Law Institute Victoria

Submission

Workplace Relations and Administrative Law and Human Rights Sections

Equal Opportunity Act Review Submission

To: Julian Gardner

A submission from the Workplace Relations and Administrative Law and Human Rights Sections of the Law Institute of Victoria (LIV)

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1 Introduction

The Law Institute of Victoria (LIV) welcomes this opportunity to comment on the review of the *Equal Opportunity Act* 1995 (Vic) (the EO Act).

Anti-discrimination legislation was first introduced in Victoria in 1977 and the LIV acknowledges that the awareness of discrimination in the community has increased as a result. It is now time to consider what else can be done to address the disadvantage that still exists within our community as a result of systemic discrimination. The LIV notes the findings of the report "*More than Tolerance: Embracing diversity for Health – Discrimination affecting migrant and refugee communities in Victoria, its heath consequences, community attitudes and solutions*" (VicHealth 2007), which highlights the costs of discrimination including higher rates of depression and other forms of mental illness.

The LIV recommends that Australia's obligations under international human rights law should be primary considerations in the review and any proposed reforms.

The current system utilises a complaints based model where individual complainants bring complaints about acts of discrimination based on a particular attribute. Complaints may be made for either direct or indirect discrimination under the EO Act. The definitions of direct and indirect discrimination are complex and have been subject to interpretation by courts and tribunals over many years. As a result, anti-discrimination law has become a highly technical and for many, confusing, area of law.

The LIV would support a change to the basis upon which individual complaints may be made so as to remove some of this complexity. The current narrow definitions of direct and indirect discrimination may also prevent many cases from being brought resulting in lack of access to remedies for aggrieved members of our community. In addition, as noted in the Discussion Paper, outcomes for disadvantaged people are not always attributable to incidents of "discrimination" in the legally defined sense of the word.

The introduction of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter) has also changed the framework for discrimination law in Victoria. The Charter recognises and promotes the right to equality as well as equal and effective protection against discrimination. The LIV would support the introduction of new equal opportunity legislation based on a human rights framework that focuses on the wider substantive right to equality and a greater role for the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to investigate and deal with breaches of that right. Such a system could include the development of codes of conduct to provide guidance on compliance with a right to equality.

In short, the overall approach to reviewing the EO Act should be as follows:

- There should continue to be an individual complaints mechanism to address individual incidents of discrimination provided for under the EO Act. However, it must be improved so as to remove some of the complexity and inefficiency.
- The VEOHRC should be given the power to deal with systemic and organisational discrimination and breaches of a general right to equality.
- Long term education initiatives should be developed and commenced with a view to preventing as much as possible attitudes developing in young Victorians that lead to discrimination and disadvantage.

2 Specific Questions in the Discussion Paper

The LIV does not intend to answer each of the questions in the Discussion Paper but will make some comments in relation to certain specific questions. In addition, it should be noted the responses to some questions not specifically answered are contained in the responses to some of the other questions where they are closely related.

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

As apparent from our comments above, the LIV considers that the law does need to be changed to address disadvantage and continuing discrimination in Victoria. The current system has been successful in raising awareness of the issue of discrimination in Victoria and providing access to remedies for certain individuals whose complaints fall within the parameters of the EO Act. The next steps must be to begin to address systemic discrimination in Victoria and promote the broader right to equality for all members of the community.

The current EO Act is not designed to deal with systemic or organisational discrimination. The LIV submits that a focus on equality rather than discrimination as well as increasing the functions and powers of the VEOHRC could help to overcome this shortcoming.

Further, the Discrimination Law and Executive Committees of the Workplace Relations Section of the LIV have identified features of the ideal anti-discrimination dispute resolution model (the 'ideal model') as including:

- One body which deals with all complaints, from lodgement to hearing. There should be one jurisdiction, be it state or federal, which would hear all discrimination and harassment complaints and applications for exemptions under the relevant Act.
- A separate body which deals with issues other than individual complaints. A commitment to addressing discrimination in our society cannot be served by a complaint-based model alone. There should be a separate

body which deals with issues other than individual complaints, such as systemic discrimination, training, prevention and policy issues. Such an organisation might also run test cases in the court or tribunal and have a role in compliance and accreditation.

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

There is currently only limited power for the VEOHRC to investigate wider issues of discrimination where more than one person is involved. The complaint-based model is not designed to address issues of systemic discrimination.

The LIV notes that while there are overseas jurisdictions in which the human rights commission does not have a complaints handling role, all Australian jurisdictions include complaints handling mechanisms. The focus in these overseas countries is on prevention, advocacy and enforcement.

The LIV considers that the VEOHRC should be provided with additional powers to assist in the prevention of discrimination in Victoria. There needs to be power to investigate and address systemic and organisational discrimination issues. In light of this, the LIV submits that ss161 and 162 of the EO Act should be amended, to give specific powers and functions to the VEOHRC in respect of its education and prevention role. The educational powers and functions of the VEOHRC should be similar to that of the Victorian WorkCover Authority (WorkSafe Victoria), and the proposed amendments to the EO Act should be in similar terms to subs7(g) - (j) of the *Occupational Health and Safety Act* 2004 (Vic).

It is noted in the Discussion Paper that in a submission to the Attorney-General in 2005, the Equal Opportunity Commission (as VEOHRC was called at the time) made proposals that it be able to:

- develop codes of conduct on a consultative basis;
- issue rulings to provide specific guidance in relation to the requirements of the EO Act;
- conduct systemic inquiries and own motion investigations;
- issue improvement notices where discrimination is occurring; and
- make submissions to a court or tribunal on issues relevant to the EO Act.

