



Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA

Justice and International Mission Unit
130 Little Collins Street
Melbourne Victoria
Australia, 3000
Telephone: +61-3-9251 5271
Facsimile: +61-3-9654 2136
jim@vic.uca.org.au

**Submission to the Equal Opportunity Review
by the Justice and International Mission Unit
Synod of Victoria and Tasmania
Uniting Church in Australia
January 2008**

Equal Opportunity Review
c/- Department of Justice
Level 24, 121 Exhibition Street
Melbourne, Victoria, 3000

The Justice and International Mission Unit of the Synod of Victoria and Tasmania welcomes this opportunity to make a submission to the Equal Opportunity Review.

However, at the same time we are disappointed at the short timeframe allowed to make initial submissions given that comment is being sought on issues of significant impact for people who are effected by discrimination and on the wider community, the limited information provided in the discussion paper on a number of these important issues (requiring substantial additional research to be conducted if informed comment is to be made) and that there are 100 questions in the discussion paper to be responded to. Also the timing of the inquiry over the Christmas break has made response more difficult. That said, we welcome the fact that a second round of submissions will be permitted around the time the progress report is submitted to the Attorney-General in March.

The Uniting Church in Australia from its foundation in 1977, with the coming together of three denominations, has committed itself to seeing the eradication of negative discrimination in our society and beyond. The Statement to the Nation made by the Inaugural National Assembly of representatives of the Uniting Church from across Australia stated:

We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal opportunities, adequate health care, freedom of speech, employment or dignity in unemployment if work is not available. We will oppose all forms of discrimination which infringe basic rights and freedoms.

Further, the annual meetings of the representatives of the congregations that make up the Synod of Victoria has actively supported anti-discrimination legislation in Victoria from 1985 onwards. Specifically these meetings have passed resolutions:

- supporting legislation to protect against discrimination on the basis of sexual orientation (1985);
- opposing discrimination against people on the basis of gender, marital status, disability, race or age (1993); and
- asking the Federal Government to enact legislation to enact anti-discrimination legislation prohibiting discrimination against gay men and lesbians in areas of housing, employment, education and the provision of goods and services (1994).

The relevant resolutions of the Synod are attached at the end of the submission.

The Uniting Church, through its agencies, provides support to many of the most vulnerable groups in our community and many of those likely to be targeted for negative discrimination. At the same time it is a significant employer and also, through all of its bodies and agencies, draws on the support of thousands of volunteers. The Uniting Church is committed to upholding all the requirements of the *Equal Opportunity Act 1995* through its policies, practices and training of staff and managers. However, in the Uniting Church, as an employer, has also had experience of a very small number of staff who have claimed discrimination against them by the Synod or its bodies on vexatious, misconceived or frivolous grounds. Such complaints can absorb significant staff time and cause considerable stress to staff that such complaints are made against. Thus the Justice and International Mission Unit recognizes the need to ensure that the legislative regime balances the need to eradicate negative discrimination against people, while seeking to minimize the inconvenience, stress and costs that result to innocent parties from having vexatious, misconceived, frivolous or even malicious allegations of discrimination being made against them.

The Justice and International Mission Unit would draw a distinction between negative and positive discrimination. Negative discrimination is that which disadvantages a person because of a particular attribute or because of their circumstances compared to how others might be treated. Positive discrimination to the Unit is where a person is offered assistance or conditions that take into account their situation that would otherwise put them at a disadvantage compared to others. Thus, programs to assist Indigenous people to find employment that are not open to other unemployed people would be seen by the Unit as an example of positive discrimination that takes into account the historical mistreatment and negative discrimination that the Indigenous people of Australia have experienced since European colonization and the need to now take steps to correct a situation of historic and entrenched discrimination against Indigenous people seeking employment. The Unit would wish to ensure that equal opportunity legislation allows for positive discrimination to provide a situation in the Victorian community where people do have equal opportunities.

As a general comment, the Unit believes that the discussion paper fails to present sufficient evidence that systemic discrimination is so widespread and of a nature that would justify the Equal Opportunity and Human Rights Commission being granted some of the more coercive measures being raised within the discussion paper, such as being able to impose enforceable equality schemes on organizations. High levels of reported discrimination in the community should be treated with caution in the absence of further information in relation to the nature of the discrimination and in the absence of those at whom the allegations of discrimination are being made having an opportunity to respond. This is not to suggest that those who allege experiences of discrimination are not being truthful of their experience, it is that the situation may in reality have been different to the perception of the person reporting the discrimination in some cases. The Unit believes that the Commission needs to make a strong case backed by solid research that is placed into the public arena in order to justify the introduction of coercive and

intrusive powers being granted to the Commission. At the same time the Commission initially needs to be given the powers, functions and resources to investigate if, objectively and impartially, such a case can be made.

