



**OFFICE OF THE  
PUBLIC ADVOCATE**

**Submission to the Review of the  
*Equal Opportunity Act 1995***

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## **About the Office of the Public Advocate**

The Victorian Public Advocate is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act 1986 (Vic)*.

The Office of the Public Advocate (the Office) provides advocacy, guardianship and investigation services to people with a cognitive disability. People with a cognitive disability include people with an intellectual disability, a mental illness, an acquired brain injury, dementia and people who are in a coma or otherwise lack the capacity for cognition or communication.

The Office coordinates the Community Guardianship Program and the Private Guardian Support Program, as well as the Community Visitors Program and the Independent Third Person Program. It also has a role in community education, the provision of advice and information and in undertaking research and policy.

The Office represents the interests of people with a disability in Victoria, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with a disability are exploited, neglected or abused. It is from this perspective that the Office makes comment and suggestions on the review of the *Equal Opportunity Act 1995 (EOA)*.

Further material on the role of the Victorian Public Advocate can be obtained by consulting the Office's website: [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au)

## Overview

The Office of the Public Advocate (the Office) believes there is a case for reforming the *Equal Opportunity Act 1995* (EOA). Despite the scope for reform, it is important to acknowledge the significance of equal opportunity legislation in Victoria, its achievements and what it represents in the context of the right to freedom from discrimination. Since the introduction of anti-discrimination legislation in Victoria, marked improvements have been achieved in increasing the visibility of people with a disability and the recognition of their needs and rights.

This review provides an important opportunity to reflect on how well the existing equal opportunity legislation fits within a new human rights context and new developments in social policy that aim to create 'a fairer Victoria'. The Office supports the review taking into consideration these aspects of recent legislative and social policy developments. Within this context, the review provides a prime opportunity to incorporate the need to address systemic discrimination.

The Office believes there is considerable scope to empower the EOA as a legislative tool to address discrimination more broadly than its current mandate allows. In addition to expanding the legislation to enable a stronger focus on addressing systemic discrimination, there would be significant benefits in extending the scope of the EOA to encompass a preventative approach to discrimination.

The case the Office makes for reform is based on its awareness that people with disability continue to be discriminated against. This is reflected by the statistics provided in this submission and the presentation of a case study.

This paper provides a range of recommendations in relation to:

- Approaches that might be considered in the prevention of discrimination
- Strategies for improving the existing system of complaints and conciliation
- The role the Commission might play in any changed system of responding to discrimination in Victoria

Notably, the Office argues there is a case for considering a more proactive approach to people with a cognitive disability to protect their right to freedom from discrimination.

## **Summary of Recommendations**

### A case for reforming the law

The Office of the Public Advocate recommends:

- That there is a case for reform of the EOA – particularly to ensure an accessible process for people with a disability and people who are socially disadvantaged.
- That there is a case for proactive measures to assist and support people with a cognitive disability to promote and protect their right to freedom from discrimination.

### Better ways to prevent discrimination

The Office makes the following recommendations:

- That the EOA broaden its objectives include the following –
  - That the Commission be empowered to cultivate community responsibility for promoting respect for, and the dignity of, people who have the attributes set out in the Act.
  - That equal opportunity includes social inclusiveness and the elimination of systemic barriers to social participation.
  - That the Commission be empowered to strive for prevention of discrimination at both an individual and systemic level
- That the EOA includes provisions that ensure a focus on prevention, such as
  - Awareness raising and education
  - Research, investigation and advocacy
  - Compliance measures
  - Appropriate sanctions and deterrents
- That the Commission undertakes a central role in any new preventative measures introduced into legislation
- That the definition of discrimination is broadened and articulated in a less technical and complex fashion
- That people with a cognitive disability are given special mention in the EOA with proactive and supportive measures introduced to prevent the abuse of their rights and to ensure the protection and promotion of their rights.

### Resolving discrimination issues more effectively

The Office makes the following recommendations:

- That the essential features of a complaints-conciliation process should include
  - Access to information
  - Advocacy and support
  - Legal advice and representation

- Person-centred conciliation
- Efficient process
- Fair process
  
- That alternatives to the current complaints-conciliation model might involve either
  - A staged approach with combined prevention and conciliation roles performed by the Commission
  - A separated approach to prevention and conciliation – with the Commission responsible for prevention and VCAT responsible for complaints and conciliation
  
- That the Commission’s mandate be broadened to enable it to investigate and lodge cases on behalf of groups that experience discrimination.
  
- That the Commission is mandated to appear in court hearings as an *amicus curiae* in issues of equal opportunity and human resources that are of significant public interest.

## Case study

George is a 42 year old man with Huntington's Disease who experienced discrimination against his right to enjoy equal opportunity to access goods and services at his local shopping centre.

Huntington's Disease (HD) is a genetic, neurodegenerative disorder. It causes progressive deterioration of physical, cognitive and emotional abilities that lead to severe incapacitation and eventually death, generally 15-25 years after onset. The symptoms are physical (involuntary, jerky movements called 'chorea', abnormal gait, slurred speech and difficulty in swallowing), cognitive (impairment including short-term memory loss, difficulties with planning and problem solving and eventually dementia) and emotional (including personality changes such as impulsiveness and disinhibition, depression, mood swings and aggression).

