

Equal Opportunity Review

**Submission to the
Department of Justice regarding the
review of the *Equal Opportunity Act
1995 (Vic)***

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1 Executive Summary and Recommendations

1.1 Summary

This submission is made by the Public Interest Law Clearing House ("**PILCH**") to the Department of Justice in response to the questions raised in the Equal Opportunity Review Discussion Paper November 2007 ("**Discussion Paper**").

PILCH welcomes the opportunity to comment on the elimination of discrimination and the promotion of equality of opportunity in Victoria and commends the initiatives of the Victorian Government and the Victorian Attorney General in undertaking this review.

This submission draws on case examples in which PILCH has assisted by providing individuals with referrals to lawyers for pro bono representation and the feedback obtained through consultation with complainants, lawyers and health professionals. Through this work PILCH has had first hand experience of dealing with a range of complaints by individuals who have endured some form of discriminatory behaviour and resultant harm.

The system for human rights compliance and protection in Victoria, enshrined under the *Equal Opportunity Act 1995* (Vic) ("**the EO Act**") has remained largely unchanged since the introduction of the State's first anti-discrimination laws nearly thirty years ago. The current system is predicated on an individual complaint based approach to unlawful discrimination. Problematically such an approach places substantial responsibility on an individual to pursue a remedy that assumes that the individual has the resources and the ability to enforce their rights under law. In contrast, it is widely recognised that people who belong to marginalised or vulnerable groups, experience discrimination that is disproportionate to the rest of the community, and are least likely of all to have the capacity to seek redress.

The inherent difficulties of this system are further compounded by the overwhelming emphasis on alternative (and private) dispute resolution as the end point of initiating a complaint even where the alleged wrongdoer is a government department or a large corporate entity. Even in the context of the best mediation model, such a complaint would give rise to a notable and unavoidable imbalance of power.

Just as importantly, the built-in limitations of the EO Act to provide redress for systemic discrimination practised by government, mean that policy implementation and administration that fails to adhere to the anti-discrimination principle, can largely go unchallenged.

PILCH believes that an overhaul of the current complaints based system is required in order to effectively eliminate discrimination and sexual harassment, to promote the principle of equality of opportunity in our society, and in order to comply with Australia's obligations under international law.

This submission focuses on the following:

- a) the inadequacies of the current complaint system;
- b) the need to expand the attributes protected under the EO Act to include homelessness, criminal record and social status;
- c) the need to widen the scope of the EO Act to provide broader powers to address systemic discrimination; and
- d) the need to expand the role of the VEOHRC to investigate and remedy discrimination.

1.2 Recommendations

Recommendation 1

That the EO Act be amended to include 'criminal record' as a protected attribute.

Recommendation 2

That the EO Act be amended to include 'social status' as a protected attribute.

Recommendation 3

That the EO Act be amended to include 'other status' as a protected attribute.

Recommendation 4

That the EO Act be amended to provide the VEOHRC with broader powers to

- a) investigate potential breaches of the EO Act, including powers to enter premises, question witnesses, require the production of documents
- b) make findings and recommendations;
- c) investigate and enforce compliance with orders or agreements arising from proceedings under the EO Act;
- d) commence proceedings; and
- e) arrange the rehabilitation of a complainant.

Recommendation 5

That the EO Act be amended to introduce mandatory reporting of serious instances of discrimination and sexual harassment to the VEOHRC.

Recommendation 6

That the limitation period be extended by amending section 108(1)(c) of the EO Act to provide that the VHEOHRC may decline to entertain a complaint if it relates to an alleged contravention of the Act that took place more than three years before the complaint was lodged.

Recommendation 7

That the EO Act be amended to remove the conciliation role of the VEOHRC.

Recommendation 8

That the VEOHRC be greater resourced to undertake research, policy reform, education and training.

Recommendation 9

That community legal centres be adequately resourced to assist complainants with complaints of discrimination and that a specialist community legal centre be established to address all types of discrimination.

Recommendation 10

That Part 2 of the EO Act be amended to include systemic discrimination within the definition of discrimination.

Recommendation 11

That the EO Act be amended to give the EOHRC the power to undertake investigations in relation to systemic discrimination, to enter premises and compel the production of information and evidence.

Recommendation 12

That the EO Act be amended to provide for a more expansive representative complaints mechanism to show that the representative body has a sufficient interest in the complaint.

Recommendation 13

That the EO Act be amended to include a 'class action' provision similar to the provisions in Rule 18.02 of the *Victorian Supreme Court (General Civil Procedure Rules) 2005*.

Recommendation 14

That the EO Act be amended to give the VEOHRC the power to investigate and ascertain compliance with any orders made by the Commission or any agreements reached in the course of the Commission carrying out its functions.

Recommendation 15

That the EO Act be amended to include a positive duty on public authorities to, when carrying out its functions, have regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity.

Recommendation 16

That the EO Act be amended to give the EOHRC the power to make binding codes of conduct and issue guidelines regarding the requirements of the EO Act.

Recommendation 17

That the government impose equality conditions on public sector procurement.

2 Public Interest Law Clearing House (VIC)

2.1 About PILCH

PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

PILCH coordinates the delivery of pro bono legal services through four schemes:

- the Public Interest Law Clearing House Scheme (“**PILCH Scheme**”);
- the Victorian Bar Legal Assistance Scheme (“**VB LAS**”);
- the Law Institute of Victoria Legal Assistance Scheme (“**LIV LAS**”); and
- the Homeless Persons’ Legal Clinic (“**HPLC**”).

2.2 Objectives of PILCH

PILCH's objectives are to:

- improve access to justice and the legal system for those who are disadvantaged or marginalised;
- identify matters of public interest requiring legal assistance;
- seek redress in matters of public interest for those who are disadvantaged or marginalised;
- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

2.3 The Schemes’ criteria for assistance

The PILCH Scheme, VB LAS and LIV LAS (“**the Schemes**”) receive, assess and refer requests for pro bono legal assistance to the private legal profession.

The Schemes only provide assistance where applicants meet a means test, where their matter has legal merit, and where legal assistance is not available from another source (eg, legal aid or a community legal centre).

The PILCH Scheme has an additional criterion. It only refers *public interest* matters to PILCH members. Public interest matters are:

- legal matters for non-profit organisations with public interest objectives or
- individuals' matters where that matter raises an issue which:
 - affects a significant number of people, not just the individual
 - is of broad public concern, or
 - impacts on disadvantaged or marginalised groups.

3 Obligations under international law

International human rights covenants make it clear that the federal and state governments of State parties have wide ranging human rights obligations. Art 28 of the International Covenant on Economic, Social and Cultural Rights (“*ICESCR*”) and art 50 of the International Covenant Civil and Political Rights (“*ICCPR*”) expressly provide that, in federations such as Australia, the obligations of the Covenants are binding on the federation without any limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at whatever level – national or state – must act to respect, protect and fulfil human rights.¹

Australia has ratified and is therefore bound by a range of human rights instruments including the ICESCR and the ICCPR.² Australia is also bound by the content and terms of customary international human rights law.

In addition to enshrining human rights, each of these instruments also imposes responsibilities and obligations of realisation in relation to those rights; namely obligations to *respect*, *protect* and *fulfil* human rights.³

The obligation to *respect* human rights requires that States parties refrain from interfering, directly or indirectly, with enjoyment of human rights.

The obligation to *protect* human rights requires that States parties prevent third parties, including organisations and individuals, from interfering in any way with the enjoyment of human rights.

The obligation to *fulfil* human rights requires that States parties take positive steps to promote and support the realisation of human rights and, where necessary, to provide for the realisation of human rights for marginalised or disadvantaged groups.

In relation to the fulfilment of civil and political rights, such as the right to equal protection before the law pursuant to art 26, the positive action required pursuant to art 2(2) of the ICCPR is that Australian governments take all necessary steps to immediately implement such rights.