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

The Justice and International Mission Unit is supportive of 'irrelevant criminal record' being added to the attributes on which it is unlawful to discriminate in Victoria in the *Equal Opportunity Act*. We have had reports from within the Uniting Church membership of people alleging that they have been discriminated against in seeking employment on the basis of an irrelevant criminal record. The Unit notes that under the *Human Rights and Equal Opportunity Commission Act 1986* the Human Rights and Equal Opportunity Commission (HREOC) can handle complaints about discrimination in employment or occupation on the basis of criminal record.¹ We note that under the *Human Rights and Equal Opportunity Commission Act 1986* there is a general exemption to discrimination in employment that would apply to the issue of criminal records.²

"It is not discrimination if the person's criminal record means that he or she is unable to perform the inherent requirements of the particular job."

The anti-discrimination legislation in Tasmania and the Northern Territory uses the words 'irrelevant criminal record' in defining the grounds under which it is unlawful to discriminate against someone on the grounds of their criminal record.

The other area of discrimination that should be given consideration for inclusion in the *Equal Opportunity Act* is discrimination on the basis of socio-economic disadvantage.

Whilst we appreciate that there are Victorian policies which recognize and aim to reduce entrenched disadvantage by reducing barriers to opportunity (referred to in page 5 of the Discussion Paper), these are not sufficient on their own.

There is potential for equal opportunity law to play an important role in leveling the playing field for groups that have traditionally not been well-represented or well-served by key social institutions, such as financial institutions.

This area would need careful exploration and consultation with people who are disadvantaged and organisations who advocate on their behalf, particularly the Victorian Council for Social Service. We recommend that the timelines for the Review be extended to allow this discussion to take place in a meaningful way.

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

The 2007 VicHealth report into discrimination affecting migrant and refugee communities in Victoria found that with nearly two in every five individuals from non-English speaking backgrounds reporting having been treated with disrespect or called names and insulted on the

¹ Human Rights and Equal Opportunity Commission, 'On the Record. Guidelines for the prevention of discrimination in employment on the basis of criminal record', November 2005 (with minor revision from September 2007), p. 10.

² Human Rights and Equal Opportunity Commission, 'On the Record. Guidelines for the prevention of discrimination in employment on the basis of criminal record', November 2005 (with minor revision from September 2007), p. 13.

basis of their ethnicity at some time. Two in five report having encountered discrimination and intolerance in the workplace at some time and 30% report having done so in education settings.³ However, the data is based on self-reporting and was not tested against the response from those alleged to have carried out the discrimination. Also, it was unclear from the report over what time period the alleged incidents of discrimination took place.

The report *Hard Labour? Pregnancy, Discrimination and Workplace Rights* investigated whether there are any difficulties for women in their workplace before, during and after taking maternity leave, and whether WorkChoices changes had exacerbated any problems in Victoria.⁴ It used 13 case studies of pregnancy-related discrimination as the foundation for the discussion. The report found that there are a wide range of incidences of discrimination against women who were pregnant or returning to work after maternity leave in Victorian workplaces. This included a loss of job through dismissal or redundancy, downgrading of employment conditions, no provision to accommodate breastfeeding, and being excluded from activities such as strategic planning. However, the report is a pointer to a possible area of systemic discrimination on the basis of pregnancy and parental status in Victorian workplaces due to its very limited sample. The report does not present extensive statistical data in the area and the authors do not investigate the response from the employers into the alleged cases of discrimination. The authors themselves acknowledge the need for a more thorough investigation into the area, with a recommendation that the Federal Government resource HREOC to “conduct a national survey to establish the incidence and nature of pregnancy-related discrimination in employment.”⁵

All of the case study subjects and a number of agencies and organisations interviewed for the report pointed to the difficulty for women to juggle the needs of their pregnancy and baby when born with pursuing any avenues of redress against discrimination experienced against them. The report recommended as such discrimination needs to be prevented to the greatest extent possible with greater promotion and awareness-raising of the employers responsibility and the employees rights.⁶

The report referenced a 1999 HREOC Inquiry which concluded that pregnancy-related discrimination was a major workplace barrier for working women. However, the inquiry recommended that as data on such issues is scarce, there is an urgent need for statistical research on pregnancy and maternity issues in the workplace. To date no comprehensive research has not been undertaken.⁷

Australia Bureau of Statistics 2005 supplementary labour force survey, *Pregnancy and Employment Transitions, Australia*, found that 22 percent of Australian women who had children aged two years or under stated that they had experienced difficulties in the workplace when pregnant, including missing out on opportunities for promotion or professional development training, being given different duties without consultation, and receiving less favourable accounts

³ VicHealth, ‘More than tolerance: Embracing diversity for health’, A summary report Victorian Health Promotion Foundation, Melbourne, 2007, p. 11.

⁴ Sara Charlesworth and Fiona Macdonald, “Hard Labour? Pregnancy, Discrimination and Workplace Rights”, Centre for Applied Social Research, RMIT University, Melbourne, October 2007.