These symptoms become progressively worse over time. Each person affected by HD has a unique manifestation of the disease and not all people will experience all of the symptoms nor will the symptoms appear in a particular order.

George experienced a range of the symptoms, including slurred speech, involuntary jerky movements, mood swings and aggression. He appeared different and would often be stared at and harassed in public.

For George, this made it difficult to get about his daily activities without incident. One of the particularly challenging experiences for George was his regular visits to his local shopping centre. Access to this centre was critical for George. He visited Centrelink, medical practitioners, Medicare and other related services. He also accessed his bank and purchased goods essential to his daily living.

On his regular visits to the centre, George was often the recipient of verbal assaults. One particular day when George retaliated, it led to a series of events that resulted in him being banned from the centre. He had been verbally abused by a group of young people calling him names and saying he shouldn't be allowed in public. In frustration, George yelled some abuse of his own back.

This incident caught the attention of security staff at the shopping centre. George had previously had altercations with the security staff – they often thought he was drunk (due to the presentations of his HD) and frequently told him to move on or leave the centre.

On this particular occasion, George tried to explain what had happened, however he struggled to articulate himself as quickly as he needed to. The security staff would not listen and made further accusations. The incident escalated and after some pushing and shoving, George fell. He was then physically escorted outside of the Centre.

The security staff contacted the police who took George away for questioning about the incident with the young people. The police ascertained that George had no history of drunk and disorderly behaviour or of assault. On learning of his disability (which one of the officers was familiar with), the police released him without charge.

The incident, however, had repercussions at the shopping centre. George learned from the police that he'd been banned from the centre. This was an extreme response and for George it had significant implications for his ability to access vital goods and services.

George sought support from his case worker and guardian, who arranged a meeting with the management of the shopping centre. After hearing George's case, the management of the centre was not amenable to changing its decision. It was of the view that George was a risk to property and person and he was not permitted to enter the centre, even with a carer. George had not been formally advised of the ban – which apparently had been in place for some time.

The Office of the Public Advocate pursued the matter – seeking to highlight the issue of discrimination based on George's disability and proposing strategies to reduce the risks that concerned the shopping centre. The shopping centre management confirmed a ban was in place and that it related to George's refusal to act in a socially acceptable manner, his alleged violence toward security staff and harassment of shoppers. It indicated it had sought legal advice in regard to the ban.

Unable to resolve the issue informally, the Office of the Public Advocate chose to lodge a formal complaint with the Equal Opportunity Commission. The Commission attempted conciliation through correspondence – a process that took six months. The shopping centre management was adamant its decisions were not based on George's disability but on his behaviour. The Office of the Public Advocate maintained that the nature of George's behaviour had neither been established nor that these behaviours were independent of his disability.

After four months of attempted conciliation, the matter was referred to the VCAT Anti-Discrimination List. They began their own process of mediation several months later.

During this time, George's condition continued to deteriorate and, with the ban still in place, he was forced to relocate to an area where he could access the services he needed. This relocation was distressing for George, whose cognitive functioning was deteriorating. He suffered significant anxiety at the separation from his previous surroundings, friends and family.

The Office of Public Advocate arranged legal representation for George, and continued to pursue the case on his behalf. The VCAT mediation process went on for a further three months. Eventually it was referred to a hearing. It was two months before VCAT heard the matter. More than a year after George had been evicted from the shopping centre, the parties finally agreed to a confidential settlement.

The confidential settlement meant that the Equal Opportunity Commission couldn't use the case to highlight systemic issues or contribute to research on the experience of discrimination encountered by people with a disability. Nor could the outcome of the case contribute in any way to the development of case law in the area of anti-discrimination.

## **1 A case for reforming the law**

It is important to acknowledge that equal opportunity legislation in Victoria (in addition to Federal anti-discrimination legislation) has been a positive force for change in the lives of people with disability. In the past two decades, community awareness of the right of people with disability to be treated equally with other members of the community has increased. People with disability are far more visible and their needs and rights are more likely to be understood and supported than they were, say, a decade ago. One example of this is the fact that many public and private sector organisations (including the Office of the Public Advocate in Victoria) have developed Disability Action Plans and actively encourage the employment of people with disability.

As a result of the legislative requirements of anti-discrimination legislation, many sectors of the community now recognise that people with disability have the same rights as others to access public places, public transport, education, employment, accommodation, and goods and services. It is generally accepted that public buildings, such as shops, cinemas, office buildings and restaurants, should include ramps and other facilities for people with disability. The community is now more aware of the fact that accessible design for people with disability is good design for all.

