forms of discrimination and measures taken to contribute to the achievement of equal opportunity, in relation to employment matters.<sup>89</sup>

In both the United Kingdom and Canada, anti-discrimination laws have been amended to include an express positive duty in relation to equality and human rights,

---

<sup>88</sup> Fredman, S. 'Equality: a new generation?' *Industrial Law Journal* 30/145, 2005, 12-13, as quoted in Belinda Smith, Positive Equality Duties (UK), The future of Australian Anti-Discrimination Law Workshop, University of Melbourne, November 2007

<sup>89</sup> *Equal Opportunity for Women in the Workplace Act 1999*, s 3

including the UK *Sex Discrimination Act 1975*, *Race Relations Act 1976*, *Disability Discrimination Act 1995* and *Equality Act 2006*, and the Canadian *Employment Equity Act 1995*.

The Canadian *Employment Equity Act 1995* sets down positive duties for federally regulated entities (both public and private) that employ more than 100 employees. Under the scheme entities must take active steps to identify, quantify and address employment barriers that restrict the equal participation of women, people with disabilities, Aboriginal / First Nation Canadians and “visible minorities”. The scheme is administered and enforced by a substantial audit function on the part of the Canadian Human Rights Commission, which focuses on working co-operatively with organisations to assist them to meet their obligations, but which can, if necessary, pursue compliance proceedings in the Canadian Human Rights Tribunal.

In the United Kingdom, a number of its anti-discrimination statutes incorporate both general and specific positive duties.<sup>90</sup> The general duty sets down a positive obligation on organisations to have due regard to the need to eliminate discrimination and promote equality of opportunity in the course of undertaking organisational activities and functions. This general duty is then further advanced by articulating specific duties in relation to some entities or issues. Under the *Race Relations Act 1976* (UK) public authorities are compelled to develop and implement an equality scheme, and the *Disability Discrimination Act 1995* (UK) requires both private and public sector providers of goods and services to make reasonable adjustments to accommodate people with disabilities.

New disability and gender equality duties were introduced in the UK in 2006 and 2007 respectively, which have a greater focus on equality of outcomes and less focus on prescribing the processes to be followed.<sup>91</sup> Specific duties include publishing equality schemes which set out action plans, reporting on progress and an obligation to take the action specified in the plans within the specified timeframes.

Under the UK *Sex Discrimination Act 1975*, a general duty is imposed on public authorities to have due regard to the need to eliminate unlawful discrimination and

---

<sup>90</sup> Refer to the *Race Relations Act 1976* (UK), *Disability Discrimination Act 1995* (UK), *Sex Discrimination Act 1975* (UK) and the *Equality Act 2006*.

<sup>91</sup> *Discrimination Law Review - A framework for fairness: proposals for a single equality bill for Great Britain* Department of Communities and Local Government , London June 2007, p 86.

harassment, and to promote equality of opportunity between men and women. There is then a power granted to the Secretary of State to impose a specific duty if it will ensure better performance of the general duty.

The current UK Discrimination Law Review (DLR) will consider creating a single equality act and introducing a single public sector duty covering all protected areas. In their consultation paper,<sup>92</sup> the government proposes that the existing positive duties be strengthened. The consultation paper notes the DLR's particular regard for the work of Sarah Spencer and Sandra Fredman in developing a framework for articulating a stronger outcome-focused duty.<sup>93</sup> Fredman and Spencer argue that the current duty to pay due regard to the need to eliminate discrimination and promote equality of opportunity is insufficient on two grounds. Firstly, the goal of equal opportunity is too vague to be workable. Secondly, a duty to have due regard requires only that consideration is given to promoting equality but does not require that any action to be taken. The authors make the point that:<sup>94</sup>

It does not make sense to require the authority to do no more than pay due regard to the need to eliminate discrimination because, by definition, unlawful discrimination is unlawful. This is true too for equal work for equal pay which is a statutory requirement.

Fredman and Spencer recommend a stronger duty:<sup>95</sup>

A public authority shall, in carrying out its functions, take such steps as are necessary and proportionate to eliminate discrimination and to achieve the progressive realisation of equality.

Equality is defined as:<sup>96</sup>

**Equal life chances:** equality duties should aim to break the cycle of disadvantage associated with discrimination, aiming at fair representation, such as in employment or in parliament, and pursuit of equality of outcomes for groups, such as parity in exam results.

**Equal dignity and worth:** equality duties should address stigma, harassment, humiliation, degrading treatment and violence.

---

<sup>92</sup> Department of Communities and Local Government, *Discrimination Law Review - A framework for fairness: proposals for a single equality bill for Great Britain*, June 2007, London

<sup>93</sup> Fredman, S. and Spencer, S. *Delivering Equality – towards an outcome-focussed positive duty*, June 2006, submission to the Discrimination Law Review

<sup>94</sup> Fredman, S. and Spencer, S. *Delivering Equality – towards an outcome-focussed duty*, Forum EOR No 156, September 2006, p.16

<sup>95</sup> Ibid, developed from the International Convention for Economic, social and Cultural Rights (ICESCR) and the South African constitution.

<sup>96</sup> Ibid, p.15

**Accommodation and affirmation:** Equality duties should go beyond identical treatment in meeting needs, and should accommodate and affirm different identities, aspirations and needs.

**Equal participation in society:** an equality goal in its own right, as well as a pre-requisites of good relations

Fredman and Spencer note that the benefits of this formulation of the general duty are that it: requires an authority to take action; is goal oriented; is progressive; and the action required is necessary and proportionate. They go on to consider whether specific duties would be required to support the general duty, and decide that the stronger duty reduces the need for specific duties, but does not entirely eliminate it. This conclusion is based on the UK model which it should be noted has a much more developed culture of codes of practice and other regulatory tools than Victoria does.

The DLR proposes using an adapted version of these dimensions of equality as a statement of purpose for a single positive equality duty:<sup>97</sup>

**Addressing disadvantage** – taking steps to counter the effects of disadvantage experienced by groups protected by discrimination law, so as to place people on an equal footing with others.

**Promoting respect for the equal worth of different groups**, and fostering good relations within and between groups – taking steps to treat people with dignity and respect and to promote understanding of diversity and mutual respect between groups, which is a prerequisite for strong, cohesive communities.

**Meeting different needs while promoting shared values** – taking steps to meet the particular needs of different groups, while at the same time delivering functions in ways which emphasise shared values rather than difference and which provide opportunities for sustained interactions within and between groups.

**Promoting equal participation** – taking steps to involve excluded or under-represented groups in employment and decision-making structures and processes and to promote equal citizenship.

The DLR notes the need for the newer duties in the individual pieces of legislation, to be tested in practice but does not specifically articulate a new single duty.

The Commission believes that a specific expression of a positive duty in the EOA is essential to move the equality agenda forward. It will be a major tool to bring about the fundamental refocusing of the obligations and responsibilities for eliminating discrimination away from the individual and onto organisations. To be consistent and

---

<sup>97</sup> Department of Communities and Local Government, *Discrimination Law Review - A framework for fairness: proposals for a single equality bill for Great Britain*, June 2007, London, p.87

effective, and to emphasise that equality of opportunity is in everyone's interests and is everyone's responsibility, the duties should apply across all sectors – public, private and not for profit.

The Commission believes that the general duty and definitions of equality suggested by Fredman and Spencer above should form the basis for this duty.

**Summary of response:**

**a) that the EOA contain a general positive duty applying to public, private and not for profit agencies to, in carrying out their functions, take such steps as are necessary and proportionate to eliminate discrimination and to achieve the progressive realisation of equality.**

**b) that in relation to this duty, equality is defined as:**

**i) Equal life chances: equality duties should aim to break the cycle of disadvantage associated with discrimination;**

**ii) Equal dignity and worth: equality duties should address stigma, harassment, humiliation, degrading treatment and violence;**

**iii) Accommodation and affirmation: Equality duties should go beyond identical treatment in meeting needs, and should accommodate and affirm different identities, aspirations and needs;**

**iv) Equal participation in society.**

The Commission believes that this stronger positive duty, combined with the compliance tools set out in the following pages will provide the appropriate legislative regime for Victoria without the need for specific duties.

### ***Education, advocacy and promoting compliance***

Central to realising the objectives of the EOA, are multi-faceted and sophisticated strategies that educate the community about, and advocate for, equal opportunity and substantive equality. The strategies must also show the community what compliance with the EOA actually means, and how to promote and attain equality of opportunity.

The DP asks:

3.2.5.1 Are the current education powers sufficient or should they be clarified or expanded to enable the Commission to prevent discrimination more effectively?

3.2.1.4 Would specific advice on how to comply with the EOA (for example for businesses and schools, accommodation providers, clubs and local government), improve compliance and prevent discrimination? If so, should this be provided by the Commission or some other agency?

The Commission believes that section 162 of the EOA, which sets out the Commission's educative role, needs to be expanded. Currently, it provides that:

- (1) The Commission must undertake programs for the dissemination of information for the education of the public with respect to—
  - (a) the elimination of discrimination, sexual harassment and vilification on the ground of race or religious belief or activity;
  - (b) the promotion of equality of opportunity;
  - (c) any other matters relevant to the provisions of this Act.

The proposed enhanced objectives of the EOA will provide an expanded framework for the operation of the education power, making it clearer that issues such as the link between disadvantage and discrimination are within the ambit of the Commission's work. However, the Commission believes that section 162 needs to be amended to better reflect the Commission's active role in advocating for the elimination of discrimination. This can be achieved by including 'advocacy' in the section, in both the title and in subsection one.

With the additional responsibilities which a positive duty would impose on agencies and individuals, the Commission would also need to take a far greater role in promoting compliance. To facilitate this work the section should be amended to include a specific reference to the promotion of compliance.

The Commission already provides education and consultancy services which are aimed at providing agencies with information about how to comply with the EOA.

Education consultants work with organisations in the public, private and community sectors to help them design and implement strategies to eliminate discrimination and harassment, with the key aims being to ensure organisations:

- are equipped to implement equal opportunity strategies

- manage their own complaints more effectively – by establishing internal complaint mechanisms
- minimise the impact of discrimination and harassment on individuals and the organisation.

Commission consultancy services include:

- expert advice about risk management and EO best practice
- policies and procedures development and review
- education programs
- assessment and analysis of work environments to measure the level and impact of discrimination and harassment
- review of equal opportunity policies and procedures and the provision of feedback and suggestions for any improvement or amendments.

The Commission offers these services on a fee for service basis. However, there must also be the capacity to provide such services on a non-fee for service basis to small entities or not-for-profit organisations. Consideration also needs to be given to entities that could make a major contribution to education around equality and realising substantive equality. One example is the Public Service Standards Commissioner who could adopt a proactive role within the public sector in consultation with the Commission, in ensuring all agencies have effective training and education programs to address not only employment practices to achieve substantive equality, but also in-service delivery. Peak statutory entities may also play such a role, such as the Municipal Association of Victoria. In addition, this would give meaning to how they progress their responsibilities under the Charter.

A significant part of an enhanced role in promoting compliance will be providing specific advice about compliance. The Commission envisages that, for example, it would have a separate information line from that which deals with complaints, to answer questions from individuals and agencies about their obligations and how they can comply. The Commission would also need specialist compliance information officers who could provide training and advice, possibly as outreach workers. ADR practitioners would also need to understand compliance obligations and be able to provide general advice in the area. However, the advice provided by the Commission will not include legal advice which would not fit with the Commission's other roles as complaint handler and regulator.

For the Commission to be able to meet its obligations under an expanded EOA this area would need to become a much greater focus of the Commission's work and to be appropriately resourced.

**Summary of response: that section 162 of the EOA be amended to:**  
**a) include the word advocacy in the title and in subsection one; and**  
**b) include a provision relating to the promotion of compliance with EOA duties.**

## ***Tools for compliance***

### **Codes of Practice**

The DP asks:

3.3.1.1 Should a power for the Commission or any other body to issue codes of practice be introduced into the EOA? If so, what status should these codes of practice have?

The Commission has previously supported the extension of its powers to include the development of enforceable codes of practice. However, it now considers that codes would be resource intensive and not deliver a sufficient benefit to justify their introduction. At this time, the enactment of a positive duty across all sectors would mean that the Commission considers the introduction of codes of practice not to be a priority within the proposed regulatory environment, and believes that consolidation of the use of other regulatory tools will provide a more effective outcome in the achievement of substantive equality.

**Summary of response: that the power to develop codes of practice not be included in the EOA, subject to the inclusion of a positive duty on all sectors.**

### **Guidelines**

The DP asks:

3.3.2.1 Should there be a specific power for the Commission to develop guidelines?

3.3.2.2 Should these guidelines be able to be considered by VCAT or the courts when determining matters under the EOA? Should these guidelines be able to be enforced in any other way?

The Commission believes that the EOA should be amended to provide for the development of equal opportunity guidelines. Unlike codes, guidelines would not be definitively linked to the liability provisions of the EOA and as such it is not proposed that they would require the approval of Parliament to come into force. However, guidelines would be given standing by making them matters for consideration by VCAT or the courts in hearings.

Guidelines could be general or more targeted in their scope depending on the situation being addressed. As they would be issued by the Commission, they could be readily amended to deal with emerging or recurrent issues identified through complaint trends, or the implications of significant decisions by VCAT or the courts in relation to the interpretation and application of the EOA.

