



Victorian Discrimination Law

Part 2—What is Discrimination

7 **Meaning of discrimination**

(1) Discrimination means—

(a) direct or indirect discrimination of an attribute; or

(b) a contravention of section 33, 40, 45, 54, 55 or 56.

(2) Discrimination on the basis of multiple discrimination or

(a) that a person has at any time, whether the time of the



Victorian Equal Opportunity & Human Rights Commission

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Foreword

I am pleased to present on behalf of the Victorian Equal Opportunity and Human Rights Commission the *Victorian Discrimination Law* resource.

It provides a comprehensive coverage of decisions in the jurisdiction as well as highlighting a range of relevant issues of practice and procedure. I have no doubt that judges, academics, practitioners, students and many others will find this research invaluable as they attempt to better understand the law of discrimination and victimisation in Victoria.

The vision of the Victorian Equal Opportunity and Human Rights Commission is for 'a community where every person values, understands and respects human rights and equal opportunity'.

The extent to which this vision has already been realised is a matter for debate. However, it is beyond doubt that Victoria is a wonderful, multicultural state, which encourages diversity and the inclusion of people from many backgrounds, cultures and religions.

Unfortunately, we still see many examples of discrimination and victimisation, particularly in regard to religion, race, sexual orientation, disability and age. This happens in employment, in the provision of goods and services, in education, in health services, in sport and on the street.

But through legislation such as the Equal Opportunity Act, the Racial and Religious Tolerance Act and the Charter of Human Rights and Responsibilities Act, our community is beginning to properly understand, value and enshrine human rights and equal opportunity.

As with all developing areas of law, the Courts and Tribunals have been instrumental in interpreting relevant legislation, and helping us understand our rights, duties and obligations. More and more people are becoming aware of their rights, the legislation that enshrines and protects those rights, and the remedies available to enforce those rights. As such, it is becoming more common for the judicial system to consider these issues and provide decisions that will serve as guides for the community in grappling with these issues.

My thanks go to everyone involved in the compilation of this wonderful publication and I commend this important resource to you.



John Searle
Chairperson
Victorian Equal Opportunity
and Human Rights Commission

Acting Commissioner's message

This year marks the 35th anniversary of the Equal Opportunity Act coming into effect in Victoria and is an opportune time to stop and reflect on the development of Victorian jurisprudence.

Discrimination law is still a relatively young area of the law and the complexity of issues that it covers is still being revealed. Over three decades in Victoria it has become apparent that discrimination law is more complex and challenging in practice than many people understood or anticipated.

The breadth of attributes covered by Victorian discrimination law has expanded to reflect our recognition that many groups within our society experience discrimination leading to disadvantage and exclusion in areas of public life where they should expect and experience equal treatment. These include the workplace, in education, in accommodation, sport and when accessing those services we use every day like transport, shops and public space.

Equal opportunity law in Victoria has evolved to keep pace with our understanding of the nature and impact of discrimination. Initially, individual complaints were the main tool the law provided to address issues of discrimination but over time the legislation has recognised the need for more complex, systemic responses to discrimination. Our most recent Equal Opportunity Act provides simpler definitions of discrimination, a streamlined dispute resolution process and the ability for the Commission to use other functions and powers to understand and address systemic discrimination.

The Commission also has an active role in contributing to the development of jurisprudence through our intervention and amicus curiae functions. We also work to support the legal profession in Victoria, advocates and community members to deepen their understanding of discrimination law.

Discrimination case law provides us with valuable guidance and insight into the application and interpretation of the law and we hope this resource helps build a deeper appreciation and understanding of discrimination law in Victoria.

To ensure it is accessible and easily available this resource is available online and will be updated regularly to reflect developments in the law.

We welcome your feedback and suggestions for how *Victorian Discrimination Law* can be improved in future editions.



Karen Toohey
Acting Commissioner
Victorian Equal Opportunity
and Human Rights Commission

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Chapter 1

> Introduction

Scope of this resource

1. The *Equal Opportunity Act 2010 (Vic)* commenced on 1 August 2011, and builds on over 30 years of anti-discrimination law in Victoria. Because the Equal Opportunity Act was a wholesale replacement of its predecessor, this is an opportune time to commence a new case law resource – one that we can continue to build on and update as cases are heard under the new Act. This is the first resource of its kind for Victoria.
2. This resource provides an overview of the Equal Opportunity Act and an analysis of the case law that helps to guide the application of the Act in practice. It also provides guidance on the scope of, and interaction between, exceptions and exemptions under the Equal Opportunity Act in light of its objective to promote substantive equality.
3. Because the Equal Opportunity Act is a new law, reference is made to issues which have arisen under the predecessors to the Equal Opportunity Act, principally the *Equal Opportunity Act 1995 (Vic)*, where they continue to be relevant.
4. This resource is not intended to be an academic text but, rather, a practical guide to the law as it currently applies in this jurisdiction and significant issues that have arisen in cases brought under the Equal Opportunity Act. While the focus of this resource is the Victorian legislation, where relevant, it will also make reference to principles as they apply in other jurisdictions including in other States and Territories and at the Commonwealth level. It is not intended to be an exhaustive study of discrimination law in these other jurisdictions. Nor is this resource intended to be a substitute for legal advice. It is, by its nature, general.
5. It is also important to note that case law from other jurisdictions, and decisions of the Victorian Civil and Administrative Tribunal are informative and provide guidance about how these issues may be approached in the future, but they are not binding precedent that must be followed in future cases.
6. Links to legislation and cases have been provided where these resources are freely available on the internet.
7. *Victorian Discrimination Law* will be updated regularly to reflect the latest developments in the law. This version is dated April 2013.
8. We welcome your feedback and suggestions for how we can improve this resource. Please contact us by:
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Abbreviations used in this resource

9. The following abbreviations are used throughout this resource.
Charter *Charter of Human Rights and Responsibilities Act 2006 (Vic)*
Commission Victorian Equal Opportunity and Human Rights Commission
Equal Opportunity Act *Equal Opportunity Act 2010 (Vic)*
1995 Act *Equal Opportunity Act 1995 (Vic)*
VCAT Victorian Civil and Administrative Tribunal (also referred to as the Tribunal)

Background

10. The Equal Opportunity Act makes it unlawful to discriminate against a person on the basis of a protected attribute listed in the Act, to sexually harass someone, or to victimise someone for speaking up about their rights, making a complaint, helping someone else make a complaint or refusing to do something that would be contrary to the Equal Opportunity Act.
11. The Equal Opportunity Act also puts in place a number of measures to help encourage the identification and elimination of discrimination, sexual harassment and victimisation, and to promote and facilitate the progressive realisation of equality.
12. To help achieve this, the Commission provides a timely and effective dispute resolution service and a number of statutory functions to encourage and facilitate best practice and compliance.
13. People can also bring a complaint about a breach of their rights to the Tribunal for determination.

Objects and purpose of the Equal Opportunity Act

14. One of the objects of the Equal Opportunity Act is to 'eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent'¹. Amendments to the Equal Opportunity Act added new objects to [section 3](#) of the Act, which include a greater focus on identifying systemic issues.
15. The objectives, or the aims, of the Equal Opportunity Act include the following:
 - a. to eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible
 - b. to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities Act
 - c. to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
 - d. to promote and facilitate the progressive realisation of equality, as far as reasonably practicable by recognising that... the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.²
16. The objectives are not merely aspirational statements. Rather, they are important tools for interpreting the Equal Opportunity Act. This is because where different interpretations are available VCAT and courts are required to interpret the legislation in a way which promotes the objectives over an interpretation which does not.³ For example, an interpretation which would help to eliminate discrimination will generally be preferred to an interpretation which would further entrench inequalities.
17. Substantive equality goes further than simply treating all people the same (which is sometimes referred to as 'formal equality'). The phrase 'substantive equality' used in [section 3\(d\)\(iii\)](#) of the Equal Opportunity Act, means achieving equal outcomes for individuals and groups of people in addition to equal opportunities. One way in which the Equal Opportunity Act seeks to promote substantive equality is by requiring duty holders to make reasonable adjustments and accommodations for persons with disabilities and parent/carer responsibilities. This helps to remove some of the structural barriers to equality.
18. By aiming for the progressive realisation of substantive equality, the Equal Opportunity Act recognises that we do not all compete on even ground and some positive steps must be taken to 'level the playing field'⁴. Another way in which the Equal Opportunity Act seeks to achieve substantive equality is through the promotion of special measures, which are discussed further in [Chapter 15](#) of this resource.

1 [Equal Opportunity Act 2010 \(Vic\) s 3\(a\)](#).

2 [Equal Opportunity Act 2010 \(Vic\) s 3](#). Refer to this section for the complete statement of objectives.

3 [Interpretation of Legislation Act 1984 \(Vic\), s 35\(a\)](#). See also [Project Blue Sky v Australian Broadcasting Authority \(1998\) 194 CLR 355, \[388\]-\[389\]](#).

4 Attorney General Robert Hulls, Second Reading Speech to the [Equal Opportunity Bill 2010 \(Vic\)](#) Hansard, Legislative Assembly, 10 March 2010, 783.

19. However, the Equal Opportunity Act recognises that substantive equality cannot be achieved immediately. According to the Explanatory Memorandum, the ‘progressive realisation’ of equality refers to the ‘gradual implementation of measures over time’ and ‘will be dependent on the capacity and resources of the duty holders’.⁵ The need to balance the ultimate aims of equality with the practical realities faced by duty holders is reflected in many ways. For example, in the factors which are relevant to deciding whether adjustments or accommodations are reasonable in all the circumstances.

Interaction with other legislation

20. The Equal Opportunity Act operates alongside federal anti-discrimination legislation, including the *Australian Human Rights Commission Act 1986 (Cth)*, *Age Discrimination Act 2004 (Cth)*, *Disability Discrimination Act 1992 (Cth)*, *Racial Discrimination Act 1975 (Cth)*, *Sex Discrimination Act 1984 (Cth)* and the *Fair Work Act 2009 (Cth)*.⁶
21. This means that people – such as employers, educators, service providers, clubs, sporting bodies and local governments – must avoid breaching their obligations under the laws at both the Commonwealth and Victorian levels. Generally speaking, however, a person claiming discrimination must select one jurisdiction in which to bring the claim. For example, the Commission may decline to provide dispute resolution services if the person has already initiated proceedings in another forum, or if the complaint has already been, or would more appropriately be, dealt with by another court or tribunal. A person is also barred from bringing a complaint under federal anti-discrimination legislation if they have already made a complaint or commenced proceedings under state law.⁷

22. In Victoria, the Equal Opportunity Act also operates alongside the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter) and the *Racial and Religious Tolerance Act 2001 (Vic)* (RRTA). The Charter provides human rights protections for people in Victoria, including protecting the right to equality.⁸ The RRTA promotes racial and religious tolerance in Victoria, by prohibiting acts which constitute racial and religious vilification, and provides an avenue of redress for the victims of such vilification.

Interaction with the Charter

23. The Charter interacts with the Equal Opportunity Act in a number of ways. First, under [section 38](#) of the Charter, ‘public authorities’⁹ must not act in a way that is incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human rights. This means that if a public authority unlawfully discriminates against a person in breach of the Equal Opportunity Act, the conduct may also constitute a breach of the right to equality under the Charter. Importantly, the Victorian Civil and Administrative Tribunal (VCAT) operates as a ‘public authority’ when carrying out certain administrative functions under the Equal Opportunity Act, including granting temporary exemptions from unlawful discrimination. In those circumstances VCAT must also consider and comply with Charter rights. Therefore, VCAT must consider its obligations under the Equal Opportunity Act in the context of the human rights protected by the Charter.

5 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 4.

6 Note that on 19 November 2012 the Federal Government released an exposure draft of the *Human Rights and Anti-Discrimination Bill* which would consolidate federal anti-discrimination legislation (except the provisions contained in the Fair Work Act 2009).

7 For example, [Racial Discrimination Act 1975 \(Cth\) s 6A](#); [Sex Discrimination Act 1984 \(Cth\) s 10](#); [Disability Discrimination Act 1992 \(Cth\) s 13](#); [Age Discrimination Act 2004 \(Cth\) s 12](#).

8 [Charter of Human Rights and Responsibilities Act 2006 \(Vic\) s 8](#).

9 ‘Public authority’ is defined in [s 4\(2\)\(j\)](#) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. For further consideration about the obligations of public authorities under the Charter, see [Lifestyle Communities Ltd \(No 3\) \[2009\] VCAT 1869](#), [33]-[46].

24. [Section 32](#) of the Charter also requires Victorian legislation to be interpreted consistently with human rights, 'so far as it is possible to do so consistently with their purpose'.¹⁰ Therefore, VCAT and the courts need to look at human rights when they are interpreting laws, including the Equal Opportunity Act. VCAT and the courts may look to international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right for guidance when interpreting a provision. In other words, [section 32\(1\)](#) of the Charter provides a 'statutory directive' that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes Charter rights'.¹¹

Interaction with the RRTA

25. While this resource does not cover the RRTA, it is worth noting that conduct that constitutes unlawful discrimination under the Equal Opportunity Act, may also constitute racial or religious vilification under the RRTA.

What is unlawful discrimination?

26. Unlawful discrimination includes both 'direct' and 'indirect' discrimination, which are explored in [Chapter Two](#) of this resource.
27. In addition, there are a number of stand-alone provisions which constitute unlawful discrimination. Those are:
- an unreasonable refusal to accommodate a person's responsibilities as a parent or carer in work-related contexts (see [Chapter Six](#) of this resource)
 - a failure to make reasonable adjustments for a person with a disability in employment or in the provision of goods and services (see [Chapter Five](#) of this resource)
 - a failure to allow reasonable alterations to accommodation to meet the special needs of a person with a disability (see [Chapter Four](#) of this resource)

- refusing to provide accommodation to a person with a disability because he or she has an assistance dog (including requiring the person to pay an extra charge or keep the assistance dog elsewhere) (see [Chapter Seven](#) of this resource).

28. If a complaint is brought under one of these stand-alone provisions, the complainant does not need to establish that the conduct constitutes 'direct' or 'indirect' discrimination.

In what areas of life is discrimination unlawful?

29. The Equal Opportunity Act prohibits unlawful discrimination which occurs in specified areas of public life. The Equal Opportunity Act does not seek to operate in respect of purely private activities of private citizens. The division between private and public will be explored further in this resource. In essence, the Equal Opportunity Act prohibits unlawful discrimination in the following areas of activity:
- employment and related areas – which include partnerships, industrial organisations, employment agencies and qualifying bodies (including contracting and pre-employment)
 - education
 - the provision of goods and services and the disposition of land
 - the provision of accommodation
 - clubs
 - sport
 - local government.
30. Even within these areas of activity, not all discrimination will be unlawful. It is only where that discrimination occurs on the basis of a protected attribute (and provided that no exemption or exception applies) that the conduct will be unlawful.

¹⁰ [Ibid s 32](#).

¹¹ [Ibid s 32\(1\)](#).

What attributes are protected?

31. The Equal Opportunity Act prohibits discrimination on any of the following grounds:
- age
 - breastfeeding
 - employment activity
 - gender identity
 - disability
 - industrial activity
 - lawful sexual activity
 - marital status
 - parental status or status as a carer
 - physical features
 - political belief or activity
 - pregnancy
 - race
 - religious belief or activity
 - sex
 - sexual orientation
32. The Equal Opportunity Act also prohibits discrimination against a person because of a personal association they have to a person with any of the attributes identified above.¹² [Chapter Three](#) of this resource explores the protected attributes in more detail.

What other protections are afforded by the Equal Opportunity Act?

33. In addition to prohibitions against discrimination, the Equal Opportunity Act expressly prohibits sexual harassment and victimisation. It also imposes positive obligations on affected persons to take steps to eliminate unlawful discrimination, sexual harassment and victimisation.
34. Where a person has an obligation not to unlawfully discriminate, then [section 15\(2\)](#) imposes a positive duty upon that person to avoid engaging in discriminatory conduct and, as far as possible, to take reasonable and proportionate steps to eliminate unlawful discrimination, sexual harassment or victimisation. [Section 15\(6\)](#) provides some guidance on the question of what constitutes reasonable and proportionate measures. This positive obligation was newly introduced under the Equal Opportunity Act. A person cannot bring an individual complaint or dispute in relation to a breach of [section 15\(2\)](#), although the Commission has the powers to investigate compliance with the positive duty.¹³

12 [Equal Opportunity Act 2010 \(Vic\) s 7\(2\)](#).

13 [Ibid ss 15\(3\)-\(4\)](#).

Chapter 2

> Types of discrimination

35. Unlawful discrimination includes both 'direct' and 'indirect' discrimination on the basis of a protected attribute. The tests for direct and indirect discrimination are general tests which may apply to any circumstances of discrimination covered by the Equal Opportunity Act.

Direct discrimination

Overview

36. Direct discrimination occurs when a person treats, or proposes to treat, someone with a protected attribute unfavourably because of that attribute. [Section 8](#) of the Equal Opportunity Act defines direct discrimination as follows:

(1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

Examples

(1) An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age.

(2) A real estate agent refuses an African man's application for a lease. The real estate agent tells the man that the landlord would prefer an Australian tenant. The real estate agent has discriminated against the man by denying him accommodation on the basis of his race.

In determining whether a person directly discriminates it is irrelevant –

- whether or not that person is aware of the discrimination or considers the treatment to be unfavourable

- whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.¹⁴

Changes to direct discrimination

37. The 'unfavourable treatment' test for direct discrimination under the Equal Opportunity Act differs from the test under the 1995 Act and most formulations of direct discrimination under other state and federal anti-discrimination legislation. The more traditional formulation of the test for discrimination is that contained, for example, in [section 5\(1\)](#) of the *Sex Discrimination Act 1984*, where a person needs to be treated 'less favourably' than someone without the protected attribute.
38. The test in the Equal Opportunity Act does not require a comparison between the way the complainant was treated (or proposed to be treated) and the way in which another person, without the protected attribute or with a different attribute, would be treated in 'the same or similar circumstances' or 'in circumstances that are the same or are not materially different'. This more traditional formulation confirms what, in discrimination law, is referred to as the 'comparator test'.
39. Parliament's stated intention in making this shift away from the 'comparator test' was to simplify the definition by avoiding the unnecessary technicalities that often accompany the identification of an appropriate comparator.¹⁵

¹⁴ [Equal Opportunity Act 2010 \(Vic\) s 8](#).

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 786 (Rob Hulls, Attorney-General).

Comparative direct discrimination tests in ACT and SA

40. Section 8(1)(a) of the Australian Capital Territory's *Discrimination Act 1991* (ACT Act) contains a substantially similar test to the Equal Opportunity Act. Like the Equal Opportunity Act, it also states that discrimination occurs in circumstances where a person 'treats or proposes to treat the other person unfavourably because the other person has an attribute' that is protected by law.¹⁶ The absence of the comparator test in ACT anti-discrimination law was discussed in the case of *Prezzi v Discrimination Commissioner & Anor* (*Prezzi*),¹⁷ in which the ACT Tribunal, after noting the difference between the usual comparator test and the terms of the ACT Act, said at paragraph 20:
- Section 8 of the Discrimination Act by way of contrast defines 'discrimination' in a way which does not involve any concept of differentiation or distinction in the consequences of the impugned treatment as between persons with different characteristics or attributes.¹⁸
41. It appears that this definition is modelled on that in the *Equal Opportunity Act 1984 (SA)*. The South Australian Act, however, includes a definition of unfavourable treatment which includes the concept of comparative treatment. Section 6(3) of that Act provides:
- For the purposes of this Act a person ('the discriminator') treats another unfavourably on the basis of a particular attribute or circumstances if the discriminator treats that other person less favourably than in identical or similar circumstances the discriminator treats or would treat, a person who does not have that attribute or is not affected by that circumstance.¹⁹
42. The Equal Opportunity Act and ACT Act do not invite a comparison between the way in which a person who has a particular attribute is treated, compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded to the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person of the treatment is unfavourable to that person, or the conditions imposed or proposed would disadvantage that person, there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person.
43. While the term 'disadvantage' might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent. The primary meaning of 'advantage' does not import comparison. The Equal Opportunity Act and ACT Act are therefore about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess.
44. In Victoria, it is therefore unnecessary to inquire whether a complainant with a particular attribute has been dealt with less favourably because of that attribute when compared with persons without that attribute. All that is required is to determine whether the consequences of dealing with the complainant are favourable to the complainant's interests or are adverse to the complainant's interest, and whether the dealing has occurred because of a relevant attribute of the complainant.

16 *Discrimination Act 1991* (ACT) s 8(1)(a).

17 (1996) 39 ALD 729.

18 *Ibid* [20].

19 *Equal Opportunity Act 1984 (SA)* s 6(3).

Meaning of 'unfavourable' treatment

45. The Equal Opportunity Act does not define 'unfavourable treatment'. For the reasons set out above, it is unlikely that the concept of 'unfavourable' will itself import a comparison. Rather the question will be whether the treatment is unfavourable to the complainant. In *Prezzi v Discrimination Commissioner & Anor* (Prezzi),²⁰ the ACT Tribunal gave this term its ordinary meaning. 'Unfavourable' is defined in the Macquarie Dictionary to mean 'not favourable, not propitious, disadvantageous, adverse'.²¹
46. Unfavourable treatment is likely to occur where the consequences of the treatment complained of are – or would be – unfavourable to the complainant.²² Treatment may also be 'unfavourable' if a person is singled-out, or treated differently, because of a particular attribute.²³
47. Treatment which is likely to constitute 'unfavourable' treatment in employment, for example, include (this is not an exhaustive list):
- unlawful bullying or harassment
 - being denied or refused a benefit that is made available to others
 - being provided a benefit on unfavourable terms (for example, less pay or greater inconvenience)
 - unfair allocation of tasks (too many tasks or an unfair share of unpleasant tasks)
 - unfair rostering (including the allocation of leave and overtime)
 - exclusion from essential communications
 - being refused essential resources needed to do the job
 - being subjected to humiliation.
48. On the question of the difference between a 'less favourable treatment' test on the one hand and an 'unfavourable' treatment test on the other, the Tribunal in *Prezzi* said:

[...] it is clear that under the like legislation in other Australian jurisdictions different but less favourable treatment on the grounds of a certain attribute is sufficient to establish discriminatory conduct whatever the consequences for the complainant of the different conduct. Differential treatment is at the heart of the issue in those jurisdictions. Under the Discrimination Act the issue is whether the consequences of the acts complained of are unfavourable to the complainant. In most cases, the results of the two inquiries will be the same. But it is possible that the Discrimination Act test may require a different result in some special cases, where comparatively unfavourable treatment, viewed against the treatment accorded a person without the relevant attribute, does not produce an ultimately unfavourable result for the complainant. The present case may be one of those special cases.²⁴

49. This approach to the definition of direct discrimination was reinforced in the decision of *Lewin v ACT Health & Community Care Services*²⁵ in which the ACT Tribunal made the following comment:

Unlike other discrimination legislation in Australia section 8 of the Act does not involve the making of a comparison between the way in which a person who has a particular attribute is treated compared to a person without the attribute or with a different attribute. Section 8 requires our examination of the treatment accorded the aggrieved person or the conditions on which the aggrieved person is or is proposed to be treated. If the consequence for the complainant is unfavourable or if the conditions imposed would disadvantage the person there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by that person (Prezzi). The test to be applied and the Act gives greater breadth of coverage to that required to be applied in other jurisdictions.²⁶

20 [1996] ACTAAT 132; (1996) 39 ALD 729.

21 *The Macquarie Dictionary* (5th ed, 2009).

22 [1996] ACTAAT 132; (1996) 39 ALD 729.

23 See, for example, *NC and Others v. Queensland Corrective Services Commission* [1997] QADT 22.

24 [1996] ACTAAT 132, [25].

25 [2002] ACTDT 2 93-201, [47].

26 *Ibid* [41].

50. *Prezzi* has been referred to positively in [Edgley v Federal Capital Press of Australia](#)²⁷ at paragraphs 53 and 54, where the Federal Court of Australia Full Court said:

Uninstructed by authority, and reading the provisions of section 8 literally, but as a whole, it would appear that the legislative intended to focus attention upon the following two quite different situations.

First where a person is treated unfavourably. ... Again, as noted in *Prezzi*, above, the adverb 'unfavourably' appears to have its ordinary meaning. The dictionary definition of the adjective 'unfavourable' include 'adverse' and this seems appropriate here. In other words section 8(1)(a) is directed at adverse behaviour towards a person because of an attribute. I emphasise that the conduct must be aimed at, or towards, the person complaining of discrimination.²⁸

Humiliation as unfavourable treatment

51. Humiliation is not defined in the Equal Opportunity Act and its definition has not been the subject of significant Victorian case law. However, the issue of what conduct may constitute humiliation for the purposes of it constituting a 'detriment' for the purposes of discrimination was considered in [Walgama v Toyota Motor Corporation Australia Ltd.](#)²⁹
52. In that case, Mr Walgama made a complaint of discrimination against his employer Toyota, including on the grounds of race because he alleged he had been subjected to racial abuse by his colleagues. In particular, Mr Walgama had been preparing a roster which had been defaced with offensive racial language ('black c**t'). The Tribunal considered that the defacement of the roster constituted a 'denigration' of Mr Walgama, but did not constitute 'humiliation'.
53. In coming to its decision, the Tribunal considered the Oxford English Dictionary definition of humiliation, namely '[t]he action of humiliating or condition of being humiliated; humbling, abasement formerly often equal humbled or humbled condition, humility', as well as the meaning of the word 'humiliate': '[t]o make low or humble imposition, condition, or feeling; to humble. Refl to humble or abase oneself, to stoop, sometimes to prostrate oneself, to bow.'³⁰
54. The Tribunal concluded that given there was no evidence that the defaced document was shown to anyone other than Mr Walgama and those to whom he complained, it was 'difficult to see that in the circumstances he has been humiliated.'³¹ Note: this reasoning only applied to 'humiliation' and did not consider whether acts that contributed to a hostile working environment could amount to unlawful discrimination and a detriment in other ways, such as harassment.
55. The Tribunal took a similar view in [Poulter v State of Victoria](#), involving a complaint of victimisation in employment. In this case, the complainant's former employer had contacted his current employer to advise them he had been seen at the Tribunal in relation to a complaint made about them. The Tribunal found that although the conduct by the former employer was improper, the complainant's subjective perception of the situation, with nothing more, was not sufficient to comprise humiliation, and therefore detriment, under the Equal Opportunity Act.³²
56. However, in [Laverdure v Jayco Caravan \(Recreational Industries\) Pty Ltd & Anor](#), the Tribunal found that humiliation had occurred as a result of racist comments made to the complainant in the workplace. In particular, humiliation was found to have occurred in a situation where:

The language used, the circumstances of its use and the tone observed by independent witnesses were such as to attract to this conduct all the hallmarks of racial abuse, designed to cause humiliation and denigration of the Complainant.³³

27 [\[2001\] FCA 379](#).

28 [Ibid](#) [53]-[54].

29 [\[2007\] VCAT 1318](#).

30 [Ibid](#) [51]-[52].

31 [Ibid](#) [53].

32 [\[2000\] VCAT 1088](#), [21].

33 [\[2001\] VCAT 1706](#), [7].

57. The language used included calling the complainant 'black prick' and 'black bastard', and telling the complainant to go back to his place of birth, in an abusive and derogatory tone. The circumstances involved the comments being made in the workplace, not in a joking manner, and not as part of workplace banter, where work colleagues could overhear/witness the abuse.

Treatment 'because of' a protected attribute.

58. In order to establish direct discrimination, it is necessary to establish a causal connection between the treatment complained of and the protected attribute. Direct discrimination only occurs where the unfavourable treatment occurred 'because' of a person's protected attribute. In discrimination law this is sometimes referred to as 'causation'.

59. Of course, it is not uncommon for the discriminatory conduct to be based on multiple reasons. The Equal Opportunity Act provides that, in order to establish direct discrimination, the protected attribute must be a 'substantial' reason for the treatment, but it does not have to be the 'only' or 'dominant' reason.³⁴

60. This was discussed in *Stern v Depilation & Skincare Pty Ltd*,³⁵ where Deputy President McKenzie said:

The attribute need not be the only or dominant reason for the treatment, but must be a substantial reason for it. This means that the attribute must be a reason of substance for that conduct. The motive of the discriminator is irrelevant, and it is also irrelevant whether the discriminator was aware of the discrimination or considered the treatment less favourable. (emphasis added)³⁶

61. In that case, the Tribunal held that Ms Stern's pregnancy was a 'substantial reason' for her redundancy. The Tribunal found that, although the 'dominant reason' for the redundancy was a downturn in business, the factor which 'actuated the minds' of the decision-makers who selected Ms Stern for redundancy was the fact that she was a part-time employee working reduced hours. The only reason Ms Stern was working those hours was because she was pregnant. Pregnancy was, therefore, a substantial reason for the conduct.³⁷

34 *Equal Opportunity Act 2010 (Vic) s 8(2)(b)*.
 35 [2009] VCAT 2725.
 36 Ibid [8].
 37 Ibid [67].

Is knowledge of a protected attribute relevant to direct discrimination?

62. Knowledge of the complainant's protected attribute is relevant to the question of whether the treatment was 'because of' that protected attribute.
63. For example, in *Tate v Rafin*³⁸ (*Rafin*) the respondent revoked the applicant's membership of a club following a dispute. The applicant claimed that the reasons for the revocation of his membership included his psychological disability, which manifested itself in aggressive behaviour. In this case, the respondent was unaware of the applicant's disability. Wilcox J found that the respondent had not treated Mr Tate less favourably because of his psychological disability:

The psychological disability may have caused Mr Tate to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability.³⁹

64. Wilcox J's reasoning in *Rafin* is consistent with the decision of the Full Federal Court in *Forbes v Australian Federal Police (Commonwealth)* (*Forbes*).⁴⁰ In that case, the Court accepted that the respondent had withheld information about the applicant's medical condition on the ground that it considered that she did not have a disability and that this did not amount to discrimination 'because of' a disability.⁴¹
65. Nonetheless, in order to succeed in this type of defence, it is likely that a respondent will need to have a plausible and legitimate basis for claiming that it had no knowledge of the particular attribute.⁴²

38 [2000] FCA 1582.
 39 Ibid [67].
 40 [2004] FCAFC 95.
 41 Ibid [71]-[73], [76].
 42 See, Australian Human Rights Commission, *Federal Discrimination Law 2011*, ch 5, 17.

66. In *Forbes*, there was evidence that Ms Forbes had lodged a claim for a depressive illness with Comcare which had been rejected (including on review). An internal investigation process and review had also found that Ms Forbes' allegations in relation to a workplace incident which, she said, had caused her illness, were unsubstantiated. On those bases, the respondent had formed the view that the applicant did not have a disability.
67. The question of the respondent's knowledge, however, is not always a straightforward one. The case of *Wiggins v Department of Defence*⁴³ (*Wiggins*) demonstrates that, where something about the complainant's protected attribute is known by a respondent organisation, that knowledge may be imputed to individuals who engage in discriminatory conduct. In *Wiggins*, an officer of the respondent demoted the applicant in circumstances where the officer had only general knowledge of the applicant's disability. The officer knew only that the applicant had a medical condition confining her to on-shore duties, although he had no specific knowledge of the applicant's disability. Despite the officer in question not having specific knowledge about the applicant's disability, McInnis FM deemed the officer to have known the nature and extent of the applicant's disability as he could have accessed her medical records if he wanted to. This was sufficient to 'establish knowledge in the mind of' the Navy.⁴⁴ His Honour stated:

I reject the submission of the Respondent that the Navy does not replace Mr Jager as the actual decision-maker in the context or that the maintenance of information in a file does not equate to operational or practical use in the hands of the discriminator. In my view that is an artificial distinction which should not be permitted in discrimination under human rights legislation. To do so would effectively provide immunity to employers who could simply regard all confidential information not disclosed to supervisors as then providing a basis upon which it could be denied that employees as discriminators would not be liable and hence liability would be avoided by the employer.⁴⁵

43 [2006] FMCA 800; (2006) 200 FLR 438.

44 *Ibid.*, [168].

45 *Ibid.*

68. This decision suggests that, where information about a person's protected attributes is known within a respondent organisation, the respondent cannot rely on its own failure to communicate in order to avoid liability for discrimination, even where the information is of a confidential or sensitive nature.

Inferring a reason for the treatment

69. It is often the case in discrimination claims that the reason for the treatment – the causation element – is not explicit or overt. Therefore, in order to make a finding that discriminatory conduct occurred because of a person's protected attribute, courts and tribunals often need to draw an inference about the reason for the treatment from the surrounding facts and evidence.
70. When inferring a discriminatory reason for certain conduct, the court or tribunal must be satisfied that there is no 'equally or more probable explanation of the conduct'.⁴⁶ This does not mean the court or tribunal is required to accept the innocent explanations proffered by the respondent in all circumstances.⁴⁷ Rather, if an innocent explanation is equally or more probable on the basis of the evidence and circumstances, an inference of unlawful discrimination cannot be drawn.⁴⁸
71. In *Department of Health v Arumugam*⁴⁹ (*Arumugam*), Fullagar J said it was not open to a tribunal to draw the inference that the applicant, Dr Arumugam, was not selected for the position of Psychiatrist Superintendent because of his race simply because another less qualified candidate was ultimately selected. Fullagar J said:

The mere fact that the appointment did not go to the man whom the Board considered to be clearly the better qualified candidate, did not of itself 'indicate discrimination of some kind'.⁵⁰

46 *Packer v Neal* [1997] VADT 52; citing *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.

47 See, for example, *Poniatowska v Hickinbotham* [2009] FCA 680; *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.

48 *State of Victoria & Ors v McKenna* [1999] VSC 310 [40] citing *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.

49 [1988] VR 319.

50 *Ibid.* 325.

72. His Honour went on to say:
- If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required. It can enable already available inference to be drawn against dishonest explainers with greater certainty, but that is all. In the present case ‘the ground of race’ was, in the absence of explanation clearly lacking, and the non acceptance of this proffered explanation could not provide the missing elements.⁵¹
73. Note however that in *Arumugam*, Fullagar J held that it was necessary to show intention to make out a case of direct discrimination. This was subsequently negated by the High Court in *Waters v Public Transport Corporation (1992)*,⁵² and then by section 10 of the Equal Opportunity Act, which provides that motive is irrelevant.
74. A different conclusion to *Arumugam* was reached in *Oyekanmi v National Forge Operations Pty Ltd*.⁵³ In that case, the Tribunal considered a complaint by Mr Oyekanmi, an engineer originally from Nigeria, who claimed that he was dismissed from employment because of his race. The Tribunal inferred that the reason for Mr Oyekanmi’s dismissal was racially based. Relevantly, Mr Oyekanmi was asked during an employment interview whether he anticipated that he would have any problems working in an organisation that was ‘all white’. The chairman of the company also gave evidence that it was crucial for Mr Oyekanmi to have ‘credibility’ with his colleagues, including being able to strike up working relationships and be accepted by his workmates.⁵⁴ The Tribunal rejected the argument that the credibility requirement was racially neutral. Instead, it held that the credibility requirement was applied to Mr Oyekanmi because of a perception that others in the workforce might not accept him due to his race. Hence, the Tribunal found that the reason for the dismissal – the failure to satisfy the credibility requirement – was because of Mr Oyekanmi’s race.⁵⁵
75. Smith J considered these decisions, especially the findings in *Arumugam*, in the later case of *State of Victoria & Ors v McKenna*⁵⁶ (*McKenna*). In his reasons, Smith J cautioned that Fullagar J’s comments in *Arumugam* ought to be understood in the context of the facts of that particular case. He pointed out that, in *Arumugam*, the selection panel had proffered an alternative, innocent explanation. Namely, that the candidate appointed to the position was better suited to the role because he was more dynamic and articulate, albeit lesser qualified than Dr Arumugam.
76. Smith J went on to say that, in discrimination complaints, the person’s attribute, as well as societal prejudices and attitudes towards persons with that attribute, are relevant to drawing inferences. For example, the existence of racist attitudes and stereotypes within a community or organisation may leave open an inference of racial discrimination. It is then a matter for the court or tribunal to decide whether an innocent reason is equally or more probable than the proscribed reason. According to Smith J, a finding of discrimination would have been open in *Arumugam* ‘if, on the evidence, it was open to the Board to find that no selection Board acting reasonably could have preferred [the other applicant] to Dr Arumugam’.
77. Smith J applied these principles in *McKenna*, holding that it was appropriate for the Tribunal to infer that a police officer, Crossley, had disclosed the personal address of one of his colleagues, the complainant, to her ex-partner because of the complainant’s sex. Crossley had told the Tribunal that he would have disclosed the personal address of any colleague in similar circumstances, regardless of whether the colleague was a man or woman. However, Smith J agreed that it was open to the Tribunal to reject that evidence and, instead, infer that the reason for the conduct was a discriminatory one, particularly given the surrounding evidence about a sexist culture within the workplace and particularly the sexist attitude of Crossley. In those circumstances, ‘it was open to the Tribunal to conclude that Crossley was reacting again in a sexist manner to aggression on the part of a woman’.⁵⁷

51 Ibid 330.

52 (1992) 173 CLR 349.

53 [1995] VADT 3.

54 Ibid [78].

55 See, Jonathan Hunyor, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’, 25(4) *Sydney Law Review* 535.

56 [1999] VSC 310.

57 Ibid [97].

Motive and intention not relevant

78. Under the Equal Opportunity Act, it does not matter whether the respondent was aware of the discrimination, or whether he or she intended to breach the law. Unlawful discrimination may be unintentional. In other words, the relevant question is, what was the 'true basis' for the conduct, putting the respondent's intention aside?⁵⁸
79. [Section 8\(2\)\(a\)](#) of the Equal Opportunity Act states that, in determining whether a person directly discriminates against another, it is not relevant whether that person – the discriminator – is aware of the discrimination or considers the treatment to be unfavourable.⁵⁹
80. [Section 10](#) of the Equal Opportunity Act also clarifies that 'in determining whether or not a person discriminates, the person's motive is irrelevant'.⁶⁰ For example, an employer who refuses to employ a candidate because she is Aboriginal, not because the employer dislikes Aboriginal people, but because the employer thinks that an Aboriginal person working in the job would be given a hard time by other employees, who are prejudiced towards Aboriginal people, still discriminates against that candidate.⁶¹

Indirect discrimination

Overview

81. Legal protections against indirect discrimination recognise that treating all people the same, regardless of difference, may unfairly disadvantage some people or groups of people. Indirect discrimination is often subtler and may be more difficult to recognise than direct discrimination.
82. Under the Equal Opportunity Act, indirect discrimination occurs when an unreasonable requirement, condition or practice – which may appear to treat people equally – has the effect of disadvantaging, or potentially disadvantaging, a group of people with a particular protected attribute.

83. [Section 9](#) of the Equal Opportunity Act defines 'indirect discrimination' as follows.

(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice –

(a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and

(b) that is not reasonable.

(2) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.

(3) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following –

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;

(b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;

(c) the cost of any alternative requirement, condition or practice;

(d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;

(e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.

(4) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.

58 See, for example, [Australian Iron and Steel v Banovic \[1989\] HCA 56](#); (1989); 168 CLR 165; (1989) 89 ALR 1 [9] (Gaudron and Dean JJ); See also [Waters v Public Transport Corporation \[1991\] HCA 49](#); (1992) 173 CLR 349 (Mason CJ, Gaudron and Dean JJ).

59 [Equal Opportunity Act 2010 \(Vic\) s 8\(2\)\(a\)](#).

60 [Ibid s 10](#).

61 [Explanatory Memorandum, Equal Opportunity Bill 2010 \(Vic\) 14](#).

Examples

(1) A store requires customers to produce photographic identification in the form of a driver's licence before collecting an order. This may disadvantage a person with a visual disability who is not eligible to hold a driver's licence. The store's requirement may not be reasonable if the person with a visual disability can provide an alternative form of photographic identification.

(2) An advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may disadvantage a person on the basis of his or her race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.⁶²

Changes to indirect discrimination

84. This test for indirect discrimination in the Equal Opportunity Act differs in a number of respects from the test which applied under the previous 1995 Act.
85. For example, under the 1995 Act, the complainant had to demonstrate that he or she could not comply with the relevant requirement, condition or practice, and that a substantially higher proportion of people without the particular attribute could comply. In contrast, the Equal Opportunity Act simply requires the complainant to establish that the requirement, condition or practice causes, or is likely to cause, 'disadvantage' to people with the particular attribute. Therefore, it is not necessary to draw comparisons between people with and without the attribute.
86. Another point of difference between the 1995 Act and the current Equal Opportunity Act, is that the respondent now has the burden of proving that a defence applies to a complaint of indirect discrimination. Under the Equal Opportunity Act, the complainant has to prove the circumstances giving rise to the claim, namely the requirement, condition or practice which caused them to suffer disadvantage. However, the respondent then has the burden of proving that requirement, condition or practice is reasonable. This reflects the fact that the respondent is usually better placed to justify and provide evidence about the reasons why the condition, requirement or practice

was imposed. The current Equal Opportunity Act also provides further guidance about the factors to be considered in deciding whether a requirement, condition or practice is reasonable.

The meaning of 'requirement, condition or practice'

87. To satisfy the test for indirect discrimination, there must be a 'requirement, condition or practice' on which the complaint is based. It is up to the complainant to formulate, with sufficient precision, the requirement, condition or practice complained of.⁶³
88. The Equal Opportunity Act does not define the terms 'requirement', 'condition' or 'practice'. However, in relation to similar provisions in anti-discrimination laws, courts have said that these elements should be interpreted in a broad rather than technical manner, for example, to encompass 'any form of qualification or prerequisite demanded'.⁶⁴
89. Nonetheless, the Tribunal is not bound by the complainant's formulation of the requirement, condition or practice. Rather, the Tribunal must ascertain the true factual position as to the formulation and existence of a requirement, condition or practice. It may decide that the requirement, condition or practice complained of did not exist, or that a different one applied, based on all the facts and circumstances.⁶⁵

63 See also *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56 [10]; (1989) 168 CLR 165; *Siewwright v State of Victoria* [2012] FCA 118.

64 *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56 [10]; (1989) 168 CLR 165, 185 (Dawson J), cited with approval by the High Court in *Waters v Public Transport Corporation* [1991] HCA 49; (1992) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J). Also see *State of New South Wales v Amery* [2006] HCA 14 [63] (Gummow, Hayne and Crenna JJ).

65 *State of New South Wales v Amery* [2006] HCA 14 [208] Callinan J; *McDougall v Kimberly-Clark Australia Pty Ltd* [2006] VCAT 2211 (10 November 2006) [35] Davis J citing *Amery*. See also *Gounder v Allmand* [2007] VCAT 1898 [87]

62 *Equal Opportunity Act 2010* (Vic) s 9.

90. For example, in *State of New South Wales v Amery*,⁶⁶ a group of female teachers brought an indirect discrimination complaint on the basis of sex. They argued that their employment was subject to a condition that in order to access higher salary scales, they were required to obtain permanent status.⁶⁷ All the complainants were supply casuals as their family responsibilities meant they could not be deployed around the state in the same way as permanent teachers. They argued that, as women with family responsibilities they could not comply with the condition, but a substantially higher proportion of men could comply.
91. In upholding the State's appeal, the majority of the High Court determined that there had been no indirect discrimination. Justices Gummow, Hayne and Crennan held that the phrase 'requirement or condition' must be given a broad meaning rather than a technical one, given 'the nature of the mischief'.⁶⁸
92. However, despite a broad interpretation of the phrase, their honours found the alleged condition had not been imposed on the teachers' employment with the state because they had been specifically employed as 'casual teachers' under a statutory scheme, rather than employed as 'teachers' more broadly. The High Court considered this to be a material distinction between the positions and their terms of employment. Moreover, the structure of employing permanent and casual teachers as distinct roles with separate pay scales was not one adopted by the state or created by decision of the state as employer as a condition placed on the teachers' employment. Rather, this structure was imposed on the state by statute and industrial award.⁶⁹
93. The requirement, condition or practice does not need to be explicit. It may be implied from the circumstances. For example, in *Waters & Ors v Public Transport Corporation*, the High Court said that the removal of conductors from trams gave rise to a requirement or condition that tram travellers be able to use the system without the help of conductors.⁷⁰ In *Catholic Education Office v Clarke*, the Full Court of the Federal Court of Australia stated that the expression 'requirement or condition should be construed broadly to include any form of qualification or pre-requisite, although the actual requirement or condition should be formulated with some precision'.⁷¹ The Court went on to say, '...the legislation should be given a generous interpretation and alleged discrimination should not be permitted to evade the statutory definition...by defining its services so as to incorporate the alleged requirement or condition'.
94. Case law also suggests that the 'requirement or condition' does not need to be absolute in order to support a claim of indirect discrimination. For example, a preference which has a practical, rather than theoretical impact may constitute a requirement or condition. Therefore, in *Secretary, Department of Foreign Affairs and Trade v Styles & Anor*⁷², the Full Court of the Federal Court of Australia held that the employer's 'preference' for a candidate employed at a particular grade (within the public sector classification scale) constituted a 'condition or requirement', notwithstanding the fact that candidates from lower grades were still invited to apply for a role. In that case, the Court said, '[we] agree with the learned primary judge that something falling short of an absolute bar to selection may be a "requirement or condition"'.⁷³

66 [2006] HCA 14.

67 Ibid [17] per Gleeson CJ.

68 Ibid [63] per Gummow, Hayne, Crennan JJ.

69 Ibid [78]-[82] Their Honours did not go on to consider whether the conduct was reasonable, but Gleeson CJ, Callinan and Heydon JJ did, and found the conduct was reasonable in the circumstances. Kirby J dissented.

70 [1991] HCA 49; (1992) 173 CLR 349 (Mason CJ, Gaudron (Deane J agreeing) Dawson and Toohey JJ).

71 [2004] FCAFC 197, 86 [103].

72 [1989] FCA 342; (1989) 88 ALR 621.

73 Ibid [26] (Bowen CJ and Gummow J).

95. Some examples of requirements, conditions or practices that have been found to exist in recent Victorian cases include: the requirement for security guards to wear a particular firearm holster at work;⁷⁴ the requirement for passengers to be able to sit safely in an economy-sized seat in order to be guaranteed air travel in economy class;⁷⁵ a rule that a doctoral candidate at university take no more than 12 months' break from study;⁷⁶ and a requirement that moviegoers access cinemas by stairs only.⁷⁷

Essential terms of an employment contract

96. In the employment context, case law under the 1995 Act suggests that in order to support a claim of indirect discrimination the requirement, condition or practice must be something more than an essential term of the employment contract. Something which is inherent to the 'nature of the job itself' cannot support a claim of indirect discrimination.⁷⁸ These principles were applied in *McDougall v Kimberly-Clark Australia Pty Ltd*,⁷⁹ in which the Tribunal held:

On the authorities, the complainant must identify a requirement or condition which is separate from the terms of her employment contract or from the nature of the job itself... The relevant requirement or condition must apply not just to the complainant but to all the relevant persons, in this case all the employees of the company.⁸⁰

97. In that case, the Tribunal held that a requirement for the complainant to work in Victoria was not a 'requirement, condition or practice' capable of supporting a claim of indirect discrimination. That was because Ms McDougall had accepted a sales role based in Victoria. She then voluntarily relocated to Perth where she sought help for her gambling problem. Subsequently, she told the company that she could not work in Victoria. The Tribunal found as follows:

It cannot be said that the fact that her duties involve working in Victoria constitutes the imposition of a discriminatory requirement or condition... In this context, the company was not imposing any requirement on her; rather, she was in effect seeking to vary her terms of employment so that the location of her employment was Western Australia rather than Victoria.⁸¹

98. In support of this reasoning in *McDougall*, Vice President Judge Davies relied on *State of Victoria v Schou (No 2)* (*Schou No 2*)⁸² (also discussed at [paragraph 99](#) below). Relevantly in *Schou No 2*, the applicant (a sub-editor of the Hansard reports) claimed that she had been indirectly discriminated against, because an unreasonable requirement or condition had been placed on her employment that she attend work full time at Parliament on house-sitting days. Ms Schou said that unlike her colleagues, she could not comply with this condition because of her status as a carer and parent. At first instance the Tribunal upheld Ms Schou's complaint, but on appeal to the Court of Appeal her complaint was rejected.
99. The key question on appeal in *Schou No 2* was whether the requirement as formulated was reasonable in all the circumstances. Phillips JA held that it was reasonable, noting it seemed 'almost inconceivable that the attendance requirement for sub-editors to attend the house on sitting days should be regarded as not reasonable.'⁸³ In particular, Phillips JA considered that there would be 'ample reason' to justify the requirement to work from Parliament in the context of Ms Schou's employment and the duties she was required to perform, considering the requirement was a term of her contract of employment when it was first made.⁸⁴

74 *Sagris v Chubb Security Australia Pty Ltd; Morros v Chubb Security Australia Pty Ltd* [2008] VCAT 2334.

75 *Perrett-Abrahams v Qantas Airways Limited* [2000] VCAT 1634.

76 *Torres v Monash University* [2006] VCAT 1208, [54].

77 *Hall Bentick v Greater Union Organisation Pty Ltd* [2000] VCAT 1850.

78 *Clymo v Wandsworth London Borough Council* [1989] IRLR 241, 247. See, eg, *Francis v British Airways Engineering Overhaul Ltd* [1982] IRLR 10 [15]; *Brook v London Borough of Haringey* [1992] IRLR 478 [483].

79 *McDougall v Kimberly-Clark Australia Pty Ltd* [2006] VCAT 2211.

80 *Ibid* [35].

81 *Ibid* [36].

82 [2004] VSCA 71.

83 *Ibid* [24].

84 *Ibid*.

100. However, the reasoning in *Schou No 2* and *McDougall* in relation to a condition or requirement being part of the essential or inherent terms of employment does not appear to have been followed in subsequent indirect discrimination cases. Further, the finding in *McDougall* that the relevant requirement or condition must apply not just to the complainant but to all the relevant persons appears to contradict other cases which have indeed found an unreasonable condition which applied only to one person.
101. For example, in *Kelly v TPG Internet*,⁸⁵ Raphael FM found that an employee had been indirectly discriminated against by the imposition of a condition that her promotion to a more senior role be offered and accepted on an 'acting' basis instead of a permanent basis, in circumstances where the employee was pregnant and planning to take maternity leave. However, another employee whom the company knew intended to take leave was appointed to a permanent role around the same point in time.⁸⁶
102. These aspects of *McDougall* and *Schou No 2* should therefore be treated with caution.

Essential term of other types of contract

103. The question of whether any essential term of a contract or service can constitute a condition or requirement for the purpose of making out an indirect discrimination claim may also be relevant to other areas of public life.
104. For example in, *Catholic Education Office v Clarke*,⁸⁷ Madgwick J found that a school had indirectly discriminated against a deaf student by the imposition of terms or conditions on which the school was prepared to admit the student. His Honour held that the school has imposed a 'requirement or condition', namely 'to participate in and receive classroom instruction without the assistance of an interpreter'. In considering what were essential terms of the service offered by the school, Madgwick J found:

It is not necessarily inherent in the education of children in high schools that such education be undertaken without the aid of an interpreter. It is not perhaps even necessarily inherent, in an age of computers and cyberspace, that it be conducted to any particular degree in spoken English or in any other spoken language, although the concept of conventional classroom education may be accepted as necessarily implying the use of a spoken language.⁸⁸

105. It remains to be seen whether these principles will apply – and, if so, to what extent they will apply – under the Equal Opportunity Act in light of key changes to the law, such as the positive duty to eliminate discrimination,⁸⁹ and the requirements to make 'reasonable adjustments' for a person with a disability⁹⁰ and to not unreasonably refuse to accommodate a person's responsibilities as a parent or carer.⁹¹

Meaning of 'disadvantage'

106. Section 9(1)(a) of the Equal Opportunity Act is concerned with the consequences of the treatment complained of. In order to satisfy the test for indirect discrimination, the requirement, condition or practice must have adverse consequences for people with the relevant attribute. Specifically, the effect (or likely effect) of the requirement, condition or practice must be to cause 'disadvantage'.
107. The Equal Opportunity Act does not define 'disadvantage'. In light of the objects and purposes of the Equal Opportunity Act, the term 'disadvantage' is likely to be interpreted broadly. Under the ACT Act, for example, it has been held that disadvantage occurs simply where the treatment is 'adverse to the interests' of persons with the relevant attribute.⁹² It is not necessary to draw a comparison between the outcomes for people with and without the relevant attribute.⁹³

85 [2003] FMCA 584 (15 December 2003).

86 Ibid [56].

87 [2003] FCA 1085, [45]; (2003) 202 ALR 340.

88 Ibid 45.

89 *Equal Opportunity Act 2010 (Vic) s 15*.

90 Ibid s 19.

91 Ibid s 20.

92 *Firestone and Australian National University [2009] ACTDT 1 [45]*. See, for example, *J v Federal Capital Press of Australia Limited [1999] ACTDT 2* where 'disadvantage' was taken to include treatment which denied the complainant the opportunity to 'participate in an activity that is generally perceived contain advantages to those who are allowed to participate'.

93 *Prezzi v Discrimination Commissioner & Anor (1996) 39 ALD 729*.

Is the condition, requirement or practice 'reasonable'?

108. As explained above, the person who imposed the requirement, condition or practice, has the burden of proving that it was reasonable in all the relevant circumstances. If the requirement, condition or practice is found to be reasonable in the circumstance, it does not constitute indirect discrimination.

109. The question of reasonableness is a factual question. In relation to Commonwealth anti-discrimination law, the Federal Court of Australia has described the reasonableness test as follows.

[...] the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.⁹⁴

110. [Section 9\(3\)](#) of the Equal Opportunity Act is consistent with this approach. That section sets out a number of factors to be taken into account in deciding reasonableness. In summary, those factors are:

- a. the nature and the extent of the disadvantage caused
- b. whether the outcome is proportionate to what the respondent sought to achieve by imposing the requirement, condition or practice
- c. the costs of any alternative measures
- d. the respondent's financial circumstances
- e. whether reasonable adjustments or accommodation could be made to reduce the disadvantage caused.⁹⁵

94 [Secretary, Department of Foreign Affairs and Trade v Styles & Anor \[1989\] FCA 342](#), [51]; (1989) 88 ALR 621, 634. Quoted with approval by Dawson and Toohey JJ in [Waters & Ors v Public Transport Corporation \[1991\] HCA 49](#); (1992) 173 CLR 349. See also [Amery v State of New South Wales \(2004\) EOC 93-352](#) and [Clarke v Catholic Education Office \(2003\) FCA 1085](#). This test of reasonableness was also applied by the Victorian Supreme Court in [State of Victoria v Turner \[2009\] VSC 66](#).

