

Submission
to the Department of Justice of
the State of Victoria
on the Equal Opportunity Review Discussion Paper

Prepared by the



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1 INTRODUCTION AND GENERAL COMMENTS

1.1 The Victorian Automobile Chamber of Commerce

VACC is a federally registered employer association, established in 1918 to represent employers in the Retail Motor Industry. VACC currently represents approximately 5,000 employers operating in Victoria and Tasmania. Membership of the Organisation includes individuals, companies and affiliated associations. It is the peak representative body for the Retail Motor Industry in Victoria.

Approximately 90% of VACC members employ 10 or fewer employees. Our members are divided into 16 divisions; Australian Automotive Dealers Association [Victorian Division], Automotive Electrical Division, Automobile Repairers Division, Auto Parts Recyclers Division, Body Repair Division, Commercial Vehicle Body Manufacturers Association, Commercial Vehicle Industry Association (Vic), Engine Reconditioners Association (Vic), Farm Machinery Dealers Association (Vic), Motorcycle Industry Division, Radiator Service Division, Service Station & Convenience Store Division, Towing Operators Division, Used Car Traders Division, the Victorian Tyre Dealers Association and general membership which includes specialists e.g. motor trimming, vehicle rental, windscreen repair, parts retail and/or distribution etc. The membership is almost equally represented in the rural and metropolitan area.

VACC staff and our members are from a diverse background and is representative of the Australian community. VACC itself is an employer of a significant size; in addition to its employer organisation staff, it employs over 400 apprentices and trainees.

VACC's Industrial Relations Department ("VACC IR") regularly provides advice and delivers training to its members on matters relating to Equal Opportunity in the area of employment, and in the provision of goods and services. The same Department represents members of the VACC in proceedings in the Human Rights and Equal Opportunity Commission of Victoria ("Commission"), the Victorian Civil and Administrative Tribunal ("VCAT"), the Human Rights and Equal Opportunity Commission of the Commonwealth, and the Australian Industrial Relations Commission.

1.2 General Comments in Respect of the Discussion Paper

VACC acknowledges the importance of the State Government's efforts in eliminating discrimination and promoting equal opportunity. In the past decade, VACC has regularly reviewed its practices in the dissemination of information and delivery of training to its members on how to create and maintain discrimination free workplaces.

In making submissions to the Victorian Government each time the *Equal Opportunity Act 1995* ('EOA') was reviewed, VACC drew from its own and its members' experiences in terms of working with and under the EOA. VACC members believe that the EOA imposes a disproportionate onus on employers in terms of educating employees about equal opportunity and discrimination. When members are required to defend complaints from aggrieved employees, they often feel prejudiced by the current administration of the complaint through the conciliation system.

In our view any reform to the Equal Opportunity legislation should focus on education. Rather than rely on employers to change the culture of individuals in most cases adults, the responsibility of education in the area of equal opportunity should be collaboratively borne by the Equal Opportunity Commission and the education system. Based on the experiences of VACC, we believe that focussing education on younger members of our community is more likely to successfully result in greater tolerance and understanding of equal opportunity principles.

This Review should also consider eliminating unnecessary duplication in the resolution of complaints, and prevent any further conflict of interest by not assigning additional non –educational powers or functions to the Commission.

The recent reviews of the EOA have resulted in changes to statutory definitions, broadening of the powers of the Commission and the establishment of additional attributes. This has created additional confusion over the obligations placed on employers, supervisors and employees simply due to the complexity of the EOA and frequency of changes. VACC recommends that consideration be given to the pace of change to the EOA.

If the conciliation of complaints remains a function of the Commission, VACC recommends that a panel of sessional conciliators with industry experience be

established and utilised, to cultivate a more pragmatic approach in resolving complaints.

VACC has considered the Discussion Paper and has identified key questions on which it wishes to make submissions. The comments and recommendations of VACC focus on workplace equal opportunity and discrimination issues.