In addition, one of the positive consequences of promoting the recognition and acceptance of the rights of people with disability has been that many in the private sector who may have feared the costs of complying with anti-discrimination legislation have now recognised the benefits of compliance. Such benefits can include: increased patronage of their business or service by the whole community, including people with disability, and the creation of demands for new services and/or products. Many businesses also recognise that employing someone with a disability is not necessarily more costly than employing someone without a disability.<sup>1</sup>

Whilst the EOA has contributed to raising community awareness and acceptance of the rights of people with disability, if the Commission's statistics can be used as an indicator, the level of discrimination experienced by people with disability continues to be high relative to the experience of others in the community.

The statistics provided by the Commission in relation to enquiries and complaints reveal interesting trends for people with disability who indicate they have experienced discrimination. Notably, people with disability represent the highest percentage of people making enquiries and complaints relating to discrimination. From 2001/02, the Commission's Annual Reports illustrate the percentage of people with a disability made enquiries and complaints as follows:

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<sup>1</sup> Disability Employment Action Centre, undated. Promotional material. Melbourne.

## Enquiries

Year	No. of disability Enquiries	% of total Enquires	Sex harassment / Sex discrimination*
2001/02	2357	17.4%	7.3%
			6.4%
2002/03	1904	17.3%	6.9%
			7.2%
2003/04	1410	16.2%	6.1%
			5.7%
2004/05	1448	16.7%	6.5%
			5.0%
2005/06	1358	18.1%	6.3%
			5.1%
2006/07	1261	19.0%	5.5%
			4.4%

\* Following general information then disability, sexual harassment and sexual discrimination are consistently the next highest area of discrimination leading to inquiry

## Complaints

Year	No. of disability complaints	% of total complaints	Sex harassment / Sex discrimination*
2001/02	794	22.7%	12.1%
			14.1%
2002/03	765	22.6%	11.4%
			12.4%
2003/04	752	23.6%	12.2%
			12.2%
2004/05	739	26.3%	13.0%
			9.2%
2005/06	573	26.4%	13.6%
			7.4%
2006/07	483	27.4%	11.6%
			9.2%

\* Following disability, sexual harassment and sexual discrimination are consistently the next highest area of discrimination resulting in complaint

Notably, despite the number of complaints decreasing overall, complaints relating to disability have increased as a percentage of all complaints made. Notably, enquiries and complaints relating to sex discrimination and sexual harassment declined as a percentage of total complaints.

There are a range of reasons that might be influencing this pattern. The inter-relationship with the *Disability Discrimination Act 1992* is one factor that requires consideration. Are more people with a disability using the Federal legislation (in which case explaining the decreasing numbers)? Are more people with other discrimination complaints deferring to Federal legislation (thus explaining the increasing percentage of disability complaints)? Statistics from the Federal Human Rights and Equal Opportunity Commission indicate, however, that the number of complaints referred from the Commission have remained relatively consistent (page 39 of Discussion Paper). This does not shed any light on the breakdown of individual areas of complaints.

With complaints by people with a disability decreasing, it is possible that this might indicate several trends. For example, it might indicate that less discrimination is occurring, or that discrimination may be hidden and less detectable, or that discrimination is still occurring but being resolved through other channels, or that complaints are under-reported.

It is quite likely that many complaints go unreported by people with a disability. In 2004, its report to the review of the *Disability Discrimination Act 1992*, the Productivity Commission noted that while people with a physical disability have been well assisted by anti-discrimination legislation, people with a mental illness or an intellectual disability have benefited less.<sup>2</sup>

People with lifelong disabilities and, notably, with profound cognitive impairments are (unfortunately) particularly vulnerable to discrimination. The disabilities they live with include acquired brain injury, degenerative cognitive impairments (such as dementia and Huntington's Disease), intellectual disabilities and mental illness. These individuals are often not in a position to protect their own rights. Consideration of how to ensure the right of this marginalized and vulnerable group of the population to equal and effective protection against discrimination is critical. Incorporating proactive elements into the EOA to support people unable to protect their own rights has considerable merit.

In addition to the inability to protect one's own rights due to the abovementioned cognitive disabilities (and other profound disabilities), there are further factors that prevent the recognition of some individuals' right to equal and effective discrimination. As acknowledged in the Discussion Paper, disadvantage has links to discrimination. In particular, the part disadvantage might play in preventing people from pursuing their right to freedom from discrimination is notable. The barriers for those people experiencing social disadvantage could range from monetary barriers to inability to pursue a lengthy complaint due to iterance, drug and alcohol treatment or instability due to mental health issues. Will government social policy (such as A Fairer Victoria) successfully ensure that people experiencing disadvantage are empowered to seek redress when their right to freedom from discrimination has been breached?

The experience of people in socially disadvantaged circumstances strengthens the case for reform of the EOA and, notably, those provisions in the legislation relating to process (discussed later in this submission) and the legal costs for complainants.

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<sup>2</sup> Productivity Commission Inquiry Report (2004), Review of the *Disability Discrimination Act 1992*, Volume 1, Report No. 30, pp.xxvi, 278.

In addition, anti-discrimination complaint processes need to be streamlined to ensure they are accessible to all people.