Mechanisms akin to guidelines are found in a variety of comparable schemes covering anti-discrimination and other areas. In particular:

- the NSW Anti-Discrimination Board can develop guidelines (called codes) that can be considered by the NSW Administrative Decisions Tribunal and the courts;<sup>98</sup>
- the Anti-Discrimination Commissioners in Tasmania and the NT are charged with the function of developing guidelines;<sup>99</sup> and
- the Victorian WorkSafe Authority can develop compliance codes to assist in developing an understanding of obligations under the *Occupational Health and Safety Act 2004* (Vic).<sup>100</sup>

**Summary of response: that the EOA be amended to give the Commission power:**  
**a) to develop guidelines; and**  
**b) for compliance with relevant guidelines to be formally considered by VCAT in determining discrimination matters.**

<sup>98</sup> *Anti-Discrimination Act 1977* (NSW), Section 120A

<sup>99</sup> *Anti-Discrimination Act 1998* (Tas), Section 6, and *Anti-Discrimination Act 1992* (NT), section 13

<sup>100</sup> s 149

## Action plans and compliance notices

The DP asks:

3.3.3.1 Are action plans a tool that should be used to prevent discrimination under the EOA?

3.3.3.2 If action plans are a tool that should be used, what role, if any, should the Commission have in registering the action plans, making them publicly available and / or commenting on them?

3.2.8.2 Should the Commission have a specific power to review a public authority's programs and practices to determine their compatibility with equal opportunity law, upon request by a public authority?

Action plans are already part of Victorian legislation. The Victorian *Disability Act 2006*, requires a public sector body to prepare a plan for the purpose of: reducing barriers to persons with a disability accessing goods and services, or obtaining and maintaining employment; promoting inclusion and participation in the community; and achieving tangible changes in attitudes and practices which discriminate against persons with a disability.<sup>101</sup> The *Multicultural Victoria Act 2004* also requires a yearly report from each government department that includes details of:<sup>102</sup>

any major improvements made, or initiatives developed, by the Department during the financial year that promote multiculturalism in Victoria and meet the identified needs of Victoria's culturally and linguistically diverse communities.

The Commonwealth *Disability Discrimination Act 1992*, makes provision for the preparation of action plans but does not impose an obligation on any agency to do so.

The Commonwealth *Equal Opportunity for Women in the Workplace Act 1999* has a requirement for the development of workplace programs which are similar to action plans. The programs must be designed to ensure that action is taken to eliminate all forms of discrimination and measures taken to contribute to the achievement of equal opportunity, in relation to employment matters.<sup>103</sup> They apply to higher education institutions and employers of more than 100 employees. Public reports must be provided yearly to the Equality of Opportunity for Women in the Workplace Agency (EOWA), with some provision for waiver of reporting requirements.

---

<sup>101</sup> s 38

<sup>102</sup> s 19

<sup>103</sup> *Equal Opportunity for Women in the Workplace Act 1999*, s 3

The UK *Equality Act 2006* provides for the use of action plans where the Commission has undertaken an investigation and determined that a person has committed an unlawful act. An unlawful act notice will then be issued and this notice may require the preparation of an action plan, the purpose of which is to avoid repetition or continuation of the unlawful act.

The models described above use action plans for different purposes including:

- providing the mechanisms for developing an action plan and an option for providing it to a state agency – an encouragement approach
- requiring a plan to be prepared with varying degrees of reporting required and of monitoring undertaken – compliance approach
- using an action plan only where it is necessary as an enforcement tool – punitive approach

The second two approaches listed above are used as part of a positive duty on agencies to act. The Commission has already stated its support for the imposition of a positive duty on agencies to work towards eliminating discrimination. The Commission considers that action plans can be a useful tool for agencies to develop a practical response to a positive duty imposed on them and therefore believes that the EOA should provide a framework for their development and use.

Rather than imposing a requirement that plans always be developed, the Commission believes that a combination of voluntary preparation of plans and their use as an enforcement tool, would work well. This would also be consistent with the existing positive duty on public authorities, to be compliant with the rights contained in the Charter, and in fact could provide a vehicle to consolidate planning and implementation across all human rights areas.

The voluntary preparation of actions plans would allow agencies to register their plans with the Commission as a public statement of their engagement with equal opportunity. The Commission could work with an agency at its request to develop an effective plan and could provide a publicly available registry of plans approved by it.

As an enforcement tool an action plan would be part of a power to assess compliance. Where the Commission has concerns about an agency's level of compliance, the Commission could undertake an assessment of the agency's programs and practices. This is the approach taken in the UK, where the UK Commission has the power to assess public sector duties<sup>104</sup> and issue compliance notices.<sup>105</sup> The provisions provide the UK Commission with a power (but not an obligation) to 'assess the extent to which or the manner in which a person has complied with a duty' under relevant sections of the *Sex Discrimination Act 1975*, the *Race Relations Act 1976* and the *Disability Discrimination Act 1995*. Where the UK Commission believes that a person has failed to comply, it may give the person a notice requiring compliance, and requiring the provision of written information within 28 days, of steps taken or proposed for the purpose of compliance. If the notice is not complied with, an application can be made to the court for an order.

The Commission may become aware of agencies failing to meet their obligations through, for example, the use of complaint statistics, or through own motion inquiries discussed later in this paper. The Commission believes it should have power to gather information in these situations so that it can assess compliance. To be effective the power would need to be able to be exercised at the discretion of the Commission rather than at the request of a public authority.<sup>106</sup> The Commission could also undertake reviews at the request of an agency.

Power to issue compliance notices in a similar manner to the UK Commission would be a useful tool. The Commission believes it should also be able to require the development of an action plan where this approach would be more effective in compliance terms.

For these powers to be enforceable, non-compliance with a Commission compliance notice or a requirement that an action plan be developed, would need to be referable to VCAT for an order to be made. Once an action plan was in force, the Commission would also need the power to monitor compliance with the plan. Failure to comply

---

<sup>104</sup> *Equality Act 2006*, s 31

<sup>105</sup> *Ibid*, s 32

<sup>106</sup> Giving the Commission the *discretion* to exercise this power would make it inconsistent with the Charter, which can only do it at the request of the agency. However, the Commission believes this would be appropriate, and a discretionary power under the Charter may be worth considering in the future.

would lead to the issuing of an action plan compliance notice by the Commission which could also be referred to VCAT for a compliance order if necessary.

Consistent with the Commission's view that a positive duty should apply to both the public and private sectors, the Commission's powers to assess compliance, to issue compliance notices and to require the development of action plans, should apply to both the private and public sectors. The Commission envisages that compliance notices would rarely be used, and would always be preceded by dialogue with the agency or individual concerned. As noted in the framework articulated earlier in this section enforcement proceedings are used only as a last resort and only after all other compliance measures have failed.

**Summary of response: that the EOA be amended to give the Commission power to:**

- a) undertake information gathering necessary to ascertain whether an agency or individual is complying with their EOA obligations;**
- b) issue a compliance notice where non-compliance is discovered;**
- c) require the development of an action plan;**
- d) refer non-compliance with a requirement to develop an action plan, to VCAT who could make an order;**
- d) monitor compliance with a compliance notice or action plan; and**
- e) refer non-compliance with a notice or an action plan to VCAT who could make an order.**

## **Public Alerts and other public information**

The DP asks:

3.3.4.1 Could more be done with the collection and analysis of complaints data and conciliation outcomes to improve the information available to the public?

4.5.9.6 Should conciliation outcomes be de-identified and published?

3.3.4.2 Are there ways this information should be used to identify possible current areas in which discrimination appears to be occurring frequently, to allow a quick response to those concerns?

4.5.7.1 Should the Commission have some capacity to make reasonable or necessary disclosures for the purposes of the performance of a function or duty or the exercise of a power under the EOA?

The secrecy provisions of the EOA have historically limited the practice of the Commission in publishing outcomes of complaints. This practice has been reviewed in the past couple of years, as internal policies have been reviewed, to ensure a greater level of public scrutiny of de-identified cases. However, notwithstanding the process of public alerts and making information public, the EOA could be enhanced to allow the Commission to:

- confirm or deny that a complaint has been lodged with it if it comes to the media's attention;
- disclose identifying information with the consent of the parties;
- refer matters to suitable authorities for example referring serious vilification to the police;

The Commission believes that the use of public alerts would be useful in particular situations of urgency or frequency. The Commission already prepares media releases in many such situations, as for example in relation to the recent public statements made about the alleged inability of newly arrived immigrants from the Horn of Africa to settle successfully in Australia. The use of public alerts would be largely a matter of repackaging its current approach to media releases. A related publicity tool is the use of case studies in publications to highlight real life examples of successful outcomes.

Section 192 of the EOA provides that:

a person to whom this section applies must not, either directly or indirectly, make a record of, disclose or communicate to any person any information to which this section applies unless it is necessary to do so for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under this Act.

Hence the Commission can already disclose information when it is necessary for the purposes of the EOA or for the performance of a duty or the exercise of a power under the EOA. The DP question asks whether this capacity should be extended from the current requirement of *necessary* to allow disclosures which are *reasonable*. The above amendments would address this issue, and *necessary* is an appropriate requirement in this regard.

**Summary of response:**

**the EOA be amended to allow Commission to:**

**a) confirm or deny that a complaint has been lodged with it if it comes to the media's attention:**

- b) disclose identifying information with the consent of the parties;**  
**c) refer matters to suitable authorities for example referring serious vilification to the Victoria Police.**

## **Procurement and granting policies**

A further tool that can be used effectively to encourage compliance by the private sector is the development of policies or guidelines that specify certain standards which are required from businesses or individuals, before the public sector will source its goods and services from them. By using the significant buying power of the public sector, pressure can be exerted on the private sector to implement practices in accordance with government policy objectives. The provision of legal services to the Victorian government is already governed by such a policy. In this arrangement only legal service providers who are members of a designated panel of providers can be used by government agencies for legal service provision. The Victorian Government Purchasing Board states, that:<sup>107</sup>

All Panel Members ... are committed to the furtherance of equal opportunity in their work practices (including work allocation) and in briefing barristers. They must also comply with model litigant principles when acting on behalf of Departments. Each Panel Member has also committed to provide pro bono services of at least 5% of the value of the legal fees they derive under the panel arrangements.

Such practices can be implemented without the need for specific legislation. However, during the recent reviews undertaken of discrimination law in the UK, differing views emerged as to whether an express provision was preferable. The proposal was for a legislative provision which stated that public sector equality duties apply to the procurement functions of public authorities. The Equalities Review thought that an express provision was necessary:<sup>108</sup>

We propose that the new public sector duty should incorporate a specific requirement for public bodies to use procurement as a tool for achieving greater equality. Ensuring that commissioning frameworks require providers to analyse the needs of different groups, and that they monitor provision using quantitative and qualitative analysis, will also be an important element of the new duty.

However, the Discrimination Law Review disagreed:<sup>109</sup>

---

<sup>107</sup> <http://www.vgpb.vic.gov.au/CA256C450016850B/0/4AA2B6BFB08C7667CA256C7C0017D220?OpenDocument>

<sup>108</sup> Department of Communities and Local Government, *Discrimination Law Review - A framework for fairness: proposals for a single equality bill for Great Britain*, June 2007, London, p.134

<sup>109</sup> Department of Communities and Local Government, *Discrimination Law Review - A framework for fairness: proposals for a single equality bill for Great Britain*, June 2007, London, p.106

The current public sector duties apply in respect of the functions of a public authority. ....Procurement is a function of public authorities. While the legislation on the public sector equality duties does not refer explicitly to procurement, the obligations under the general duties apply to a public authority's functions as a whole. This means that, in carrying out procurement, public authorities need to [comply with the duties] as well as continuing to ensure compliance with the legal and policy framework for public sector procurement.

The Commission agrees with the latter approach and does not propose any specific reference to procurement in the EOA. The Commission has proposed earlier in this paper that a positive duty should apply to both the public and private sectors. If such a duty is incorporated into the EOA, procurement policies will be an additional incentive for complying with a duty which will already apply directly to the private sector. However, if a positive duty is confined to the public sector, the importance of using procurement as a tool to encourage the private sector to also comply, will be much more significant.

The granting policies of government can similarly be changed to require demonstrated adherence to substantive equality in order to be eligible for grants.

**Summary of response: that the EOA does not need to specify that a positive duty imposed by the EOA also applies to the procurement or granting functions of the agency subject to the duty. Government policies and practices will have to be changed to be consistent with the positive duty.**

## **The Regulatory Environment**

In 2006 the then (Victorian) treasurer John Brumby released the Government plan, *Reducing the Regulatory Burden*. The plan acknowledges the value of regulation as an important tool for achieving policy objectives and protecting the community and environment, while at the same time committing the government to minimising regulation wherever possible. This government wide plan has clear implications for the Commission proposition that an amended EOA should include the imposition of a positive duty which can be enforced with targeted compulsory action plans and compliance notices.

The *Victorian Guide to Regulation* identifies a number of rationales for government intervention, including that of addressing social and equity objectives, specifically

including human rights and protecting the vulnerable and disadvantaged.<sup>110</sup> With these principles in mind the Commission has taken the view that the imposition of a positive duty and its associated compliance mechanisms strikes the right balance between achieving social equity and not placing too great a burden on business and the private sector generally.

## ***Developing the Law***

The DP asks:

3.2.6.2 Should the Commission or any other body have intervention or amicus curiae powers?

3.2.6.1 Should the power the Commission has to intervene in proceedings relating to the Charter be extended to a power to intervene in relation to proceedings raising questions relating to the EOA?

### **Amicus Curiae**

The Commission believes that such a function would be a very powerful tool for ensuring that the development of the law takes place in an environment in which the tribunal or court has access to specialist advice on the EOA. This advice would be based on the objectives of the Act, and would not be influenced by the interests of a party in the case. Submissions could be made on broad policy considerations.

Whilst the legislation should express such a mechanism in broad terms, the Commission believes that it would be most relevant to matters that:

- raise significant questions concerning the interpretation and application of the EOA or RRTA;
- potentially involve significant implications for the administration of the EOA or RRTA;
- have the potential to affect the interests of individuals who are not a party to the proceedings; or
- involve other special circumstances of particular relevance to the public interest.