¹ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13, [4] (2004). See also art 27 of the *Vienna Convention on the Law of Treaties* which provides that a State party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.

² The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980. The ICESCR was signed on 18 December 1972 and ratified on 10 December 1975.

³ UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, [17]–[29], UN Doc E/C.12/2002/11 (2002). See also UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food*, 66, [15], UN Doc HRI/GEN/1/Rev.5 (2001) and UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The Right to Education*, 74, [47], UN Doc HRI/GEN/1/Rev.5 (2001).

Art 26 requires State parties in respect of the right to equal protection before the law to guarantee to all person equal and *effective* protection against discrimination. The obligation to protect extends beyond the rights of the Covenant to every form of discrimination. Whilst it is up to the State parties to decide how to give effect to the obligation, the requirement to provide 'effective' protection may render the absence of adequate measures a violation of the provision.⁴

PILCH submits that the State is therefore under an obligation under international law to take positive measures to ensure that Victorians enjoy their human rights without discrimination.

⁴ Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCR Commentary* (2nd ed) pages 630-631.

4 Content of Protected Attributes

The Victorian Government recently enacted the Victorian Charter of Rights and Responsibilities embedding the current Government's commitment to improving the protection of promotion of human rights. The substantive rights recognised under the Charter include the fundamental right to be free from discrimination and the right to equality before the law.⁵

'Discrimination', however, for the purposes of section 8 of the Charter is limited to the protected attributes set out in section 6 of the EO Act, which currently do not include social status, that is homelessness, unemployment, being a recipient of social security benefits or possession of a criminal record. This is in spite of overwhelming evidence that this group of particularly marginalised and vulnerable people are regularly subject to wide ranging and damaging discrimination on the basis of these 'attributes.'

If the Victorian Government's commitment to the protection of civil and political rights under the Charter is to ring true and have real consequences in Australian society, reform of the EO Act is urgently required to include social status and criminal record as protected attributes under the EO Act. PILCH refers to, and supports the PILCH Homeless Persons' Legal Clinic submission in this regard.

Recommendation 1

That the EO Act be amended to include 'criminal record' as a protected attribute.

Recommendation 2

That the EO Act be amended to include 'social status' as a protected attribute.

Recommendation 3

That the EO Act be amended to include 'other status' as a protected attribute.

⁵ Section 8 of the Charter.

5 The Impact and Extent of Discrimination

5.1 Introduction

Notwithstanding the legal, educative and normative progress made by the EO Act and the significant work of the VEOHRC, discrimination and sexual harassment remains prevalent in Victorian society. For the purposes of this submission PILCH consulted with a number of victims, lawyers, and health professionals all of whom were in unanimous agreement that the current regime provided for under the EO Act fails to address discrimination in all its forms effectively.

The following section illustrates that discrimination and its impacts are still largely misunderstood by much of the community. Greater insight into the impact of discrimination and a greater capacity to remedy it when it occurs is essential for the pursuit of equality of opportunity in Victoria to be fully realised.

The Review Discussion Paper calls for a 'socio-economic' analysis of the impact of discrimination. There is compelling evidence that discrimination results in social isolation, lack of self esteem, enduring mental health issues and lower productivity, particularly where the discrimination or sexual harassment occurs in the workplace. All of these consequences place costs and pressures on the health system – particularly the already chronically under funded mental health system – the social security system, and the employment market.

Irrespective of these 'costs', PILCH submits that any review and resultant reform of the EO Act should be framed within and guided by human rights principles. That is, that policy and legislation should be driven by Victoria's obligations under international and domestic law to ensure that all people are free from discrimination and are able to lead lives of equality.

5.2 Evidence of Discrimination

Recent data from the VEOHRC indicates that official inquiries and complaints of discrimination have decreased since 2001. It would be erroneous to assume, however, that this translates into a decrease in incidents of discrimination. Anecdotal evidence suggests that discrimination and sexual harassment often goes underreported, remains unresolved or is not currently unlawful – as in the case of discrimination on the basis of 'social status' – so as to be able to trigger a formal VEOHRC complaint.

PILCH continues to receive inquiries and applications for assistance in a wide range of discrimination matters ranging from disability and religious discrimination through to sexual harassment involving sexual assault.

5.2.1 The Impact of Discrimination on Victims

Consultations by PILCH with victims of discrimination and sexual harassment, relevant health professionals, and other lawyers specializing in this field, reveal that the impact

of discriminatory conduct is wide reaching. Victims often experience anger, humiliation, a low sense of self worth, a sense of isolation/alienation, and distress as illustrated below:

Case Study A:

Robert, a student, was a highly committed member of a particular religion. His 'take home' exam had to be completed on a day of religious observance. Robert made a request with reasonable notice that he be permitted to complete the exam one day later, however, the educational institution refused his request. Robert was extremely distressed and angry about the situation and was conflicted between not failing his course and maintaining his religious observance.

Case Study B:

Gracey was a pre-operative transsexual. When she attempted to enter an entertainment venue she was refused admission despite being well dressed and having a polite manner. It was soon made evident to her that the refusal was based on her gender identity – there was no other factor that distinguished her from the other patrons that were admitted onto the premises. Gracey felt humiliated by the experience and extremely angry about the lack of awareness and acceptance of transgender individuals. As a consequence she required counselling to assist her to deal with the experience.

Victims of discrimination and sexual harassment have also required treatment for depression, panic attacks, anxiety adjustment disorders, and chronic post-traumatic stress disorder ("**PTSD**") that led to them reliving or re-experiencing of the trauma.

5.2.2 The Impact of Discrimination and Sexual Harassment in the Workplace

Discrimination and sexual harassment in the workplace has particular consequences. In a number of the cases that PILCH has been involved with, victims of workplace sexual harassment and discrimination report that they have been forced to leave their workplace due to the inappropriate handling of the case, lack of support by their employer, victimization by other staff and both overt and covert support for the perpetrator.

The impact of leaving work under these conditions can make it extremely difficult for the victim to reapply for similar positions in appropriate organisations. This is particularly problematic where the victim works in a specialized area where work is hard to come by.

The impact of employment discrimination can be particularly debilitating where an already vulnerable individual makes a concerted effort to progress their lives through seeking employment but is undermined in their attempts to do so. This situation is highlighted in the following case study:

Case Study C:

Esther had been on unemployment benefits for a long time when she applied for a position with a business and was ostensibly accepted for the role. She was informed that all she was required to do before commencing employment was to undertake a medical assessment. During the assessment she disclosed to her examiner that she suffered from Hepatitis C. The employer then withdrew the offer of employment because of her medical condition even though it would not interfere with her carrying out her duties and obligations in the proposed role.

Esther was devastated by the withdrawal of the offer of employment as she had been looking forward to rebuilding her life. She suffered from depression and an increased sense of alienation as a result of the discrimination.

Eliminating and preventing discrimination is not only in the interests of the potential victim and their families but is a social and financial imperative for employers and other goods and services providers. The most obvious impact of claims of sexual discrimination and harassment on employers is in the context of their vicarious liability for an employee's prohibited conduct. The range of direct negative consequences for employers include:

- a) potential increases in insurance premiums for WorkCover;
- b) potential exposure to common law damages under the *Accident Compensation Act 1985* (Vic) where a 'serious injury' is suffered by the victim; and
- c) potential to expose employers to compensation payments under the EO Act.

There are also broader consequences for employers. Studies illustrate that discrimination in the workplace leads to lower worker productivity, undermines workplace morale and increases employee turnover.⁶ Unlawful discriminatory conduct may also lead to increased accidents, frequent mistakes and overall lower quality work product due to the affect on concentration and mental health of staff.⁷ This in turn leads to overall decreased profitability due to decreased motivation resulting from deteriorated relationships with supervisors and a decline in quality of employee performance.⁸

⁶ Employer Defenses to Sexual Harassment Claims, Weitzman, Allan H. *Duke Journal of Gender Law and Policy* Volume 6:27 1999 p27.