95 [Equal Opportunity Act 2010 \(Vic\) s 9\(3\)\(a\)](#).

111. The Explanatory Memorandum clarifies that none of these facts in isolation will be determinative of reasonableness. There may also be other relevant factors depending on the particular case.⁹⁶

112. In [Schou No 2](#)⁹⁷ Phillips JA commented that the central question is whether the condition, requirement or practice actually imposed is reasonable, and not whether some alternative arrangement proposed by the complainant is also reasonable:

As I have said, so far from being not reasonable, the attendance requirement was perfectly reasonable... The existence of the alternative – an alternative which was put forward merely as a short-term solution to the temporary problem – did not dictate the contrary. That is not to say that alternatives are irrelevant: as already noticed, the fact that an alternative could have been adopted will ordinarily be one of the circumstances that must be examined in determining reasonableness. But it must be one that bears upon the reasonableness of the condition or requirement at issue.⁹⁸

113. Phillips JA went on to provide an example where one condition or requirement is no 'better suited' to the employer's needs than another, in which case 'it ceases to be reasonable to insist upon the one over the other'.

114. It remains to be seen whether the explicit requirement to consider the availability of reasonable adjustments or accommodation in an analysis of 'reasonableness' goes further than the test set-out by Phillips JA in [Schou No 2](#).

Motive and intention not relevant

115. Indirect discrimination may be unintentional. [Section 9\(4\)](#) of the Equal Opportunity Act states that in determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.⁹⁹ This complements [Section 10](#) of the Equal Opportunity Act, which also clarifies that 'in determining whether or not a person discriminates, the person's motive is irrelevant'.¹⁰⁰

96 [Explanatory Memorandum to the Equal Opportunity Bill 2010](#), 14.

97 [\[2004\] VSCA 71](#).

98 *Ibid* 26.

99 [Equal Opportunity Act 2010 \(Vic\) s 9\(4\)](#).

100 *Ibid* s 10.

Chapter 3

> Protected attributes

Which attributes are protected?

116. [Section 6](#) of the Equal Opportunity Act sets out the 'attributes' on the basis of which discrimination is prohibited in the areas of activity in Part 4 of the Equal Opportunity Act. Those attributes are:
- age
 - breastfeeding
 - employment activity
 - gender identity
 - disability
 - industrial activity
 - lawful sexual activity
 - marital status
 - parental status or status as a carer
 - physical features
 - political belief or activity
 - pregnancy
 - race
 - religious belief or activity
 - sex
 - sexual orientation
 - personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.¹⁰¹
117. Many of the protected attributes are relatively self explanatory, for example, age, breastfeeding and sex. For others, the Equal Opportunity Act itself contains more detailed definitions. Some of the more complex attributes are set out and explored further.

Extensions of protected attributes

118. Importantly, [section 7\(2\)](#) provides that discrimination on the basis of an attribute includes discrimination on the basis:
- that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination
 - of a characteristic that a person with that attribute generally has
 - of a characteristic that is generally imputed to a person with that attribute
 - that a person is presumed to have that attribute or to have had it at any time.¹⁰²
119. The Equal Opportunity Act also now makes it clear that the use of an assistance aid, such as an assistance dog, by somebody with a disability will be treated as a 'characteristic' generally pertaining to people with the relevant disability, as discussed further below.
120. It is evident from these provisions that, in determining whether discrimination occurs on the basis of a protected attribute, the inquiry is much broader than simply whether the complainant actually has the protected attribute and whether there is a causal nexus between that attribute and the alleged discriminatory conduct.

101 [Ibid s 6.](#)

102 [Ibid s 7\(2\).](#)

Presumed attribute

121. In *Daniels v Hunter Water Board*,¹⁰³ Mr Daniels alleged that he was harassed and discriminated against by the Respondent over a number of years on the grounds of his presumed homosexuality, even though he did not identify himself as being homosexual.
122. The alleged conduct began after Mr Daniels adopted a 'trendy' haircut and an earring in his left ear. He also took up jazz, ballet, drama and modelling. At this time, his co-workers started to call him a 'weirdo' and to allege that he must be 'gay'. After Mr Daniels removed a poster of a naked woman from his workplace because it had offended a female colleague, the frequency of derogatory comments made towards him, on the basis of him being 'gay', increased.
123. Mr Daniels' claim on the basis of his presumed homosexuality was upheld. While this decision was made in New South Wales, the wording of [section 7\(2\)](#) Equal Opportunity Act suggests that the same principles would apply in Victoria under the Equal Opportunity Act.

Imputed characteristic

124. In *Waterhouse v Bell*,¹⁰⁴ the complainant was refused registration as a racehorse trainer because she was married to a person who had been 'warned off' all racecourses as a result of his involvement in a horse substitution scandal. The New South Wales Court of Appeal found that the refusal to grant the licence to the complainant was because of a characteristic imputed to married women, namely, that all wives are liable to be corrupted or influenced to do wrong by their husbands. On that basis, the Court held that the refusal constituted discrimination against the complainant on the ground of marital status.

Comparison with protected attributes under Commonwealth anti-discrimination laws

125. The majority of the attributes in the Equal Opportunity Act overlap with protected attributes under federal anti-discrimination legislation and industrial legislation such as the [Fair Work Act 2009 \(Cth\)](#). There are however, a number of protected attributes which remain peculiar to Victoria and only a few other states, in the following paragraphs.

Discussion of protected attributes

Employment activity as a protected attribute

126. 'Employment activity' is defined in [section 4](#) of the Equal Opportunity Act to mean an employee in his or her individual capacity:
 - a. making a reasonable request to his or her employer, orally or in writing, for information regarding his or her employment entitlements
 - b. communicating to his or her employer, orally or in writing, the employee's concern that he or she has not been, is not being or will not be, given some or all of his or her employment entitlements.¹⁰⁵
127. 'Employment entitlements' are broadly defined in [section 4](#) of the Equal Opportunity Act to include in relation to an employee, the employee's rights and entitlements under an applicable:
 - a. contract of service
 - b. federal agreement or award
 - c. minimum wage order under the [Fair Work Act 2009 \(Cth\)](#)
 - d. contract for services (such as independent contractor)
 - e. Act or enactment
 - f. law of the Commonwealth.¹⁰⁶
128. These definitions are carried over from the 1995 Act where they were inserted, by an amendment, in 2007. The Explanatory Memorandum to the amending Bill stated that the amendment sought to:

[...] provide further protection to Victorian employees where, in their individual capacity, they make a reasonable request to their employer for information about their employment entitlements or communicate concerns to their employer about whether they have been, are being or will be given their employment entitlements.¹⁰⁷

105 [Equal Opportunity Act 2010 \(Vic\) s 4.](#)

106 *Ibid.*

107 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2007 \(Vic\)](#), 1.

103 (1994) EOC 92-626.

104 (1991) 25 NSWLR 99.

129. The [Explanatory Memorandum](#) to the 2007 amending Bill provides extensive guidance about the interpretation of 'employment activity':

A request for information does not extend to questions unrelated to or outside of an employee's existing employment entitlements. A request for information would include questions about the source of the employee's employment entitlements, what the entitlements are and whether the employee has been, is being, or will be given those entitlements. For example:

- what is my rate of pay?
- how many holidays have I accrued?
- do I have an entitlement to paid maternity leave?
- have I been paid for those extra hours I worked?
- will I be able to take my annual leave next month?

A request for information can be made verbally or in writing but the request must be reasonable. This means that the nature of the information sought about the employment entitlements should be reasonable and that the request should be made in a reasonable manner and at a reasonable time. For example, a request will not be reasonable if the employee asks the employer for confidential or unduly complicated information that the employer cannot readily access. Some examples of a request that may not be made in a reasonable manner or at a reasonable time is a request made in a violent or threatening manner or made outside of normal work hours.

The attribute also covers an employee communicating a concern to his or her employer about whether his or her employment entitlements have not been, are not being or will not be given to him or her.

This may cover concerns such as:

- I am worried that I have not been paid my overtime allowance.
- why am I not being paid at the correct rate of pay?
- someone has told me that the company is going under and I will not be paid my redundancy pay.

It is not intended, however, that the attribute provide a mechanism for enforcing employment entitlements or for negotiating a pay rise or other terms and conditions of employment more generous or different than those to which an employee is currently entitled.¹⁰⁸

Gender identity as a protected attribute

130. As noted above, the Equal Opportunity Act protects against discrimination on the basis of a person's 'gender identity'. This covers a range of expressions of gender, from the way that a person dresses or speaks, to gender reassignment surgery.

131. 'Gender identity' is defined in [section 4](#) to mean:

- a. the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognized as such):
 - i. by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise
 - ii. by living, or seeking to live, as a member of the other sex
- b. the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):
 - i. by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise
 - ii. by living, or seeking to live, as a member of the other sex.¹⁰⁹

108 [Ibid 2-4](#); [Loevski v Jacobson \[2010\] VCAT 1428](#).

109 [Equal Opportunity Act 2010 \(Vic\) s 4](#).

132. This definition is consistent with the definition of 'gender identity' that was introduced into the 1995 Act in 2000. The gender identity characteristic was included to extend protection against discrimination to those whose gender identity does not match their physical sex at birth, ranging from people who occasionally dress in a style that is usually associated with the opposite sex, to persons undergoing gender reassignment surgery.¹¹⁰
133. However, the definition of 'gender identity' under the Equal Opportunity Act does not extend to people who do not identify as either 'male' or 'female' gender, for example people who identify as of 'indeterminate sex' (often due to their mixed or indeterminate sex characteristics). Note: people can be protected from discrimination because they are physically intersex, on the basis of the 'sex' protected attribute.
134. Gender identity is only protected in Victoria, Queensland, and Tasmania, though very similar protections are afforded in some other States, such as 'chosen gender' in South Australia and the slightly more ambiguous 'gender history' in Western Australia. There is currently no protection for gender identity under federal anti-discrimination legislation or federal industrial legislation although it has been included as a new attribute in the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* consolidating federal anti-discrimination law.
- ii. a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder
- e. malformation or disfigurement of a part of the body –
...and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability.¹¹¹
136. The broadening of the definition to include behaviour that is a symptom or manifestation of a disability clarified in the legislation issues that had been raised in the High Court of Australia's decision in *Purvis v New South Wales (Department of Education) (Purvis)*.¹¹²
137. The *Purvis* case concerned the treatment of a high school student, Daniel Hoggan, who suffered from a number of disabilities as the result of a brain injury acquired when he was a baby. Daniel's disabilities manifested in certain behaviours, including violent behaviour and swearing. Daniel was suspended several times and, later, expelled from South Grafton High School on the basis of his violent and disruptive behaviour. Daniel's foster parents brought a claim of discrimination under the *Disability Discrimination Act 1992 (Cth)* on his behalf. The case went to the High Court of Australia on appeal. One of the issues before the High Court was whether Daniel's behaviour – which was described as a 'symptom' or 'manifestation' of his disability – fell within the meaning of 'disability' under the *Disability Discrimination Act 1992 (Cth)*.

Disability as a protected attribute

135. The Equal Opportunity Act sees a shift from the term 'impairment' previously used in the 1995 Act to the more commonly used term of 'disability'. 'Disability' is defined in [section four](#) of the Equal Opportunity Act to mean:
- total or partial loss of a bodily function
 - the presence in the body of organisms that may cause disease
 - total or partial loss of a part of the body
 - malfunction of a part of the body, including:
 - a mental or psychological disease or disorder
138. When the case was first decided, Commissioner Innes had not drawn a clear distinction between Daniel's disabilities and the manifestation of those disabilities.¹¹³ In the Federal Court of Australia, however, Emmett J applied a narrow interpretation of 'disability', stating that 'it is the disorder or malfunction, or the disorder, illness or disease that is the disability. It is not the symptom of that condition that is the disability.'¹¹⁴

110 Victoria, *Parliamentary Debates*, Equal Opportunity (Gender Identity and Sexual Orientation) Bill, 13 April 2000, 1014–1015.

111 *Equal Opportunity Act 2010 (Vic) s 4*.

112 [2003] HCA 62.

113 *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC 93-117.

114 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 77 (Emmett J).

139. A majority of the High Court disagreed with Emmett J's narrow interpretation of the term 'disability'. The High Court in *Purvis* concluded that the definition of disability does include behaviour resulting from the disability.¹¹⁵ In reaching the conclusion to apply this broader interpretation of 'disability', the majority looked at the purpose and objectives of the *Disability Discrimination Act 1992 (Cth)* which, as McHugh and Kirby JJ said, was intended to be 'beneficial and remedial in nature'.¹¹⁶
140. Due to the characteristics extension, discussed above, it is also unlawful to discriminate against a person on the basis of a characteristic generally appertaining or imputed to a person with a disability.
141. The use of an assistance aid, including an assistance dog, is deemed to be a characteristic generally pertaining to somebody with the relevant disability for the purposes of the Equal Opportunity Act. Sections 7(2) and (3) of the Equal Opportunity Act make this position clear. This means that discrimination on the basis of the assistance aid – including an assistance dog – will be unlawful (unless a defence or exception applies).
142. The express provisions contained in sections 7(2) and (3) of the Equal Opportunity Act were inserted to deal with the situation which arose in *Walker v State of New South Wales (Walker)*.¹¹⁷ In *Walker*, the applicant used a walking stick and an aluminium scooter as mobility aids to cope with a back injury. On several occasions he tried to access the Parramatta Court complex but was initially denied entry with his stick or scooter until the court staff were able to ascertain that these items were assistance aids. Once the court staff were satisfied that Mr Walker used his stick and scooter to cope with a disability, he was granted special dispensation to use these items within the court complex. Mr Walker said that he should not be required to obtain special dispensation to enter the court complex for a matter in which he was personally involved.

115 *Purvis v New South Wales* [2003] HCA 62 [27], [80] (McHugh and Kirby JJ), [209]-[212] (Gummow, Hayne and Heydon JJ); 217 CLR 92; 202 ALR 133; 78 ALJR 1.

116 Ibid [80]. Note: Although the High Court accepted the broader meaning of 'disability', it adopted a narrow approach to the comparator test which meant that the discrimination claim ultimately failed. This aspect of the case is no longer directly relevant to the *Equal Opportunity Act 2010 (Vic)* due to the recent changes which remove the comparator test from the definition of 'direct discrimination'.

117 [2003] NSWADT 13.

143. One of the issues that the New South Wales Administrative Decisions Tribunal had to consider was whether the use of a scooter or stick as a mobility aid was a characteristic which appertains generally to, or is generally imputed to, people with back injury. Mr Walker, who was unrepresented, had not led any evidence on this point. In the absence of evidence, the Tribunal said it was not open to it to make such a finding. In other words, it was not 'common knowledge' that the use of a walking stick or scooter are characteristics generally appertaining to or imputed to a person with a back injury. The Tribunal noted that the *Disability Discrimination Act 1992 (Cth)*, unlike the NSW legislation they were dealing with, dealt expressly with palliative or therapeutic devices or auxiliary aids.
144. The insertion of sections 7(2) and 7(3) brings the Equal Opportunity Act more closely into line with the *Disability Discrimination Act 1992 (Cth)* and means that complainants do not need to lead evidence to prove that the use of an assistance aid, including an assistance dog, is a characteristic generally appertaining or imputed to somebody with a disability.
145. In circumstances that fall outside sections 7(2) and 7(3) of the Equal Opportunity Act, the complainant will still need to identify the particular characteristic and satisfy the Tribunal that it is a characteristic that a person with a disability generally has, or is generally imputed to have. For example, in *O'Connor v State of Victoria (Dept of Education and Training)*, VCAT did not accept that the taking of sick leave is a characteristic generally pertaining to persons who have a disability.¹¹⁸

Industrial activity as a protected attribute

146. The Equal Opportunity Act protects against discrimination on the basis of a person's industrial activity.
147. The definition of 'industrial activity' in the Equal Opportunity Act continues that which existed in the 1995 Act, as amended in 2006. In 2006, the definition of 'industrial activity' was amended to include the setting-up of an industrial organisation or association, organising or promoting, encouraging, assisting or participating in, or not participating in a lawful activity, organised by an industrial organisation or association, or representing or advancing the views, claims or interests of an industrial organisation or association.

118 [2004] VCAT 1188.

148. These amendments were designed to more explicitly reflect various decisions of VCAT in relation to the interpretation of 'industrial activity'. For example, in *Dickenson v Shire of Yarra Ranges*,¹¹⁹ Deputy President McKenzie stated that 'industrial activity' includes action taken by groups of employees acting or expressing themselves in a collective way, or action to promote compliance with relevant awards or workplace regulations, or to improve workplace conditions where a union, or group of staff acting collectively, is also involved in that activity, or encourages, assists or supports that activity.
149. Similarly, in *Aylett v Australian Paper & Purdy*,¹²⁰ the applicant's level of participation in occupational health and safety issues with the support and/or sanction of a union was defined as industrial activity.
150. In *Hendrickson v Victorian Association of State Secondary Principals & Anor*,¹²¹ not joining or not being a member of the Australian Principals Federation (APF) was held to be industrial activity as defined in the 1995 Act. In circumstances where the applicant was charged a higher subscription fee to join only the Victorian Association of State Secondary Principals (VASSP), than the fee charged to individuals who wished to join both VASSP and the APF, VCAT held that the applicant had been discriminated against because of his industrial activity.
151. More recently, in *Dulhunty v Guild Insurance Limited*,¹²² VCAT held that Guild Insurance Limited had discriminated against a chiropractor on the basis of his 'industrial activity' by charging him a higher premium as a non-member of the Chiropractor's Association of Australia (Association), than the premium charged to members of the Association. In doing so, VCAT found that not being a member of the Association was an 'industrial activity' within the meaning of the Equal Opportunity Act.
152. 'Industrial association' is defined to mean a group of employees or employers, formed formally or informally to represent or advance the views, claims or interests of the employees or employers in a particular industry, trade, profession, business or employment, not including an industrial organisation.
153. The definition was originally inserted into the 1995 Act in 2006 to reflect decisions of VCAT, which established that while a collective dimension is required to constitute an industrial organisation, a formal link with a union is not required.¹²³
154. 'Industrial organisation' is defined to mean one of the following organisations that is registered or recognised under a State or Commonwealth Act or enactment:
- an organisation of employees
 - an organisation of employers
 - any other organisation established for the purposes of people who carry on a particular industry, trade, profession, business or employment.¹²⁴
155. This definition was also amended in 2006 to stipulate that an industrial organisation must be registered or recognised under a State or Commonwealth enactment. This is intended to distinguish an industrial organisation from an industrial association.

Lawful sexual activity as a protected attribute

156. Lawful sexual activity means:
- engaging in
 - not engaging in
 - refusing to engage in any form of sexual activity not prohibited by Victorian law.
157. This definition applies to homosexuals, lesbians, bisexuals and heterosexuals, legal prostitution and people perceived to fall into one of these groups.
158. The attribute of 'lawful sexual activity' has been raised where a person has been treated unfavourably because of extra-marital affairs or sexual relationships between co-workers. For example, in *Rowley v Goodyear Tyres Pty Ltd and Ors*,¹²⁵ the respondent's application to strike out a complaint of discrimination in employment on the ground of lawful sexual activity was denied. In that case, the complainant was terminated on the basis of his alleged extra-marital sexual relationship with another member of the executive leadership team. The Tribunal refused to strike out the application on the basis that the question of whether the attribute extends to relationships (as opposed to actually engaging in lawful sexual activity) needs further consideration.

119 [2000] VCAT 1093.

120 [2004] TASADT 4.

121 [2007] VCAT 1193.

122 [2012] VCAT 1651.

123 *Schou v State of Victoria* [1999] VCAT 632; *Moloney v State of Victoria* [2000] VCAT 1089.

124 *Equal Opportunity Act 2010* (Vic) s 4.

125 [2011] VCAT 1536.

159. Examples of sexual activities that fall outside of the scope of this definition include paedophilia, incest, bestiality or sexual assault, regardless of gender or sexual practice, because they are unlawful.

Marital status as a protected attribute

160. The Equal Opportunity Act protects against discrimination on the basis of a person's marital status, which includes being single, married (whether living separately or apart from one's spouse), in a domestic partnership, divorced, or widowed.¹²⁶
161. Protections against discrimination on the basis of a person's 'marital status' do not necessarily extend to circumstances where the discrimination occurs because of the identity or situation of a person's spouse – as opposed to the relationship itself – unless the personal association discrimination applies.
162. For example, in *Tebby v Davies & Ors*¹²⁷ (*Tebby*) Deputy President Coghlan applied an earlier New South Wales case *Boehringer Ingelheim Pty Ltd v Reddrop*¹²⁸ and found that the prohibition against discrimination on the basis of a person's 'marital status' does not 'extend to characteristics of the particular spouse or partner'.¹²⁹ In that case, the Deputy President dismissed a complaint by an employee about the termination of their employment due to their spouse working for a competitor.
163. The outcome would be different under the Equal Opportunity Act if the discrimination occurred because of a person's 'personal association' with another – including a spouse – who has a protected attribute. For example, it would be unlawful for an employer to refuse to employ a candidate on the basis that he or she is married to a union official or a person of a particular religion. Such conduct would constitute unlawful discrimination against the candidate on the basis of his or her personal association with somebody who had engaged in industrial activity in the first example, or on the basis of religion in the second.

164. An exception to the rule may also exist where discrimination in relation to the identity or situation of a person's spouse is based on an assumption about a characteristic generally imputed to marital status, as in *Waterhouse v Bell*.¹³⁰ In that case, the New South Wales Court of Appeal considered a complaint of discrimination brought by horse trainer Gai Waterhouse. Ms Waterhouse had applied to the Australian Jockey Club for a trainer's licence but her application was rejected on the basis that her husband had been involved in betting fraud. The Court of Appeal found that, in circumstances where there was no suggestion that Ms Waterhouse had a relevant character deficiency, the reason for the refusal to grant her a licence was the respondent's belief that 'all wives are liable to be corrupted by their husband', which was held to be a characteristic attributed or imputed to married women.

Physical features as a protected attribute

165. Victoria is the only Australian jurisdiction which protects against discrimination on the basis of a person's physical features.
166. The definition of 'physical features' remains unchanged from the 1995 Act. 'Physical features' is defined to mean a person's height, weight, size or other bodily characteristics. The term 'bodily characteristics' has been interpreted widely and has been found to include tattoos¹³¹ and the styling, colour and location of hair.¹³² However, personal hygiene (such as body odour), not wearing underwear and overeating are not 'physical features'.¹³³ Transsexualism is also not a 'physical feature', however, it has been held to constitute an impairment.¹³⁴ (Note that this decision took place before 'gender identity' was a protected attribute in Victoria).

126 *Equal Opportunity Act 2010 (Vic)* s 4.
127 [2002] VCAT 1023.
128 [1984] 2 NSWLR 13.
129 Ibid 45.

130 (1991) 25 NSWLR 99.
131 In *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849, the Tribunal assumed without deciding that tattoos are physical features.
132 *Fratras v Drake International Ltd t/as Drake Jobseek* (1998) EOC 93-038 VCAT.
133 *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.
134 *Menzies v Waycott & Anor* [2001] VCAT 415.

167. In *Ruddell v DHS*¹³⁵, the Tribunal considered whether the applicant's loud voice fell within the meaning of a 'physical feature'. The Tribunal did not rule-out the possibility that a 'physical feature' may include 'not only visible bodily characteristics like height or weight but any other bodily characteristics with an external manifestation such as voice which is audible'. However, the Tribunal found that the loudness of Mr Ruddell's voice – which he could control at his own will – was not within the meaning of a 'physical feature'.¹³⁶

Personal association as a protected attribute

168. The Equal Opportunity Act also protects against discrimination of a person on the basis that the complainant has a 'personal association' (whether as a relative or otherwise), with somebody who is identified by reference to another protected attribute. The complainant must prove the association – whether with a relative, friend or otherwise – and that the person associated with, has one of the protected attributes.¹³⁷
169. This protection was introduced with the 1995 Act. In the second reading speech for the Bill, which later became the 1995 Act, the Honourable Haddon Storey said:
- Discrimination based on the attribute of personal association is prohibited under the Bill. This ground of prohibited discrimination is intended to protect people who are discriminated against because of the association, whether as relatives or otherwise with a person who has had any of the [protected attributes]... For instance, relatives, friends and helpers of disabled persons often suffer discrimination when attempting to gain access to accommodation and also services. Such people are provided with an avenue of redress under this Bill.¹³⁸
170. In *Lund v Eyrie Common Equity*,¹³⁹ Mr Lund claimed that his landlord, in giving him a notice to vacate, had directly discriminated against him because of his 'personal association' with another person,

Mr Milsom. Mr Lund lived with and cared for Mr Milsom, who had a psychological impairment. The Tribunal referred to the second reading speech (cited at paragraph 169 above) regarding the purpose and scope of the personal association protections. In that case, the Tribunal accepted that the personal association attribute applied, but the claim did not succeed because the Tribunal was not satisfied that it was the reason for issuing the notice to vacate. Rather, the Tribunal accepted that the reason for issuing the notice was to resolve a long-running dispute between tenants.

Political belief or activity as a protected attribute

171. Political belief or activity means:
- a. holding or not holding a lawful political belief or view
 - b. engaging in, not engaging in or refusing to engage in a lawful political activity.¹⁴⁰
172. Political belief or activity has been interpreted more narrowly by courts and tribunals in Victoria than in other jurisdictions.¹⁴¹ In Victoria, 'political' has been interpreted as a matter or activity which involves the state and 'bears on government'.¹⁴² A belief is not political where 'it has no bearing on the form, role, structure, feature, purpose, obligations, duties or some other aspect of government'.¹⁴³ 'Political belief' has been distinguished from beliefs basic to the structure of society such as honesty¹⁴⁴ and must be related to the 'mores of society'.¹⁴⁵ Public expression by a teacher of views about the age of consent may be 'political'.¹⁴⁶

¹³⁵ [2001] VCAT 1510 (20 June 2001).

¹³⁶ Ibid [55]–[56].

¹³⁷ See, for example, *Lund v Eyrie Common Equity Rental Housing Cooperative Ltd* [1999] VCAT 617; *Johnson v Berwick City Soccer Club* [2010] VCAT 1093.

¹³⁸ Victoria, Parliamentary Debates, Legislative Assembly, 4 May 1995, 1251 (Jan Wade, Attorney-General).

¹³⁹ [1999] VCAT 617.

¹⁴⁰ *Equal Opportunity Act 2010* (Vic), s 4.

¹⁴¹ See, for example, *Croatian Brotherhood Union of WA (Inc) v Yugoslav Clubs & Community Assns of WA Inc* (1987) EOC 92-190, EOT(WA).

¹⁴² *Hein v Jacques Ltd* (1987) EOC 92-188; followed in this respect *Nestle Australia Ltd v Equal Opportunity Board* [1990] VR 805; (1990) EOC 92-281; *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107; (1991) EOC 92-332 at 78,290.

¹⁴³ *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107.

¹⁴⁴ *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107; (1991) EOC 92-332 at 78,290.

¹⁴⁵ *Jolly v Director-General of Corrections* (Vic) (1985) EOC 92-124.

¹⁴⁶ *Thorne v R* (1986) EOC 92-182.

173. 'Political activity' means more than 'capable of being political',¹⁴⁷ but can relate to deeply held political views manifested in refusal to support certain union action of a political nature.¹⁴⁸ Dismissal of a builder's labourer after rejoining a deregistered union was found not to be discrimination on the ground of 'political activity' because there was no evidence that the employer had the employee dismissed for engaging in political activity as defined, or that his failure to present a financial clear card was political.¹⁴⁹ In the provision of goods and services, failure to allow a municipal hall to be used by protesters against a United States base, when it had been made available to supporters, was held to be discriminatory on grounds of political belief and activity.¹⁵⁰

Race as a protected attribute

174. Race includes:

- a. colour
- b. descent or ancestry
- c. nationality or national origin
- d. ethnicity or ethnic origin
- e. if 2 or more distinct races are collectively referred to as race:
 - i. each of those distinct races
 - ii. that collective race.¹⁵¹

175. Courts have generally taken the view that 'race' as described in anti-discrimination legislation is a broad term and should be understood in the popular sense.¹⁵² The meaning of 'race' was considered in the context of disputes between Aboriginal people in *Williams v Tandanya Cultural Centre*,¹⁵³ where Driver FM held:

The word 'race' is a broad term. Also, in addition to race, the *Racial Discrimination Act 1975* (Cth.) (RDA) proscribes discrimination based upon national or ethnic origins or descent. It will be apparent to anyone with even a rudimentary understanding of Aboriginal culture and history that the Australian Aborigines are not a single people but a great number of peoples who are collectively referred to as Aborigines. This is clear from language and other cultural distinctions between Aboriginal peoples. It is, in my view, clear that the RDA provides relief, not simply against discrimination against 'Aboriginals' but also discrimination against particular Aboriginal peoples.¹⁵⁴

176. 'Decent or ancestry' was considered in *Australian Macedonian Human Rights Committee (Inc) v State of Victoria*¹⁵⁵ where it was found that:

'Descent' and 'national or ethnic origin' must also be given a liberal construction. 'Descent' has a meaning that includes coming from, by birth or lineage, an ancestor or ancestors and does not require any particular citizenship, country of birth or particular territorial link. The terms 'national' and 'ethnic' give expanded scope to the term 'origin'.

177. There is a distinction between discrimination on grounds of national origin and discrimination on grounds of nationality. National origin is normally a status acquired and fixed at birth and incapable of change, whereas a person may acquire a number of different nationalities over the course of a lifetime.¹⁵⁶ In *Australian Medical Council v Wilson*,¹⁵⁷ Sackville J held 'national origin' does not simply mean citizenship.

147 *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107; (1991) EOC 92-332 at 78,291.

148 *Hein v Jacques Ltd* (1987) EOC 92-188; BC8900498.

149 *Duggan v South Yarra Constructions Pty Ltd* (1988) EOC 92-220; 25 IR 367.

150 *Williams v Council of the Shire of Exmouth* (1990) EOC 92-296.

151 *Equal Opportunity Act 2010* (Vic) s 4.

152 *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362.

153 [2001] FMCA 46 (23 July 2001); (2001) 163 FLR 203.

154 Ibid [21].

155 [2000] HREOCA 52.

156 See *Australian Medical Council v Wilson* [1996] FCA 1618; (1996) 68 FCR 46 at 75; 137 ALR 653; *Macabenta v Minister for Immigration and Multicultural Affairs* [1998] FCA 385; (1998) 90 FCR 202 at 211, 212; 159 ALR 465; 52 ALD 8.

157 [1996] FCA 1618; (1996) 68 FCR 46 at 75; 137 ALR 653.

178. The distinction between national origin and ethnic origin was considered in *Australian Macedonian Human Rights Committee v State of Victoria*:¹⁵⁸

'National origin' has a meaning that includes coming from, by birth or lineage, an identifiable nation or country of people. In particular, the nation or country need no longer exist or indeed have a particular international status. In my opinion, the term 'ethnic origin' has a meaning that includes coming from an identifiable group or community who use speech different to the majority language (here in Australia English) and does not require any particular territorial link.

179. 'Ethnic origin' has been interpreted broadly in a number of jurisdictions to include Jewish¹⁵⁹ and Sikh people. The Court in *King-Ansell* held that Jewish people in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). Richardson J stated that:

...a group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.¹⁶⁰

180. Similarly, in *Mandla v Dowell Lee*¹⁶¹ the House of Lords held that for a group (such as Sikh people) to constitute an ethnic group for the purposes of the legislation in question, it had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.

Religious belief or activity as a protected attribute

181. Religious belief or activity means:

- a. holding or not holding a lawful religious belief or view
- b. engaging in, not engaging in or refusing to engage in lawful religious activity.¹⁶²

182. 'Religious belief or activity' has been interpreted broadly, and includes atheism.¹⁶³ 'Religious belief' has been extended to a union member who refused to make a welfare payment on account of his religious belief that charitable works and welfare support was the sole province of the church and was not a function of union members.¹⁶⁴ Discrimination on the basis of religious belief or activity has been found in not providing fresh Halal meat to a Muslim prisoner who requested it.¹⁶⁵

158 [2000] HREOCA 52.

159 *Miller v Wertheim* [2002] FCAFC 156, [14]. See also *Jones v Scully* [2002] FCA 1080; (2002) 120 FCR 243, 271-273 [110]-[113], *Jones v Toben* [2002] FCA 1150, [101], *Jeremy Jones v Bible Believers Church* [2007] FCA 55, [21] and *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, [22] where it was found that Jews in Australia are a group of people with a common 'ethnic origin' under the *Racial Discrimination Act 1975* (Cth).

160 *King-Ansell* [1979] 2 NZLR 531, 543.

161 [1983] 2 AC 548, [1983] 1 All ER 1062, [1983] 2 WLR 620, [1983] IC R 385, [1983] IRLR 209, (46 MLR 759, 100 LQR 120, [1984] CLJ 219)

162 *Equal Opportunity Act 2010* (Vic) s 4.

163 *Aitken & Ors v The State of Victoria - Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547.

164 *Marett v Petroleum Refineries (Aust) Pty Ltd* (1987) EOC 92-206; 24 IR 101, EOB(VIC); *Petroleum Refineries (Australia) Pty Ltd v Marett* [1989] VicRp 69; [1989] VR 789 (16 September 1988); (1988) EOC 92-237, SC(VIC).

165 *Queensland v Mahommed* (2007) EOC 93-452; [2007] QSC 018.

Chapter 4

> Areas of public life in which discrimination is prohibited

183. As discussed above, the Equal Opportunity Act does not apply to all interactions between people. Rather, it prohibits unlawful discrimination in certain areas of public life. This chapter looks at those areas in which discrimination is prohibited, including issues that commonly arise in each of these contexts.

Employment and related areas

184. [Part 4, Division 1](#) of the Equal Opportunity Act makes it unlawful to discriminate in employment, while [Part 4, Division 2](#) of the Equal Opportunity Act prohibits discrimination in employment-related areas.
185. The protection against discrimination in employment extends beyond the traditional employer-employee relationship to include independent contractors and people whose remuneration is commission based.
186. Subject to the relevant exceptions, these Divisions of the Equal Opportunity Act prohibit discrimination against:
- job applicants¹⁶⁶
 - employees¹⁶⁷
 - contract workers¹⁶⁸
 - partners (including prospective partners) of firms comprising five or more partners¹⁶⁹
 - members of industrial associations (including prospective members)¹⁷⁰
 - members of professional qualifying bodies (including prospective members).¹⁷¹

166 [Equal Opportunity Act 2010 \(Vic\) s 16.](#)

167 [Ibid s 18.](#) Also see the discussion in [GLS v PLP \(Human Rights\) \[2013\] VCAT 221 at \[47\]-\[53\]](#) in relation to the approach of the Tribunal where there is a question of whether the complainant is an employee for the purposes of the Equal Opportunity Act.

168 [Ibid s 21.](#)

169 [Ibid ss 32-33.](#)

170 [Ibid s 35.](#)

171 [Ibid s 36.](#)

187. The Equal Opportunity Act also describes, broadly, how discrimination may occur in employment and employment-related contexts. In summary, this includes discrimination:
- in deciding who should be offered employment, membership of an industrial association or a professional qualifying body
 - in the terms or conditions of work
 - by denying access to benefits such as ongoing education, training or opportunities for promotion
 - by subjecting the complainant to a 'detriment'.
188. There are some differences in the way in which discrimination is described in relation to applicants, employees, contract workers, partners, members of industrial associations and members of professional qualifying bodies. Persons bringing or responding to complaints should refer to the applicable sections within Division 1 of the Equal Opportunity Act for clarification on this issue.

Offers of employment

189. Fundamentally, candidates for employment must be judged on their individual merits, rather than stereotypical assumptions based on their attributes. For example, it is unlawful to presume that a person who has parental responsibilities will not be available for weekend work, or that a male candidate will not 'fit in' with the team as well as a female candidate, because of his sex.

190. In offering employment to a person with a disability, an employer also must take into account any 'reasonable adjustments' necessary for accommodating the person's special needs (provided the candidate could 'adequately perform the genuine and reasonable requirements' of the job once those reasonable adjustments were made). This is because [section 20](#) of the Equal Opportunity Act specifically requires that an employer must make reasonable adjustments for a person with a disability who is offered employment. [Chapter Five](#) of this resource considers the requirement to make reasonable adjustments in more detail.
191. Similar issues were considered under the 1995 Act in [Davies v State of Victoria \(Victoria Police\)](#).¹⁷² In that case, the Tribunal found that Victoria Police directly discriminated against the complainant by rejecting his application to join the police force because he failed a colour vision test. Ultimately, the Tribunal was not satisfied that the results of the colour vision test proved whether the complainant either was, or was not, able to perform the genuine and reasonable requirements of employment as a Constable. Those requirements included motor vehicle pursuits and identifying people and things. The Tribunal ordered Victoria Police to undertake more rigorous testing before it made a decision.

Terms on which employment is offered

192. The Equal Opportunity Act specifically prohibits discrimination against prospective employees 'in the terms' on which employment is offered. This may encompass things such as the basis of the employment, salary package arrangements, working hours and work-related benefits such as vehicle allowances.
193. For example, if female candidates were offered part-time or casual work, whereas male candidates were offered full-time permanent work, and the reason for the distinction was because of the candidates' sex, this would constitute unlawful discrimination in the terms on which the employment is offered.

Access to 'benefit' including opportunities for promotion, training, transfer, guidance etc

194. The Equal Opportunity Act also prohibits discrimination in relation to advancement opportunities such as promotions and further training. This is important because opportunities for training and promotion often lead to further benefits within the workplace, such as greater seniority and better remuneration.¹⁷³

Employment-related medical testing

195. An employer may investigate issues in relation to job applicants if the employer can establish that the information sought relates to the inherent requirements of the job. The inherent requirements of employment must be determined having regard to the circumstances in which the employment is carried on and the dangers to which an employee may be exposed or may expose others.¹⁷⁴
196. In [Davies v State of Victoria \(Victoria Police\)](#),¹⁷⁵ VCAT considered that these matters were also relevant in determining the 'genuine and reasonable requirements of employment' for the purposes of [section 22](#) and [section 23](#) of the 1995 Act (relating to specific exceptions to discrimination).¹⁷⁶
197. In that case, VCAT found that Victoria Police had directly discriminated against the applicant by rejecting his employment application because he failed a colour vision test. VCAT held that the inability to perform the inherent requirements of the role must be assessed in a practical way that enables the employer to conclude that it is more probable than not that the person will not be able to perform adequately the requirements of the employment. A decision needs to be genuinely made and based on information capable of supporting that decision:

An assumption based on no information or on scant information, will not be enough.¹⁷⁷

173 See, for example, [Keenan v The Age Company Limited \[2004\] VCAT 2535](#) regarding failure to provide a vehicle.

174 [X v The Commonwealth \[1999\] HCA 63](#); 200 CLR 177; 167 ALR 529; 74 ALJR 176.

175 [\[2000\] VCAT 819](#).

176 Note that these exceptions have been removed from the Equal Opportunity Act.

177 [Davies v State of Victoria \(Victoria Police\) \[2000\] VCAT 819](#).

172 [\[2000\] VCAT 819 \(5 January 2000\)](#).

198. In *Vickers v The Ambulance Service of NSW*,¹⁷⁸ the complainant applied for a job as a trainee ambulance officer with the Ambulance Service of NSW (Ambulance Service). The complainant was required to undergo a pre-employment medical assessment, in the course of which he disclosed that he had Type 1 insulin-dependent diabetes. Despite providing a letter from his treating endocrinologist supporting his application for employment, the medical service conducting the assessment recommended to the Ambulance Service that the complainant was unsuitable for the position because of his diabetes. Acting on the basis of this recommendation, the Ambulance Service rejected the complainant for the position.
199. Mr Vickers claimed that he had been directly discriminated against on the basis of his diabetes in the Ambulance Service's decision not to employ him. Mr Vickers also argued that the Ambulance Service's process of selection amounted to direct discrimination in the arrangements made for the purposes of determining who should be offered employment. The Ambulance Service sought to rely on the defence that it is not unlawful for an employer to discriminate against a person who is unable to carry out the inherent requirements of the job.
200. In emphasising that employers must investigate each case according to its own individual circumstances, the Federal Magistrates' Court held that the Ambulance Service had unlawfully discriminated against the complainant in refusing to consider his employment application further on the basis of his diabetes. The Court held that the 'inherent requirements' defence could not be relied upon on the basis that the complainant had never had a hypoglycaemic event; had previously been able to control his diabetes during hospital shift work; and that should his blood glucose levels alter, he would easily be able to take appropriate remedial measures which would not pose a threat to patients of the Ambulance Service.
201. In *Tarr v Torrens Transit Services (North) Pty Ltd*,¹⁷⁹ the Equal Opportunity Tribunal found that failing a back fitness test should not have disqualified a bus driver from getting a job. The complainant was given pre-employment tests, including a back fitness test. The complainant was then told he could not do the job because he had failed the back fitness test. The Tribunal found that a back fitness test did not show whether Mr Tarr could do the job.
202. The Tribunal rejected the medical testing which formed the basis of the refusal to employ the complainant, finding that the respondent did not:
- ...attempt to undertake an overall assessment of an applicant, having regard to recent work experience and history. [The respondent] did not make a balanced assessment of all of the test results in context. It seems, from the evidence, that [the respondent] did not appreciate the difference between the fulfilment of job requirements and the presence of risk factors.¹⁸⁰
- The Tribunal concluded that this meant the respondent was thus in no position to assess the extent of the risk factor identified, reasoning that medical testing before employment needs to be specifically related to the work the person has to do.
203. In the decision of *Melvin v Northside Community Service*,¹⁸¹ the complainant was dismissed because of her impaired eyesight, on the basis of an optometrist's report that she was 'legally blind'. The report however did not answer the questions the employer had asked, or address the complainant's ability to perform the inherent requirements of the job. The Australian Human Rights and Equal Opportunity Commission found that Ms Melvin had been unlawfully discriminated against. It accepted specialist medical and other evidence that she could in fact perform the inherent requirements of the job, and awarded her over \$56,000 in damages. In this context the exception contained in [section 86](#) relating to the protection of health, safety and property may also be relevant. This is discussed further at [Chapter Eight](#) of this resource.

178 [\[2006\] FMCA 1232](#).

179 [\[2008\] SAEOT 12](#).

180 *Ibid* [33].

181 [\[1996\] HREOCA 20](#).

Any other 'detriment'

204. The Equal Opportunity Act also prohibits discrimination in work by subjecting an employee to 'any other detriment'. [Section 4](#) of the Equal Opportunity Act specifies that 'detriment' includes 'humiliation and denigration'.¹⁸²
205. However, the Equal Opportunity Act does not exhaustively define 'detriment'. Case law suggests that a person suffers detriment where he or she is placed 'under a disadvantage of a matter of substance'¹⁸³ or 'suffers a material difference in treatment'¹⁸⁴ which is 'real and not trivial'.¹⁸⁵
206. Examples of other treatment which may constitute a detriment include:
- dismissal
 - demotion
 - terminating employment during a probationary period on the basis of pregnancy¹⁸⁶
 - selecting an employee for redundancy on the basis of a protected attribute¹⁸⁷
 - unlawfully requiring a pregnant employee to take unpaid maternal leave¹⁸⁸
 - requiring an employee to attend a 'painful' and 'humiliating' meeting about performance¹⁸⁹
 - harassment, or 'depriving an employee of quiet enjoyment of employment'¹⁹⁰

- altering an employee's position in a manner that is prejudicial to the employee (for example by requiring the employee to change their work location, hours or duties)
 - loss of status and responsibility¹⁹¹
 - being laughed and, in certain circumstances, smirked at, by fellow employees¹⁹²
 - denying flexible work arrangements/ refusing access to part time employment.¹⁹³
207. In [Dickie v State of Victoria & Ors](#)¹⁹⁴, VCAT was not satisfied that an 'emotionally charged exchange of views' between the applicant and another person constituted a 'detriment' to the applicant.

Humiliation

208. The Equal Opportunity Act is clear that causing a person to experience humiliation – for example, subjecting a person to public ridicule or racial abusing the workplace¹⁹⁵ - constitutes a 'detriment'. This is discussed in more detail in [paragraphs 51 to 57](#) of this resource.

Reasonable requirements and conditions

209. Notwithstanding what is set out above, the Equal Opportunity Act does not prohibit an employer from imposing or maintaining reasonable terms of employment, provided the employer does not breach specific obligations, such as the obligation to accommodate parental/carer responsibilities and to make reasonable adjustments for somebody with a disability.

182 See the discussion in relation to humiliation and [Walgama v Toyota Motor Corporation Australia Ltd \[2007\] VCAT 1318](#) above at [Chapter 2](#) of this resource.

183 [Bogie v University of Western Sydney](#) (1990) EOC 92-313.

184 [Bailey v Australian National University \[1995\] HREOCA 274](#).

185 [Sivanathan v Commissioner of Police \(NSW\)](#) (2001) NSWADT 44.

186 See, eg, [Tran v Swinburne University & Ors \[2000\] VCAT 1083](#).

187 See, eg, [Stern v Depilation & Skincare Pty Ltd \[2009\] VCAT 2725](#).

188 See, eg, [Kogoi v East Bentleigh Child Care Centre \[1997\] VADT](#) (6 March 1997).

189 [Drummond v Telstra Corporation Limited \[2008\] VCAT 2630](#), [67]; [Drummond v Telstra Corporation Limited \(Anti-Discrimination\) \[2009\] VCAT 2411](#) (13 November 2009), [25].

190 [Candan v Holden Ltd & Ors \[2000\] VCAT 2300](#), [39] citing [R v Equal Opportunity Board ex parte Burns \[1985\] VR 317](#); [Bebbington v Dove \[1993\] 5 VIR 28](#).

191 [King v Nike Australia Pty Ltd \[2007\] VCAT 70](#) (19 January 2007), [148]-[149].

192 [Packer v Vagg and the Department of Education \[2001\] 2218](#) (22 November 2001), [22].

193 [Howe v QANTAS Airways Ltd \[2004\] FMCA 242](#) (15 October 2004) at [7.8] of the applicant's submissions, set out at [62] of the decision and discussed at [129].

194 [\[2009\] VCAT 713](#).

195 [Laverdure v Jayco Caravan \(Recreational Industries\) Pty Ltd & Anor \[2001\] VCAT 1706](#); [Walgama v Toyota Motor Corporation Australia Ltd \[2007\] VCAT 1318](#); [Poulter v State of Victoria \[2000\] VCAT 1088](#).

210. For example, in *State of Victoria v Schou (No 2)*¹⁹⁶ (*Schou No 2*) the Victorian Court of Appeal found that the requirement for Hansard Reporters to attend full-time at Parliament House when Parliament was sitting was reasonable in all the facts and circumstances. A factor in the court's reasoning was that the requirement was 'appropriate and adapted' to Parliament's needs.¹⁹⁷ However, it is worth noting that the decision in *Schou No 2* concerned the 1995 Act under which there was no obligation to accommodate an employee's obligations as a parent or carer. It is possible that a court today, would reach a different result in light of the conclusion that alternative working-from-home arrangements proposed by the complainant, Ms Schou, were also found to be reasonable.

Exceptions relating to employment and related areas

211. There are several permanent exceptions that make discrimination lawful in employment and related areas. These exceptions, which are discussed in [paragraphs 473-498](#), relate to:

- a. adjustments for a person with disabilities that are not reasonable¹⁹⁸
- b. offering employment for domestic or personal services¹⁹⁹
- c. employment for the care of children, where discrimination is necessary for their wellbeing²⁰⁰
- d. offering employment to people of one sex where it is a genuine occupational requirement of employment that employees be people of a particular sex²⁰¹
- e. offering employment on the basis of political belief or activity for political employment²⁰²
- f. offering employment to people with a particular attribute to deliver services for people with the same attribute²⁰³
- g. the payment of youth wages²⁰⁴

196 [\[2004\] VSCA 71 \(30 April 2004\)](#).

197 Ibid. Note that the requirement in *Schou No 2* arose in the context of an allegation of an unreasonable requirement.

198 *Equal Opportunity Act 2010* (Vic) s 23, 34.

199 Ibid s 24.

200 Ibid s 25.

201 Ibid s 26.

202 Ibid s 27.

203 Ibid s 28.

204 Ibid s28A.

h. early retirement schemes²⁰⁵

i. reasonable terms of an occupational qualification.²⁰⁶

Discrimination in education

212. [Part 4, Division 3](#) of the Equal Opportunity Act prohibits discrimination in education.

213. Under this Division, an 'educational authority' (namely a person or body which administers a school, college, university or other educational institution) must not discriminate against students or prospective students. Discrimination may occur in relation to admissions, the delivery modes, access to benefits, expulsion or 'any other detriment' experienced by the student.²⁰⁷

214. These provisions apply to entities which run schools, TAFE Institutes, and Universities in both the private and public sector. They also apply to any other entity or person which runs an educational institution. An educational institution is defined broadly to include any institution at which education or training is provided.

215. Where educational providers also employ staff or provide any other services, such as services to parents of students, they will also be subject to other aspects of the Equal Opportunity Act discussed elsewhere in this resource.

216. A school may provide parents with 'services' in the course of providing education to their offspring. In *Murphy v New South Wales Department of Education*²⁰⁸ the Commissioner held that the parents of a disabled student were treated less favourably by the school than the parents of able-bodied children. The school created a hostile environment, which caused the parents to leave the suburb, where they had lived for some years, and transfer their daughter to another school. This was a substantial detriment that occurred because of their daughter's disability. Note however that 'services' under section 4 of the Equal Opportunity Act does not include training and education in an educational institution, but may include things ancillary to the provision of training and education, such as enrolment, case management, the provision of facilities and furniture, and communication with parents about the wellbeing of their children.

205 Ibid s 29.

206 Ibid s 37.

207 Ibid s 40, s 38.

208 [\[2000\] HREOCA 14](#).

217. Put simply, an educational authority must not discriminate against a student or prospective student in its dealings with that person in their capacity as a student or prospective student. This prohibition extends to both direct and indirect discrimination.
218. In addition, the Equal Opportunity Act now includes an express and positive obligation on educational providers to make reasonable adjustments for students or prospective students who need adjustments made to enable them to 'participate in or continue to participate in or derive or continue to derive any substantial benefit from an educational program'.²⁰⁹ This obligation applies unless the educational authority can demonstrate that the person would not be able to participate or derive a substantial benefit from the educational programme, even if adjustments were made.²¹⁰
219. The Equal Opportunity Act provides a couple of examples of the type of adjustments that an educational authority could make for a person with a disability, namely, the provision of a teachers' aide or particular computer software program or moving a course or event from an inaccessible venue to an accessible one.
220. Types of adjustments will depend on the student's disability, but could include things like:
- a. modifying educational premises: for example, providing ramps, modifying toilets and ensuring that classes are in rooms accessible to the student
 - b. modifying or providing equipment: for example, lowering lab benches, enlarging computer screens, providing specific computer software or an audio loop system
 - c. changing assessment procedures: for example, allowing for alternative examination methods, such as oral exams, or allowing additional time for someone else to write an exam for the student
 - d. changing course delivery: for example, providing study notes or research materials in different formats.
221. A range of factors are identified as relevant to the question of whether an adjustment is reasonable. These are set out in detail in [section 40\(3\)](#). Reference is made in this provision to acts that comply with the various requirements of the *Disability Discrimination Act 1992 (Cth)*. In the context of disability discrimination in education, the Disability Discrimination Act provides that the Minister may, by legislative instrument, formulate disability standards in relation to any area in which it is unlawful for a person to discriminate against another.²¹¹
222. In 2005, the Commonwealth promulgated the *Disability Standards for Education* under the *Disability Discrimination Act 1992 (Cth)*. The Equal Opportunity Act operates concurrently with federal discrimination law including the *Disability Discrimination Act 1992 (Cth)*. Not only does it do so by operation of law, but this interaction is expressly referred to and relied upon in the way in which section 40 is drafted. For example, [section 40\(4\)](#) expressly provides that:
- An educational authority is not required to make an adjustment under subsection (2) to the extent that the educational authority has complied with or has been exempted from compliance with, a relevant disability standard made under the Disability Discrimination Act 1992 of the Commonwealth in relation to the subject matter of that adjustment.²¹²
223. The aim of this provision is to ensure that there is some consistency across both state and federal jurisdictions in dealing with the concepts of disability discrimination and the need to make reasonable adjustments and, presumably, to avoid a situation where the same educational authority is held to be compliant with federal discrimination laws but in breach of state laws.
224. Many of the cases which have been brought under the predecessor to the Equal Opportunity Act in the education context relate to claims of disability discrimination. By and large they have involved significant consideration of the technical requirements needed to establish either direct or indirect discrimination. Because of the changes to the definitions of both direct and indirect discrimination which now apply under the Equal Opportunity Act,²¹³ it is unclear what relevance these earlier cases will continue to have.

209 [Equal Opportunity Act 2010 \(Vic\) s 40](#).

210 [Ibid s 41](#).

211 [Ibid s 41](#).

212 [Equal Opportunity Act 2010 \(Vic\) s 40\(4\)](#).

213 Refer to the discussion in [Chapter Four](#) of this resource.

225. What is evident from these earlier cases however, is that such claims turn on their specific facts. This is not likely to change. Some of the issues which are likely to continue to arise include:
- a. does the person have a protected attribute?²¹⁴
 - b. were they subjected to unfavourable treatment?²¹⁵
 - c. if so, is there a causal nexus between that treatment and their protected attribute?²¹⁶
 - d. in the case of indirect discrimination, is any condition or requirement that has been imposed, reasonable?²¹⁷ Whether the condition, requirement or practice complies with the Disability Standards for Education is likely to be particularly relevant to the consideration of 'reasonableness'.

Religion in education

226. In the case of *Aitken & Ors v The State of Victoria – Department of Education & Early Childhood Development*,²¹⁸ the Tribunal considered a claim of direct discrimination against the Department of Education and Early Childhood Development (Department) made by parents of children at Victorian State primary schools. The complainants argued that the method of providing religious instruction in these schools, which is based on distinctive religious tenets and beliefs, was discriminatory because:

- a. children not participating in religious instruction (Non-participating Students) are identified as different, and separated from, their classmates when religious instruction classes are held
 - b. there is no curriculum instruction during religious instruction classes for Non-participating Students, denying them the opportunity to be taught secular subjects
 - c. religious instruction is timetabled during school hours.
227. The complainants sought that:
- a. the Department make religious education something parents must opt into – the Department amended its policy to shift to an opt in system in 2011 following the lodgement of the complaint
 - b. that religious instruction occur after school or at lunchtime
 - c. that Non-participating Students be provided with proper educational alternatives – the amendments to Department policy also included a commitment that Non-participating Students would be engaged in meaningful activities.