The amicus role could advance progress in relation to systemic discrimination in a number of ways:

---

<sup>110</sup> Department of Treasury and Finance, *Victorian Guide to Regulation*, 2007, p.2-2

- through accessing the Commission's expertise, which is currently absent from tribunal and court proceedings, decision makers benefit from a perspective that is informed by a range of legal and social influences, as well as focussed on the effective operation of the EOA and RRTA. Expecting the parties involved in individual disputes to air and address such matters is both unfair and unrealistic.
- the development of jurisprudence in relation to equal opportunity can be enhanced via the Commission advocating for consistency with developments in other jurisdictions as well as an interpretation of the law that will most advance the EOA's specified objectives.
- giving the Commission the scope to be present in tribunal and court proceedings also positions it to most effectively utilise and advance many of the other mechanisms being proposed in this paper. In particular, the Commission could appear as amicus curiae to make submissions directed at advancing the cause of those most discriminated against in our communities - submissions informed by the Commission's engagement with the community, relationships with others working to eliminate discrimination, research and own initiative inquiries. It could also appear to further explain the rationale or approach underlying particular Commission guidelines.

A number of the Commission's federal and interstate counterparts are vested with amicus and/or intervention powers, specifically HREOC, the Anti-Discrimination Commissioners of Qld, Tasmania and the NT, and the Equal Opportunity Commissioner of WA.<sup>111</sup> It is relevant to note that on a number of occasions where Commissions have acted as amicus curiae this has been positively acknowledged not just by the court or tribunal but also the parties – see for example the intervention of the Federal Sex Discrimination Commissioner in *Jacomb v. The Australian Municipal Administrative Clerical and Services Union*.<sup>112</sup>

**Summary of response: that the EOA be amended to give the Commission power to appear as amicus curiae in discrimination matters.**

<sup>111</sup> Refer to section 64PV of the *Human Rights and Equal Opportunity Commission Act 1986*, section 235(j) of the *Anti-Discrimination Act 1991* (Qld), section 7(b) of the *Anti-Discrimination Act 1998* (Tas), section 13(q) of the *Anti-Discrimination Act 1992* (NT) and section 113 of the *State Administrative Tribunal Act* (WA).

<sup>112</sup> [2003] FCA 1143

## **Intervener**

The role of intervener, while different from that of amicus curiae, serves a similar function in that it allows the views of the Commission, acting as the advocate for the EOA, to be placed before the court. The Commission has this power in relation to human rights matters under the Charter,<sup>113</sup> and believes that it is appropriate for its intervention power to cover both human rights and equal opportunity matters. This recognises the relationship between the two and allows a broader and more complete presentation to be put to the court in cases which may involve aspects of both Commission responsibilities.

**Summary of response: that the EOA be amended to give the Commission power to intervene in discrimination matters.**

The potential for a conflict of interest in the Commission's role as intervener, combined with its role as a provider of ADR is discussed later in this report.

## **Exemption applications**

The Commission currently appears before VCAT in some applications under s.83 for an exemption from provisions of the EOA. This occurs following an agreement reached in March 2005 between the Commission and the VCAT, that VCAT notify the Commission when an individual or organisation applies for an exemption which raises a significant issue of policy and/or requires a public hearing.

This arrangement between the VCAT and the Commission does not provide the Commission with a broad discretion to intervene in exemption applications it considers warranting its attention. Rather the purpose of the agreement is to allow the Commission to provide its submission on an exemption application consistent with the objectives and spirit of the EOA. VCAT can decide on the particular course it wishes to take once an exemption application has been made, and the Commission's input into the process is very much determined by VCAT's handling of the matter. To this extent, the Commission's role as governed by the arrangement is analogous to the role performed by an amicus curiae in other jurisdictions.

---

<sup>113</sup> s 40

In the relatively short period since the agreement was reached, the Commission's intervention in these applications appears to have contributed to the s.83 scheme's rigorous testing of proposed exemptions against the objects of the EOA and has facilitated the formulation of conditions that, if accepted by the VCAT, can ameliorate (potentially) arbitrary or otherwise unconsidered impacts of an exemption. A particularly good example of the value of this work was in the 2007 application brought by the Boeing group of companies for an extension of an exemption that permitted discrimination on the basis of race (in this case expressed as nationality) in its employment practices where this was necessary to meet their contractual obligations governed by the US International Traffic in Arms and Export Administration Regulations. A detailed submission was made by the Commission and the application by Boeing for an extension of the exemption was granted with conditions.

This work gives weight to the Commission's belief that its powers should be extended to specifically allow it to appear as amicus and intervener in discrimination related matters before VCAT and the courts.

### **Initiating claims and prosecutions**

The DP asks:

- 3.2.6.3 Should the Commission be empowered to initiate claims at VCAT?
- 3.2.6.4 Would the current requirement for the Commission to remain a neutral complaint handling body prevent it from initiating claims at VCAT?

The Commission has proposed that the EOA be amended to allow the Commission to assess compliance with EOA duties, issue compliance notices and require development of and compliance with action plans. Failure to comply would require the matter to be taken to VCAT for an enforcement order. These actions would be targeting systemic discrimination found in programs and practices, and would be in relation to a failure to comply with the positive duty proposed for the EOA.

Compliance notices would not equate to the initiation of a prosecution at VCAT.

A recent review of the Commonwealth *Disability Standards for Accessible Public Transport* has recommended that HREOC be given the power to instigate cases in the Federal Court where it identifies broader (not individual) or systemic non-

compliance issues with the disability standards.<sup>114</sup> The standards are specific and enforceable and similar to a code of practice - a compliance tool that the Commission is not suggesting it should adopt at this time. The Commission does not consider this approach would work well as a compliance tool for the general positive duty which the Commission is proposing for inclusion in the EOA. In addition, a breach of a general duty would be more difficult to establish than one relating to a specific standard and hence a focus on identifying areas for improvement would be more appropriate. The Commission currently has limited powers to prosecute, identified in part 10 of the EOA. The Commission considers that these powers, though rarely used, should be retained.

**Summary of response: that no change is needed to the prosecution powers in the EOA.**

Potential conflict between the Commissions ADR role and its enforcement powers as a regulator are discussed later in this report.

## ***Research and inquiries***

### **Research**

The Commission currently has a research power<sup>115</sup> that allows it to undertake research into any matter arising from or incidental to the operation of the EOA. The provision also allows the Commission to submit a report to the Minister at any time. The Commission believes this power is appropriate and general enough to meet its research needs, allowing for example for the preparation of the Commission's recent report on the use of taxi services by people with disabilities.<sup>116</sup>

However, the Commission considers that it needs an additional power (outlined below) to undertake inquiries.

---

<sup>114</sup> Allen Consulting Group, *Review of the Disability Standards for Accessible Transport, Draft report*, January 2008, Canberra, p.165

<sup>115</sup> s 162

<sup>116</sup> VEOHRC, *Time To Respond - Realising Equality for people with a disability utilising taxi services*, November 2007.

## Investigations

The Commission's investigation powers<sup>117</sup> allow it to undertake an investigation into a suspected breach of the EOA but only when a matter is referred to it by VCAT or with the consent of the Minister, and where such a breach concerns a possible contravention in relation to a class or group of people. Such an investigation must be carried out, as nearly as practicable, as if it were a complaint.<sup>118</sup> Other restrictions also apply.

The DP asks:

3.2.4.1 Are the limitations on the Commission's power to conduct an investigation or inquiry 'of its own motion' necessary or would other measures such as a broader power to conduct inquiries and make binding recommendations be better at preventing discrimination?

The Commission believes that own initiative investigation powers that relate to specific breaches of the Act present too great a potential conflict of interest while the Commission retains any type of complaint handling function. Consequently, the Commission believes that Part 8 of the Act should be amended to replace the investigation power with a more general power to undertake an own initiative inquiry, described below.

## Inquiries

The purpose of such inquiries would be to better understand and quantify an issue, develop an understanding of underlying systemic and institutional causes, and identify solutions – preferably on a collaborative basis. It is proposed that Commission reports from such inquiries would be tabled in Parliament and a response from government would be required.

Used strategically and appropriately, the Commission believes an inquiry function could operate to 'bring to the table' representatives of those affected by, and those with the capacity to influence, a particular issue. Unlike an own-motion investigation, inquiries would not feed into a tribunal process, allowing a more effective canvassing

---

<sup>117</sup> s 156  
<sup>118</sup> s 158

of views and the development of a broader range of possible solutions, including long-term and systemic solutions.

Reports would contain recommendations that would have to be specifically addressed in a government response. Recommendations by definition cannot be binding and the Commission would not seek to impose any binding obligations by way of its inquiry process as this would make the process more like a tribunal hearing and would confuse the role of the Commission and VCAT.

Obligations that are imposed by other provisions of the EOA uncovered by an inquiry could however be enforced in the appropriate manner related to that power, as a separate matter, for example, requiring the development of an action plan.

To give sufficient authority to such an inquiry and ensure its effectiveness, the EOA should make provision for the Commission to, where necessary, call witnesses and require the production of documentary information.

For the sake of clarity it should also be specified that the secrecy provisions of the EOA do not apply, however, the Commission should have the power to suppress details that would identify individuals in cases where this was considered appropriate.

Broad inquiry functions and powers are vested in a number of anti-discrimination bodies including:

- HREOC under section 11 of the *Human Rights and Equal Opportunity Commission Act 1984*;
- NSW Anti-Discrimination Board under section 119 of the *Anti-Discrimination Act 1977*;
- WA Commissioner for Equal Opportunity under section 80 of the *Equal Opportunity Act 1984*; and
- New Zealand Human Rights Commission under section 5(h) of the *Human Rights Act 1993*.
- The UK CEHR under section 16 of the *Equality Act 2006*

**Summary of response: that the EOA be amended to:**  
**a) give the Commission power to undertake own motion inquiries;**

- b) allow the Commission to compel the appearance of witnesses and require the production of documents;
- c) require inquiry final reports to be tabled in Parliament;
- d) require the tabling of a government response within a specified time;
- e) clarify that s 192 (secrecy) does not apply to information obtained for the purposes of an inquiry; and
- f) allow the Commission to order suppression of information where it considers it necessary or appropriate.

The DP asks:

3.2.4.2 It is outside the function of the Ombudsman to conduct own motion inquiries into the private sector. Should the Commission have the power to conduct these kinds of inquiries?

The EOA covers discrimination occurring in the public areas of life, with no distinction made between the public and private sector in terms of what is prohibited behaviour. Some of the most significant systemic discrimination occurs in the private sector and it is vital that the Commission's inquiry powers can be applied in these areas. The Ombudsman's area of operation, in contrast to that of the Commission, is confined specifically to the public sector.

The Commission has recommended elsewhere in this paper the imposition of a positive duty on the private sector that are the same as those imposed on the public sector. Consistently with this approach, which seeks to emphasize the responsibility of all sectors for delivering equal opportunity, the Commission believes its inquiry powers should extend to the private sector. Reports would still be tabled in Parliament, with a response invited from the private sector agency.

**Summary of response: that the proposed own motion inquiry power for the Commission apply to the public, private and not for profit sectors.**

### ***Legislative review***

Ensuring that the law itself does not discriminate is critical. The DP asks:

3.2.7.1 Are sections 162(3) and 207 useful mechanisms to facilitate the review of legislation that entrenches discrimination? Is it sufficient to review draft legislation to ensure compliance with the requirement of equal and effective protection against discrimination in the Charter?

3.2.7.2 Are any other measures needed to ensure that the law does not discriminate?

3.2.8.1 Should the Commission have a specific power to review the effect of laws upon equality of opportunity, upon request by the Attorney-General?

The Commission believes that the existing mechanisms for reviewing legislation and assessing draft legislation are adequate. These are:

- the requirement to notify a responsible Minister when the Commission becomes aware of any discriminatory effect of legislation;<sup>119</sup>
- the requirement that the Scrutiny of Acts and Regulations Committee assess bills and regulations in relation to their effect on rights and freedoms;
- and the Charter requirement for statements of compatibility.

Section 207 of the EOA, which requires the Minister to review all Acts, has already been complied with and does not require any ongoing review process. The Commission considers that this section should be removed.

The Commission also notes its existing research powers that could be used to review legislation, and the suggested additional power to undertake own initiative inquiries which could also serve this purpose.

**Summary of response: that section 207 of the EOA be removed.**

### ***Substantive provisions of the Act***

The terms of reference ask whether technical aspects of the law, including protected attributes and the definitions of direct and indirect discrimination, could be improved so that the law itself does not prevent the elimination of discrimination.

#### **Direct discrimination**

The DP asks:

---

<sup>119</sup> s 162(3)

3.4.3.1 Are complaints of direct discrimination which fall within the EOA's objective to "eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes" failing because the elements of the direct discrimination test are too complex or too restrictive?

3.4.3.2 What improvements, if any, should be made to the test for direct discrimination?

3.4.3.3 Should a finding of discrimination be possible in circumstances where a complainant establishes a prima facie case of discrimination and the respondent does not provide any evidence of the actual basis for less favourable treatment?

The three elements of the direct discrimination test, taken from section 8 of the EOA are:

- Less favourable treatment;
- Comparison between the aggrieved person and a real or hypothetical person without the attribute; and
- Circumstances that are the same or similar.

The Commission does not propose any changes to the direct discrimination test.

**Summary of response: that the direct discrimination test remain unchanged.**

### **Indirect discrimination**

The DP asks:

3.4.4.1 Are complaints of indirect discrimination which fall within the EOA's objective to "eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes" failing because the elements of the indirect discrimination test are too complex or too restrictive?