⁵ Sara Charlesworth and Fiona Macdonald, “Hard Labour? Pregnancy, Discrimination and Workplace Rights”, Centre for Applied Social Research, RMIT University, Melbourne, October 2007, p. 79.

⁶ Sara Charlesworth and Fiona Macdonald, “Hard Labour? Pregnancy, Discrimination and Workplace Rights”, Centre for Applied Social Research, RMIT University, Melbourne, October 2007, p. 78.

⁷ Sara Charlesworth and Fiona Macdonald, “Hard Labour? Pregnancy, Discrimination and Workplace Rights”, Centre for Applied Social Research, RMIT University, Melbourne, October 2007, p.37.

of job performance. However, women were not asked about the reason for the difficulties, nor whether the difficulties were associated with the pregnancy.⁸

2.1.2 What is the impact of discrimination?

The Justice and International Mission Unit notes that the impacts of negative discrimination can be serious of the individuals subject to it, but that allowing it to go unaddressed will also have negative impacts on the wider community and undermines social harmony and cohesion to the detriment of the whole community. Discrimination actually further entrenches structural inequalities, and is more than an issue of personal and community health, although that impact is significant enough to warrant redress.

The Unit notes that the World Health Organisation, cited in the report by VicHealth on discrimination affecting migrant and refugee communities in Victoria, has stated that “many health disparities are rooted in fundamental social structural inequalities, which are inextricably related to racism and other forms of discrimination in society. ...Overt or implicit discrimination violates one of the fundamental principles of human rights and often lies at the root of poor health status.”⁹ The study by VicHealth found that there is a strong relationship between exposure to discrimination and poor mental health, especially depression.

The 2007 VicHealth report into discrimination affecting migrant and refugee communities in Victoria found strong causal links of experience of interpersonal-discrimination and ill-health, the data collected was based on self-reports by the person alleging the discrimination. While it is possible that respondents may exaggerate the experience, there is also a likelihood of under-reporting as a result of negative social pressures, like being seen as a ‘whinger’, or because of lack of insight into the dynamics of discrimination.¹⁰

2.1.3 What are the consequences of not addressing this discrimination?

By not addressing discrimination, structural inequalities are further embedded in our society. Further, to not address discrimination is to deny people their basic human rights as recognized in the international human rights treaties such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

The 2007 VicHealth study found that the relationship between discrimination and poor mental health behaviours is well established, with the majority of studies indicating an association. This is particularly the case for depression. However, the report found that studies yielded conflicting findings as to whether discrimination negatively affects mental well-being (e.g. self-esteem or quality of life). This was also true for physical health such as obstetric outcomes and high blood pressure. A link between discrimination and chronic diseases, such as diabetes and heart disease, has also been found in a small number of studies.¹¹

⁸ Sara Charlesworth and Fiona Macdonald, “Hard Labour? Pregnancy, Discrimination and Workplace Rights”, Centre for Applied Social Research, RMIT University, Melbourne, October 2007, pp. 38-39.

⁹ VicHealth, ‘More than tolerance: Embracing diversity for health’, A summary report Victorian Health Promotion Foundation, Melbourne, 2007.

¹⁰ VicHealth, ‘More than tolerance: Embracing diversity for health’, A summary report Victorian Health Promotion Foundation, Melbourne, 2007, p. 31.

¹¹ VicHealth, ‘More than tolerance: Embracing diversity for health’, A summary report Victorian Health Promotion Foundation, Melbourne, 2007, p. 27.

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

In considering the case for the need to reform of equal opportunity legislation, there is a need to assess if there is underlying systemic discrimination taking place. An assessment based on a complaints system will be inadequate as there will always be people who have experienced actionable discrimination but choose not to follow through with a complaint. Further, the number of complaints is likely to represent a small sample and must be tested against the wider situation relevant to the type of discrimination being considered. An assessment on complaints may create a false impression of the real situation, possibly not revealing an underlying systemic problem or creating a false impression of a systemic problem where the problems are actually isolated incidents. An assessment of what reform is then needed to address the negative discrimination that is occurring should involve establishing what effective measures need to be put in place while imposing the minimum costs and impositions on the relevant communities effected. These measures would be very different if those carrying out negative discrimination do so out of ignorance compared to a situation where those carrying out the discrimination do so with a clear intention to do so.

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

An example of good practice to prevent discrimination comes from one of the *UnitingCare*¹² agencies, Kildonan *UnitingCare* which has worked in partnership with utility companies to put in place policies to prevent discrimination against people who have trouble paying their bills because of financial hardship. This has resulted in negotiating affordable payment plans, and in some cases, debt write-down connected with making affordable payments, to allow people to stay connected to the utility.