228. Judge Timothy Ginnane held that the complainants had failed to establish that the Department had discriminated against the Non-participating Students within the meaning of the 1995 Act or the Equal Opportunity Act, finding that 'the evidence did not establish that the children, who did not attend SRI at the three schools, were treated in any discriminatory manner,'²¹⁹ and accepting evidence of teachers that there was no teasing, bullying or pressure on students to attend religious instruction. His Honour reasoned that 'instruction is not compulsory and parents have a choice whether their children attend. If they do not, they engage in useful, non-curriculum activities under teachers' supervision.'²²⁰

214 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873, *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

215 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873, *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

216 See, for example, *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

217 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873, *Beasley v Department of Education and Training* [2006] VCAT 187; *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

218 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873; *Beasley v Department of Education and Training* [2006] VCAT 187; *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

219 Ibid [6].

220 Ibid.

229. A school may provide parents with ‘services’ in the course of providing education to their offspring. In *Murphy v New South Wales Department of Education*²²¹ the Commissioner held that the parents of a disabled student were treated less favourably by the school than the parents of able-bodied children. The school created a hostile environment, which caused the parents to leave the suburb, where they had lived for some years, and transfer their daughter to another school. This was a substantial detriment that occurred because of their daughter’s disability. Note however that ‘services’ under section 4 of the Equal Opportunity Act does not include training and education in an educational institution, but may include things ancillary to the provision of training and education, such as enrolment, case management, the provision of facilities and furniture, and communication with parents about the wellbeing of their children.
230. In dismissing the complaint, his Honour noted that ‘attendance by a child at special religious instruction does not, necessarily, indicate that the child, or the parents, hold any particular religious beliefs.’²²²
231. It should be noted that this case was still under consideration in the preparation of this resource, the complainants appealed VCAT’s decision to the Supreme Court of Victoria. The appeal had not yet been heard at the time of publication of this resource.

Exceptions relating to education

232. There are several permanent exceptions that make discrimination lawful in education. These exceptions, which are discussed in paragraphs 371 and 499 to 506, relate to:
- dedicated programs for students of a particular sex, race, religious belief, age or age group, or students with disabilities²²³
 - adjustments for a person with disabilities in education that are not reasonable²²⁴
 - standards of dress and behaviour²²⁵
 - age based admission schemes and age quotas.²²⁶

221 [2000] HREOCA 14.

222 Ibid.

223 *Equal Opportunity Act 2010 (Vic)* s39.

224 Ibid s 41.

225 Ibid s 42.

226 Ibid s 43.

Discrimination in the provision of goods, services and land

233. Part 4, Division 4 of the Equal Opportunity Act makes it unlawful to discriminate in the provision of goods and services and in the disposal of land. The Equal Opportunity Act prohibits discrimination:
- by refusing to provide goods or services to a person²²⁷
 - in the terms on which goods or services are provided²²⁸
 - by subjecting the person to ‘any other detriment’ in connection with the provision of goods or services²²⁹
 - by refusing to dispose of any land to the other person²³⁰
 - in the terms on which land is offered to the other person.²³¹
234. There are also specific obligations on service providers to make reasonable adjustments for a person with a disability, as discussed in Chapter Five of this resource.²³²

What are ‘services’ for the purposes of the Equal Opportunity Act?

235. Section 4 of the Equal Opportunity Act defines ‘services’ as follows:
- services includes, without limiting the generality of the word –
 - access to and use of any place that members of the public are permitted to enter
 - banking services, the provision of loans or finance, financial accommodation, credit guarantees and insurance
 - provision of entertainment, recreation or refreshment
 - services connected with transportation or travel
 - services of any profession, trade or business, including those of an employment agent

227 *Equal Opportunity Act 2010 (Vic)* s 44(1)(a).

228 Ibid s 44(1)(b).

229 Ibid s 44(1)(c). See, for example, *Yesilottlak Ali v State of Victoria - Department of Human Services* [1999] VCAT 637 (3 May 1999) in relation to an alleged detriment in the provision of services.

230 Ibid s 50(1)(a).

231 Ibid s 50(1)(b).

232 Ibid s 45.

vi. services provided by a government department, public authority, State owned enterprise or municipal council – but does not include education or training in an educational institution.²³³

236. 'Services' is defined inclusively such that it is not limited to those falling within the categories listed in [section 4](#) of the Equal Opportunity Act. The only clear limit on the area of services is that education or training in an education institution is not a service. However, this kind of activity would be captured within the area of education.
237. A generous interpretation of 'services' is therefore appropriate,²³⁴ particularly given that the Equal Opportunity Act is beneficial legislation, and an interpretation that furthers the objectives of the Equal Opportunity Act and provides access to redress for those alleging discrimination is likely to be consistent with the [Charter](#).
238. The Tribunal made general comments about the scope of 'services' in the decision of [Bayside Health v Hilton](#),²³⁵ which are consistent with this approach. Specifically, DP McKenzie stated:
- The definition of 'services' in section 4 is inclusive and not exhaustive. Even from the inclusions, one can see that the definition is extremely broad. It covers a diverse range of things provided by a diverse range of individuals and bodies. Putting the inclusions to one side, 'services' has its ordinary dictionary meaning and covers any act of helpful activity.²³⁶
239. DP McKenzie considered that services can be tangible or intangible, voluntary or provided for payment, and can be provided to more than one person. Furthermore, the fact that services may be regulated by statute does not deprive them of the character of services.²³⁷

240. However, the Tribunal noted that not every benefit which one person derives from the act of another constitutes a 'service', such as benefits derived from the exercise, for example, of a judicial or quasi-judicial discretion, or from something done by a body acting as a legislator.

Services established in case law

241. The following have been held to constitute 'services' for the purposes of predecessors to the Equal Opportunity Act:
- a. protection of, and assistance to, members of the public by police²³⁸
 - b. the staging of a parade or a general exhibition by a council²³⁹
 - c. a service may be provided in the future²⁴⁰
 - d. provision of pastoral services and conduct of mass by a parish priest²⁴¹
 - e. the actions of the Principal Registrar in responding to a request to amend the Birth Register under the *Births Deaths & Marriages Act 1973* to the benefit of an applicant who had had gender reassignment surgery²⁴²
 - f. the provision of facilities within prisons for the care and custody of children by prisoners²⁴³
 - g. visits by a spouse to a prisoner²⁴⁴
 - h. the decision to refuse legal aid to a child²⁴⁵
 - i. access to infertility treatment under the *Victorian Infertility Treatment Act 1995* (Vic).²⁴⁶

233 [Equal Opportunity Act 2010 \(Vic\) s 4.](#)
234 [IW v Perth \[1997\] HCA 30; \(1997\) 191 CLR 1.](#)
235 [\[2007\] VCAT 1483.](#)
236 [Ibid 17.](#)
237 [Ibid 18.](#)

238 [Staberhofer v The City of Sale \(1990\) EOC 92-292.](#)
239 [Falun Dafa Association of Victoria Inc. v Melbourne CC \[2003\] VCAT 1955 \(23 December 2003\).](#)
240 [Waters v Rizkalla \[1991\] 1 VR 12 \(24 January 1990\).](#)
241 [Tassone v Hickey \[2001\] VCAT 47 \(4 July 2001\).](#)
242 [AB v Registrar Births, Deaths and Marriages \[2006\] FCA 1071 \(16 August 2006\) \[65\].](#)
243 [Henderson v Victoria \(1984\) EOC 92-027.](#)
244 [Clarkson v Governor of Metropolitan Reception Prison \(1986\) EOC 92-153.](#)
245 [George v Victoria Legal Aid \[2000\] VCAT 2014 \(31 October 2000\).](#)
246 [McBain v Victoria \[2000\] FCA 1009.](#)

Statutory services

242. There is some uncertainty around whether services provided by a statutory authority in accordance with legislation constitute 'services' for the purposes of anti-discrimination laws, including the Equal Opportunity Act.
243. The issue is not legally settled and the case law supporting this interpretation often relates to legislation other than the Equal Opportunity Act.
244. It is the Commission's view that the broad definition of 'services' under the Equal Opportunity Act includes services provided by a government department, public authority, State owned enterprise or municipal council.²⁴⁷ The fact that a service is set out in legislation does not exclude it from being a service within the meaning of the Equal Opportunity Act.
245. The question of what governmental activity will constitute a service was considered by the High Court in *IW v City of Perth*²⁴⁸ in the context of Perth City Council's decision to reject an application for town planning approval for a centre for people with HIV. In that case, the members of the High Court took different approaches to the question of whether the Council was providing a service, and, if it was, how that service should be identified. The majority determined that the Council had not provided a service by refusing to exercise a statutory discretion to approve the application for rezoning. However, the judges did not share the same reasoning for their conclusion, making the application of the case to other situations difficult. However, the majority did agree that in some cases the performance of statutory duties may also amount to a 'service' to a particular individual.
246. In subsequent cases, the Courts have held:
- the provision of additional superannuation benefits under Retirement Benefits Regulations was a service.²⁴⁹
 - a regulatory impact statement prepared by the Commonwealth Attorney-General for Cabinet in relation to a disability standard was not a service.²⁵⁰
 - the alteration of a person's sex on birth registration was a service.²⁵¹
247. There is nothing to suggest that this interpretation might change in light of the new Equal Opportunity Act. The Equal Opportunity Act re-enacts the definition of services in the 1995 Act, and there is nothing in the Explanatory Memorandum²⁵² or the Second Reading Speech²⁵³ to the Equal Opportunity Act to indicate that the approach to statutory services may differ.

Identifying the 'service' claimed with sufficient particularity

248. In *Waters & Ors v Public Transport Corporation*,²⁵⁴ the High Court of Australia considered a complaint about the discriminatory effect of changes to the Victorian public transport system on people with disabilities. The changes included the removal of conductors from trams and the introduction of a new ticketing system described as 'scratch tickets'.²⁵⁵ In considering the case before it, a majority of the High Court was of the view that it is important to define what the 'service' is with particularity. In this instance, the service was defined broadly as the 'public transport system'. The majority held that the introduction of 'scratch tickets' and the removal of conductors were incidental to the provision of the service, and not, as the respondent sought to argue, separate services in themselves.

247 [Equal Opportunity Act 2010 \(Vic\) s 4\(f\)](#).

248 [\[1997\] HCA 30](#); (1997) 191 CLR 1.

249 [Australian Education Union v The Human Rights & Equal Opportunity Commission & Anor \[1997\] FCA 1288](#); (1997) 80 FCR 46.

250 [Vintila v Federal Attorney-General \[2001\] FMCA 110 \(1 November 2001\)](#).

251 [AB v Registrar Births, Deaths and Marriages \[2006\] FCA 1071 \(16 August 2006\)](#).

252 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

253 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 115-121 (Rob Hulls, Attorney-General).

254 [\[1991\] HCA 49](#); (1992) 173 CLR 349.

255 *Ibid* [2]-[3] The new tickets were to be purchased from retail shops and validated by the traveller making a scratch mark in designated places to indicate the journey being undertaken. Each of the nine complainants suffered from a disability making it 'exceedingly difficult, if not impossible, to use scratch tickets' (Mason and Gaudron JJ).

249. *Towie v State of Victoria*²⁵⁶ (*Towie*) adopted the same reasoning as the High Court in *Waters*. Mr Towie complained that the Magistrate's Court failed to accommodate his hearing impairment by not providing him with a graphic equaliser and headphones during a hearing, despite his requests for this equipment. Mr Towie argued that the State provides a service which can be described as 'access to justice', or 'access to court processes', and that he was discriminated against by the State's failure to provide equipment which would allow him to participate in this service in the same way as others.
250. The Tribunal rejected Mr Towie's argument and concluded that the 'service' he had identified was so vague, undefined and non-specific that it was not a service at all. The Tribunal considered that if it were to adopt Mr Towie's reasoning, it would mean that the 'service' would vary according to the needs of individuals seeking access to the courts. For example, for a person with an impairment who needs special equipment to effectively participate in the hearing process, the service would relate to the provision of equipment. For a non-English speaker who needs an interpreter to effectively participate in the hearing process, the service would vary to relate to the provision of interpreters. The Tribunal considered that such variation removes the distinction between the 'service' and the terms on which the service is provided. The Tribunal considered that Mr Towie was seeking the provision of a new service and a policy change, rather than making a claim regarding an existing service and seeking a remedy under the 1995 Act.
251. The *Towie* decision indicates that a specific identification of the 'service' being provided may be required, and that where services can be described as of a general nature to the community, and can be delivered variably to individuals, there may be difficulty in separating what the 'service' is from what the terms of the service are. This seems to contrast with the Tribunal's decision in *Falun Dafa Association of Victoria Inc. v Melbourne CC*²⁵⁷ where it commented, 'the performance of an activity can represent the provision of services to more than one person or group of persons, and that the nature or character of the service so provided can differ from recipient to recipient'.
252. While *Towie* and *Waters* underline the importance of identifying the service with some degree of specificity, the decisions appear to turn on the particular facts and identification of the 'service' in each case.
253. It is unclear whether the Tribunal would make the same finding if *Towie* were heard today, in light of *Charter* considerations and explicit reasonable adjustment requirements which require a service provider to consider individual circumstances.
- Does the service have to be directed to the complainant?**
254. While there needs to be some service offered, provided or denied to the complainant for the conduct to come within 'services', the service does not have to be directed solely to the complainant. It is also unnecessary that the complainant be the person who is the 'main' recipient of a service, as long as there are services offered, provided or denied to the complainant.
255. In *Bayside Health v Hilton*,²⁵⁸ Mr Hilton made a complaint about the way he was treated by a hospital where his partner was a patient. The hospital lodged an application to strike out Mr Hilton's complaint on the basis that the following were not able to be considered services:
- support provided to Mr Hilton by the hospital's social workers and psychologists
 - ad hoc accommodation provided to Mr Hilton by the hospital
 - other services that were broadly described as the provision of information by the hospital to Mr Hilton
 - communication by the hospital with Mr Hilton, and involvement of Mr Hilton in decision-making concerning the Mr Hilton's partner's treatment and care.
- Although the hospital's application was rejected, the Tribunal noted that not every hospital provides services to every member of a patient's family. However, in Mr Hilton's case, services were directly provided to Mr Hilton on account of his being the patient's partner and his direct involvement in decision-making regarding the patient's care.

256 [2007] VCAT 1489 (22 August 2007).

257 [2003] VCAT 1955.

258 [2007] VCAT 1483.

256. In contrast, the Tribunal in *Judd v State of Victoria*²⁵⁹ found that there was no service provided to the complainant in circumstances where the complainant claimed that the Department of Transport had discriminated in the provision of services by permitting a design of buses that were insufficient to accommodate a tall person comfortably. In that case, the Tribunal found that there was no service to the complainant because the design rules in question are determinations made by the Commonwealth Minister for Transport in administering the *Motor Vehicle Standards Act 1989* (Cth). Considering the provisions of that legislation, the Tribunal concluded that the design rules represent vehicle standards that are instruments of a legislative character, and not services directed to the complainant.
257. In the case of *Zangari v St John Ambulance Service*,²⁶⁰ the Western Australia State Administrative Tribunal held that two paramedics who attended Dr Zangari's surgery to provide a service to one of her patients did not provide a service to her as the attending doctor.
258. The Tribunal noted that, even though Dr Zangari had called the ambulance, she was not the 'pivotal link' or 'conduit' between St John Ambulance and the patient, finding that the paramedics were required to take control of the situation and provide medical care to the patient, and that a medical practitioner should take a step back when an ambulance arrives.
259. The Tribunal commented that it might be possible for St John Ambulance to provide a service to another medical practitioner who called an ambulance in different circumstances, but noted that each case would turn on its facts.
260. In terms of these circumstances, the Tribunal commented, 'the mere fact that Dr Zangari might have benefited from St John Ambulance providing services to her patient is not sufficient to establish that she was a person receiving a service within the meaning of [the legislation].'²⁶¹

Nature and character of services can differ between recipients

261. In *Falun Dafa v MCC*,²⁶² the Tribunal considered whether Melbourne City Council had refused to provide a service to the Falun Dafa Association of Victoria (an organisation promoting, amongst other things, meditation and exercise) in excluding it from participation in the 2003 Moomba Parade.
262. Falun Dafa argued that, in staging the Moomba Parade and determining who would be permitted to participate, the Council provided a service to participants and potential participants, including Falun Dafa by allowing it to present its culture and beliefs to a large audience. Falun Dafa contended that the proper characterisation of the service was one of exercising decision-making power, and that, whilst the Council provided a service to the public by staging the Moomba Parade for entertainment, the conduct of the parade was also a service to the participants.
263. Judge Bowman agreed that services can be reciprocal and represent the provision of services to more than one person or group, so that the nature and/or character of the service provided differs between recipients, and expressly agreed with the proposition that different facets of an activity may represent services that can be characterised differently.
264. His Honour concluded that in organising and staging the Moomba Parade, the MCC provided a service to participants and prospective participants (whereby they could promote themselves). Furthermore, the Council provided a service in deciding who could participate in the Moomba Parade.

Ignoring customers is refusal of service

265. *Whitehead v Criterion Hotel*²⁶³ considered circumstances where the complainant entered a hotel dining room with her three children and a friend. After changing dining rooms at the manager's request, the group waited for some time for service. The complainant began to breastfeed her youngest child. The manager again approached the group and displayed annoyance at the act of breastfeeding in a dining room. The group finally left the hotel after being ignored for another 10 minutes.

259 [2000] VCAT 2495.

260 [2010] WASAT 6.

261 Ibid [198].

262 [2003] VCAT 1955.

263 (1985) EOC 92-129.

266. The former Equal Opportunity Board found that the refusal of service amounted to discrimination on the ground of parenthood, and the refusal of service included the ignoring of customers. However, no damages were awarded.

Ejection from hotel due to drunkenness

267. In *Cruikshank v Walker*,²⁶⁴ the complainant alleged discrimination on the ground of impairment after being told to leave the respondent's hotel and being barred from drinking at the hotel.

268. The complaint was based on an incident two years earlier, when the complainant had suffered a nervous breakdown which involved hospitalisation and psychiatric attention. During the breakdown, he had burst out crying at the bar and had been allowed to lie down for several hours at the hotel.

269. The hotel argued that the complainant had been ejected from the hotel because he and his friends were drunk and noisy, and it was his behaviour while leaving which had led to him being barred.

270. The former Equal Opportunity Board was satisfied that the complainant's impairment was not a factor in the refusal of service by the hotel under the 1995 Act.

Provision of government accommodation and associated benefits.

271. In *Power v State of Victoria*,²⁶⁵ a profoundly intellectually disabled man lodged a complaint that he was discriminated against in the provision of accommodation and services provided by the Victorian Government. The complainant's allegations concerned living conditions and access to training, recreational and other activities.

272. The Board held that the respondent had discriminated against the complainant in that particular activities had a bias towards persons with certain skills and against others who, as a result of their impairments, did not possess such skills. All other allegations of discrimination were dismissed. Although less favourable treatment had been established, it was not established that this treatment was on the ground of the complainant's impairments.

273. The respondent was directed to review its activities and to provide additional unit-based activities to the complainant.

Attending council meetings

274. *Byham v Preston City Council*²⁶⁶ considered a complaint by a person with disabilities who was keenly interested in local affairs and made a point of attending council meetings, which were located on the second floor of a building. The complainant was usually able to attend council meetings by having his son assist him up the stairs.

275. The complainant had raised the issue of a lift numerous times before the council, and a preliminary study of the feasibility of a lift had been performed. It was estimated that a lift would cost approximately \$150,000 to install, an expense which the council considered unjustified. No other complaints regarding the lack of access to the first floor had been received by the council, although the complainant pointed to a large number of elderly and disabled ratepayers who could benefit from the installation of a lift.

276. The complainant alleged that this was a case of indirect discrimination, the relevant requirement being that the complainant access the first floor via a staircase in order to attend council meetings, with which a lower percentage of people with disabilities were able to comply when compared with people who did not have disabilities.

277. The former Board held that, in spite of the fact that the complainant usually attended council meetings through the assistance of his son, he could not comply with the requirement to access the first floor via the staircase. The fact that the complainant was able to access the first floor with the assistance of another person was not sufficient.

278. The Board held that it was not reasonable to refuse to install a lift and ordered the council to do so by a prescribed date.

264 (1987) EOC 92-212.

265 (1988) EOC 92-221.

266 (1991) EOC 92-377.

Council recreation services

279. Recreational services provided by a local council, such as swimming, aerobics and leisure facilities, will most likely be considered a 'service' under [Part 4, Division 4](#) of the Equal Opportunity Act. For example, in *Pulis & Banfield v Moe City Council*²⁶⁷ the former Equal Opportunity Board considered a complaint in relation to discrimination in services by two men, who were refused entry to a recreation centre's 'women's night' for aerobics, sauna and swimming on Monday evenings. In that case the Board found that the women's night did constitute discrimination.
280. However, this decision was made prior to the introduction of [section 12](#) of the Equal Opportunity Act in relation to 'special measures'. Under the Equal Opportunity Act, council recreational services including after-hours aerobics swimming and other events specifically designed to cater for the needs of culturally and linguistically diverse groups (such as Muslim women), may be covered by the special measures provision in [section 12](#). Special measures are explained in more detail in [Chapter 15](#) of this resource.
281. For example, in *Casey Aquatic & Recreation Centre*²⁶⁸ the applicant applied for an exemption under [section 89](#) of the Equal Opportunity Act to enable the applicant to open the Casey Aquatic & Recreation Centre on any Friday evening (when it would otherwise be closed) between 8pm and 10pm for women, girls and boys aged up to seven years only. It also applied for an exemption to staff the centre with women only during those hours and to advertise that service. The particular focus was on providing a service to Muslim women and their children, and evidence was provided to support the need for the segregated services. The Tribunal found that the Casey Aquatic & Recreational Centre did not require an exemption as the proposed services fell within the special measure provision of the Equal Opportunity Act meaning the conduct would not be discriminatory.

282. Similarly, in *Darebin City Council Youth Services v Victorian Equal Opportunity and Human Rights Commission*,²⁶⁹ the Council applied for an exemption under [section 89](#) of the Equal Opportunity Act to enable it to host two women's only events, to mark the end of Ramadan and the other to provide a music based social event. Ultimately, the Tribunal found that the proposed conduct was a special measure under [section 12](#) of the Equal Opportunity Act, so no exemption was necessary.

Do prisoners receive services from Corrections Victoria?

283. This issue has arisen in a number of cases and will depend on the particular factual circumstances.
284. In the case of *Garden v Victorian Institute of Forensic Mental Health t/as Thomas Embling Hospital*,²⁷⁰ the Tribunal held that the following were not services provided to the complainant, a prisoner at the Hospital:
- reports made to the Adult Parole Board. The Tribunal considered that the provision of the reports was a service, however, the service was provided to the Board, not to the complainant. The reports were not for treatment purposes and no copy of them was provided to the complainant
 - the continued presence of a particular staff member in the ward in which the complainant was located despite the complainant's requests that he be removed. The Tribunal considered that the true nature of the service provided was the provision of nursing services to each patient, and not the provision of a particular individual as primary nurse, or the provision of a primary nurse chosen by the complainant
 - the Tribunal assumed, however, that the sending and receiving of mail was a service provided to prisoners.
285. The Federal Court decisions of *Rainsford v State of Victoria* (at [first instance](#),²⁷¹ and on [appeal to the Full Court](#)²⁷²), considered a complaint by a prisoner made against Corrections Victoria under the *Disability Discrimination Act 1992* (Cth).

267 (1986) EOC 92-170 and (1988) EOC 92 – 243.

268 [2012] VCAT 893.

269 [2011] VCAT 1693.

270 [2008] VCAT 582.

271 *Rainsford v Victoria* [2007] FCA 1059.

272 *Rainsford v State of Victoria* [2008] FCAFC 31.

286. The complainant claimed the bed he was required to sleep in was inappropriate for his impairment, and that transport without breaks to enable him to stretch aggravated his impairment. One of the questions posed in this case was whether Corrections Victoria provided the prisoner with transport services or accommodation.
287. At first instance, Justice Sundberg held that the activities of transport between prisons and cell accommodations were not 'services' to the complainant, but rather were basic and inherent aspects of prison incarceration.²⁷³ In making these findings, Justice Sundberg observed that although some government functions are undoubtedly services, not all of them are. This is a question of fact determined by the situation in the particular case.
288. On appeal, the Full Court considered it was unnecessary to decide whether Justice Sundberg erred in his interpretation of what constitutes a 'service'.²⁷⁴ However, the Full Court did note that, while the issue was not argued in depth, there was 'some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility'.
289. The duty to interpret legislation consistently with human rights in the Charter²⁷⁵ means that an interpretation of 'services' in the Equal Opportunity Act that limits prisoners' access to equality and anti-discrimination rights would be less likely to be adopted by the Tribunal or the Victorian Supreme Court in future cases.
290. In *Mahommed v State of Queensland*²⁷⁶ the Queensland Anti-Discrimination Tribunal (QADT) held that Corrective Services Department indirectly discriminated against a Muslim prisoner, Mr Mohammed, in the provision of goods and services on the basis of religious belief or activity by requiring that he eat general prison fare (without fresh Halal meat) during the first three months of his prison term. The QADT held that the fact that Mr Mohammed was serving a long prison sentence was a very relevant consideration as to the reasonableness of the requirement to eat standard prison fare.²⁷⁷

273 *Rainsford v Victoria* [2007] FCA 1059.
 274 *Rainsford v State of Victoria* [2008] FCAFC 31.
 275 *Charter of Human Rights & Responsibilities Act 2006* (Vic), s 32(1).
 276 [2006] QADT 21.
 277 *Ibid* [58].

Do police provide individuals with a service?

291. Inactivity on the part of police officers could be characterised as a refusal of services.
292. In *Field Meret v State of Victoria*²⁷⁸ the Tribunal considered a complaint alleging that police had discriminated against the complainant, because she was a Protestant, in the course of investigating the alleged abuse of her granddaughter by the granddaughter's father.
293. The investigation was the result of the complainant claiming that the child would be at risk of abuse because the father was a Roman Catholic. More specifically, she alleged the police did not take a statement from her daughter about the possible abuse, assigned the investigation to a particular officer and 'misinformed' the Department of Justice.
294. VCAT made the comment that police 'fulfil a public duty to investigate crime but they do not provide a service to any individual such as the Complainant in the circumstances of this case where the Complainant is not a victim of crime or where there is a duty owed to protect her', and dismissed the complaint as misconceived.

Volunteers as recipients and providers of services?

295. The Equal Opportunity Act specifically excludes volunteers and unpaid workers from its definition of employees (except for the purposes of sexual harassment).²⁷⁹ However, in keeping with the notion of reciprocal services endorsed in *Falun Dafa v MCC*,²⁸⁰ and with the broad application of the term 'services', volunteers can be considered to receive, and provide, services within the meaning of the Equal Opportunity Act. A volunteer who has contact with others as part of their volunteer role may provide a service to another person, and their conduct while providing these services will be subject to the Equal Opportunity Act.²⁸¹ (Refer to related discussions about volunteers in [paragraphs 550–553](#) and [603](#) of this resource). A volunteer in an organisation can also receive services from that organisation, such as training.

278 [1999] VCAT 616.
 279 *Equal Opportunity Act 2010* (Vic), s 4; *Nason v RVIB & Ors* [2002] VCAT 403.
 280 [2003] VCAT 1955.
 281 *Buljan v Ethnic Broadcasting Association of Victoria Ltd* [2000] VCAT 2020.

Exceptions relating to the provision of goods and services and disposal of land

296. The exceptions that make discrimination in the provision of goods and services lawful under the Equal Opportunity Act, which are discussed in [paragraphs 507–512](#), relate to:
- adjustments for a person with disabilities that are not reasonable²⁸²
 - offering insurance, or the terms on which an insurance policy is provided²⁸³
 - offering or refusing an application for credit²⁸⁴
 - requiring adult supervision as a term of providing goods and services to a child²⁸⁵
 - the disposal of land by will or gift.²⁸⁶

Discrimination in accommodation and access to public premises

297. [Part 4, Division 5](#) of the Equal Opportunity Act makes it unlawful to discriminate in relation to accommodation. The Equal Opportunity Act prohibits a person from discriminating against another person:
- in offering to provide accommodation²⁸⁷
 - in providing accommodation.²⁸⁸
298. The Equal Opportunity Act also prohibits discrimination by refusing to:
- provide accommodation to a person with a disability because they have an assistance dog, or requiring the person to pay an extra charge or to keep the assistance dog elsewhere²⁸⁹
 - allow reasonable alterations to be made to accommodation to meet the special needs of a person with a disability.²⁹⁰
A number of conditions apply to these obligations, including that the 'adjustments' to the accommodation must be made at the expense of the person with the disability and not unduly impact other occupiers
 - in relation to lots affected by an owners' corporation, allow reasonable alterations to be made to common property to meet the special needs of a person with a disability.²⁹¹

282 [Equal Opportunity Act 2010 \(Vic\), s 46.](#)

283 [Ibid s 47.](#)

284 [Ibid s 48.](#)

285 [Ibid s 49.](#)

286 [Ibid s 51.](#)

287 [Ibid s 52.](#)

288 [Ibid s 53.](#)

289 [Ibid s 54.](#)

290 [Ibid s 55.](#)

291 [Ibid s 56.](#)

What is accommodation for the purposes of the Equal Opportunity Act?

299. [Section 4](#) of the Equal Opportunity Act defines 'accommodation' as follows.
- accommodation includes –
 - business premises
 - a house or flat
 - a hotel or motel
 - a boarding house or hostel
 - a caravan or caravan site
 - a mobile home or mobile home site
 - a camping site.²⁹²
300. Accommodation should be looked at broadly and given a wide interpretation.²⁹³ It expressly covers the most obvious categories such as renting houses, apartments and hotel rooms, but also extends to areas such as camping, caravan and mobile home sites and property intended to be used for business purposes.

Discrimination in offering to provide accommodation²⁹⁴

301. A person must not discriminate against another person:
- by refusing, or failing to accept the other person's application for accommodation²⁹⁵
 - in the way in which the other person's application for accommodation is processed²⁹⁶
 - in the terms on which accommodation is offered to the other person.²⁹⁷

292 [Ibid s 4.](#)

293 [Burton v Houston \[2004\] TASSC 57.](#)

294 [Equal Opportunity Act 2010 \(Vic\) s 52.](#)

295 [Ibid s 52\(a\).](#)

296 [Ibid s 52\(b\).](#)

297 [Ibid s 52\(c\).](#)

Discrimination in providing accommodation²⁹⁸

302. Section 53 of the Equal Opportunity Act provides that a person must not discriminate against another person:
- by varying the terms on which the accommodation is provided to the other person²⁹⁹
 - by denying or limiting access by the other person to any benefit associated with the accommodation³⁰⁰
 - by evicting the other person from the accommodation³⁰¹
 - by refusing to extend or renew the provision of accommodation to the other person³⁰²
 - in the terms on which the provision of accommodation to the other person is extended or renewed³⁰³
 - by subjecting the other person to any other detriment in connection with the provision of accommodation to that person.³⁰⁴

Examples of discrimination in the provision of accommodation

303. The following circumstances have been found to give rise to unlawful discrimination in the provision of accommodation:
- Refusing to allow a family with teenage sons to book holiday park accommodation³⁰⁵
 - Refusing to rent premises to be occupied by women and children without husbands³⁰⁶
 - Refusing to hire a caravan to people of a certain ethnic background³⁰⁷
 - Using tenancy application forms that included discriminatory questions, such as, 'are you single, married, divorced, widowed, separated?'; 'What are your child care arrangements?'³⁰⁸
 - Refusing to rent a flat to two adults because they are both men.³⁰⁹

298 [Ibid s 53.](#)

299 [Ibid s 53\(a\).](#)

300 [Ibid s 53\(b\).](#)

301 [Ibid s 53\(c\).](#)

302 [Ibid s 53\(d\).](#)

303 [Ibid s 53\(e\).](#)

304 [Ibid s 53\(f\).](#)

305 [Galea v Hartnett – Blairgowrie Caravan Park \[2012\] VCAT 1049.](#)

306 [Calman & Ors v Haloulos \(1986\) EOC 92-163.](#)

307 [Bull & Anor v Kuch & Anor \[1993\] HREOCA 15.](#)

308 [Calman & Ors v Haloulos \(1986\) EOC 92-163.](#)

309 [Wagen v Nicholas Moss \(Vic\) Pty Ltd & Ors \(1985\) EOC 92-121.](#)

304. In [Galea v Hartnett – Blairgowrie Caravan Park](#),³¹⁰ the respondent, who operated a caravan park, was alleged to have discriminated against the applicant by refusing the applicant's holiday booking because he and his wife had two sons (one adult, one older teenager), who were also to come on the holiday.
305. The applicant had telephoned the respondent to make an enquiry about booking a caravan site at the Blairgowrie Caravan Park over the summer holidays. The applicant was advised that a site was available, and several days later, drove to Blairgowrie to confirm the booking and pay the required deposit. The applicant alleged that on arriving at the caravan park and informing the respondent the ages of his two sons, 18 and 21 years old, the respondent stated that he had a problem with the children, as they were young adults, and the applicant's family did not fit in with the park's clientele. The respondent allegedly stated that he preferred middle aged couples with young children, and that he could not help the applicant with a booking.
306. At hearing, the respondent gave evidence that he believed the caravan park would not be suitable for the applicant's family because he thought the applicant's sons would not enjoy spending all of the holiday with their parents, and that the only issue he had with the ages of the applicant's sons was in relation to the tariffs to be charged.
307. The Tribunal was satisfied that a substantial reason for the respondent's refusal to provide accommodation to the applicant was because he intended to bring his two sons on the holiday, amounting to direct discrimination and a breach of both the prohibition against discrimination in offering to provide accommodation, and the prohibition against discrimination in the provision of goods and services (the offering of accommodation being a service). Whilst the Tribunal did not consider the circumstances sufficient to warrant an award of aggravated or exemplary damages, the Tribunal did award the applicant damages of \$1,000 for distress, hurt and humiliation.

310 [\[2012\] VCAT 1049.](#)

308. In *Bull & Anor v Kuch & Anor*,³¹¹ the respondent operated a business providing emergency caravan hire accommodation. When a council officer sought to obtain emergency accommodation for the complainants, an Aboriginal couple, the first respondent replied that she would not rent to 'Aboriginals' under any circumstances whatsoever. When the first respondent was told by the council officer that her refusal might amount to discrimination, she replied that she did not care. The Australian Human Rights and Equal Opportunity Commission described the case as a 'serious and significant case of blatant racial discrimination', particularly as the refusal arose in emergency circumstances, and ordered the owners to pay the complainants compensation of \$20,700.
309. In *Calman & Ors v Haloulos*,³¹² two women seeking new premises for a women's refuge answered an advertisement for a rental property. The respondent, whose daughter owned the property, intimated to one of the complainants that they would not be able to afford the rent, and suggested that she come back with her husband. When she replied that she had no husband, the respondent asked her to leave. When advised of the complainants' intention that four women and two children would live in the property, the respondent told all the women present to leave. The Tribunal held that the respondent had treated the women less favourably than applicants who were married couples, and had not made any enquiries about the complainants' ability to pay the rent.

310. In the case of *Wagen v Nicholas Moss*³¹³ the complainant, a single male who sought to rent a house with a male friend, was advised by the real estate agent that his application was unsuccessful because the owner had requested that the property be leased to a 'happy family'. The complainant was told that the house would be re-advertised and his application might be reconsidered if no suitable applicant responded to the advertisement. Eventually, the complainant was told his application had been unsuccessful, forcing him to rent another house on less favourable terms (higher rent and a shorter-term lease).
311. The Tribunal held that the real estate agent had discriminated against the complainant on the ground of marital status by rejecting his application and giving it a lower order of precedence than other applications. The damages awarded took into account the extra rent and shorter lease of the house the complainant ended up leasing. No order was made against the owner of the house.

Other discrimination in connection with accommodation

312. A number of cases have considered broader connections between the provision of accommodation and unlawful discrimination.
313. For example, the federal case of *Marlene Ross v Heinz Loock*³¹⁴ considered circumstances where a landlord, his female tenant and others were socialising together in the landlord's unit. At the end of the evening when the other guests left, the landlord asked the tenant to stay behind to discuss something. He then made unwelcome sexual advances on the tenant. Soon after, the landlord terminated the tenancy. The Commission found that the landlord's conduct was sexual harassment, and unlawful, because the landlord was her accommodation provider. It was held in this case that the landlord had, therefore, sexually harassed the tenant in the course of providing accommodation.

311 [1993] HREOCA 15. See also *Smith v Jamsek* [2012] NSWADT 3.

312 (1986) EOC 92-163.

313 (1985) EOC 92-121.

314 [2000] HREOCA 6.

314. The case of *Houston v Burton*³¹⁵ considered complaints about noise in connection with accommodation. In that case, the complainant and respondent shared a balcony in an apartment complex. The complainant had complained to the respondent about the noise levels in the apartment complex. The respondent subsequently started shouting vilifying statements at the complainant whilst on their shared balcony, on the basis that she was transgender. The Tribunal considered section 22(1) of the *Anti-Discrimination Act 1998* (Tas), which prohibits discrimination in any activity in connection with protected areas of public life, including accommodation, and found that at the time of the conduct complained of, the complainant was undertaking an activity in connection with accommodation within the meaning of the legislation.³¹⁶ This was because the complainant was engaged in the activity of speaking to the respondent about his conduct, as her neighbour, which was impacting on the quality of her accommodation. On appeal, the Supreme Court of Tasmania upheld the Tribunal's findings.³¹⁷ Justice Blow considered that section 22(1) applies to anyone who has any contact with someone who is engaged in or undertaking an activity that has some degree of connection with one of the matters listed in section 22, in this case, accommodation.
315. In the case of *H v G*,³¹⁸ the Tasmanian Tribunal considered that to apply the prohibition against discrimination in accommodation to people in a personal relationship, living under the same roof, would be stretching the connection too far. The Tribunal considered that the conduct complained of, namely Mr G's treatment of Ms H, related to their relationship; and although the fact they lived together facilitated Mr G's conduct, the Tribunal did not believe that the alleged discrimination was sufficiently connected with accommodation to properly bring the claim within unlawful discrimination in accommodation. Distinguishing *Burton v Houston*,³¹⁹ the Tribunal considered that the only connection was that the parties shared accommodation, and Mr G considered Ms H should do all of the housework. The connection to accommodation must be clear and cogent in order for the prohibition to apply.

315 [2003] TASADT 3.
 316 *Anti-Discrimination Act 1998* (Tas) s 22.
 317 *Burton v Houston* [2004] TASSC 57.
 318 [2010] TASADT 5.
 319 [2004] TASSC 57.

Do prisoners receive accommodation from Corrections Victoria?

316. In *NC, AG, JC, SM, Matthews & Matthews as personal representatives of the Estate of Matthews v Queensland Corrective Services Commission*,³²⁰ the Queensland Anti-Discrimination Tribunal (QADT) considered complaints on behalf of five prisoners that the respondent had discriminated against them in accommodation on the basis of their HIV positive status. The allegations of discrimination included being housed in a medical segregation unit, not being given the option to work in the kitchen at the prison, and for a time not being permitted to attend the oval at the same time as the mainstream protection prisoners. Applying *Hoddy v Executive Director, Department of Corrective Services*,³²¹ the QADT noted that it is open to a prisoner to complain of discrimination in the provision of services or facilities, accommodation and work (i.e. work at the prison). The QADT found that the treatment of the complainants in the correctional centres was less favourable than that of other prisoners who were not HIV positive, and accordingly the respondent had been in breach of the *Anti Discrimination Act 1991* (Qld).

Discrimination in access to public premises

317. Section 57 of the Equal Opportunity Act prohibits discrimination on the basis of disability in relation to access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether or not for payment). This includes discrimination:
- by refusing to allow access to, or use of, the premises or any facilities in the premises³²²
 - in the terms or conditions on which a person is allowed access to, or use of, the premises or facilities in the premises³²³
 - in providing the means of access to the premises³²⁴
 - by requiring a person to leave or cease use of any facilities in the premises.³²⁵
318. For the purpose of these provisions, 'premises' includes a structure, building, aircraft, vehicle, vessel, a place and a part of premises.

320 (1998) EOC 92-940.
 321 (1992) EOC 92-397.
 322 *Equal Opportunity Act 2010* (Vic) s 57(1)(a)-(d).
 323 *Ibid* s 57(1)(b)(e).
 324 *Ibid* s 57(1)(c).
 325 *Ibid* s 57(1)(f).

Exceptions relating to the provision of accommodation and access to public premises

319. Several exceptions make it lawful to discriminate in the provision of accommodation and access to public premises (discussed in [paragraphs 513 to 523](#)). The exceptions relate to:
- accommodation that is unsuitable or inappropriate for occupation by a child because of their design or location³²⁶
 - shared rental accommodation³²⁷
 - accommodation provided by a hostel or similar institutions for the welfare of persons of a particular sex, age, race or religious belief³²⁸
 - accommodation for students³²⁹
 - accommodation for commercial sexual services³³⁰
 - access to, or use of, public premises that is not reasonable.³³¹

Access to cinema

320. In the case of *Hall-Bentick v Greater Union Organisation Pty Ltd*,³³² a cinema was ordered to modify its premises and screening practices after the Tribunal found it had indirectly discriminated against the wheelchair-bound complainant by not providing wheelchair-access to him in its cinemas and cinema facilities such as bathrooms. The Tribunal required Greater Union not only to modify its premises and screening practices to ensure that all discriminatory circumstances were eliminated, but also to screen latest release films in the smaller theatre that had wheelchair access.

Discrimination in clubs

What is a 'club'?

321. The way the Victorian Parliament has sought to balance this has resulted in a change to the definition of what constitutes a 'club' under the Equal Opportunity Act.
322. 'Club' was previously defined under the 1995 Act by reference to whether it was a social, recreational, sporting or community organisation occupying Crown Land or directly or indirectly receiving financial assistance from the State or a municipal council,³³³ the Equal Opportunity Act now defines a club by reference to:
- the number of members (i.e. more than 30)
 - whether the members are associated together for social, literary, cultural, political, sporting, athletic or other lawful purpose
 - whether it has a licence to supply liquor
 - whether it operates its facilities wholly or partly from its own funds.³³⁴
323. The definition does not extend to temporary limited licences and major event licences issued for events over a limited period or for one-off events.³³⁵ The changes in this definition were intended to bring the concept of what is a club, and therefore, what falls within the jurisdiction of the Equal Opportunity Act, into line with similar definitions under federal anti-discrimination laws.³³⁶

326 [Ibid s 58A.](#)

327 [Ibid s 59.](#)

328 [Ibid s 60.](#)

329 [Ibid s 61.](#)

330 [Ibid s 62.](#)

331 [Ibid s 58.](#)

332 [\[2000\] VCAT 1850.](#)

333 [Equal Opportunity Act 1995 \(Vic\) s 4.](#)

334 [Equal Opportunity Act 2010 \(Vic\) s 4.](#)

335 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\), 6.](#)

336 [Sex Discrimination Act 1984 \(Cth\); Disability Discrimination Act 1992 \(Cth\).](#)

Discrimination against applicants for membership

324. Subject to the relevant exceptions, this Division of the Equal Opportunity Act prohibits discrimination against applicants for club membership³³⁷ and club members.³³⁸
325. [Section 64](#) of the Equal Opportunity Act provides that:
- a. a club, or a member of the committee of management or other governing body of a club, must not discriminate against a person who applies for membership of the club:
 - i. in determining the terms of a particular category or type of membership³³⁹
 - ii. in the arrangements made for deciding who should be offered membership³⁴⁰
 - iii. by refusing or failing to accept the person's application for membership³⁴¹
 - iv. in the way the person's application for membership is processed³⁴²
 - v. in the terms on which the person is admitted as a member.

Discrimination against club members

326. Further, a club, or a member of the committee of management or other governing body of a club, must not discriminate against a member of the club by:
- a. refusing or failing to accept the member's application for a different category or type of membership³⁴³
 - b. denying or limiting access to any benefit provided by the club³⁴⁴
 - c. by varying the terms of membership³⁴⁵
 - d. by depriving the member of membership³⁴⁶
 - e. by subjecting the member to any other detriment.³⁴⁷

What is a club for the purposes of the Equal Opportunity Act?

327. Associations which fall within this definition cannot discriminate against existing or prospective members of the club, unless an exception applies.
328. There is no separate definition for voluntary bodies in Victoria, nor any requirements as to incorporation or non-incorporation.
329. Under the 1995 Act, a 'club' meant a social, recreational, sporting or community service club or organisation that occupied Crown land or received direct or indirect State or council funding. Clubs falling outside this definition were considered 'private clubs'. The philosophy underlying the exception for private clubs was the promotion of freedom of association and the sharing of mutual interests. The second reading speech to the *Equal Opportunity Act 1984* (Vic) noted that organisations wishing to maintain exclusivity, of whatever nature, are free to do so but the Government will not make available, to general organisations engaging in unacceptable discrimination, public moneys or access to public property. This position has significantly changed under the Equal Opportunity Act, and private clubs are no longer automatically exempt from the prohibitions against discrimination. However, exceptions may still apply, such as those for single sex clubs, clubs for minority cultures or particular age groups.

Exclusion from club not racially based

330. In *Toledo v Eastern Suburbs Leagues Club Limited*,³⁴⁸ the complainant and his party of Japanese visitors sought entry to the Eastern Suburbs Leagues Club. A heated altercation took place between the complainant and the club doorman when the visitors were unable to produce adequate identification. The complainant alleged that he and his visitors were refused entrance to the club on the basis of their race.

337 [Equal Opportunity Act 2010 \(Vic\) s 64.](#)

338 [Ibid s 65.](#)

339 [Ibid s 64\(a\).](#)

340 [Ibid s 64\(b\).](#)

341 [Ibid s 64\(c\).](#)

342 [Ibid s 64\(d\).](#)

343 [Ibid s 65\(a\).](#)

344 [Ibid.](#)

345 [Ibid.](#)

346 [Ibid.](#)

347 [Ibid.](#)

348 [\[1992\] HREOCA 22.](#)

331. The Australian Human Rights Commission (the Federal Commission) considered it unlikely that management of the club was influenced by racist attitudes, noting that the club had a multicultural membership and that the doorman had been employed at the club for 22 years. Rather, the incident was traceable to an inflexible application of identification rules. No mention was made of race or national origin as a cause of the refusal. There was also no suggestion of racist remarks other than that made by the complainant.
332. The Federal Commission recommended that the club apologise to the complainant.

Refusal of club membership due to marital status

333. In *Ciemcioch v Echuca-Moama RSL & Citizens Club Ltd*,³⁴⁹ the Federal Commission found that, in rejecting the complainant's application for club membership, the Echuca-Moama RSL Citizens Club had discriminated against her on the ground of her marital status.
334. The complainant argued that the rejection was based on the fact that the club held a grudge against her husband who had been involved in a dispute with the club culminating in litigation. The club contended that a decision by it involving a grudge in relation to the complainant's husband, was not one that involved any connection with the fact of the complainant's marriage to her husband.
335. The Federal Commission favoured a liberal construction of the definition of marital status in the *Sex Discrimination Act 1984 (Cth)*,³⁵⁰ and held that the presence of the characteristics of loyalty and support in interpersonal relationships other than marriage did not prevent their classification as characteristics appertaining generally to a person's marital status.
336. The Federal Commission considered that there was enough evidence to raise a suspicion in the mind of the complainant that she had been discriminated against, and that suspicion was more than just a fanciful one. The club was ordered to reconsider the complainant's application to join the club, and to pay her \$3,000 damages by way of compensation.

Refusal of club membership due to political belief

337. [Section 4](#) of the Equal Opportunity Act defines political belief or activity as:
- holding or not holding a lawful political belief or view
 - engaging in, not engaging in or refusing to engage in a lawful political activity.
338. This re-enacts the definition of political belief or activity that was in the 1995 Act. The Supreme Court in Tasmania has considered the implications of discrimination on the grounds of political belief or activity in relation to the refusal of club membership. In *Lindisfarne R & SLA Sub-Branch and Citizen's Club Inc and Another v Buchanan*,³⁵¹ Mr Buchanan claimed that the Sub-Branch and the Citizen's Club (Clubs) had discriminated against him on the grounds of his political beliefs when he tried to join the Clubs, by requiring him to sign a declaration that he was prepared to swear or affirm loyalty to the Sovereign of the Commonwealth, and that he would uphold the Constitution of the Commonwealth, which was a precondition for membership of the Clubs.
339. Mr Buchanan was a republican, and on this basis saw it as hypocritical for him to swear loyalty to the Monarch. He therefore amended his application to swear loyalty to the Commonwealth. His application was rejected on this basis, because it did not comply with the prescribed requirements for eligibility for membership. Mr Buchanan brought a claim that he had been discriminated against on the basis of his political beliefs, which was upheld by the Anti-Discrimination Tribunal of Tasmania. The Clubs appealed this decision to the Supreme Court of Tasmania.

349 [1994] HREOCA 2.

350 *Sex Discrimination Act 1984 (Cth)* s 6.

351 (2004) 80 ALD 122.

340. The Supreme Court held that the fact that the monarchist aspect of the Clubs' objectives did not negate the attraction of membership for some republicans did not mean that the membership requirement did not disadvantage those republicans barred from membership who, because of their conscience, could not meet the requirements. The Court was satisfied that otherwise qualified applicants for membership who could not reconcile their republican beliefs with the membership requirement, was an identifiable ground, and the requirement disadvantaged those holding that political belief more than those not a member of that group. On that basis, the appeal was dismissed, and the finding of unlawful discrimination upheld.
344. The Commission found that the opportunity to tee-off on a Saturday was a benefit and that female members' access to this benefit had been restricted. The Commission was not persuaded by the club's argument that it would be impracticable to have more than two womens' tee-off times on a Saturday because the men participate in a separate competition on that day.
345. The Commission found that it was practicable for the benefit to have been used by men and women to the same extent, noting that the question of practicability is different from 'whether it is desirable, or whether the committee may think it desirable, that the men members should have a greater use of the course on the Saturday.' Therefore, the restricted playing times was held to constitute sex discrimination, as women had their access to a benefit by the club limited, and did not receive a fair and reasonable proportion of use of the benefit (even allowing for the fact that fewer women played golf than men).

Club playing times

341. *Corry & Ors v Keperra Country Golf Club*³⁵² considered the case of a Queensland golf club which had limited the number of highly-sought after Saturday tee-off times available for women members, while no such limit applied to male members. The restriction meant that only eight women could play, and only at designated times, whereas men were able to tee-off at all other times.
342. The female members complained that the restriction constituted unlawful sex discrimination because it limited the female members' 'access to any benefit provided by the club'.³⁵³
343. The club relied on an exception to the prohibition (identical to [section 69](#) of the Equal Opportunity Act) which provided that the discrimination complained of would not be unlawful if:
- a. it is not practicable for the benefit to be used or enjoyed to the same extent by both men and women (First Limb)
 - b. either the same or an equivalent benefit is provided for the use of men and women separately from each other, or men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit (Second Limb).³⁵⁴
346. Because the First Limb of the exception was not made out, the discrimination was unlawful and the Commission was not required to rule on the Second Limb, regarding whether men and women members were each entitled to 'a fair and reasonable proportion of the use and enjoyment of the benefit'.
347. The club had argued that the availability of two tee-off times was a fair and reasonable proportion given the respective numbers of men and women that were likely to wish to play the course on a Saturday. However, the Chairman of the Commission expressed doubt that the club's arrangements met the 'fair and reasonable proportion' test in the Second Limb of the exception.
348. The Commission declared that the club must permit all members, regardless of sex, to sign up in single sex groups, choosing tee-off times on a 'first-come, first-served' basis.

352 (1986) EOC 92-150.

353 [Sex Discrimination Act 1984 \(Cth\) s 25\(2\)\(c\)](#).

354 [Ibid s 25\(4\)](#).

Exceptions relating to discrimination by clubs and club members

349. Discrimination by clubs and club members may be lawful under several exceptions (discussed in [paragraphs 524 to 532](#)), including:
- clubs for minority cultures³⁵⁵ and political purposes³⁵⁶
 - clubs and benefits for particular age groups³⁵⁷
 - single sex clubs³⁵⁸
 - a club providing separate access to benefits for men and women.³⁵⁹

Discrimination in sport

350. The Equal Opportunity Act prohibits discrimination in sport. Specifically, under [section 71](#) of the Equal Opportunity Act, it is unlawful to discriminate against a person on the basis of a protected attribute (for example, disability, sex or race) by:
- refusing or failing to select them in a sporting team³⁶⁰
 - excluding them from participation in a sporting activity.³⁶¹

What does 'participating in a sporting activity' mean?

351. 'Participating in a sporting activity' is broadly defined to include the activities of people who are themselves not 'playing' the particular sport – for example, coaching, umpiring or refereeing, and participating in the administration of a sporting activity.³⁶²

Meaning of 'sport' and 'sporting activity'

352. 'Sport' and 'sporting activity' have their ordinary meaning, and the Equal Opportunity Act expressly states that they include a game or a pastime.³⁶³
353. In the past, the Tribunal has confirmed that the ordinary meaning of sporting activity includes activities that may normally be regarded as recreational rather than purely sporting, and includes non-competitive games where physical athleticism is not a factor.³⁶⁴

354. In [Robertson v Australian Ice Hockey Federation](#),³⁶⁵ DP McKenzie summarised the scope of 'sport' in considering a complaint by Ms Robertson that, on the basis of her sex or age, she was banned by the Federation from playing ice hockey, unless she played in a women's competition. DP McKenzie noted that:

...the ordinary meaning of 'sporting activity' is expanded to include certain activities that would normally be regarded as recreational rather than sporting, and to include non-competitive games and games where physical athleticism is not a factor. The breadth of the term is made clear in the explanatory memorandum speech for the bill which eventually became the Equal Opportunity Act 1995. The memorandum pointed out that 'sporting activity' could include activities such as chess or debating.

355. The Explanatory Memorandum to the *Equal Opportunity Bill 2010 (Vic)* also makes clear that 'sporting activity' includes games and pastimes like chess and debating.³⁶⁶

Interaction with other provisions

356. Where a complaint may be lodged in the 'sport' area, there may also be the potential for a complaint to be lodged in the 'services' or 'clubs' areas.
357. It is unlawful for a club, or a member of a club, committee or management body, to discriminate against a person on the basis of a protected attribute by denying them membership to a club or in the terms on which the person is admitted as a member.³⁶⁷ This could include opportunities to be involved in sporting activities, as was the case in [Robertson v Australian Ice Hockey Federation](#).³⁶⁸

355 [Equal Opportunity Act 2010 \(Vic\) s 66](#).