⁷ Ibid, p28.

⁸ Ibid, p28.

6 The Complaints Based System

6.1 Introduction

The EO Act defines what type of treatment amounts to discrimination, victimisation and sexual harassment. In brief, it provides for a complaint-based model whereby a complaint is lodged at the VEOHRC and may be settled at conciliation. If the matter is not resolved at conciliation, upon the request of the complainant it will be referred to VCAT where the matter will initially be listed for mediation. In both processes of conciliation and mediation, the outcome will usually remain confidential to the parties and there will be no finding on whether the alleged unlawful conduct took place or not.

If the matter does not resolve at mediation at VCAT it will proceed to a hearing where findings will be made about whether discrimination is proven or not. These decisions are on public record and form part of the development of jurisprudence in this area of law.

The current system fails to adequately prevent discrimination primarily because many victims of discrimination and sexual harassment are unlikely to make a formal complaint. The inherent unequal bargaining power between the parties is a disincentive to potential applicants making a claim, as is the difficulty in obtaining legal representation and the perceived lack of adequate remedies provided by the system. The current two-tiered system of conciliation at the VEOHRC prior to initiating proceedings at VCAT increases the cost and time involved in resolving a complaint making it less likely that a victim of discrimination or sexual harassment will lodge a formal complaint. The use of alternatives to the official complaints system such as internal grievance procedures is also problematic given the potential lack of expertise of those conducting the inquiry and conflicts of interest that may arise.

Finally, the fact that most complaints settle prior to hearing means that there is limited jurisprudence available in the area. As a result, there is little guidance available to the community as to means of ensuring compliance with the obligations under the EO Act and penalties for failure to comply with those obligations.

6.2 Lack of Complaints

Some victims of discrimination or sexual harassment do not report the matter because they are under the misapprehension that what they have experienced is not 'serious enough' or they do not realise that it constitutes discrimination or sexual harassment. A strong reliance upon the complaint-based system to address discrimination has not had the effect of enhancing awareness of the issue to an acceptable level.

PILCH has received applications from victims of sexual harassment and discrimination who have been traumatised by the unlawful acts committed against them. These clients report that they have received previous legal advice not to pursue the perpetrator or employer for compensation and/or other remedies through the

complaints process because of the potential for them to be further traumatized by the process. Further, the two-tiered process takes many months if not years to resolve a complaint which can cause the complainant further anxiety. The publicity generated by a public hearing in relation to what can often be a very personal matter can also be very traumatic for clients.

Victims of discrimination and sexual harassment matters are also reluctant to have their cases proceed to hearing because they fear that the case may interfere with future employment prospects.

The impact of undergoing the complaints process provided by the EO Act on vulnerable complainants is evidenced in the following case study:

Case Study E:

Jane was a victim of sexual harassment. She underwent the external complaints process by lodging a complaint to the VEOHRC, She then had her allegations substantiated at the Victorian Civil and Administrative Tribunal (“**VCAT**”) hearing.

Despite an outcome in Jane’s favour, a result of the trauma she had experienced in the workplace - compounded by the stress and anxiety of undergoing the external complaints process - she was detained in a psychiatric unit after the VCAT hearing.

6.3 Unequal Bargaining Powers of Parties

Further problems with the complaint-based system arise due to the inherent unequal bargaining power between complainants and respondents. In most matters concerning discrimination and sexual harassment, the perpetrator is in a position of power or influence over the complainant.

The power differential may arise by reason of the nature of the relationship between the parties such as in the employer/employee, supervisor/junior, student/teacher relationships. Alternatively, the power differential may arise by reason of differing access to resources including legal assistance, for example in the relationship between a pensioner and a service provider such as a financial institution.

As discussed above, this unequal bargaining power results in the under-reporting of discrimination and sexual harassment claims which is a fundamental problem with relying on a complaints-based model.

6.4 Legal Representation

Despite the VEOHRC’s position that legal representation is not required, in order to ensure a fair outcome it is often necessary for a complainant to be represented at the VEOHRC. In addition to the need to address the power imbalance discussed above, it is not appropriate for complainants to be in a position where they are required to cross-examine respondents and vice versa. Moreover, many complainants, particularly those dealing with mental health issues, language issues and histories of vulnerabilities, will

be unable to adequately express the nature and impact of the discrimination they have faced. Further, the cost of litigation will deter many complainants with meritorious claims from pursuing their cause of action.

While Victoria Legal Aid (“**VLA**”) provides some assistance for discrimination matters, assistance is limited to claims where the amount of compensation claimed is above \$5,000 and where there are strong prospects of a benefit to be gained by the applicant. In assessing the ‘benefit’, VLA will also consider any detriment to the applicant if the applicant is not granted assistance. In PILCH’s experience, discrimination and sexual harassment matters do not generally attract high compensation payments. The strict financial guidelines for legal aid therefore often lead to individuals not receiving free legal assistance when they cannot afford private representation.⁹

Despite PILCH’s best endeavours, pro bono assistance in discrimination matters can be difficult to facilitate, as solicitors and barristers generally will not undertake pro bono work in circumstances where the applicant is seeking compensation as a remedy. Pro bono assistance may be available in limited circumstances where there are special circumstances or a public interest element involved in the matter.

Most community legal centres do not have the capacity or the expertise required in discrimination and sexual harassment matters to provide the requisite advice and assistance. However, PILCH does acknowledge the valuable contribution made by the specialist legal services operating in the area such as the Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service which provide advice and representation before the VEOHRC in the areas of employment, education and training for people with a disability.

6.5 Remedies Afforded Through the Complaints Based System

Victims of discrimination and sexual harassment may also be reluctant to make a formal complaint due to the perceived lack of appropriate remedies available under the current system.

Very few matters actually proceed to a full hearing before the Tribunal.¹⁰ Most matters settle either during the conciliation process at the Commission or at the VCAT mediation. Whilst early settlement of a dispute has many benefits to both parties, some complainants are reluctant to attend the conciliation process because they know that it is likely that a confidentiality agreement will be required in order for the matter to be resolved. For some victims of discrimination and sexual harassment, a confidentiality agreement which prevents disclosure of the experience of the discrimination/harassment and its impact to health professionals, friends, future partners and future employers, denies the complainant the opportunity for the conduct the subject of the complaint to be properly acknowledged.

⁹ VLA guidelines provide strict criteria under Chapter 2 Appendix 2I of the VLA Grants Handbook.

¹⁰ Department of Justice, *Equal Opportunity Review Discussion Paper*, p13.

Even if exemptions to the breadth of confidentiality agreements are negotiated, in our experience those exemptions are usually limited to permission to speak to health professionals and/or family members about the matter. In addition, employers have little or no control over what their employees say amongst themselves or to people outside the workplace. By signing a confidentiality agreement, a victim may forfeit the ability to protect his or her reputation and seek necessary support at the same time.

An early negotiated settlement of the dispute may have the effect of denying the complainant an adequate and appropriate acknowledgement of the unlawful discriminatory conduct. For many victims, this is the remedy that is ultimately most important.

6.6 Two-tiered System

The current system requires that a complainant attend a conciliation conference at the VEOHRC before proceedings can be issued at VCAT. Where matters are not resolved at conciliation and progress to VCAT, they are generally listed for mediation or compulsory conference before finally proceeding to a full hearing. Whilst section 124 of the EO Act permits a party to apply to the VEOHRC to refer the matter to VCAT without conciliation, the VEOHRC still has the discretion to insist that the matter proceed to conciliation first.

This process, which effectively requires the parties to mediate twice, renders the complaints process more costly and prolonged for both parties.

Advocates for the VEOHRC's conciliation process may argue that this process is necessary to ensure that complaints that are vexatious or lacking in substance do not proceed to VCAT. However, the mediation and compulsory conference process at VCAT provide a similar opportunity for a complainant to be advised that his or her complaint is in danger of being found to be vexatious or frivolous at hearing by the Member. Complainants are also cautioned that they will be at risk of an adverse costs order should the matter proceed to hearing and fail.