3.4.4.2 What improvements, if any, should be made to the test for indirect discrimination?

The DP notes a 2006 proposal by the government to:

- remove the proportionality test
- add a criteria that a complainant must demonstrate that their inability to comply with the requirement, condition or practice (due to their attribute) causes them detriment or damage and

- shift the onus of proof from the complainant to the respondent to show that a requirement or condition shown to be discriminatory, is reasonable in the circumstances.

This position mirrors that which the Commission advanced in its 2005 submission and remains its position.

**Summary of response: that the definition of indirect discrimination be amended to:**

- a) remove the proportionality test;**
- b) add a criteria that a complainant must demonstrate that their inability to comply with the requirement, condition or practice (due to their attribute) causes them detriment or damage; and**
- c) shift the onus of proof from the complainant to the respondent to show that a requirement or condition shown to be discriminatory, is reasonable in the circumstances.**

## **Intersectional discrimination**

The DP asks:

3.4.6.1 Does the intersection of different forms of discrimination, for example race discrimination and sex discrimination, have a particular impact on those who experience it?

3.4.6.2 Do people who experience combined forms of discrimination, or multiple discrimination face particular issues in raising and resolving their complaints?

The concept of intersectional discrimination acknowledges the reality of individuals who experience discrimination because of more than one attribute.

It is common for complaints to the Commission to raise more than one attribute as the grounds of discrimination<sup>120</sup> and these are then addressed separately within the same complaint process. This can make the process more complex but the legislation will still be applied to consider whether direct or indirect discrimination has occurred.

---

<sup>120</sup> 26% of complainants in 2006/07.

The Commission does not believe that there is a need for substantive legislative changes to deal with intersectional discrimination but does believe that it should be acknowledged in the EOA as a particular manifestation of discrimination. This could be done by including a reference to intersectional discrimination as a note attached to section 6 of the EOA which lists the attributes which are protected.

Importantly intersectional discrimination needs to be acknowledged and accounted for in the development of policies and strategies to eliminate discrimination by the Commission, as such strategies will not be successful if they are conceived only as addressing single or one-dimensional discrimination issues.

**Summary of response: that a note be attached to section 6 of the EOA which specifically identifies the existence of, and additional burden created by, intersectional discrimination.**

## Attributes

### Marital status

The DP asks:

3.4.7.1 Should the attribute of 'marital status' include reference to the identity of a domestic partner or spouse?

Currently discrimination on the basis of the *identity* of the spouse is not unlawful as established by the case of *Boehringer Ingelheim v Reddrop*.<sup>121</sup> In *Boehringer*, a husband and wife worked in sensitive positions for competing companies. The wife's position was terminated by the respondent, not because of her status as a married woman, but because of the identity of her husband. No unlawful discrimination was found to have occurred.

However, if less favourable treatment is connected to an assumption made about characteristics generally imputed to a person with a specified marital status (eg wives) then a discrimination complaint may be sustained. Examples include:

---

<sup>121</sup> [1984] 2 NSWLR 13.

- *Waterhouse v Bell* (assumption leading to less favourable treatment was that wives are prone to corruption from husbands or to breach confidence)<sup>122</sup>
- *Lamberti v TRW Carr Pty Ltd* (1984) (assumption that married women are less financially disadvantaged than single women by virtue of access and benefit from their husband's incomes)

Thus, each case must be assessed on its facts to consider whether the complaint raises issues of identity or status, and whether there has been a characteristic of a person's marital status imputed to the person. VCAT appears unprepared to allow strike out applications on the basis that a complaint about marital status, which appeared to be about the identity of a person's spouse, was misconceived; *Cunningham v Hayden Real Estate (Geelong) Pty Ltd.*<sup>123</sup>

The Commission believes that this situation could be simplified and greater protection provided by amending the EOA to include in the attribute marital status, a reference to the identity of a domestic partner or spouse.

**Summary of response: that the attribute of 'marital status' be amended to include a reference to the identity of the partner or spouse.**

#### **Parental or carer status**

The DP asks:

3.4.7.2 Should the scope of parental or carer status in the EOA definitions be changed to reflect the range of responsibilities involved in these roles rather than emphasising a person's status?

The Commission does not propose any change to the definitions in the EOA. The Commonwealth SDA's use of the term 'family responsibilities' is coupled with a definition of who a family member is and hence the status of the person is still required to be established.

---

<sup>122</sup> (1991) 25 NSWLR

<sup>123</sup> [2003] VCAT 41

The Commission also supports the proposed family responsibilities amendments, which will expand the range of what constitutes discrimination against parents or carers in the workplace.<sup>124</sup>

**Summary of response: that the attribute of 'parental status or status as a carer' remain unchanged.**

### Physical features

The DP asks:

3.4.7.3 Is clarity required on the scope of the physical features attribute?

The EOA defines “physical features” as meaning a person’s height, weight, size or other bodily characteristics.

The original rationale for the inclusion of this attribute was that discrimination on the basis of bodily features that a person cannot change or control is inherently unfair. The Second Reading speech to the 1995 Act made a distinction between immutable (unchangeable) aspects of bodily appearance and the apparent mutable aspects of personal grooming and attire.

However, VCAT has interpreted the definition of physical features to include bodily characteristics that may be mutable. The Tribunal’s departure from the rationale enunciated in the second reading speech appears to be based upon statutory interpretation.

In *Fratas v Drake International Ltd t/as Drake Jobseek*<sup>125</sup> considered whether hair, posture, facial expressions and dress constituted ‘other bodily characteristics’ for the purposes of establishing discrimination on the basis of physical features. The Tribunal confirmed the following:

- physical features include the form, makeup, build or proportions of the body of any physical component of the body
- physical features may include bodily characteristics that a person may change, such as hair

---

<sup>124</sup> *Equal Opportunity Amendment (Family Responsibilities) Bill 2007*

<sup>125</sup> (1998) EOC 93-038 VCAT

- facial expression and posture may be based on physical features if the expression or posture is a manifestation of a bodily characteristic
- facial expression and posture may also be a manifestation of the person’s mood or mental state – if this is the case then expression and posture will not be considered a physical feature
- clothing and the way it is worn are not bodily characteristics, as they are not characteristics pertaining to the body.

The Tribunal noted that such interpretations are consistent with the exceptions at sections 24 and 40 of the EOA, which permit employers and educational institutions to impose reasonable standards of dress, appearance and behaviour.

In a decision of *Hill v Caterbury Road Lodge Pty Ltd*<sup>126</sup> the Tribunal held that personal hygiene (such as body odour), not wearing underwear and overeating did not fall within the definition of “physical features”.

The Commission believes that clarification would be desirable and that this could be achieved by codifying the legal developments by expanding the definition of what constitutes a physical attribute for the purposes of the Act. This has been done with the definition of ‘industrial activity’, which was amended in this way during 2006.

**Summary of response: that definition of ‘physical attribute’ be expanded by codifying existing legal developments.**

### **Impairment**

The DP asks:

3.4.7.4 Should the definition of ‘impairment’ be amended to include medical record or genetic indicators for a particular condition or the presence in the body of organisms that may cause illness?

Currently the EOA definition of impairment covers the presence of organisms in the body that may cause disease but does not include genetic indicators, which may also manifest in an impairment at some future date. The Commission considers this to be inconsistent and proposes that the EOA be amended to include a disability which

---

<sup>126</sup> [2004] VCAT 1365

may exist in the future. This would cover the existence of a genetic indicator without need for a specific reference to them. This is an important amendment due to the increasing potential for genetic predictors of disability to be identified, and that information to be used for discriminatory purposes.<sup>127</sup>

This amendment would also align the EOA with the Commonwealth Disability Discrimination Act 1992 which already prohibits discrimination on the basis of a disability that may exist in the future.<sup>128</sup>

**Summary of response: that the definition of impairment be expanded to include a disability which may exist in the future.**

### **Assistance animals**

The DP asks:

3.4.7.5 Should the EOA also make it unlawful to discriminate against a person because that person has an assistance animal?

There are two issues which need to be addressed in relation to guide dogs and other assistance animals – the definition of assistance animal and the areas in which discrimination is prohibited.

Currently the EOA refers only to guide dogs and relates only to dogs which are trained to assist a person who has a visual, hearing or mobility impairment. Research conducted by the Commission in response to concerns raised by members of the community has identified that an assistance animal may be something other than a dog, and may also be trained to provide assistance in relation to a range of disabilities, including psychological disabilities.

---

<sup>127</sup> In this context it is relevant to note that the Australian Law Reform Commission has recommended that the DDA's coverage of genetic discrimination be made more explicit. Australian Law Reform Commission, *Essentially Yours – The Protection of Human Genetic Information in Australia*, 2004 p.96. The Victorian Law Reform Commission also identified genetic discrimination as an emerging issue of concern in its *Workplace Privacy – Final Report*, October 2005, at paras 3.121-3.139.

<sup>128</sup> s 4 and includes a disability that:

- (1) presently exists; or
- (2) previously existed but no longer exists; or
- (3) may exist in the future; or
- (4) is imputed to a person.

In relation to the area in which discrimination is prohibited, the EOA prohibits discrimination only in the provision of accommodation in relation to a person's possession of a guide dog.<sup>129</sup> The Commonwealth *Disability Discrimination Act 1992*, goes much further, making it unlawful to discriminate against a person by treating them less favourably, because they possess or are accompanied by an assistance animal.<sup>130</sup> The liability of a person with a disability for property damage caused by their assistance animal is not affected by this provision.<sup>131</sup>

The Commonwealth DDA has been criticised on the grounds that its vague definition of assistance animal and the broad rights that it confers make it difficult to establish accreditation and training standards, and formal schemes for the identification and registration of assistance animals.

The Commission is of the view that ideally the EOA reference to guide dogs should be replaced with the broader category of assistance animals, and that it should cover animals that provide assistance in relation to any disability. In addition, the Commission believes that the DDA provisions, which apply to any less favourable treatment, are desirable. However, further work needs to be done around the issues noted above to avoid introducing legislative change which may impede progress in another important area - that of working to improve the recognition and quality of assistance animals. The Commission is aware that the Victorian Law Reform Commission is currently undertaking some work on the issue of assistance animals and suggests that any legislative change await the outcomes of this work.

**Summary of response: legislative change should await the completion of work being done by the Victorian Law Reform Commission on assistance animals.**

#### **Irrelevant criminal record**

The DP asks:

3.4.7.6 Should the Equal Opportunity Act 1995 be amended so that it is unlawful to discriminate against someone because of their irrelevant criminal record?

---

<sup>129</sup> s 52

<sup>130</sup> ss 9(1)

<sup>131</sup> ss 9(2)

A criminal record will almost always be a barrier to gaining employment. In recognition of the inhibiting affect this will have on a person's chances of successful rehabilitation, many states have introduced spent conviction schemes which wipe some criminal convictions or other recorded outcomes, from a person's record after a specified time of non-offending. Victoria does not have such legislation and this is a matter of concern to the Commission. Introduction of spent conviction legislation would provide the most effective method of ensuring that irrelevant criminal records are not used as a basis for discrimination in a large number of cases.

Regardless however of the presence or not of such a scheme, the Commission believes that the EOA needs to include a protection against the use of an irrelevant criminal record to discriminate against a person in their present and future life.

At the federal level, a person can complain to HREOC of discrimination in employment on the basis of a criminal record. HREOC can then investigate the complaint, and attempt to conciliate between the complainant and the employer. However, if the complaint is unable to be conciliated, HREOC's actions are limited to sending a report to the Attorney-General for tabling in federal parliament. That is, the discrimination is not unlawful. HREOC complaints in this area are increasing.<sup>132</sup>

**Summary of response: that the EOA be amended to make it unlawful to discriminate against a person on the basis of an irrelevant criminal record.**

### **Homelessness**

While the Commission considers the homelessness guidelines currently in place to be useful, it remains supportive of the inclusion of homelessness as an attribute under the EOA given the anecdotal evidence of significant levels of discrimination being directed at people who are homeless.<sup>133</sup>

---

<sup>132</sup> Innes, G. *Police Checks - A Human Rights Perspective*, paper presented at the Aged and Community Services Association of NSW and ACT Occupational Health & Safety & Human Resources Conference, 2 November 2007

<sup>133</sup> PILCH Homeless Persons' Legal Clinic, *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee*, 2005. The submission was based on information gathered by consultative workshops involving people who were homeless or who had previously experienced homelessness. According to the submission, on any given night there are over 100,000 people who are homeless across Australia, and 20,000 in Victoria. The submission found strong links between human rights and homelessness, as human rights violations can contribute to homelessness and homelessness renders people more vulnerable to human rights violations, whereas the protection of human rights can address the issue of homelessness. 80% of the homeless people consulted considered the current protection of human rights, including the right to adequate housing, in Victoria to be inadequate or very inadequate.

**Summary of response: that the EOA be amended to make it unlawful to discriminate against a person because of homelessness.**

## **Areas of discrimination**

### **Sexual harassment**

The DP asks:

3.4.8.1 Should particular approaches be designed specifically to target the causes and effects of sexual harassment? If so, what approaches would you suggest?

3.4.8.2 How could the system be improved to encourage the resolution of complaints of sexual harassment?

Sexual harassment remains an area in which a large number of complaints are received by the Commission. As it often occurs within a work environment which tolerates or even condones such behaviour, measures to identify and eliminate systemic discrimination will target many of the attitudes and practices which allow sexual harassment to continue.

The Commission does not propose any changes to the way in which complaints of sexual harassment are handled.

**Summary of response: that no changes are needed to the way complaints of sexual harassment are currently handled.**

### **Volunteers**

The DP asks:

3.4.8.3 Is there any reason that discrimination against volunteers in the workplace should be lawful, but discrimination against paid workers should be unlawful?