356 [Ibid s 66A](#).

357 [Ibid s 67](#).

358 [Ibid s 68](#).

359 [Ibid s 69](#).

360 [Equal Opportunity Act 2010 \(Vic\) s 71\(a\)](#).

361 [Ibid s 71\(b\)](#).

362 [Ibid s 70](#).

363 [Ibid](#).

364 [Robertson v Australian Ice Hockey Federation \[1998\] VADT 112](#).

365 [Ibid](#).

366 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\), 70](#).

367 [Equal Opportunity Act 2010 \(Vic\) s 64](#).

368 [\[1998\] VADT 112](#).

358. It is also unlawful to discriminate against a person on the basis of a protected attribute by refusing to provide goods or services to them, or in the terms on which goods or services are provided. Arguably this would include, for example, a sporting body refusing to provide the same range of sporting equipment to a women's cricket team as for the men's team, or offering competition or training opportunities to one sex only.

359. The provision of sporting facilities, as well as access to sporting teams and competitions, can be considered to be provision of services.

Exceptions relating to sport

360. [Section 72](#) of the Equal Opportunity Act provides an exception to discrimination on the basis of sex and gender identity for competitive sporting activities. This exception is discussed in [paragraphs 434 to 441](#).

Discrimination in local government

361. [Part 4, Division 8](#) of the Equal Opportunity Act makes it unlawful to discriminate in local government. Specifically, [section 73](#) of the Equal Opportunity Act prohibits a councillor of a municipal council from discriminating against:

- a. another councillor of that council
 - b. a member of a committee of that council who is not a councillor of that council
- in the performance of his or her public duties.

362. To the extent that local governments provide services or employ staff, their activities are also covered by other parts of the Equal Opportunity Act.

363. In the case of *Evans v Brimbank CC*³⁶⁹ a local councillor complained that individual fellow councillors had discriminated against him on the basis of his impairment when they refused to grant him leave of absence from a number of council meetings. The refusal occurred in circumstances where leaves of absence had been routinely granted to other councillors when they had requested leave. The complainant indicated that the reason for his absences was his stress-related illness. The council had put the complainant on notice that if he wished to be granted leaves of absence, some evidence of his medical condition would be needed, together with an indication as to when he would be able to resume duties. This information was not provided. Ultimately, after the complainant missed four meetings without leave being granted, an extraordinary vacancy was declared and a by-election was triggered for the councillor's area.

364. Senior Member Lyons noted that the complainant had not provided medical certificates indicating that he was unfit to attend meetings, and had not indicated when he would be able to resume attendance. The Tribunal considered that for the councillor to provide such information would not have imposed an unreasonable burden on him.

365. In circumstances where the councillor appeared capable of attending other council-related events and making media comments in his capacity as a councillor, the Tribunal considered that the complainant's actions led to the stated reasons for his absences legitimately being called into question.

366. For these reasons, the Tribunal determined that, in all the circumstances, the councillors had not unlawfully discriminated against the complainant councillor.

Exceptions relating to local government

367. [Section 74](#) of the Equal Opportunity Act provides an exception to discrimination by councillors on the basis of political belief or activity. This exception is discussed in [paragraphs 533 to 534](#).

369 [\[2003\] VCAT 1904](#).

Chapter 5

> Reasonable adjustments for somebody with a disability

Overview

368. The Equal Opportunity Act now imposes express obligations to make 'reasonable adjustments' for a person with a disability in certain areas. While these obligations were implicitly required by the Equal Opportunity Act's predecessors, the duty is now explicit.
369. Each of the 'reasonable adjustment' obligations are 'stand alone' provisions, and a contravention of any of them constitutes unlawful discrimination and can be an additional head of claim for a person bringing a complaint to the Tribunal or Commission.

When reasonable adjustments are required

370. The obligations to make reasonable adjustments are set out in various sections of the Equal Opportunity Act and apply in relation to:
- employment (including adjustments for employees, people offered employment and partners/people offered partnership)³⁷⁰
 - education³⁷¹
 - the provision of services.³⁷²
371. The Equal Opportunity Act contains a number of examples of practical steps that may constitute 'reasonable adjustments', including installing access ramps for wheelchairs, allowing a person or employee to be absent from work for rehabilitation or medical treatment, allowing a person to take more frequent rest breaks during work, providing a teacher's aide to a student, and including subtitles in audio-visual presentations.

Are the adjustments reasonable?

372. In determining whether it is reasonable to require a person to make adjustment for somebody with a disability, the Tribunal must look at all relevant facts and circumstances. The Equal Opportunity Act prescribes the factors which may be relevant.³⁷³ Broadly speaking, these include:
- the nature of the complainant's disability
 - the nature of the work offered or performed
 - the type of adjustment needed to accommodate the disability
 - the respondent's circumstances, including its size and financial circumstances
 - the effect on the respondent of making the adjustment (including the number of other people who would be benefited or disadvantaged by making the adjustment, financial impacts and impacts on efficiency and productivity)
 - the consequences for the respondent if adjustments are made
 - the consequences, for the complainant, of not making the adjustment
 - any relevant 'disability action plan' made under the *Disability Discrimination Act 1992 (Cth)* or the *Disability Act 2006 (Vic)*.

When adjustments are not required

373. The requirements to make reasonable adjustments apply unless it can be shown that the adjustment would be ineffective because:

370 *Equal Opportunity Act 2010 (Vic)* ss 20, 33.

371 *Ibid* s 40.

372 *Ibid* s 45.

373 *Ibid* ss 20(3), 33(3), 40(3), 45(3).

- a. in a work-related context, the person or employee could not 'adequately perform the genuine and reasonable requirements' of the employment or partnership even after the adjustments are made³⁷⁴
- b. in an education context, the person 'could not participate in or continue to participate in or derive or continue to derive any substantial benefit from the educational program' even after the adjustments are made³⁷⁵
- c. in relation to the provision of services, 'the person could not participate in or access the service or derive any substantial benefit from the service' even after the adjustments are made.³⁷⁶

374. There are also specific defences available to respondents where the adjustments are not reasonable and/or the adjustment would be ineffective for the reasons summarised above.³⁷⁷

What are genuine and reasonable requirements of employment?

375. In order to understand what are the 'genuine and reasonable requirements' of the employment, the Tribunal must look at all the circumstances surrounding the employment, including any contract of employment, statutory functions, and organisational or operational requirements.³⁷⁸

376. The Tribunal considered the phrase 'genuine and reasonable requirements of the employment' in the case of *Davies v State of Victoria (Victoria Police)*³⁷⁹ in the context of the exception under section 22 of the former 1995 Act. In that case, the Tribunal said:

What are the genuine and reasonable requirements of the employment?
In our view, these are wider than the inherent or essential requirements of the employment... The requirements of the employment and the requirements of the employer are not necessarily the same thing, although they will often be the same.

The requirements of the employment refers to what the job or position requires to be done, as well as what is necessary to do those duties. The term covers the whole range of these requirements, and not just the 'essential' ones. The requirements must be requirements 'of the employment'. In other words, they must relate to and derive from the employment. They must be genuine requirements. An employer cannot invent requirements which are not truly requirements of the employment. They must be reasonable requirements. As was pointed out in the context of indirect discrimination, 'reasonable' is a more demanding test than one of convenience but a less demanding test than one of necessity (*Secretary, Department of Foreign Affairs and Trade v Styles* [1989] FCA 342; [1989] 23 FCR 251 at 263 per Bowen CJ). So, a requirement for abilities or qualifications that are grossly disproportionate to the degree of difficulty of the duties, might not constitute a reasonable requirement of the employment.³⁸⁰

377. The Tribunal went on to say that the genuine and reasonable requirements of employment may also include certain abilities and skills provided that they are relevant to the particular duties of the employment. For example, a certain degree of physical or mental fitness.³⁸¹

378. The Tribunal also commented that the circumstances in which the employment is carried out, including dangers to which the employee may be exposed or may expose others, may also be relevant in determining the genuine and reasonable requirements.³⁸² On that point, the Tribunal cited the reasons of Gummow and Hayne JJ in *X v Commonwealth of Australia & Another*,³⁸³ which concerned the question of whether a soldier with HIV/AIDS could perform the 'inherent requirements' of combat duties and, in particular, whether the risk of others being infected in the course of the employment was relevant.

374 [Ibid ss 20\(2\), 33\(2\)](#).

375 [Ibid s 40\(2\)](#).

376 [Ibid s 45\(2\), 46](#).

377 [Ibid ss 23, 34, 41, 46](#).

378 [\[2000\] VCAT 819](#).

379 [Ibid](#).

380 [Ibid](#).

381 [Ibid](#).

382 [Ibid](#), citing *X v Commonwealth of Australia & Another* [1999] HCA 63.

383 [\[1999\] HCA 63](#).

Chapter 6

> Accommodating a person's responsibilities as a parent or carer in employment and related areas

379. In work-related contexts, employers have specific obligations under the Equal Opportunity Act to provide flexible working arrangements for parents and carers, provided that it is reasonable to do so. These obligations are separate to, but broadly consistent with, the right to request flexible working arrangements under the *Fair Work Act 2009 (Cth)*.³⁸⁴ But note that the Equal Opportunity Act applies to all employers in Victoria.
380. More specifically, the Equal Opportunity Act provides that an employer, principal or firm must not 'unreasonably refuse' to accommodate a person's responsibilities as a parent or carer in relation to their 'work arrangements'.³⁸⁵ These obligations are set out in various different sections of the Equal Opportunity Act and apply in relation to:
- people who are offered employment³⁸⁶
 - employees (including casual employees)³⁸⁷
 - contract workers³⁸⁸
 - partners (including people who are invited to become partners) of firms – such as legal and accounting firms – comprising more than five partners.³⁸⁹

384 Note that [section 65](#) of the *Fair Work Act 2009 (Cth)* contains similar obligations, although the scope of these obligations is narrower under the FW Act as they only apply in respect of parents of children who are under school age, or children under 18 years old who have a disability. Note that at the time of publication the *Fair Work Amendment Bill 2013* had been introduced which would amend [section 65](#) of the *Fair Work Act 2009 (Cth)* to expand the categories of employees who may make such a request.

385 [Section 4](#) of the *Equal Opportunity Act 2010 (Vic)* defines 'work arrangements'. Broadly, it encompasses arrangements that apply or would apply to the individual as well as the workplace.

386 [Equal Opportunity Act 2010 \(Vic\) s 17](#).

387 [Ibid s 19](#).

388 [Ibid s 22](#).

389 [Ibid s 32](#).

381. The Equal Opportunity Act includes several examples of the types of flexible working arrangements that may assist in accommodating a person's responsibilities. These may include, for example, changing a person's hours of work, rescheduling meetings so that people with parent/carer's responsibilities can attend, or permitting work from home.

Responsibilities as a 'parent' or 'carer'

382. A person has responsibilities as a 'carer' if 'another person is wholly or substantially dependent [on them] for ongoing care and attention'. This may include, for example, a person's responsibilities to care for an elderly person or somebody with an illness or disability.³⁹⁰ The definition of carer excludes circumstances where the caring arrangements are wholly or substantially commercial (for example, paid nurses or carers).
383. For the purposes of the Equal Opportunity Act a 'parent' includes step-parent, adoptive parent, foster parent or guardian.³⁹¹

Complainant must make a request

384. In order to engage these provisions of the Equal Opportunity Act, the complainant must actually make a request for accommodation of their responsibilities as a parent or carer. This was found by the Tribunal to be an implicit requirement, although the Equal Opportunity Act does not specifically refer to such a request.³⁹²

390 [Ibid s 4](#).

391 [Ibid s 4](#).

392 [Richold v State of Victoria, Department of Justice \[2010\] VCAT 433, \[38\]](#).

When is a refusal unreasonable?

385. The Equal Opportunity Act sets out a number of factors to be taken into account in determining whether it was reasonable for the employer, principal or partnership to refuse the employee's request. Broadly, these factors include:
- a. the complainant's personal circumstances including the nature of his or her responsibilities as a parent or carer
 - b. the nature of the complainant's role or the work performed by them
 - c. the respondent's circumstances (including its finances, size, and operations)
 - d. the effect that accommodating the complainant's responsibilities would have on the respondent (including efficiency, productivity, customer service and the impacts on other people in the workplace)
 - e. the consequences, for the complainant, of the refusal to accommodate his or her parental or carer responsibilities.
386. In determining whether the respondent's conduct was reasonable, the Tribunal must weigh-up and balance the competing interests of the complainant and respondent by reference to these 'commonsense considerations'.³⁹³ In *Richold v State of Victoria, Department of Justice*³⁹⁴ (*Richold*), the Tribunal clarified that the obligation 'does not require an employer to entirely subjugate its own interests to the interests of the employee as a parent or carer. Rather it requires a reasonable accommodation to be reached between the two'.³⁹⁵
387. In *Richold*, the complainant was employed as a casual prison guard. Her complaint related to a policy introduced by the employer which changed the way shifts were allocated to casual staff. The reason for the change was to ensure that work which attracted higher penalty rates (such as weekend work) was distributed fairly. The effect of the change was that if Ms Richold refused more than two shifts per week – which she often had to do due to her parental responsibilities – she received fewer shifts in total. This was different from the previous policy, whereby casual staff had been rostered for days that they were available and the number of hours were distributed as evenly as possible. Ms Richold argued that the new policy constituted an unreasonable failure to accommodate her parental responsibilities.
388. In that case, the Tribunal said that although the previous policy was more accommodating of Ms Richold's family responsibilities, the new policy was 'not unreasonable', especially because it was designed to address concerns raised by other employees about the fair allocation of work.³⁹⁶ The Tribunal looked at a number of factors in reaching this conclusion. Ms Richold's status as a casual employee was found to be especially relevant because, according to the Tribunal, 'the very nature of casual employment... grants the fullest possible flexibility'.³⁹⁷
389. A different result may have been reached in this case if the changes had impacted the working arrangements of permanent full-time or part-time employees.³⁹⁸

393 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, 3468 (Bob Cameron, Minister for Police and Emergency Services).

394 [2010] VCAT 433.

395 Ibid [43].

396 Ibid [44].

397 Ibid [42].

398 Ibid [34].

Chapter 7

> Refusing accommodation to a person because they have an assistance dog

What is an 'assistance dog'?

390. An 'assistance dog' is defined to mean a dog that is trained to perform tasks or functions that assist a person with a disability to alleviate the effects of his or her disability.³⁹⁹ This is a shift away from (and arguably a broadening of) the term 'guide dog' used in the 1995 Act, which was limited to a dog that is trained to assist a person who has a visual, hearing or mobility impairment.
391. According to the Explanatory Memorandum, the definition of 'Assistance Dog' may include, for example, a dog trained to assist people who suffer from seizures or psychiatric disorders.⁴⁰⁰ However, the Explanatory Memorandum also confirms that the definition is not intended to be so broad to encompass companion or comfort dogs, but may extend to animals trained to assist with 'navigating social interactions where the nature of the impairment is such that this helps to alleviate the impairment'.⁴⁰¹

392. In *State of Queensland (Queensland Health) v Che Forest*⁴⁰² (*Che Forest*), Spender and Emmett JJ considered the meaning of 'assistance animal' under the *Disability Discrimination Act 1992 (Cth)*. They said the question is not whether a dog does, in fact, assist an applicant to alleviate the effects of a disability. What is relevant is whether the animal was trained with that purpose or object in mind. In that case, Queensland Health reported that the applicant's dogs were ill-behaved and ill-controlled and therefore requested evidence of the dogs' training. In their reasons, Spender and Emmett JJ suggest that an applicant may need to provide evidence of proper assistance dog training, where the existence or quality of training is in question.⁴⁰³

Protection for people with assistance dogs in accommodation

393. Discrimination against someone because of their assistance dog, can be discrimination on the basis of the disability if it occurs in any area of public life.
394. [Section 54](#) of the Equal Opportunity Act specifically provides that a person must not refuse to provide accommodation to a person with a disability because he or she has an assistance dog. In particular, it is unlawful to require a person with a disability to keep the dog elsewhere (other than in the accommodation) or to require the person to pay an extra charge because of the dog. [Section 54](#) is a stand alone provision and does not require proof of direct or indirect discrimination.⁴⁰⁴

399 [Equal Opportunity Act 2010 \(Vic\) s 4](#).

400 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 5.

401 [Ibid.](#)

402 [\[2008\] FCAFC 96](#), [106].

403 [Ibid](#) [118].

404 [Equal Opportunity Act 2010 \(Vic\) s 7\(1\)\(b\)](#).

Chapter 8

> Permanent exceptions

Overview of exceptions

395. The Equal Opportunity Act contains a number of exceptions to discrimination which operate on an automatic, permanent basis (as opposed to temporary exemptions which may be granted by the Tribunal in certain circumstances). The effect of the permanent exceptions is to deem certain activities, which would otherwise constitute unlawful discrimination, to be lawful conduct under the Equal Opportunity Act. Some of these exceptions apply in specific areas of public life, like employment, education and good and services. Other exceptions apply generally across all areas of the public life. Each of those permanent exceptions is discussed below.
396. In addition, a person may apply to the Tribunal for an order granting it a temporary, specific exemption to allow it to discriminate in certain circumstances. Temporary exemptions are dealt with in [Chapter Nine](#) of this resource.
397. There is often overlap in decisions of the Tribunal with respect to permanent exceptions and temporary exemptions. When a person or entity applies for a temporary exemption from the Equal Opportunity Act, the Tribunal must consider whether such an exemption is necessary or, rather, whether the proposed discriminatory conduct is already lawful in accordance with one of the permanent exceptions to discrimination.

Exception for things done with statutory authority

398. [Section 75](#) of the Equal Opportunity Act replicates section 69 of the 1995 Act. This provision allows a person to discriminate, if that discrimination is necessary to comply with, or authorised by, a provision of a Victorian Act or enactment.⁴⁰⁵ Such discrimination will therefore only be permitted in very specific circumstances, but the nature of the exception should allow for minimal ambiguity.
399. The case of [H.J. Heinz Company Australia Ltd v Turner](#),⁴⁰⁶ heard in the Supreme Court of Victoria, illustrated how this provision can operate in practice. Towards the end of his employment, Heinz had placed Mr Turner on 'limited duties', which restricted him to the operation of only two machines. This was to accommodate Mr Turner's work related injury. As a result of this, Mr Turner was prevented from working overtime, because Heinz had a policy that did not allow workers who were on modified duties to work overtime because, Heinz said, it could not guarantee that the duties performed on overtime would fit within the employee's modified duties.
400. The Equal Opportunity Board of Victoria found that the exclusion of Mr Turner from overtime was discriminatory because a 'blanket policy' had been applied, and consideration had not been given to how Mr Turner may be permitted to undertake overtime.

405 Enactment includes rules, regulations, by-laws, local laws, orders, Order in Council, proclamation or other instrument of legislative character: [Equal Opportunity Act 2010 \(Vic\)](#), s 4; [Interpretation of Legislation Act 1984 \(Vic\)](#), s38; [Dulhunty v Guild Insurance Limited \(Anti-Discrimination\)](#) [2012] VCAT 1651, [16]-[33].

406 [1997] VicSC 282; (1990) EOC 92-964.

401. Heinz appealed this decision, and argued that its obligations under the *Occupational Health and Safety Act 1985* (Vic) (as in force at the relevant time) meant that the overtime policy was a reasonable and practicable one, and, most significantly for this exception, that the policy was one that Heinz was authorised to implement by law. The Supreme Court found in favour of Heinz.
402. In providing reasons for the decision, the Court favoured the approach that, if the policy was formulated by Heinz in fulfilment of its legal obligations to provide safe working conditions, the only question then for determination was whether the discrimination occurred because of a bona fide application of the policy. As this was the case, the discrimination was lawful.
403. The findings of the court in *Heinz* have been echoed in other cases in Australia. For example, in *Cercone v Bull's Transport Pty Ltd*⁴⁰⁷ and *Hills v The State of South Australia*.⁴⁰⁸
404. In *Garden v Victorian Institute of Forensic Mental Health t/as Thomas Embling Hospital*⁴⁰⁹ the complainant, Mr Garden, was an inpatient at Thomas Embling Hospital, a forensic psychiatric facility. Mr Garden claimed that the confiscation and opening of his mail constituted discrimination. Deputy President McKenzie however found that the conduct was authorised by law:
- There is no doubt that, if the opening and confiscation of the letter were in the course of implementing a necessary security condition, that conduct would be authorised by s 47 of the Mental Health Act and would in turn be exempt from the prohibitions on discrimination in the Equal Opportunity Act by virtue of s 69 of that Act. It is my view that it is the scheme of the Mental Health Act and of s 47 in particular that an authorised psychiatrist or his or her delegate may impose necessary security conditions on a patient without having to be concerned whether those conditions may be discriminatory.
405. Mr Garden's discrimination claim was struck out.

Exception for things done for the protection of health, safety and property

406. [Section 86\(1\)](#) of the Equal Opportunity Act allows for discrimination on the basis of disability and physical features where the discrimination is reasonably necessary to protect the health, safety or property of any person. This includes the person discriminated against, or the public generally.
407. [Section 86\(2\)](#) of the Equal Opportunity Act allows discrimination on the basis of pregnancy where it is reasonably necessary to protect the health and safety of any person (including the person discriminated against).
408. In *Hall v Victorian Amateur Football Association*⁴¹⁰, Mr Hall was excluded by the Victorian Amateur Football Association (VAFA) from participating in amateur football because he was HIV positive. VAFA said that the exclusion of Mr Hall was 'reasonably necessary' in the circumstances and was permitted under section 80(1) of the 1995 Act (the predecessor to [section 86\(1\)](#) Equal Opportunity Act).
409. In considering the arguments put forward by VAFA, the Tribunal noted that players and officials that Mr Hall may come into contact with during the game were at risk of infection. While this risk was thought to be low, the Tribunal held that the banning of Mr Hall was not unlawful in light of that risk.
410. However, the Tribunal went on to consider VAFA's Infectious Diseases Policy, which was very detailed in its methods of dealing with people and property contaminated by blood and containing hygiene in team areas. The Tribunal said that VAFA had not rigorously and consistently applied this Policy, but if it had done so, the risk of infections such as HIV would be reduced. Most notably, the Tribunal further found that because application of the Policy would give increased protection to the class of players and officials at risk, rather than simply banning the applicant (which still left open the risk of infection from other HIV sufferers), banning Mr Hall was not 'reasonably necessary'. Proper application of the Policy was a non-discriminatory means by which VAFA could reduce the identified risk to health and safety without banning Mr Hall. Mr Hall's claim of discrimination was therefore upheld.

407 [\[2002\] SADC 123](#); (2002) EOC 93-246.

408 [\[2002\] SASC 171](#); (2001) EOC 93-145.

409 [\[2008\] VCAT 582](#).

410 [\[1999\] VICCAT 333](#); (1999) EOC 92-997.

411. By way of further example, in *NC, AG, JC, SM, Matthews & Matthews as personal representatives of the Estate of Matthews v Queensland Corrective Services Commission*,⁴¹¹ the Queensland Anti-Discrimination Tribunal considered complaints on behalf of five prisoners that the respondent had discriminated against them on the basis of their HIV positive status. The allegations of discrimination included being housed in a medical segregation unit, not being given the option to work in the kitchen at the prison, and for a time not being permitted to attend the oval at the same time as the mainstream protection prisoners.
412. In this case, the Tribunal found that the treatment of the complainants in the correctional centres was less favourable than that of other prisoners who were not HIV positive, and accordingly the respondent had been in breach of the *Anti Discrimination Act 1991* (Qld). The Respondent, in its defence, sought to evoke a number of exceptions in the Act. One of the exceptions that it tried to rely on was section 107, which is similar to [section 86](#) of the Equal Opportunity Act. The Tribunal was not satisfied that the exception applied in this matter because there was a 'paucity of evidence' to show that segregation of prisoners who were HIV positive was necessary for health reasons.
415. The special needs exception also specifically covers:
- rights or benefits granted to women in relation to pregnancy or childbirth⁴¹³
 - the provision or restriction of holiday tours to people of a particular age or age group.⁴¹⁴
416. [Section 88](#) of the Equal Opportunity Act, replaces section 82(1)(a) of the 1995 Act. Section 82(1)(b) of the 1995 Act was reframed as the special measures provision in [section 12](#) of the Equal Opportunity Act. The interaction between 'special needs' and 'special measures' under the Equal Opportunity Act is discussed below.
417. The Explanatory Memorandum indicates that a person wanting to rely on this exception must demonstrate, on an objective basis, that there is a need for the services, benefits or facilities and that the measures put in place are objectively capable of meeting those needs.⁴¹⁵
418. However, previous case law suggests that the person's state of mind will be centrally relevant to determining whether the services, benefits or facilities were 'designed' for a lawful reason, namely to meet a group's special needs. The Tribunal reviewed this authority in *Lifestyle Communities Ltd (No 3)*, in relation to section 82(1) of the 1995 Act:

Exception for special needs

Scope of the exception

413. The special needs exception, under [section 88](#) of the Equal Opportunity Act, allows a person to establish services, benefits or facilities, to meet the 'special needs' of people with a particular attribute. Further, eligibility for such services may be limited to people with the particular attribute.
414. The Equal Opportunity Act includes the following example of conduct which would fall within the special needs exception: '[a] community organisation establishes a support group for single fathers in response to research that shows that single fathers have a need for targeted counselling and support.'⁴¹² This example would fit within the special needs exception because there is a demonstrated need for the service, whether or not single fathers are a disadvantaged group within the community.

413 [Ibid s 88\(3\)\(a\)](#).

414 [Ibid s 88\(3\)\(b\)](#). For example, see *Morris (Anti Discrimination Exemption)* [2007] VCAT 380, in which the Tribunal expressed doubt that the special needs exception under the 1995 Act would enable a tour organiser to offer women-only tours. In doing so, the Tribunal noted that the exception applied to holiday tours provided for particular age groups, not to holiday tours provided for people with other attributes.

415 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 45.

411 [\[1997\] QADT 22](#); (1998) EOC 92-940.

412 [Equal Opportunity Act 2010 \(Vic\)](#), s 88.

Whether the purpose of a special measure under [section 82\(1\)](#) of the Equal Opportunity Act was to be ascertained subjectively or objectively was considered in *Colyer v State of Victoria (Colyer)*. Kenny JA (Brooking and Callaway JJA agreeing) held the exception applied where the service-provider genuinely believed the services would meet those purposes. Her Honour held [s 82\(1\)](#) 'requires the relevant decision-maker to be satisfied that the genuine and not-colourable intention of the service-provider' was to achieve the beneficial purpose. According to her Honour, this belief is ascertained as a fact from the evidence, including inferences to be drawn from 'the nature of the services to be provided and the identity of the recipients of the service'. In summary:

If upon consideration of all relevant matters, the decision-maker is satisfied that the genuine and not colourable intention of the service-provider is to provide the special services for the ends identified in paragraphs (a) or (b) of s. 82(1), then it follows that the services are 'designed' to meet those needs. If the decision-maker is not so satisfied, then it follows that the services are not so designed. That is, if it were to appear that the relevant intention was not held or not genuinely held by the service-provider, then s. 82(1) would not apply.⁴¹⁶

Colyer was followed by the Full Court of the Federal Court of Australia in *Richardson v ACT Health and Community Care Service*. Finkelstein J (Miles and Heerey JJ agreeing) held the 'purpose' (not 'design') element of the exception in s 27 of the *Discrimination Act 1991* (ACT) refers to 'the actual intention of the decision-maker or actor.' But that intention must still be established:

To determine whether the decision-maker holds the requisite state of mind, it will be permissible to enquire whether the conduct in question was capable of achieving equal opportunity (s 27(a)) or meeting special needs (s 27(b)). That enquiry may be necessary for the purpose of establishing that the claimed intention is one that is likely to have been held by the decision-maker. It is not, however, to substitute for an enquiry into the subjective state of mind of the decision-maker an objective criterion. It is merely one of the means by which a claimed subjective intention can be established, in cases where there may be doubt.

Interaction between 'special needs' and 'special measures'

419. The special needs exception complements the promotion of 'special measures' under [section 12](#) of the Equal Opportunity Act. Section 12 of the Equal Opportunity Act provides that taking measures for the purpose of promoting or realising substantive equality for members of a group with a particular attribute is not discrimination. However, unlike the special measures provision, the 'special needs' provision operates as an exception to discrimination and may apply regardless of whether the beneficiaries of the services, benefits or facilities experience a particular disadvantage.⁴¹⁷

420. In *Georgina Martina Inc*,⁴¹⁸ in relation to the special measures provision, Member Dea explained that:

In order to consider whether conduct is taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, it is necessary to identify the inequality which is being sought to be remedied and its cause and then consider how the proposed measure promotes or realises substantive equality.

417 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), [45].

418 [\[2012\] VCAT 1384](#), [41].

416 [\[2009\] VCAT 1869](#), [246]-[247].

421. In contrast, the special needs exception enables the establishment of special services, benefits or facilities that meet the special needs of people with a particular attribute, regardless of whether or not they are disadvantaged. Section 88 only requires 'the special services, benefits or facilities to be identified and for them to be shown to meet the special needs of the relevant group identified by the attribute.'⁴¹⁹

422. In, *Georgina Martina Inc*,⁴²⁰ the Tribunal found that the special needs exception applied in relation to services provided by a high-security women's refuge to women fleeing family violence (including emergency accommodation and case management). However, the Tribunal was not satisfied that the services could be properly characterised as a special measure, noting that:

On the evidence before me, the current application is not concerned with the creation of a service to meet the needs of women, which are not met by services currently available to men and women, in order to achieve equality between men and women. It is a response to the needs of some women, not for reasons based on inequality in the existing options available to all, but because they have a particular need arising from the violence of some men.

Unlike the counselling example (set out in section 12 of the Equal Opportunity Act), this is not a case where there are family violence services available to men and women which better serve the needs of men. Rather than adjusting or improving on an existing service for the purpose of promoting or realising equality for women, on the evidence this and other refuge services were created as a new initiative because there were no other services available.⁴²¹

423. For further discussion of this decision (in relation to the Tribunal's decision to grant a temporary exemption permitting the refuge to employ women-only), see [paragraphs 485, 489–493](#) and [518](#) of this resource.

424. Current case law does not provide definitive guidance on the application of the 'special needs' exception. Further case law is needed to provide clarity about the scope of, and interaction between, the 'special needs' and the 'special measures' provisions.

Exception for age benefits and concessions

425. Under [section 87](#) of the Equal Opportunity Act, it is permissible to discriminate in the provision of providing benefits to a person based on age. This includes, for example, providing concessionary tickets to an event.

Exceptions relating to superannuation and pensions

Discrimination by retaining an existing discriminatory superannuation fund condition

426. [Section 78](#) of the Equal Opportunity Act allows a person to discriminate by retaining an existing discriminatory superannuation fund condition in relation to a person who is a member of the fund and was a member of the fund at 1 January 1996.

427. The provisions of the Equal Opportunity Act relating to the superannuation exceptions have not yet been tested by the courts. However, the approach the courts may take in relation to the issues of discrimination and superannuation was demonstrated by the decision of the Queensland Anti-Discrimination Tribunal in *Lundsbergs v Q Super*.⁴²² In that case, Lundsbergs, a former police officer who suffered from a major depressive disorder, as well as other drug-induced disorders, alleged that the Queensland Government Superannuation Office (Q Super) discriminated against him on the basis of his impairment by paying his superannuation payment as a lump sum to the Public Trustee, instead of to him, after he was dismissed from the police force. Q Super argued that Lundsbergs was not capable of accepting responsibility for handling a large financial payment.

419 [\[2012\] VCAT 1384, \[57\]](#).

420 *Ibid.*

421 *Ibid* [47].

422 [\[2004\] QADT 12](#).

Q Super acknowledged that it had discriminated against Lundsbergs by requiring that the payment be made to the trustee, but said that it was exempted by the [Anti-Discrimination Act 1991 \(Qld\)](#), which provided that it was not unlawful to discriminate on the basis of an impairment by imposing a condition which is reasonable having regard to any other factors.⁴²³ The superannuation fund's trust deed, in this case, gave the trustees discretion to determine how benefits would be paid in cases of mental ill-health or incapacity of the fund member. The Tribunal held that the wording of these provisions did not impose a specific condition within the meaning of that Act, and Super Q could therefore not rely on the Act to exempt its actions. It was not 'reasonable' for Q Super to have relied on the exemption because the provisions of the trust deed were too broad and did not define types of ill health or incapacity, nor did they distinguish between degrees of it, nor set out clear circumstances for its use.⁴²⁴

428. Accordingly, it was held that unlawful discrimination had occurred in this case. Clearly, findings in respect of such exceptions will depend heavily on the facts of each specific case, but this case demonstrates that this exception does not constitute a blanket exception; the courts are likely to give detailed consideration to the particular terms of the superannuation scheme.

Discrimination on the basis of age in superannuation

429. Under [section 79](#) of the Equal Opportunity Act, a person is permitted to discriminate against another on the basis of age by imposing conditions in relation to a superannuation fund in a number of circumstances. This clause closely resembles section 73 of the 1995 Act, with the exception of paragraphs (c) and (d), which have been amended to bring the circumstances in which discrimination is allowed into line with those in the *Age Discrimination Act 2004 (Cth)*.

430. The Equal Opportunity Act now permits discrimination in relation to superannuation if:
- a. it is based upon actuarial or statistical data on which it is reasonable for the person to rely
 - b. it is reasonable having regard to that data and any other factors
 - c. in a case where no actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.
431. The person relying on the exception would have the burden of demonstrating this.

Exception for pensions

432. [Section 77](#) of the Equal Opportunity Act provides that the provisions relating to discrimination, in Part 4 of the Equal Opportunity Act, do not affect discriminatory provisions relating to pensions. This provision re-enacts section 71 of the 1995 Act.

Exceptions for competitive sporting activities

Exclusion on the basis of sex and gender identity

433. The Equal Opportunity Act contains a number of exceptions which permit sporting competitions to operate on a single-sex or single-gender basis for competitors over 12 years of age, provided that certain criteria are met.
434. The first exception only applies to competitive sporting activities for which 'strength, stamina or physique of the competitors' is relevant.⁴²⁵ The Tribunal has found, for example, that strength, stamina and physique are relevant to participation in competitive calisthenics. Thus, in *McQueen v Callisthenics Victoria Inc*,⁴²⁶ the Tribunal held that it was lawful to exclude Mr McQueen, a 33 year-old man, from callisthenics competitions which were open to women over 14 years of age. In that case, the Tribunal member said:

423 [Anti-Discrimination Act 1991 \(Qld\) s 63](#).
424 [Lunsbergs v Q Super \[2004\] QADT 12 \[66\]](#).

425 [Equal Opportunity Act 2010 \(Vic\) s 72\(1\)](#).
426 [\[2010\] VCAT 1736](#).

I am satisfied the respondent has proved to the appropriate standard there are differences between the sexes in strength, stamina and physique which can affect participation of females in the sport of callisthenics which has developed as a sport participated in by women only above the age of 14 years. In its execution, competitive callisthenics requires skill, endurance, strength and coordination. It requires a high degree of physical dexterity. It is designed entirely around the female form. The introduction of males into the sport would be such as to materially change the way the sport is conducted and thus have a significant effect upon the roles of those who participate in it.⁴²⁷

435. In considering the question of the relevance of strength, stamina or physique, the Tribunal has held that the question of relevance is determined by considering whether 'if both sexes were to compete against each other, the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors'.⁴²⁸ Lawn bowls has been found to be a sport in which strength, stamina or physique is not relevant in this sense.⁴²⁹
436. A second exception applies to permit the exclusion of persons of a particular sex from a competitive sporting activity where the exclusion is necessary for progression to an elite, national or international competition or level of competition.⁴³⁰
437. Thirdly, a permanent exception applies where the exclusion or restriction of persons of a particular sex is for the purposes of facilitating participation by people of the non-excluded sex, provided that the exclusion is reasonable, having regard to:

- a. the nature and purpose of the activity
- b. the consequences of the exclusion or restriction for people of the excluded or restricted sex
- c. whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.⁴³¹

438. The second and third exceptions referred to above were introduced into the Equal Opportunity Act by an amendment in 2011. According to the Explanatory Memorandum to the 2011 amending Bill,⁴³² the new exceptions are intended to apply beneficially. For example, the participation exception is only intended to be available where the exclusion or restriction is designed to encourage stronger participation in sport by a particular sex in circumstances where participation has been a problem.
439. The Second Reading Speech highlighted, as a reason for the new exception, concerns about dwindling numbers in some competitive sports like lawn bowls where single-sex competitions were not automatic.⁴³³ According to the Second Reading Speech, 'the needs of those who want to play with members of their own sex' were not being adequately addressed, which had led to participants leaving the sport.⁴³⁴

Age and ability

440. The Equal Opportunity Act also allows competitive sporting activities to be restricted to people who can effectively compete, people of a specified age or age group or people with a general or particular impairment.⁴³⁵

Exceptions on the basis of religion

Scope of the exceptions

441. The Equal Opportunity Act contains a broad range of exceptions which apply in relation to the activities of religious bodies, including who may become members of a religious order, the activities of religious schools and other conduct which is reasonably necessary to comply with a person's religious doctrines, beliefs or principles.

427 [2010] VCAT 1736, [58].

428 *South v Royal Victorian Bowls Association* [2001] VCAT 207, [35].

429 See, for example, *Royal Victorian Bowls Association Inc* [2008] VCAT 2415. In later cases involving lawn bowling, exemptions were granted under the 1995 Act's equivalent to section 89 of the *Equal Opportunity Act 2010* (Vic), on the basis that certain events were part of what was described as the elite pathway leading to national and international championships.

430 *Equal Opportunity Act 2010* (Vic) s 72(1A).

431 *Equal Opportunity Act 2010* (Vic) s 72(1B).

432 *Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011* (Vic), 7.

433 Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2011, 1363-1367 (Robert Clark, Attorney-General).

434 *Ibid.*

435 *Equal Opportunity Act 2010* (Vic) s 72(2).

What is a religious body?

442. [Section 81](#) defines 'religious body', for the purposes of these exceptions, to mean:
- a body established for a religious purpose
 - an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

Religious officials

443. [Section 82](#) of the Equal Opportunity Act provides that religious bodies may discriminate on the basis of any protected attribute in relation to the:
- ordination or appointment of priests, ministers of religion or members of a religious order
 - training or education of people seeking ordination or appointment of priests, ministers of religion or members of a religious order
 - the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

Religious schools

444. [Section 83](#) of the Equal Opportunity Act authorises some types of discrimination in relation to religious schools. This exception is slightly different from the religious schools exception which applied under section 76 of the 1995 Act.
445. The religious schools exception applies to 'a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles'.
446. It covers conduct 'in the course of establishing, directing, controlling or administering the educational institution' provided the conduct:
- conforms with the doctrines, beliefs or principles of the religion
 - is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

447. This exception does not apply in relation to all attributes. It is limited to discrimination on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

Religious beliefs or principles

448. The Equal Opportunity Act also contains a broad exception which permits discrimination by religious bodies on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity provided that the conduct:
- conforms with the doctrines, beliefs or principles of the religion
 - is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.⁴³⁶
449. This broad exception, contained in [section 82\(2\)](#) of the Equal Opportunity Act, applies only to religious bodies. It does not extend to discrimination on the basis of all attributes. It does not permit discrimination on the basis of age, employment activity, disability, industrial activity, breastfeeding, pregnancy, physical features, political belief/activity or race.
450. There is also a broad exception for discrimination by any person (including but not limited to a religious body) where the conduct is 'reasonably necessary' for the discriminator 'to comply with the doctrines, beliefs, or principles of their religion'. This exception also only applies to discrimination on the basis of certain attributes, namely religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.
451. It is intended that the term 'reasonably necessary' requires an objective assessment of whether the discrimination is necessary to conform with the doctrines, beliefs or principles of the person's religion.

436 [Equal Opportunity Act 2010 \(Vic\) s 82\(2\)](#).

452. Although decided under the 1995 Act, *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor*⁴³⁷ provides some guidance on the way in which some of these concepts are likely to be applied. Note that this case has been appealed by Christian Youth Camps (CYC). A judgement has not been delivered in this appeal at the time of publication of this document.
453. This case concerned a refusal by the Phillip Island Adventure Resort (Resort) to accept a booking from the Cobaw Health Service (Cobaw). The WayOut project is a youth suicide prevention initiative operated by Cobaw that targets same-sex attracted young people in rural Victoria.
454. In June 2007, Cobaw contacted Phillip Island Adventure Resort to make a booking for a two day youth forum. Cobaw claimed that its booking was rejected because of the sexual orientation of the proposed attendees. Cobaw lodged a complaint on the basis that this refusal contravened the 1995 Act.
455. The resort's operator, CYC, denied it had discriminated against Cobaw, or that if it had, this was permitted by religious exemptions under the 1995 Act. The resort and CYC is owned by the Christian Brethren Trust.
456. CYC sought to rely on the exemptions in section 75 of the 1995 Act, namely, that CYC was a 'body established for religious purposes' and that its refusal of Cobaw's booking was:
- a. in conformity with the doctrines of its religion
 - b. necessary to avoid injury to the religious sensitivities of people of its religion.
457. CYC also sought to rely on the exemption under section 77 of the 1995 Act, namely that the refusal of Cobaw's booking was necessary to comply with genuine religious beliefs or principles.
458. Justice Hampel found that CYC discriminated against Cobaw in refusing to accept its booking for accommodation on the basis of the sexual orientation of the proposed guests.
459. Justice Hampel found that CYC was not a body established for religious purposes and was therefore unable to rely on the exemptions in section 75 of the 1995 Act. In determining this, she considered it relevant that CYC provided camping facilities to both secular and religious groups and that its marketing materials made no mention of the Christian Brethren religion or Christian Brethren Trust.⁴³⁸
460. Although it was unnecessary for Justice Hampel to consider whether the refusal to take the booking was conduct which conformed with the doctrines of the religion or was necessary to avoid injury to the religious sensitivities of people of the religion, having regard to the extent to which these matters were argued before her at hearing, her Honour set out her findings on those matters.

What are doctrines of the religion?

461. In determining that the 'relevant religion' was the Christian Brethren denomination of Christianity, Justice Hampel followed the case of *OV and OW v Members of the Board of the Wesley Mission Council*.⁴³⁹
462. In establishing what were doctrines of the Christian Brethren's religion, Justice Hampel relied on the creeds, declarations of faith in addition to a statement of fundamental beliefs and doctrines set out in the Christian Brethren's 1921 Trust Deed.
463. Justice Hampel found that beliefs about marriage, sexual relationships or homosexuality, did not constitute a doctrine of the religion of the Christian Brethren. In making this finding, her Honour found compelling:

[T]he absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith.⁴⁴⁰

437 [2010] VCAT 1613.

438 Ibid [254].

439 (2010) NSWCA 155.

440 *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* [2010] VCAT 1613, [305].

What does 'conforms with the doctrines of the religion' mean?

464. Justice Hampel was not satisfied that the refusal of the booking conformed with the doctrines of the religion, even if (1) CYC was a body established for religious purposes, and (2) beliefs about marriage, sexual relationships and homosexuality amounted to a doctrine of the Christian Brethren religion.⁴⁴¹
465. Her Honour noted that while for the Christian Brethren, conformity with their beliefs about sex and marriage required them to restrict their own sexual activity to sex within marriage, there was no evidence to suggest that conformity with their beliefs about marriage and sexuality required them to avoid contact with people who were not of their faith and who did not subscribe to their beliefs about God's will in respect of sex and marriage.
466. In finding that CYC failed to establish that the refusal to take the booking conformed with the doctrines of the religion, Justice Hampel referred to the decision of *McFarlane v Relate Avon Limited*⁴⁴² where Laws LJ held that the right to freedom of religious belief does not confer a right on members of a religion to impose their beliefs on a secular society.⁴⁴³

Was the refusal to take the booking necessary to avoid injury to the religious sensitivities of people of the religion?

467. Justice Hampel found that the relevant sensitivities which must be considered are not the subjective sensitivities of one person, rather the sensitivities common to adherents of the religion. Her Honour said that the sensitivities are the common religious sensitivities which are to be contrasted with, for example, the social or cultural sensitivities of adherents of the religion.⁴⁴⁴

468. Her Honour found it compelling that CYC had not taken any steps to prevent people other than married couples who engaged in sexual activity from staying at the adventure resort, or engaging in sexual activity at the adventure resort. Justice Hampel found that the logical conclusion of CYC's failure to take such steps was that 'it was not necessary to avoid injury to the religious sensitivities of the Christian Brethren in respect of sex and marriage, to refuse bookings to same sex attracted people, or people who engaged in sexual activity outside marriage'.⁴⁴⁵
469. Therefore, if it was not necessary to exclude other same sex attracted people, or people who had, or might, while at the adventure resort, engage in sex outside marriage to avoid injury to the religious sensitivities of the Christian Brethren, then it was not necessary to exclude the WayOut group on that ground.

Genuine religious beliefs or principles

470. In determining the applicability of the exemption under section 77 of the 1995 Act, her Honour found that the relevant question was 'whether the refusal was necessary to comply with the genuine religious beliefs or principles' of CYC.
471. Justice Hampel found that CYC's personnel genuinely held beliefs about marriage, sexual activity and sexual orientation which were based on their beliefs as members of the Christian Brethren and that these beliefs, were, for the purposes of section 77 of the 1995 Act, religious beliefs, genuinely held. However, CYC had not made out a claim for an exception under this section because of the reasons identified above, including, the manner in which the adventure resort is operated such as marketed to secular and religious groups.⁴⁴⁶

441 Ibid [308].

442 [2010] EWCA Civ B1.

443 [Cobaw Community Health Services v Christian Youth Camps Ltd & Anor \[2010\] VCAT 1613, \[309\]](#).

444 Ibid [329].

445 Ibid [344].

446 Her Honour made a declaration that CYC had committed discrimination in breach of the 1995 Act and ordered that CYC pay compensation of \$5,000 for the hurt and distress caused.

Exceptions relating to employment

Employment: domestic or personal services

472. A person may discriminate in relation to employment for positions involving domestic and personal services, including child-care services, in their own home.
473. The permanent exception extends beyond an individual who employs somebody to work in their own home. It also covers employers, such as employment agencies, who provide staff to perform home-based domestic or personal care services where the person receiving the services makes a particular request. [Section 24](#) of the Equal Opportunity Act sets out the following illustrative example:

An agency employs people to provide personal care services. A woman contacts the agency and requests that it provide a carer to assist her with personal care in her home. The woman tells the agency that the carer must be female. The agency may discriminate in determining who should be employed to provide personal care to the woman as the services will be provided in the woman's home, and she has specifically asked for a female carer.

Employment: care of children

474. [Section 25](#) of the Equal Opportunity Act provides a permanent exception for employment that involves the care, instruction or supervision of children provided that the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the children.
475. The exception extends to the prohibitions on discriminating against both employees and job applicants ([section 16](#) and [18](#) of the Equal Opportunity Act). However, the exception does not extend to post-secondary education providers.

476. The exception, as it appeared in the 1995 Act, was considered by the Tribunal in an application for a temporary exemption brought by the American Institute for Foreign Study (AIFS).⁴⁴⁷ In that case, the AIFS sought a temporary exemption from the 1995 Act to enable it to discriminate against Australian candidates for positions as 'au pairs', or nannies, in the USA. Due to the USA's visa requirements, candidates had to be of a certain age and physical fitness and also had to disclose other personal characteristics, such as their nationality and place of birth, as these factors were relevant to the visa fees payable.
477. The Tribunal referred to the permanent exceptions relating to domestic or personal services and the care of children. The Tribunal said that, while neither of those permanent exceptions entirely covered the proposal by AIFS, that proposal was nonetheless 'within the spirit' of the existing exceptions. On that basis, the Tribunal decided to grant AIFS a temporary exemption permitting it to discriminate in the terms sought.

Employment: genuine occupational requirements

478. [Section 26](#) of the Equal Opportunity Act allows employers to limit the offering of employment to people of one sex where it is a genuine occupational requirement that employees be people of that sex, or necessary for authenticity or credibility in art/performance. It is important to note that this permanent exception only applies in relation to certain protected characteristics, in certain circumstances. It does not apply generally, or in relation to all characteristics that are protected by law.

447 *American Institute for Foreign Study* [2000] VCAT 432.

479. [Section 26\(2\)](#), provides a number of examples of circumstances where it may be a 'genuine occupational requirement' for a person to be of a particular sex, including where the employment:
- can only be performed by a person having particular physical characteristics other than strength or stamina
 - needs to be performed by a person of a particular sex to preserve decency or privacy
 - includes the conduct of searches of the clothing or bodies of people of that sex (for example, security staff required to conduct physical searches)
 - the employee will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex (as may be the case for some cleaners)
 - the employee will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress (for example, a sales assistant working in a women's lingerie department).
480. The threshold test for genuine occupational requirements under section 26 differs to the test for 'inherent requirements of the job' under the *Disability Discrimination Act* (Cth), which is not defined. Accordingly, federal case law on the 'inherent requirements' has limited relevance to section 26, and should be used cautiously.
481. Further, [section 26\(3\)](#) allows employers to limit the offering of employment to people of a particular age, sex or race, or to people with or without a particular disability in relation to a dramatic or artistic performance, entertainment, photographic or modelling work, or any other employment provided that the discrimination is necessary for 'authenticity or credibility'.
482. An example of employment other than dramatic or artistic related work that may require discrimination 'for authenticity' is the employment of an Indigenous person to provide educational information about Indigenous culture at a cultural centre.⁴⁴⁸

483. [Section 26\(4\)](#) allows employers to discriminate on the basis of physical features in the offering of employment in relation to a dramatic or artistic performance, photographic or modelling work or any similar employment. The term 'similar employment' in this subsection limits the exception to dramatic or artistic related work for which a person's physical features are relevant.⁴⁴⁹
484. Cases such as *Georgina Martina Inc*⁴⁵⁰ do not provide definitive guidance on how much of a job needs to fall within the relevant exception for it to apply. For example, even situations envisaged by the Act, such as fitting of clothes as a genuine occupation requirement under subsection 26(2)(b), are likely to involve other activities such as stock maintenance, cash register sales etc. Further case law is needed to provide clarity about the scope of these provisions.

Employment: political employment

485. [Section 27](#) of the Equal Opportunity Act allows discrimination on the grounds of political belief or activity in the offering of employment to a person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment. According to the Explanatory Memorandum, it is intended that this exception apply only to employment where a person's political belief or activity is relevant to the job, and employment with the Australian Electoral Commission.⁴⁵¹

Employment: welfare services

486. [Section 28](#) of the Equal Opportunity Act allows an employer to limit an offer of employment to people with a particular attribute where the employment is to provide services that:
- are special measures under [section 12](#) of the Equal Opportunity Act
 - meet the special needs of people with a particular attribute under [section 88](#) of the Equal Opportunity Act if those services can be provided most effectively by people with that attribute.

449 Ibid.

450 [2012] VCAT 1384.

451 Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic), 24.

448 Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic), 24.

487. According to the Explanatory Memorandum, the circumstances in which a service 'can be provided most effectively' by a person with the same attribute as the target group of the services is not defined in the section, as there are a range of reasons why services may be provided most effectively by a person from the same group as the target group. For example, it may be that only a person from the target group will have insight into the particular issues faced by the target group, or it may not be culturally appropriate to have anyone other than a member from the target group providing the services, or the target group may have a fear or mistrust of anyone who is not from the target group because of their experience.⁴⁵² However, this should be based on more than a personal preference or prejudice.

488. In *Georgina Martina Inc*,⁴⁵³ an application was made for a temporary exemption to enable the applicant – a high security 24-hour women's refuge – to employ women only, to offer services only to women and their children, to provide accommodation only to women and their children and to advertise these matters. The applicant indicated to the Tribunal that it intended to appoint women only to all roles within the organisation, rather than just counsellors or other front line staff.

489. Before granting the temporary exemption, the Tribunal had to consider whether such a temporary exemption was necessary, or whether the proposed discrimination was already authorised by the Equal Opportunity Act because it was a special measure, or because it fell within one of the permanent exemptions, including [section 28](#).

490. While Member Dea considered that the proposals to discriminate in the provision of accommodation and services were covered by permanent exceptions to discrimination – particularly [section 60](#) (welfare measures) and [88](#) (special needs) of the Equal Opportunity Act, she concluded that the permanent exception under [section 28](#) did not permit the organisation to restrict employment to women across all areas of its operations, because that would go beyond what was necessary to 'most effectively' provide services to the organisation's clients. Member Dea said:

Arguably, the available material does not sufficiently prove that the services can be provided most effectively by women rather than men. While the arguments put by the applicant and the Commission appear fair and reasonable, they are not supported by objective evidence about the effectiveness of service delivery by women as compared with men. That evidence could take the form of a survey which shows that clients would not wish to have any interactions with any men irrespective of their role. Evidence that men had been employed and had been less effective in their roles than women might be sufficient.⁴⁵⁴

491. In considering whether the proposed conduct was covered by [section 28](#), Member Dea said:

The front line roles whose focus is assisting women who seek refuge in a state of distress and on accessing supports and services in the aftermath of violence would most likely fall within [section 28](#). However, the material before me does not allow me to conclude that all roles within the applicant organisation can be provided most effectively by women and so I am not persuaded that [section 28](#) would operate with the effect that the employment of women only throughout the organisation could not be found to involve prohibited discrimination. In another case, evidence may be available such that the exception is proven to clearly apply to all roles.⁴⁵⁵

492. Although the Tribunal was not convinced that the proposal to restrict employment to women fell within the exception in [section 28](#), it nonetheless decided to grant the organisation a temporary exemption to allow this to occur, in accordance with its powers under [section 89](#) of the Equal Opportunity Act. In doing so, the Tribunal considered that the granting of the exemption was consistent with the Charter and amounted to a reasonable limitation on the right to equality. [Chapter Nine](#) of this resource deals with the Tribunal's power to grant temporary exemptions.

452 Ibid [25].
453 [\[2012\] VCAT 1384](#).

454 Ibid [66].
455 Ibid [69-70].

493. In *Domestic Violence Victoria (Anti Discrimination Exemption)*,⁴⁵⁶ the Tribunal granted an exemption for Domestic Violence Victoria Inc to advertise for and employ women only. In granting the exemption the Tribunal noted, as determinative factors, the fact that any staff member could be the first point of contact for women seeking direct assistance in relation to family violence. In addition, the fact that the applicant was involved in projects requiring its staff to liaise closely with victims of family violence, and believed that users would not avail themselves of its services if male employees were present were also reasons for the application being granted. Further, the Tribunal considered that the limit imposed by this exemption was reasonable and justified under the Charter.