See the case study of the partnership between Kildonan *UnitingCare* and Yarra Valley Water at: <http://www.yvw.com.au/yvw/YourHome/YourAccount/PaymentAssistance/HardshipPolicy/AdditionalInformation.htm>

For more information about Kildonan's social advocacy visit: <http://www.kildonan.unitingcare.org.au/>

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

The Justice and International Mission Unit is supportive of additional powers and functions being given to the Equal Opportunity and Human Rights Commission in helping to prevent negative discrimination. The Unit would support the Commission having the following functions:

- Promoting public awareness of equal opportunity and respect for basic human rights through education and communication programs;
- Providing advice and assistance to parliaments and governments in developing legislation, regulations and policy relating to equal opportunity;
- Assisting government in developing plans of action to address discrimination;
- Assisting organizations across the public, private and not-for-profit sectors in developing action plans on steps needed to comply with equal opportunity legislation;
- Providing legal and strategic advice to people to prevent discrimination and empowering them to assert their legal rights against discrimination;
- Undertaking and commissioning research into equal opportunity issues, monitoring, auditing and reporting on the situation with regard to equal opportunity compliance;

¹² *UnitingCare* is the name/identity by which all of the Uniting Church's network of community services across Australia are known.

- Conducting public inquiries on issues of public importance, which may be initiated by the Commission itself or referred by the Attorney General;
- Entering into agreements with a person or body that certain actions will be taken to ensure compliance with non-discrimination; and
- Initiating investigations into a person or body suspected of committing unlawful discrimination, to seek corrective action but at this stage without the ability to issue an “unlawful act notice” or seek a court order. The Unit would want a period where such investigations can be conducted and used to pressure people and bodies to take corrective action without further coercive measures. If a subsequent assessment showed that significant non-compliance continued after such investigations, then the Unit would support the introduction of coercive measures such as issuing an “unlawful act notice”, requiring the person to develop an action plan and being able to seek a court order.

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

The Justice and International Mission Unit is concerned that if the Commission is given additional powers in dealing with negative discrimination, its role in assisting in a conciliated outcome for a complaints handling mechanism is not undermined or compromised. The Commission should be structured so that its additional powers and functions would be independent from its complaint handling role, but that the work of the Commission is informed by the complaints it handles.

It would be of grave concern to the Unit if a situation was established where the Commission could ‘use’ people who make complaints as instruments to pursue an agenda that staff within the Commission wished to pursue. The Unit’s primary concern is that people who experience discrimination are not placed in a situation where they are used as objects to pursue the agenda of others. Secondly, the Unit recognizes that many complaints can be effectively settled through conciliation, and would not wish to see this role of the Commission undermined through the Commission no longer being seen as an objective facilitator in the conciliation process.

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

The Justice and International Mission Unit believes that the Commission being able to provide specific legal and strategic advice is something that should be introduced, which would include informing organizations and businesses on how to be compliant with the legislation and what best practice in the area is. It would also mean advising those who feel they have been discriminated against to empower them in asserting their legal rights. However, in the latter case, the provision of the advice would need to be kept completely separate from the part of the Commission that dealt with complaints. The advice providing section of the Commission should have no communication with the complaints section of the Commission so as to not undermine the impartiality and objectivity of the Commission’s role in facilitating conciliation of complaints.

3.2.1.2 Would the provision of legal or strategic advice (including information about conciliation and complaint outcomes), assist complainants to decide whether or not to pursue a complaint or use other means to resolve the dispute?

The Justice and International Mission Unit believes that it would be helpful if the Commission were able to publish thematic reports on issues of particular areas of discrimination using de-identified cases from conciliation and complaint outcomes, which individuals and organizations could be referred to. This would assist in helping to prevent discrimination by giving concrete examples and would allow complainants a better idea if they had a case to pursue.

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

As stated above, the Unit is comfortable with the Commission providing the advice provided that the section of the Commission providing the advice was separate from the section of the Commission dealing with complaints. The Unit would also be open to the advice being provided by a body completely separate from the Commission, provided that the body in question had the expertise to provide the advice and that there was a clear mechanism for the body providing the advice to be informed by the experience of the Commission.

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

The Justice and International Mission Unit is supportive of the Commission being able to offer advice on how to comply with the *Equal Opportunity Act* to businesses and organisations. However, it would need to be clear that the advice is non-binding. Further, it would need to be clear that compliance with the advice would not provide protection to a complaint being made against the business or organization.

There is an advantage to the advice being provided by a body separate from the Commission, provided it had sufficient expertise to do so. The advantage would be in the area of perceived independence in handling of complaints if advice was offered by a body separate from the Commission.

A perceived conflict of interest arises if a person seeks to make a complaint against a business or organization that the Commission has given advice to in the area the advice has been given. If the Commission declines the complaint, it may be perceived by the complainant that the Commission is acting to protect the credibility of its own advice rather than on the merits of the complaint. If the complaint is allowed to proceed the organization that received the advice may believe that the Commission is not a credible body to provide advice, if the organization believes that it has complied with the advice. However, this perceived conflict of interest is fairly minor as the complainant can always take the case to be heard at VCAT and VCAT is separate from the advice that has been given by the Commission.