2 CHAPTER 2: IS THERE A CASE FOR REFORMING THE LAW?

Question 1: Does the law need to be changed to improve equality of opportunity and elimination of discrimination in Victoria?

- 2.1** VACC members believe that the EOA imposes a disproportionate onus on employers in terms of educating employees about equal opportunity and discrimination. The significant majority of employees within the Retail Motor Industry commence employment above the age of 16 years. At that age, young persons have developed certain values and behaviour patterns through their interaction with family, social networks and with the education system.
- 2.2** It is the experience of VACC IR, who regularly deliver training sessions on Equal Opportunity at the Workplace, that people working in the Retail Motor Industry have no or very little working knowledge of the vocabulary and concepts central to equal opportunity.
- 2.3** It is unrealistic to accept that small and medium businesses, like members of the VACC, have sufficient resources and expertise to reshape employees' behaviour patterns and way of thinking about issues that are fundamental to the concepts of equal opportunity. Given this limitation, education about equal opportunity and discrimination should start in the primary school years.
- 2.4** VACC believes that community education should be one of the most important tasks of the Commission. Under section 162 (1) of the EOA, the Commission must undertake programs for dissemination of information for the education of the public with respect to the elimination of discrimination, sexual harassment and vilification on the ground of race or religious belief or activity. However, at present there appears to be no other provision under the EOA compelling the Commission to discharge comprehensive educative functions.

2.5 VACC recommends that sections 161 (1) (c) and 162 (1) of the EOA be amended to strengthen and widen the Commissions' powers and function in connection with education similarly to section 7 (g), (h) (i) and (j) of the *Occupational Health and Safety Act 2004*.

Under the above mentioned sections the Victorian WorkCover Authority has the function:

- “(g) to promote education and training by—*
- (i) devising, in co-operation with educational and other bodies, courses in occupational health, safety and welfare; and*
 - (ii) approving courses in occupational health, safety and welfare (whether or not devised in co-operation with another body); and*
 - (iii) facilitating access to those courses; and*
 - (iv) initiating or promoting events such as conferences and forums, and the publication of information, relating to occupational health, safety and welfare;*
- (h) to foster a co-operative, consultative relationship between employers and their employees in relation to the health, safety and welfare of those employees;*
- (i) to engage in, promote and co-ordinate the sharing of information to achieve the objects of this Act;*
- (j) to promote public awareness and discussion of occupational health, safety and welfare issues and an understanding and acceptance of the principles of health and safety protection set out in section 4;*
- (k) to develop and implement programs to provide incentives for employers—*
- (i) to implement measures to eliminate or reduce risks to health or safety; and*
 - (ii) to otherwise improve occupational health, safety and welfare;”*

2.6 VACC recommends that section 161 (1) of the EOA be amended by inserting a new subsection (e) in the following terms:

“(e) to develop Equal Opportunity programs to be included into the educational curriculum of primary and secondary education.”

2.7 VACC has positive experience in working with the Victorian WorkCover Authority in a constructive and collaborative way in the area of workplace safety training.

Question 2.2.1: What factors should be taken into account when considering whether there is a case for reform of the law to improve the complaints system and the system’s capacity?

2.8 It is the experience of the VACC that a significant number of complaints do not settle at conciliation conferences held by the Commission. However, most Equal Opportunity complaints before the Victorian Civil and Administrative Tribunal (“VACT”) are settled at mediation. This is due to the fact that the conciliators of VCAT adopt a more pragmatic than legalistic approach by assisting parties to identify the weaknesses and strengths of their respective cases.

2.9 Under the current complaints system, there is an unnecessary duplication of the non - judicial dispute resolution process (one conciliation conference before the Commission and at least one mediation session before VCAT).