Employment: youth wages

494. [Section 28A](#) of the Equal Opportunity Act provides for an exception that enables an employer to discriminate on the basis of age in paying an employee who is under the age of 21 years. The effect of section 28A is to authorise, under the Equal Opportunity Act, the payment of junior rates of pay provided for under certain instruments (for example in a modern award).
495. According to the Explanatory Memorandum, the purpose of the exception is to clarify that the payment of an employee under the age of 21 years according to their age, does not amount to unlawful discrimination.⁴⁵⁷

Employment: early retirement schemes

496. Under [section 29](#) of the Equal Opportunity Act, it does not amount to unlawful discrimination if an employer considers the age of an employee, together with that employee's eligibility to receive a superannuation retirement benefit, in deciding the terms on which to offer an employee an incentive to resign or retire.

Employment related areas: reasonable terms of qualifications

497. [Section 37](#) of the Equal Opportunity Act provides that where a person cannot meet the terms or requirements of an occupational qualification because of an impairment, it is not unlawful discrimination for a qualifying body to set reasonable terms in relation to the occupational requirement, or to make reasonable variations to those terms, so that the person can practise the profession, carry on the trade or business or engage in the occupation or employment to which the qualification relates.

Exceptions relating to education

Education: standards of dress and behaviour

498. An educational authority is permitted under [section 42](#) to set and enforce reasonable standards of dress, appearance and behaviour for students.
499. In assessing whether the standard is reasonable, [section 42\(2\)](#) provides that the views of the school community are a relevant but not determinative factor.
500. According to the Explanatory Memorandum, section 42 is not intended to allow schools to apply standards in a way that unreasonably restricts the rights of students and teachers to adhere to religious dress codes, for example by wearing a turban or hijab.⁴⁵⁸
501. International treaties and case law have been significant in the development of this and similar exceptions.
502. In the case of *Begum, R (on the application of) v Denbigh High School*,⁴⁵⁹ the House of Lords found that the school did not interfere with a pupil's right to manifest her religion by refusing to let her wear a jilbab (a full length, loose cloak) to school because 'Article 9 [of the European Convention on Human Rights on the right to freedom of thought, conscience and religion] does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'.⁴⁶⁰ The Lords' majority judgment turned on the fact that the claimant chose to attend a school that did not allow the jilbab to be worn, when in fact three other schools in the area did allow for the jilbab in their dress code.

456 Exemption Application No A48/2012, General Gazette Number G38, 20 September 2012, 2084.

457 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011 \(Vic\)](#).

458 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

459 [\[2006\] UKHL 15](#) (the *Begum* case).

460 *Ibid* [50] (Lord Hoffman).

503. The Lords also held that even if there had been an interference with the claimant's rights, the interference was objectively justified following the reasoning of the European Court of Human Rights (the European Court) in *Sahin v Turkey*.⁴⁶¹ In that case, the European Court held that there is a need for compromise and balance, recognising 'the value of religious harmony and tolerance between competing groups and of pluralism and broadmindedness.'⁴⁶² The Lords found that the school uniform policy at Denbigh High was developed following extensive consultation with Muslim students, parents and local mosques and that it served the wider educational purposes of promoting harmony. This aim was deemed important given the complex make-up of the school, with students from 21 different ethnic backgrounds and 79 per cent of students who were practising Muslims.

504. This case was followed in the case of *R (on the application of X) v Head teachers of Y School and Governors of Y School*,⁴⁶³ in which the High Court of England and Wales upheld a school uniform policy that prohibited the niqab.

Education: age-based admission schemes and age quotas

505. Under [section 43](#) of the Equal Opportunity Act, educational authorities are allowed to select students for a program on the basis of an admission scheme that has a minimum qualifying age or that imposes quotas in relation to students of different age groups. According to the Explanatory Memorandum, this exception is intended to enable educational authorities to ensure the different developmental and learning needs of students of different ages can be catered for by schools.⁴⁶⁴

Exceptions relating to the provision of goods and services and the disposal of land

Goods and services: insurance

506. [Section 47](#) of the Equal Opportunity Act sets out limited circumstances under which insurers may discriminate against a person by refusing to provide an insurance policy.
507. Circumstances in which an insurer will be able to discriminate in the provision of insurance include if the discrimination is:
- permitted under Commonwealth anti-discrimination legislation⁴⁶⁵
 - based upon actuarial or statistical data on which it is reasonable for the insurer to rely
 - reasonable having regard to that data and any other relevant factors
 - in relation to a situation where no actuarial or statistical data is available and can not reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

Goods and services: credit providers

508. [Section 48](#) of the Equal Opportunity Act allows credit providers to discriminate against people applying for credit on the basis of age. The section has been amended to be consistent with the [Age Discrimination Act 2004 \(Cth\)](#).
509. The exception provides that a credit provider will be able to discriminate on the grounds of age if:
- it is based on actuarial or statistical data on which it is reasonable for the credit provider to rely
 - the discrimination is reasonable having regard to the data
 - in a case where no actuarial or statistical data is available and can not reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

461 *Sahin v Turkey*, (Application No 44774/98, 10 November 2005, unreported).

462 Ibid.

463 *R (on the application of X (by her father and litigation friend)) v Head teachers of Y School and Governors of Y School* [2007] EWHC 298.

464 Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic).

465 Specifically, the [Sex Discrimination Act 1984](#), the [Disability Discrimination Act 1992](#), or the [Age Discrimination Act 2004](#).

Goods and services: supervision of children

510. The provider of goods and services to a child is allowed to require the child be accompanied or supervised by an adult if there is a reasonable risk that the child may cause a disruption or endanger himself or herself or another person.⁴⁶⁶ This exception is intended to protect the health and safety of children and the general public.

Disposal of land: disposal by will or gift

511. It is not unlawful for a person to discriminate against any person on the basis of any attribute in the disposal of land by will or gift.⁴⁶⁷

Exceptions relating to the provision of accommodation and access to public premises

Accommodation: unsuitable for children

512. A person may refuse to provide accommodation to a child or a person with a child if the premises are unsuitable or inappropriate for occupation by a child because of their design or location.⁴⁶⁸
513. According to the Explanatory Memorandum, the exception does not allow a person to refuse to provide accommodation where the premises are considered unsuitable for other reasons such as the amenity of other guests.⁴⁶⁹

Accommodation: shared accommodation

514. A person can discriminate in deciding who is to occupy residential accommodation if the provider of accommodation or a near relative resides in the premises, and it will accommodate no more than three people excluding the provider or near relatives. 'Near relative' includes a parent or grandparent, child or grandchild, spouse or domestic partner.⁴⁷⁰

Accommodation: welfare measures

515. [Section 60](#) of the Equal Opportunity Act provides that hostels or similar institutions which are run wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief are permitted to refuse accommodation to people who do not have the particular attribute.

516. By way of illustration, the Explanatory Memorandum provides the example of an aged care facility targeted at the Greek community, that refuses to accept non-Greek people. Such a situation would come under this exception.⁴⁷¹

517. In *Georgina Martina Inc*,⁴⁷² VCAT found that the welfare measures exception applied to a refuge established for the welfare of women (and their children) fleeing domestic violence. As a result, it was lawful to discriminate against males over the age of 18 in relation to the provision of accommodation.

Accommodation: for students

518. The exception in [section 61](#) of the Equal Opportunity Act, allows educational authorities that operate an educational institution (including schools, colleges, universities or other education or training institution), wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular impairment (as allowed by the exception in [section 39](#)) to provide accommodation wholly or mainly for students with that particular attribute.
519. The Explanatory Memorandum states that it is not intended that the exception allow discrimination in the allocation of accommodation to people who have been accepted into the accommodation by the educational authority.⁴⁷³

Accommodation: for commercial sexual services

520. [Section 62](#) of the Equal Opportunity Act provides that a person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis, such as a licensed brothel.

466 [Equal Opportunity Act 2010 \(Vic\)](#), s 49.

467 [Equal Opportunity Act 2010 \(Vic\)](#), s 51

468 [Equal Opportunity Act 2010 \(Vic\)](#), s 58A.

469 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011 \(Vic\)](#).

470 [Equal Opportunity Act 2010 \(Vic\)](#), s 59.

471 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

472 [Georgina Martina Inc \[2012\] VCAT 1384](#).

473 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

Access to or use of public premises not reasonable

521. The Equal Opportunity Act has a specific exception for discrimination in access to public premises. [Section 58](#) allows discrimination in relation to the access or use of public premises where the discrimination cannot reasonably be avoided⁴⁷⁴ or the discrimination is permitted because of the operation of a disability standard under the [Disability Discrimination Act 1992 \(Cth\)](#) or by virtue of a determination under the [Building Act 1993 \(Vic\)](#). In determining whether the discrimination can be reasonably avoided, all relevant facts and circumstances must be considered, including:
- a. the circumstances of the person with the disability, including the nature of their disability⁴⁷⁵
 - b. the nature of the measures required to provide or allow access to, or use of, the premises or facilities in the premises⁴⁷⁶
 - c. the person's financial circumstances⁴⁷⁷
 - d. the consequences for the person of avoiding the discrimination⁴⁷⁸
 - e. the consequences for the person with the disability of the person not avoiding the discrimination.⁴⁷⁹
522. More specifically, under [section 58\(3\)\(a\)](#) of the Equal Opportunity Act, discrimination will be permitted where the premises or facilities comply with, or are exempted from compliance with, a disability standard under the [Disability Discrimination Act 1992 \(Cth\)](#). Under that Act, statutory disability standards may be made to deal with reasonable adjustments, unjustifiable hardship and exemptions from the standards. Discrimination will also be permitted where a determination has been made under [section 160B](#) of the Building Act, which exempts a person from having to comply with disability standards under the [Disability Discrimination Act 1992 \(Cth\)](#) in relation to the building or land on which the relevant premises or facilities are situated.⁴⁸⁰

474 [Equal Opportunity Act 2010 \(Vic\)](#), s 58(1).

475 [Ibid](#) s 58(2)(a).

476 [Ibid](#) s 58(2)(b).

477 [Ibid](#) s 58(2)(c).

478 [Ibid](#) s 58(2)(d).

479 [Lifestyle Communities Pty Ltd \(No. 3\) \[2009\] VCAT 1869](#) [30].

480 [Building Act 1993 \(Vic\)](#) s 160B.

Exceptions relating to clubs

Clubs: clubs for minority cultures

523. A club that operates principally to preserve a minority culture may exclude a person from membership if that person is not a member of the group of people with an attribute for whom the club was established.

Clubs: clubs for political purposes

524. [Section 66A](#) of the Equal Opportunity Act provides an exception for clubs that were established principally for a political purpose, to allow them to exclude from membership a person on the basis of political belief or activity.
525. The section was inserted in 2011, immediately prior to the commencement of the Equal Opportunity Act. According to the Explanatory Memorandum,⁴⁸¹ the exception was introduced to protect the operation of political clubs which now fall within the new definition of 'clubs'. Under the 1995 Act, a political club was not captured under the definition of 'club'.

Clubs: clubs and benefits for particular age groups

526. Clubs established for people of a particular age group are permitted by [section 67](#) of the Equal Opportunity Act to exclude people from membership who are outside that age group. It must be reasonable to do so in the circumstances.

Clubs: single sex clubs

527. The exception in [section 68](#) of the Equal Opportunity Act permits clubs to exclude a person from membership on the basis of that person's sex, if membership of the club is available only to persons of the opposite sex.
528. [Section 68\(2\)](#) imposes an obligation on a club relying on the exception to make its rules of eligibility for membership publicly available, without charge.

481 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011 \(Vic\)](#).

Clubs: separate access to benefits for men and women

529. Clubs are allowed to limit a member's access to benefits on the basis of their sex where it is not practicable for men and women to enjoy the same benefit together, and access to the same or an equivalent benefit is provided separately for men and women, or men and women are each entitled to a reasonably equivalent opportunity to enjoy the benefit.⁴⁸²
530. [Section 69\(2\)](#) of the Equal Opportunity Act sets out five matters that must be considered in determining whether the exception is valid, including the purposes for which the club is established, the membership of the club, the nature of the benefits provided, the opportunities for the use and enjoyment of those benefits by men and women, and any other relevant circumstances.
531. The Explanatory Memorandum uses the following example to illustrate the exception:

This exception may apply to allow clubs to limit access to facilities to members of one sex at certain times if the facilities only have change rooms suitable for use by members of one sex at a time. However, if a club does restrict access in this way it would need to provide equivalent access to members of the opposite sex in order to attract the protection of the exception.⁴⁸³

Exceptions relating to local government

Local government: political belief or activity

532. [Section 74](#) of the Equal Opportunity Act provides an exception to the prohibition in [section 73](#) of the Equal Opportunity Act on councillors discriminating against fellow councillors and council committee members in the performance of their public functions.
533. The exception means that a councillor of a municipal council may discriminate against another councillor or member of a council committee on the grounds of their political belief or activity. This exception is intended to allow councillors to form political alliances within municipal councils and to act on the basis of the political-parties to which councillors are members.

482 [Equal Opportunity Act 2010 \(Vic\)](#), s 69.

483 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

Chapter 9

> Temporary exemptions by the Tribunal

The exemptions

534. [Section 89](#) of the Equal Opportunity Act provides for the granting, renewing or revoking of exemptions by the Tribunal. The purpose of this section is 'to empower the Tribunal to exercise a broad discretion to grant, renew or revoke exemptions from provisions of the Equal Opportunity Act'.⁴⁸⁴ This section states as follows.

89 Exemptions by the Tribunal

(1) The Tribunal, by notice published in the Government Gazette, may grant an exemption:

- a. from any of the provisions of this Act in relation to –
 - i. a person or class of people
 - ii. an activity or class of activities
- b. from any of the provisions of this Act in any other circumstances specified by the Tribunal.

(2) An exemption remains in force for the period, not exceeding 5 years, that is specified in the notice.

535. This provision is reflective, in the main part, of section 83 of the 1995 Act. However, it is notable that the maximum period for which an exemption can remain in force under the Equal Opportunity Act has been extended to five years, from three years in the 1995 Act.

Factors to be considered by the Tribunal

536. [Section 90](#) of the Equal Opportunity Act contains a list of the factors that must be considered by the Tribunal when assessing applications for the grant, renewal or revocation of an exemption.

537. The list of factors is as follows:

- a. whether the proposed exemption is unnecessary because:
 - i. an exemption or exception already applies to the conduct
 - ii. the conduct would not amount to prohibited discrimination (such as is a special measure).
- b. whether the proposed conduct is a reasonable limitation on the right to equality in the Charter.
- c. all the relevant circumstances of the case.

538. These factors were determined with the intention of reflecting the Tribunal's approach, at the time of drafting the Equal Opportunity Act, to considering exemption applications.⁴⁸⁵

539. A clear focus for Parliament in drafting [section 90](#) of the Equal Opportunity Act was the aim of providing the framework for consistency of exemption decisions by the Tribunal, in addition to providing clearer guidance to applicants about when exemption applications are required, and the information required to support an application.⁴⁸⁶

540. For the purposes of [section 90\(a\)](#), conduct will not amount to discrimination if it is a special measure under [section 12](#) of the Equal Opportunity Act. [Chapter 15](#) of this resource includes a detailed discussion of the special measures provision.

484 [Georgina Martina Inc \[2012\] VCAT 1384](#).

485 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

486 *Ibid*.

Compatibility with the Charter

541. In exercising its powers to grant, renew or revoke exemptions from the Equal Opportunity Act, the Tribunal is acting in its capacity as a public authority and is, therefore, bound by obligations under the Charter.
542. As such, the Tribunal must consider whether the exercise of its powers limits any relevant Charter rights in a manner that is consistent with [section 7\(2\)](#) of the Charter. This requires the Tribunal to undertake a 'balancing act', weighing up the nature of the right; importance, purpose, nature and extent of the proposed limitation; whether the proposed limitation is reasonably likely to achieve its purpose; and, whether there is any other less restrictive means available of achieving that purpose.⁴⁸⁷
543. The Tribunal must also exercise the exemption power consistently with the purpose and objectives of the Equal Opportunity Act.

544. As stated by Justice Bell in [Lifestyle Communities \(No 3\)](#), in relation to the exemption power under section 83 of the 1995 Act:

[O]n my reading of the exemption provisions and in the context of the purposes of the *Equal Opportunity Act* and the legislation as a whole, the discretion to grant an exemption must be exercised taking those purposes into account. It could not be exercised in a way that would defeat them. To interpret the provision otherwise is to allow the exercise of the discretion to be directly disobedient of the parent legislation, which I cannot accept on first principles. In the legislative order of things, the human rights purposes are primary and the exemption power is secondary. The Charter steps in to strengthen the operation of the discretion in these respects by requiring it to be exercised compatibly with human rights.⁴⁸⁸

487 See, for example, [Lifestyle Communities Pty Ltd \(No. 3\) \[2009\] VCAT 1869](#).

488 [Lifestyle Communities Pty Ltd \(No. 3\) \[2009\] VCAT 1869 \[30\]](#).

Chapter 10

> Sexual harassment

545. Part 6 of the Equal Opportunity Act deals with sexual harassment and largely reflects Part 5 of the 1995 Act.

546. [Section 92\(1\)](#) of the Equal Opportunity Act defines sexual harassment as follows.

92 What is sexual harassment?

(1) For the purpose of this Act, a person sexually harasses another person if he or she:

- a. makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person
- b. engages in any other unwelcome conduct of a sexual nature in relation to the other person –

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

(2) In subsection (1) conduct of a sexual nature includes:

- a. subjecting a person to any act of physical intimacy
- b. making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence
- c. making any gesture, action or comment of a sexual nature in a person's presence.

547. In essence, the Equal Opportunity Act prohibits a person from engaging in conduct of a sexual nature that could reasonably be expected to offend, humiliate or intimidate a person.

Areas of activity in which sexual harassment is prohibited

548. [Sections 93 to 102](#) of the Equal Opportunity Act prohibit sexual harassment in the following areas:
- a. harassment by employers and employees⁴⁸⁹
 - b. harassment in common workplaces⁴⁹⁰
 - c. harassment by partners in firms⁴⁹¹
 - d. harassment in industrial organisations⁴⁹²
 - e. harassment by members of qualifying bodies⁴⁹³
 - f. harassment in educational institutions⁴⁹⁴
 - g. harassment in the provision of goods and services⁴⁹⁵

489 [Equal Opportunity Act 2010 \(Vic\) s 93](#). See also [Equal Opportunity Act 2010 \(Vic\) s 27](#).

490 [Ibid s 94](#). Section 94(3) defines 'workplace' for the purposes of a common workplace as 'a place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business or trade'. See, for example, [Ionescu v John Blair Motor Sales and Anor \[2011\] VCAT 706](#)

491 [Ibid s 95](#). Section 4 of this Act confirms that partnership, for the purposes of the Act, has the same meaning as in [Partnership Act 1958 \(Vic\)](#), namely 'the relation which subsists between persons carrying on a business in common with a view of profit'.

492 [Ibid s 96](#). Section 4 of this Act also defines 'industrial organisation', including in relation to acts of sexual harassment.

493 [Equal Opportunity Act 2010 \(Vic\) s 97](#). [Equal Opportunity Act 2010 \(Vic\) s 4](#) defines 'qualifying body' as 'a person or body that is empowered to confer, renew or extend an occupational qualification'.

494 [Equal Opportunity Act 2010 \(Vic\) s 98](#). [Turner v Department of Education and Training \[2007\] VCAT 873](#) confirmed that 'educational institution' includes 'a school at which education is provided'.

495 [Equal Opportunity Act 2010 \(Vic\) ss 99, 125](#). By way of example, massage therapy was held to be the provision of a service in the context of which it is possible for an individual to be sexually harassed in [Andropoulos Pana v Peppers Delgany Portsea \[1999\] VCAT 645](#). (Note that in this case there was no finding of sexual harassment for other reasons).

- h. harassment in the provision of accommodation⁴⁹⁶
- i. harassment in clubs⁴⁹⁷
- j. harassment in local government.⁴⁹⁸

Protection of volunteers in ‘employment’

549. The Equal Opportunity Act defines the employment relationship to include a person who performs work for another on a voluntary or unpaid basis, but only for the purposes of the prohibitions against sexual harassment in Part 6 of the Equal Opportunity Act. As a consequence, volunteers now have protection against sexual harassment to the extent that this occurs in the context in which they provide their voluntary services. They do not otherwise derive the same protection available to employees under the Equal Opportunity Act.
550. The reasons for limiting the protection afforded to volunteers in this way was not explicitly clarified during the consultation process for the Equal Opportunity Act. The Second Reading Speech clarified that the extension of the Equal Opportunity Act to protect unpaid workers and volunteers was to recognise that, ‘a person can experience discrimination or sexual harassment in the workplace even if they are not paid a wage’.⁴⁹⁹ It was recognised, however, that this change would present challenges to some organisations, especially those in the community and not-for-profit sector that have limited resources, who will have to both understand and prepare for the change. This is most likely the explanation behind only acts of sexual harassment being within the remit of this additional protection at this time.
551. The fact that the Second Reading Speech recognised that unpaid workers and volunteers can be subjected to all types

496 [Equal Opportunity Act 2010 \(Vic\) s 100](#). In [Marlene Ross v Heinz Looock \[2000\] HREOCA 6](#) a landlord, his female tenant, and other tenants were socialising together. The landlord asked the female tenant to stay behind after others had left. He then made sexual advances on her, and soon after, terminated the tenancy. The Human Rights and Equal Opportunities Commission found that the landlord, as the accommodation provider, had sexually harassed the female tenant in the course of providing her accommodation.

497 [Equal Opportunity Act 2010 \(Vic\) s 101](#). See [s 4](#) for further discussion of the definition of ‘clubs’ for the purposes of the [Equal Opportunity Act 2010 \(Vic\)](#) and [Chapter 2](#) of this resource.

498 [Equal Opportunity Act 2010 \(Vic\) s 102](#).

499 Victoria, [Parliamentary Debates](#), Legislative Assembly, 10 March 2010, 115-121 (Rob Hulls, Attorney-General).

of discrimination, and not just to sexual harassment, indicates that perhaps the definition will be extended in the future.

552. Volunteers may however be protected from discrimination in the context of the provision of goods and services, as discussed in [paragraph 295](#) of this resource.

Sexual Harassment – some key concepts

553. To constitute sexual harassment, the conduct complained of must satisfy a number of characteristics. In particular, the conduct complained of must have a sexual element to it. Secondly, the conduct must be unwelcomed by the recipient. This is a particularly important element in establishing whether conduct complained of constitutes sexual harassment – as the same conduct in the context of a consensual relationship is clearly outside the scope of the sexual harassment provisions and would not be unlawful. These provisions do not proscribe conduct based on mutual attraction between consenting adults.
554. In addition, the conduct complained of must occur in circumstances in which a reasonable person with knowledge of all the surrounding circumstances would have anticipated that the subject of the conduct would be ‘offended, humiliated or intimidated’.
555. As with other provisions under the Equal Opportunity Act, intention or motive is not required to make out a claim of sexual harassment.⁵⁰⁰
556. Each of these concepts will be explored further below.

Conduct of a sexual nature

557. As stated, to constitute sexual harassment, the conduct complained of must be able to be characterised as conduct of a sexual nature. This includes a sexual advance or request for sexual favours or other conduct of a sexual nature. A request for sexual favours is relatively self explanatory and the case law is peppered with cases where an employer, for example, propositions an employee and requests sex in circumstances which have been held to constitute sexual harassment.⁵⁰¹

500 [Equal Opportunity Act 2010 \(Vic\) s 10](#).

501 See, for example, [Delaney v Pasunica Pty Ltd \[2001\] VCAT 1870](#).

558. In *Campagnolo v State of Victoria - Department of Environment & Sustainability*⁵⁰² VP Judge Harbison confirmed that an ‘unwelcome sexual advance...connotes some sexual importuning or soliciting’.⁵⁰³
559. In *Sammut v Distinctive Options Limited*,⁵⁰⁴ Mr Sammut pursued a claim of sexual harassment against his employer on the basis that Ms Joy, one of his fellow employees, had sexually harassed him. One of the allegations was that Ms Joy had told Mr Sammut, in graphic detail, about an incident in which she had had sex in a car. The Tribunal held that the story was, ‘clearly, not in the nature of a sexual advance or a request for sexual favours’. However, the fact that it was an explicit statement about a sexual experience meant that it was a ‘comment of a sexual nature,’ and was therefore sufficient to fall within the definition of ‘conduct of a sexual nature’.⁵⁰⁵
560. Another allegation was that Ms Joy had subjected Mr Sammut to ‘conduct of a sexual nature’ by hugging him. The Respondent tried unsuccessfully to argue that this was not conduct of a sexual nature given that the workplace was a ‘huggy’ one, in which staff members often gave others ‘supportive hugs’. The Tribunal did not accept that the workplace was ‘universally huggy’ and also found that the hugs were ‘intimate’ and were ‘more than a comforting or supportive pat on the shoulder’.
561. The respondent also submitted that ‘no reasonable person would view the alleged conduct as being offensive, and that the sexual harassment legislation is not designed to address such trivialities nor to sterilise the workplace from harmless displays of care and respect between colleagues’.⁵⁰⁶ The Tribunal rejected those submissions:

I do not accept that the conduct was trivial, or that it was a harmless display of care and respect. Mr Sammut did not like to be touched, and was given a nickname to that effect. Ms Joy gave him physically intimate hugs with both arms around him. He asked her on a number of occasions to stop. She respected his wishes only after he had objected in front of two colleagues. I accept his evidence that he was concerned that her behaviour would jeopardise his relationship with his partner. I find that the circumstances were such that a reasonable person, having regard to all the other circumstances, would have anticipated that Mr Sammut would be offended or humiliated by Ms Joy’s conduct. I am therefore satisfied that the hugs constituted sexual harassment within the meaning of [section 85](#), and a contravention of [section 86\(2\)\(a\)](#) of the EOA.⁵⁰⁷

562. In some cases, the context may be crucial in determining whether or not the conduct is found to be of a ‘sexual nature’ and therefore constitute sexual harassment. For example, in *State of Victoria & Ors v McKenna*,⁵⁰⁸ three alleged acts of sexual harassment were complained of by Ms McKenna, a former police officer. Two of the incidents in the series were clearly conduct of a sexual nature. They involved Mansfield, another police officer, firstly, pulling Ms McKenna onto his lap and, secondly, saying to her ‘how about a head job?’ The third incident involved Ms McKenna being grabbed and pulled towards a holding cell, followed by an attempt to lock her in the cell. The Court rejected the argument that the third incident should be classed as assault, rather than sexual conduct. This was rejected on the basis that the incident occurred as part of a series, the other incidents being sexual, and therefore this act had the necessary sexual element to render it a sexual assault and therefore also amount to sexual harassment. Had this incident occurred in isolation, it may not have had the necessary sexual element.⁵⁰⁹

502 [\[2008\] VCAT 1996](#).

503 *Ibid* [23].

504 [\[2010\] VCAT 1735](#).

505 *Ibid* [54].

506 *Ibid* [69].

507 *Ibid* [69]-[71]. Section 85 of the *Equal Opportunity Act 1995* is replicated in [s92](#) of the *Equal Opportunity Act 2010*; Section 86(2)(a) of the *Equal Opportunity Act 1995* is replicated in [s93\(2\)\(a\)](#) of the *Equal Opportunity Act 2010*.

508 [\[1999\] VSC 310](#).

509 *Ibid* [219]-[223].

563. Where the conduct complained of falls short of constituting a request for sexual favours or a sexual advance, it may nonetheless constitute sexual harassment if it constitutes conduct of a sexual nature. As stated above, [section 92\(2\)](#) further assists in the interpretation of what amounts to conduct of a sexual nature. It is important to note, however, that this section is an inclusive not an exhaustive list of what constitutes conduct of a sexual nature. There may be other conduct which would fall within the ordinary meaning of conduct of a sexual nature not expressly referred to in [section 92\(2\)](#).

564. In *Te Papa v Woolworths Ltd trading as Safeway*⁵¹⁰ at paragraph 7, Judge S Davis made the following comment about the predecessor to [section 92\(2\)](#) which was in the same terms:

While section 85(2) defines conduct of a sexual nature inclusively and not exhaustively, it is clear from the terms of the section that it is confined to acts or statements of a sexual nature related to sexual matters or which can be characterised as sexual or sexually related. The term relates to matters which have to do with sexual activity or attraction or relationships.⁵¹¹ Within this broad category, the term may refer to many things, including: requests for sexual intercourse, love letters, invitations to date, comments about parts of the body which are generally regarded as having a sexual function or about a person's sex life, physical contact such as patting, pinching or touching in a sexual way, indecent exposure, offensive telephone calls, offensive hand or body gestures.⁵¹² Whether conduct or a statement is 'sexual' may depend on the circumstances including where and when and how the conduct occurred, and the understanding of the participants at the time.

565. In *Johanson v Michael Blackledge Meats*,⁵¹³ a customer had been sold a bone at a butcher's shop, which had been deliberately made into the shape of a penis by an employee of Michael Blackledge Meats. Although the sale of the bone to that customer was unintentional, the transaction was sufficient to constitute sexual harassment. The reasoning for this was that by making the bone into the shape of a penis and then disguising it amongst the rest of the bones for sale, the employee had engaged in conduct which exposed the customer to the risk of obtaining from the shop, an object which caused her serious offence.⁵¹⁴

566. The test of whether conduct is conduct of a sexual nature is an objective one and the motivation or understanding of the perpetrator is irrelevant.⁵¹⁵ Also note that a single incident may constitute sexual harassment, as can a series of incidents.

567. In *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors*,⁵¹⁶ Justice Lockhart said that the definition of sexual harassment 'clearly is capable of including a single action and provides no warrant for necessarily importing a continuous or repeated course of conduct'.⁵¹⁷ In the same case, Justice French also held that sexual harassment need not involve repetition, stating that, 'circumstances, including the nature and relationship of the parties may stamp conduct as unwelcome the first and only time it occurs'.⁵¹⁸

568. Further exemplifying this point, in *Tan v Xenos*,⁵¹⁹ damages of \$100,000 were awarded in relation to a single incident of sexual harassment. It should be noted that this act involved serious sexual, unwelcomed conduct by Mr Xenos, a neurosurgeon, towards his trainee. The incident was considered to have been exacerbated by the fact that Mr Xenos took advantage of his position of seniority and control.

513 [2001 FMCA 6](#).

514 *Ibid* [90].

515 *Frith v the Exchange Hotel* [2005] FMCA 402.

516 [1989] FCA 72.

517 *Ibid* [40] per Lockhart J (first judgement).

518 *Ibid* [53] per French J (third judgement). See also *Sammur v Distinctive Options Limited* [2010] VCAT 1735 [51]; *Equal Opportunity Act 2010 (Vic) s 92(2)* which is in substantially the same terms as its predecessor in the 1995 Act.

519 [\[2008\] VCAT 1273](#).

510 [\[2006\] VCAT 1222](#).

511 See also *Cassandra Evans v Total Food Management* [1997] VCAT 213, [9].

512 *Ibid*.

569. [Section 92\(2\)\(a\)](#) refers to conduct which subjects a person to an act of physical intimacy. The extent to which acts of physical intimacy constitute sexual harassment was considered in *Pana Andropoulos v Peppers Delgany Portsea*.⁵²⁰ In that case, the complainant made a complaint of sexual harassment in the provision of goods and services and accommodation. The facts, in summary, were that the complainant was having a massage at a hotel where she was staying with her partner. She alleged that during the massage, Mr McKinlay, the masseuse, unhooked her bra, began massaging her back, and ‘without warning’ pulled the towel to below her buttocks, pulled down her underwear and massaged her buttocks. The complainant made no comment to Mr McKinlay until after the massage had finished.
570. In determining whether this constituted conduct of a sexual nature for the purposes of the 1995 Act, the Tribunal recognised that the act complained of had occurred in circumstances ‘where the complainant had subjected herself voluntarily to treatment that was to include the massage of muscles and tissue in various parts of her body, including her back’.⁵²¹ This was relevant to the Tribunal’s consideration of whether there had been an act of ‘sexual physical intimacy’, which would be necessary for the complaint of sexual harassment to be upheld. In such circumstances as these, there can still be an act of sexual harassment if, for instance:
- There was unusual other conduct or obsessive behaviour or where the treatment was accompanied by remarks, gestures or other actions that gave an indication that the nature of the treatment had turned from normal therapeutic manipulation to ‘sexual’ physical intimacy.
571. In this case, the complainant’s main concern was that Mr McKinlay had ‘exposed’ her buttocks, rather than the fact that he had massaged them. There was nothing in the complainant’s evidence to suggest that the nature of the treatment that Mr McKinlay was providing, being the massage, had so changed the treatment so as to make it conduct that could constitute ‘sexual physical intimacy’. The Tribunal therefore found that there had been no sexual harassment in this instance.
572. The Peppers Delgany Portsea case illustrates the point that where there has been any physical contact, the context in which that contact has occurred will be very important in determining whether or not it meets the test of ‘sexual harassment’. Similarly, in *Burgiss v Clisby Pty Ltd*,⁵²² for example, there was agreement about the fact that Mr Grech, an employee of the respondent, hit the complainant on the ‘backside with a newspaper’. There was a dispute about the context in which this happened. On this point Deputy President Davis said:
- It was submitted on behalf of the respondents that if Mr Grech slapped Mrs Burgiss in anger, the conduct was not of a sexual nature. However, Mr Grech said he was not angry with Mrs Burgiss at the time of the slap. I consider that the slap to the backside subjected Mrs Burgiss to an act of physical intimacy and thereby constitutes unwelcome conduct of a sexual nature.⁵²³

520 [\[1999\] VCAT 645](#).
521 *Ibid* [5].

522 [\[2004\] VCAT 1817](#).
523 *Ibid* [29].

Unwelcome conduct

573. As stated above, to constitute sexual harassment for the purposes of the Equal Opportunity Act, not only must the conduct be of a sexual nature, but, importantly, it must be 'unwelcome'. In *GLS v PLP*⁵²⁴ the Justice Garde, President of the Tribunal adopted the test in *Aldridge v Booth*,⁵²⁵ where Spender J held that for conduct to be 'unwelcome' meant it was not solicited or invited by the employee, and that the employee regarded the conduct as undesirable or offensive. Justice Garde further held that the question of whether behaviour is unwelcome is subjective, based on the state of mind of the complainant.⁵²⁶
574. This means that not only must the conduct not be invited or solicited, but even where unsolicited or uninvited, it must nonetheless be unwelcomed. The notion that the sexual conduct is unwelcome is at the core of the concept of what constitutes sexual harassment.
575. In the decision of *Styles v Murray Meats Pty Ltd*,⁵²⁷ Deputy President McKenzie also held that whether the conduct is unwelcome is a subjective test:

... the conduct must be, and be seen to be, unwelcome to the recipient. A comment would not be unwelcome if the recipient by conduct or comment condones it. For example, by replying with comments of a similar nature or by otherwise showing in actions or words that the conduct is found to be amusing.

The fact that a recipient of a comment or a gesture is silent does not automatically mean that the comment is welcome. Again, the fact that the maker of the comment or gesture has not been told in advance by the potential recipient, does not automatically make the comment welcome.

The maker of the comment might beforehand know or suspect that the recipient would find the comment unwelcome. Whether or not a comment is welcome must be determined having regard to all the circumstances...⁵²⁸

576. This, however, does not mean that the respondent has to have actual knowledge that the conduct is unwelcome. As noted by Deputy President McKenzie in *Kaldawi v Smiley*.⁵²⁹

... unwelcome conduct must mean conduct unwelcome to the recipient but does it also mean that the person who engages in the conduct must know that it is unwelcome to the recipient? In effect the Doctor and Ms Smiley rely on different meanings of this phrase. Ms Smiley does not deny that it was not till September 2001 that she told the Doctor the e-mails were unwelcome. The Doctor says that at the time he sent the e-mails he did not know, and had no reason to know, that they were unwelcome conduct.

The proper interpretation of this phrase was not fully argued before me. For the purpose of determining this application, I'm not satisfied that the phrase so clearly requires some knowledge of the unwelcomeness of the conduct by the person who engages in it that the conduct is incapable of constituting unwelcome conduct for the purposes of the definition of sexual harassment. Even if the phrase is interpreted as requiring some outward manifestation by the recipient of the conduct that the conduct is unwelcome, it may well be that the failure to respond in kind to such e-mails or to actively encourage more to be sent may be enough.⁵³⁰

524 [2013] VCAT 221.

525 [1988] FCA 170; (1988) 80 ALR 1, 5 cited in *GLS v PLP* [2013] VCAT 221, [33].

526 *GLS v PLP* [2013] VCAT 221, [30] and [32] relying on *Kraus v Menzie* [2012] FCAFC 144 (Rares, McKerracher and Murphy JJ). The Full Federal Court was considering the construction of section 28A of the *Sex Discrimination Act 1984 (Cth)* which is in a very similar form to section 85(1) of the 1995 Act, which was under consideration by Justice Garde in *GLS v PLP*.

527 [2005] VCAT 2142.

528 Ibid [14]-[16].

529 [2002] VCAT 1754.

530 Ibid [46]-[47]. This decision was given in the context of an interlocutory application to strike out the complaint and therefore ought to be read accordingly.

577. A similar issue arose in the case of *Howard v Geradin Pty Ltd T/A Harvard Securities*.⁵³¹ At paragraph 50 Deputy President Davis said:

The Complainant needs to establish that the conduct complained of was unwelcome. A finding that the complainant willingly participated in exchanging sexually explicit text messages by mobile telephone with her colleagues in the workplace would necessarily undermine such a conclusion.

578. Ambivalence towards a person's conduct is not sufficient to defeat a claim of sexual harassment. For example, in *Aldridge v Booth & Ors*⁵³² the federal Human Rights and Equal Opportunity Commission, as it then was, found that the age of the complainant, who was 17 at the time, and her lack of sophistication, had caused her to tolerate the behaviour because she was afraid that her employment would be terminated if she had made it clear that the conduct was unwelcome. It is worth noting that the acts complained of in this case were significant, including several acts of sexual intercourse. The fact that the acts were 'largely unwelcome' was sufficient to meet the requirements of the Act, despite the fact that the complainant had endured the conduct and not openly objected.

579. Such examples can be differentiated from instances where it would not at all be apparent that the sexual conduct was unwelcome. The Victorian case of *Hardy v Kelly (Kelly)*⁵³³ concerned allegations of sexual harassment against Mr Kelly by his secretary, Ms Hardy. The Tribunal found that Ms Hardy and Mr Kelly had a 'close friendship' at the time when the relevant incidents occurred. It was found in this case that, because of the close friendship that existed, and the fact that Ms Hardy actively participated in out-of-hours conversations with Mr Kelly, including allowing him to visit her at home on a number of occasions, the conduct was not unwelcome, and so could not constitute sexual harassment. Ms Hardy's evidence that when Mr Kelly attempted to hug her on one occasion she had 'repelled him' and told him to go home, did not assist her claim, when considered in the context of their relationship at that time.

580. The finding of the Tribunal in *Kelly*, and the emphasis that was placed on the close friendship between the parties in determining that there had been no sexual harassment, contrasts with the decision of the Federal Court in *Leslie v Graham*.⁵³⁴ In this case, the applicant was employed by Roger Graham and Associates, which was a family business, and she had become a personal friend of the Graham family. Mr L Graham, who ran Roger Graham and Associates with his father, and the applicant went away for the weekend together to a work-related conference, where they shared an apartment. The applicant alleged that she had woken in the night to find Mr L Graham on top of her, and that she then fled from the apartment. The Court upheld the applicant's allegation of sexual harassment. It found that, in reality, the applicant did not fear, when she woke up, that Mr L Graham would rape her, but did not consider it a mitigating factor that a friendship existed between Mr L Graham and the applicant. The nature of the conduct alleged may also have been relevant factors in these cases.

581. The finding of the Tribunal in *Kelly* also contrasts with the recent decision in *GLS v PLP*.⁵³⁵ In that case the complainant Ms GLS and respondent Mr PLP had been close friends prior to Mr PLP agreeing that GLS could undertake a professional legal service placement at his firm. The Tribunal upheld 11 out of 14 instances of sexual harassment alleged by GLS despite making a finding that there was a close friendship of admiration and affection between Ms GLS and Mr PLP, involving socialising outside work together and with each other's families, visiting each others' homes, as well as evidence of conversations between the two containing 'sexual innuendo or banter, teasing and provocation that passed between them virtually on a daily basis'.⁵³⁶

531 [2004] VCAT 1518.

532 [1986] HREOCA 1.

533 (1991) EOC 92-369.

534 [2002] FCA 32.

535 [2013] VCAT 221.

536 Ibid [151]-[152].

582. In relation to whether the context of the parties' relationship affected whether Mr PLP's conduct was sexual harassment and whether his sexual advances and requests for sexual intercourse were welcome, Justice Garde held:

Allegations of sexual harassment are not assessed in a vacuum, but must be assessed in the context of the relationship and friendship between the parties. This relationship is evidenced by the numerous texts, emails and letters that passed between them, and by video evidence.

However, there were limits and boundaries to the friendship and relationship between Ms GLS, Mr PLP and his partner. Whilst there was much sexual banter, teasing, provocation, jesting and much shared personal information and commentary about mutual friends, Ms GLS did not at any time desire or agree to sexual intercourse or indeed to any sexual relationship with Mr PLP. This was a clear boundary for her.

I am satisfied that Ms GLS did not at any time welcome Mr PLP's sexual advances or requests for sexual intercourse with her. She did not seek out any such approaches, and she was offended, diminished, and insulted by them. She considered that it was improper for Mr PLP to be making approaches for sexual intercourse and other sexual favours given his relationship with his partner and his obligation to his partner.⁵³⁷

583. Therefore, the close and affectionate relationship between Ms GLS and Mr PLP was not considered a barrier to Mr PLP's conduct amounting to sexual harassment.

Reasonable anticipation that the conduct would offend, humiliate or intimidate

584. The final element which needs to be established to make out a claim of sexual harassment is that the conduct has occurred in circumstances in which it could reasonably have been expected that the conduct would offend, humiliate or intimidate the person to whom the conduct was directed.⁵³⁸

585. This requires an objective, not subjective, assessment of the evidence, namely 'the perspective of a reasonable person in the role of a hypothetical observer'.⁵³⁹

586. As noted in *Styles v Murray Meats Pty Ltd*⁵⁴⁰ at paragraph 16:

The test of whether the comment could reasonably be anticipated to offend, humiliate or intimidate is not to be judged from the subjective point of view of either the actor, or the recipient. For this reason I disagree with the respondent's submission that I must ask whether a person of the same age and background of Mr Ujvari one of the people alleged to have made a number of comments in question would have anticipated that his comments would offend humiliate or intimidate Ms Styles. The matter is to be judged from the stand point of a reasonable person with knowledge of all the circumstances and this is in my view consistent with the objects of the Act.

587. Similarly in *Mohican v Chandler McLeod Ltd T/A Forstaff Australia*⁵⁴¹ at paragraph 13, the Tribunal noted:

Sexual harassment is defined in section 85 of the Act as an unwelcome sexual advance or request for sexual favours or any other conduct of a sexual nature if a reasonable person would have anticipated that the conduct would offend, humiliate or intimidate the other person. ... This means that Mr Mohican must prove *both* that the conduct in fact occurred *and* that a reasonable person would have found the proven conduct offensive.

537 Ibid [153]-[155].

538 *Equal Opportunity Act 2010 (Vic) s 92(1)*.

539 *GLS v PLP* [2013] VCAT 221, [30]-[32] relying on *Kraus v Menzie* [2012] FCAFC 144, [7] and *Leslie v Graham* [2002] FCA 32, [70] per Branson J. Also see *Poniatowska v Hickinbotham* [2009] FCA 680, [289].

540 [2005] VCAT 914.

541 [2009] VCAT 1529.

Other considerations

Failing to 'flee' or strongly reject harassment

588. Failing to flee or strongly reject harassing behaviour is not a matter which will affect a complaint of sexual harassment, particularly in relation to whether the conduct was welcome or not. The Tribunal made very clear in its decision *GLS v PLP*⁵⁴² it is not appropriate to criticise a complainant for the way they handle the sexual harassment. It is enough for the case if the respondent's conduct meets the test for sexual harassment under the Equal Opportunity Act.⁵⁴³

589. In that case, the complainant Ms GLS was a mature aged graduate legal student undertaking a professional legal placement with Mr PLP and his firm. She complained that throughout her placement, Mr PLP sexually harassed her on a daily basis including repeated requests for sex, inappropriate touching, viewing pornography in the workplace and inappropriate comments. Ms GLS did reject Mr PLP's advances, but with body language which Mr PLP's counsel argued contradicted her words.⁵⁴⁴ Mr PLP's counsel further criticised Ms GLS for not escaping from Mr PLP's embraces, not acting more strongly or at an earlier time to reject his advances, spoken her mind more directly or forcibly removed herself from his grasp and presence.⁵⁴⁵

590. Justice Garde was not persuaded by this criticism and held that such comments were inappropriate considering the obligation was on the employer to refrain from sexually harassing its employees and eliminate sexual harassment as far as possible:

None of the conduct or behaviour referred to by counsel for Mr PLP should be taken as meaning that Mr PLP's conduct was in any way welcome, or not unwelcome to Ms GLS. She sought to manage an unwanted situation. She did not want to upset Mr PLP or lose his support. He was her employer and the principal of the firm for which she worked. He was in a position of authority and superiority. He was her supervisor and was responsible for her placement. She certainly did not want to lose or fail to complete her placement which

she had to complete to gain admission to practice. She was an older age student, and placements were not all that easy to come by, despite her network of contacts.

In addition to the position of authority held by Mr PLP, he and his partner were considered by Ms GLS to be her friends. She was reluctant to do anything that might upset the friendship that she had with Mr PLP and his partner. She wanted to save the friendship and complete the placement.⁵⁴⁶

591. Similarly, in *Delaney v Pasonic Pty Ltd*⁵⁴⁷ it was alleged that Mr Daley, amongst other things, approached Ms Delaney in the storeroom of the shop where they worked, grabbed her breasts and bottom, kissed her neck, and touched her all over. The fact that Ms Delaney did not 'flee' from the workplace in response to this advance 'because she was frightened of losing her job and did not know what to do' did not affect her claim of sexual harassment being upheld.

Sexual harassment and out-of-work conduct

592. A further element to consider in respect of sexual harassment is how far the scope of 'employment' extends. This is also relevant to the issue of vicarious liability discussed in [Chapter 13](#) of this resource.

593. The question of whether a person's private or out-of-work conduct bears a relevant connection to the workplace is not clear cut. The answer in each case will turn on the particular facts, although guidance can be attained from cases that have addressed this issue. [Section 93](#) of the Equal Opportunity Act does not require on a connection with the workplace over and above the fact there is an employment (or potential employment) relationship between the parties. It is only when the tribunal or court is considering an employer's vicarious liability under [section 109](#) of the Equal Opportunity Act that there is a requirement to consider if an act was done 'in the course of employment', and therefore consider whether there was a connection to the workplace. The answer in each case will turn on the particular facts with guidance from cases that have addressed this issue.

542 [\[2013\] VCAT 221](#).

543 Ibid [228].

544 Ibid [220], [222].

545 Ibid [226]-[227].

546 Ibid [229]-[230].

547 [\[2001\] VCAT 1870](#).

594. For example, *South Pacific Resort Hotels Pty Ltd v Trainor*,⁵⁴⁸ an incident of sexual harassment occurred at accommodation that had been paid for by the employer, even though the harassment by the victim's co-worker did not occur while either of them were actually 'working'. The employer argued that this case should be distinguished from other cases where incidents of sexual harassment had occurred, for example, in a hotel room paid for by the employer after a work event, because, in this case, the employees involved were both living on the premises. The court did not consider that this removed the conduct from the scope of 'employment'. A key consideration in this regard was the fact that only employees were allowed on site. Extending from this, the employer was held to be vicariously liable for the harassment because the employees' rooms were close to each other and accessible, which created the opportunity for the conduct to occur 'within the course of employment' at any time. The employer had taken insufficient steps to prevent a 'foreseeable' possibility of harassment.
595. In *A v K Ltd & Z*,⁵⁴⁹ A alleged that he was sexually harassed by Z. The allegations related to a number of different incidents. The first incident was alleged to have occurred at and following a private party that they both attended organised by a colleague. Both A and Z worked for the same employer. The party however, was conceded to be a private function and whilst there were some employees from K Ltd at the party, it was conceded that the party was not organised or authorised by the company. A number of the people attending the party were not employees of the company. The party was also held on a Saturday which was not a work day. The second allegation related to events over the course of a Friday/Saturday period. Both A and Z were required to attend a function as part of their job and the employer paid for Z's accommodation for the Friday evening as he had to come down from Sydney. At the end of the function a number of employees and clients and guests of the company went to a bar. The company authorised and paid for the supply of alcohol at the bar. A alleged that in the course of that evening, Z subjected him to an act of physical intimacy that he either did not consent to or could not consent to because of his alcohol affected state.
596. There was a significant dispute between A and Z as to what happened that evening. Z denied that anything of a sexual nature occurred at all. This case arose in the context of a strike out application. In that context, the Tribunal held that the first incident was misconceived and ought to be struck out on the basis that there was not a sufficient connection with the employment as between the employees and the circumstances of the incident, to properly found a claim against the employer. The incident clearly occurred in a situation that was a private function where the employees were not acting as employees. However, in relation to the second incident, the Tribunal was not satisfied that there was not so clearly an absence of a sufficient link to the employment relationship that the claim was bound to fail. On this basis the Tribunal refused to strike out the second incident.
597. In *Lee v Smith & Ors*⁵⁵⁰, the Australian Defence Force (ADF) was held vicariously liable for unlawful sexual harassment and victimisation in breach of the *Sex Discrimination Act 1984 (Cth)*. That unlawful conduct included a rape, which occurred following some after-work drinks at the home of one of Ms Lee's colleagues. Central to the Court's finding that the ADF was vicariously liable was its conclusion that the rape 'arose out of a work situation' and, in fact, 'was the culmination of a series of sexual harassments that took place in the workplace'.⁵⁵¹
598. In contrast to these cases, in *Tichy v Department of Justice – Corrections Victoria*⁵⁵² an incident of serious sexual harassment by a colleague was held not to have been in the course of employment for the purposes of allegations of misconduct. The incident took place while the employees were away for work purposes, but, the significant distinction was that the event had not been authorised or sanctioned by management, and had been organised by the employees at their own initiative. The fact that the employees were not required, because of work, to be in such close proximity to each other, was the critical factor in removing the incident harassment from the nexus of the workplace. However, given this was a case regarding misconduct and not an allegation of sexual harassment in breach of [section 93](#) of the Equal Opportunity Act, it is possible sexual harassment may have been found in the same circumstances but in the discrimination jurisdiction.

548 [2005] FCAFC 130.
549 [2008] VCAT 261.

550 [2007] FMCA 59.
551 Ibid [203].
552 [2005] AIRC 136 and [2005] AIRC 592.

599. The scope of employment has been further expanded over recent years because of the way that electronic communication and social media have now infiltrated the workplace. The courts have clarified that behaviour engaged in via social media sites and electronic communication can still have a sufficient nexus to the workplace to bring it within the scope of employment.⁵⁵³

600. These cases show how circumstantial the case law on sexual harassment can be. The relationship between those involved and the context of the incident are just as important as where the incident took place.

Sexual harassment is not limited to harassment of women by men

601. Finally, it should be noted that sexual harassment is not limited to conduct by a male towards a female but can also occur in respect of conduct by a female towards a male, or male towards a male or female towards a female.⁵⁵⁴

Changes to definitions under the Equal Opportunity Act

602. The Equal Opportunity Act amended the definitions of 'employee', 'employer' and 'employment'.⁵⁵⁵ As noted in [paragraphs 550 to 553](#) of this resource, the effect of the revised definitions is that the protections afforded under Part 6 of the Equal Opportunity Act for sexual harassment now extend to unpaid workers or volunteers. The practical implications of this are as follows:

- a. An employer must not sexually harass a person who works for that employer as an unpaid worker or volunteer, or a person seeking to work with that employer as an unpaid worker or volunteer. In addition, an unpaid worker or volunteer must not sexually harass their employer, other employees (whether unpaid workers, volunteers or otherwise) or people seeking to work with their employer (whether as unpaid workers, volunteers or otherwise).

- b. A person must not sexually harass another person (including an unpaid worker or volunteer) at a place that is a workplace of both of them.
- c. A member of an industrial organisation must not sexually harass a person who works for that organisation as an unpaid worker or volunteer, and an unpaid worker or volunteer must not sexually harass a person seeking to become a member of an industrial organisation or a member of that organisation.
- d. A member of a qualifying body must not sexually harass a person who works for that body as an unpaid worker or volunteer, and an unpaid worker or volunteer must not sexually harass a person seeking action in connection with an occupational qualification or a member of that qualifying body.
- e. A person who works as an unpaid worker or volunteer for an educational institution must not sexually harass a person seeking admission to that institution as a student, or a student of that institution, and a student must not sexually harass a person who works as an unpaid worker or volunteer for that institution.
- f. A member of a club, including a member of the management committee or other governing body of the club, must not sexually harass a person who works as an unpaid worker or volunteer for the club.

553 See, for example, [Cooper v Western Area Local Health Network \[2012\] NSWADT 39](#).

554 See, for example, [Thomas v Alexiou \[2008\] VCAT 2264](#) and [Sammut v Distinctive Options Limited \[2010\] VCAT 1735](#).

555 [Equal Opportunity Act 2010 \(Vic\) s 4](#).

Chapter 11

> Victimisation

What is victimisation?

603. [Section 103](#) of the Equal Opportunity Act prohibits victimisation. Victimisation, for the purposes of section 103, is defined under [section 104](#) of the Equal Opportunity Act, as follows:

104 What is victimisation?

(1) A person victimises another person if the person subjects or threatens to subject the other person to any detriment because the other person, or a person associated with the other person:

- a. has brought a dispute to the Commissioner for dispute resolution
- b. has made a complaint against any person under the old Act
- c. has brought any other proceedings under this Act or the old Act against any person
- d. has given evidence or information, or produced a document, in connection with –
 - i. any proceedings under this Act or the old Act
 - ii. any investigation or public inquiry conducted by the Commission
- e. has attended a compulsory conference or mediation at the Tribunal in any proceedings under this Act or the old Act
- f. has otherwise done anything in accordance with this Act or the old Act in relation to any person
- g. has alleged that any person has contravened a provision of Part 4 or 6 or this Part, or Part 3, 5 or 6 of the old Act, unless the allegation is false and was not made in good faith

h. has refused to do anything that –

- i. would contravene a provision of Part 4 or 6 or this Part
- ii. would have contravened a provision of Part 3, 5 or 6 of the old Act –

or because the person believes that the other person or the associate has done or intends to do any of those things.

