

# A review of the Equal Opportunity Act (Vic)

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## Introduction

Only in recent years has HIV/AIDS been raised as a justification for discriminating against homosexuals. Debate about whether discrimination on this basis is ever justified has occurred worldwide. A policy paper released by the federal Government in 1989 concluded that

The effect of discrimination is to alienate people with HIV (who are often members of already stigmatised groups such as homosexuals, prostitutes and IV drug users.) This causes increased lack of self-esteem and lowers the motivation to make sustained and responsible behaviour change.

National HIV/AIDS Strategy — A Policy Information Paper, AGPS, Canberra, 1989, 65.

Discrimination against a person because of his or her sexuality is one of the many contentious issues upon which the VLRC received conflicting views when it sought submissions on the Equal Opportunity Act, 1984 (Vic). The VLRC has recently published a report *Review of the Equal Opportunity Act* (VLRC 36) in which it assesses the Act on the basis of three criteria:

- whether there are significant gaps and anomalies
- whether the means of enforcing its requirements are effective
- whether the structure and language of the Act is clear.

The VLRC review is timely. Not only have new bases for discrimination — such as HIV/AIDS arisen in recent years but community views about the desirable scope of the EO Act have changed since it was enacted in 1984. The complaints handling procedures provided by the Act have been tested, and there is now further information available about how anti-discrimination laws work in other jurisdictions, both in Australia and overseas.

## Philosophy

The VLRC points out that there has been bipartisan political support for equal opportunity legislation in Victoria and in other Australian jurisdictions. It received evidence that most employers supported the legislation and the philosophy behind it. However, the report notes that there are people who consider equal opportunity legislation undesirable on the basis that denying a person the right to discriminate is, in effect, denying that person freedom of belief and conscience. The VLRC says, in response to this philosophical objection, that it does not consider that there is, or should be, an unqualified 'right to discriminate'.

Discrimination based on prejudice and ignorance deprives people of their rights. The Act does not impose legal sanctions on people for what they believe, but only (on) acts that harm others.

Other submissions objected to EO legislation on the basis that compliance with it involves costs which are likely to jeopardise the economic survival of employers. The VLRC points to several responses to this 'costs' objection. The first is that costs must be balanced against benefits. Obviously a benefit is received by the individuals who would otherwise be denied jobs, promotions and freedom from harassment. However, in addition, those who are prohibited from discriminating (such as employers) may benefit from taking notice of a larger pool of eligible people. Society as a whole benefits if the talents of all its members are tapped. Secondly, the VLRC notes that it did not receive any Australian or overseas evidence which suggested that the costs of complying with anti-discrimination legislation are unacceptably high. A number of submissions did address the cost implications of the legislation, but these sought amendments to the legislation rather than its removal from the statute-books.

## Inconsistency

The Commonwealth Constitution provides that, if State and Commonwealth laws are inconsistent, the Commonwealth law prevails. As a result, some of the Victorian provisions in relation to discrimination based on sex and race may be inoperative because they conflict with the Sex Discrimination Act 1984 (Cth) or the Racial Discrimination Act 1975 (Cth) respectively. Thus although

the Equal Opportunity Act 1984 (Vic) is not generally inconsistent with either of these Commonwealth Acts, there are some differences which the VLRC sought to remove when preparing its draft legislation.

### **Types of conduct prohibited**

The Act expressly prohibits discrimination, both direct and indirect, and sexual harassment. The VLRC explains that an example of indirect discrimination is the imposition of a minimum height requirement for a job. This disadvantages women, who are generally shorter.

### **Discrimination**

The VLRC approves of the fact that under the Equal Opportunity Act discrimination is prohibited regardless of the person's *motive* for discriminating, but only if the person '*consciously*' treats another person unfavourably on a prohibited ground. However, it considers inappropriate the present position in relation to 'multiple grounds': the Commission says that a victim should be entitled to claim compensation even if the harmful conduct was only partly (rather than 'substantially') based on a discriminatory ground.