The LIV supports the above proposals. In addition, the Workplace Relations Section of the LIV holds the view that, whether or not the above proposals are implemented, the VEOHRC should not continue to have a role in dealing with individual complaints (in line with the 'ideal model' for individual complaints, outlined above under 2.1). On this view, it is considered that it would be better for individual complaints to be brought to and dealt with at the Victorian Civil and Administrative Tribunal (VCAT).

In light of these views, the LIV submits that complainants should have the option of direct application to VCAT for hearing, thereby bypassing any complaint-handling process that may remain at VEOHRC. We also propose that respondents should have the ability to make an application to VCAT for an order that the VEOHRC refer any complaint to VCAT.

The above proposals are similar to the approach of WorkSafe Victoria in relation to occupational health and safety issues. Given the impact of unchecked discrimination and harassment on the health of Victorians it would be pleasing to see equal opportunity issues treated with the same degree of seriousness as workplace health and safety.

The LIV would welcome further opportunity to have input into codes of conduct that would provide guidance on the implementation of new equal opportunity legislation. It is expected that codes of conduct would also be welcomed by the business community who would appreciate the additional guidance.

The LIV also wishes to emphasise the need for appropriate levels of funding and resources to be provided for strategies targeting the prevention of discrimination in the future including education campaigns for young Victorians. The educative role of the VEOHRC should be a significant part of its work as we must plan for future generations to continue to address disadvantage and discrimination in our community.

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

In the event that individual complaints are to be dealt with at VCAT from start to finish, the LIV recommends additional resources be made available to attempt to resolve complaints before they get to the hearing stage at VCAT. This is in order to provide the best opportunity for parties to find a resolution of their own making and is the practice where the LIV members are representing parties.

There is feedback from LIV members of general dissatisfaction with the current system whereby complaints must be brought at VEOHRC and conciliated and if not resolved it is referred to VCAT if the complainant wishes to take it further. Once at VCAT, the matter does not proceed to hearing until there has been a further attempt to resolve the issue through mediation. Having the process spread across two organisation means additional legal costs and delays in having matters resolved. The practice of having to use two forms of alternative dispute resolution – conciliation and mediation – is considered to be repetitive and unnecessary.

The LIV recommends that there should be one without prejudice mediation, rather than conciliation, and it should take place after the complaint and response have been exchanged. The LIV considers it to be appropriate for a suitably qualified mediator to adopt an inquisitorial style so as to draw out the issues and

to ensure that all parties give mediation the best opportunity to succeed in resolving the issues in dispute.

It would be desirable and appropriate for there to be an opportunity for complainants to have legal advice prior to bringing complaints. Much time and money can be saved if complaints are structured so as to clearly identify the claims being made. Currently, a complainant provides information about the claim in a non-structured way which may result in a delay in having the complaint resolved. It is the experience of LIV members frequently involved in discrimination matters that often clarification is required on all the issues raised, for both the complainant and respondent, even though some may have little relevance to the end result.

Having a more structured and formal process, including option(s) for ADR, will assist to make complaint resolution more effective and efficient. One option to ensure that unrepresented parties are not disadvantaged by such a system would be to set up and fund a specialist legal centre that deals solely with equal opportunity matters. Advice could be sought by complainants and respondents on drafting and preparing material and in some circumstances representation at the tribunal could also be sought. It should be acknowledged that respondents, particularly small businesses, may also be unable to afford private legal representation.

Alternatively, there could be within the VEOHRC advisors who could provide assistance for parties in preparing material for VCAT. This could be provided over the telephone and/or in person by appointment. Again, the LIV considers this would be possible if VEOHRC was able to avoid a conflict of interest.

Question 6: Could technical aspects of the law (including protected attributes and definitions of ‘direct’ and ‘indirect’ discrimination be improved so that the law itself does not prevent the elimination of discrimination?

The LIV agrees with the view in the Discussion Paper that:

“Compliance with the law is made easier if the law is clear and certain. Clarity and certainty in the law also assist parties who may want to assert their rights under the law.”

It is therefore essential that we ensure that the law itself does not prevent the elimination of discrimination. As indicated above, the definitions of discrimination in the EO Act are narrow and highly technical. The LIV considers this is an area which could be improved greatly to the benefit of people trying to comply with the law and those who wish to uphold their rights.

The LIV is particularly concerned about the definition of indirect discrimination in the EO Act. Section 9 provides that indirect discrimination occurs where there is a condition, requirement or practice that:

- someone with an attribute does not or cannot comply with;
- a higher proportion of people without that attribute or with a different attribute do, or can comply with (proportionality test); and
- is not reasonable.

The three elements of this definition, and the interpretation of these elements, have led to indirect discrimination becoming a highly technical area of law. The proportionality test can be very difficult to apply and often requires comparisons of statistics and other complex evidence in order to successfully prosecute a claim. The necessity that the condition, requirement or practice is not reasonable is also difficult to prove as the evidence will often be contained across a large amount of material held by the respondent which would have to be identified, obtained and analysed by the complainant.

The LIV notes that in 2006 the Victorian government proposed removing the proportionality test and shifting the onus of proof in relation to reasonableness to the respondent. The LIV would support these amendments to the EO Act. It was also proposed that there be a new criterion which required complainants to demonstrate that the condition, requirement or practice caused them detriment or disadvantage. The LIV would also support an amendment to this effect.

2.4 Question 11: Are there any other matters that you wish to raise?

The LIV considers that there needs to be more research in the area of discrimination as there is little known about how to achieve the outcomes sought, particularly with respect to changing community attitudes. New equal opportunity legislation should contain provisions that provide for research, review and evaluation into these areas to be monitored and initiated by VEOHRC. This will require the dedication of appropriate resources.