(2) It is sufficient for subsection (1)(g) that the allegation states the act or omission that would constitute the contravention without actually stating that this Act, or a provision of this Act, has been contravened.

(3) In determining whether a person victimises another person it is irrelevant:

- a. whether or not a factor in subsection (1) is the only or dominant reason for the treatment or threatened treatment provided that it is a substantial reason
- b. whether the person acts alone or in association with any other person.

604. To establish victimisation within the statutory definition in [section 104](#), a complainant must establish the following:

- a. that the alleged victimiser has subjected the complainant to conduct which constitutes a detriment
- b. that the conduct which constitutes the detriment must be directed at and affect the complainant
- c. the alleged victimiser must engage in the conduct complained of for one or more of the proscribed reasons set out in [section 104](#).⁵⁵⁶

556 *Tan v McArdle & Anor* [2010] VCAT 248.

605. Unlike discrimination and sexual harassment, the prohibition on victimisation is not tied to any particularly area of public life or relationship.

Detriment

606. Detriment is defined in the Equal Opportunity Act to include 'humiliation and denigration'. It otherwise is to be given its ordinary meaning. Detriment is defined in the Macquarie Dictionary to mean 'loss, damage or injury'.

607. Taken together, and given the beneficial nature of the Equal Opportunity Act, it is likely that the term detriment is to be interpreted in a broad sense. In *Kistler v R E Laing Training and Robert Laing*,⁵⁵⁷ the Tribunal stated:

Detriment within the meaning of the 1995 Act has a broad meaning and includes every kind of disadvantage. By reason of section 4 of the Act, 'detriment' includes humiliation and denigration.

608. The following have been held to constitute a 'detriment' in the context of a victimisation claim by VCAT:

- a. the delay and eventual withdrawal of services⁵⁵⁸
- b. subjecting an employee who had made a complaint of sexual harassment to the following:
 - i. shaking a packet of Ratsak (rat poison) in her face and saying words to the effect of that he would 'get a rat' before putting it away in the cupboard
 - ii. requiring her to be accompanied to an external training session when this had not ever been required before
 - iii. issuing a direction that she not be in the general office area unless absolutely necessary
 - iv. omitting the employee from a list of professional development activities as was usual for other staff
 - v. avoiding and/or refusing to process a WorkCover claim in a timely manner⁵⁵⁹
 - vi. banning a person from membership of an organisation.⁵⁶⁰

609. In *Besley v National Aikido Association Inc*,⁵⁶¹ President McKenzie noted that an alleged flaw in an investigation process into allegations of discrimination or harassment is unlikely to amount to victimisation or a detriment. At paragraph 52 she said as follows:

But in my view a flaw in the complaint handling process, without more, and except in very unusual circumstances, will not be capable of constituting victimisation. This is so for two reasons.

First, it will be impossible to show that the allegation made by the complainant is a substantial reason for the flaws in the complaint handling process. That complaint handling process would not have occurred but for the making of the complaint or the allegation. But this is not the same thing as showing that the flaw in the process is directly attributable to the making of the allegation or that the of the allegation is a substantial reason for the flaw (sic). Generally, the reasons for the flaw will be a matter of inference. An equally or more probable explanation for the flaw will often be misunderstanding, ignorance, inefficiency or incompetence. In my view such an explanation is clearly available here even on Ms Besley's own version of events.

Second, in most cases, the flaw cannot be characterised as detriment. It is the conduct the subject of the original allegation which usually will be the detriment. The complaint handling process itself will almost always result in tension and stress, whether or not that process is flawed. In other words the attention or stress comes from the process not from particular flaws in it.

However, there can be detriment where something occurs beyond the process itself, and that something occurs substantially because of the making of the allegation.

557 (2000) EOC 93-064.

558 *Fratas v Drake International Limited t/as Drake Jobseek* (2000) EOC 93-038.

559 *Gray v State of Victoria & Anor* [2000] VCAT 1281.

560 *Parr v Steamrail Victoria* [2012] VCAT 678.

561 [2005] VCAT 245.

610. Similarly, in *Lazos v Australian Workers Union & Anor*,⁵⁶² the Tribunal stated:

Under the Act, victimisation means subjecting a person to a detriment because the person has alleged a contravention of the Act. Applying this provision to the claim and trying to characterise it, it would mean that the claimant says that the respondents were inactive in supporting Mr Lazos's complaint of race discrimination because he alleged that he had been discriminated against. It simply makes no sense to try to characterise the claim in this way, and it seems to me that to this extent the claim of victimisation should be struck out.

Substantial reason

611. To make out a claim of victimisation, the complainant must demonstrate that one of the factors listed in [sections 104\(1\)\(a\) to \(h\)](#) was a substantial reason for the alleged victimisation. It does not need to be the only or even the dominant reason, provided that it is a substantial reason.⁵⁶³ That is, that it is 'a reason of substance for that conduct'.⁵⁶⁴ The complainant must establish a causal nexus between the alleged detriment suffered and the action taken under section 104(1) relied upon.

612. In *G v Victoria Legal Aid*⁵⁶⁵, in finding that a claim of victimisation was not made out under the 1995 Act, the Tribunal said:

The complainant must prove a clear causal link between subjecting a person to a detriment, and that person's having earlier taken action of the kind set out in section 97(1) to (g). Clear evidence of a causal link has not been adduced, nor is there evidence from which it would be safe to draw an inference of a causal link. In these circumstances, the complainant's case of victimisation fails.

562 [\[1999\] VCAT 635](#).

563 *Equal Opportunity Act 2010 (Vic) s 104(3)(a)*. For more information, refer to the discussion of *Stern v Depilation & Skincare Pty Ltd* [\[2009\] VCAT 2725](#) in [Chapter 2](#) of this resource.

564 *Stern v Depilation & Skincare Pty Ltd* [\[2009\] VCAT 2725](#), [8].

565 (2000) EOC 93-060.

613. A similar conclusion was reached in the more recent decision of *Parr v Steamrail Victoria*.⁵⁶⁶ In that case, Mr Parr complained that he had been victimised because Steamrail Victoria banned him from its organisation indefinitely, after it became aware that he had gone to the police with three teenage boys, who alleged to the police that a member of Steamrail Victoria had sexually assaulted them. Some time later, after some further discussions between Mr Parr and the new Chairman of Steamrail Victoria, the question of Mr Parr's membership was put to a general vote. The claim under the Equal Opportunity Act, was that Mr Parr had been subjected to a detriment because, through him, the teenagers had made a complaint of sexual harassment. Steamrail submitted that this had not been the reason for Mr Parr's treatment. There was no direct evidence of the reason why Mr Parr had been banned. Rather the new Chairman of Steamrail Victoria said that members told him that they voted against Mr Parr's membership because 'of Mr Parr's abusive and aggressive behaviour toward them...(and) that many members told him that, if Mr Parr's membership were reinstated, they would leave the Steamrail organisation.'

614. Mr Parr's claim failed. The Tribunal member stated:

I am not satisfied that the allegation was a substantial reason for the decision made at the meeting of members to continue Mr Parr's ban. The only evidence about the reasoning of the members is general and is that Mr Parr's abusive behaviour was a factor in the decision. There is no evidence about how many of the members voting at that meeting had that reason in mind. There is no evidence at all that they had in mind any other reason, such as the allegation made. It would need to be a matter of inference. I am not prepared to draw that inference because there is insufficient evidence to do so. Moreover, it would need to be established that a majority of the members voting at the meeting had that reason as a substantial reason for voting in a particular way. There is no evidence on which I could base such a finding.⁵⁶⁷

566 [\[2012\] VCAT 678](#).

567 [Ibid](#) [65].

615. The Tribunal therefore found that the claim of victimisation was not made out.
616. Ultimately, whether there is the necessary causal nexus will be a factual issue for the Tribunal to determine on the basis of the evidence.⁵⁶⁸

Knowledge and other matters

617. A related question is the extent to which the alleged victimiser has knowledge of the action under [section 104\(1\)](#), upon which the victimisation claim is based. That is, if a complainant claims that they have been victimised because of an earlier complaint made under the Equal Opportunity Act, to what extent is it necessary for the complainant to lead evidence of the fact that the alleged victimiser had knowledge of the earlier complaint. This issue was addressed in the case of *Gabriel v Council of Box Hill Institute of TAFE*.⁵⁶⁹ In that case, VCAT said

To be an actuating basis for victimisation the Institute, its council or its employee or officer must have known about the complaint. Ms Gabriel doesn't explain in the particulars when, how and who from the Institute came to know about this letter of complaint. She may reinstate this paragraph in the amended particulars if she can particularise how the complaint came to the knowledge of the council or its officers or employees.⁵⁷⁰

618. It is also important to note that it is possible to make out a claim of victimisation even in circumstances where the underlying claim of discrimination or harassment is ultimately not successful. In *Kistler v RE Laing Training & Robert Laing*⁵⁷¹, the Tribunal found that the claim made by Ms Kistler of sexual harassment was not made out and did not accept her evidence. Notwithstanding this, it went on to find that the respondent did nonetheless engage in victimisation within the meaning of the Act substantially because she had made a complaint. The alleged victimisation took the form of intimidating comments and conduct including threats to the complainant.

619. Although the Tribunal did not accept the evidence given by the complainant in relation to the allegations of sexual harassment, it concluded that the complaint was nonetheless made in good faith. A finding that the complaint had been made other than in good faith would have precluded a finding of victimisation⁵⁷² where complaints of discrimination on the grounds of race, disability and carer's responsibilities were dismissed, but the complaint of victimisation on the basis of these complaints upheld.

Duty to eliminate victimisation

620. The Equal Opportunity Act imposes a requirement on duty holders to take reasonable and proportionate measures to eliminate victimisation as far as possible.⁵⁷³

568 See, for example, *Grah v RMIT* [2011] VCAT 2184 in which it was held that the detriment claimed was ultimately the result of the complainant's own conduct not the claimed attribute necessary to make out a claim of victimisation.

569 [2002] VCAT 302.

570 Ibid [40]. See, for example, *State of Victoria v McKenna* [1999] VSC 310.

571 (2000) EOC 93-064.

572 *Equal Opportunity Act 2010 (Vic) s 104(1)(g)*. See also *Zareski v Hannanprint* [2011] NSWADT 283.

573 *Equal Opportunity Act 2010 (Vic) s 15*.

Chapter 12

> Authorising and assisting discrimination and sexual harassment

621. [Section 105](#) and [section 106](#) of the Equal Opportunity Act together regulate the extent to which individuals and an organisation can be held liable for secondary liability, sometimes referred to as ‘authorising or assisting’.
622. [Section 105](#) states ‘A person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 4 or 6 or this Part.’
623. [Section 106](#) states:
- If, as a result of a person doing any of the things specified in section 105, the other person contravenes a provision of Part 4 or 6 or this Part, a person may:
- bring a dispute to the Commissioner for dispute resolution
 - make an application to the Tribunal – against either the person who authorises or assists or the person who contravenes a provision of Part 4 or 6 or this Part or both of those persons.
624. Part 4 deals with discrimination and Part 6 with sexual harassment. ‘This Part’ refers to Part 7 which includes the prohibition on victimisation.
625. [Section 105](#) prohibits a person from requesting, instructing, inducing, encouraging, authorising or assisting another to engage in unlawful discrimination or sexual harassment in breach of the Equal Opportunity Act. It does not require an actual contravention but rather comes into play by the mere act of the first person.
626. [Section 106](#) goes on to provide that where there has been an actual contravention, then the complainant can effectively initiate proceedings against either or both the ‘assistant’ and the ‘principal protagonist’.
627. A person can bring a dispute to the Commission in respect of an alleged breach of section 105 as stand-alone contravention of the Equal Opportunity Act without other unlawful conduct actually taking place. For example, on its face, section 105 could be breached by the first person making a request or giving an instruction, without the second person actually acting on that and engaging in unlawful discrimination or sexual harassment.
628. This is consistent with the reasoning in [Besley v National Aikido Association Inc](#),⁵⁷⁴ (*Besley*) which considered the predecessor provisions to sections 105 and 106. At paragraph 57 of that decision, the Tribunal said:
- In her particulars of complaint, Ms Besley claims the Association has breached s 98 of the Equal Opportunity Act. On a reading of her particulars and the complaints as a whole, the claim is that by mishandling the process of investigating her complaint about her alleged sexual harassment by Mr Watson, the Association condoned the sexual harassment, or condoned Mr Savage’s conduct during his mishandling of the complaints process.

574 [2005] VCAT 245.

The respondents submit that even if Ms Besley can prove that the complaint handling process was flawed, the conduct is incapable of constituting a breach of s.98. I agree. Apart from the word 'encourage' s.98 uses the words 'request, instruct, induce, authorise or assist' in relation to a breach of the Act by another person. Section 99 provides that: 'If as a result of a person doing any of the things specified in s.98' another person breaches the Act, then either or both are taken to be liable and the complaint may be lodged against either or both of them. (sic)

Given the wording of s.98 and s.99 which deals with liability where as a result of conduct in s.98 another person breaches the Act, I conclude that s.98 looks at something occurring before what I might call the substantive breach. In other words the instruction, authorisation, encouragement, inducement or assistance to the other person to breach the Act, must occur before that other person commits the breach. On Ms Besley's material the complaint handling process occurred after the alleged sexual harassment. Section 98 is, in my view, not directed to condoning a breach of the Act after the event. Of course it would cover encouraging, assisting, et cetera, a person to breach the Act even if no breach occurs. But this is not the claim here.

629. This view is consistent with the view expressed by the Tribunal in *Brooks v State of Victoria*⁵⁷⁵ where the Tribunal said:

Section 98 is itself a prohibition. A person contravenes the section if he or she engages in the conduct prohibited by it. A complaint about that contravention may be lodged with the Commission...It is not a requirement of s98 that a contravention by the person who is assisted, encouraged or authorised to contravene the Act must occur. It is enough if a person gives encouragement, authority or assistance to another to contravene the Act.⁵⁷⁶

Timing of conduct

630. As is evident from the decision in *Besley* referred to above, where a claim is brought under section 106, it must be shown that the authorising or assisting conduct occurred prior to any actual unlawful discrimination or sexual harassment.⁵⁷⁷ But organisations will need to be careful about the implications of this. For example, failure to properly investigate claims referred to in the example above may be found to be authorising and assisting where there is ongoing conduct, and in some circumstances it could amount to discrimination or a breach of the positive duty in section 15 of the Equal Opportunity Act.

Degree of knowledge required

631. What level of knowledge must a person have before they can be held liable for authorising, assisting or encouraging another to breach the Equal Opportunity Act in breach of either section 105 or 106 of the Equal Opportunity Act?

⁵⁷⁵ [1997] VADT 13.

⁵⁷⁶ Ibid. Compare this with the position in NSW where the relevant provision is in slight different terms. In the decision of the New South Wales Anti Discrimination Tribunal in *Mitchell v Clayton Utz (No 3)* [2010] NSWADT 100 it was held at [24] 'the first element in establishing what is known as 'contributory' liability under s 52 is to establish that there was an unlawful contravention of the Act. It is this contravention which triggers the liability of third parties'. See also *Dixon v RNJ Sicame Pty Ltd & Anor; Sims v RNJ Sicame & Anor* [2002] NSWADT 154 [42] and *Cooper v Human Rights & Equal Opportunity Commission* [1999] FCA 180 [27] (Madgwick J).

⁵⁷⁷ [2005] VCAT 245.

632. In *Kogoi v East Bentleigh Child Care Centre*⁵⁷⁸, the Tribunal considered a provision similar, although not identical to, [section 106](#), which existed in the *Equal Opportunity Act 1984* (Vic) in the following terms:

Where a person (hereinafter called 'the first person' counsels, requests, demands or procures another person) (hereinafter called 'the other person' to act in contravention of this Act –

- a. if the other person so acts, both those persons shall be jointly and severally liable under this Act in respect of the contravention
- b. if the other person refuses to so act and the first person so acts and that first person's action causes the other person to suffer any detriment as a result of such refusal, such action shall constitute unlawful discrimination under this Act.⁵⁷⁹

633. In considering the construction to be applied to this clause, the Tribunal relevantly said:

(2) A person will not be liable as a secondary party under this section unless he or she knows all the essential facts necessary to constitute a contravention of the Act, and counsels, requests, demands or procures another person to commit that contravention. Knowledge maybe (sic) inferred from the fact that a person has deliberately shut his eyes to the consequences of particular conduct.

(3) If the secondary party has knowledge of all the essential facts necessary to constitute a contravention of the Act, he or she does not need to know that those facts will constitute unlawful conduct.

634. Although the wording of [sections 105](#) and [106](#) are in slightly different terms to the former provision under the *Equal Opportunity Act 1984* (Vic), the Commission considers that the comments in relation to the requisite knowledge required remains equally applicable.

635. For example, in *Roulston v Temp Team Pty Ltd*,⁵⁸⁰ Mr Roulston was assigned to work for Orange by Temp Team, an employment agency. At the request of Orange, Temp Team removed Mr Roulston from that assignment. Mr Roulston submitted that Temp Team had authorised and assisted Orange to discriminate against him, alleging that the removal was because of his psychiatric impairment. Temp Team was told by Orange that the request for removal was made on performance-based grounds. The Tribunal found:

Temp Team cannot be regarded as assisting Orange to discriminate in breach of the [1995] Act if Temp Team did not know that the request for removal was made substantially because of Mr Roulston's impairment and had no reason to believe or suspect that this was the case and had no reason to be put on enquiry as to whether the request for removal might be discriminatory.

...[t]here is no previous complaint or situation that might have made [the alleged authoriser] aware that [another person] was at real risk of impairment discrimination...⁵⁸¹

636. This can be compared to the situation in *Elliott v Nanda & Commonwealth*,⁵⁸² where the Federal Court held that the Commonwealth Employment Service (CES), as the employment agency, did have sufficient knowledge to be liable for having authorised or assisted the sexual harassment alleged by Ms Elliott under the *Sex Discrimination Act 1984* (Cth). In that case, the Court found that the CES had been informed that several young women placed in employment with Dr Nanda had complained about having been sexually harassed by him in a way that would constitute sex discrimination. The CES did not seek to acquire sufficient knowledge to determine whether these complaints were of any substance. There was no record of any communication from the CES to Dr Nanda requiring him to take any action, nor requesting that he demonstrate that he had satisfied any of the 'safeguard' steps that he had been asked to take by CES in response to the complaints.

578 [\[1996\] VADT 27](#).

579 *Equal Opportunity Act 1984* (Vic) s 35.

580 [\[2001\] VCAT 2036](#).

581 *Ibid* [36]-[37].

582 [\[2001\] FCA 418](#).

637. The CES was held liable for having authorised and assisted the acts of sexual harassment. The fact that the CES caseworker who facilitated Ms Elliott's employment did not know about the history of the complaints against Dr Nanda did not prevent the finding that the CES had authorised or assisted the discrimination. The Federal Court clarified that a person can permit another to discriminate if:

Before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a situation where there is a real, and something more than a remote, possibility that the unlawful conduct will occur.

638. This suggests that in order to make out a claim under what is now [section 106](#), a complainant needs to show that the secondary person either:

- a. knew that the proposed conduct was because of a prohibited reason
- b. there was a reasonable basis for a belief or suspicion to that effect
- c. there was a reasonable basis upon which that person ought to have made enquiries as to the basis for the proposed conduct.

639. The more recent case of *Tomasevic v Strauss*⁵⁸³ offered some further clarification on this point. In that case, Mr Tomasevic argued that Dr Strauss breached section 98 of the 1995 Act in that he authorised or assisted the Department of Education to discriminate against him (Mr Tomasevic). In particular, Mr Tomasevic argued that his employer, the Department, used Dr Strauss's report as the basis of its decision to continue to suspend him from teaching duties. In dealing with this part of the claim, the Tribunal said:

Assuming for the purpose of this application only, that the conduct of the department and or Principal Van Halen, would be capable of constituting a breach of Part 3, there is nothing in the material before me, which is direct evidence or on the basis of which it will be open to the Tribunal at hearing, to infer that Dr Strauss authorised or assisted that breach.

Some direct knowledge of the action that the employer proposes, after receiving the medical report, to take in relation to Mr Tomasevic is necessary before Dr Strauss could be said to have authorised or assisted that action. On the material before me, the most that can be said is that the employer has chosen to use Dr Strauss' report in a particular way. There is nothing to link this choice with Dr Strauss.⁵⁸⁴

Will inaction be enough to make out a claim of secondary liability?

640. The cases on this issue need to be considered with care. In particular, where cases arise in jurisdictions other than Victoria, the statutory provisions vary from that in the Equal Opportunity Act. The slight variation in the wording of the provisions may have a significant impact on how the provision operates.

641. [Sections 105](#) and [106](#) of the Equal Opportunity Act use the words 'request, instruct, induce, encourage, authorise or assist'.

642. By comparison, legislation in other jurisdictions sometimes uses the word 'permit' in equivalent provisions. For example in Western Australia [section 160](#) of the *Equal Opportunity Act 1984 (WA)* (WA Act) states:

A person who causes, instructs, induces, aids, or permits another person to do an act that is unlawful under this Act shall for the purposes of this Act be taken also to have done the act.

643. In *Horne & Anor v Press Clough Joint Venture & Anor*⁵⁸⁵ a decision of the Western Australian Equal Opportunity Tribunal, it was held that the union had 'aided and permitted' discrimination by, among other things, failing to take any action to have sexually oriented posters removed from the workplace, by failing to take any action to prevent the sexual harassment and by failing to act in any real way on the complainant's objections.

644. The use of the word 'permit' in the WA Act may distinguish that provision from the Victorian Act and provide a stronger basis from which to argue that the WA Act covers inaction as well as action on the part of the secondary offender.

583 [\[2002\] VCAT 395](#).

584 *Ibid* [23]-[24].

585 (1994) EOC 92-59.

645. However, there have been some cases decided under the predecessor to [sections 105](#) and [106](#) which have also suggested that inaction in certain circumstances could also give rise to secondary liability.

646. In *Lazos Leslie v Australian Workers Union & Anor*⁵⁸⁶ the Tribunal said that it would only be in unusual circumstances that inaction could fall within the prohibition in the predecessor [sections 105](#) or [106](#). For example, where there was a reasonable expectation that a person would take some action. Similar views were also expressed in *Kafantaris v City of Yarra*,⁵⁸⁷ where it was held that, ‘it may well be that s 98 contemplates omission as well as commission, at least where it can be said that there was a duty or legitimate expectation that the relevant person would act’. An employer failing to act on complaints in a situation of ongoing sexual harassment by a supervisor of one of its employees could be an example of this, because the employer is in effect ‘authorising’ the behaviour.

647. Similarly, in *Mitchell v Clayton Utz (No 3)*,⁵⁸⁸ the NSW Anti Discrimination Tribunal had to consider whether liability arose under [section 52](#) of the *Anti-Discrimination Act 1977 (NSW)* which says ‘[i]t is unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of this Act.’ That section, unlike the Victorian section also contains the word ‘permit’. In Mitchell’s case, the Tribunal said:

The effect of s 52 is that a person who contributes to an act of unlawful discrimination becomes jointly liable for the conduct. The provision has seldom been used. It has most commonly been applied, not to the actions of employees, but to the actions of third parties such as unions (*Horne v Press Clough Joint Venture (1994) EOC 92-556*), employment agencies (*Elliott v Nanda (2001) 11 FCR 240*) and companies other than the employer (*Molony v Golden Ponds Corporation Pty Ltd (1995) EOC 92-674*).⁵⁸⁹

648. The issue was whether two individuals ‘permitted’ others to sexually harass him. This case involved an application by Mr Mitchell to amend his complaint to include the aiding and abetting allegations. Although ultimately the Tribunal decided against Mr Mitchell and refused to allow the amendment sought, in the course of its decision, it did make the following comments about the requirements necessary to make out a claim of secondary liability under [section 52](#). In particular the Tribunal said:

The second element of contributory liability has four aspects:

1. the person alleged to have contributed to the act knew or had reason to suspect that the principal wrongdoer was going to engage in an act of unlawful discrimination
2. the person had power to prevent that act
3. the person defaulted in some duty of control or capacity to interfere with the conduct of the principal wrongdoer
4. that person’s default resulted in a failure to prevent the unlawful discrimination: *Elliott v Nanda & Commonwealth [2001] FCA 418* at [\[161\]](#).⁵⁹⁰

649. By comparison, in *Walgama v Toyota Motor Corporation*⁵⁹¹ the Victorian Tribunal seemed to move away from this view and suggest quite clearly that [section 98](#) of the 1995 Act does not permit a claim based on inaction. It points to the absence of the word ‘permit’ in [section 98](#) (continued in the current provisions) as the basis for this view. At paragraph 93, the Tribunal said:

586 [\[1999\] VCAT 635](#).

587 [\[2005\] VCAT 2591](#).

588 [\[2010\] NSWADT 100](#).

589 Ibid [13]. See also Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law*, (Federation Press, 2008), 10.8.32–10.8.40.

590 Ibid [25].

591 [\[2007\] VCAT 1318](#).

Section 98 of the statute prohibits the person from requesting, instructing, inducing, encouraging, authorising or assisting another person to contravene the provisions of Part 3, 5 or 6 of the statute. Part 3 deals with discrimination, Part 5 deals with sexual harassment and Part 6 deals with victimisation. The persons alleged to have authorised encouraged or assisted the alleged wrongful act are Messrs Nikolovski, Adelwohrer, Atsiaris and Ms McCarthy. The first three are supervisors with line responsibility for Mr Walgama and Ms McCarthy is a member of the Human Resources Group. In all cases the complaint seems to be of inaction rather than that any of these individuals took affirmative steps. Section 98 of the Victorian Act, which I paraphrased above, stands in contrast to a number of other State and Federal pieces of anti-discrimination legislation which prohibit not only the encouragement of unlawful discriminatory activity but also prohibit persons from 'permitting' that conduct. The absence of such a reference in the Victorian statute means that mere inaction, such as alleged here, cannot constitute a breach of Section 98. This part of the complaint fails.⁵⁹²

650. In light of the different views expressed in these cases, and the slightly different wording used in the Equal Opportunity Act as compared to other jurisdictions, there will need to be further clarification of whether and if so when, inaction by a person can itself give rise to secondary liability under [section 105](#) and [106](#). In interpreting section 105 and 106, regard would also now need to be had to the requirements under [section 32](#) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to interpret legislation compatibly with human rights.

592 See also [Campagnolo v Bonnie Doon Football Club Inc \[2009\] VCAT 97](#) in which the following comment was made at [35]: 'As Deputy President Macnamara concluded in that matter, the complaint was one of inaction and for that reason, it failed. Mr Campagnolo's case is that the League sat by and failed to offer him support or assistance in what he saw as the discriminatory behaviour of the Club. Were he to make a claim under section 98 against the League, it would certainly fail.'

Chapter 13

> Vicarious liability

651. [Section 109](#) of the Equal Opportunity Act provides:

109 Vicarious liability of employers and principals

If a person in the course of employment or while acting as an agent:

- a. contravenes a provision of Part 4 or 6 or this Part
- b. engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 4 or 6 or this Part –

both the person and the employer or principal must be taken to have contravened the provision and a person may bring a dispute to the Commissioner for dispute resolution or make an application to the Tribunal against either or both of them.

652. [Section 110](#) goes on to provide a defence against vicarious liability. It relevantly provides:

110 Exception to vicarious liability

An employer or principal is not vicariously liable for a contravention of a provision of Part 4 or 6 or this Part by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening this Act.

653. In making out a claim of vicarious liability, therefore, the following needs to be established:

- a. the conduct complained of has to have occurred in the course of employment or while acting as an agent for another
- b. the employer or principal has not taken reasonable precautions to prevent the employee or agent from contravening the Equal Opportunity Act.

In the course of employment

654. Various cases have tested how far-reaching the concept of 'in the course of employment' can be.

655. In [Coyne v P & O Ports](#),⁵⁹³ the Tribunal had to determine whether the employer was vicariously liable for conduct of one of its employees. The issue in this case was whether the employer ought to be held vicariously liable for the sexual harassment carried out by its employee.

656. The employer argued that the conduct did not occur 'in the course of employment'. The claim related to an act of inappropriate sexual contact by Mr Buttigieg of the complainant, Ms Coyne. The employer's position was that Mr Buttigieg's conduct was not in the course of his employment as it was 'plainly tortious (and) the wording of [section 102](#) of the Act, read ordinarily, does not cover a plainly tortious conduct of its employees'.⁵⁹⁴ The employer sought to import into the interpretation of the vicarious liability provision under the 1995 Act, common law notions of vicarious liability. The Tribunal summarised the employer's position as follows:

593 [\[2000\] VCAT 657](#).

594 *Ibid.*

Before an employee's conduct may be said to have been 'in the course of employment' the injury caused must have occurred whilst the employee is 'doing something which is part of his service to his employer or master or incidental to the employment':

South Maitland Railways Pty Ltd v James [1943] HCA 5 (per Starke J).

Alternatively, the employee's conduct may also be within 'the course of employment' if expressly or impliedly authorised by the employer.

On this basis, it was submitted that Mr Buttigieg's conduct in exposing himself and grabbing the Complainant's vagina was not merely an improper mode or means of carrying out his authorised tasks but it was also a criminal sexual assault. As such, it was contended Mr Buttigieg's conduct did not occur in the course of his employment. It was said to be in no way related or incidental to, or consequent upon, anything required of him in his role as an employee in the canteen area where his job was to collect rubbish, clear tables and clean the canteen.⁵⁹⁵

657. By contrast, the complainant argued that the term 'in the course of employment' ought to be given a wide interpretation and that this was consistent with decisions of this and similar tribunals in the past.⁵⁹⁶

658. Ultimately, the Tribunal concluded that analogous common law concepts of what amounts to 'in the course of employment' ought not be applied to the interpretation of section 102 of the 1995 Act. It came to this view for the following reasons:

- a. applying the common law concepts would not further the objects of the Act
- b. the 1995 Act is beneficial and remedial legislation and therefore ought to be given a 'fair, large and liberal' interpretation and ought to be given an interpretation that as far as possible aides the elimination of sexual harassment

- c. the concept of 'in the course of employment' in the 1995 Act ought to be construed by reference to 'the intention of the legislature underlying the Act...the Act is an example of legislation protecting human rights and dignity'⁵⁹⁷
- d. the Tribunal rejected the argument that the mere fact that Parliament used words which had a common law meaning necessarily evidenced that it intended that meaning to be attributed to those words in this instance
- e. section 102 must contemplate that an employer may be held vicariously liable for conduct that it had not expressly authorised, otherwise section 102 (which establishes the defence to vicarious liability would be unnecessary).

659. Having concluded that the common law notion of the term 'in the course of employment' ought not be relied upon in interpreting the 1995 Act, the Tribunal concluded that in interpreting this term, guidance ought to be taken from cases in the workers' compensation jurisdiction. In reviewing the case law on this point, the Tribunal noted that the court's approach to this issue has moved to a fairly flexible one. At page 12, the Tribunal summarised the interpretation given in the workers' compensation context as follows:

...an injury might be said to have arisen 'out of or in the course of employment' if sustained in an interval or interlude and occurring within an overall period or episode of work. That would be so if the employer had, expressly or impliedly, induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way.⁵⁹⁸

595 Ibid.

596 Reference was made to *Hopper v Mt Isa Mines Ltd* [1997] QADT 3; *Tran v Swinburne University & Ors* 18 October 1999 Unreported; *McKenna v State of Victoria & Ors* No 17 of 1997 & No 180 of 1997, Unreported; *Gray v State of Victoria & Anor* [2000] VCAT 1281 and *Greenhalgh v National Australia Bank* [1997] HREOCA 2.

597 Reference was also made to the comments of Dawson and Gaudron JJ in *IW v City of Perth* (1997) 191 CLR 1 in which they stressed that 'there is special responsibility to take account of and give effect to the purpose of legislation designed to protect basic human rights and dignity'.

598 *Coyne v P & O Ports* [2000] VCAT 657.

660. The Tribunal went on to say:

[I]n our view, even at this infancy stage of its jurisprudence, a restricted approach to the phrase ‘in the course of employment’ ought not to be adopted in sexual harassment situations as regulated by the Act. That could tend to defeat the objectives of the Act...it is not unlikely that the prohibition of sexual harassment in the workplace may be at serious risk of being frustrated if a narrow approach were adopted. That could be so, for instance, if the words ‘in the course of employment’ were taken to cover only conduct that related to anything required of the employee by his employer. One effect of that could be that employers may not be held vicariously responsible for a wide variety of conduct constituting sexual harassment in the workplace. This is particularly in so far as, strictly speaking, sexual harassment of a fellow employee cannot be said to be incidental to the purposes for which the discriminator-employee is engaged by the employer. Such a result cannot have been intended by the legislature when enacting the Act.

The words ‘in connection with’ mean no more than that the relevant acts were done during the course of the person’s employment or whilst he or she was ostensibly performing duties of an agent.⁵⁹⁹

661. Applying these principles to the facts in this case then, the Tribunal considered that Mr Buttigieg’s conduct occurred in the course of his employment for the purpose of the vicarious liability provisions of the 1995 Act.
662. Applying this test, therefore, an employer may be held liable for conduct which occurs even where that conduct occurs outside of normal working hours and even at times where that conduct occurs outside of work premises.⁶⁰⁰

Reasonable precautions defence

663. Where a complainant can establish that an employee or agent engaged in conduct which, if engaged in by the employer or principal, would constitute a breach of the Equal Opportunity Act, then both the employee/agent and the employer/principal will be held liable unless the employer/principal can show that they took all reasonable precautions to prevent the discrimination, sexual harassment or victimisation.
664. The steps that will need to be taken in order to avoid liability under [section 110](#) are not specified in the legislation. The definition of what is a ‘reasonable precaution’ will vary, depending on factors such as:
- the size of the business or operation
 - the nature and circumstances of the business or operation
 - available resources
 - business and operation priorities
 - practicability and costs of the measures.
665. However, some of the steps that employers/principals may be expected to take include:
- identifying potential areas of non-compliance
 - developing a compliance strategy, such as undertaking training or developing policies
 - reviewing or improving compliance policies or strategies where relevant.
666. The Victorian courts have given consideration to what practical steps are required of a duty holder to discharge this burden. For example, in [Howard v Geradin Pty Ltd t/a Harvard Securities](#)⁶⁰¹ the employer was able to avoid being held vicariously liable for claims of sexual harassment because it had in place a sexual harassment policy, informed all employees of it, implemented it and provided regular informal feedback about sexual harassment. Whilst it was held that the steps taken had not been ‘ideal’, or of the highest possible standard, this did not prevent them from being sufficient to provide a successful defence.

599 Ibid.

600 See, for example, [South Pacific Resorts Hotels Pty Ltd v Trainor](#) [2005] FCAFC 130; [Cooper v Western Area Local Health Network and Locke](#) [2012] NSWADT 39.

601 [\[2004\] VCAT 1518](#).

667. A similar interpretation of the 1995 Act was offered in *Walgama v Toyota Motor Corporation Australia Ltd*,⁶⁰² in which Mr Walgama claimed that he had been discriminated against because of his race and that he had been subjected to several instances of sexual harassment.
668. In considering whether Toyota had taken 'all reasonable precautions', so as to avoid liability under the 1995 Act, the Tribunal considered the following steps, taken by Toyota, sufficient to discharge the burden:
- a. rolling out a workplace policy to all employees. This had been done three years prior to the incident in question
 - b. meeting with all employees to discuss the policy
 - c. issuing all employees with a booklet explaining the policy.
669. In discussing what is reasonable for the purposes of avoiding vicarious liability, the Tribunal noted that the criteria for duty holders is 'not very high or very exacting'. In that case, the Tribunal went on to say that management can, 'not be expected to supervise every word that comes out of the mouth of a worker'.⁶⁰³
670. The focus of the Tribunal in each of these cases was on the relevant policies that the respective duty holders had in place, the implementation of these policies, and the fact that employees had been trained on these policies. These steps were crucial in determining that the employer had successful defences to the allegations of discrimination, without the policies, implementation or training having to be of optimum standards.
671. The importance of an employer having effectively communicated its policies to its employees was emphasised in *State of Victoria & Ors v McKenna*,⁶⁰⁴ the facts of which are discussed in [Chapter Four](#). In this case, the Victorian police had distributed a folder on sexual harassment obligations to senior officers. It also made the subject a pre-requisite for promotion within the Force. However, none of the key players in that case had received any training. The materials distributed had been aimed principally at managers, supervisors and contact officers of the Force. A copy had been kept at the office of the Officer in charge of each station. On this basis, the Tribunal held that the burden on the employer to take all reasonable precautions had not been discharged.
672. A more recent decision of the New South Wales Tribunal, *Cooper v Western Area Local Health Network*,⁶⁰⁵ found in relation to a sexual harassment complaint, that the employer had discharged its obligations by:
- a. requiring its employee to commit to abiding by the company's code of conduct (which explicitly prohibited sexual harassment)
 - b. attend training on sexual harassment and bullying
 - c. both at the time of employment and again when the employee was promoted.
673. The Tribunal noted in relation to the defence to vicarious liability that an employer has taken all reasonable steps to prevent the employee from contravening the *Anti-Discrimination Act 1977 (NSW)*:
- It is not enough for an employer merely to institute policies; the policies need to be implemented and brought to the attention of the employees in a meaningful way. By failing to do so the employer may be found to have authorised the conduct.⁶⁰⁶

602 [2007] VCAT 1318.
603 Ibid [98].

604 [1999] VSC 310.
605 [2012] NSWADT 39.
606 Ibid [83].

674. However, the Tribunal did not find this was the case with the employer in question. Rather, the above steps taken by the employer were considered to be sufficient to meet the defence, in that it had taken all steps it could have to ensure its employees were aware of the various policies affecting their conduct at work and the necessity to abide by them, including penalties if they did not do so. As a result, the employer was not found to be vicariously liable for the sexual harassment.
675. In *Zareski v Hannanprint Pty Ltd (No 2)*,⁶⁰⁷ useful insight was given by the New South Wales Tribunal into the level of training that can be required for employers to avoid liability for discrimination claims.
676. Mr Zareski brought a number of complaints of race, disability and carer's discrimination against Hannanprint. These complaints were not upheld, but the Tribunal did find that Mr Zareski's team leader had victimised him by mocking him for bringing the discrimination complaints.
677. In consequence of the victimisation finding, the Tribunal made orders as to the further training that Hannanprint must provide to its HR specialists, managers and supervisors.
678. Hannanprint proposed to the Tribunal that several training sessions would be provided by an external law firm, each of which would be attended by a maximum of 12 people. The Tribunal approved this proposal, on the basis that the sessions would cover areas such as complaint handling procedures, processes for conducting formal investigations, and recording interviews. Despite no finding of liability having been made in relation to the allegations of discrimination, bullying and harassment, the Tribunal also said that refresher training in these areas must be provided.
679. The New South Wales legislation, in so far as it deals with vicarious liability in relation to discrimination and the 'all reasonable steps' defence, does not differ significantly from the Victorian legislation. These decisions therefore indicate that, while the standard expected of employers to demonstrate that all reasonable precautions were taken to prevent the alleged act(s) has not been set especially high,⁶⁰⁸ where any finding of vicarious liability is made out against the duty holder, specific and detailed orders can be made in terms of future training requirements with which the duty holder must comply.

607 [2012] NSWADT 65.

608 *Howard v Geradin Pty Ltd t/a Harvard Securities* [2004] VCAT 1518.

Chapter 14

> The positive duty

Duty to eliminate discrimination, sexual harassment and victimisation

680. Where a person has an obligation not to discriminate, then [section 15\(2\)](#) imposes a positive duty upon that person to avoid engaging in discrimination, sexual harassment and victimisation and, as far as possible, to take reasonable and proportionate steps to eliminate unlawful discrimination, sexual harassment or victimisation. This requires a person to be proactive about discrimination and take steps to prevent discriminatory practices before they occur.
681. Whilst this duty was arguably in the 1995 Act, it is now explicitly stated. It also requires similar steps to those employers may take to reduce their risk of vicarious liability.

Reasonable and proportionate measures

682. This duty requires people and organisations to take steps that are reasonable, and so requires an assessment of whether measures are reasonable and proportionate, with regard to factors such as the nature of the organisation, its resources and its business and operational priorities.⁶⁰⁹ The Act recognises that what may be possible for one duty holder, may not be possible for another, and also allows for the progressive implementation of policies or procedures where appropriate.

683. [Section 15\(6\)](#) provides some guidance on the question of what constitutes reasonable and proportionate measures. Factors that must be considered include:
- the size of the business or operations
 - the resources of the business
 - the nature of the business
 - the business and operational priorities
 - the practicability and cost of the measures in question.
684. Complying with the positive duty might mean having policies aimed at preventing discrimination, harassment and victimisation, and ensuring all staff are aware of their obligations. It might also include having a good complaint-handling or grievance procedure, and mechanisms for reviewing and improving compliance where appropriate.⁶¹⁰

609 See [Equal Opportunity Act 2010 \(Vic\) s 15\(6\)](#) for the specific considerations that are relevant in this assessment.

610 For more information on meeting the positive duty, see the Commission's [Organisational Evaluation Tool](#).

685. Examples of the steps that may need to be taken for a duty holder to comply with the requirement to eliminate discrimination, sexual harassment and victimisation are as follows:
- a. making staff aware of a 'zero tolerance' of discrimination, sexual harassment and victimisation
 - b. having policies on discrimination, sexual harassment and bullying and training staff
 - c. developing an action plan setting out proposed reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation, and a timeframe for implementation. This could include introducing policies and training on discrimination, sexual harassment and victimisation
 - d. conducting a baseline assessment or audit of existing policies and practices to identify actual or potential discrimination, sexual harassment and victimisation. This could involve monitoring the handling and outcomes of complaints – both internal and external – including aspects such as dismissal, resignations and absenteeism
 - e. monitoring and publicising baseline assessments and annual progress in the elimination of discrimination, sexual harassment and victimisation.
686. An individual cannot pursue an alleged contravention of this duty to the Commission or to VCAT, but a contravention may enable the Commission to investigate potential serious systematic discrimination.

Chapter 15

> Special measures

Special measures are not unlawful discrimination

687. As part of its emphasis on substantive equality, the Equal Opportunity Act now explicitly permits duty-holders to afford different treatment to a group of people on the basis of a protected attribute, provided that the treatment constitutes a 'special measure'.⁶¹¹ Broadly, a special measure is something which is designed to alleviate disadvantage suffered by a group of people with a particular attribute. Special measures are sometimes referred to colloquially as 'positive discrimination' or 'affirmative action'. The definition of a 'special measure' is discussed in more detail below.
688. The special measures provisions were new in the Victorian context from 1 August 2011, although the concept of 'special measures' is well-established under international human rights law as well as other state, territory and federal anti-discrimination laws.⁶¹²
689. While the 1995 Act contained a general exception from discrimination for 'welfare measures and special needs', which was somewhat similar, the new special measures provision in the Equal Opportunity Act contains an updated test, which is more in line with international legal standards, and which operates as a positive tool for promoting substantive equality. In other words, special measures are now 'an expression of equality, rather than an exception to it'.⁶¹³ Specifically, [section 12\(2\)](#) states that 'a person does not discriminate against another by taking a special measure'.

611 [Equal Opportunity Act 2010 \(Vic\)](#), s 12.

612 See, for example, [Sex Discrimination Act 1984 \(Cth\)](#), s 7D; [Racial Discrimination Act 1975 \(Cth\)](#), s 8(1); [Disability Discrimination Act 1992 \(Cth\)](#), s 45.

613 Second Reading Speech to the [Equal Opportunity Bill 2010 \(Vic\)](#) Hansard, Legislative Assembly, 10 March 2010, 786 (Attorney General Robert Hulls).

Definition of a special measure

690. [Section 12\(1\)](#) of the Equal Opportunity Act describes a special measure as action which is taken 'for the purpose of promoting or realising substantive equality for members of a group with a particular attribute'.⁶¹⁴ This may be the sole purpose or one of multiple purposes for the action.⁶¹⁵
691. Under the Equal Opportunity Act, in order to meet the test of a special measure the conduct must also satisfy the criteria set out in [section 12\(3\)](#), namely it must be:
- undertaken in good faith for achieving the purpose of promoting or realising substantive equality for members of a group with a particular attribute
 - reasonably likely to achieve that purpose
 - a proportionate means of achieving the purpose
 - justified because the members of the group have a particular need for advancement or assistance.⁶¹⁶
692. According to the Explanatory Memorandum, 'these factors reflect the intention that the purpose of a special measure must be necessary, genuine, objective, and justifiable'.⁶¹⁷ Further, the measure itself must be proportionate and 'reasonably likely' to achieve its purpose. A measure will cease to be a 'special measure' once it has achieved its purpose.⁶¹⁸

614 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(1).

615 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(4).

616 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(3).

617 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), s 15.

618 [Equal Opportunity Act 2010 \(Vic\)](#), s 13(7).

Is consultation required?

693. There is some authority to suggest that the group of people toward whom the special measure is directed – the beneficiaries – ought to be consulted about, and agree to, the special measure. At the very least there needs to be some basis upon which it can be determined that the measure taken is actually for the purpose of addressing prior disadvantage as determined by the very people who have suffered the disadvantage. For example, in *Gerhardy v Brown*,⁶¹⁹ Justice Brennan said:

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.⁶²⁰

694. The issue of consultation was considered in the context of the obligations under the Equal Opportunity Act in the Explanatory Memorandum which clarifies that the criteria for special measures contained in [section 12\(3\)](#):

...do not specifically require consultation with the group that is to be assisted or advanced by the measure in question. However, in practice, evidence of some consultation with the group to be assisted or advanced is likely to be necessary. It is not intended that special measures under clause 12 authorise conduct that is not wanted and not welcome by the target group.⁶²¹

695. Therefore, conduct which is claimed to be a special measure, but which is unwanted or not welcomed by the beneficiaries, may not meet the test for a 'special measure' under the Equal Opportunity Act.

Effect of special measures

696. Where a special measure exists, a duty holder does not need to rely on a permanent exception or obtain a temporary exemption.

697. If faced with an allegation of unlawful discrimination, a respondent may raise special measures as a defence. In those circumstances, the respondent bears the onus of proving that the conduct complained of was a special measure within the meaning of the Equal Opportunity Act.⁶²²

Reasonable restrictions on eligibility for special measures

698. Special measures do not need to apply to all people with a particular attribute. [Section 12\(5\)](#) of the Equal Opportunity Act permits the imposition of 'reasonable restrictions on eligibility'. According to the Explanatory Memorandum, 'this recognises that the person may be subject to budgetary or other constraints and allows the eligibility for special measures to be limited to a subset of the target group, such as people in the target group who are of a particular age.'⁶²³

Examples of special measures

699. The Equal Opportunity Act includes some examples of special measures as follows:

- a. A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.
- b. A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.
- c. A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.

619 [\[1985\] HCA 11](#), (1985) 159 CLR 70.

620 *Ibid* [37].

621 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), s 12.

622 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(6).

623 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 15.

700. In *Darebin City Council Youth Services v Victorian Equal Opportunity and Human Rights Commission*,⁶²⁴ VCAT held that a proposal by council to host a series of women's-only events (one to mark the end of Ramadan and the other a music festival) constituted a special measure within the meaning of the Equal Opportunity Act. The proposed events were aimed at young women within the community, who, due to their cultural and religious backgrounds, could not attend events that were also attended by men and who suffered isolation and disadvantage as a result.
701. VCAT has also recently struck-out a number of applications for temporary exemptions on the basis that the proposed course of conduct constituted a special measure (so no exemption was necessary). These applications have concerned proposals to advertise for and employ Indigenous persons for particular roles.⁶²⁵

624 [2011] VCAT 1693.

625 See, for example, *Parks Victoria* [2011] VCAT 2238; *Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237; *Stawell Regional Health* [2011] VCAT 2423; *The Ian Potter Museum of Art* [2011] VCAT 2236.

Chapter 16

> Compliance powers

702. The Equal Opportunity Act gives the Commission powers to facilitate compliance and encourage good practice. These powers include:

- a. issuing practice guidelines relevant to the Equal Opportunity Act.⁶²⁶ Guidelines are not legally binding, but may be taken into consideration by a court or tribunal in relevant to legal proceedings⁶²⁷
- b. conducting a review of an organisation's programs and practices for compliance with the Equal Opportunity Act (on request)⁶²⁸
- c. providing advice about preparing and implementing action plans (which specify steps necessary for an organisation to improve compliance)⁶²⁹ and maintaining a register of action plans⁶³⁰
- d. conducting investigations on matters:
 - i. that are serious, relate to a class or group of people, and cannot be reasonably expected to be resolved through dispute resolution and involve a possible contravention of the Equal Opportunity Act
 - ii. where there are reasonable grounds to expect that one or more contraventions of the Equal Opportunity Act have occurred
 - iii. that would advance the objectives of the Equal Opportunity Act.⁶³¹
- e. intervening as a party in proceedings that involve issues of equal opportunity, discrimination, sexual harassment or victimisation⁶³²
- f. assisting in proceedings as amicus curiae where the intervention would be in the public interest, and where proceedings are likely to affect protection against discrimination.⁶³³

This may include investigating a breach of the positive duty.

626 *Equal Opportunity Act 2010 (Vic)*, s 148.

627 *Equal Opportunity Act 2010 (Vic)*, s 149.

628 *Equal Opportunity Act 2010 (Vic)*, s 151.

629 *Equal Opportunity Act 2010 (Vic)*, s 152.

630 *Equal Opportunity Act 2010 (Vic)*, s 153.

631 *Equal Opportunity Act 2010 (Vic)*, s 127.

632 *Equal Opportunity Act 2010 (Vic)*, s 159.

633 *Equal Opportunity Act 2010 (Vic)*, s 160.

Chapter 17

> Disputes

Background

703. Part 8 of the Equal Opportunity Act sets out the process for resolving disputes about discrimination, sexual harassment and victimisation. Part 8 replaces the complaint-handling process in Part 7 of the 1995 Act with a new model that allows a greater range of dispute resolution options for parties to a dispute. The Equal Opportunity Act refers to 'disputes' rather than 'complaints'. The dispute resolution procedures provided by the Equal Opportunity Act also apply to disputes under the *Racial and Religious Tolerance Act 2001* (RRTA).⁶³⁴
704. A dispute means 'a dispute about compliance with this Act'.⁶³⁵ This broad definition means that the Commission has the power to deal with any issue where a party is alleging that the other party has breached the Equal Opportunity Act or RRTA, whether or not an actual breach has occurred. The Commission has no role in determining whether there has been a breach of either Act.

Dispute resolution at the Commission

705. The Equal Opportunity Act requires the Commission to offer services designed to facilitate resolution of disputes, whether through the provision of general information and education to duty holders and people with disputes at the initial stages, or through the process of dispute resolution at the Commission. It also allows people with disputes to go directly to the Tribunal to have their matter determined, without first having to go through the Commission's dispute resolution process. If a dispute does not resolve at the Commission, a party may still withdraw from dispute resolution and apply to have the matter heard by the Tribunal.⁶³⁶

634 *Racial and Religious Tolerance Act 2001* (Vic) s 22.

635 *Equal Opportunity Act 2010* (Vic) s 4.

636 *Equal Opportunity Act 2010* (Vic) s 122.

706. The Commission offers flexible, independent and confidential services to help parties to resolve their disputes. The Equal Opportunity Act gives the Commission the discretion to use a wide variety of methods to resolve the dispute. The type of dispute resolution offered will be appropriate to the nature of the dispute. Once the person with the dispute informs the Commission that they want to proceed with dispute resolution, the Commission may make contact with the person or organisation being complained about. The methods the Commission may use range from informal discussions and providing education and information about the Equal Opportunity Act, through to conciliation. Conciliation can take place in a face-to-face meeting, by telephone conference or by contact through the conciliator.
707. Under the Equal Opportunity Act, a party to a dispute may withdraw from the Commission's process at any stage and may take the dispute to the Tribunal for determination. This means that parties to a dispute do not need to request that the Commission refer their matter to the Tribunal. For matters taken to the Tribunal, the Tribunal will continue to have the power to order compulsory conferences and mediation, and to strike out claims in certain circumstances.

Who may bring a dispute to the Commission?

708. The following persons may bring a dispute to the Commission for dispute resolution:
- a person who claims that another person has discriminated, sexually harassed or victimised them
 - if that person cannot bring a dispute because of a disability – a person who is authorised to do so on his or her behalf or (if that person is unable to authorise another person) any other person

- c. if that person is a child – the child, a parent on the child’s behalf, or (if the Commission is satisfied that the child consents) any other person.⁶³⁷

Representative complaints

Representative complaints to the Commission

709. [Section 114\(1\)\(a\)](#) of the Equal Opportunity Act provides that a representative body may bring a dispute to the Commission on behalf of a named person or persons if the Commission is satisfied that:
- a. each person is entitled to bring a dispute to the Commission under [section 113\(1\)\(a\)](#) as a person who claims that another person has contravened a provision in Part 4, 6 or 7 of the Equal Opportunity Act in relation to them
 - b. each person has consented to the dispute being brought by the body on the person’s behalf.
710. The representative body must have a sufficient interest in the dispute ([section 114\(1\)\(b\)](#)); and if the dispute is brought on behalf of more than one person, the alleged contravention must arise out of the same conduct [section 114\(1\)\(c\)](#).
711. Section 114 is based on sections 104(1B) and (1C) of the 1995 Act and is intended to work in the same way as those provisions did under the 1995 Act.⁶³⁸ Representative complaints were introduced into the 1995 Act in 2006 with a view to replicating the representative complaints mechanism in the RRTA.⁶³⁹
712. Representative complaints and who can be a representative body are discussed further below commencing at [paragraph 694](#).