### **Sexual harassment**

The Act prohibits sexual harassment separately from other forms of discrimination. The VLRC recommends that some of the differences between the protection provided against discrimination and that against sexual harassment be removed. It wishes to remove the requirement that multiple incidents of sexual harassment must occur before a victim can make a complaint; it says that even a single event can be serious and harmful.

### **Other conduct**

The Commission recommends that in addition to discrimination and sexual harassment, other types of conduct should be expressly prohibited. These are:

- *Failure to accommodate a special need.* This conduct is at present prohibited only as a form of indirect discrimination. The draft provision which sets out the duty to accommodate special needs does not define 'special needs'. It does however indicate the type of criteria that will be relevant to the question of whether the failure to accommodate the special need was 'reasonable' or not: for example, the cost and disruption that would have resulted if the person *had* provided for the need.
- *Unlawful requests for information.* The VLRC says that a person should be prohibited from asking for information on which discrimination might be based, unless the information is reasonably required for a non-discriminatory purpose.
- *Proposed discrimination.*

### **Who is protected and who is liable?**

At present only individuals may make complaints; the VLRC recommends that organisations be entitled to complain if they are discriminated against because of the people with whom they are associated. In relation to liability, the Commission recommends a change to the Act so that any person may be liable for a prohibited act.

### **Grounds of discrimination**

The Act currently prohibits discrimination on the grounds of the following attributes: sex, marital

status, de facto status, race, impairment, parental status and religious and political belief and activity. The VLRC recommends that the Act should also prohibit five new grounds of discrimination.

- *Age.* The VLRC says that the prohibition on age discrimination should apply to the fixing of compulsory retirement ages. It also considers that the payment of youth wages is clearly discriminatory, but says that the abolition of this practice might substantially increase youth unemployment. The VLRC therefore decided that, in the absence of clear evidence about the economic consequences of abolishing youth wages, such wages should be exempt from the prohibition on age discrimination. It also accepts that there should be exemptions from the prohibition where the use of criteria other than 'age' would be impractical.
- *Sexuality.* The VLRC received some submissions which opposed the introduction of sexuality as a ground of discrimination on the basis that proximity to people who are homosexual exposes other people to a risk of contracting AIDS. The Commission does not accept this argument for various reasons including that prohibiting discrimination will greatly strengthen the fight against AIDS.
- *Transsexuality.*
- *Irrelevant criminal record, and*
- *Social origin:* This is presently a ground of discrimination under the Human Rights and Equal Opportunity Commission Act

(Cth). It should also be a ground under the Equal Opportunity Act (Vic); this would extend its application to areas other than employment, and provide more effective means of enforcement.

The VLRC also recommends that the Act should prohibit the following three forms of discrimination which are related to the current grounds of discrimination:

- *Pregnancy.* This is implicitly covered by the current Act as a form of sex discrimination.
- *Personal association.*
- *Presumed attributes.*

In addition the VLRC says that the Act should clearly prohibit discrimination based on a belief that many employees who receive compensation for work injuries are malingerers. It does not consider that the other grounds of discrimination suggested by the submissions, such as 'personal appearance', should be added at this stage.

### Exemptions from liability

The VLRC recommends that discrimination be permitted (and thus exemptions from liability recognised) in certain circumstances. For example:

- *Providers of superannuation:* "discrimination should be permitted if it is based on statistical or other reasonable grounds".
- *Children or other classes of people:* these groups are "less capable of making informed decisions in certain situations".
- *Sport:* The Act currently permits both competitive and non-competitive sporting activities to be restricted to people of

one sex. The VLRC considers the exemption of non-competitive sport to be inconsistent with the Victorian government's intention and the Sex Discrimination Act (Cth). It says that the exemption "should apply only to competitive activities where strength, stamina and physique are relevant". It further recommends that no segregation should be permitted in relation to children under 12.

- *Discrimination to protect health, safety and property:* such discrimination is acceptable if it is 'reasonably necessary' for any such purpose.
- *An act done in compliance with statutory authority:* such an act should be exempt only if Parliament has made a clear decision that it should be exempt.

Certain exemptions in the Act should be abolished, for example:

- *Small businesses.*
- *Industrial agreements and arrangements:* except union membership agreements, which should be the subject of a separate review.