Further, if the VEOHRC declines to entertain a complaint as lacking in substance under section 108(1) of the EO Act, complainants can still require the VEOHRC to refer the complaint to VCAT. PILCH contends that this is an unnecessary duplication of process.

6.7 Alternatives to the Official Complaints System – Internal Grievance Procedures

In Victoria many employers and organizations use internal grievance procedures where a complaint of sexual harassment or discrimination is made. These procedures are adopted to address the issue of vicarious liability arising under sections 102 and 103 of the EO Act and the procedures themselves have been further developed through the common law.

At present many complainants are consenting to the use of internal grievance procedures to resolve the matter rather than lodging a complaint with the VEOHRC because they trust their employer to handle the matter appropriately and protect them, they are not aware of the complaint-based procedure available through the VEOHRC and VCAT or do not have much knowledge about it, or they believe the external complaint-based procedure to be too stressful to use, particularly without legal assistance.

Whilst the use of internal grievance procedures has been an important development since the introduction of the EO Act, there are serious problems with these procedures being utilized as an alternative to complainants litigating through the VEOHRC and VCAT. These problems include the following:

- a) internal grievance procedures are not open to public scrutiny and the institutions are not required to report the number, nature or outcome of sexual harassment or discrimination complaints.¹¹ As a result, there is currently no way of assessing the incidence of discrimination and sexual harassment within the Victorian community.
- b) the procedures that employers or private investigators hired by employers use to investigate complaints are not consistent and there is no control over the quality of the investigation.
- c) there is a potential conflict of interest in employers handling internal investigations as they may be a defendant to any legal action subsequently brought by the complainant.
- d) employers often prioritize protecting their reputation before protecting the victim and may apply pressure on the complainant to agree to the matter being dealt with quickly and quietly in a manner that could jeopardize a just and fair outcome.

In the cases that inform our submission involving the most serious forms of sexual harassment, the perpetrators who were found guilty by internal investigations, either left the workplace with a confidentiality agreement signed by the employer and were then assisted by colleagues in gaining employment elsewhere in a high level position, or were simply transferred to another department and remained in the same position of seniority with a confidentiality agreement signed by all parties.

In these cases the victims reported that they felt there was no choice but to resign either directly after the investigation or at a later date when reintegration back into the workplace failed. The following case study illustrates the problems that may arise from the use of internal grievance procedures:

Case Study F:

¹¹ Tipping the Scales of Justice in Sexual Harassment Law, Lawton, Anne *Ohio Northern University Law Review* Vol 27.2000-2001 p530

Katie was a victim of sexual assault and sexual harassment by a senior employee and mentor. After a an internal workplace investigation over a two month period during which Katie and the perpetrator were suspended with pay, the private investigator found the perpetrator guilty of the alleged unlawful conduct. The perpetrator later resigned, insisting that the employer sign a confidentiality agreement which it did.

When Katie returned to work her employer made a statement to staff that allowed them to assume that she had committed some form of misconduct. Katie felt isolated and ignored by staff and was told by Human Resources not to tell anyone about what had happened to her.

After further inappropriate conduct by staff, Katie was diagnosed with chronic post-traumatic stress disorder and was placed on stress leave with WorkCover for 18 months. She contemplated lodging a complaint through the VEOHRC but decided against it given that settlements at the VEOHRC involved the use of confidentiality agreements and the process would be too traumatic for her.

6.8 Lack of Jurisprudence

PILCH has been involved in assisting complainants in the settlement of discrimination matters at the VEOHRC which have important precedential value to organizations working in the disability discrimination area. However, PILCH is not at liberty to publish these outcomes due to confidentiality clauses in the negotiated settlement agreements.

The fact that many incidents of discrimination and sexual harassment are unreported and that most of those that are reported settle with confidentiality agreements has the effect of limiting the development of further jurisprudence in this area of the law.

Reliance on the complaint-based system fails to identify the prevalence of discrimination and sexual harassment in the community and provides limited guidance to lawyers and the community in the way of case law as to what constitutes discrimination and sexual harassment, the appropriate remedies for various forms of misconduct and means of ensuring compliance with obligations under the EO Act.

6.9 Limitation Period

At present, a complainant must lodge a complaint with the VEOHRC within 12 months of the conduct occurring.¹² An extension of time can be sought in special circumstances, however, there is no guarantee that the extension will be granted. This is despite the fact that:

¹² Section 108 *Equal Opportunity Act 1995* (Vic).

- a) many complainants suffer from mental illnesses or disorders and may require a longer period of time to have the strength to make the complaint and take any legal action;
- b) complainants may fear retaliation or not know how to proceed which may contribute to delays in seeking redress;¹³
- c) in relation to claims of sexual harassment, harassment can be cumulative in which case it is only further down the track that a complainant may realise that the early events were the beginnings of a pattern of harassment;¹⁴ and
- d) also in relation to claims of sexual harassment, complainants may initially disclose to colleagues or family members the sexual harassment and be met with sympathy for the perpetrator or indifference. As a result, they may begin to blame themselves and minimize the seriousness of the sexual harassment. The complainant may not feel the need to disclose the matter again to another person until later in time when the trauma cannot be repressed. By that stage they may be encouraged to make a complaint.

¹³ Tipping the Scales of Justice in Sexual Harassment Law, Lawton, Anne *Ohio Northern University Law Review* Vol 27.2000-2001, p522.

¹⁴ Ibid.

7 The Proposed Changes to the Complaints Based System

7.1 Introduction

Drawing on lessons and legislative measures from a range of jurisdictions, PILCH contends that there is greater scope for the EO Act to empower the VEOHRC to enforce the provisions of the Act and the principles that inform it. In particular, PILCH submits that the EO Act be amended and the VEOHRC be adequately resourced to:

- a) conduct investigations into breaches of the EO Act;
- b) make findings and recommendations where unlawful discrimination has occurred;
- c) extend the limitation period during which a complaint can be lodged or an investigated conducted; and
- d) commence its own proceedings.

7.2 Investigatory Powers

PILCH submits that the VEOHRC should be empowered to carry out investigations into individual complaints of discrimination of its own motion. The proposed powers would extend to the power to enter premises, question witnesses and the power to access all relevant documents including workplace policies on discrimination and sexual harassment. Investigators would be thoroughly trained in investigation processes, cross-examining witnesses, and the nature of discrimination and sexual harassment.

Prior to the investigation commencing the investigators would also ensure that if the matter warranted it, the complainant was referred to an appropriate counsellor for counselling to assist them in dealing with the distress and trauma of the discrimination or sexual harassment and the investigation process.

Providing the VEOHRC with investigatory powers in relation to individual complaints would assist in ensuring that a victim of discrimination or sexual harassment would:

- a) have their matter thoroughly investigated in a manner sensitive to their needs;
- b) be provided with rehabilitation in returning to work;
- c) be less likely to lodge a WorkCover claim that would require an extensive period of not working at all; and
- d) have less need to take legal action against the employer and/or perpetrator in order to recover from the discrimination or sexual harassment.

In order to facilitate the proposed new investigatory power of the VEOHRC, PILCH submits that the EO Act be amended so that it is mandatory for an employer or goods and services provider to report more serious forms of discrimination and sexual

harassment to the proposed Investigations Unit.¹⁵ Failure to comply would result in penalties ranging from fines to prosecution.

An analysis of individual complaints often leads to the identification of systemic discrimination. Therefore, it is in the public interest for the VEOHRC to have the power to investigate individual complaints to fully understand the level of systemic discrimination occurring in the community and be in a position to deal with it appropriately.

PILCH also submits that notification of discrimination may also be made by the complainant or a third party on his or her behalf.

7.2.1 Investigative Powers in the Other Contexts

The establishment of a VEOHRC Investigations Unit could be modelled on the system that currently exists under the Worksafe and WorkCover regimes.