The current definition of both employee and employment preclude volunteers from the protection of the EOA.<sup>134</sup> At the same time, however, decisions of VCAT appear

---

<sup>134</sup> Employee *does not include an unpaid worker or volunteer*, whilst employer *does not include a person who employs another person on an unpaid or voluntary basis*.

to have left open the possibility that in some circumstances, volunteers will be able to pursue discrimination complaints against the organisation they serve, under the goods and services provisions of the EOA.<sup>135</sup> This represents a confusing and unsatisfactory position in relation to the coverage of the EOA, and the Commission believes it should be resolved in favour of explicitly extending the protection of the employment provisions of the EOA to volunteers.

Volunteers make an enormous contribution to the Victorian community. Given volunteers do this for no payment, it seems especially unreasonable that they should also be expected to sacrifice their fundamental rights. It is also illogical to suggest that simply because a person is not receiving a wage or salary, harassment or discrimination that may be directed toward them is any less repugnant. In the ACT, Queensland, South Australia and Tasmania volunteers are expressly included in the relevant anti-discrimination statute.<sup>136</sup>

The Commission believes that volunteers should be protected against discrimination in the same way as employees are.

**Summary of response: that EOA be amended to make discrimination against volunteers in the workplace unlawful.**

### **Reasonable adjustment**

3.4.9.1 Should section 51 be expanded so that tenants or owner-occupiers can make reasonable alterations to parts of a property or common property to accommodate an impairment?

3.4.9.2 Should the EOA include other express requirements to make reasonable adjustments?

### **Accommodation**

The Commission believes that the EOA needs to be amended to extend its provisions to cover necessary structural alterations to parts of the property or common property, governed by the rules of a body corporate. In a case before the

---

<sup>135</sup> Refer, for example, to *Buljan v Ethnic Broadcasting Association of Victoria Ltd* [2000] VCAT 2020.

<sup>136</sup> Refer to the Dictionary in the *Discrimination Act 1991* (ACT), section 4 of the *Anti-Discrimination Act 1991*, section 5 of the *Equal Opportunity Act 1984* (SA) and section 3 of the *Anti-Discrimination Act 1998* (Tas).

Queensland Anti-Discrimination Tribunal it was determined that in relation to common property, the body corporate was a provider of both accommodation and services, and in relation to these functions, was covered by the provisions of the *Anti-Discrimination Act 1991 (Qld)*.<sup>137</sup> The matter has not yet been resolved by VCAT. Specifically incorporating bodies corporate into the EOA will provide immediate protection and place the matter beyond doubt.

**Summary of response: that section 51 of the EOA be expanded to cover property governed by the rules of a body corporate**

### **Employment**

In relation to employment, an obligation to provide reasonable adjustment is implied by the exception provision relating to special services or facilities (s22).

Discrimination is allowed only if a person with a disability requires special services or facilities and it is not reasonable in the circumstances to provide these. The Commission believes that the obligation would be clearer and more compelling if it was stated as a positive duty.

This view was also expressed by the Productivity Commission in its 2004 report:<sup>138</sup>

... an explicit duty to make reasonable adjustments should be included in the DDA. This would not only clarify the DDA but also subtly reposition it as a more positive force for change. The duty would reinforce the roles played by the prohibitions on direct and indirect discrimination. Thus, failure to provide a reasonable adjustment could itself be unlawful discrimination and the subject of a complaint. This would put the Act on a more proactive basis, by focusing on what needs to be done to avoid charges of direct or indirect discrimination.

[...] The Commission considers that the task of eliminating discrimination cannot be adequately addressed in the absence of a duty to make reasonable adjustments. If disability discrimination legislation only went as far as formal equality, it would entrench existing disadvantages. For example, an employer who is concerned only with the productivity of employees and the costs of employment will have a commercial incentive to overlook candidates with disabilities if he or she can recruit someone who might be no better qualified but does not require additional workplace adjustments. This might sometimes be an efficient response from the employer's perspective, but it might not be either efficient or equitable from a broader community perspective.

A duty to make reasonable adjustments would be an important means of creating more substantive equality between people with and without disabilities.

---

<sup>137</sup> C v. A [2005] QADT 14

<sup>138</sup> Productivity Commission Inquiry Report, *Review of the Disability Discrimination Act 1992*, 1/30, 30 April 2004, pp.194-5

The approach taken in relation to the proposed family responsibilities amendments<sup>139</sup> provides a good model, and an amended section in relation to disability could mirror these provisions.

**Summary of response: that the EOA be amended to place a positive duty on employers to make reasonable adjustments for a person with disabilities**

### **Built environment**

The coverage of the EOA in relation to disability access to public spaces within the built environment is extensive, but not straightforward. Rather than simply making unreasonable inaccessibility a breach, the current structure of the EOA requires these issues to be framed as indirect discrimination in the provision of goods and services. This is problematic for at least two reasons. Firstly, it adds an unnecessary degree of legal complication to issues that are already complex in terms of both the law and also a number of technical issues related to construction and building. Secondly, it hinders the development of a more straightforward educational message about the requirements of the EOA in relation to disability access.

Access by people with disabilities to the built environment is one of the most widespread and fundamental forms of systemic discrimination confronting our community. It is therefore critical that the relevance of the EOA is immediately clear and apparent. Accordingly the Commission recommends the inclusion in the EOA of specific provisions covering disability access which could be modelled on the provisions of the DDA, section 23 of which provides:

- (1) It is unlawful for a person to discriminate against another person on the ground of the other person's disability or a disability of any of that other person's associates:
  - (a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or
  - (b) in the terms or conditions on which the first-mentioned person is prepared to allow the other person access to, or the use of, any such premises; or
  - (c) in relation to the provision of means of access to such premises; or

---

<sup>139</sup> *Equal Opportunity Amendment (Family Responsibilities) Bill 2007*

(d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or

(e) in the terms or conditions on which the first-mentioned person is prepared to allow the other person the use of any such facilities; or

(f) by requiring the other person to leave such premises or cease to use such facilities.

(2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in relation to the provision of access to premises if:

(a) the premises are so designed or constructed as to be inaccessible to a person with a disability; and

(b) any alteration to the premises to provide such access would impose unjustifiable hardship on the person who would have to provide that access.

Amendments to incorporate a specific disability access provision would not extend the application or coverage of the EOA in relation to these matters. Rather they would simply clarify its existing operation.

**Summary of response: that the EOA be amended to incorporate specific provisions covering disability access to public spaces in the built environment.**

## Section 4 – Improving individual access to justice

The DP asks a number of threshold questions about individual complaints:

### Key Questions

7. Once a complaint of discrimination has been made could it be handled more efficiently and effectively?
8. What role should the Commission have in resolving discrimination, including any additional powers or functions (if any)?
9. Are there ways in which disputes can be resolved that allow systemic and public interest issues to be raised?

The Commission believes that much can be done to improve the complaint handling process and outlines below its proposal for a very different role for the Commission as well as a flexible process for complainants. The proposal maintains a key role for the Commission in the provision of dispute resolution services as an alternative to formal tribunal proceedings. It also significantly reduces the formality and time of the complaint handling process. This reflects the Commission's view that the continuing availability in discrimination complaints, of a highly accessible ADR<sup>140</sup> service provided by a human rights body, is an essential aspect of a justice system designed particularly to assist disadvantaged and marginalised individuals.<sup>141</sup>

The Commission proposal also acknowledges that Commission ADR services will not be appropriate in every case and provides for complaints to be taken directly to VCAT where the complainant wishes to engage immediately with the formal legal system. The proposal therefore contains aspects of a direct access model evident in other jurisdictions,<sup>142</sup> while retaining a strong and accessible ADR component with the Commission. It is the Commission's view that this is consistent with the

---

<sup>140</sup> Throughout this discussion the term ADR is used to describe the variety of different services offered, including mediation and conciliation. As consistent definitions are lacking in this area, the use of the generic term ADR avoids the need to define what is meant by particular names given to ADR.

<sup>141</sup> See also Ipsos Australia Pty Ltd, *Dispute Resolution in Victoria, Community Survey 2007*, prepared for the Department of Justice, 2007. Results show that 79% of those surveyed believed that the government, as opposed to courts or tribunals, had a responsibility to provide ADR to help dispute resolution – 37% because of reduced cost and 35% because of better timeliness and efficiency.

<sup>142</sup> For example in the UK, where matters go directly to court.

Government's demonstrated commitment to the use of ADR in all areas of the legal system.

### ***The Commission's role - a new model for handling complaints***

The Commission believes that it should retain a role in complaint handling, albeit a very different one from that presently performed. This is based on the view that:

- an option to access early, and often informal, ADR for complaint resolution is essential
- the availability of ADR is consistent with current policy in the justice system
- the Commission's familiarity with the particular features of discrimination matters and its expertise in ADR delivery, makes it ideally placed to deliver this service
- the Commission's involvement in complaint handling feeds into its work in identifying and addressing systemic discrimination and furthers its understanding of the dynamics of how discrimination operates

The Commission proposes the model outlined below for complainants who choose to bring their complaints to the Commission rather than directly accessing VCAT. The model is based largely on the current model operating in New Zealand.<sup>143</sup>

The main features of the proposed model are:

- a point of first contact phone line staffed by information advisors – for obtaining information or making a complaint. This will include gathering some preliminary information, outlining self help options or other more appropriate agencies
- if the matter is not resolved the call is referred on to a duty ADR practitioner (on duty that day to deal with incoming matters) to begin to deal with it on that same day if appropriate, or is acknowledged and assessed further if the nature of the complaint suggests that immediate intervention will not be productive
- duty ADR practitioners offer early informal ADR which can include phone calls, writing a letter, or face to face meetings – there is no compulsion for either party to participate and the focus is on dealing with issues quickly
- there is no requirement for a written complaint but one may be asked for if this would assist resolution

---

<sup>143</sup> Information about the NZ model was drawn from the NZ Commission Annual Report, and from phone conversations with the Commission Chair and Chief Mediator.

- matters not resolved by the duty ADR practitioner are then assessed and if considered to be within jurisdiction are either assigned to a ADR practitioner (who will deal with it in an ongoing way rather than as a duty ADR practitioner) or if considered inappropriate for ADR, referred to an external agency for legal representation/advice or left with the complainant to decide whether to take the matter to VCAT
- there is no investigation of complaints. However an ADR practitioner could request information which is necessary to resolve the matter
- ADR is undertaken with consent only and impartially in relation to the parties. Notwithstanding this, the ADR practitioners are clearly understood to be providing their services with the objective of the EOA at the forefront of the process.
- a complainant or respondent can have legal representation at any stage
- ADR practitioners give and receive expectations from parties against timeframes, follow them up and keep parties informed as to progress or reasons for delay - ADR practitioners will provide information about the Act, examples of relevant settlements and possible solutions, and encourage reality checking.
- Regular monitoring of the progress on all matters
- the complainant can make application directly to VCAT at any time

The current NZ model, which has been in operation for five years, is reported to be much more flexible and responsive to complaints than the previous model which was similar to the current Victorian model, with the Commission processes being able to provide a timely response which is proportionate to the wrong done and/or the harm intended.<sup>144</sup> The NZ Commission also reports higher satisfaction levels than under its old model, for both complainants and respondents.<sup>145</sup>

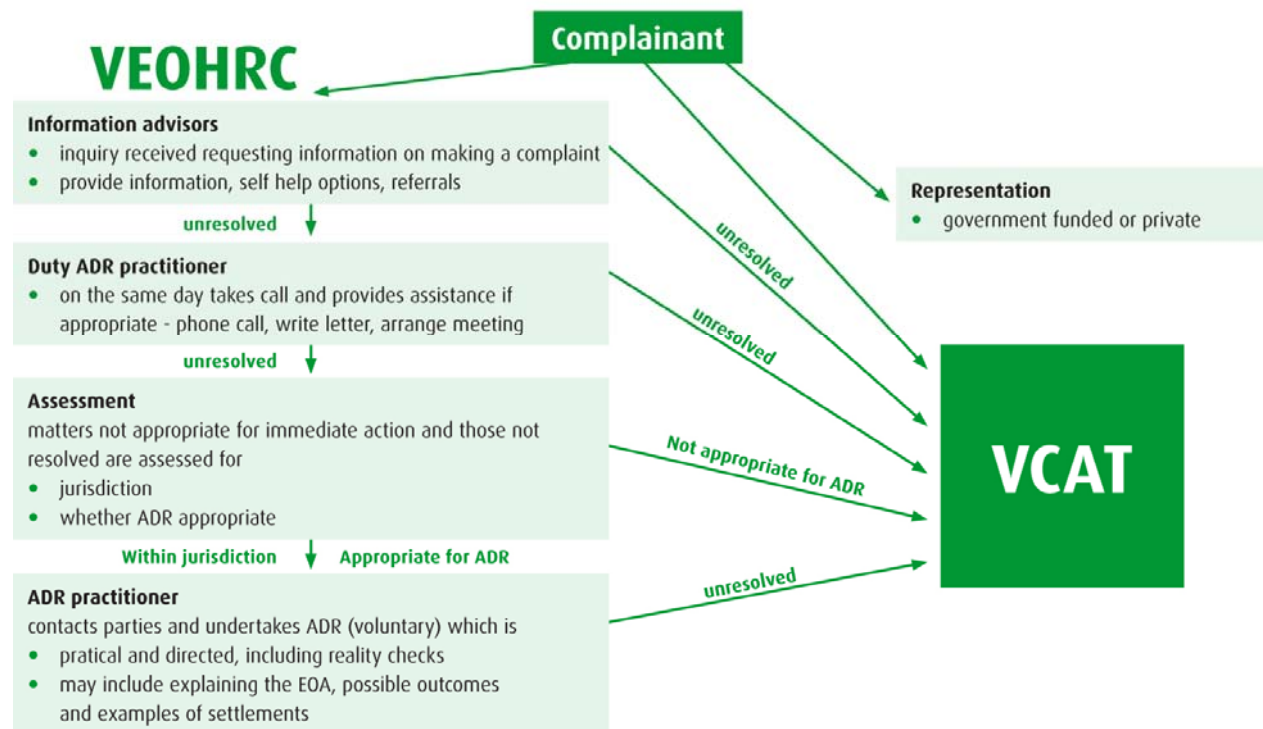
This model, applied to the Victorian situation is represented in the diagram below.