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

The Justice and International Mission Unit supports the Commission being granted greater powers to conduct investigations and inquiries of its own motion, believing this is vital to establishing the level of systemic discrimination as it exists in Victoria. Clearly the Commission will need to prioritise its inquiries and investigations that it conducts based on the level of resources it is provided with for such purposes. At this stage the Unit does not support the Commission being able to make unspecified binding recommendations. The Unit does not believe the evidence has been presented to justify the Commission being able to make unspecified binding recommendations. The Unit might be willing to support the Commission having some well defined power to make binding recommendations if it was clearly spelled out what the limitations of these recommendations might be and the avenues of recourse that those the recommendations are directed at would have to appeal against the recommendations. For example, if the Commission's power to issue binding recommendations was limited to cases of

clear and well-established breaches of the *Equal Opportunity Act*, where the Commission's discretion to interpret the Act was very limited, then the Unit is likely to be supportive.

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

The Justice and International Mission Unit is supportive of the Commission being given the power and resources to conduct inquiries into the private sector, but at this stage believes that the outcome of such investigations should be non-binding recommendations. Should over time this prove to be insufficient to address issues of discrimination, then the Unit would be open to the ability for Commission to issue binding requirements.

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

The Justice and International Mission Unit is supportive of increasing the education powers of the Commission with regard to the elimination of discrimination, although the discussion paper fails to clarify in what ways the existing education powers of the Commission restrict it in the performance of such a function.

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

The discussion paper states that other Australian States and Territories have allowed their equal opportunity commission the right to intervene in relevant matters before the courts. However, it provides no assessment of how these powers have been used and what their impact has been. The Unit has not had the time to investigate this area for itself and therefore is not in a position to offer an informed opinion as to whether such a power would be useful and the implications of granting such a power.

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

The Justice and International Mission Unit is supportive of the Commission being granted the power to act as *amicus curiae* to VCAT and the courts on matters of discrimination, equal opportunity and related matters.

3.2.6.3 Should the Commission be empowered to initiate claims at VCAT?

The Justice and International Mission Unit is unable to offer an informed opinion on the possibility of power of the Commission to initiate claims at VCAT as the discussion paper offers no information or analysis on how such a power has been used and its impact in other jurisdictions and the Unit has not had the time to investigate this matter for itself.

However, the Unit would be open to a case being made that in addition to the Commission being granted powers to conduct inquiries and investigation and issue non-binding recommendations, it then have the power to initiate a claim at VCAT if the recommendations have not been acted upon in a reasonable period of time. This provides an enforcement mechanism where the power of enforcement does not simply reside with the Commission. At the same time such an arrangement may force individuals and organizations to comply with unreasonable recommendations made by the Commission in order to avoid the expense, time and stress related to being compelled to be party to hearings at VCAT. Evidence of how the power to initiate claims has worked in other jurisdictions would allow the Unit to develop a firmer view on the granting of this power.

3.2.6.4 Would the current requirement for the Commission to remain a neutral complaint handling body prevent it from initiating claims at VCAT?

There is clearly a risk that the ability of the Commission to initiate action at VCAT could undermine its ability to be seen as a neutral complaint handling body. However, at the same time this would allow the Commission to be more active in addressing discrimination, particularly on behalf of groups in the community that feel disempowered and alienated and therefore are likely to lack the motivation to pursue a complaint all the way to a hearing at VCAT even in cases of severe discrimination.

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

It is desirable that the financial status of parties should not be a barrier to them being able to access judicial recourse to cases of discrimination. Thus the Unit is supportive of the Commission being able to resource litigation in cases where:

- The Commission has assessed that the complaint is not frivolous, vexatious, misconceived or lacking in substance and has not already been dealt with by a tribunal or court;
- That attempts to conciliate the complaint have failed; and
- The person making the complaint lacks the financial resources to pursue litigation.

At the same time the Unit believes the Commission should be able to resource a respondent in a case where the Commission has assessed that a complaint is frivolous, vexatious, misconceived or lacking in substance and the respondent would be placed in financial hardship by having to defend against litigation pursued by the complainant. Such resourcing would help to deter a well-resourced complainant seeking to pursue a malicious action against a poorly-resourced respondent.

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

The Justice and International Mission Unit is supportive of the Commission having the power to review the effect of laws upon equality of opportunity, with or without such a request being made by the Attorney General, assuming that the outcome of the review would be non-binding recommendations being made to the government.

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

The Justice and International Mission Unit is supportive of the Commission having the power to review a public authority's programs and practices to determine their compatibility with equal opportunity law, upon request by a public authority.

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

The Justice and International Mission is supportive of the Commission being able to issue non-enforceable Codes of Practice to assist in compliance with the *Equal Opportunity Act* and promote equality of opportunity, provided such Codes are first put out for public consultation and are approved by the Attorney General. We believe that such Codes may assist in making compliance with the law easier and increased compliance should reduce discrimination and the number of legitimate complaints made with regard to discrimination which should allow businesses and organizations to reduce the costs associated with legitimate complaints of discrimination being made.