The case study presented at the beginning of this submission illustrates the experience of one person's challenges with the discrimination complaints system. George's story could well be a story experienced by many. Others in similar circumstances, however, are often not as well supported as George was and might not have a guardian with the skills and knowledge of the professional guardians at the Office of the Public Advocate, or might not have a disability case worker who can support them through the process. George was not in a position to have achieved the outcome without support, particularly in view of the barriers he confronted and the length of time the process took and the deterioration of his wellbeing.

The case study highlights the need for reforms to –

- the process of the complaints-conciliation system,
- ensure access to advocacy, support and legal representation
- the roles of the Commission and VCAT.

### **Cost Effectiveness of the EOA**

People with disability are amongst the most disadvantaged in Australian society. One in five people in the community have some type of disability and the rate and incidence of disability increases as the population ages. People with disability are less likely than people without disability to be employed, have lower levels of education, and are more likely to be dependent on social security benefits.<sup>3</sup>

In 2004, in its report to the review of the *Disability Discrimination Act 1992*, the Productivity Commission commented on the cost effectiveness of the legislation, in particular its impacts on the costs associated with disadvantage. It stated that:

Anti-discrimination legislation plays a significant role in helping to redress some of this disadvantage. By reducing discrimination, the DDA can improve the material, social and psychological situation of people with a disability. It can reduce the costs of their disability and improve their capabilities. People without a disability can also benefit. For example, older Australians or parents with prams can benefit from improved physical access.

The DDA has the potential to contribute to the productive capacity of the economy. Reducing discrimination can enhance the participation and employment of people with a disability in the workforce. It can allow students with disabilities to improve their educational outcomes, making them more productive members of the community.<sup>4</sup>

By inference, similar arguments could be made in regard to the cost-effectiveness of the EOA.

### **Summary and recommendations**

The statistics, case study and issues raised in this section demonstrate that while there has been progress, there are improvements that can be made to the EOA to enable Victoria to work more effectively towards eliminating discrimination.

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<sup>3</sup> Australian Bureau of Statistics (1999) cited in Productivity Commission (2004), page 17.

<sup>4</sup> Productivity Commission (2004), page xxxvii.

The Office of the Public Advocate recommends:

- That there is a case for reform of the EOA – particularly to ensure an accessible process for people with a disability and people who are socially disadvantaged.
- That there is a case for proactive measures to assist and support people with a cognitive disability to promote and protect their right to freedom from discrimination.

## 2 Better ways to prevent discrimination

The elimination of discrimination relies on effective strategies of prevention – both at an individual level and a broader systemic level.

The current system is strongly focused at the individual level. In its focus on the individual, the system tends to lean towards addressing issues of discrimination after the event. Furthermore, to the extent that it *does* focus on prevention, it is largely directed towards preventing discrimination against people in specific situations.

Victoria would benefit significantly from broadening the mandate of the Commission to strengthen its powers to research the causes of systemic discrimination, to investigate matters of alleged discrimination and to adopt an advocacy role for individuals claiming discrimination.

In recent years, Victorian social policy has taken the time to reflect on the importance of prevention and the systemic causes of issues in a way that has not previously occupied the attention of government. The EOA can benefit significantly from this trend in legislative and social policy by integrating a stronger focus on prevention and on addressing systemic discrimination.

To successfully work towards prevention, a greater understanding of discrimination and its affect on people needs to be achieved. Further, a sense of responsibility for reducing discrimination within the community and its multiple layers needs to be engendered.

### Initiatives to consider

To achieve this, a broad range of strategies might be valuable to consider.

#### 1 Awareness raising and education

- Advice – extend the advice function of the Commission to enable it to undertake advocacy and investigations on behalf of potential complainants
- Education – strengthen the legislative education function of the Commission to reflect the work that it does in seeking to educate the public and raise awareness. Notably, providing a platform for education is challenging when recipients have no interest to learn. It is possible that in some areas, education might need to be linked to sanctions
- Leaders and champions – for example, in employment, industry leaders could champion the issue of equal opportunity. This may have the benefit of spreading the message more effectively into areas the Commission itself might not be in a position to access
- Increase awareness raising efforts – programs targeted to specific groups and industries, community media campaigns
- Public alerts – as proposed in the Discussion Paper.

## 2 Research, investigation and advocacy

- Strengthen the capacity of the Commission to undertake research into discrimination matters – extending its powers to enable it to undertake site inspections
- Strengthen the capacity of the Commission to pursue own motion investigations
- Provide the Commission with an advocacy role to enable it to advocate on behalf of groups that are discriminated against at a systemic level.

## 3 Compliance expectations

Expectations on business, government and incorporated associations could be promoted through compliance measures. Ideas in the discussion paper provide a range of strategies to enforce compliance with the EO legislation

- Codes of Practice
- Guidelines
- EO action plans

These incentives could be successful if they are coordinated effectively and supported by effective government policy. The obvious body to undertake such a coordination role would be the Commission. Coordination could include the following:

- Regular reporting by industry groups to the Commission on progress with action plans
- Statewide EO action plan and strategic framework for preventing discrimination
- A statewide communication strategy on the prevention of discrimination.