---

<sup>144</sup> Conversation with NZ Commission Chief Mediator, 6/12/07.

<sup>145</sup> Conversation with NZ Commission Chief Commissioner, 6/12/07.

## Model for Alternative Dispute Resolution Service



The DP asks:

4.2.1 How does the current complaints system rate in terms of the criteria set out in the Attorney-General's Justice Statement for an effective dispute resolution system (fairness, timeliness, cost and complexity that is proportionate to the subject matter, choice of dispute resolution options, transparency, quality, efficiency and accountability)?

4.2.2 Are there any other considerations that should be taken into account in assessing the effectiveness of the complaints system?

The Commission has applied these criteria in developing its new model:

- the model improves **fairness** by providing alternative routes to dispute resolution
- the model retains a high level of **affordability** (no fees at the Commission) and accessibility for the often less well resourced complainant
- timeliness** will be improved by a streamlined process at the Commission coupled with the option of proceeding directly to VCAT
- the new model specifically aims to reduce the Commission's **costs** involved in complaint handling, and redirect resources to the more long-term but more broadly

effective process of eliminating systemic discrimination – for parties, costs are already relatively low

- **choice of dispute resolution options** is significantly enhanced with a larger range of ADR options and allowing direct access to VCAT
- the model seeks to modernise and make relevant the **quality** of the formal ADR offered by the Commission, by improving its relevance and efficiency, and to generally enhance its complaint handling processes
- **efficiency** will be improved in a number of ways with some cases being resolved earlier through the enhanced early ADR processes, those cases proceeding to Commission ADR passing through a much streamlined process, and some cases proceeding directly to VCAT thus avoiding duplication
- **accountability** and **transparency** will both be enhanced by a system which allows complainants a choice of whether to seek assistance from the Commission or proceed directly to VCAT

### **Dealing with identified risk of the model**

The Commission has identified a risk in the model insofar as a powerful or hostile respondent could decline to participate in the Commission's ADR process and force the complainant to make a decision to pursue a complaint in a more formal VCAT form. The Commission believes that this can be addressed in two ways:

- The Commission's proposal (on page 106) in relation to legal representation of a complainant with an important public interest or test case complaint would be an option for complainants in this situation;
- The Commission would also have an option in such circumstances to use its amicus/intervention powers to advocate for the EOA. In this regard the Commission notes that HREOC, which has both a complaint handling and an advocacy role, does not see the two roles as conflicting because one role is in relation to the resolution of individual complaints whereas the other role is in relation to the court's interpretation and application of the law – in the latter case HREOC is not a party which comments on whether discrimination did or did not occur in a particular matter.

### **Necessary legislative change**

It is not proposed to identify the specific legislative changes required to support the model suggested. This detailed task should be undertaken only after there is a more

settled agreement on whether the Commission should retain a complaint handling model, and if so, what this would look like.

## ***Why there needs to be change***

### **Limitations of the current model for complaint handling by the Commission**

The aspects of the current model which do not work well or which lead to duplication and delay are:

- there is no provision for direct access to VCAT
- the assistance provided to complainants to formulate complaints has developed into a highly structured and time consuming exercise which involves too much formality and paperwork
- investigations, which are undertaken for all complaints, are time and resource consuming - the practice has become document focussed and the need for investigations in all or indeed many cases needs to be re-assessed. Information gathering during ADR will take place and the Commission's proposed power to undertake inquiries can be used where the matter goes beyond the fact situation of a single complaint.
- when a case proceeds to VCAT there is a duplication of paper work as the matter must be lodged separately at Commission and VCAT
- there is also often a duplication of ADR as the matter may have undergone conciliation at the Commission and will then almost certainly be mediated at VCAT
- the process of the Commission declining complaints involves the Commission in making in-principle merit determinations – a role which should be left to VCAT. Further, if the Commission were free of this role it would enable it to adopt more regulatory and advocacy functions.
- complaint handling dominates the resources of the Commission, making it difficult to give sufficient focus to eliminating discrimination at a systemic level

### **Limitations of a model allowing only direct application to VCAT**

Without the Commission receiving enquiries and undertaking a gatekeeper role, VCAT would have to develop a mechanism for screening the many additional

applications it would receive.<sup>146</sup> The Commission received 6628 enquiries from all sources in 2006/07 and had 1765 complaints issues lodged. Only 209 files were referred to VCAT.<sup>147</sup> The Commission has staff familiar with the client group and trained in the area of discrimination.

It is unlikely that VCAT, given its many lists and wide responsibilities, would offer a service as focussed and relevant to the particular client group. This is likely to have two detrimental consequences. Firstly, applicants may not receive the level of assistance and facilitation provided by the Commission to determine whether they have a discrimination complaint, and may decide not to proceed because the process is too difficult, even though their complaint is genuine. Secondly, for similar reasons related to the particular skills of those receiving calls at VCAT, unmeritorious matters may proceed to VCAT lodgement and processing, which would previously have been dealt with in another way.

#### **Early informal ADR**

With a direct access model there would be no capacity to provide early intervention to try to resolve the dispute without resorting to any formal process. Given the nature of complaints and the number which require both quick resolution to provide an effective remedy, and are amenable to informal approaches, maintaining this function at the Commission would have positive outcomes and be in keeping with the Government's commitment to ADR.

#### **Provision of ADR**

If complaints can only be lodged directly with VCAT, complainants will have very limited options to access ADR prior to approaching VCAT. The ADR currently offered by VCAT would not provide the range of flexible options which the Commission proposes to provide under the new model.

In the UK, which has a direct access model, ADR is provided independently of the Commission and in two defined areas - disability and employment related. No existing external agencies currently offer these services in Victoria and there may not be any advantage, in terms of efficiency and effectiveness, in shifting a service already offered by the Commission, elsewhere.

---

<sup>146</sup> Note, however, that it would be possible for the Commission to retain a role in receiving initial enquiries even if a direct application model was introduced.

<sup>147</sup> A file may include multiple issues.

### **Loss of direct access to information from complaints**

Improved Commission processes for obtaining information from complaint data are discussed elsewhere in this report. With a direct access model, the Commission would be dependent on VCAT to provide it with complaint data and whilst there will be ways of ameliorating this, the anecdotal information and insights gained by the Commission through complaint handling will be lost. In addition, if less people lodge complaints because they are not prepared to go to VCAT directly, there will be an overall loss of knowledge of the level and types of discrimination being encountered as well as a possible decline in access to justice.

### ***ADR in discrimination complaints***

The Commission recognises the importance of standards setting and the development of the law which can only occur when discrimination cases are determined by VCAT or the courts. However, the choice of how a complaint will be dealt with must remain with the complainant in relation to a matter going into a public tribunal process, and in discrimination cases this will often mean that some form of ADR will provide the best outcome for the individual concerned.

The DP asks

- 4.3.2.1 Are there benefits of alternative dispute resolution methods, such as conciliation and court ordered mediation, in the context of a discrimination dispute?
- 4.4.2.2 Does alternative dispute resolution, as practised in the anti-discrimination area, avoid the problems of inequality of bargaining power? If not, what steps could be taken to limit the impact of such inequality?

The Justice Statement focuses on identifying appropriate ways to deal with disputes, whether by traditional means through the courts or through the use of alternative processes. This approach to conceptualising dispute resolution as the ultimate aim of a model providing various tools for its achievement, has led to the establishment of initiatives such as the Neighbourhood Justice Centre and Koori Courts, both making use of a range of ADR techniques. In relation to discrimination matters, the potential of ADR was recognised early and its use as a major tool in resolving matters in this jurisdiction has persisted over a considerable period of time. The Commission believes that ADR has proved its value and should be retained, but that its use needs to be better targeted and refined.

ADR is also offered by VCAT where almost all matters in the anti-discrimination list will be referred to their mediation service. Currently when ADR is offered at VCAT the dispute is well entrenched with the arguments and documents well in place. In this context ADR at VCAT appears to have a very different focus to Commission ADR processes.

### **Appropriate for many discrimination complaints**

By far the most compelling argument for the provision of good quality ADR is the nature of complaints and the proven value of ADR in successfully resolving them. A large number of complaints received by the Commission relate to employment (around 75% in 2006/07) and in these circumstances, an early resolution which allows the preservation of the employment relationship is a significant advantage.

Also in relation to employment, Commission statistics show that very few complaints are lodged relating to recruitment<sup>148</sup> although the Commission knows anecdotally that this is a significant area of discrimination. Access to quicker, more informal early ADR may bring more of these complaints to light if people feel they can have a matter dealt with immediately, before job offers etc are finalised and the issue is still amenable to negotiation. Similarly, in relation to accommodation complaints the Commission received only eight race related complaints in the last financial year, although anecdotally, this is a much larger and persistent problem. If a same day response could be provided by the Commission, more people may consider it worthwhile to act on instances of discrimination as it may have an immediate positive outcome for them.

The flexibility of outcomes that ADR can provide is also very useful for discrimination complaints allowing resolutions that may serve multiple purposes such as retaining the complainants job, as well as agreed changes to workplace practices which make the job able to be retained. In addition, ADR allows the parties to retain more control of the process and enhances the chances of good outcomes through an enhanced perception of ownership and 'buy-in' of any resolution achieved.

---

<sup>148</sup> 5% of employment related claims in 2006/07 were recorded under the event category of 'not employed'.

### **Appropriate for Complainants**

Many complaints in discrimination matters come from people from marginalised communities and who experience various forms of disadvantage. The non-adversarial and relatively informal nature of ADR is for many people a much more attractive option than the VCAT alternative, albeit that it has its own form of ADR. Many will be too intimidated to take their matters directly to VCAT. In addition, many complainants (and perhaps even more so respondents) value the possibility of keeping their complaint confidential.

ADR is also useful in its capacity to assist in identifying the issues of substance in a complaint, in a way in which a direct application to VCAT would not. This is often of considerable benefit to complainants, particularly those with no, or limited, prior experience of the legal system and those facing linguistic or other barriers to their understanding of the legal process. This aspect of ADR will also become more important if the new model for complaint handling which the Commission is suggesting is implemented, as the current investigation stage of the complaint handling process would be removed.

### **Fairness**

There are important considerations concerning the potential for unfairness in the ADR process when the relationship between the two parties involved is not equal. In a discrimination matter, inequality of power, both structural and personal, between the parties is very likely to be an issue.

There are aspects of ADR which can work to overcome some of this power imbalance, chief amongst them being the presence of an impartial (as between the parties) ADR practitioner. From the complainant's point of view, ADR may represent a significant improvement in the power imbalance compared to the situation that they have been experiencing and may have a validating and empowering effect.

While voluntary ADR is highly desirable in discrimination matters for the reasons outlined above, often the same characteristics of discrimination complaints and complainants will make compulsory ADR highly undesirable. Where a respondent is open to discussion and prepared to accept that some mistakes may have been made, ADR may provide an excellent resolution. However, where the power balance is acute, attempts at ADR may be futile and counterproductive.

The Commission believes that fairness is achieved when the complainant has a choice as to whether or not ADR is appropriate in their circumstances. In the model proposed above, a complainant can choose to go directly to VCAT, or to access a range of ADR processes through the Commission, from the very informal to the highly structured. In addition, the Commission can assess a case as being unsuitable for ADR, and the issue of inappropriate power imbalance would be part of this assessment.

The DP also raises issues around an inequality of bargaining power. The practical realities of a situation that may lead a complainant to accept a settlement rather than fully asserting her/his rights, cannot be completely ameliorated by any system of dispute resolution offered. The Commission has recommended elsewhere in this paper that legal representation be made available to complainants as one way of providing a complainant with more options. In addition, the Commission proposes elsewhere that the Commission has an *amicus curiae* or intervener role in matters of public interest.

#### **Commission as a point of first contact**

ADR at its broadest, is not just a formal meeting following an exchange of documents. It can also encompass a range of early intervention strategies such as making a phone call to clarify issues and possibly resolve a misunderstanding, or prompt a change of behaviour. It could be providing information that allows the caller to assert their rights themselves or approach a more appropriate agency for assistance. It could be sending a letter or facts sheet that provides information about the law and responsibilities.

This type of ADR can be quick, practical and effective in outcome and cost. The Commission already provides some of these services but has identified the expansion of options at this early stage as an area in which its operations could be substantially enhanced.

#### **Cost effective**

ADR has clear cost savings in terms of party time and tribunal time and resources. In addition, any proposal which suggests additional access to legal representation as an alternative to ADR is likely to increase costs, as more cases are likely to proceed to VCAT.

The offer of ADR as an alternative route to going directly into the legal system, is likely to be attractive to all but the most determined complainants and those with the most developed complaints, and provides an opportunity to impose an effective gate keeping role. Filling this role currently allows the Commission to screen out many inappropriate cases before they get to the VCAT, thus avoiding a potentially vastly increased workload for VCAT.

### ***Complaint handling and systemic discrimination***

The DP asks:

4.5.5.1 Should complaints processes be changed to ensure that complaints that raise systemic issues are resolved in a way that will create systemic outcomes? If so, how?

#### **Private/public dichotomy**

The DP notes that there is a view that any individualised complaints process, which includes the use of ADR to resolve disputes, can in fact hide systemic discrimination. Arguments around this are sometimes contradictory. On the one hand it can be argued that as an unlawful act, the matter should be heard in public by a tribunal, rather than be arbitrated or conciliated in private with confidentiality agreements making even its outcome private. The contrary argument is that placing the onus on the individual to take the matter to a tribunal, is actually placing discrimination more in the private sphere, as it is then no longer a concern of the Commission as a representative of the state, but characterised as a dispute between individuals.