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

The Justice and International Mission Unit is supportive of the Commission being able to issue non-enforceable guidelines and supports the right to exercise this function being formally enshrined.

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

The Justice and International Mission Unit does not support guidelines issued by the Commission being used by VCAT or the courts when determining matters under the *Equal Opportunity Act*, as this would appear to give the Commission, a statutory body, the ability to interpret the law in a way that the judicial arm takes notice of. The Unit is concerned that this has an impact on the independence of the judiciary in deterring the meaning of the law.

The Unit does not support the guidelines being enforceable at this time, without some clear clarification as to the safeguards over the Commission having the power to arbitrarily issue guidelines based on the Commission's interpretation of the law and what avenues of appeal would be available against unreasonable requirements being imposed through the issuing of guidelines.

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

The Justice and International Mission Unit is supportive of public sector bodies being required to prepare action plans to prevent discrimination and to report on the implementation of their action plans. The Unit is also open to private sector bodies being required to develop action plans and report on their implementation where clear evidence is provided to show there is a systemic problem with a particular form of discrimination in a particular sector. The Unit is open to the Parliament passing legislation that would allow the Attorney General to require particular private sectors to have to prepare action plans and report on implementation of the action plans where there is significant evidence of systemic discrimination existing in a particular sector for the aspects of discrimination for which such evidence exists. This would provide further incentives for particular sectors to take collective actions to address discrimination to avoid the imposition of action plans.

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

It would be reasonable for action plans to be registered with the Commission and made public, unless a business or organization could demonstrate a legitimate reason why their action plan should not be made public. Making the plans public would be an accountability mechanism by which businesses and organizations would be held up to public scrutiny on the seriousness with which they were seeking to prevent discrimination. It would seem reasonable for the Commission to have the power to comment on the action plans to the business or organization that prepared the action plan in question, but at this stage the Unit would not support such comments being made public. The Unit may be willing to support comments on action plans being made public if it was found that private comments on the action plans by the Commission were being largely ignored by the organizations and businesses in question.

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

The Commission should be able to use data collected from complaints to identify areas where inquiries and investigations are warranted. It should also be able to publicly publish de-identified cases to assist the public in understanding the types of complaints that have been made, the types that have been rejected as frivolous, vexatious, misconceived or lacking in substance and the types that have been conciliated and what the outcomes of the conciliation have been. This would assist the public in a better understanding of how to prevent discrimination. Being able to publish such data would also assist in making a case for the Commission to have increased coercive enforcement powers in areas where the complaints mechanism is failing to have an impact on systemic discrimination.

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

As stated above, such data should be used to assist the Commission in deciding areas in which it should hold inquiries and investigations.

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

The *Equal Opportunity Act* should include an objective which would be to eliminate, as far as possible, the disadvantages people experience as a result of discrimination.

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

The Unit is very supportive of the recognition of substantive equality rather than formal equality, which is the argument between negative discrimination and positive discrimination that seeks to account for historic or entrenched disadvantages faced by certain groups of people which justify the need to provide supports that are not available to other groups so that the result is a genuine equality of opportunity. To treat everybody the same regardless of their circumstances may simply further entrench historic or cultural disadvantage suffered by certain groups in society. For example, to treat a person with parental responsibilities or caring responsibilities exactly the same as other employees without such responsibilities in a workplace may actually place them in great hardship and the employer being required to act to take account of these responsibilities is likely to result in a fairer outcome across the workplace. In such a case, an employer may be able to accommodate the needs of employees with parental and carer responsibilities with part-time work, flexible start and finish times and work from home arrangements, but it may not be possible to offer such arrangements to all employees without unreasonable impact on the running of the business. Thus, a legislative equal opportunity regime that would require an employer to offer the same arrangements to all employees, may actually prevent an employer from accommodating the needs of parent and carer employees. Perversely, it may actually allow employees without parental and carer responsibilities to seek legal action against the employer on the grounds that they are being discriminated against on the grounds of parental status (that they are not parents) because the employer is only able to accommodate the needs of employees with parental responsibilities.

3.4.2.4 Should the objectives of the EOA recognize that in some circumstances, equal treatment can reinforce disadvantage and inequality? An individual or group that has

been subjected to on-going discrimination and entrenched disadvantage may find it more difficult to comply with an apparently neutral requirement, policy or practice.

The *Equal Opportunity Act* should recognize that in some circumstances, equal treatment will reinforce disadvantage and inequality as has already been argued.

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

The Justice and International Mission Unit opposes that a finding of discrimination should be able to be made in such cases, as it effectively undermines the presumption of innocent for the respondent. While the Unit acknowledges that people may act in discriminatory ways without betraying that their less favourable treatment is a result of discriminatory thinking (such as deciding not to employ someone on discriminatory grounds). However, to allow for a finding of discrimination in circumstances where a complainant establishes a prima facie case of discrimination and the respondent does not provide any evidence of the actual basis for less favourable treatment seems likely to result in cases of findings of discrimination when in reality discrimination had not occurred and also seems likely to undermine public support for equal opportunity legislation. Such an erosion of public support for equal opportunity principles may then actually increase the likelihood of discriminatory attitudes prevailing in the community.