Under the Worksafe and WorkCover systems, investigators or inspectors are appointed under each Australian Occupational Health and Safety (“OHS”) statute for the Worksafe Authority.¹⁶ OHS inspectorates are empowered to conduct independent inspections of workplaces where it is alleged that there has been a contravention of OHS legislation and to ensure compliance with these laws. Their powers include:

- a) power to enter workplaces – an inspector may enter a workplace at any time during work hours;¹⁷

¹⁵ PILCH acknowledges that all forms of discrimination and sexual harassment are serious and amount to unlawful conduct. However, PILCH acknowledged that from a resourcing perspective it may not be feasible for the VEOHRC investigators to conduct investigations into all complaints of this nature. .

¹⁶ **Commonwealth:** *Safety, Rehabilitation and Compensation Act 1988* establishes ComCare as the OHS enforcement agency. Sections 40 and 51 of the *Occupational Health and Safety (Commonwealth Employees) Act* regulate the appointment and qualifications of investigators. **New South Wales:** *Occupational Health and Safety Act* establishes The Workcover Authority of New South Wales as the OHS enforcement agency. Section 49 of the OHS Act (NSW) deals with inspectors. **Victoria** *Occupational Health and Safety Act* establishes Worksafe Victoria as the OHS enforcement agency. Section 22 of the *Accident Compensation Act 1985* deals with inspectors. **Queensland** *Workplace Health and Safety Act* establishes Worksafe Victoria as the OHS enforcement agency. Section 99-103 of the WHSA deals with inspectors. **South Australia** The OHS inspectorate is housed in the Department of Industrial Affairs. Section 4 of the *Occupational Health Safety and Welfare Act* regulates the appointment and qualifications of investigators. **Western Australia** Worksafe is a division housed in the Department of Consumer and Employment Protection. Section 42 of the *Occupational Health and Safety Act* regulates the appointment and qualifications of investigators. **Tasmania** The Workplace Standards Tasmania is a division of the Department of Infrastructure, Energy and Resources. Sections 33-35 of the *Workplace Health and Safety Act* regulates the appointment and qualifications of investigators. **Northern Territory** *Work Health Act* establishes the Work Health Authority as the OHS enforcement agency. Sections 30 and 36 of the WHA regulate the appointment and qualifications of investigators. **Australian Capital Territory** *Occupational Health and Safety Act* provides the Chief Executive with powers to create and maintain an offices in the Government Service establishes ComCare as the OHS enforcement agency. Sections 40 and 51 of the *Occupational Health and Safety (Commonwealth Employees) Act* regulate the appointment and qualifications of investigators.

¹⁷ **Commonwealth:** Section 42 **New South Wales:** Section 50 **Victoria:** Section 39(1)(a) **Queensland:** Section 104 **South Australia:** Section 38 (1)(a) **Western Australia:** Section 43(1)(a) **Tasmania:** Section 36(1) **Northern Territory:** Section 37(1) **Australian Capital Territory:** Section 62

- b) general powers to investigate – these powers include searching, inspecting, examining, requiring the production of documents, questioning individuals and taking affidavits; and¹⁸
- c) requiring assistance from an employer – owners, employers and occupiers must assist the inspector in the exercise of his or her duties.¹⁹

Under the WorkCover regime, once a claim has been substantiated, the client is referred to a rehabilitation agency. That agency provides a rehabilitation officer to assist the injured employee to return to work with their current employer or to a new workplace.

7.3 Power to Make Findings and Recommendations

PILCH submits that having undertaken a fair and comprehensive investigation, VEOHRC investigators should be empowered to make a finding as to whether discrimination has occurred on the balance of probabilities. PILCH further submits that VEOHRC should have the power to make recommendations as to any disciplinary action against the perpetrator if the claims are substantiated, together with an assessment of the liability of the employer, and any recommendations on what preventive measures the employer or organization should introduce.

7.4 Power to Enforce Findings and Initiate Legal Proceedings

PILCH submits that the VEOHRC should be vested with the power to enforce its findings. If the VEOHRC determines that legal action against a goods and service provider is necessary due to a breach of mandatory reporting, failure to provide compulsory education and training on discrimination and sexual harassment or breach of an order of the VEOHRC, the matter should be referred to a litigation section of the VEOHRC to commence proceedings at VCAT. This power is analogous to WorkCover's current capacity to refer matters to its Prosecutions Section.

7.5 Examples of Regulatory Powers in Other Jurisdictions

The suggestions for reform outlined above are based on consideration of comparative regimes and jurisdictions. For example, the Canadian Human Rights Commission ("**CHRC**") may designate a person as an 'investigator' to investigate a complaint.²⁰ The investigator is granted extensive powers in carrying out the investigation, including the power to enter and search any premises in order to carry out inquiries at any reasonable time with a warrant.²¹ An investigator also has the power to require any

¹⁸ **Commonwealth:** Sections 41(1) and 41(2) **New South Wales:** Sections 59-64 and 68-75 **Victoria:** Section 39(1),(c),(d),(e),(i),(k) and Section 39(3) **Queensland:** Sections 108, 122, 120-121 148-157 **South Australia:** Sections 38(1)(b),(c),(f),(g),(h) and 38(2) **Western Australia:** Sections 43(1)(d),(i),(k),(l),(m),(o) and 43(3) and 44 **Tasmania:** Sections 36(1)(a),(b),(c),(e),(f) and 36(7) and 36(5) **Northern Territory:** Section 10(h),(j) and 11 and 12 and 36(1) **Australian Capital Territory:** Section 62(3), (3)(a), (3)(b), (3)(c), (3)(d), (3)(g) and Sections 81 and 83.

¹⁹ **Commonwealth:** Section 43 **New South Wales:** Section 68 **Victoria:** Section 41 **Queensland:** Section 108 **South Australia:** Section 38 (7) **Western Australia:** Section 43(1)(n) **Tasmania:** Section 36(6) **Northern Territory:** Section 38 **Australian Capital Territory:** Section 62(3)(h)

²⁰ *Canadian Human Rights Act* s43 (1)

²¹ *Canadian Human Rights Act* s43(2.1)

individual found in any premises entered to produce material that may be relevant to the investigation.²²

In addition, the CHRC also has extensive compliance powers. If a compliance officer believes that an employer is in breach of an obligation under the *Employment Equity Act*, the compliance officer can attempt to negotiate a written undertaking with an employer to take certain specified measures to remedy the non-compliance.²³ If an employer provides a written undertaking and the compliance officer is of the opinion that the employer has breached the undertaking, the compliance officer is required to notify the CHRC of the non-compliance and the CHRC may issue a direction to the employer requiring them to take any action specified in the direction to remedy the non-compliance.²⁴

Similarly, in the United Kingdom, section 20 of the *Equality Act 2006* (UK) empowers the Equality and Human Rights Commission (“**EHRC**”) to investigate whether a person has committed an unlawful act, complied with requirements imposed by an unlawful notice under the Act (s21) or complied with an undertaking given under the Act (s23).

In addition, the EHRC is empowered to:

- a) issue unlawful act notices;²⁵
- b) enter into an agreement with a person in which the person undertakes not to commit an unlawful act;²⁶
- c) enforce such undertakings where there is non-compliance in the courts;²⁷
- d) make an application to a court for an injunction restraining a person from committing an unlawful act;²⁸
- e) assist an individual who is a party to equality legal proceedings;²⁹ and
- f) institute or intervene in legal proceedings if it appears to the ECHR that the proceedings are relevant to a matter in connection with its functions.³⁰

Recommendation 4

That the EO Act be amended to provide the VEOHRC with broader powers to

- f) investigate potential breaches of the EO Act, including powers to enter premises, question witnesses, require the production of documents
- g) make findings and recommendations;
- h) investigate and enforce compliance with orders or agreements arising from proceedings under the EO Act;
- i) commence proceedings; and

²² *Canadian Human Rights Act* s43(2.4)

²³ *Canadian Human Rights Act* s15(1)

²⁴ *Canadian Human Rights Act* s15(3)

²⁵ *Equality Act 2006* (UK) s22(6)

²⁶ *Equality Act 2006* (UK) s23(1)

²⁷ *Equality Act 2006* (UK) s23(1)

²⁸ *Equality Act 2006* (UK) s24(1)

²⁹ *Equality Act 2006* (UK) s28(1)

³⁰ *Equality Act 2006* (UK) s30

j) arrange the rehabilitation of a complainant.