## 4 Sanctions and deterrents

While sanctions are undesirable, unfortunately there are always some individuals and bodies resistant to acknowledging the importance of peoples' right to freedom from discrimination. In these circumstances, sanctions might function as a deterrent and provide an opportunity to engage resistant bodies in education. A system of sanctioning might involve:

- Mandatory reporting – the introduction of a system similar to that originally introduced under the Federal affirmative action legislation – now known as the *Equal Opportunity for Women in the Workplace Act 1999*. That is, a scheme of mandatory reporting on the progress of organisations (with more than 100 employees) in promoting equal opportunity and eliminating discrimination. Those organisations that failed to report would be named in the former Affirmative Action Agency's Annual Report which was tabled in Parliament. The Agency reported that the sanctions had been successful – with a reporting rate of 95%.<sup>5</sup> After 10 years, however, it was deemed that the sanctions were no longer relevant and would require strengthening. Recommendations included that –
  - The naming sanction would gain greater credibility if the basis for applying the sanction was a site-based assessment
  - Fines be introduced for those organisations that fail to meet minimum standards.<sup>6</sup>

A similar process of sanctions could be considered for the EOA.

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<sup>5</sup> Affirmative Action Agency (1998) Submission to the Regulatory Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*, p.117.

<sup>6</sup> Affirmative Action Agency Submission, p.128.

## **Role of Commission**

It is critical that the Commission has a central role in any new strategies or approaches to preventing discrimination. Notably, however, broadening the scope of the Commission in relation to preventative functions could lead to potential conflicts of interest with its conciliatory functions. Resolving any potential conflicts might be best handled by restructuring the Commission to ensure a structure that minimises the potential for conflicts of interest.

The Commission would be best positioned as the body to oversee the four areas of preventing discrimination outlined above – that is, awareness raising, research & investigations, compliance and sanctions.

If the Commission's role were expanded into the area of overseeing compliance and sanctions, it would clearly have moved into a strong preventative role and away from the role of conciliator and resolver of discrimination issues. As the next chapter outlines, there could be a case for the Commission to hand its conciliatory responsibilities to VCAT to minimise the occurrence of duplication.

It is possible that the structure of the Commission could be changed to enable it to perform both a preventative role and a conciliatory role. Regardless of its structure, however, the extent to which the Commission could perform both roles would need to be tailored to prevent potential conflicts of interest.

In addition to these issues, the intersections across the functions of the Commission in relation to the *Charter of Human Rights & Responsibilities Act 2006* and the EOA will need to be reflected in the EOA.

## **Technical aspects of the law – definition of direct & indirect discrimination / objectives**

- National Harmonisation

On the whole, the concept of national harmonisation is potentially of benefit to all parties affected by anti-discrimination legislation. On the other hand, however, with two legislative options for people with a disability seeking redress from an alleged experience of discrimination, there is also a degree of choice.

For example, one of the major differences relates to costs. In the Commonwealth legislation the person who loses the case must pay out costs to the winner of the case. In Victoria, on the other hand, each party must bear their own costs. There are pros and cons about which is to be preferred when parties have quite different levels of power. The idea of costs might intimidate a powerless person from pursuing their claim. On the other hand, if there is no chance to recoup costs a person who is economically disadvantaged may not be able to initiate the claim and get a lawyer to act for them on a 'no win no fee' basis.

▪ Objectives of the Act

The Office of the Public Advocate supports the objectives of the EOA reflecting the link with the *Charter of Human Rights and Responsibilities 2006* (the Charter). Currently, there is minimal reference to rights in the EOA. The legislation would benefit from an introduction on how equality, including equality of opportunity, is a human right that is essential to enhancing the quality of life for all Victorians. In addition, an explanation of what equality of opportunity is and a framework of human rights principles that support and flow from it would enhance the EOA. Alongside the reference to the Charter, reflecting the principles contained in UN Conventions on Human Rights (that are inclusive of both socio-economic rights and political rights) would strengthen the rights base of the legislation. It needs to be made clear that the focus and function of the Commission is to uphold the human rights of all people in Victoria (with the emphasis on *people* rather than business or government).

In addition, the Office recommends that the following objectives are included:

1. That the Commission be empowered to cultivate community responsibility for promoting respect for, and the dignity of, people who have the attributes set out in the Act.
2. That equal opportunity includes social inclusiveness and the elimination of systemic barriers to social participation.
3. That the Commission be empowered to strive for prevention of discrimination at both an individual and systemic level.

▪ Definitions of discrimination

The definition of discrimination (both direct and indirect) contained in the EOA is narrow and highly technical. It is possible that the overly complex definition of discrimination in the EOA makes it inaccessible and prevents people from pursuing a complaint of discrimination. The concept of discrimination, however, *is* complex. Without considering the detail of the many exceptions and exemptions, merely acknowledging them adds to the realisation of its complexity. Even so, the definition of discrimination is limited (Pt2) and the explanation of how it is determined is confusing (Pt3). An accompanying explanatory document that sets out the basics of the definition of discrimination in plain English (preferably with illustrations and examples) would be a valuable aide.