This reflects an ambivalence about how discrimination fits into the legal framework – not fitting neatly into the criminal or civil category. In common with criminal matters, it is unlawful and considered to have adverse consequences for society. The state has taken on an advocacy role by establishing the Commission and incorporating it into the legal process. However, it has not made discrimination criminal to the extent that the state then brings the prosecution. So it remains not fully criminal, but more than a mere dispute between two private parties.

It is as a consequence of this characterisation of discrimination that it can never be fully a public matter. Hence, when individuals choose to deal with their matters in private, the state's opportunity to use the case for a systemic or public purpose is

reduced or possibly lost completely. As an access to justice issue, once the state has made its decision to leave prosecutions to the individual, its role becomes that of providing the most appropriate avenues for these individual disputes to be resolved. However, a dispute resolution technique that delivers the best outcome for the individual may not also provide the best outcome for the public.

For these reasons individual complaints will always be of limited assistance in identifying and addressing systemic discrimination. While acknowledging this fact the Commission has identified wherever possible, ways in which individual complaint handling can be used to complement its activities in directly addressing systemic discrimination.

### **Identifying cases for intervention or amicus role**

The Commission has outlined its plans for addressing systemic discrimination in the previous section of this report, including its view that it needs to have the power to intervene in, or act as amicus, in cases which may establish important legal precedents or raise issues of public interest. The identification of appropriate cases is crucial for this role to be effective. This includes being aware of particular cases which may establish new law or raise important public interest issues, as well as being able to identify what the emerging trends and issues are. Being involved in compliant handling serves both of these purposes. When cases originate at the Commission, staff at each stage of the process can identify cases with potential to become test cases.

If as proposed in this model, cases can also proceed directly to VCAT, the Commission will need to develop a co-operative arrangement with VCAT so that appropriate matters can be brought to the Commission's attention. The Commission would also expect that, if as proposed, an external agency is funded to provide legal representation, when it may not be otherwise available for an individual or representative group, notification of a public interest matter may also come to the Commission through this agency.

In the previous section of this paper the Commission has outlined its plans for the much more effective use of information gained through complaint handling to identify trends, emerging issues and evidence of systemic discrimination.

## ***Legal representation***

The DP asks:

4.4.2.1 Should the Commission or any other body have a role in providing legal or advocacy assistance to complainants?

3.2.6.5 Should the Commission or any other body have the power to resource litigation

The Commission does not currently have a role in providing legal representation and does not seek to change this situation, whether or not its proposal in relation to its complaint handling role is adopted by the government. The Commission believes that the EOA's purposes are better served by its advocacy role in relation to complaints being restricted to amicus curiae and intervener functions. This arrangement recognises that the infrastructure and expertise lies elsewhere for providing legal representation, and is in keeping with the need for the Commission to retain its impartiality, both real and perceived, in relation to individual complaints being dealt with in its own ADR service.

The Commission does however strongly support the provision of legal representation by another agency - whether this be Victoria Legal Aid, a community legal centre or other appropriate organisation.<sup>149</sup> This is for two reasons.

Firstly there is a clear advantage in having discrimination complainants who proceed to VCAT properly represented so that good law is developed. For this to happen, at least test cases and those developing the law in significant ways would need to be provided with representation. The problem of identifying such cases in advance may mean that a generous approach when deciding which cases to provide representation to will be most effective.

Secondly complainants in discrimination matters are often from marginalised groups and suffer considerable disadvantage. Representation can go some way to overcoming the power imbalance that often exists between complainants and respondents. If it is proposed that more matters will go directly to VCAT, this will be a more significant concern.

---

<sup>149</sup> In New Zealand for example, a separate body, the Office of Human Rights Proceedings, provides legal representation for some complainants to their Human Rights Tribunal, often referred to by the Human Rights Commission.

As to whether any agency should be able to fund litigation, the Commission believes for similar reasons to those noted above relating to providing legal representation, it would be inappropriate for it to have such a power. The view that legal representation is necessary and should be provided separately from the Commission, also applies to the funding of litigation by some other appropriate agency.

We note that the New Zealand model of complaint handling has resolved this by having an independent Commissioner for Legal Proceedings who can provide representation in both discrimination and privacy matters. In the Victorian context, one possibility for consideration is that referrals could be made by the Commission in the first instance to the Director of Victoria Legal Aid.

**Summary of response: that legal representation and/or the funding of litigation be provided for complainants by an agency external to the Commission.**

The DP asks:

3.2.1.1 Would the provision of legal or strategic advice help to prevent discrimination by empowering people with knowledge?

3.2.1.2 Would the provision of legal or strategic advice (including information about conciliation and complaint outcomes), assist complainants to decide whether to pursue a complaint or use other means to resolve the dispute?

3.2.1.3 Should legal or strategic advice be provided by the Commission or some other agency?

The first of these questions appears to relate in part to a general educative role that the Commission already engages in through publications, training and other forms of community education, and which the Commission considers has considerable value. In this response the Commission has also set out a case for the power to issue guidelines to assist with the process, as well as resources to increase its capacity to give practical advice to assist individuals and organisations to prevent discrimination.

While legal advice can only be provided by a legal practitioner, the complaint handling model proposed above does include an enhanced role for Commission ADR practitioners, which it is proposed would include providing practical advice to parties

about their complaint in terms of the provisions of the EOA and possible resolution strategies. The Commission information phone lines could also provide non-legal advice.

The Commission has noted above that it does not consider that it has a role in the provision of legal representation, and this would include the provision of legal advice.

**Summary of response: that the Commission not provide legal advice to complainants or respondents, but that practical information can be provided by the Commission on its information line and by ADR practitioners.**

### ***VCAT and systemic discrimination***

In the section above on the private/public dichotomy, the Commission has outlined its view that an individual complaint process can do little to tackle systemic discrimination. Notwithstanding this, some exceptional individual cases can assist in tackling systemic discrimination. Recognising this, the Commission has recommended ways to provide legal representation for complainants, and has also proposed that it be given its own amicus/intervention role.

The DP asks:

4.5.9.1 Should VCAT's power to make 'any other order' be better described so that it is clear this can encompass a remedy with a potentially systemic effect?

4.5.9.2 Are there ways in which disputes can be resolved that allow systemic outcomes and public interest issues to be raised?

4.5.9.3 Outcomes arising from a complaint may not have an effect unless they are mainstreamed into culture change. How can the outcomes of disputes that raise systemic issues be incorporated into the culture of an organisation?

4.5.9.4 Should there be other remedies or responses available in cases in which it is found that unlawful discrimination has occurred?

4.5.9.5 Should the Commission have a greater role in advancing the public interest through taking a greater role in advocacy, monitoring or enforcement?

4.5.9.7 Should there be new offences and penalties – eg for repeat discrimination, or failure to comply with notices?

All the questions are grouped in the DP under the heading of VCAT and are therefore taken to apply to its functions and powers.

The Commission's view is that VCAT's powers are sufficient to make orders with systemic effect and which raise issues of public interest. This already happens for example with orders to advertise made in the 'Catch the Fire Ministry' case.<sup>150</sup> However, VCAT's powers to make orders could be clarified to better enable orders with systemic consequences to be made.

To be realistically enforceable, VCAT orders need to be able to be readily assessed as being implemented or not. Such orders will tend to be for straightforward and short-term activities. The Commission does not believe that additional remedies or responses need to be made available to VCAT. While current orders may assist in addressing systemic discrimination in some cases, within the context of a revised regulatory regime those orders may be used more proactively to address systemic discrimination. The proposals put forward in section 3 of this paper present the longer term and more broadly focused activities to be undertaken by the Commission, which will be the main tools in addressing systemic discrimination. These will include taking a greater role in advocacy, monitoring and enforcement.

In relation specifically to the question of how disputes could be resolved to allow systemic outcomes and public interest issues to be raised, the Commission has noted earlier its proposal for the EOA to be amended to provide the Commission with the power to appear as *amicus curiae* or intervener in VCAT proceedings. There are also some existing arrangements with VCAT to notify the Commission and allow its appearance in exemption applications which raise public interest issues.

In relation to offences and penalties, the Commission does not propose any additional offences. Repeat discrimination will be difficult to identify in a system which does not keep an individual record in the way in which the criminal system does. In addition, where a previous offence is known of, this could be taken into account in setting penalties.

The Commission notes a relatively recent a phenomena of the tribunal imposing cost orders in a predominantly no order cost jurisdiction. The Commission has a concern

---

<sup>150</sup> *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (22 December 2004).

that if this trend continues it could provide a disincentive to people bringing cases to the tribunal that could have systemic outcomes.

In relation to enforcement, the Commission is proposing that failure to comply with a compliance notice would result in the matter being referred to VCAT who could then make an order for compliance. This process would not require any additional offences at VCAT.

**Summary of response: that VCAT's power to make orders is sufficient and that no additional penalties or offences are required. VCAT's power to make orders could however be clarified to better enable orders with systemic outcomes.**

## ***Complaint handling in a dual federal/state system***

### **Complaints**

The DP asks

4.2.3 Complaints are handled within different timeframes at State level as opposed to Federal level. Is this a factor in deciding whether to elect the Federal or State jurisdiction?

4.3.1.1 What are the benefits of lodging a complaint at HREOC rather than the Commission, where lodgement at Federal level is possible?

4.3.1.2 What are the factors that might influence the steady decline in complaints lodged at the Commission?

Overlap of the federal and state jurisdictions inevitably means that complainants who are aware of the options will choose that system which best suits their needs. In reality this decision is likely to be made by legal advocates where the complainant is represented, and will depend on the particulars of each case. Factors which appear to influence the choice of jurisdiction include:

- time taken to complete complaint – generally quicker in Victoria
- advocate view of the jurisdiction which will deliver the best outcome – both in terms of process and decision – many favour federal jurisdiction
- costs of bringing complaint – this is already an issue federally and is emerging as more of an issue in Victoria - and the likelihood of a costs order

- a perception that the Federal jurisdiction awards of compensation are higher

The Commission believes that the decline in complaints lodged in recent years is due to:

- decline in employment related complaints due to work choices legislation
- the time taken to resolve complaints and the perception of complexity of the Commission process
- inflexibility of Commission resources to provide continuous advertising of the complaint service

The Commission believes that these factors make the case for reform of the dispute resolution processes.

### **National harmonisation**

The DP asks:

3.4.1.1 Are there any ways in which Victorian law should be harmonised with Federal law to reduce inconsistencies without reducing the current protections offered by State law to Victorians?

#### **Authorising and assisting**

Harmonisation would be achieved by amending the Victorian definition of authorising and assisting an act of discrimination to include 'permitting' such activity. Section 98 of the EOA provides that:

A person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 3, 5 or 6.

Clearly to request, instruct, induce or assist discriminatory conduct requires some form of pro-active conduct. However, the formulation of section 98 has been interpreted as also requiring some form of direct knowledge and positive act on the part of a respondent before it can be said that they have encouraged or authorised discriminatory behaviour.<sup>151</sup> What this means is that section 98 will not necessarily operate to capture situations where a person may become aware of discriminatory conduct (eg through an internal complaint), however does nothing about it and the behaviour continues. The inclusion of 'permitting' would bring the EOA into

---

<sup>151</sup> For example, *Tomasevic v. Strauss* [2002] VCAT 395.

alignment with a number of federal and interstate provisions,<sup>152</sup> and make its reach in relation to some of the causes of discrimination and harassment more effective.

**Summary of response: that the definition in section 98 of the EPA of ‘authorising and assisting’ be expanded to include ‘permitting’.**

### **Vicarious liability**

In relation to the exceptions to vicarious liability (s 103 of the EOA) the Commission believes that an amendment to change this wording to the same as that used in federal legislation would also promote clarity and allow the Victorian legislation to specifically rely on federal case law. The current wording of ‘reasonable precautions’, would become ‘all reasonable steps’.

**Summary of response: that the phrase ‘reasonable precautions’, be changed to ‘all reasonable steps’ in section 103 of the EOA.**

## ***Other issues***

### **Discrimination as part of other proceedings**

The DP asks:

4.5.5.2 If proceedings are issued in a Court and the parties are the same, should the parties be able to raise a discrimination issue as part of those proceedings and have the issue resolved in court?

The Commission does not consider that it would be appropriate for other courts to hear discrimination matters, as the discrimination matter could well be sidelined as a subsidiary issue and its significance not fully explored. In addition, there is benefit in discrimination matters being heard by an adjudicator with experience in the area and this can be best achieved by having all matters heard by a single tribunal.

**Summary of response: that all discrimination matters continue to be heard at first instance in VCAT.**

---

<sup>152</sup> Specifically section 105 SDA, section 52 *Anti-Discrimination Act 1977* (NSW), section 160 *Equal Opportunity Act 1984* (WA) and section 108H *Discrimination Act 1991* (ACT).

## Monitoring settlements and costs

The DP asks:

4.5.8.1 Should the Commission or any other body be empowered to monitor or enforce settlement agreements or VCAT orders?

It is the Commission's view that monitoring and enforcement of agreements is essentially a matter for the parties to pursue. However the Commission is concerned that there is currently no mechanism to monitor the enforcement of agreements with systemic effect, and given the complexity of this issue, this matter needs consideration.

In cases such as the example provided in the discussion paper of an order to ensure access for blind people to automatic teller machines, the Commission believes that other Commission powers recommended in this paper, such as the power to undertake an inquiry could be used to ensure compliance.