Dispute resolution procedures

713. The process for dispute resolution can be summarised as follows:
- a. a person may bring a dispute to the Commission alleging unlawful discrimination, sexual harassment or victimisation under the Equal Opportunity Act, or racial or religious vilification under the RRTA. The Commission requires that complaints must be submitted in writing – either online or by mail. The Commission can help persons who are not able to submit their complaint in writing

- b. dispute resolution starts when the person bringing the dispute informs the Commission that he or she wishes to proceed with dispute resolution⁶⁴⁰
- c. dispute resolution ends when the earliest of the following occurs:
 - i. the Commission declines to provide or continue to provide dispute resolution under section 116
 - ii. a party withdraws from dispute resolution under section 118 by providing the Commission with written notice
 - iii. the parties to the dispute reach agreement about the dispute⁶⁴¹
 - iv. the Commission decline to provide or continue to provide dispute resolution in accordance with section 116.
- d. a party may make an application to the Tribunal about a breach of the Equal Opportunity Act or RRTA whether or not the person has brought a dispute to the Commission.⁶⁴²

Discretion to decline to provide or continue to provide dispute resolution

714. Section 116 provides the Commission with the discretion to decline to provide or continue to provide dispute resolution for any of the following reasons:
- a. the alleged contravention occurred more than 12 months before the dispute was lodged with the Commission
 - b. the matter has been adequately dealt with by another court of tribunal
 - c. the matter involves a subject matter that would be more appropriately dealt with by a court or tribunal (for example sexual assault)
 - d. the person has started proceedings in another forum (for example Australian Human Rights Commission or Fair Work Commission)
 - e. having regard to all the circumstances, it is not appropriate to provide or continue to provide dispute resolution.⁶⁴³

637 [Equal Opportunity Act 2010 \(Vic\) s 113](#).

638 [Explanatory Memorandum to the Equal Opportunity Bill 2010](#), 52.

639 [Explanatory Memorandum to the Justice Legislation \(Further Amendment\) Bill 2006](#), 10.

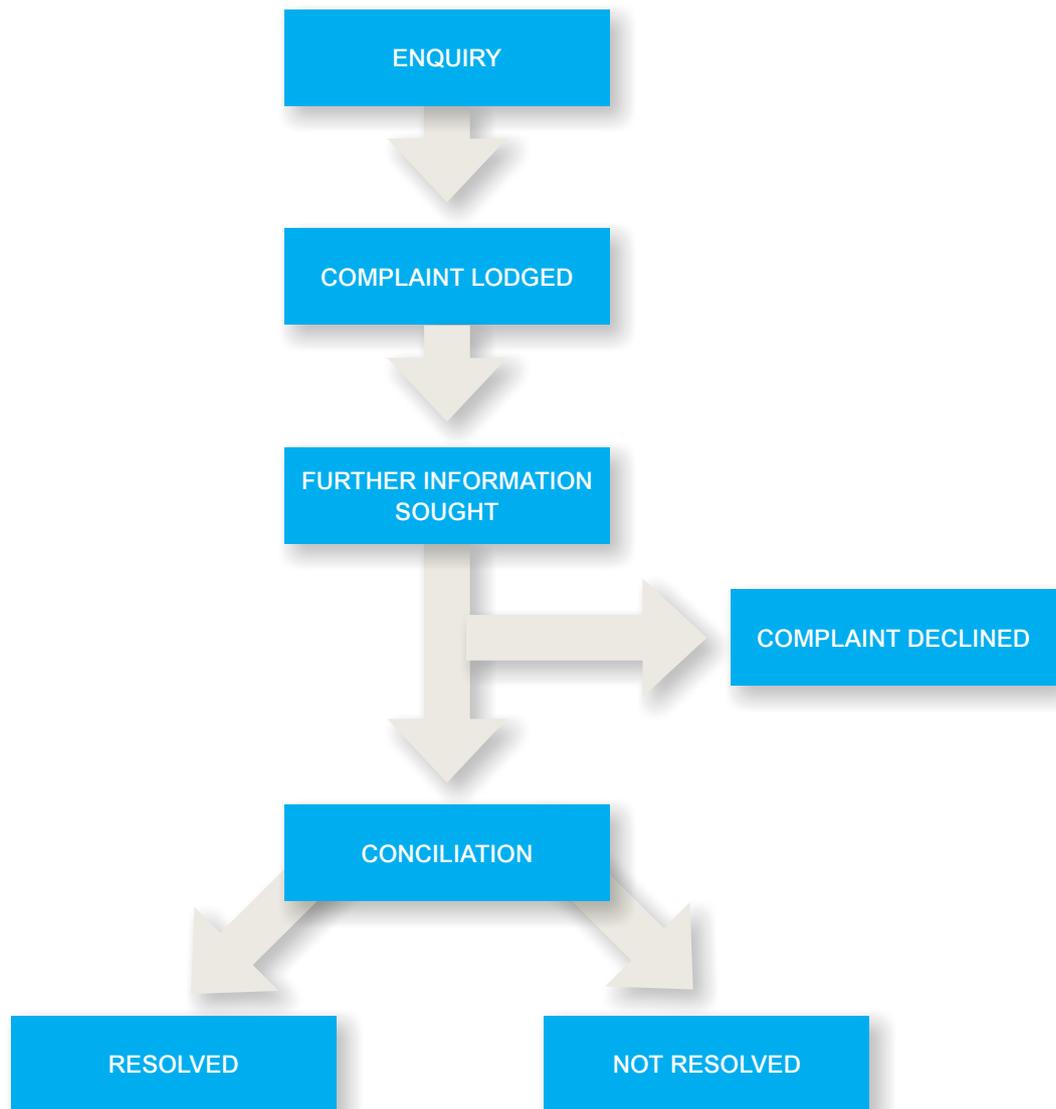
640 [Equal Opportunity Act 2010 \(Vic\) s 115\(1\)](#).

641 [Equal Opportunity Act 2010 \(Vic\) s 115\(2\)](#).

642 [Equal Opportunity Act 2010 \(Vic\) s 122](#).

643 [Equal Opportunity Act 2010 \(Vic\) s 116](#).

Complaint resolution process



715. Factors that may be relevant to consideration of 'all the circumstances' in [section 116\(e\)](#) include whether:

- a. the Commission has previously provided dispute resolution services in relation to the allegations
- b. the Commission has previously declined to provide dispute resolution services in relation to the allegations
- c. the allegations are misconceived due to:
 - i. a misunderstanding of legal principle
 - ii. a lack of jurisdiction (such as the allegations are not covered by the Equal Opportunity Act, for example, the alleged breach did not occur in an area of public life)
 - iii. the absence of unfavourable treatment or the absence of a connection between the conduct and the protected attribute

iv. the Commission does not have jurisdiction due to an inconsistency between state and federal laws.⁶⁴⁴

- d. the respondent is unable to engage with, or respond to, the complaint (for example the organisation or respondent has moved or cannot be contacted, or there is no evidence to support the claim)
- e. contact has been lost with the parties
- f. attempts to conciliate have been unsuccessful.

716. If the Commission decides to decline to offer dispute resolution, it must provide all parties to the dispute with sufficient reasons for its decision.

⁶⁴⁴ For more information on misconceived complaints, see *Cocks Macnish & Anor v Biundo* [2004] WASCA 194 (26 August 2004).

Withdrawing from a dispute

717. Dispute resolution at the Commission is voluntary⁶⁴⁵ and parties may withdraw from the process at any time by informing the Commission in writing.⁶⁴⁶ Withdrawal from dispute resolution does not prevent a person from applying to the Tribunal under the Equal Opportunity Act, or commencing proceedings in another jurisdiction.⁶⁴⁷

Applications to the Tribunal

718. A person may apply directly to the Tribunal in relation to a complaint of discrimination, sexual harassment or victimisation, whether or not that person has attempted dispute resolution at the Commission.⁶⁴⁸

Who may apply to the Tribunal?

719. The following persons may make an application to the Tribunal under [section 122](#) of the Equal Opportunity Act:

- a. a person who claims that another person has discriminated, sexually harassed or victimised them
- b. if that person cannot bring a dispute because of a disability – a person who is authorised to do so on his or her behalf or (if that person is unable to authorise another person) any other person
- c. if that person is a child – the child, a parent on the child's behalf, or (if the Commission is satisfied that the child consents) any other person.

Representative complaints to the Tribunal

720. A representative body may also make a direct application to the Tribunal under [section 124](#) of the Equal Opportunity Act. Section 124(1)(a) provides that a representative body may make an application to the Tribunal on behalf of a named person or persons if the Tribunal is satisfied that:

- a. each person is entitled to bring a dispute to the Tribunal under [section 123\(1\)\(a\)](#) as a person who claims that another person has contravened a provision in Part 4, 6 or 7 of the Equal Opportunity Act in relation to them
- b. each person has consented to the dispute being brought by the body on the person's behalf.

721. As with representative complaints to the Commission, the representative body must have a sufficient interest in the dispute (section 124(1)(b)), and if the dispute is brought on behalf of more than one person, the alleged contravention must arise out of the same conduct (section 124(1)(c)).

722. Section 124 of the Equal Opportunity Act is a new provision. Parliament intended for it to mirror [section 114](#) of the Equal Opportunity Act so that the same representative bodies that can bring a complaint to the Commission can apply directly to the Tribunal.⁶⁴⁹

723. Previously, under section 134 of the 1995 Act, the Tribunal could hear complaints referred to it from the Commission, which included representative complaints. This meant that a representative body was required to seek referral of its case to the Tribunal, if the body and those it represented wished to take their complaint further. However, there was no equivalent provision to section 124 in the 1995 Act, whereby the Tribunal must be satisfied that the complainants were entitled to bring the complaints and the representative body had sufficient standing as an interested party to bring the complaint on behalf of those named persons.

724. Instead, the Tribunal performed that assessment as part of their role in hearing and determining a complaint referred by the Commission, by determining whether the complainant (such as the representative body) was the proper party, with the necessary connection with the conduct of the complaint to bring the complaint.⁶⁵⁰ In other words, the Tribunal conducted the same assessment now contained in [section 124](#) despite there being no specific obligation to do so in the legislation.

645 [Equal Opportunity Act 2010 \(Vic\) s 112\(d\)](#).

646 [Equal Opportunity Act 2010 \(Vic\) s 118\(1\)](#).

647 [Equal Opportunity Act 2010 \(Vic\) s 118](#). Note however that as at February 2012, a person cannot lodge a complaint with the Australian Human Rights Commission about a matter the subject of dispute resolution under the Equal Opportunity Act.

648 [Equal Opportunity Act 2010 \(Vic\) s 122](#).

649 [Explanatory Memorandum to the Equal Opportunity Bill 2010](#), 56.

650 [Cobaw Community Health Services v Christian Youth Camps Ltd and Anor \(Anti-Discrimination\) \[2010\] VCAT 1613 \(8 October 2010\) \[48\]-\[50\]](#).

725. By including section 124 of the Equal Opportunity Act, Parliament has clarified that it expects the Tribunal to conduct this assessment before considering a complaint by a representative body.

Who can be a 'representative body'?

726. The term 'representative body' is not specifically defined in the Equal Opportunity Act. However, as noted above, the representative body must have a sufficient interest in the application. Sections 114(2) and section 124(2) each provide:

A representative has a sufficient interest in an application if the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to adversely affect the interests of the body or the interests or welfare of the persons it represents.

727. In *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)*,⁶⁵¹ the Tribunal considered the issue of whether Cobaw Community Health Services (Cobaw) had standing as a representative body under the equivalent provision of the Act 1995 (sections 104(1B) and (1C)). The decision in *Cobaw* provides useful guidance on the Tribunal's approach to the interpretation of the relevant provisions.⁶⁵²

728. Cobaw managed a project called 'WayOut', a state-wide youth suicide prevention project, targeting same sex attracted young people in rural areas. Christian Youth Camps (CYC) was a Christian Brethren organisation, which ran the 'Phillip Island Adventure Resort'. Cobaw alleged that one of their staff members (the WayOut coordinator) had contacted CYC and sought to book the resort for a camp for 60 young people and 12 workers. However, Cobaw alleged that CYC refused to accept the booking because of the sexual orientation of the young people attending.

729. Cobaw brought a complaint of discrimination on the basis of sexual orientation and personal association with a person identified by their sexual orientation, in the area of provision of services, on behalf of 12 named people who intended to attend the camp. Some of the named people were Cobaw workers or workers from organisations involved in WayOut, some were same sex attracted young people involved in WayOut, and some were not same sex attracted but were involved in the WayOut programme.

730. The Tribunal considered that before turning to the merits of the application, it was required to assess each of the criteria the Commission must be satisfied of, for a representative complaint to be made under section 104(1B) of the Equal Opportunity Act 1995:⁶⁵³

- a. that the people named in the complaint are entitled to do so under section 104(1)(a)
- b. that the people named in the complaint consented to Cobaw bringing the complaint on their behalf
- c. that the contravention arises out of the same conduct for each complainant
- d. that Cobaw has a sufficient interest in the complaint.

731. In assessing these matters, the Tribunal considered it must interpret them consistently with the purposes of the Equal Opportunity Act, and the right to equality and freedom from discrimination in the Charter.⁶⁵⁴ The Tribunal noted that this approach meant it must interpret section 104(1B) in a manner which would give effect to the right of the people claiming they have been discriminated against to seek and obtain an effective remedy.⁶⁵⁵

651 [2010] VCAT 1613 (8 October 2010).

652 Note that this case is currently on appeal to the Supreme Court. However, the parts of the decision relating to the standing of Cobaw to bring the complaint were not challenged in the appeal.

653 *Cobaw Community Health Services v Christian Youth Camps Ltd and Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) [51].

654 Ibid [40]; *Charter of Human Rights and Responsibilities Act 2006*, s8(2) and s8(3).

655 *Cobaw Community Health Services v Christian Youth Camps Ltd and Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) [52].

732. The Tribunal concluded that giving effect to the 'right to a remedy' meant, in essence, that section 104(1B) should be interpreted in a way that facilitates the making of a complaint.⁶⁵⁶ To do so otherwise, the Tribunal considered:

...would be to risk denying people with a genuine complaint, but who, by reason of age, status or circumstance, are less willing or able than the independent, well resourced and strong willed, the means to seek an effective remedy where they claim they have been subjected to discrimination.⁶⁵⁷

733. In the case of those represented by Cobaw, the Tribunal considered there was a real prospect that without the assistance of a representative body, that the individuals would be deterred from bringing their complaints.⁶⁵⁸ In coming to this decision, the Tribunal took into account the power imbalance resulting from the young age and sexual orientation of many of the individuals represented as against a large, well-resourced organisation such as CYC, and the effect of the potential intrusion into the private lives of the complainants by virtue of bringing the complaint in a public forum.

734. Ultimately the Tribunal concluded that Cobaw did meet the first three criteria in section 104(1B) in relation to 10 of the 12 complainants. In relation to whether Cobaw had a 'sufficient interest' in the complaint, the Tribunal referred to section 104 (1C) of the 1995 Act:

A representative has a sufficient interest in an application if the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to adversely affect the interests of the body or the interests or welfare of the persons it represents.

735. In interpreting section 104(1C) the Tribunal gave the following guidance:

- a. 'conduct that constitutes the alleged contravention' is to be ascertained by reference to the complaint⁶⁵⁹
- b. 'conduct of that nature' requires consideration of the 'essential features' of the conduct giving rise to the complaint, and 'an application of the facts of the particular case to the provisions of the Equal Opportunity Act said to have been contravened'⁶⁶⁰
- c. consideration must also take place of:
 - i. the interests of the representative group
 - ii. the interests and welfare of those they seek to represent
 - iii. whether the contravention was 'a matter of genuine concern' to the group, through an examination of the activities of the representative group.⁶⁶¹
- d. the objects of the organisation, and its aims and purposes, are relevant to the 'sufficiency of interest' test, but are not determinative⁶⁶²
- e. the question of whether the organisation has a sufficient interest must be answered by reference to the words of the section, interpreted compatibly with human rights.⁶⁶³

736. After undertaking this significant analysis, the Tribunal was satisfied that Cobaw had a sufficient interest in the complaint to have standing as an applicant.

656 Ibid [55].

657 Ibid [55].

658 Ibid [59].

659 Ibid [72].

660 Ibid [73].

661 Ibid [74]-[75].

662 Ibid [89].

663 Ibid [92].

Chapter 18

> Other common procedural issues

737. In this section, we will cover:

- a. choosing a jurisdiction
- b. strike out applications
- c. remedies, including damages
- d. costs.

Choosing a jurisdiction

738. Complaints of discrimination, sexual harassment, victimisation and racial and religious vilification can be dealt with in a range of jurisdictions.⁶⁶⁴ Some jurisdictions require persons to make a choice on their jurisdiction prior to lodging and may prevent them from changing jurisdictions after proceedings have been commenced.

739. Factors that may be relevant to choosing a jurisdiction include:

- a. **Time limits and timeframes:** the statutory timeframes for lodging applications vary between jurisdictions. For example, there are strict timeframes for lodging claims under the *Fair Work Act 2009* (Cth) relating to unfair dismissal and general protections where employment has been terminated. By contrast, the Equal Opportunity Act provides the Commission and Tribunal with the discretion to decline a matter that is more than 12 months old.

b. **Multiple different grounds or**

attributes: the protection of attributes and areas varies between state and federal jurisdictions. Where an alleged contravention relates to multiple attributes or areas, there may be benefits in using a one-stop-shop statute where all attributes are covered.

c. **Mixed reasons and motive:** Some laws provide that attribute should be the substantial reason for the treatment,⁶⁶⁵ while others require that the attribute needs only be one of the reasons for the treatment. Similarly, whether motive or awareness of the discrimination is relevant to discrimination varies between jurisdictions.

d. **Onus or burden of proof:** The onus of proving that behaviour was for the alleged reason may vary depending on the Act or part of the Act. Note for example the difference between the onus for proving general protections under the *Fair Work Act 2009* (Cth) (where the onus is on the respondent) and the onus of proving direct discrimination under the Equal Opportunity Act (and other such acts). Note also that under the Equal Opportunity Act the respondent has the onus of showing that the requirement condition or practice is reasonable. See [paragraph 741–749](#) below for more information on the burden of proof under the Equal Opportunity Act.

664 As at April 2013, these include the *Equal Opportunity Act 2010* (Vic), *Racial and Religious Tolerance Act 2001* (Vic), *Accident Compensation Act 1985* (Vic), *Occupational Health and Safety Act 2004* (Vic), *Age Discrimination Act 2004* (Cth), *Australian Human Rights Commission Act 1986* (Cth), *Disability Discrimination Act 1992* (Cth), *Fair Work Act 2009* (Cth), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth). Note that all five federal discrimination statutes are currently under review as part of the national consolidation of federal discrimination laws.

665 *Equal Opportunity Act 2010*, s 8.

- e. **Forum shopping:** There are some prohibitions on bringing multiple actions under different laws for the same matter.⁶⁶⁶ If a dispute is lodged under the Equal Opportunity Act, it cannot then be brought under federal discrimination laws.⁶⁶⁷ The Commission has the discretion to accept a matter that has been lodged in the federal jurisdiction.
- f. **Parental/carer issues:** Not all jurisdictions have a specific obligation to accommodate the responsibilities of a parent or carer in employment.⁶⁶⁸
- g. **Disability issues:** The obligation to make an adjustment for a person with a disability (for example, in employment, education and the provision of goods and services) varies between jurisdictions.⁶⁶⁹
- h. **Sexual harassment issues:** Protection from sexual harassment is explicit in some statutes, and implied in others.⁶⁷⁰ The protections relating to sexual harassment and volunteers also vary between jurisdictions.
- i. **Remedies:** The remedies typically granted⁶⁷¹ and penalties⁶⁷² that may arise for unlawful conduct vary markedly between jurisdictions.
- j. **Costs:** There are no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Magistrates Court and Federal Court. Rather, the courts have a general discretion to order costs under the provisions of the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth) (recently amended to be called the *Federal Circuit Court of Australia Act 1999* (Cth)).⁶⁷³ At VCAT there is a general presumption that parties each bear their own costs.⁶⁷⁴
- k. **Definitions:** Given the difference in definitions between state and federal laws may give rise to a complaint in one jurisdiction but not another. Note for example the different definitions of 'disability', 'gender identity' and 'employee'.
- l. **Related actions:** Some matters give rise to related actions in a particular forum. For example, breach of contract, adverse action because of workplace rights, breach of a National Employment Standard, breach of the *Competition and Consumer Protection Act 2010* (Cth).

Burden and standard of proof

Burden of proof

740. Under the Equal Opportunity Act it is well established that the burden (or onus) of proof is placed on the complainant to prove their claim.⁶⁷⁵ This means that the complainant must provide particularised complaints with sufficient evidence to show that the alleged incidents took place and amount to a breach of the Equal Opportunity Act.

666 See, for example, s 116(b) and (d) of the *Equal Opportunity Act 2010* (Vic), which provides the Commission with the discretion to decline to provide dispute resolution in a matter that has been adequately dealt with by a court or tribunal or where the person has commenced proceedings in another forum.

667 *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth).

668 See, for example, *Equal Opportunity Act 2010* (Vic), s 17 and 19. Compare with the 'inherent requirements' exception under s351(2)(b) of the *Fair Work Act 2009* (Cth).

669 See, for example, *Equal Opportunity Act 2010* (Vic), s 20; *Disability Discrimination Act 1992* (Cth) s 5(3).

670 For example, sexual harassment is specifically prohibited under the *Equal Opportunity Act 2010* (Vic), but may be covered by the general protections provision under the *Fair Work Act 2009* (Cth).

671 For example, note the limits on unfair dismissal cases.

672 See *Equal Opportunity Act 2010* (Vic), s 125; *Australian Human Rights Commission Act 1986* (Cth) s 46PO; and *Fair Work Act 2009* (Cth) s 539, 545 and 546.

673 Some of the factors that have been identified in federal discrimination cases as being relevant to the discretion to order costs include where there is a public interest element to the complaint; where the applicant is unrepresented and not in a position to assess the risk of litigation; that the successful party should not lose the benefit of their victory because of the burden of their own legal costs; that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage; and that unmeritorious claims and conduct which unnecessarily prolongs proceedings should be discouraged.

674 Note however that VCAT has the discretion to order costs. Costs are discussed in this chapter from paragraph 847.

675 See, for example, *GLS v PLP (Human Rights)* [2013] VCAT 221, [34]; *Pham v Drakopoulos & Ors (Anti-Discrimination)* [2012] VCAT 1198, [23]; *Finch v The Heat Group Pty Ltd (Anti-Discrimination)* [2010] VCAT 802, [956].

741. However, where a respondent seeks to rely on an exception in the Equal Opportunity Act (whether a specific exception under Part 4 or a general exception under Part 5 of the Equal Opportunity Act) or an exemption granted by the Tribunal under [section 89](#) of the Equal Opportunity Act, the burden of proof is placed on them to provide sufficient evidence to show how the exception or exemption applies to their conduct.⁶⁷⁶
742. Similarly, to rely on the exception to vicarious liability for unlawful conduct of employees under [section 110](#) of the Equal Opportunity Act, employers and principals have the burden of proof to show that they took reasonable precautions to prevent their employee or agents from breaching the Equal Opportunity Act.
743. Where a person is alleged to have breached [section 107](#) of the Equal Opportunity Act (requesting or requiring discriminatory information), the burden is on the person who requests or requires the information to prove that the information is reasonably required for a purpose that does not involve prohibited discrimination.⁶⁷⁷
744. For claims of indirect discrimination, the person who imposes a requirement, condition or practice (or proposes to impose one) has the burden of proof to show that the requirement, condition or practice is reasonable.⁶⁷⁸
745. Where a person or organisation wishes to rely on [section 12](#) of the Equal Opportunity Act to say that their conduct is not unlawful on the grounds that it is a special measure, they too have the burden of proof to show that the measure meets the criteria in section 12.⁶⁷⁹

Standard of proof

746. Where a party has the burden of proof in a proceeding, they must meet that burden to the civil standard of proof – the balance of probabilities.⁶⁸⁰ This means that the Tribunal must be satisfied that ‘overall it is more probable than not that the events occurred as described and that the inferences sought to be drawn can reasonably be drawn from the facts as they have been found’.⁶⁸¹

676 [Equal Opportunity Act 2010 \(Vic\) s 13\(2\)](#).

677 [Equal Opportunity Act 2010 \(Vic\) s 108\(2\)](#).

678 [Equal Opportunity Act 2010 \(Vic\) s 9\(2\)](#).

679 [Equal Opportunity Act 2010 \(Vic\) s 12\(6\)](#).

680 [Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd](#) (1992) 67 ALJR 170 [2]. Also see [Evidence Act 2008 \(Vic\) s 140](#).

681 [Drew v Whitehorse City Council \(Anti-Discrimination\)](#) [2010] VCAT 372, [18] relying on [Morgan v Austin Health & Anor](#) [2007] VCAT 2229, [22] per Harbison J.

747. The level of satisfaction required to be reached for a finding in favour of the complainant is described in [Briginshaw v Briginshaw](#).⁶⁸² The following comments made by Dixon J are usually relied upon by courts and tribunals in applying this level of satisfaction:⁶⁸³

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.⁶⁸⁴

748. This means that the seriousness of the allegations made must be considered when assessing whether the burden of proof has been discharged by the complainant.⁶⁸⁵ Where the matters to be considered are very serious, the Tribunal has held that ‘clear and cogent evidence may be required before there is reasonable satisfaction that the allegations have been made out on the balance of probabilities’.⁶⁸⁶

Strike-out applications

Strike out and dismissal proceedings

749. [Section 75](#) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) gives the Tribunal a discretion to dismiss or strike out a proceeding whether or not all the evidence has been heard. It can do this if, in the Tribunal’s opinion, all or part of the proceeding is frivolous, vexatious, misconceived or lacking in substance, or is otherwise an abuse of process.

682 [\[1938\] HCA 34](#); (1938) 60 CLR 336.

683 See, for example, [Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd](#) [1992] HCA 66 [2], [GLS v PLP \(Human Rights\)](#) [2013] VCAT 221, [35]-[36], [44]; [Thomas v Alexiou \(Anti-Discrimination\)](#) [2008] VCAT 2264, [106]-107].

684 [Briginshaw v Briginshaw](#) (1938) 60 CLR 336, 362.

685 [King v Nike Australia Pty Ltd \(Anti Discrimination\)](#) [2007] VCAT 70, [124].

686 [GLS v PLP \(Human Rights\)](#) [2013] VCAT 221, [39], relying on [Clark v Stingel](#) [2007] VSCA 292, [35] and [Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd](#) (1992) 67 ALJR 170 [2].

750. The principles to be followed in these proceedings are set out in *Norman v Australian Red Cross Society*,⁶⁸⁷ where Deputy President McKenzie considered this function:

The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to, a case where a complaint can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

751. If the Tribunal is not satisfied that these circumstances exist, then the matter should go to hearing so the evidence can be heard and tested.

752. In *State Electricity Commission of Victoria v Rabel and others*,⁶⁸⁸ the Court of Appeal considered the operation of section 44(c) of the Equal Opportunity Act 1984 (Vic) which also at that time provided a power of summary dismissal. The Court said that a complaint could not be dismissed under section 44(c) unless it was clear beyond doubt that the complaint was lacking in substance, and that the complainant had no arguable case which should be allowed to be resolved at a full hearing.

753. In *Forrester v AIMS Corporation*,⁶⁸⁹ the Supreme Court has made clear that the onus of establishing a ground for summary termination rests with the party who has made the application. It is a heavy onus. The Tribunal should also generally assume for the purposes of the application that the applicant can prove the allegations made in the application.

754. The Tribunal has applied these principles in a number of cases. Some examples are set out in the following paragraphs.

No area of public life

755. The Tribunal may strike an application out where the complaint does not disclose an area of public life covered by the Equal Opportunity Act and the claim is manifestly hopeless. For example in *Tarpey v Victoria*,⁶⁹⁰ a father brought a discrimination claim against the primary school his daughter attended. He claimed that the school and the State of Victoria discriminated against him on the basis of sex and physical features in the provision of goods and services, by failing to communicate with him about his daughter's case and development, in circumstances where the school kept in contact with his daughter's mother. The State of Victoria made an application to dismiss his claim, saying that it was misconceived and lacking in substance, as they were not providing any good or services to him. The Tribunal found that although the complainant possessed the relevant attributes, he could not point to an area of activity in the Act where the discrimination occurred. The Tribunal said that the school or State of Victoria was not providing goods or services to him and it dismissed the claim on the ground that it was misconceived, lacking in substance, and manifestly untenable both as to fact and in law.

756. However, in some circumstances a school may well be found to provide services to a parent. For example, in *Murphy v New South Wales Department of Education*⁶⁹¹ the Australian Human Rights Commission upheld a complaint of discrimination by the parents of a student in relation to the provision of services and facilities by the school. In particular, the complaint had alleged that the 'services' provided related to the administration of the public education system and the provision of facilities for the education of their child. This is also discussed at [paragraphs 216 and 229 to 231](#) of this resource.

757. In *Kavanagh v Victorian WorkCover Authority trading as WorkSafe Victoria*,⁶⁹² the Tribunal considered a claim of discrimination and victimisation by WorkSafe in the handling of a complaint. The Tribunal found that the alleged services (the power to investigate, the power to issue an improvement notice, the power to charge an offence), were not services within the definition in the 1995 Act because they all require the exercise of a discretion that is quasi judicial in nature. If exercised, none of them would confer

687 *Norman v Australian Red Cross Society* (1998) 14 VAR 243.

688 *State Electricity Commission of Victoria v Rabel and others* [1998] 1 VR 102.

689 *Forrester v AIMS Corporation* (2004) 24 VAR 97.

690 [2009] VCAT 410.

691 [2000] HREOCA 14.

692 [2011] VCAT 2009.

any benefit, advantage or welfare on the applicant. The Tribunal also found that the complaints of victimisation could not succeed because they were not supported by evidence. The Tribunal dismissed the complaints.

758. It is important to bear in mind that there is also federal case law which has established that a claim should not be dismissed or struck out simply because the pleadings (or particulars) are deficient, for example by not setting out the area of public life when one may well apply. Rather, in a strike out application it is the prospects and merits of the case itself which should be examined underlying the pleadings, not the pleadings taken on face value as they may be able to be amended to rectify any deficiency.⁶⁹³

Exceptions clearly apply

759. In *Garden v Victorian Institute of Forensic Mental Health*,⁶⁹⁴ the Tribunal also found that there was no 'service' under the 1995 Act. In this case, the complainant who was a patient at the Victorian Institute of Forensic Mental Health, made a claim of discrimination against the Institute on the basis of impairment in the provision of a service. The complaints related to reports from his psychiatrist to the Adult Parole Board and requirements that he open his mail in front of his psychiatrist. The Institute applied to have the complaints struck out on the basis that they were frivolous, vexatious, misconceived or lacking in substance. The Tribunal found that the complaints relating to the reports from the psychiatrist to the Adult Parole Board were not a service to the patient. The Tribunal struck out this part of the complaint as manifestly hopeless. The Tribunal found that while the requirement that he open his mail in front of his psychiatrist could amount to discrimination, this was also struck out, as it was authorised by an enactment (the Mental Health Act) and the statutory authority exception under the 1995 Act applied. This part of the complaint was also found to be manifestly hopeless.

760. The Tribunal has confirmed that if a respondent relied on an exception under the Act as the basis for striking out a claim, the exception must so completely answer the claim as to satisfy the Tribunal that the complaint is undoubtedly hopeless.⁶⁹⁵

Time delay

761. The Equal Opportunity Act does not set a strict time limit for commencing dispute resolution at the Commission or making an application to the Tribunal.
762. Where the alleged contravention occurred more than 12 months before the application was made:
- [section 116](#) provides the Commission with the discretion to decline to provide dispute resolution
 - item 18 of Schedule 1, Part 7 of the *Victorian Civil and Administrative Act 1998* (Vic) (VCAT Act) provides the Tribunal with the discretion to make an order under section 76 summarily dismissing an application.
763. Delay in bringing an application may also amount to an abuse of process and therefore be a basis for summary dismissal under [section 75](#) of the VCAT Act. The factors that bear on whether delay does amount to an abuse of process are:
- whether the delay was inordinate and unreasonable or inexcusable
 - any explanation for the delay and its adequacy
 - the nature of the proceeding
 - whether and to what extent the respondent was responsible for delay
 - prejudice to the respondent if the proceeding were to continue
 - the public interest
 - the effect of the delay on the quality of justice, in particular the ability to conduct a fair hearing.
764. All of these factors must be balanced against each other and no single one is determinative. The primary consideration is the interests of justice.⁶⁹⁶

693 *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401, [19]-[20].

694 [2008] VCAT 582.

695 *Forrester v AIMS Corporation* (2004) 24 VAR 97
Dulhunty v Guild Insurance Ltd [2011] VCAT 2209.

696 *Burrows v State of Victoria* [2002] VCAT 1655, [38];
Garcia v Miles [2012] VCAT 262, [16]. These decisions are consistent with the approach taken to abuse of process because of delay in other settings: see for example *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27.

765. In *Burrows v Victoria*,⁶⁹⁷ the Tribunal dismissed parts of a complaint on the basis that the delay in relation to the claims would prejudice the hearing of the case. In this case, the applicant brought a number of claims of discrimination against the State of Victoria on the basis of impairment in the area of employment, alleging that he had been denied opportunities for promotion, transfer and training, or that they had been limited. A number of the claims related to events that occurred between six to 12 years before the complaint was lodged. The State of Victoria applied to strike out or dismiss the complaints on the ground the delay in lodging the complaint amounted to an abuse of process. The Tribunal held that this length of delay would prejudice the case, because there would be problems with gathering evidence given the delay.⁶⁹⁸

766. This could be compared with *Bligh and Ors v State of Queensland*⁶⁹⁹ where there was more than 10 years' delay in issue. In that case, the complainants each initially wrote letters of complaint to the Federal Race Discrimination Commissioner in 1985 and 1986, in relation to their employment on Palm Island in North Queensland between 1975 and 1984. During this period the complainants alleged they had been discriminated against on the basis they were Aboriginal, by being employed in a range of occupations on terms and conditions less favourable than would have applied if they were not Aboriginal. While the Commissioner initially accepted the complaint, it closed the file in 1988 due to a misunderstanding that the complaint had been remedied by a decision of the Queensland government to pay Aboriginals award rates. The complainants sought to reinstate their complaints in 1990, but the matter was considered non-conciliable and referred to the Australian Human Rights Commission in 1995 for determination.

767. In defending the complaint, the state submitted that the matter should be dismissed by the Commission on the basis it was outside the 12 month 'time limit' contained in the federal *Racial Discrimination Act 1975*, and that no extension of time should be granted. The Commission rejected this argument on the basis that the respondent had misconceived the provisions of the Act and was wrong to assert that a complaint 'has no statutory validity unless the Commissioner exercises the "power" to extend the period.' The Commission held that there was no basis for the State to assert that the discretion exercised by the Race Discrimination Commissioner in favour of inquiring into the alleged discriminatory acts was exercised wrongly, and refused to dismiss the complaints on the basis of delay. This shows that what is appropriate in relation to a time delay will depend on the circumstances of the case.

Claim being heard in another forum

768. In *Moloney v Victoria*,⁷⁰⁰ a number of claims of discrimination on the basis of impairment were made against the State of Victoria in the area of employment. One of the claims raised an issue that was also currently being considered by the Australian Human Rights Commission under the *Disability Discrimination Act 1992 (Cth)*. The respondent sought to strike out this part of her claim as frivolous, vexatious, misconceived or lacking in substance, or an abuse of process. The Tribunal said that it would be an abuse of process to determine this matter while the AHRC complaint was still on foot. The Tribunal struck out this part of the complaint.

769. An abuse of process may also be established where an applicant has brought repeated applications or is seeking to re-agitate issues that have already been determined by the Tribunal or another body.⁷⁰¹

697 [2002] VCAT 1655.

698 See also *Garcia v Miles* [2012] VCAT 262.

699 HREOCA [1996] 28.

700 [2000] VCAT 1089.

701 *Fernandez v Insulation Solutions Pty Ltd* [2004] VCAT 125; *Cartledge v Skyway Executive Pty Ltd* [2004] VCAT 2017.

No prospect of success

770. In *Carnegie v Victorian Registration and Qualifications Authority*,⁷⁰² the Victorian Registration and Qualifications Authority cancelled the registration of the Carnegie School because of its failure to comply with the minimum standards set out in the *Education and Training Reform Regulations 2007*. Dr Carnegie said that his school catered for emotionally and socially traumatised students and his claim of discrimination was in the area of discrimination, based on the attribute of his personal association with others who had a disability. The respondent applied for the matter to be struck out or dismissed because the claim could not possibly succeed. The Tribunal found that the Authority is not an educational authority and the standards imposed are those set out in the Regulations. The Tribunal found that there was no prospect of success in this case and dismissed the complaint.

Application of immunity provisions and body capable of being sued

771. Judicial immunity from civil liability only applies to persons exercising judicial functions in a court or tribunal, rather than administrative functions.⁷⁰³ Accordingly, both the individual and State of Victoria are capable of being sued in relation to administrative functions. Note however that in *Towie v State of Victoria & Ors*⁷⁰⁴ the complainant made allegations that the treatment he received during the conduct of a hearing at VCAT was discriminatory. The Tribunal found that it would be a fundamental breach of the rules of natural justice for VCAT to be both a named party and a decision-maker in the matter, so it was a matter that must be struck-out under [section 77](#) of the VCAT Act (a matter where the proceeding is more appropriately brought before another court). The Tribunal also found that Tribunal members have the same protection as a judge in the performance of his or her duties and that it was inappropriate to name VCAT as a party, as it is not a body capable of being sued.

702 [2012] VCAT 1952.

703 *X v State of South Australia (No 3)* [2007] SASC 125 (5 April 2007) [148]-[159]; *Sirroos v Moore* [1975] QB 118 [132]; *Mann v O'Neill* [1997] HCA 28; (1997) 191 CLR 204 [212].

704 [2002] VCAT 1395 (12 November 2002).

Acts took place beyond the territorial reach of the Equal Opportunity Act

772. In *Gluyas v Google Inc*,⁷⁰⁵ the complainant alleged that a blog established by a third person (in the United States) containing offensive material amounted to discrimination against him in the provision of goods and services. Google sought to have the matter dismissed because the acts done occurred entirely outside the State of Victoria and where therefore not governed by the provisions of the 1995 Act. The Tribunal found that the alleged conduct in question was Google's assistance in putting the material up and its refusal to take that material down, and that these acts had occurred outside the jurisdiction. The Tribunal distinguished this from cases involving those who actively publish the material on the internet. The Tribunal dismissed the complaint as lacking jurisdiction.
773. In *Tan v McArdle*,⁷⁰⁶ the Tribunal considered a claim about an employment decision made in Tasmania while the complainant was living and working in New South Wales. The claim alleged victimisation because of a sexual harassment complaint that had been previously made in Victoria. The Tribunal found that none of the elements of victimisation occurred in Victoria and that there was therefore an insufficient connection to Victoria. The Tribunal dismissed the complaint.

Vexatious claims

774. The courts have provided some guidance on when an application will be vexatious:

If it is brought predominantly for a purpose other than obtaining an adjudication of rights under the Equal Opportunity Act, or primarily to annoy, embarrass or place an unfair burden on the respondent, or if it is so untenable as to be manifestly hopeless.⁷⁰⁷

705 [2010] VCAT 540.

706 [2010] VCAT 248.

707 *Al-Hakim v Arthur Robinson & Hedderwicks* [2001] VCAT 1767, citing *Cabot v City of Keilor* [1994] 1 VR 220 and *Attorney-General v Wentworth* (1998) 14 NSWLR 481.

Secrecy

775. It is unlawful for any employee or Board member of the Commission, or the Commissioner to disclose, communicate or make a record of any information that concerns the affairs of any person, where that information was provided to the Commission for a purpose under the Equal Opportunity Act.⁷⁰⁸ To do so is an offence under [section 176\(3\)](#) of the Equal Opportunity Act.
776. The purpose of the secrecy provision is to ensure that information provided to the Commission is kept confidential, with a view to achieving outcomes in difficult and complex cases where confidentiality is important.
777. There are some limited exceptions to the operation of the secrecy provision set out in [sections 176A](#) and [177](#) of the Equal Opportunity Act. Broadly speaking, these exceptions allow a Commission staff member to disclose information where it is necessary to do so when carrying out another function under the Act, where parties consent to certain information being released, and where disclosure of information is required by a Court in a criminal proceeding (for example sexual assault).

Admissibility

778. Evidence of anything said or done in the course of dispute resolution is inadmissible in proceedings before the Tribunal, or any other legal proceedings.⁷⁰⁹
779. The dispute resolution process starts when a person informs the Commission that they wish to proceed with dispute resolution. In practice, this will be when the Commission receives either a signed letter or a completed online form from a person lodging a complaint. This means that settlement offers and negotiations during dispute resolution process will be inadmissible.
780. The question of what documents or information will be inadmissible in a proceeding is a matter for determination by the Court or Tribunal hearing the matter.

Remedies

781. When a person brings a complaint under the Equal Opportunity Act there are a number of remedies open to them if they are successful.
782. [Section 125\(a\)](#) of the Equal Opportunity Act provides that if the Tribunal finds that a person has breached the Equal Opportunity Act it can make any one or more of the following orders:

- i. an order that the person refrain from committing any further contravention of this Act
- ii. an order that the person pay to the applicant, within a specified period, an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention
- iii. an order that the person do anything specified in the order with a view to addressing any loss, damage or injury suffered by the applicant as a result of the contravention.
- iv. This forms the basis for the remedies available to a complainant.

783. [Section 125](#) allows the Tribunal to make any order it thinks fit that will either stop the unlawful conduct under the Equal Opportunity Act occurring or continuing, or to address any loss, damage or injury suffered by the conduct.
784. Examples of remedies ordered by the Tribunal which are particular to the circumstances of the complainant include:
- a. equal opportunity training for staff involved in unlawful conduct⁷¹⁰
 - b. written apology⁷¹¹
 - c. amending a policy to remove discriminatory clauses⁷¹²
 - d. reinstating a job application and removing discriminatory assessment criteria from the application process⁷¹³
 - e. reassessing a person's insurance premium when the original method of calculation was discriminatory⁷¹⁴
 - f. reinstatement.⁷¹⁵

710 *Morgan v Dancen Enterprises Pty Ltd (Anti-Discrimination)* [2006] VCAT 2145.

711 *Flekac v Australian Cable and Telephony Pty Ltd* [2003] VCAT 2012 and *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914.

712 *South v RVBA* [2001] VCAT 207.

713 *Davies v State of Victoria (Victoria Police)* [2000] VCAT 819.

714 *Dulhunty v Guild Insurance Limited* [2012] VCAT 1651.

715 *Tobin v Diamond Valley Community Hospital* (1985) EOC 92-139. Also see *Duma & Mader International Pty Ltd (Anti-Discrimination)* [2007] VCAT 2288 where reinstatement was considered but found not to be appropriate at [93]; *Ilobuchi Peter v Amcor Flexibles* [1999] VCAT 664 (4 June 1999) and *O'Keefe v Wyndham City Council* [2002] VCAT 17 (21 January 2002) [46]-[48], both relating to interim orders, where the Tribunal's power to order reinstatement was generally discussed.

708 *Equal Opportunity Act 2010* (Vic), s 176.

709 *Equal Opportunity Act 2010* (Vic), s 117.

Examples of conciliated outcomes at the Commission with a range of remedies

Age discrimination in the area of employment and discriminatory information request

The complainant wished to apply for a position as area manager for a retail chain. The application form asked for a qualification and required him to select the year that he obtained his qualification. The drop down list only went as far back as 1995. The complainant completed his degree in 1976 and was therefore unable to complete the application and was denied the opportunity to apply for the position.

The respondent agreed to attend a conciliation conference and stated that the drop down list of when a person obtained their qualification being only from 1995 was an oversight and the application form has been updated, with the drop down box replaced with a free text entry field. The respondents expressed their sincere apologies to the complainant for any inconvenience caused and invited him to apply for the role if he wished.

The complainant was satisfied with the action taken by the respondent and the matter was resolved.

Disability discrimination in the area of goods and services

The complainant was admitted to a psychiatric ward as an involuntary patient. He alleged that staff on the ward did not give him information about his rights, let him make any decisions or let him access his phone or a computer.

The respondent stated to the Commission that it followed its set procedures when admitting the complainant while he was an involuntary patient. However, they did agree to attend a conciliation conference to discuss the complainant's admission and its processes.

Via the conciliation conference, the complainant had the opportunity to raise and discuss his concerns with the respondent. As a result, the respondent committed to reviewing some of their practices. The complainant was happy that he was able to meet with the respondent and considered his complaint resolved.

Marital status in the area of employment

The complainant is employed by an airline and applied under the staff travel policy to travel with her two children. Her application was denied on the basis that she was not legally married to her partner, her children's father. The complainant had to purchase full fare tickets for her and her children.

The respondent agreed to attend a conciliation conference and stated that a staff member had misread the staff travel policy which resulted in the complainant's application being denied. The respondent acknowledged the application should have been approved and expressed its regret at the hurt and inconvenience the complainant experienced and refunded the cost of the tickets purchased by the complainant. The respondent also agreed to change its staff travel policy (which had previously stated that only married spouses of staff were eligible), so that the policy extended to 'common law' spouses (de facto and same sex couples).

Disability in the area of education

The complainant's son has an intellectual disability and wanted to attend school camp. She sought permission from the school to stay near the camp during the day and for her son to stay overnight with her to be dropped back to the camp the following day. This request was based on her son's integration aide not attending the school camp and her concerns about her son bedwetting and having unsupervised access to food at night.

The respondent denied the complainant's request, stating it felt that her son was more than capable of attending the camp independently and that doing so would help his development. The school considered that if the complainant collected her son at night this would highlight his disabilities and differences to other children.

When notified of the complaint by the Conciliator, the respondent agreed to meet the complainant to further discuss her request so that her son could participate in the school camp. Following this meeting, the school agreed to the adjustments sought by the complainant and the matter was resolved.

Examples where conciliation resulted in payment of compensation are set out in [paragraph 836](#).

Damages overview

785. Under the Equal Opportunity Act jurisdiction, a person can seek financial compensation (also known as damages) when they have suffered loss, whether financially or physically, because of unlawful conduct.
786. Damages can be ordered by the Tribunal under [section 125\(a\)\(ii\)](#) of the Equal Opportunity Act as outlined above 'to compensate the applicant for loss, damage or injury suffered as a consequence of the discrimination'. Importantly, this means there must be a connection between the loss and the unlawful conduct for an award to properly be made by the Tribunal. In assessing damages, each case will be determined on its own merit.
787. The unlawful conduct in question does not need to be the sole cause of the loss or damage, but the loss or damage suffered must be as a consequence of the breaches of the Equal Opportunity Act. The Tribunal has indicated that it may be possible for damages to be awarded where there have been multiple causes of loss or damage, despite some of those causes being unrelated to breaches of the Equal Opportunity Act. However, this is on the proviso that the complainant can demonstrate that the unlawful conduct was a cause of the loss or damage.⁷¹⁶
788. A complainant may also seek damages at conciliation with the Commission, using decisions of the Tribunal and other jurisdictions to assist with formulating their complaint and negotiating an outcome.
789. [Hall & Ors v A. & A. Sheiban Pty Ltd & Ors](#)⁷¹⁷ is considered the leading authority in setting out the overarching principles for assessing damages in anti-discrimination claims. In that case, Lockhart J noted that the closest analogy would be with the principles guiding damages for claims in tort, although:

...it is difficult and would be unwise to prescribe an inflexible measure of damage of cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law.

Generally speaking, the correct way to approach the assessment of damages in cases under section 81 of the [\[Sex Discrimination Act 1984\]](#) is to compare the position in which the complainant might have been expected to be if the discriminatory conduct had not occurred with the situation in which he or she was placed by reason of the conduct of the respondent.⁷¹⁸

790. Practically speaking, this means that a complainant should think about what has happened to them as a result of the conduct about which they are complaining, in relation to both financial loss and hurt and humiliation. This approach to damages has been followed in the Federal and Victorian jurisdictions.
791. It is important to note that under the Equal Opportunity Act, there is no upper limit on the amount of damages/compensation as there is in similar jurisdictions, such as unfair dismissal under the [Fair Work Act 2009](#).⁷¹⁹ However, any claim of damages will need to be justified with supporting evidence.

Categories of damages

792. As damages in anti-discrimination complaints are considered by the Tribunal and Courts to be 'entirely compensatory' in nature,⁷²⁰ the two main types of damages are:
- 'special damages' which relate to economic or financial losses (past or future). For example, loss of wages or out of pocket expenses such as medical expenses
 - 'general damages' which relate to non-economic losses (past or future). For example, compensation for hurt, humiliation and injury to feelings or for diagnosed psychological injury or physical illness that have been caused or exacerbated by the discriminatory treatment.

716 [GLS v PLP \(Human Rights\) \[2013\] VCAT 211](#), [275]-[276], citing [I & L Securities Pty Ltd v HTW Valuers \(Brisbane\) Pty Ltd](#) (2002) 210 CLR 109, 128 [56]-[57].

717 [\[1989\] FCA 72](#).

718 [\[1989\] FCA 72](#) [72]-[73].

719 [Fair Work Act 2009](#) (Cth) ss 392(5) and (6).

720 [Graeme Innes v Rail Corporation of NSW \(No 2 \) \[2013\] FMCA 36](#) (1 February 2013) [160], citing with approval [Qantas Airways v Gama \[2008\] FCAFC 69](#) [94].

793. There are other types of damages, but they are not as commonly awarded. For example, ‘aggravated damages’ may be awarded in circumstances where there is clear evidence that the person who committed the discrimination has been ‘high handed, malicious or oppressive’, and has been ‘calculated to increase the hurt suffered by the complainant’.⁷²¹
794. For example, aggravated damages were claimed in *Delaney v Pasonica Pty Ltd*⁷²² but the Tribunal refused to order them because the factors raised in support of aggravated damages were factors already taken into account in the Tribunal’s award of general damages, and the Tribunal was not satisfied that there had been conduct on the part of the respondent calculated to increase the applicant’s hurt and humiliation.⁷²³ *Delaney* is also discussed at paragraphs 592 and 829 to 830.
795. Damages in anti-discrimination matters are not intended to be punitive. Therefore ‘exemplary damages’, which are designed as a punishment for the party found guilty of unlawful conduct, are generally not available for claims of discrimination, sexual harassment and victimisation.⁷²⁴
796. Note that an award of damages will not include an amount for any legal expenses incurred, which are described as ‘costs’ (discussed from paragraph 847).

Assessing special damages – financial loss

797. There are a number of factors can be considered in calculating an award of special damages to cover specific financial loss of a complainant as a result of the unlawful conduct. For example:
- a. Compare the past earnings of the complainant before the unlawful conduct with the current earnings or future potential earnings of the complainant. Can any difference in income be attributable to the unlawful conduct? In other words, has the earning capacity of the complainant suffered as a result of the unlawful conduct? Is there total or partial incapacity? How long is the incapacity expected to last?
 - b. Were there any other benefits of the job which the complainant is now unable to access which can be measured financially? For example, a promotion, rostered overtime, weekend penalty rates, special bonuses, share benefits, use of a mobile phone or car.
 - c. Has the complainant spent their own money on doctors and medical specialists because they have fallen ill or had a medical condition aggravated as a result of the unlawful conduct?
 - d. Does the complainant have copies of their pay slips, receipts, invoices and proof of payment which can be provided as evidence of this loss?
798. An example of an itemised award of special damages for medical expenses can be found in *Gama v Qantas Airways Ltd (No.2)*.⁷²⁵ In that case, Mr Gama was awarded damages to compensate him for breaches of section 9 of the *Racial Discrimination Act 1975* (Cth) and s.15(2)(d) of the *Disability Discrimination Act 1992* (Cth). Mr Gama claimed damages for attendance at medical appointments, travel to medical appointments, and medication costs, each for the past and future. Ultimately, Mr Gama was awarded a 20 per cent contribution towards these costs by way of special damages, comprising:
- a. \$1,350 for 20 per cent of the cost of the doctor’s appointments and \$945 for 20 per cent of the cost of travel to date of hearing
 - b. \$2,831 for 20 per cent of medication costs taken to date of hearing
 - c. \$3,150 for future doctor’s appointments calculated at 15 visits per year for seven years, again on the 20 per cent basis
 - d. \$3,603 for 20 per cent of future medication costs for seven years
 - e. interest on those amounts (taking into account Mr Gama would have received a medicare rebate).⁷²⁶

721 *Hall & Ors v A & A Sheiban Pty Ltd & Ors* [1989] FCA 72 [75] per Lockhard J citing *Alexander v Home Office* [1988] 2 All ER 118.

722 [2001] VCAT 1870.

723 *Ibid* [51]-[55].

724 Also see e.g. *Howe v Qantas* [2004] FMCA 242; *Hall v Sheiban* [1989] FCA 72 [78]-[83]; *Phillis v Mandic* [2005] FMCA 330 [26].

725 [2006] FMCA 1767 [129]-[130]. Qantas appealed the decision on a number of grounds, including the award of damages. The ground of appeal relating to damages was dismissed by the Full Court: see *Qantas Airways Limited v Gama* [2008] FCAFC 69 [5], [100]-[104], although the appeal was upheld in part in relation to the disability discrimination aspect at [91].

726 [2006] FMCA 1767 [129]-[130].

799. In support of his claim for the medical expenses (past and future), Mr Gama had provided a sworn affidavit setting out how much he had spent on medication to date, and how long he was required to take the medication for in the future. Mr Gama further provided evidence of his travel costs for attending medical appointments, and the expected period he would need to continue to see his doctor for. Mr Gama's doctor also provided oral evidence of Mr Gama's attendance at her consultancy.⁷²⁷ Mr Gama also received \$40,000 as a 20 per cent contribution towards general damages and 9 percent interest on that amount.⁷²⁸
800. If the complainant is claiming economic loss for lost or reduced wages, it is also relevant whether they are currently receiving any salary/wages, leave payments or insurance payments such as worker's compensation, and if so, how much they are receiving. Any damages awarded are likely to be offset and therefore reduced by any income or payments received or even potentially accrued entitlements.⁷²⁹ Tax is also likely to be payable on any damages awarded as economic loss as it may be considered taxable income or an 'employment termination payment' under [section 82-130\(1\) of the *Income Tax Assessment Act 1997 \(Cth\)*](#) if it is paid as a consequence of termination of employment.

Mitigation of loss

801. Whether a person is currently earning is also relevant to show they have met their legal obligation to 'mitigate their losses'. A complainant has a duty to take steps to improve their situation and make their financial loss less severe. For example, if the person has left their job because of unlawful conduct in breach of the Equal Opportunity Act, or if they were fired for an unlawful reason, the person still has an obligation to look for another job to 'mitigate' their loss of income. Where a person has been unable to mitigate their loss, for example because of injury or illness, there needs to be evidence of that reason available for the Tribunal to consider.
802. However, if a person is not working because they have chosen to take unpaid leave such as parental leave, and this is the reason they are not earning, the Tribunal and courts are unwilling to order economic damage to cover that period of leave. This is because the loss of earnings of the applicant is not attributable to the conduct of the respondent.⁷³⁰

Basis for assessing general damages

803. While economic damages can be calculated by reference to money spent or lost as a result of the unlawful conduct, hurt and humiliation is often harder to calculate. The principle that the Tribunal and the courts will use to assess hurt and humiliation was summarised by Tribunal Member Dea in August 2012 as follows:

The starting position in relation to awards for prohibited discrimination for injury to feelings (also referred to as non-economic loss), is that the amount should not be minimal, as that would trivialise or diminish respect for the public policy to which the Equal Opportunity Act gives effect. On the other hand, awards ought not be excessive, as that would also damage respect for that public policy.⁷³¹

727 [Qantas Airways Limited v Gama \[2008\] FCAFC 69 \[102\]-\[103\]](#).