The explanation of discrimination as a comparative treatment of individuals based on various attributes is not well-constructed. Attributes are listed first but without any context (s6), then discrimination is described as discrimination (s7), and only then is a clear definition provided that discrimination is '*less favourable treatment*' (s8). This requires several re-readings to get the full import of what is meant. Then follow the distinctions between direct or indirect, with motive or without, and by action or omission, making an already complex definition more complicated.

Grounding the EOA in human rights will make it clear that the denial of a person's human rights is discrimination. It is a comparison not to other people, but to how a person has a right to be treated. The argument that there has to be a comparison between some people being treated positively and others being treated negatively for there to be a case of discrimination and therefore fall within the jurisdiction of the EOA, is to settle for the lowest common denominator of behaviour. It is not a defence to treat all people equally unfavourably.

Discrimination should be illegal when the act complained of is compared with the norms as set out in the UN Conventions on Human Rights.

- Attributes

The way in which a person has a right to be treated can vary depending on the attributes they may have. Thus, people have a responsibility to take into account the attributes others possess, in order to treat them according to how they have a right to be treated. Not taking into account the special needs of a person's attribute is discrimination. The definition of the attributes is therefore very important.

There is scope for creating clarity in the meaning of disability and impairment. There is a range of definitions of disability contained within other legislation. For example, in the *Disability Discrimination Act 1992* an inclusive framework is adopted which looks at behavioural as opposed to diagnostic criteria. Another example is provided in the *Guardianship and Administration Act 1986* which makes specific mention of cognitive disability, such as dementia, intellectual disability, psychiatric illness and acquired brain injury. Whilst this submission has highlighted the additional burden that people with cognitive disability experience in bringing discrimination matters to the Commission, it is probable that the broader entry provisions of the DDA may be more useful in facilitating access to the discrimination complaints and conciliation process. In framing any legislative amendments, the harmonisation with existing legislation is also an important consideration.

As outlined in Section 1 of this submission, in the context of preventing discrimination, special mention for people with a cognitive disability should be considered. These individuals are often not in a position to protect their own rights – and it is vital to consider how to ensure their right to equal and effective protection against discrimination. Incorporating pro-active elements into the EOA to support people unable to protect their own rights has considerable merit.

Generally, the detail of when discrimination is prohibited is well worked (Pt3), especially and understandably in the area of employment, as this is the area of greatest complaint. The definition of sexual harassment and the description of 'conduct of a sexual nature' are quite clear and reflect the seriousness with which society views this form of discrimination. People with cognitive disability are especially vulnerable, needing of protection, and worthy of similar and specific reference in the EOA.

## **Summary & recommendations**

This section has outlined that the EOA would potentially benefit from a greater focus on prevention. A range of strategies might be considered to integrate a preventative approach into the legislation.

The Office makes the following recommendations:

- That the EOA broaden its objectives include the following –
  - That the Commission be empowered to cultivate community responsibility for promoting respect for, and the dignity of, people who have the attributes set out in the Act.

- That equal opportunity includes social inclusiveness and the elimination of systemic barriers to social participation.
- That the Commission be empowered to strive for prevention of discrimination at both an individual and systemic level
- That the EOA includes provisions that ensure a focus on prevention, such as
  - Awareness raising and education
  - Research, investigation and advocacy
  - Compliance measures
  - Appropriate sanctions and deterrents
- That the Commission undertakes a central role in any new preventative measures introduced into legislation
- That the definition of discrimination is broadened and articulated in a less technical and complex fashion
- That people with a cognitive disability are given special mention in the EOA with proactive and supportive measures introduced to prevent the abuse of their rights and to ensure the protection and promotion of their rights.

### **3 Resolving discrimination issues more effectively**

In addition to efforts to prevent discrimination, it is critical that Victoria has an accessible, equitable and effective system of resolving discrimination complaints. As already noted, the current system in Victoria is based on an individual complaints approach. This is limited in its focus – yet as part of a broader system of prevention and resolution of discrimination, it is also an important avenue for individuals to seek redress if they believe they have experienced discrimination.

As the case study demonstrated, there are significant issues with the process of the current complaints-conciliation model. Reforms to this process are necessary to make it more accessible, to minimise the length of time to reach a resolution and to minimise the stress on complainants.

In reviewing the current model of complaints and conciliation, there is also scope to broaden the focus from responding to individual complaints to discrimination complaints that reveal systemic issues.

#### **Issues arising from the current complaints-conciliation model**

It is widely accepted that many people do not make formal complaints. On page 6 of the Discussion Paper, there is reference to the findings in the research report of the Commission in 1999 that revealed 72% of people who had experienced discrimination chose to do nothing about it.

Experiencing discrimination can affect a person's quality of life; and, in turn, their psychological, material and social wellbeing. Equal opportunity to participate in social life, to access transport, goods and services, to acquire a job, and to receive an education are all vital opportunities to enhancing quality of life.