Recommendation 5

That the EO Act be amended to introduce mandatory reporting of serious instances of discrimination and sexual harassment to the VEOHRC.

7.6 Limitation Period

PILCH recommends that the period of limitation in making a complaint to the VEOHRC be increased to three years. The same period should apply with respect to VEOHRC's capacity to conduct an investigation.

This is analogous to personal injury claims under section 27D of the *Limitation of Actions Act 1958* which provides for a three year limitation period.

Recommendation 6

That the limitation period be extended by amending section 108(1)(c) of the EO Act to provide that the VEOHRC may decline to entertain a complaint if it relates to an alleged contravention of the Act that took place more than three years before the complaint was lodged.

7.7 Conciliation Power of VEOHRC

Due to the proposed increased investigatory powers of the VEOHRC and the duplication of the process of conciliation followed by mediation at VCAT, PILCH submits that VEOHRC's current conciliation function should be removed.

This would establish a more efficient external complaints process whereby complainants or respondents seeking to appeal a finding of the VEOHRC's investigators, would proceed to lodge their appeal with VCAT. Where a complainant wishes to pursue the perpetrator or employer or provider of goods and services for compensation, they would need to proceed to VCAT.

Recommendation 7

That the EO Act be amended to remove the conciliation role of the VEOHRC.

7.8 Research, Law Reform, Promotion and Training

PILCH submits that the VEOHRC should not only have the responsibility of carrying out investigations into alleged unlawful conduct under the EO Act but should also be greater resourced to undertake necessary research, policy reform and training to

enable it to keep relevant legislation under review and act as a centre of expertise on equality and human rights.³¹

Recommendation 8

That the VEOHRC be greater resourced to undertake research, policy reform, education and training.

7.9 The Establishment of a Specialist Anti-Discrimination Legal Centre

The most immediate grievance for most clients upon application to PILCH is the difficulty they have accessing legal assistance. This goes directly to the right of equal access to justice – a right in respect of which Victoria has obligations arising under arts 2(3), 14 and 26 of the ICCPR and under the new Victorian Charter.

While it is commonly stated that everyone, formally, is entitled to equal access to justice, this proposition is not borne out in practice. PILCH's experience shows that the need for legal assistance by the disadvantaged in the community far outstrips the legal services currently available to them.

Clients approach PILCH at different stages of the 'discrimination process': some have tried to initiate a complaint but have found it very difficult to do so without the assistance of a direct advocate; others have filed a complaint that has been dismissed and are unable to appreciate why; some request representation at conciliation and others have been dissatisfied and often damaged by the conciliation process and are seeking to refer their matter to VCAT for hearing. In each circumstance the impact of discrimination is compounded by the significant difficulties in navigating discrimination complaint channels and a perception that the process is in and of itself discriminatory in that it favours the often better resourced perpetrator who is better placed to receive comprehensive advice and representation.

PILCH submits that community legal centres should be resourced to better deal expertly and efficiently with complaints of discrimination. We further submit that a specialist community legal centre should be established to address all types of discrimination with the provision of advice and representation for meritorious matters and where the applicant for assistance cannot afford private representation. The need for the establishment of such a service is based on:

- a) narrow VLA discrimination guidelines;
- b) the possible increase in discrimination complaints under the proposed regime; and
- c) the need for individuals to receive comprehensive advice and representation in these matters that at present the community legal sector and pro bono sectors do not have sufficient capacity and resources to provide.

³¹ Ibid, p36-37.

Recommendation 9

That community legal centres be adequately resourced to assist complainants with complaints of discrimination and that a specialist community legal centre be established to address all types of discrimination.

8 Addressing Systemic Discrimination

8.1 Introduction

The current regime is heavily reliant upon individuals making complaints. As discussed in detail earlier in this submission, the nature of discrimination and sexual harassment is such that very few victims are willing to lodge a formal complaint when subjected to unlawful conduct.

Further, a significant number of the formal complaints made are resolved between the parties at conciliation. Many agreements reached at conciliation contain a confidentiality clause which prevents either party from disclosing the terms on which the matter settled. Discrimination is being addressed in an ad hoc manner and focus is diverted away from the underlying causes of discrimination which are, as a result, not addressed.

As a result of these factors, the current complaints-based system is failing to identify and address the underlying causes of discrimination which may be embedded in social structures and institutions.

Further, the current system fails to proactively address issues of equality in breach of the State's obligations under international law and in contrast with the provisions of the *Charter of Human Rights and Responsibilities Act 2006* ("**the Charter**").

PILCH submits that the current system is in urgent need of review in order to proactively address systemic discrimination.

8.2 What is 'systemic discrimination'?

As discussed at page 3 of the Discussion Paper, systemic discrimination refers to the underlying causes of discrimination. The underlying causes may be requirements, policies and practices that have the effect of excluding particular members of society from full participation in particular areas such as employment, the provision of goods and services and other accommodation.

8.3 Why should systemic discrimination be addressed?

8.3.1 The complaints based system fails to address fundamental causes of discrimination

As discussed earlier, PILCH submits that the complaints-based system, in dealing with discrimination on a case by case basis in an area of law where few victims actually make a complaint, fails to identify and address fundamental causes of inequality within our society.

Given the lack of precedent and data available due to the nature of discrimination³² and the fact that many complaints settle on a confidential basis, there is currently no means of identifying the underlying causes of, or systemic issues that give rise to, inequality of opportunity.

8.3.2 Social benefits of equality

Through its referral work, PILCH observes at first hand the social effects of inequality within the Victorian community.

Our clients who are the victims of discrimination such as homeless people or people with disabilities, report feelings of exclusion and an inability to participate in employment, education and society generally.

These observations of social fragmentation have been confirmed by reports such as the Final Report of the Equalities Review carried out in the United Kingdom, which states at page 21 that:

“The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies.”

PILCH submits that it is a responsibility of the State to promote equality and social cohesion within our society.

8.3.3 Economic considerations

PILCH further submits that there are compelling economic reasons for the State to proactively take measures to ensure equality of opportunity for all Victorians.

Research indicates that the “efficiency of an economic system is impeded when the productive potential of individuals is wasted. For instance, a more equal society is one in which the average levels of education and human capital are higher and those present in unequal societies. It is also one in which there is more stability and less social conflict. All these factors are essential to sustained growth and prosperity”.³³

Similarly, the United Kingdom’s Discrimination Law Review found that “there is a clear business case for equality. In a rapidly changing world, we cannot as a nation afford to waste potential talent and skills of all individuals in our increasingly diverse society. We want a flourishing economy in which all have equal opportunities to thrive and contribute”.³⁴

³² In 2005/2006, only 19 cases proceeded to final hearing in Victoria. This figure rose to 43 in 2006/2007 – Discussion Paper, p13.

³³ Equalities Review, Final Report, 20.

³⁴ United Kingdom, Communities and Local Government, *Discrimination Law Review: A framework for fairness: Proposals for a single equality bill for Great Britain*, Consultation Paper (June 2007) 8.

8.4 Identifying systemic discrimination

PILCH submits that relying on complaints to identify systemic discrimination is inherently inadequate for the reasons already articulated. PILCH also submits that the State has a responsibility and economic incentive to identify and address systemic discrimination and proposes the following in order to address systemic discrimination within the community.