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

The Unit is supportive of the definition of ‘impairment’ being modified to include medical record or genetic indicators for a particular condition, provided that reasonable action can be taken to protect the health of others. For example, if a person has an infectious illness it is reasonable for their employer to require of that employee actions that preserve the health of other employees in the workplace.

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

The Justice and International Mission Unit is supportive of the irrelevant criminal record being added to the attributes on which it is unlawful to discriminate in Victoria in the *Equal Opportunity Act*. We have had reports from within the Uniting Church membership of people alleging that they have been discriminated against in seeking employment on the basis of an irrelevant criminal record. We note that the anti-discrimination legislation in Tasmania and the Northern Territory already contains ‘irrelevant criminal record’ as ground under which unlawful discrimination might take place.

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

The Justice and International Mission Unit is supportive of legislative requirements with regard to discrimination in the workplace applying equally to paid employees and volunteers.

3.5.1 Do you perceive any potential conflict of interests arising if the Commission takes on additional powers or functions? If so, how do you think this conflict would best be managed?

The Justice and International Mission Unit has outlined above concerns as to where conflicts of interest may arise for the Commission depending on what additional powers and functions it was granted. The Unit believes the best way to handle those conflicts of interest is to have strict separation between different parts of the Commission that handle different functions and to

ensure that there are safeguards to protect against any misuse or arbitrary application of any enforcement powers granted directly to the Commission.

In terms of separation between the powers of the Commission, an example would be if the Commission was given the power to offer advice to organizations and businesses on compliance with the *Equal Opportunity Act* such a function would need to be run by a section of the Commission completely separate from the section of the Commission that handles complaints.

The safeguards over the misuse or arbitrary application of any enforcement powers granted to the Commission need to be spelt out in the *Equal Opportunity Act* so that all parties can have confidence about the nature of the safeguards. Such safeguards might include a low-cost appeal process for example.

4.3.2.1 Are there benefits of alternative dispute resolution methods, such as conciliation and court ordered mediation, in the context of a discrimination dispute?

The Unit believes that in many cases there are benefits of conciliation and court ordered mediation in discrimination cases over an adversarial judicial process. These would appear to be the ability to reach an agreement accepted by all parties involved, flexibility in outcomes, the speed with which the issue can be resolved and reduced cost.

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

As outlined previously the Unit is supportive of the Commission or another body being able to provide legal or advocacy assistance to a complainant where:

- The Commission has assessed that the complaint is not frivolous, vexatious, misconceived or lacking in substance and has not already been dealt with by a tribunal or court;
- That attempts to conciliate the complaint have failed; and
- The person making the complaint lacks the financial resources to pursue litigation.

At the same time the Unit believes the Commission should be able to offer the same support to a respondent in a case where the Commission has assessed that a complaint is frivolous, vexatious, misconceived or lacking in substance and the respondent would be placed in financial hardship by having to defend against litigation pursued by the complainant. Such resourcing would help to deter a well-resourced complainant seeking to pursue a malicious action against a poorly-resourced respondent.

4.4.2.2 Does alternative dispute resolution, as practiced in the anti-discrimination area, avoid the problems of inequality of bargaining power? If not, what steps could be taken to limit the impact of such inequality?

The Justice and International Mission Unit does not believe that the current alternative dispute resolution system in the anti-discrimination area is able to avoid the problems of inequality of bargaining power, especially when one party is at a disadvantage such as they do not understand English well. However, no dispute resolution system would be able to avoid the problems of inequality in all cases. Limiting the impact of such inequality means providing support services to those parties that are clearly disadvantaged. The Unit would be open to the establishment of an advocate office that could act to assist parties that are at a disadvantage in alternative dispute resolution situations and where it is not possible for the party in question to obtain appropriate assistance from another source.

Within the Synod, employees who are both the complainant and respondent to a complaint of discrimination are permitted to draw on a support person of their choice within internal steps to resolve the complaint.

4.4.3.1 Should the role of the Commission be educator, complaint-handler, aid provider, advocate, conciliator, adjudicator, regulator and enforcer? If there is a conflict of interest between any or all of those roles, how should that conflict be managed?

The Unit believes that the Commission should at this stage have the roles of educator, complaint-handler, aid provider, investigator, researcher, advocate and conciliator and believes that these roles can be managed without a conflict of interest if the functions are clearly separated. However, some flow of information between the different areas will be vital. For example the educator role will need to be informed by the types of discrimination that continue to be reported in the complaints handling system. The Unit does not believe that, at this stage, there is justification for the Commission to become adjudicator, regulator and enforcer and believes that the granting of such additional roles would need to occur with a clear indication of the limitations of these powers and what checks and safeguards would be in place to restrain misuse of these powers and what avenues of appeal would be available.