Despite the impact of discrimination on people's quality of life, people who lodge complaints relating to an experience of discrimination are not necessarily representative of all people whose right to equality of opportunity has been breached.

By far the majority of complaints for people with a disability over the past 5 years are in the area of employment. The most recent statistics from the Australian Bureau of Statistic (ABS) in 2003 reveal that the labour force participation rate of persons with a disability was 53% and the unemployment rate was 8.6%. Corresponding rates for those without a disability were 81% and 5.0%. Complaints made by people with a disability relating to employment in 2006/07 were 17% of all discrimination complaints and 67% of the total number of complaints of people with a disability.

This raises the question about the accessibility of the complaints process for people with a disability who are not in employment – that is, nearly 50% of people with a disability are not in employment, yet seemingly not experiencing discrimination (if we use the complaints statistics as a measure). It is often not feasible for people with a disability to lodge a complaint *every* time they experience an act of discrimination.

In returning to the statistic of 72% of people who experience discrimination and choose not to complain about it, it is safe to assume that a significant proportion of people with a disability fall within this category. As noted earlier in this submission, there is potential merit in exploring more proactive approaches to supporting people with a cognitive disability in accessing the complaints process.

### **Essential features of an effective dispute resolution system**

In view of the impact of discrimination, it is critical to provide an avenue for individuals to enforce their right to equality of opportunity. The Office of the Public Advocate supports the process of conciliation as the first step in seeking to resolve complaints. But it is important that if this fails, individuals have the option of a legal remedy.

The accessibility and effectiveness of the complaints process is significant in influencing whether people will choose to use the process to seek redress. For many people there are a range of disincentives to using the process. These include:

- The complexity and potential formality of the process
- The fear of victimisation
- The unequal access to legal resources for many complainants
- Concerns about the enforceability of conciliation agreements

In general, following an inquiry about discrimination that progresses to a complaint, the Commission holds a neutral position and facilitates a process that involves

- Lodging a formal complaint
- Investigating the complaint
- Conciliating an outcome
- Resolving the issue with a confidential settlement

This is largely based on the assumption that cases can be resolved through this conciliation process. Generally, many complaints are successfully resolved. A significant proportion, however, are not resolved and escalate to require legal resolution. In 2006/07, the Commission referred 200 complaints to VCAT (of a total of 1,765 complaints) – that is, 11%. In 2005/06, 14% of complaints were referred to VCAT.

It is important to bear in mind, therefore, that a significant proportion of complaints cannot be resolved through the Commission's conciliation process and are forced to progress to VCAT to achieve resolution. It is critical, then, to ensure that VCAT is integrated into the complaint process rather than approached as a separate or parallel process leading to duplication and prolonging the resolution process.

What do people who have experienced discrimination need from the complaints process to encourage them to seek redress? While the following considerations are important to all people who experience discrimination, for people with a disability there is a particular need for a proactive approach to support them to seek redress through these measures:

- Access to information – adequate information about the process and what it involves
- Advocacy and support – investigation of circumstances and access to an advocate (possibly a legal advocate) to provide support through the process

- Legal advice – access to adequate legal advice and representation
- Person centred conciliation – an approach to conciliation that focuses on the needs of complainants as people. A restorative justice approach to conciliation may have benefits if complainants are seeking acknowledgement of their experience and a commitment to change. This would provide an opportunity for the complainant to explain their experience of discrimination to the respondent and the affect of that experience on their well-being. This might provide the respondent an opportunity to consider how they could change their approach and improve the experience of people with a disability in their workplace, school, sporting association or shopping centre.

It is important that in the process of resolving a complaint the person (and their needs) do not get lost in the goal of achieving a result. As mentioned, discrimination has significant personal consequences, and sensitivity to the alleged experience of complainants is important.

- An efficient process – while taking the person into account, ensuring that delays are minimised and experiences of victimisation identified.
- A fair process – for both the complainant and the respondent.

### **Alternatives to the current complaint-conciliation model**

As mentioned above, the current system of resolving discrimination complaints exists in two separate parts – the conciliation process at the Commission and the legal process at VCAT. As noted, it is clear that resolution at the Commission cannot be guaranteed and often leads to duplication of process when referrals are made to VCAT. VCAT frequently requires that a mediation process is entered into when a discrimination complaint is referred to the Tribunal. This prolongs the process and can be very stressful for complainants. It is therefore important to ensure a system that minimises duplication of the roles that both VCAT and the Commission play in the resolution process.

The Office proposes two options for the role of the Commission.