8.4.1 Amend the EO Act to include systemic discrimination

There is presently no prohibition of systemic discrimination under the EO Act. In order to identify and subsequently address systemic discrimination, it is important that the concept be defined and prohibited to enable complaints to be made in relation to the underlying causes of discrimination and for the formulation of policy.

PILCH therefore recommends that systemic discrimination be recognised as a form of discrimination under the EO Act.

Recommendation 10

That Part 2 of the EO Act be amended to include systemic discrimination within the definition of discrimination.

8.4.2 Enable the VEOHRC to conduct investigations on its own motion and to table reports regarding the findings of any investigations carried out.

PILCH submits that in order to comply with its international obligations, the State is obliged to empower the VEOHRC to conduct investigations of its own motion to uncover instances of systemic discrimination and to table reports regarding the findings of any investigations carried out. These powers have been granted to national human rights institutions in other jurisdictions and have been granted to bodies in Australia in respect of analogous areas of the law.

Recommendation 11

That the EO Act be amended to give the EOHRC the power to undertake investigations in relation to systemic discrimination, to enter premises and compel the production of information and evidence.

8.4.3 Expand the complaints mechanisms and enable parties, other than those directly affected by the prohibited conduct such as representative bodies, to bring a claim

Whilst the EO Act permits a representative body to make a complaint to the VEOHRC on behalf of another person or persons, the VEOHRC must be satisfied that the conduct that constitutes the alleged contravention is a matter of genuine concern to the

representative body because of the way conduct of that nature adversely affects or has the potential adversely to affect the interests of the representative body or the interests or welfare of the persons it represents. PILCH submits that this requirement is unduly restrictive.

Further, international bodies such as the International Council on Human Rights Policy have recommended that in order to be effective, human rights institutions should be able to receive complaints from parties not directly affected by discrimination.³⁵

PILCH submits that the requirements under section 104 of the EO Act are unnecessary and do not accord with international best practice. Given the very nature of discrimination and the difficulties that victims face in bringing claims, in order to be effective it is imperative that representative bodies have the power to bring complaints on behalf of victims who are often disadvantaged and may not have the means to commence costly litigation.

Similarly, PILCH recommends that a provision enabling class actions similar to Rule 18.02 of the *Victorian Supreme Court (General Civil Procedure Rules) 2005* be inserted into the EO Act. Such a provision would enable victims to share the cost and potential risk of litigation, move the focus from the individual nature of the complaints and provide a further avenue of redress for victims of systemic discrimination.

It is submitted that enabling representative bodies to bring proceedings on behalf of victims and providing victims with the option of bringing their claim as part of a class action may assist to reduce the trauma suffered by the victims of discrimination and sexual assault by the conduct forming the basis of any complaint and the complaints process as described earlier in this submission.

Recommendation 12

That the EO Act be amended to provide for a more expansive representative complaints mechanism to show that the representative body has a sufficient interest in the complaint.

Recommendation 13

That the EO Act be amended to include a 'class action' provision similar to the provisions in Rule 18.02 of the *Victorian Supreme Court (General Civil Procedure Rules) 2005*.

³⁵ International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, *Assessing the Effectiveness of Human Rights Institutions* (2005). 18-22.

8.5 Remediating systemic discrimination

8.5.1 VEOHRC to monitor and enforce compliance with orders or agreements

PILCH submits that rights necessarily go hand in hand with remedies and enforcement of those remedies. VEOHRC would effectively be rendered a ‘toothless tiger’ if it does not have the power to monitor and enforce compliance with any orders made under its proposed new powers.

Further, compliance with orders made by VEOHRC may indirectly affect others who are not parties to the complaint under investigation and as a result have no standing to seek to enforce the orders. If, for example, a declaration that a policy or proceeding is unlawful made in the context of a complaint made by one person affected by that policy despite the fact that it may affect others to whom the same policy applies. Those people would not, however, have any means of enforcing the VEOHRC’s order. In order for VEOHRC to address systemic discrimination, therefore, it is necessary for it to have the power to ensure compliance with any orders made in carrying out its functions.

In relation to agreements, as discussed earlier in this submission, PILCH submits that the conciliation role of VEOHRC be abolished. However, PILCH anticipates that in carrying out the proposed new investigatory functions, VEOHRC may enter into binding agreements with parties the subject of an investigation.

The current system requires complainants to ensure that any agreements reached at VEOHRC are complied with. Pursuant to section 115 of the EO Act, a certified record of a conciliation agreement may be lodged at VCAT and enforced as if it a VCAT order.

However, in order to enforce an order of the Tribunal, it is necessary for the complainant to bring any non-compliance by the respondent before the Tribunal. For the reasons discussed earlier in this submission, it is often difficult for the victims of discrimination to lodge a complaint and to vigorously prosecute that complaint. Requiring a complainant to ensure compliance with the VCAT order has the effect of prolonging what is likely to be a very difficult process for the victim. For these reasons, PILCH submits that it would be preferable for VEOHRC to have the power to enforce compliance with any agreements reached in the performance of its investigatory powers.

Recommendation 14

That the EO Act be amended to give the VEOHRC the power to investigate and ascertain compliance with any orders made by the Commission or any agreements reached in the course of the Commission carrying out its functions.

8.5.2 Imposition of a positive duty to eliminate discrimination and promote equality

As previously discussed, the reliance on a complaints based system is a fundamental flaw of the current system. Reliance on complaints has the effect of focussing attention on the individual nature of discrimination rather than the underlying causes or trends.

Whilst empowering VEOHRC to carry out investigations in respect of systemic discrimination will allow a consideration of underlying or institutional factors that may lead to discrimination, such an approach still relies on a complaint or investigation into a breach of a duty not to discriminate against a person or persons by reason of a protected attribute.

PILCH submits that greater inroads could be made to promote and ensure equality of all Victorians if a positive duty to eliminate unlawful discrimination and to promote equality was imposed on public authorities under the EO Act.

The potential impact of the imposition of a positive duty was recognised in the United Kingdom Equality Review which states at page 131 the “A strong, integrated public sector duty, covering all equality groups, with a focus on outcomes and not process, should enable better policy design as well as better service delivery”.³⁶

Following that review, the United Kingdom enacted *The Equality Act 2006* (UK) which empowers the Commission for Equality and Human Rights to assess the extent to which, or the manner in which a person has complied with a duty under or by virtue of provisions of the *Sex Discrimination Act 1975* (UK), *Race Relations Act 1976* (UK) and the *Disability Discrimination Act 1995* (UK).

For example, section 76A(1) of the *Sex Discrimination Act 1975* (UK) provides that a public authority shall in carrying out its functions have regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. A failure in respect of performance of the duty does not, however, confer a cause of action at private law.³⁷

Similar positive duties are imposed in respect of human rights by the *Human Rights Act 1998* (UK) (“**the Human Rights Act**”). In its report dated July 2006 following a five year review of that Act the Department of Constitutional Affairs found that:

“Overall, the Human Rights Act can be shown to have had a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation which leads to better outcomes, and ensuring that the needs of all members of the UK’s increasingly diverse population are appropriately considered both by those formulating the policy and by those putting it into effect. In particular, the evidence provided to the DCA by Departments shows

³⁶ Equalities Review, Final Report, 131.

³⁷ Section 84(6) of the Sex Discrimination Act 1975 (UK).

how the Act has led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals.”³⁸

The Review found that since the Human Rights Act came into force in 2000, the United Kingdom has benefited from a greater immediacy of human rights protection.³⁹

Further, as discussed earlier in this submission, the State is under an obligation pursuant to international law to take positive measures to ensure protection from discrimination.

PILCH submits that in order to ensure the promotion of equality and the elimination of discrimination, it is necessary to impose a positive obligation to do so rather than rely on compliance with a negative duty. The proposed duty to eliminate unlawful discrimination and harassment to promote equality would apply to public authorities and would not create a new cause of action. Rather, it would inform the actions of those authorities and bring a greater immediacy to the promotion of equality throughout the community.