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

The Unit is supportive of the Commission being able to use its knowledge of complaints to mount inquiries and investigations into if systemic discrimination is occurring in a particular area and make non-binding public recommendations to address the discrimination.

The Unit is not supportive of the Commission encouraging complainants to pursue public interest cases with VCAT. This has the potential to undermine the complaint handling role of the Commission in seeking to conciliate a complaint as the Commission could then develop a culture of seeking to encourage complainants to pursue cases at VCAT in order to get interpretations of the law.

The Unit is open to the Victorian Government providing resources to bodies such as community legal centres to assist a complainant in pursuing a public interest discrimination case.

The Unit strongly supports the publication of de-identified outcomes of conciliation settlements to facilitate improved dispute resolution processes and systemic outcomes for individual complaints.

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

The Unit supports the Commission having the capacity to make reasonable or necessary disclosures for the purposes of the performance of a function or duty or the exercise of a power under the *Equal Opportunity Act*. This should include the ability for the Commission to refer inquiries to other agencies where necessary or appropriate (with the consent of the parties).

The Commission should have the ability to disclose the details of a complaint that raises issues of educative significance with the consent of the parties involved.

The Commission should also have the power to disclose matters of fact relating to specific cases, where a party to the case is misrepresenting the case in public and especially where a party is using false information to run a public campaign against the *Equal Opportunity Act*. The

Unit believes that there have been organizations that have used false and misleading information about the *Racial and Religious Tolerance Act* to try to have the legislation repealed and the Unit believes that the Commission should have a free hand to counter such campaigns with their own public comment and campaigning. A number of the organizations that have campaigned for the repeal of the *Racial and Religious Tolerance Act* are on the record as opposing large sections of the *Equal Opportunity Act*.

4.5.8.1 Should the Commission or any other body be empowered to monitor or enforce settlement agreements or VCAT orders?

The Commission should have the power to monitor conciliation agreements and to be able to resource a complainant to take further action where a conciliation agreement has been breached. The Unit is also supportive of the Commission being able to bring an action to VCAT for a serious breach of a conciliation agreement and where it would be in the public interest to do so. The Unit at this stage is not supportive of the Commission simply being able to judge that a conciliation agreement has been breached and then being able to impose penalties.

4.5.9.6 Should conciliation outcomes be de-identified and published?

The Unit supports the publication of de-identified conciliation outcomes as a way of providing public education around the *Equal Opportunity Act* and also to demonstrate publicly how the *Equal Opportunity Act* is working.

Dr Mark Zirnsak
Director
Justice and International Mission Unit
Synod of Victoria and Tasmania
Uniting Church in Australia
Phone: (03) 9251 5271
E-mail: mark.zirnsak@victas.uca.org.au

Resolutions of the annual Victorian Synod meetings on Equal Opportunity issues

1985 re: Equal Opportunity, Homosexuality, Discrimination

85.2.1 The Synod resolved:

To call upon all political parties in Victoria to support an amendment to the Equal Opportunity Act to ensure that individual homosexual citizens are not discriminated against in employment, housing or the provision of goods and services solely on the grounds of their homosexuality.

Note: The following members asked that their dissent from the motion be recorded - Mrs. C. Coulter, Rev. R.L. Maddigan, Rev. K.H. Moorhead, Rev. R.C. Outhred, Mr. J.H. Strickland, Mr. H. Trevenen.

1992 re: Equal Opportunity, Discrimination

92.4.8.2 The Synod resolved:

That the Synod Commission for Mission be requested:

- (i) to consider the issue of the perceived inconsistency of the acceptance by the Uniting Church of exemption from equal opportunity and discrimination provisions of state legislation whilst taking an active role in opposing acts of discrimination, and
- (ii) to report, with recommendations, to Synod 1993.

1993 re: Equal Opportunity, Discrimination

93.5.1.1-3 The Synod resolved:

- (a) To affirm that persons should not be discriminated against on the basis of their gender, marital status, disability, race or age in matters of employment, education, church membership or access to accommodation and other services provided by the Uniting Church in Australia.
- (b) That all presbyteries, parishes and agencies be advised of the above resolution.
- (c)
 - (i) To support the maintenance of Clause 38 of the Equal Opportunity Act 1984, in order to protect the freedom of religious groups to practise their beliefs.
 - (ii) That the Victorian Government be informed of resolution (i) hereof.

94.3.3.3 The Synod resolved:

- (a) That the Synod request the Commonwealth Government to enact anti-discrimination legislation prohibiting discrimination against gay men and lesbians in areas of housing, employment, education and the provision of goods and services.
- (b) That the Synod request the Victorian and Commonwealth Governments to initiate public enquiries into the nature and extent of public violence and abuse directed at lesbians and gay men in Australia.