728 [Gama v Qantas Airways Ltd \(No.2\) \[2006\] FMCA 1767 \[127\] and \[131\]](#); Also see [Qantas Airways Limited v Gama \[2008\] FCAFC 69 \[99\]](#).

729 See, for example, [Howe v Qantas Airways \[2004\] FMCA 242 \[133\]](#) where the Federal Magistrates Court found that the applicant was not entitled to the benefit of the sick leave accrued during the period of unpaid maternity leave, as her award of damages was intended to compensate her for not being granted sick leave. Therefore, the respondent was entitled to offset the equivalent amount of salary from the calculation of damages for each day of sick leave accrued during her maternity leave.

730 *Ibid* at paragraph 366.

731 [Galea v Hartnett – Blairgowrie Caravan Park \[2012\] VCAT 1049](#) at paragraph 83, relying on [Hall & Ors v A & A Sheiban Pty Ltd & Ors \[1989\] FCA 72](#).

804. In *GLS v PLP (Human Rights)*⁷³² Justice Garde has also held that an award of general damages should be made 'as appropriate for the individual case having regard to the facts and circumstances and the contraventions proved.'⁷³³
805. It is important to remember that unless there is clear evidence of significant psychological or physical injury, the Tribunal (and the courts) have been unwilling to make orders for large sums in the hundreds of thousands of dollars as compensation for hurt and humiliation.
806. The amount awarded for hurt and humiliation will depend on the circumstances. For example the following factors may influence the amount of damages:
- a. whether the perpetrator of the unlawful conduct has a position of power and control over the complainant, by reason of their age or job
 - b. if the unlawful conduct occurred in a public place (including a workplace) which resulted in the complainant being humiliated in front of other people
 - c. if there are other factors which have made the hurt and humiliation worse for the person, such as a breach of privacy
 - d. if the unlawful conduct affected the person's health and particularly their mental health, and the level of seriousness of the mental or physical anguish as supported by medical evidence such as a doctor or specialist's report.
807. Examples of general damages from the Tribunal, the Federal Magistrates Court and the Federal Court, as well as examples of general damages negotiated in conciliated outcomes are set out below from [paragraph 834](#) onwards.

Tax treatment of general damages

808. A complainant seeking compensation for hurt and humiliation may want to seek advice from a financial advisor about the tax implications of the payment or settlement.
809. The Australian Taxation Office (ATO) has previously commented that 'the determination of the character of a compensation payment, and in particular whether it is liable to tax in the hands of an employee, depends upon the nature of the payment'.⁷³⁴ The ATO ruled that a payment made by an employer to an employee as compensation in anti-discrimination matters for injury to feelings is usually considered a capital payment, and is not subject to income tax or capital gains tax.⁷³⁵
810. However, where the payment is made as a consequence of termination of employment, it must meet the requirements of [section 82-135\(i\)](#) of the *Income Tax Assessment Act 1997 (Cth)* to be excluded from being a taxable 'employment termination payment'. Generally speaking, the amount must be an identifiable amount paid specifically for or in respect of a personal injury, and be a reasonable amount having regard to the nature and extent of the personal injury.⁷³⁶
811. This was the issue in *An Employee v Federal Commissioner of Taxation*.⁷³⁷ In that case, the applicant claimed that his employer had breached the *Age Discrimination Act 2004 (Cth)* in requiring his retirement at the age of 65, as well as a breach of contract claim, and bullying and harassment of the employee by senior officers. The applicant claimed that he had suffered post-traumatic stress disorder as a result. The parties settled the dispute in a settlement agreement for the amount of \$395,000. The question considered was how that settlement amount should be classified for taxation purposes.

⁷³² [\[2013\] VCAT 221](#).

⁷³³ *Ibid* [274].

⁷³⁴ [Taxation Ruling No. IT 2424](#) (2 July 1987).

⁷³⁵ *Ibid*.

⁷³⁶ *An Employee v Federal Commissioner of Taxation* [2010] AATA 912. Also see [Taxation Ruling 2003/13](#) (22 October 2003).

⁷³⁷ [2010] AATA 912.

812. In a private ruling, the Commissioner of Taxation found the payment was paid as a consequence of termination, and therefore the entire payment was an ‘employment termination payment’ under [section 82-130\(1\)](#) of the *Income Tax Assessment Act 1997 (Cth)*. The applicant appealed that decision, submitting that [section 82-135](#) applied as the payment was made in respect of a personal injury suffered as a result of the age discrimination.
813. The Administrative Appeals Tribunal (AAT) affirmed the Commissioner’s decision, finding that the payment was made as a consequence of the applicant’s termination and was an ‘employment termination payment’, as the payment would not have been made if not for the termination. Termination need not be the dominant reason, but provided the payment follows as an effect or result of the termination, it will be considered to be a consequence of termination.⁷³⁸
814. The ATT further found that [section 82-135](#) did not apply. This was for two reasons. First, the applicant’s compensation payment was ‘a single, undissected lump sum with no attribution of any portion of it to any of the various heads of relief claimed by the taxpayer’.⁷³⁹ The AAT relied on *McLaurin v Federal Commissioner of Taxation*⁷⁴⁰ in finding that where the amount is a lump sum, it is appropriate to treat the sum as a whole as it was impossible to tell what portion of the compensation was in respect of that personal injury.
815. Second, the ATT considered that even if the hurt and humiliation claimed by the applicant amounted to ‘personal injury’, given the employer had denied liability in the settlement, there had been no agreement that ‘personal injury’ had occurred. Therefore, the payment could not genuinely amount to a payment for personal injury under [section 82-135](#).⁷⁴¹

Eggshell skull rule – taking the person as you find them

816. In assessing damages, a discriminator or wrongdoer must take the complainant as they find them, at the time the unlawful conduct occurs. This is called the ‘eggshell skull’ rule.
817. However in applying the rule and considering the applicant’s physical and mental state in assessing the appropriate quantum of damages, the courts are unwilling to consider notions of ‘normal fortitude’ of applicants as a threshold to receiving damages, nor notions of ‘reasonableness’ by reference to a person’s psychological make-up, in relation to the resulting compensation awarded.
818. For example, in *South Pacific Resort Hotels Pty Ltd v Trainor*⁷⁴² the respondents argued that the applicant was precluded from seeking damages for a complaint of sexual harassment, as she was not of ‘normal fortitude’ and had not previously disclosed a mental condition to the employer. The respondent considered it was unfair to be ordered to pay compensation when the extent of the applicant’s mental injury was unforeseeable and argued that the notion of what a reasonable person would anticipate should be carried through into an assessment of damages.⁷⁴³
819. The Magistrates Court at first instance and the Full Federal Court on appeal both rejected this argument. The Full Federal Court considered that the argument ignored the separate statutory schemes for defining and finding discrimination on one hand, and the power to order compensation on the other. The Full Federal Court also warned against the inclusion of the notion of ‘normal fortitude’ into discrimination law as it was:
- capable of misuse in support of the false idea – perhaps hinted at rather than stated bluntly – that some degree of sexual harassment (or some other form of unlawful discrimination) would and should be accepted by persons of normal fortitude.⁷⁴⁴

738 Ibid [12]-[17], relying on *Reseck v Commissioner of Taxation* [1975] HCA 38; *McIntosh v Federal Commissioner of Taxation* (1979) 25 ALR 557, 560; *Le Grand v Commissioner of Taxation* [2002] FCA 1258 [63].

739 *An Employee v Federal Commissioner of Taxation* [2010] AATA 912 [20].

740 [1961] HCA 9.

741 Ibid [22] relying on *Dibb v Commissioner of Taxation* [2004] FCAFC 126.

742 [2005] FCAFC 130.

743 Ibid [44]-[45].

744 Ibid [46] and [51]-[52].

820. The Full Federal Court dismissed the appeal and the Magistrates' award of \$17,536.80 to the applicant was upheld. That award was made up of \$5,000.00 general damages; \$1,907.50 for medical treatment; \$5,000 for past loss of income; \$1,564.65 for interest and \$2,500 for future economic loss.
821. The application of the 'eggshell skull rule' in Victorian anti-discrimination cases was reinforced by Deputy President McKenzie in *Styles v Murray Meats Pty Ltd (Anti-Discrimination)*⁷⁴⁵ (*Styles*) in relation to a complaint of sexual harassment and sex discrimination. In *Styles*, the complainant had been sexually abused by her father and subjected to physical violence by her mother for a number of years as a child and teenager. The evidence provided to the Tribunal was that as a result, she suffered from chronic but fluctuating anxiety, depression, chronic pain disorder, panic disorder and 'a predisposition to react strongly in situations of sexual harassment'.⁷⁴⁶
822. Deputy President McKenzie upheld the sexual harassment complaint and awarded the complainant \$8,000 in general damages for embarrassment, loss of self-esteem, stress, and aggravation of previous medical conditions. In doing so, Deputy President McKenzie noted:
- I pause here to say that in my view, in cases under the Equal Opportunity Act, one must take the victim as one finds the victim. Loss is still compensable even though the victim may, because of some earlier condition or event, be more than ordinarily sensitive to the particular conduct.⁷⁴⁷
823. Therefore, where a complainant has a pre-existing condition that makes them more sensitive, vulnerable or pre-disposed them to developing a psychological injury, this cannot be held against them in calculating damages for the unlawful conduct. Instead, the discriminator is liable for the full extent of their injuries even if the injuries are greater than someone with a 'normal' disposition may have suffered.

Examples of damages awards from the Tribunal

824. Case law examples are useful to consider in assessing what level of damages may be appropriate in a particular case, although the Federal Court has warned that care needs to be taken in making such comparisons to ensure that particular acts are not 'rated' and that the complainant's individual circumstances are specifically referred to and considered.⁷⁴⁸
825. The level of damages awarded in the Tribunal and its predecessor, the Victorian Anti-Discrimination Tribunal (VADT) have varied significantly over time. However, the cases do indicate that where there is discrimination, sexual harassment or victimisation between persons with an imbalance of power, where there is the ability for the unlawful conduct to influence the person's ability to gain ongoing employment or reputation, or where that unlawful conduct results in psychological injury supported by medical evidence, the Tribunal is more likely to make a higher award of general damages.
826. For example, in 1998 VADT ordered \$125,000 in damages in *McKenna v State of Victoria*⁷⁴⁹ for the complainant's exposure to
- ...considerable pain and suffering, to debilitating physical symptoms, to mental breakdown, to humiliation, loss of self esteem and of self confidence, and to loss of normal enjoyment of her professional and private life...
- caused by sex discrimination, victimisation and sexual harassment in employment. VADT noted the award was relatively large for the Victorian anti-discrimination jurisdiction but that VADT considered the unlawful actions were very serious in nature and had been 'initiated, supported or endorsed at high levels' of the employing organisation.⁷⁵⁰
827. In *Delaney v Pasunica Pty Ltd*⁷⁵¹ the Tribunal upheld a complaint of sexual harassment and sex discrimination, and ordered \$25,000.00 in general damages, \$3,617.60 in special damages (loss of earnings); \$871.50 for medical expenses and that the respondents pay the complainant's costs for one day's hearing on County Court Scale A to be taxed in default of agreement.

745 [2005] VCAT 914 (12 May 2005).

746 Ibid [99].

747 Ibid [100]. Also see *Gordon v Commonwealth of Australia* [2008] FCA 603 [119].

748 *Phillis v Mandic* [2005] FMCA 330 [26].

749 [1998] VADT 83.

750 Ibid [6.1].

751 [2001] VCAT 1870 (13 September 2001).

828. The complainant, Ms Delaney, was 16 years old and in the first few weeks of her first job as a sales assistant and kitchen hand at a roast chicken shop. Ms Delaney alleged that her 40 year-old employer, Mr Daley, made inappropriate sexual comments about her body, made sexual advances on her, kissed her against her will and requested sexual favours from her. Ms Delaney provided evidence about the effects this conduct had on her, from her family doctor, a qualified social worker, a sexual assault counsellor, and a consultant psychiatrist. The Tribunal was satisfied that Ms Delaney had suffered an ongoing adjustment disorder, with associated anxiety, hurt and humiliation, and had been unable to work for periods of time because of this disorder, as a direct result of the conduct. Of particular importance to the Tribunal was the power imbalance between Ms Delaney and Mr Daley, and Mr Daley's intimidation and oppressive behaviour towards Ms Delaney.⁷⁵²
829. In *Tan v Xenos (No. 3)*,⁷⁵³ the Tribunal awarded \$100,000 for hurt and humiliation for a complaint of sexual harassment by a neurosurgeon against a neurosurgeon registrar. The level of damages awarded for hurt and humiliation took into consideration the way the respondent had defended the claim which had aggravated the suffering of the complainant (although aggravated damages were not awarded), and the seriousness of the treatment of the applicant by the respondent, who was in a position of great power over the applicant in relation to her training and career progression. However, no evidence was provided that any loss of income had resulted from the conduct, and so no award of special damages was made.
830. By way of contrast, in *Duma & Mader International Pty Ltd (Anti-Discrimination)*⁷⁵⁴ the Tribunal upheld a complaint of indirect discrimination in the area of employment on the grounds of impairment and awarded \$4,000 for hurt and humiliation, and \$418.26 for lost income, comprising \$383.72 for three public holidays at an hourly rate of \$16.83 and superannuation contributions for those three days. The complainant had been absent from work on long term sick leave due to a work-related injury and depression when his employer wrote to him requiring that he notify the company when he would be returning, and to authorise them to contact his doctor to give the company information about his condition. The Tribunal considered that the complainant could not comply with this condition because neither he nor his doctor knew when he would recover, and that the requirement was unreasonable in the circumstances, which included placing his employment in jeopardy after only three months absence where he was certified unfit for all duties due to the seriousness of his injuries.⁷⁵⁵
831. The Tribunal noted that while it was unreasonable for the employer to terminate Mr Duma at the point it did, the Tribunal was not satisfied he would have ever have worked again because of his injury – not because of the discrimination. Therefore, there would have come a time where it was reasonable for the respondent to terminate, and so the only lost income Mr Duma was only entitled to under the relevant award was three public holidays and superannuation on those days. Mr Duma's chronic pain and depression existed prior to the termination and could not be attributed to it, nor were his injuries exacerbated by the termination. Therefore, the level of general damages could only reflect the hurt and humiliation arising from the embarrassment and upset of the unlawful termination.⁷⁵⁶
832. Between August 2008 and March 2013, of the reported Tribunal anti-discrimination decisions available on Austlii, damages have only been awarded in seven cases. Below is a table outlining these cases in summary.

752 Ibid [50].
753 [2008] VCAT 584.

754 [2007] VCAT 2288.
755 Ibid [85].
756 Ibid [94]-[95].

Table: Damages awarded at the Tribunal since August 2008

Name	Date	Summary	Area	Attribute	Outcome
<i>GLS v PLP (Human Rights) [2013] VCAT 221</i>	13-3-13	Complaint by a mature aged graduate legal student of 14 instances of serious and sustained sexual harassment by her employer during a legal practice placement.	Sexual harassment by employer; sexual harassment in a common workplace	(Not applicable in sexual harassment cases as stand alone provision)	Tribunal upheld 11 of the 14 complaints and awarded the complainant \$100,000 for general damages on the basis of the serious psychological damage caused by the employer's conduct. No special damages sought or awarded.
<i>Galea v Hartnett-Blairgowrie Caravan Park [2012] VCAT 1049</i>	18-7-12	Complaint that applicant refused accommodation at caravan park on basis of parental status.	Provision of accommodation	Parental status	Complainant awarded \$1000 for the distress caused by the refusal to provide accommodation and \$90 for economic loss relating to travel costs.
<i>Cobaw Community Health Services v Christian Youth Camps Ltd [2010] VCAT 1613</i>	8-10-10	Complaint that Christian adventure resort refused to take booking for youth group based on sexual orientation of attendees.	Services and accommodation	Sexual orientation	Complaint successful. complainant awarded \$5,000 for hurt and distress caused by the unlawful discrimination of the respondents. Currently on appeal.
<i>Sammut v Distinctive Options Limited [2010] VCAT 1735</i>	14-9-10	Sexual harassment and victimisation complaint.	Employment	N/A	Complaint proven in part. Complainant awarded \$2,000 for humiliation, pain and suffering. VCAT accepted the sexual harassment had a significant impact on the complainant, and that he was humiliated as a result. However, VCAT found there was insufficient evidence to link the sexual harassment with any inability the complainant had to work.

Name	Date	Summary	Area	Attribute	Outcome
Laviya v Aitken Greens Pty Ltd [2010] VCAT 1233	3-8-10	Complaint that applicant was dismissed for taking sick leave, requiring applicant to return to work following Kinglake bushfires, and sexual harassment.	Employment	Impairment, sexual harassment	Complainant awarded \$3,500 in general damages for extreme distress caused by the unlawful conduct. A further \$1,500 general damages were awarded against a person found to have sexually harassed the applicant. Both amounts payable within 14 days. No financial loss was alleged by the complainant. In any event, there was insufficient evidence to support any award to compensate for medical expenses, even though the complainant had undergone counselling.
Stern v Depilation & Skincare Pty Ltd [2009] VCAT 2725	22-12-09	Complaint that employment status changed and employment terminated.	Employment	Pregnancy	Complaint proven in part. \$6,607.58 total compensation ordered, made up as follows – (a) \$3000 for loss arising from the change of her employment status during her employment; (b) \$2807.58 for loss of earnings; (c) \$800 for humiliation and emotional distress.
Thomas v Alexiou [2008] VCAT 2264	31-10-08	Complaint of sexual harassment by apprentice against director.	Employment	Sex	Complaint proven. Ordered \$35,000 in general damages based on the extent of the repetition and duration of that sexual harassment and the Tribunal's assessment of its effect on the complainant.

833. These examples show that in every case, the level of damages will be assessed on the facts and evidence available as to the person's individual loss.

Conciliated outcomes at the Commission

834. A significant proportion of cases are settled at conciliation at the Commission and do not end up at VCAT. In 2011/12, 58 per cent of complaints where conciliation was held were resolved. Some examples of the outcomes reached during conciliation at the Commission are set out in the following pages.

Examples of conciliated outcomes at the Commission - damages

Parental/carer discrimination in employment

The complainant worked as a dental nurse for three years. She had been on 12 months maternity leave and asked to return to work part-time. Her employer refused her request for part-time employment stating she had to return to her substantive position working full-time hours.

The complaint was resolved at conciliation for compensation of \$15,000 and a letter of apology.

Disability impairment discrimination in employment

The complainant is an administrative officer and has an impairment. She alleged her manager refused to allow her to work from home or to negotiate timelines for completion of work. When the complainant returned to work from sick leave she was removed from her position and excluded from her team. She became ill again and took sick leave and when she was ready to return to work her employer informed her it was not ready for her return and terminated her employment.

The respondent stated that the complainant's employment was terminated for failure to meet the inherent requirements of her position. She was provided with the opportunity to improve her performance and this did not occur.

The complaint was settled for \$17,000.

Sex discrimination in employment

The complainant was employed as an engineer with an international company. She stated her employer paid her less and refused her the same benefits of employment as male engineers, such as a company car and corporate card.

The complainant was also overlooked for particular projects as males were considered to be more reliable.

The complainant resigned from her employment as she felt she could not progress in her field of expertise. The complaint was settled at conciliation for \$45,000, a statement of regret and equal opportunity training.

Disability discrimination in the provision of goods and services

The complainant has a hearing impairment and is assisted by a hearing dog. He attended a restaurant with his hearing dog and was told he could only sit outside the restaurant and was refused entry into the restaurant due to his hearing dog.

The complaint was settled at conciliation for a change of policy permitting assistance animals into the restaurant, signage placed at the entrance to the respondent's premises welcoming assistance animals, a written apology and \$500 compensation.

Age and employment activity discrimination in the area of employment

The complainant is in her late 60's and worked in car sales. She alleged her manager talked about wanting a younger workforce and asked her several times when she was going to retire. The complainant felt bullied by her manager when she made several enquiries clarifying conflicting information she was receiving about salary increments.

At conciliation, the complainant informed the respondent she wished to resign from her employment. The respondent agreed, without admission of liability, to pay the complainant \$10,000 compensation, transfer ownership of the complainant's company car to her, and provide a written apology and statement of service.

Disability, parental/carer status and personal association discrimination in goods and service.

The complainant and her adult daughter who has Asperger's Syndrome applied for a loan through a finance broker to purchase an investment property. They had an appointment to sign the loan documents. The daughter did not realise that she would have to answer questions from the respondent at this meeting. She became overwhelmed with anxiety and could not appropriately respond even though she understood what they were asking. The respondent made the decision that the daughter was incapable of understanding the nature of the loan and business transaction. The purchase of the property did not proceed.

The respondent disputed the allegations of discrimination but agreed to attend a conciliation conference.

At conference, the respondent acknowledged that it could have handled the situation better and has implemented policies to guide its staff where finance applicants have a disability. The respondent offered apologies to the complainant and her daughter. The respondent agreed, without admission of liability, to pay \$3,000 compensation to both the complainant and her daughter.

Disability discrimination in the area of employment

The complainant suffered a workplace injury and needed to undertake his duties by rotating between standing and sitting. He alleged that he was not provided with a chair to facilitate this and was issued with a warning for checking the time (for rotations) on his phone. The complainant considered his employer did not provide him with suitable alternative duties and alleged he was directed not to return to the workplace until appropriate duties were found. His employer made no further contact with him.

The respondent stated to the Commission that the complainant was assessed for alternative duties and these were implemented. The complainant was provided with a chair. The complainant was given a first and final warning for using his phone while on duty and using inappropriate language. The respondent also stated it had explored several options for alternative duties for the complainant. These were approved by doctors, but the complainant did not want to perform them and walked off the job. The complainant was sent several warnings and there were a number of attempts made to contact him. The complainant's WorkCover claim was terminated.

At conciliation, the respondent agreed, without admission of liability, to pay \$10,000 compensation and \$3,900 for counselling services the complainant had undertaken.

Pregnancy and disability discrimination in the area of employment

The complainant is a store manager for a retail company. She was pregnant and developed high blood pressure. Her doctor advised her to take a week's leave to rest. The complainant contacted her manager to advise of her absence and sought information about potentially modifying her hours/role given her health concerns and her progressing pregnancy. When the complainant returned to work, she received 'counselling and corrective' action effectively disciplining her for not opening the store when she was on sick leave. The complainant had a heated argument with her manager and resigned which meant she would not be entitled to paid parental leave.

The respondent agreed to attend a conciliation conference. The respondent stated that the 'counselling and corrective action' was a tool to implement the change in the complainant's hours/role sought by her due to her pregnancy and ill health.

The parties reached resolution as the respondent agreed to provide a written apology to the complainant, pay \$800 lost wages, treat the complainant's employment as continuing, withdraw the 'counselling and corrective action' and alter work arrangements to enable the complainant to work four hours per week in a customer service role.

Sexual harassment in the area of employment

The complainant alleged she was sexually harassed over a number of years by the senior manager of her employment organisation. She stated her manager made numerous unwelcome advances including hugging, kissing and neck rubbing and he forced her to have a sexual relationship with him.

The respondent denied the allegation of sexual harassment claiming they were engaged in a consensual sexual relationship. The matter settled for \$50,000.

Sexual harassment in the area of employment

The complainant worked in a warehouse and alleged two co-workers subjected him to verbal and physical conduct of a sexual nature. The employees made comments on a regular basis that referred to the complainant performing sexual acts with them. The harassment was brought to the attention of management on a number of occasions.

The respondent agreed to attend a conciliation conference and acknowledged that the company had failed to handle the issue appropriately, deeply regretted the pain and suffering caused by the behaviour of the co-workers and apologised for the failure to properly assist him to remedy the situation. The respondent agreed to provide the complainant with a written apology and pay \$25,000 compensation.

Examples of damages under federal discrimination law

835. Examples of damages awards from the federal jurisdiction can also be a useful reference point, given the larger number of cases decided in that jurisdiction.
836. One recent case illustrates the approach of the federal courts to damages calculations.
837. In *Graeme Innes v Rail Corporation of NSW (No. 2)*⁷⁵⁷, the Federal Magistrates Court found that the NSW Rail Corporation (RailCorp) indirectly discriminated against Commonwealth Disability Commissioner Graeme Innes (in his personal capacity) in the provision of goods and services, on the grounds of disability, in breach of [sections 24 and 32](#) of the *Disability Discrimination Act 1992 (Cth)*.⁷⁵⁸
838. The court found that requiring Mr Innes to travel on trains without clear and audible 'next stop' announcements amounted to provision of services subject to an unreasonable condition that Mr Innes make himself aware of where he was, by utilising his sight.⁷⁵⁹ Clearly, neither Mr Innes nor any other blind person could comply with this condition, but those who were not blind could comply. Further, making clear and audible station announcements would have amounted to reasonable adjustments to the provision of the service to assist Mr Innes.⁷⁶⁰ RailCorp were also found to have breached the *Disability Standards for Accessible Public Transport*, which provided that all passengers 'must be given the same level of access to information on their whereabouts during a public transport journey'.⁷⁶¹
839. Mr Innes was awarded \$10,000 in general damages plus interest of \$881.99, as compensation for the conduct as a whole, as opposed to each instance where RailCorp failed to provide audible announcements.⁷⁶² While Mr Innes had given unchallenged evidence as to his personal experience of stress and anxiety caused by the failure to provide announcements, he had not provided medical evidence in support. Raphael FM noted that in a case where there was 'paucity of medical evidence', this should be taken into consideration in assessing damages.
840. In setting the level of damages, Raphael FM considered the case of *Evans v National Crime Authority*,⁷⁶³ where the court had originally awarded the complainant \$25,000 for general damages and special damages of \$16,197.60 for lost wages and \$1,295.81 for loss of superannuation (plus interest) arising out of discrimination on the grounds of family responsibilities. The Commonwealth appealed, including on the basis that the award of general damages was excessive.⁷⁶⁴
841. Raphael FM noted that in deciding the *Evans* appeal, Branson J had given 'detailed consideration' to the issue of quantum of general damages, and had reduced the award from \$25,000 to \$12,000 because the complainant's emotional damage (proven through medical evidence) was not as great as that suffered by other complainants who had received lower awards of damages than *Evans* at first instance.⁷⁶⁵
842. In support of this reduction, Branson J referred to:
- Shiels v James*,⁷⁶⁶ where the Federal Magistrate offered the view that the authorities 'indicate a range for damages for hurt and humiliation of between \$7,500 and \$20,000', where the higher range was awarded in cases where the complainant was more substantially affected by the conduct.⁷⁶⁷ Branson J considered this range may be higher than the authorities support, but did not provide a concluded view on the issue
 - Leslie v Graham*⁷⁶⁸ where \$16,000 was awarded for non economic loss for sexual harassment
 - Elliot v Nanda*⁷⁶⁹ where \$15,000 was awarded in general damages for sex discrimination and sexual harassment.⁷⁷⁰

757 [2013] FMCA 36.

758 Ibid [142].

759 Ibid [47].

760 Ibid [142] and [147].

761 Ibid [156].

762 Ibid [158]-[160].

763 [2004] FCA 654.

764 Ibid [41].

765 *Graeme Innes v Rail Corporation of NSW (No. 2)* [2013] FMCA 36 [162].

766 [2000] FMCA 2.

767 *Commonwealth v Evans* [2004] FCA 654 [82], citing *Shiels v James* [2000] FMCA 2 [79].

768 [2002] FCA 32.

769 [2001] FCA 418.

770 *Graeme Innes v Rail Corporation of NSW (No. 2)* [2013] FMCA 36 [161]-[163] citing *Commonwealth v Evans* [2004] FCA 654 [81]-[84].

Other examples under federal law

843. More examples or information about damages awards in the federal courts for similar complaints under the Sex Discrimination Act, Age Discrimination Act and Racial Discrimination Act can be found in the Australian Human Rights Commission's resource 'Federal Discrimination Law' available online [here](#).
844. The Australian Commission also has a complaints register with examples of cases that have settled at conciliation under federal law. The register is available at www.humanrights.gov.au/complaints_information/register

Costs

845. When a complaint of unlawful conduct is made under the Equal Opportunity Act, the parties involved may need to engage a lawyer or advocate to assist them. Unless the lawyer or advocate is acting on a 'pro bono' basis (for free), each party will be accumulating costs.
846. 'Costs' is the term used to describe the legal fees a party incurs in making a complaint and taking it to a court or tribunal. 'Costs' can also include other expenses, charges or 'disbursements' that the party's lawyer has incurred in preparing, presenting or defending a case, such as application fees, barristers' fees, photocopying, expert witness fees, or other costs involved in calling witnesses. When costs are awarded against a party, this means they have to pay the costs of the other party or parties in accordance with the order of the court or tribunal.
847. Costs are different to damages or financial compensation for loss caused as a result of unlawful conduct. Damages are discussed above commencing at [paragraph 787](#).

When can a party recover costs?

848. At conciliation with the Commission under the Equal Opportunity Act, a complainant can seek costs as part of their negotiated settlement, if they are able to agree this with the other party. There are no rules in the Equal Opportunity Act to restrict a complainant seeking to recover their costs during dispute resolution facilitated by the Commission.

849. When the complaint is before the Tribunal, the general rule is that the Tribunal will not award costs and the parties must therefore bear their own costs in the proceeding. This rule is set out in [section 109\(1\)](#) of the [Victorian Civil and Administrative Tribunal Act 1998](#) (VCAT Act) which governs the Tribunal's procedure.
850. However, the Tribunal has a discretion under [section 109\(2\)](#) of the VCAT Act to award that a party pay all or part of the other party's costs at any time in the proceeding, having regard to a list of factors set out in [section 109\(3\)](#) of the VCAT Act. These factors are discussed in more detail below.
851. If the Tribunal decides to order costs, it is usually the successful party who has their costs paid for by the unsuccessful party. However, because VCAT has a discretion in ordering costs, it is possible for a successful party to have to pay some or all of the costs of the unsuccessful party if VCAT considers it fair to do so considering the factors outlined below.

On what basis will the Tribunal order costs against a party?

852. At any time during the proceeding, the Tribunal can make orders for one party to pay all or part of another party's costs if the Tribunal is satisfied it would be fair to do so, having regard to the factors in [section 109\(3\)](#) of the VCAT Act.
853. Generally speaking, if the Tribunal exercises its discretion to award costs against a party, it will be on the application of the other party, and in relation to poor conduct during proceedings, such as causing delay, lying or leading the other party or the Tribunal, or for bringing a claim with no basis in law or fact.
854. As the Tribunal noted in [Tan v Xenos](#)⁷⁷¹:
- Most costs orders appear to have been made against unsuccessful Complainants whose cause of action has been hopeless from the start. Costs orders against Respondents have usually been made where the Respondent has not complied with interlocutory orders, or to take into account the manner in which the Respondent has conducted the defence, or the maintaining of any clearly hopeless defence.

771 [\[2008\] VCAT 1273, \[7\]](#).

855. In determining whether to award costs, the Tribunal may have regard to a number of factors under [section 109\(3\)](#) of the VCAT Act:

1. whether a party has conducted the proceeding in a way that unnecessarily disadvantaged the other party, including:
 - a. failing to comply with the Tribunal's directions or orders without reasonable excuse
 - b. failing to comply with the VCAT Act or rules
 - c. asking for an adjournment as a result of failing to comply with directions or rules
 - d. causing an adjournment
 - e. attempting to deceive another party or the Tribunal
 - f. vexatiously conducting the proceeding.
2. whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding
3. the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law
4. the nature and complexity of the proceeding
5. any other matter the Tribunal considers relevant.

856. The Tribunal may also order costs under [section 74\(2\)\(b\)](#) of the VCAT Act where a party withdraws their application, or under [section 75\(2\)](#) of the VCAT Act where the Tribunal makes an order summarily dismissing or striking out all or part of a proceeding that it considers is frivolous, vexatious, misconceived, lacking in substance or an abuse of proceedings.

857. In the costs decision *Styles v Murray Meats Pty Ltd (Anti-discrimination)*⁷⁷² Deputy President McKenzie provided some guidance on how section 109 will be interpreted and applied by the Tribunal:

As the Victoria Court of Appeal pointed out in *Pacific Indemnity Underwriting v Maclaw* [2005] VSCA 165, the position under section 109 of the VCAT Act is different from that applying in the courts. The general rule is that costs lie where they fall unless the Tribunal considers it fair to award otherwise. Whether it is fair to award otherwise

must be determined on a case by case basis. Some of the factors taken into account may be of a more general nature. Other factors will relate only to the case in question. It is difficult to argue by reference to analogy in other cases. Each case must be considered on its merits and will be different from each other case.

I accept that it is important that the redress provided by the Equal Opportunity Act should not be undermined or made less accessible because potential complainants fear orders for costs against them if they lose. This is a good reason for not applying an automatic rule that costs follow the event. Section 109 does not do this. It requires each case to be considered on its own circumstances.⁷⁷³

858. Deputy President McKenzie further noted that a party will not be entitled to costs in every case, simply because they have legal representation or the matter has been 'vigorously contested'. The latter may be a 'decisive factor' in one case, but not in every case. The question will be, whether in a particular case it is fair to award costs.⁷⁷⁴

859. In *Styles*, the complaint was of sexual harassment and sex discrimination. The complainant was successful only in relation to sexual harassment. In assessing the complainant's costs application, Deputy President McKenzie considered the relative strengths of the parties cases, and found that the complainant's sexual harassment case was strong, whereas the respondent's sex discrimination complaint was also strong. Taking these into account, and the fact the complaint was strongly contested, Deputy President McKenzie considered it fair to award 50 per cent costs in favour of the complainant, calculated on Scale B of the County Court Scale awarded on a party-party basis.⁷⁷⁵

Quantum of costs

860. In conciliation, the amount of costs a complainant might recover will depend on the negotiations. Any amount negotiated between the parties should be based on what the party has been charged by their lawyer or advocate.

773 Ibid [15]-[16].

774 Ibid [17]-[19].

775 Ibid [21]-[24].

772 [2005] VCAT 2142.

861. If the Tribunal makes an order for costs, it may set the amount of costs itself, such as by reference to an existing court costs scale⁷⁷⁶ or by simply setting an amount payable.⁷⁷⁷ Alternatively, the Tribunal can order that the Costs Court assess, settle, tax or review the costs of the proceedings (section 111 of the VCAT Act). Taxation of costs may be ordered in the first instance, or can be ordered in default of agreement.

862. The Costs Court is a specialist court established by section 17C of the *Supreme Court Act 1986* (Vic). If the Tribunal orders an assessment or taxation of costs by the Costs Court, this will involve filing a detailed bill of costs for the Costs Court to ascertain whether the costs were reasonably incurred and have been billed at a reasonable rate. The rules contained in Order 63 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) govern this process.

863. If the matter goes to the Costs Court for assessment, costs can be ‘taxed’ and awarded on three bases:⁷⁷⁸

- ‘Party-Party basis’ which are the necessary and proper costs incurred in relation running a case and the attainment of justice⁷⁷⁹
- ‘Solicitor-Client basis’ which are the costs reasonably incurred and of a reasonable amount as between the solicitor and their client arising from their professional legal services, such as the solicitor giving the client advice, taking instructions, and preparing the complaint or defence⁷⁸⁰

776 Previous cases have used either Scale B, C or D of the County Court Costs Scale. See for example Scale B: *Styles v Murray Meats Pty Ltd (Anti-discrimination)* [2005] VCAT 2142; Scale C: *Gonsalves v MAS National Apprenticeship Services Costs* [2007] VCAT 64; Scale D: *Finch v The Heat Group Pty Ltd* (Unreported, Victorian Civil and Administrative Tribunal, Harbison VP, 31 January 2011) noted in costs appeal decisions: *Finch v The Heat Group and Ors* [2011] VSCA 100, [1], [10]-[12] and *Finch v The Heat Group Pty Ltd & Ors* [2012] VCAT 223, [5].

777 See for example *Morros v Chubb Security Personnel Australia (Anti-Discrimination)* [2009] VCAT 1845 where the complainant was ordered to pay a contribution of \$8,000 towards the costs of Chubb Security.

778 Rule 63.28 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

779 Rule 63.29 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

780 Rule 63.30 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

- ‘Indemnity basis’ which are all costs, except those which were unreasonably incurred or are of an unreasonable amount.⁷⁸¹

864. Costs are usually awarded and assessed on a party-party basis, whether taxed by the Costs Court or ordered by VCAT.

865. Parties should make sure they retain their tax invoices and receipts so there is an accurate record of costs.

Rejecting an offer of settlement

866. The VCAT Act does contain a provision that a party who makes an offer of settlement will be entitled to have their costs reimbursed where the offer is rejected.⁷⁸² However, these sections do not apply to complaints under the Equal Opportunity Act.⁷⁸³

867. Instead, in exercising its discretion to order costs under section 109(3) of the VCAT Act, the Tribunal may take into consideration the fact a party has rejected an offer of settlement or compromise (including a ‘Calderbank letter’ where the offer is said to be ‘without prejudice save as to costs’). This is usually relevant where the party rejecting the offer is the unsuccessful party in the proceedings, or the less likely situation where an unsuccessful party seeks costs against a successful party, where the offer of settlement was more favourable than what the Tribunal awarded.⁷⁸⁴

868. Rejecting an offer of settlement may therefore be relevant to whether costs are awarded. However, the Tribunal has noted that rejecting an offer will not automatically result in an award of costs against an unsuccessful party.⁷⁸⁵

Examples of costs awarded by the Tribunal

869. This is not an exhaustive table of all costs awards by the Tribunal but provides a sample of the type and amount of costs ordered and the reasons why they are so ordered. It also does not cover cases where costs were sought and refused.

781 Rule 63.30.1 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

782 VCAT Act ss 112, 113, 114 and 115.

783 VCAT Act, schedule 1, clause 22.

784 See, for example, *Morros v Chubb Security Personnel Australia* [2009] VCAT 1845, [21]-[25].

785 Ibid [21]; *Coomans-Harry v Direct Mobile Conveyancing Pty Ltd* [2012] VCAT 143, [26].

Table: Examples of costs awarded by the Tribunal

Name	Grounds for seeking costs	Outcome and basis for orders
<p><i>Singh v RMIT University and Ors (Anti-Discrimination)</i> [2011] VCAT 1890 (4 October 2011)</p>	<p>The respondents sought orders for costs under section 109(3)(b) and (c) of the VCAT Act on the basis that:</p> <ul style="list-style-type: none"> the complainant was responsible for unreasonably prolonging the time taken to complete the proceeding; and the claim had no tenable basis in fact or law. <p>In particular, the respondents relied on the following conduct:</p> <ul style="list-style-type: none"> the complainant produced two additional folders of email material during the hearing, which the respondents had to review and decide whether any should be tendered. This resulted in a loss of at least one day's hearing time. the complainant was evasive and non-responsive manner during cross examination, which took almost three days. In particular, she refused to answer many questions asked of her, and instead the respondent argued that she used cross-examination as a platform to 'ventilate'. the complainant decided to get married mid-hearing which caused the matter to be adjourned. 	<p>Orders</p> <p>Complainant ordered to pay the respondent's party/party costs on County Court Scale D for five full days of hearing.</p> <p>Reasons</p> <p>The specified circumstances set out in section 109(3)(b) and (c) had been made out and that, in all the circumstances, the Tribunal considered it fair that an order for costs be made.</p> <p>While the complainant did not intend to deliberately prolong the hearing, the manner in which she conducted herself (particularly during cross examination and despite warnings about her conduct) resulted in the hearing being delayed.</p> <p>The very serious complaints against the respondent were found to be baseless, the complainant 're-invented history' in her evidence. As a result, the hearing took nine days.</p>

Name	Grounds for seeking costs	Outcome and basis for orders
<p><i>Finch v The Heat Group Pty Ltd</i> (Unreported, VCAT, Harbison VP, 31 January 2011)⁷⁸⁶</p>	<p>Not available.</p>	<p>Orders:</p> <p>Complainant ordered to pay two-thirds of the respondent's costs, 'taxed at County Court Scale D and do not include professional costs otherwise the subject of an order of costs previously made in this proceeding'.⁷⁸⁷</p> <p>Reasons</p> <p>Costs awarded on the basis of the extent to which the conduct of the complainant and her insistence on exploring irrelevant matters extended the length of the trial and complicated the pre-trial process.</p> <p>In particular, the Tribunal was concerned that the complainant's conduct had significantly prolonged the hearing of the proceeding over 20 days when it should have only run for five days.</p> <p>Time was lost because the complainant:</p> <ul style="list-style-type: none"> • did not appear to have read or know what was in her particulars of claim, or any of the witness statements (including her own); • insisted on exploring at trial matters of no relevance or marginal relevance; • had not properly drafted the particulars of complaint and complainant's witness statements; and • failed to comply with VCAT orders.
<p><i>Morros v Chubb Security Personnel Australia (Anti-Discrimination)</i> [2009] VCAT 1845 (25 August 2009)</p>	<p>The successful respondent sought costs on the basis that:</p> <ul style="list-style-type: none"> • the complainant's claim had no tenable basis in fact or law • the claim was not one in which complainant could reasonably have believed would succeed; and • because the complainant unreasonably rejected offers made by respondent to settle the complaint. 	<p>Orders:</p> <p>Complainant ordered to pay respondent \$8,000 as a contribution towards its costs.</p> <p>Reasons:</p> <p>The complainant rejected several offers of settlement and failed to identify an attribute on which her complaint was based. Also relevant was the fact the case was strongly contested.</p> <p>Note that this complaint and costs application were heard at the same time as another, <i>Sagris v Chubb Security Australia Ltd (Anti-Discrimination)</i> [2009] VCAT 1786 (25 August 2009). While Ms Morros had costs awarded against her, the Tribunal did not consider it fair in the circumstances to award costs against Mr Sagris because he had an arguable case, whereas Ms Morros' case was 'doomed from the start'.</p>

786 Upheld on appeal in *Finch v The Heat Group Pty Ltd & Ors* [2011] VSCA 100 (8 April 2011).

787 As reproduced in later proceedings *Finch v The Heat Group Pty Ltd and Ors* [2012] VCAT 223, [5].

Name	Grounds for seeking costs	Outcome and basis for orders
<p><i>Tan v Xenos (Anti-Discrimination)</i> [2008] VCAT 1273 (30 June 2008)</p>	<p>The complainant sought costs on the basis of sections 109(3)(b) through to (e), which includes</p> <ul style="list-style-type: none"> • the nature and complexity of proceedings • that the respondent unreasonably prolonged proceedings • whether a party has made a claim that has no basis in fact or law • any other relevant matters. <p>Solicitor-client costs sought rather than party-party costs.</p>	<p>Orders:</p> <p>Respondent ordered to pay one third of the complainant's party-party costs of this proceeding to be taxed on County Court Scale D.</p> <p>Reasons:</p> <p>Costs were awarded against the respondent on the basis that the respondent had introduced irrelevant evidence that unnecessarily lengthened the hearing:</p> <ul style="list-style-type: none"> • material led by the respondent had not properly been evaluated before being led in evidence • often the same points were made repeatedly, but unnecessarily • cross examination of witnesses by the respondent appeared to have no 'forensic purpose' • the irrelevant evidence had been deliberately included and 'magnified out of proportion' to support the respondent's claim that the applicant had fabricated her complaint. <p>Approximately one-third of the proceedings were affected by this conduct.</p> <p>In making such orders, her Honour Judge Harbison, Vice President noted that each application must be judged 'on its merits and in the light of the <i>raison d'être</i> of the Tribunal, which is to promote affordable and timely access to justice.'⁷⁸⁸</p> <p>Judge Harbison noted the proceeding was 15 days, and was strongly contested with neither side willing to make any concessions to the other.⁷⁸⁹ However, her Honour noted that a long complex commercial dispute is very different to a long complex anti-discrimination dispute and further considerations apply.⁷⁹⁰</p> <p>Solicitor client costs were rejected in favour of party party costs, on the basis that 'gross behaviour' during the case was required to justify an award of solicitor client costs.⁷⁹¹</p>

788 *Tan v Xenos* [2008] VCAT 1273, [10].

789 *Ibid* [15], quoting *Bryce v City Hall Albury Wodonga Pty Ltd t/a City Hall Hotel (Costs)* [2004] VCAT 2013.

790 *Ibid* [15].

791 *Ibid* [41].

Name	Grounds for seeking costs	Outcome and basis for orders
<p><i>Mangan v Melbourne Cricket Club (costs) (Anti-Discrimination)</i> VCAT 792 (8 May 2006)</p>	<p>The complainant sought indemnity costs, claiming that there was 'an element of public interest in the proceeding, the absence of personal gain for the complainant, a disparity in the relative means of the two parties, and the respondent's conduct of the proceeding'.</p>	<p>Orders:</p> <p>Respondent ordered to pay the costs of the complainant, to be assessed by the Principal Registrar on County Court Scale 'A'.</p> <p>Reasons:</p> <p>The matter was serious, but was at the lower order of things. It was fair in all the circumstances to award a 'modest' amount of costs.</p> <p>The Tribunal was not satisfied that the respondent conducted the proceeding in a manner which was in any way improper or unnecessarily imposed costs on the complainant. Nor was the Tribunal satisfied that the disparity in the means of the parties is a relevant consideration.</p> <p>There was no basis for any order for indemnity costs, and the Tribunal noted that indemnity costs are rare. The Tribunal did not accept that the complaint was 'wholly public spirited' as part of the relief sought provided a personal benefit to the complainant.</p>

Name	Grounds for seeking costs	Outcome and basis for orders
<p><i>Beasley v Department of Education and Training (Anti Discrimination)</i> [2006] VCAT 2044 (12 October 2006)</p>	<p>The complainant sought costs in relation to a strike out application by the respondent, and the substantive hearing. For each, the complainant relied on section 109(3)(c),(d) and (e). The arguments focussed primarily on section 109(3)(c) – strengths of the respective cases.</p>	<p>Orders:</p> <p>Respondent ordered to pay 80 per cent of the complainant’s total costs of and incidental to the respondent’s application to strike out or dismiss the complaint under section 75 of the VCAT Act. Costs payable on a party/party basis on Scale A of the County Court Scale.</p> <p>Respondent also ordered to pay seven per cent of the complainant’s costs of and incidental to the rest of the substantive proceeding. Costs include disbursements to the advocate for interpreting services provided in connection with the proceeding. Those costs are to be on a party/party basis and on Scale C of the County Court Scale.</p> <p>In default of agreement, costs are to be settled or assessed by the Principal Registrar.</p> <p>Reasons:</p> <p>The respondent was 80 per cent unsuccessful as to their strike out application, and their arguments in seeking to strike out the complaint were very weak.</p> <p>In relation to the substantive proceedings, the parties should bear their own costs except in relation to a small part of the complainant’s claim, which Deputy President McKenzie considered equalled seven per cent of the total claim. In that case, the case was extremely weak, and the complaint extremely strong, and so the respondent should pay a proportion of the costs. Otherwise, there was no improper, unreasonable, vexatious or oppressive conduct by the respondent.</p>
<p><i>Kelly v Catholic Education Office (Anti-Discrimination)</i> [2006] VCAT 2367 (24 November 2006)</p>	<p>The respondents, in the course of a strike out application, sought costs against the complainant under section 109(3)(b), (c) and (d):</p> <ul style="list-style-type: none"> • the complainant was responsible for unreasonably prolonging the time taken to complete the hearing • the claim had no tenable basis in fact or law • the nature and complexity of the proceeding warranted costs to be ordered. 	<p>Orders:</p> <p>Complainant ordered to pay the costs of the respondent on County Court Scale D.</p> <p>Reasons:</p> <p>Rejected claim under section 109(3)(b) – while the complainant spent considerable time addressing the Tribunal the hearing still finished within the dates scheduled. Took into account nature and complexity of proceedings under section 109(3)(c) and (d): there was no tenable basis for the complaint and could not be supported by the evidence she put before the Tribunal; further, the proceedings were complex in law and fact – 10 witness statements filed by the respondent and two large volumes of additional material to be relied upon.</p>

Name	Grounds for seeking costs	Outcome and basis for orders
<p><i>McDougall v Kimberly Clark (Anti-Discrimination)</i> [2006] VCAT 2604 (19 December 2006)</p>	<p>The respondents had sought orders for costs under section 109(3)(c) and (e) of the VCAT Act on the basis that:</p> <ul style="list-style-type: none"> • complaint had no tenable basis in fact or law despite complainant having legal representation who could give her advice as to merits of her complaint • complainant failed to provide sufficient evidence to support case • respondent required to raise evidence on particular issues even though the onus was on the complainant to prove those matters • the complainant's cross examination of the respondent's expert witness was irrelevant. 	<p>Orders:</p> <p>Complainant ordered to pay respondent's costs as follows:</p> <ul style="list-style-type: none"> • \$14,162 for disbursements • \$5,000 towards the respondent's solicitor client costs. <p>Reasons:</p> <p>Fair in all the circumstances to order costs. The Tribunal agreed with the reasons for ordering costs as put forward by the respondents. The Tribunal noted that the complainant had been on notice of the deficiencies in her case by the member hearing the application, but had taken no steps to address them.</p>
<p><i>Khalil v Wallace (Anti-Discrimination)</i> [2006] VCAT 10 (2 February 2006)</p>	<p>The complainants sought costs on the basis that the respondents had:</p> <ul style="list-style-type: none"> • conducted the proceeding in a way which unnecessarily disadvantaged them, by: • failing to comply with a direction or order of the Tribunal without reasonable excuse • failing to comply with the Victorian Civil and Administrative Tribunal Rules 1998 ('the VCAT Rules') • causing an adjournment • prolonging unreasonably the time taken to complete the proceeding. 	<p>Orders:</p> <p>Respondents ordered to pay the complainants' costs, fixed at \$3,334.58.</p> <p>Reasons:</p> <p>In the view of the Tribunal it was fair to do so. The respondents failed to comply with orders to file or serve particulars of defence and did not advise the Tribunal of changes to addresses for service, as required by the VCAT Rules require. The respondents failed to explain their failure to comply. As a result of their conduct, the hearing had to be adjourned but the respondents continued to disobey the Tribunal's directions. The respondents' conduct in this respect was found by the Tribunal to have 'unnecessarily disadvantaged the complainants and has prolonged unreasonably the time taken to complete this case'.</p> <p><i>Note this was a complaint under the Racial and Religious Tolerance Act.</i></p>

Protective costs orders

871. A protective costs order is where a court orders that any costs awarded are capped at a particular level. For example, in *King v Jetstar Airways Pty Ltd*⁷⁹² the Federal Court capped the costs able to be awarded against the applicant in the appeal proceedings at \$10,000, noting that ‘the point of this cost-capping order is to avoid the stifling of what is potentially an important appeal.’⁷⁹³
872. The position in Victoria as to whether the courts and tribunals have jurisdiction to make protective costs orders is unclear. Unlike the Federal Court⁷⁹⁴, there are no specific legislative provisions setting out the ability to make cost capping orders. Rather, the *Supreme Court Act 1986*, and the *VCAT Act 1998* provide for a wide discretion in what orders to make in respect of costs.
873. The issue was recently canvassed by the Victorian Supreme Court in an application for leave to appeal in an anti-discrimination matter, *Aitken & Ors v State of Victoria*⁷⁹⁵. In that case, the applicants sought a protective costs order on public interest grounds, wishing to limit their potential costs liability to \$10,000 if leave to appeal was granted. The applicants argued that the wide discretion in [section 24\(1\)](#) of the *Supreme Court Act 1986* (Vic), combined with [rule 64.24\(1\)](#) of the *Supreme Court (General Civil Procedure Rules) 2005* (Vic) and [section 65C](#) of the *Civil Procedure Act 2010* (Vic) gave the Supreme Court the power to make protective costs orders.⁷⁹⁶
874. The applicants in *Aitken* relied upon *R (Corner House Research) v Secretary of State for Trade and Industry*⁷⁹⁷ which set out criteria for awarding a protective costs order as follows:
- (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
 - i. the issues raised are of general public importance
 - ii. the public interest requires that those issues should be resolved
 - iii. the applicant has no private interest in the outcome of the case
 - iv. having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order
 - v. if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
 - (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a [protective costs order].
 - (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.⁷⁹⁸
875. The respondent in *Aitken* opposed the making of a protective costs orders on the basis it would not facilitate the overarching purposes of the *Civil Procedure Act* and it was doubtful whether the courts had the ability to make such orders under the legislative regime.
876. Ultimately, the Court considered it was unnecessary to decide whether it had jurisdiction to make a protective costs order, on the basis that it refused leave to appeal. However, the Court noted that even if the jurisdiction exists, it would not make a protective costs order as the public interest issues raised by the applicant had been resolved prior to hearing.

792 [2012] FCA 413.

793 Ibid [21].

794 See, for example, [Rule 40.51 of the Federal Court Rules 2011](#).

795 [2013] VSCA 28 (22 February 2013).

796 Section 65C(2)(d) states that without limiting a courts power to order costs to further the overarching purpose in the Civil Procedure Act 2010, it is able to fix or cap recoverable costs in advance.

797 [2005] 1 WLR 2600.

798 Ibid [74].

Chapter 19

> Offences

Discriminatory advertising

877. [Section 182](#) of the Equal Opportunity Act makes it a criminal offence to publish, display or authorise the publication or display an advertisement that could be reasonably understood as indicating that any person intends to engage in any conduct that would amount to discrimination, sexual harassment or victimisation.⁷⁹⁹ For example, an employer, recruiter and publisher may be criminally liable for posting a discriminatory job advertisement seeking people of a particular race, age or sex for a position, without being able to rely on an exception or exemption.
878. It is a defence to a charge of discriminatory advertising that a person took reasonable precautions and exercised due diligence to prevent the publication and display.⁸⁰⁰
879. Proceedings may be brought by the Commission, a member of the police force, or any other authorised person.⁸⁰¹

799 The penalty is 60 units for a person and 300 penalty units for a body corporate: [Equal Opportunity Act 2010 \(Vic\) s 184](#).

800 [Equal Opportunity Act 2010 \(Vic\) s 183](#).

801 [Equal Opportunity Act 2010 \(Vic\) s 180](#).



Victorian Equal Opportunity
& Human Rights Commission

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