2.10 The above mentioned duplication in the complaints system is in addition to the avenues of redress through other jurisdictions

2.11 The total (actual costs, loss of productivity, impact on work – life balance) costs of all concerned parties associated with participating in the above mentioned duplicitous process should be taken into consideration to create a legislative framework for a more cost effective complaint resolution system. VACC recommend that the conciliation process in the Commission be abolished.

3 CHAPTER 3: ARE THERE BETTER WAYS TO PREVENT DISCRIMINATION?

Question 3: Are there current ways of preventing discrimination working well or could they be improved?

3.1 Please see our submissions under paragraphs 2.4 and 2.5 above.

Question 4: What role should the Commission have in preventing discrimination, including additional powers or functions (if any)?

3.2 Members of VACC often express the view that the Commission appears to:

3.2.1 operate for the benefit of complainants exclusively;

3.2.2 show less concern for the impact of any complaint on the business of the employer, and

3.2.3 fail to acknowledge the difficulties by industry to understand the legal framework and their practical application.

3.3 VACC does not believe it necessary to amend the Commission's power to conduct investigations or enquiries, or other measures such as making binding recommendations.

3.4 VACC recommends that sections 161 (1) and 162 (1) of the EOA be amended to give a new power and function to the Commission to foster a co-operative and consultative relationship with employers for the welfare of both employers and employees.

3.5 The Commission should support industry organisations through collaborative initiatives such as draft policies or educational materials. Collaborative and co-operative arrangements will proactively engage the support of industry and promote greater understanding of equal opportunity principles.

3.6 VACC recommends amending section 161(1) of the EOA by inserting a new subsection (f) in the following terms:

(f) to establish and foster collaborative and consultative relationships with industries, employers, and their representative organisations.

3.7 VACC recommends amending section 162 of the EOA by inserting a new subsection (1a) in the following terms:

(1a) The Commission must promote education and training by -

- (i) devising, in co-operation with educational and other bodies, and with industry and employers' representatives courses in Equal Opportunity and discrimination at the workplace;*
- (ii) facilitating access to those courses, and*
- (iii) engaging, promoting and co-ordinating the sharing of information to achieve the objects of the EOA.*

Question 5: Would any potential conflict of interest arise if the Commission takes on additional functions? Question 3.2.1.3 Should legal or strategic advice be provided by the Commission or some other agency?

3.8 The VACC would oppose any amendments to the EOA that would enable the Commission to provide legal advice to complainants.

3.9 VACC believes that if the EOA enables the Commission to provide legal advice to complainants, many employers would perceive the Commission to be incapable of discharging its neutral investigative powers and functions.

Question 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?

3.10 VACC understands that the number of complaints lodged in the Commission in the 2005/6 and in the 2006/7 financial years decreased. The Discussion Paper does not provide any compelling ground that necessitates assigning the Commission the power of the Ombudsman to conduct own motion inquiries into the private sector.

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

3.11 Please see our submissions under paragraphs 2.4 and 2.5 above.

3.12 VACC supports amendments to the EOA to clarify the educational powers of the Commission.

Questions 3.2.6.2 and 3: Should the Commission or any other body have intervention or amicus curiae powers? Should the power of the Commission be empowered to initiate proceedings?

3.13 The Discussion Paper did not provide sufficient grounds that necessitate empowering the Commission or any other body to enable it to intervene or act as amicus curiae in equal opportunity or discrimination matters in the area of employment.

3.14 VACC does not support any reform that empowers the Commission to intervene or act as amicus curiae.

Question 3.3.1.1: Should a power for the Commission or any other body to issue codes of practice be introduced into the EOA?

3.15 VACC's experience is that it is very difficult to establish an enforceable code of practice that suits the varying size and mode of operations of small businesses.

3.16 VACC does not support the proposition that the Commission or any other body should have power to issue codes of practice for private sector workplaces.

3.17 If the legislators decide that the Commission should be empowered to issue codes of practice for private sector workplaces, their status should be non enforceable in respect of workplaces that employ 100 or less employees.