### Enforcement

The chapter on enforcement in VLRC 36 contains many practical recommendations on ways in which complaints made under the Equal Opportunity Act (Vic) can be handled more efficiently and more fairly. For example, the VLRC recommends that:

- The Act should "permit complaints by agents generally, because this would assist victims who feel particularly intimidated by the power of the discriminator", and might not otherwise make a complaint.

- The Act should provide that people can complain despite having made agreements not to complain, if it would be unfair to enforce the agreement.
- The Act should allow representative actions.

The VLRC recommends retention of the rule that in a complaint of direct discrimination the onus of proof rests on the complainant, who must prove his or her case on the balance of probabilities. It considers that conciliation agreements lodged with the Board should be enforceable as if they were orders of the Board, and that the Commissioner should have the power to make submissions to the Board (if granted leave), and to submit investigation reports to the Board.

As to the important matters of remedies and costs, the VLRC recommends that:

- the Board should be entitled to declare void an agreement which was made in relation to a discriminatory act; and
- the Board should be able to award costs against a person not only if the complaint made by him or her was frivolous, vexatious or lacking in substance, but also if the person "behaved unreasonably in relation to the proceedings".

### Further matters

It is of some interest that two of the grounds upon which the Commissioner automatically ceases to hold office under the Act are that he or she 'is convicted of an indictable offence' or 'turns 65'. Use of these criteria of 'age' and 'criminal record' (if irrelevant) is, of course, inconsistent with the VLRCs' recommendations that these should be prohibited grounds of discrimination generally. In relation to the

Commissioner's staff, the Commission recommends the abolition of the requirement that the staff be subject to the Public Service Act.

Further comments made in relation to the agencies established by the Act are that:

- An advisory council on equal opportunity would be a useful source of support and community liaison, but there are more pressing needs for the resources required to service it.
- There is no reason to replace the Commissioner by a Commission.
- The Board should be renamed the 'Tribunal' to better reflect its functions. The President of the Tribunal should be a lawyer and should be entitled to determine questions of law which arise in the course of cases before it.

The VLRC recommends that State Government agencies should be under the same legal obligation as

private and local government employers not only to refrain from discriminatory practices but to promote actively equal employment opportunity. It considers that two issues should be considered in more detail by other review committees:

- *Racism*: The Victorian Attorney-General has appointed a committee to advise whether there should be action to combat racial vilification generally so as to cover a wider area than the present prohibition on racist acts and statements in the Act.
- *Sexism*: The VLRC recognises that the publication of sexist material may promote discrimination against women, but acknowledges that prohibiting the publication of such material has significant implications for freedom of expression, and raises constitutional issues. It says that the issues would be better considered at a national level.

## Implementation

*Reform* has been told by the VLRC that the report is currently under consideration by the Victorian government.

## Conclusions

The recommendations made in VLRC 36 are significant both in number and in potential impact. An independent review of State equal opportunity/anti-discrimination legislation would seem to be a worthwhile task for the other State law reform commissions to undertake. It is unlikely that any of the statutory bodies created under the various State Acts (for example, the Anti-Discrimination Board in NSW) would have sufficient resources and time to devote to an overview of the type undertaken by the VLRC, as opposed to the rather piecemeal amendment of the legislation which tends to occur at present. □

## VLRC champions consumers

'Read the fine print before you sign anything' may be excellent advice as far as it goes, but when it comes to insurance, it may not go far enough. That's according to the VLRC. Chairperson David Kelly pointed out to an insurance industry conference that the problem is not how fine the print but how comprehensible the language on insurance policies. He stressed the absurdity of selling a product to people who cannot understand what they are buying. The problem can be solved, according to Prof Kelly, by requiring insurers to write in plain English.

Prof Kelly was scathing of the industry's support for specialist tribunals to deal with consumer complaints. 'Institutionalised factionalism' was how he described the proposed membership of the tribunals, which would comprise representatives of insurers and consumers. Instead, he urged setting up an Insurance Ombudsman not only to resolve disputes but also to assist insurers to improve their documents.