Recommendation 15

That the EO Act be amended to include a positive duty on public authorities to, when carrying out its functions, have regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity.

8.5.3 VEOHRC to make binding codes of conduct or guidelines regarding the requirements of the EO Act

For similar reasons, PILCH submits that the EO Act should be amended to provide VEOHRC with the power to make binding codes of conduct or to issue guidelines regarding the requirements of the EO Act.

One of the key means of promoting equality and eliminating discrimination is to educate decision makers and the general community to ensure a greater understanding of the nature and illegality of all forms of discrimination. Binding codes of conduct and guidelines prepared by the Commission with its extensive expertise in the area are, in our submission, another means of bringing an immediacy to the promotion of equality to the Victorian community.

Recommendation 16

That the EO Act be amended to give the EO HRC the power to make binding codes of conduct and issue guidelines regarding the requirements of the EO Act.

³⁸ Review of the Implementation of the Human Rights Act, Department of Constitutional Affairs, July 2006, p.4.

³⁹ Review of the Implementation of the Human Rights Act, Department of Constitutional Affairs, July 2006, p.35.

8.5.4 Imposition of equality conditions on public sector procurement

Whilst the imposition of the proposed positive duty to eliminate discrimination and promote equality would apply only to public authorities, the effect could be felt wider than that by the imposition of equality conditions on public sector procurement.

The International Labour Organisation has reported that public procurement policies requiring the inclusion of equality clauses are increasingly being viewed as an effective tool to combat discrimination given the scale and economic importance of public tenders.⁴⁰

PILCH has seen first hand the effect of the imposition of social justice objectives in government legal contracts including a contractual requirement that legal firms deliver pro bono legal services. The inclusion of those provisions has led to the delivery of approximately \$11 million in free legal services since July 2002 as well as the encouragement of equal opportunity in the workplace and in the briefing of barristers for government work.⁴¹ During the 2005-2006 reporting period, panel firms reported carrying out a total of \$5.195 million in free legal services, of which \$3.032 million worth was referred through the various PILCH schemes.

PILCH has observed a marked difference in attitudes towards pro bono work since the introduction of the social justice requirements in government legal contracts. Pro bono in Victoria is now considered, particularly amongst panel firms, as another aspect of the business of the firm. This is in contrast to the take up of pro bono work in the legal sector in other jurisdictions within Australia.

PILCH submits that the introduction of equality conditions on public sector procurement generally would have a similar positive effect on the elimination of discrimination and the promotion of equality within Victoria.

Recommendation 17

That the government impose equality conditions on public sector procurement.

⁴⁰ ILO, *Equality at Work; Tackling the challenges* (2007) xi.

⁴¹ Department of Justice *Pro bono Fact Sheet, Government Legal Services* – October 2007.

9 Relationship between the *Equal Opportunity Act* and the *Charter Of Human Rights and Responsibilities Act 2006*

9.1 Current position

The objectives of the EO Act are:

- a) to promote recognition and acceptance of everyone's rights to equality of opportunity;
- b) to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes;
- c) to eliminate as far as possible, sexual harassment; and
- d) to provide redress for people who have been discriminated against or sexually harassed.⁴²

Parts 3, 5 & 6 of the EO Act prohibit certain conduct and entitle a complainant to lodge a claim in respect of a breach of the Act.⁴³

The remedies available to a complainant in respect of a breach of the EO Act include:

- a) an order that the respondent refrain from committing any further contravention of the Act in relation to the complainant;
- b) an order that the respondent pay the complainant an amount to compensate the complainant for loss, damage or injury suffered in consequence of the contravention; and
- c) an order that the respondent do anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the contravention.⁴⁴

There is no provision for the award of punitive damages or any other remedy available to address the effect of the unlawful conduct beyond compensating the complainant. There are no remedies to address the effect of the conduct on others or to restrain the respondent from committing any further contraventions of the EO Act when that conduct will not affect the complainant.

Similarly, in circumstances where the respondent is a public authority,⁴⁵ the Charter provides a mechanism for individuals who have an existing claim to seek that relief or remedy on the additional ground that the act or decision was unlawful because of the Charter.

⁴² Section 3 of the *Equal Opportunity Act 1995* (Vic).

⁴³ Section 104 of the *Equal Opportunity Act* provides a right to lodge a complaint with the Equal Opportunity & Human Rights Commission & section 134 of that Act provides a right to lodge a complaint with the Victorian Civil and Administrative Tribunal.

⁴⁴ Section 136 of the *Equal Opportunity Act 1995* (Vic).

⁴⁵ Defined in section 4 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to include a public official, an entity established by a statutory provision that has a public nature, an entity whose functions are or include functions of a public nature when it is exercising those functions on behalf of the State or a public authority, the Victoria police and local councils.

Section 1 of the Charter provides that the main purpose of the Act includes imposing an obligation on all public authorities to act in a way that is compatible with human rights. The Charter renders it unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.⁴⁶ This positive duty on the part of public authorities under the Charter is in contrast to the EO Act which merely prohibits unlawful conduct.

There is some overlap between the regimes under the EO Act and the Charter in that the 'human rights' defined in Part 2 including:

- the right to enjoy his or her human rights without discrimination;⁴⁷ and
- the right to equality before the law, equal protection of the law without discrimination and effective protection against discrimination.⁴⁸

However, a person may only seek relief or remedy under the Charter if his or her human rights have been breached in circumstances where that person has a basis for seeking that relief of remedy otherwise than because of the Charter⁴⁹ and there is no provision for the award of damages.⁵⁰

In other words, the person must already have a basis to bring a claim (such as under the EO Act) in relation to the conduct that constitutes a breach of their human rights in order to allege a breach of the human rights protected under the Charter.

Whilst there is no inconsistency between the two pieces of legislation as such, the extent to which the rights under the Charter are enforceable under the EO Act is limited to the extent that there is no positive duty to eliminate discrimination or promote equality imposed under that Act.

For the reasons discussed earlier in this submission, PILCH submits that a positive duty to eliminate discrimination and promote equality should be imposed on public authorities. This would also have the effect of making the EO Act more compatible with the Charter.

From the research carried out in the United Kingdom, and discussed earlier in this submission, the imposition of such a duty is likely to assist in ensuring that the needs of all members of society are considered both by those formulating policy and by those putting it into effect.⁵¹

5.3 Illustration

⁴⁶ Section 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷ Section 8(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁸ Section 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁹ Section 39(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁰ Section 39(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵¹ Review of the Implementation of the Human Rights Act, Department of Constitutional Affairs, July 2006, p.35

A government policy provided that children who were tested and found to be unsuitable for mainstream schooling were to be placed in special schools for children with learning disabilities.

The government body responsible for administration of the test failed to ensure that the special needs of a vulnerable group with a different lifestyle were taken into account when devising the test.

As a result, a disproportionately high number of children from the vulnerable group were found to be unsuitable for mainstream schooling.

The effect of the policy to exclude those children who were found to be unsuitable from mainstream schooling was to decrease the likelihood of those children attending mainstream secondary schools and to decrease their chances of obtaining employment and being able to meaningfully participate in society.⁵²

In this example, a child excluded from a mainstream school under the policy (or his or her litigation guardian) could potentially bring a claim under the EO Act asserting indirect discrimination by an educational authority and seek orders restraining that authority from continuing the policy (at least in so far as it applied to the complainant) and compensation for any loss suffered.

One of the grounds open to the child to rely upon in those proceedings is that the policy also violated the child's right to non-discrimination and the equal enjoyment of human rights (as found by the Grand Chamber of the European Court of Human Rights in the example cited) under the Charter. The remedy for a breach of that right would be the remedy sought under the claim made pursuant to the EO Act.

However, if the EO Act imposed a positive duty on public authorities to eliminate discrimination and promote equality, it is less likely that such a policy would have been formulated in the first place.

⁵² These facts are taken from the decision of *DH and others v the Czech Republic* [2007] ECHR 57325/00 (Grand Chamber).