3.18 If the legislators decide that the Commission should develop codes of practice for large employers (100 or more employees) industry organisations should be consulted in their development.

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

3.19 VACC does not oppose amending the EOA to prescribe specific power for the Commission to develop guidelines provided that the guidelines for the area of employment are developed through extensive consultation with employers and the guidelines remain non-enforceable.

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

3.20 VACC does not believe it necessary for the Commission to have a role in action plans other than provide assistance in the drafting and commentary when requested by employers.

Question 3.4.1.1 Are there 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?

3.21 Principles of equal opportunity and their jurisdictions for redress are contained in multiple jurisdictions. Employers operating across jurisdictions and across state boundaries are required to ensure compliance with all their legal obligations. The variance across states in particular, adds additional complexities that can be avoided through some consultation firstly at Ministerial level.

3.22 VACC believe however, that the pursuit of harmonisation should not result in more complexity and additional obligations, rather an approach to simplify the area of law. A comparison of equal opportunity legislation across states generally shows that whilst the definitions of each attribute may vary, the level of protection is relatively uniform.

3.23 Tribunal powers across states do vary and VACC does not support additional powers except those relating to education as referred to in this submission.

Question 3.4.3.3 Should 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 the less favourable treatment?

3.24 It is the experience of VACC IR that employers in the Retail Motor Industry often do not understand the necessity or underestimate the complexity of defending discrimination complaints and do not engage professional advocates or solicitors for presenting the necessary evidence at proceedings under the EOA.

3.25 VACC does not support the establishment of a legislative framework that enables a tribunal or court the finding of discrimination where a complainant establishes a prima facie case of discrimination and the respondent does not provide any evidence of the actual basis for the less favourable treatment.

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

3.26 VACC opposes the recognition of the concept of systemic discrimination in the EOA because it believes that the concept is prejudicial against employers and does not recognise the serial vexatious litigant phenomenon.

Questions contained in 3.4.6 Intersectional Discrimination

3.27 VACC does not support the expansion of any of the attributes referred to in section 3.4.6. VACC has not evidenced any difficulties experienced by complainants relying on multiple attributes. Each of the attributes listed in our view can be read broadly to encompass genuine complaints of discrimination.

Question 3.4.7.6. Should the EOA be amended so that it is unlawful to discriminate against someone on the basis of their irrelevant criminal record?

3.28 Determining what irrelevant criminal record is, should be determined by an employer. Further, decisions which should have serious impact on a business should not be easily substituted by the decision of a tribunal or court. VACC

opposes amendments to the EOA to include irrelevant criminal record as an attribute under the EOA.

4 CHAPTER 4: ARE THERE BETTER WAYS TO RESOLVE DISCRIMINATION?

Question 7: Once a complaint of discrimination has been made could it be handled more efficiently and effectively?

- 4.1** Under the complaint resolution practices of the HREOC of the Commonwealth, respondents need only address the written questions of the Investigating Officer rather than the whole statement of complaint. That practice is far more effective than the current response requirements in the Commission.
- 4.2** VACC recommends that Complainants' written comments on the respondents' responses to the originating complaints be provided to the respondents prior to any conciliation conferences.
- 4.3** Also under the current complaint resolution practices of the Commission, respondents can be compelled to participate in a preliminary investigative meeting. As a consequence of the above practice, it can happen that a respondent must spend time to attend two meetings (investigative meeting and conciliation) in addition to preparing the detailed written response to the statement of complaint. If the parties do not settle the matter at the conciliation conference before the Commission and the complaint proceeds for determination before VCAT, a respondent will have to submit a new set of written responses and attend a mediation session.
- 4.4** VACC recommends that the Commission adopt the unfair/unlawful termination of employment application's dispute resolution model of the Australian Industrial Relations Commission, under which at the first instance a respondent is not compelled to provide a detailed written response to the application of the aggrieved former employee.