**Summary of response: that monitoring and enforcement of agreements and VCAT orders remain a matter for the parties to a dispute. However the Commission is concerned that there is currently no mechanism to monitor the enforcement of agreements with systemic effect, and given the complexity of this issue, this matter needs consideration.**

## Representative complaints

The DP asks:

4.5.6.1 Is the representative complaints mechanism working well? What, if any, improvements could be made?

The Commission does not believe that the representative complaints mechanism needs to be amended. While the requirement that all parties be identified has been a barrier to some potential complainants, the HREOC model which allows complainants to remain anonymous has problems associated with fairness to the respondent. The Commission considers that more time should be allowed to assess the present provisions' effectiveness before changes are considered.

**Summary of response: that no change is required to the representative complaints mechanism.**

### ***Conflict of Interest***

The proposals put in this paper for the Commission to maintain its participation in complaint handling while at the same time being an advocate, regulator and enforcer represent a unique combination of functions which need careful management to work together.

The DP asks:

3.5.1 Do you perceive any potential conflict of interests arising if the Commission takes on additional powers or functions? If so, how do you think this conflict would best be managed?

4.4.3.1 Should the role of the Commission be educator, complaint-handler, aid provider, advocate, conciliator, adjudicator, regulator and enforcer? If there is a conflict of interest between any or all of those roles, how should that conflict be managed?

The Commission believes that any conflict or perception of conflict within its functions must be addressed through the governance arrangements (see Section 5). In the context of the model that is proposed, the Commission will have a role as an advocate, and a regulator. At the same time, it is proposed that the Commission offer an impartial dispute resolution service.

### **Advocacy and Complaint Handling**

The Commission does not consider that the functions of advocacy and complaint handling create any actual conflicts of interest when the roles the Commission undertakes in relation to each are properly considered. As an advocate for the EOA it is appropriate and essential that the Commission actively promote equality and condemn discriminatory practices.

The Commission believes that a more transparent division of the roles of complaint handling and advocacy will be needed, in consideration about the governance arrangements for the future.

HREOC, which similarly has both a complaint handling function (similar to the current Victorian model) and advocacy role has a structure which provides that all complaints lodged with the Commission must be referred to the President of the Commission.<sup>153</sup>

The President may not delegate to any other member of the Commission the President's powers under Part IIB of the Act, which deals with conciliation.<sup>154</sup>

Advocacy work is undertaken by the special purpose commissioners consisting of the Human Rights Commissioner, Race Discrimination Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner.

Similarly, the New Zealand Human Rights Commission also quarantines responsibility for complaint handling with the Chief Commissioner. This does not limit that person's capacity to also advocate for the Act.

### **Legal Representation**

The Commission does not have, and has not recommended that it be given, a role in representing complainants at VCAT. However, the Commission has recommended that it have an amicus and intervenor function which would allow it to appear in proceedings. The Commission believes that confining its legal representation to representing only the Commission avoids many but not all of the potential conflict issues. Currently information gained during conciliation is not available to VCAT. However, if the Commission takes on a role in VCAT proceedings, it will potentially be aware of matters raised during conciliation. It could be argued that even when it is presenting only argument in support of the EOA this would be a potential conflict situation.

The proposal that all Commission complaint handling processes be voluntary would provide a respondent with the option of declining to participate in Commission ADR and avoid this conflict situation. It would need to be made clear to potential ADR participants that should the matter proceed to VCAT, the Commission could undertake an amicus curiae or intervener function. While this would allow most potential conflict to be avoided it may also result in routine refusal to participate in Commission ADR by parties, particularly respondents.<sup>155</sup> The Commission believes

---

<sup>153</sup> *Human Rights and Equal Opportunity Commission Act 1986*, s 46PD.

<sup>154</sup> *Ibid*, ss19(2A)

<sup>155</sup> Note that the matters in which the Commission may appear as amicus curiae or intervener, are likely to be raising matters of interpretation or other areas of substantive law, and would be likely to have a

that a structural approach to this conflict issue should also be established, effectively quarantining oversight of its ADR service from decision making in relation to participation in VCAT matters as *amicus curiae* or intervener.

Both the New Zealand Human Rights Commission and HREOC again may be a source of reference for such a structural division. HREOC's *amicus curiae* function is specifically confined to special purpose commissioners and not the President, who as noted above is the only commission member who may deal with complaints.<sup>156</sup>

### **Complaint handling and regulation/enforcement**

There is a potential for conflict where the Commission takes on a role of complaint handling as well as having a regulating and enforcement role. A respondent may be reluctant to engage in Commission ADR process when it could later act against them for non-compliance with a duty imposed by the EOA, as the situation amounting to non-compliance may be revealed in the ADR process.

The position here is similar to that noted above in relation to the conflict with *amicus curiae*/intervener roles. A combination of quarantining Commission functions and the choice of not participating in Commission ADR could be used to avoid conflict situations.

---

legally represented respondent who is unlikely to have been prepared to participate in Commission ADR, regardless of any conflict issues.

<sup>156</sup> s 46PV **Amicus curiae function of Commission members**

- (1) A special-purpose Commissioner has the function of assisting the Federal Court and the Federal Magistrates Court, as *amicus curiae*, in the following proceedings under this Division:
- (a) proceedings in which the special-purpose Commissioner thinks that the orders sought, or likely to be sought, may affect to a significant extent the human rights of persons who are not parties to the proceedings;
  - (b) proceedings that, in the opinion of the special-purpose Commissioner, have significant implications for the administration of the relevant Act or Acts;
  - (c) proceedings that involve special circumstances that satisfy the special-purpose Commissioner that it would be in the public interest for the special-purpose Commissioner to assist the court concerned as *amicus curiae*.
- (2) The function may only be exercised with the leave of the court concerned.
- (3) In this section, special-purpose Commissioner means:
- (a) the Aboriginal and Torres Strait Islander Social Justice Commissioner; and
  - (b) the Disability Discrimination Commissioner; and
  - (c) the Human Rights Commissioner; and
  - (d) the Race Discrimination Commissioner; and
  - (e) the Sex Discrimination Commissioner.

## Section 5 – the Commission’s structure and governance

The DP asks:

### **Key questions**

10 What should the Commission’s institutional structure be like to ensure that it is effective and best placed to meet the objectives of the EOA and the Charter?

### **Structure of the Commission**

5.1.1 Is the current structure of a Chairperson, Chief Conciliator/Chief Executive Officer and part time Commission members appropriate?

5.1.2 Should there be a Commission or Board at all or should there only be a Commissioner?

5.1.3 Which structure will enable the Commission to fulfil its functions and exercise its powers (both current and proposed) under the Equal Opportunity Act 1995, the Racial and Religious Tolerance Act 2001 and the Charter for Human Rights and Responsibilities Act, effectively and without conflict of interest?

### **Membership of the Commission**

5.3.1 What is the recommended number of members?

5.3.2 Should criteria for the selection of members be set? If so, what are appropriate criteria?

5.3.3 What is the recommended term of appointment?

5.3.4 Should appointments be on a part-time or full-time basis?

5.3.5 Should the current provisions relating to resignation and removal in sections 165 and 175 of the Equal Opportunity Act 1995 be retained or modified?

### **Role of the members**

5.4.1 What is the appropriate role of the governing body (eg should it be a ‘governing body’ or an ‘advisory body’)?

5.4.2 What is the appropriate role of the Chairperson of the governing body?

5.4.3 What is the appropriate role of the Chief Executive Officer?

5.4.4 What is the appropriate relationship between members of the governing body and: the Chief Executive Officer; staff; and stakeholder groups?

The Commission will contribute to the consultancy commissioned by the Department of Justice to review governance options as part of the review of the EOA. This consultancy and the Commission's own view about the ultimate governance arrangements will of course be informed by the final reforms to the EOA and the subsequent responsibilities of the Commission arising from that reform process. Without this conclusive position, it is difficult to make substantive comments about the governance arrangements.

Notwithstanding, the Commission has invested significant resources to address the current governance arrangements of the Commission. A consultancy commissioned in 2006, identified significant challenges within the current governance arrangements. To address this, particularly in light of additional functions that have been assumed under the Charter, the Commission developed policies and procedures to enable it to undertake its broad responsibilities within the constraints of its current governance arrangements.

**Summary of response**

**It is the view of the Commission that modernised and sufficiently resourced governance arrangements are critical to the success of fulfilling any functions and powers that it has under the *Equal Opportunity Act*, the *Racial and Religious Tolerance Act* and the Charter.**

Arising from this work and the experience of the current governance arrangements, the Commission, in its response to the Charter of Human Rights consultative process recommendation to establish a Human Rights Commission, identified the need to move away from the concept of a single commissioner, to vest responsibility for the Commission's human rights functions within the existing Commission. This is consistent with international human rights bodies, which incorporate responsibility for equality matters within the one Commission with broader responsibility for human rights functions beyond equality of opportunity.

Research undertaken by the Commission as part of this review has considered the governance arrangements of other human rights bodies, including the federal Human Rights and Equal Opportunity Commission, the New Zealand Human Rights Commission and the Commission for Equality and Human Rights in the United Kingdom. It is noted that these bodies operate with significantly more resources

allocated to enable Commission Members and the Chairperson to fulfil their functions.

#### **Summary of response**

**Whilst not pre-empting the final framework for a revised equal opportunity act, and revised functions for the Commission, it is clear that a number of broad principles need to be considered in relation to the future governance of a modernised human rights body with equal opportunity functions. These principles are proposed, taking into account the Commission's response to the DP and the additional functions proposed for the Commission, should this be adopted. These include:**

- **Where there is a combination of broad regulatory function and an alternative dispute resolution function, the governance arrangements must be structured in such a way to ensure that actual and perceived conflicts of interest have been addressed; this has been dealt with in other jurisdictions by having a legislatively specified Commission Member with sole responsibility for individual complaint handling matters and delegations in relation to these functions;<sup>157</sup> Notwithstanding, the Commission notes that its proposal for an alternative dispute resolution service rather than the current complaint mechanism which involves investigation and determinations, will make the governance arrangements significantly more straightforward;**
- **The combination of broad regulatory functions to address equal opportunity and specific human rights functions under the Charter means that the governance of a human rights body should represent a broad range of expertise relevant to its powers and functions rather than as representatives;**
- **The governance arrangements should provide a clear framework of delegations to enable clarity about Commission Members roles;**
- **In identifying a governance structure for the future, the appropriate level of resources needed to enable it to meet its responsibilities, will need to accompany any legislative amendment.**

Beyond these broad principles, the specifics of the governance arrangements require greater discussion about the ultimate functions of the Commission in the future, and consideration given to transport the positive and appropriate aspects of other governance models to these revised functions.

---

<sup>157</sup> For Example: HREOC: President; New Zealand Human Rights Commission: Chief Commissioner.



## Section 6 - Resources

Resources required for any amendments to the Equal Opportunity Act and revised functions that arise from this will require quantifying once the reform model is determined.

It is timely, at this stage of the consultative process, for the Commission to outline some key considerations in relation to the future resourcing of an EOA that addresses systemic discrimination. These are considerations that the finalisation of the reform process must take into account, to ensure that the reformed EOA is able to operate effectively, and the Commission is able to fulfil its functions without being compromised by lack of resources.

### Summary of response

It is the Commission's view that:

- 1. A regulatory body requires adequate resourcing to enable it to fulfil its regulatory functions. When the functions of the Commission are finalised, arising from the review of the Act, it will be critical to undertake some financial modelling to identify what can be achieved with the resources that are allocated. Such financial modelling can be drawn from the experience of other regulatory bodies such as Ombudsman Victoria and the Victorian Competition and Efficiency Commission<sup>158</sup>**
- 2. Achieving substantive equality requires expertise in particular attribute areas within the staff. Past experience of the Commission and research from other jurisdiction such as HREOC and the New Zealand Human Rights Commission, indicate that accumulated and dedicated expertise in disability, gender and age discrimination, indigenous issues, and culturally and linguistically diverse communities is required to develop the networks and resources to adequately address these issues. Historically the Commission has attempted to provide this resource through community outreach workers and then subsequently policy positions. Significant expansion in any proposed revised function for the Commission to regulate and promote substantive equality will have further resource requirements, including expertise in particular attribute areas and in promoting and assessing private sector compliance and assessing compliance.**

---

<sup>158</sup> For example, in 2006/2007 VCEC worked on three inquiries, which involved the allocation of 12.1 EFT and \$2.06m. As reported in VCEC Annual Report, 2006-2007 p.17.

- 3. Benchmarking and financial modelling is required to ensure that the provision of information is adequately resourced over and above dispute settlement. To implement a positive duty, it is critical that the Victorian community can access accurate and up-to-date information about equal opportunity laws, through telephone enquiry services, email and web, as well as general guidelines to assist with compliance.**
- 4. As mentioned above, governance arrangements must be adequately resourced to ensure that availability of Commission Members commensurate with their functions and responsibilities under the Act. The governance arrangements include not only the time allocation for Commission Members, whether full time or part time, but also the resourcing of a board structure, and the resourcing of Commission Members as they undertake public duties in line with their responsibilities.**
- 5. The current education functions of the Commission are heavily subsidised through fee for service training predominantly in the employment sector. The Commission has embarked on a review of its education strategy including the future of this fee for service component. Without the revenue currently generated through fee for service activities, and in the absence of an alternate source of funding for this education function, the Commission would lose at least 3 EFT staff currently utilised for fee for service and limited free training and education for the Victorian Community. In addition, the Commission is required to provide education on human rights. Future education functions must be adequately resourced to allow for greater guidance to be given about how to achieve substantive equality. Shifting the focus from a heavy reliance on individual complaints to a positive duty to improve measures to realise equality will require an injection of additional resources in the education area.**
- 6. Integral to the requirement for a positive duty to achieve substantive equality is the use of information to inform the community, and to build understanding about substantive equality. Such campaigns and the provision of information should be adequately resourced to enable this to be undertaken in a manner which supports the compliance and regulatory functions of the Commission.**