#### Option 1 – a staged approach with combined prevention and conciliation roles

In this approach the Commission would have a role in both the prevention of discrimination and the conciliation of complaints. The respective roles of VCAT and the Commission would be as follows:

- The Commission
  - Advocacy – advocacy and support (no legal representation)
  - Investigation – greater power to investigate discrimination against groups
  - Complaints
  - Conciliation
- VCAT – if resolution through conciliation is unsuccessful, VCAT *continues* the conciliation process (and does not start the process again with mediation)
  - Directions Hearing
  - Hearing

## Option 2 – separated approach to prevention and conciliation

This approach would involve the complaints process being handled separately from the prevention and advocacy role. The roles of the Commission and VCAT would be as follows:

- The Commission
  - Advocacy & legal advice
  - Investigation and legal support / representation
  - Research & advocacy into systemic discrimination
  - Lodge cases on behalf of groups
- VCAT
  - Conciliation / mediation of complaints
  - Hearings

### **Systemic outcomes for complaints**

As noted throughout this paper, the current system of addressing discrimination in Victoria is based on an individual complaints system. This in turn has implications for the capacity of the system to address broader systemic discrimination.

In particular, there is no effective avenue for a group of people experiencing barriers in accessing school, university, the workplace, the sports field, the theatre or other social networks. If the EOA were revised to adopt a version similar to Option 2 outlined above, the Commission might be well-positioned to lodge representative complaints on behalf of such groups following a process of investigation. In this approach, however, there would be a risk that the Commission might be seen as a body adversarial to the interests of business and this could have implications for the role of the Commission as an educator.

Ideally the EOA should enable the Commission to appear in court hearings as *amicus curiae* in issues of equal opportunity and human rights that are of significant public interest.

An additional issue affecting the capacity of the legislation to address systemic discrimination is the secrecy provision. The Commission is prevented from recording, disclosing or communicating information relating to discrimination complaints, except in exceptional circumstances.

This has implications for the Commission's capacity to report on systemic issues and to encourage change and action to address these issues. In order to address systemic discrimination, the Commission requires the capacity to report on issues that currently cannot be addressed without disclosing information bound by the secrecy provisions.

In regard to the issue of individual settlements and confidentiality, the solutions are not straightforward. A major shortcoming of the current approach is the diminished development of equal opportunity case law. On the other hand, however, confidentiality provides some safeguards for ensuring that matters are settled (with concerns about reputation allayed) and not drawn out longer than the process already takes.

The EOA needs to provide an opportunity for all agreed settlements and VCAT rulings to be recorded, as well as the reasons for cases that are abandoned, even if this in a de-identifiable form, and so contribute to the development of equal opportunity law.

### **Summary and recommendations**

This section has outlined that there are significant improvements that could be made to the current complaints-conciliation model to remove duplication and to ensure that complainants receive the degree of support, advocacy and legal representation they need. The current model is potentially preventing people from engaging in the complaints process.

The Office makes the following recommendations:

- That the essential features of a complaints-conciliation process should include
  - Access to information
  - Advocacy and support
  - Legal advice and representation
  - Person-centred conciliation
  - Efficient process
  - Fair process
- That alternatives to the current complaints-conciliation model might involve either
  - A staged approach with combined prevention and conciliation roles performed by the Commission; or
  - A separated approach to prevention and conciliation – with the Commission responsible for prevention and VCAT responsible for complaints and conciliation
- That the Commission’s mandate be broadened to enable it to investigate and lodge cases on behalf of groups that experience discrimination.
- That the Commission is mandated to appear in court hearings as an *amicus curiae* in issues of equal opportunity and human resources that are of significant public interest.

## 4 Governance structure of the commission

The Office sees the Commission having performed an essential role in protecting people's rights and promoting awareness of human rights issues. In line with the introduction of the Victorian Charter of Human Rights and Responsibilities, the Office believes the role of the Commission could be enhanced from a processor of discrimination resolution to that of a facilitator and support mechanism. In addition, the Office would envision an increased role for the Commission in developing and implementing strategies to prevent discrimination and to promote equal opportunity.

As a consequence of the changes to the Commission's role outlined in this submission, consideration of the most appropriate governance structure would be necessary.

The Office does not hold strong views as to how this might best be achieved, but clearly the model of governance would be dependent upon the model of complaint resolution that is adopted.

Referring to the options outlined in the last section, the following considerations of the governance of the Commission would need to be made.

Option 1: The current governance structure of CEO and Board is probably the most appropriate. It would enable some separation of the process – yet would still give the message that conciliation would be independent, notwithstanding the increased investigation and advocacy role of the Commission. That is, the investigation and advocacy functions would be driven by the CEO and the conciliation functions would be overseen by the Commissioners and the Board.

Option 2: In the event of conciliation moving under the auspice of VCAT, the requirement of a Board of Commissioners may no longer be required.

### Summary and recommendations

In regard to the governance structure of the Commission, determining the most appropriate option will depend ultimately on the responsibilities that the Commission holds following the review.

As indicated, the Office does not hold a strong view regarding the governance structure of the Commission. It does, however, consider that the essential issue is to ensure the independence of the Commission and to enhance and support the ability of the Commission to conduct fair and impartial hearings and investigations. In the event that an arrangement similar to Option 2 was adopted, the nature and scope of the Commission's independence may need to be reframed. Most significantly, any changes to the structure should be undertaken in such a way as to minimise conflict of interest and to ensure fair process for complainants and respondents of the discrimination complaints system.